

# Gender Violence



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# Defining Domestic Violence

- ▶ Domestic violence occurs between two people, where one individual tries to assert **power or maintain control** over another by *causing fear, physical and/or psychological harm*.
- ▶ It is a pattern of abusive, threatening, violent, isolating, or degrading behavior

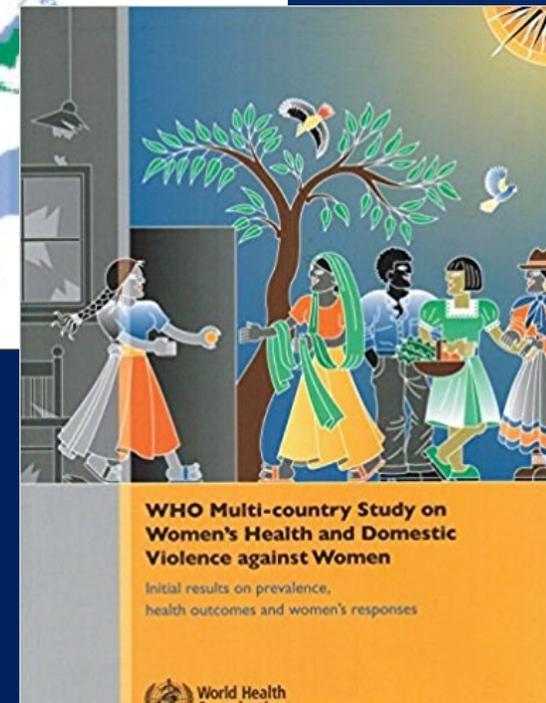
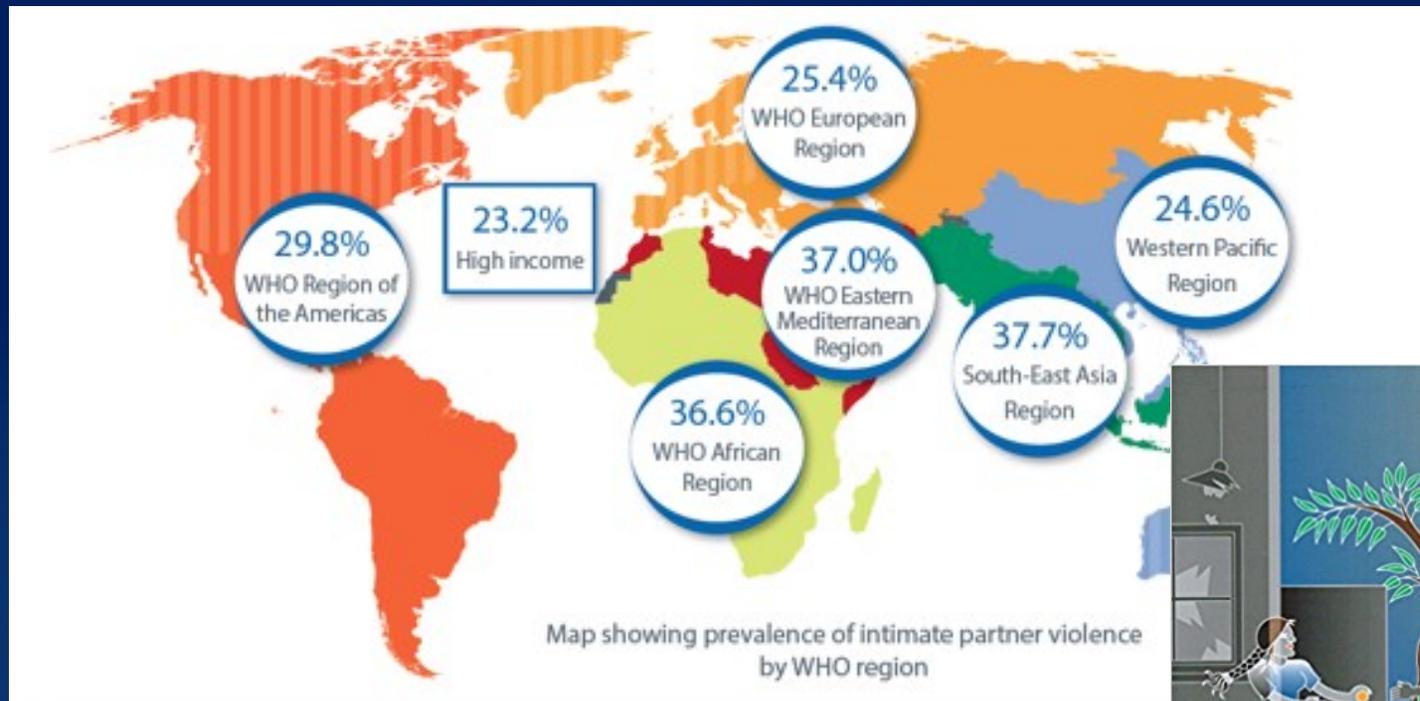


Drawn by a Sanctuary client and survivor of domestic violence.

# Prevalence in the U.S.

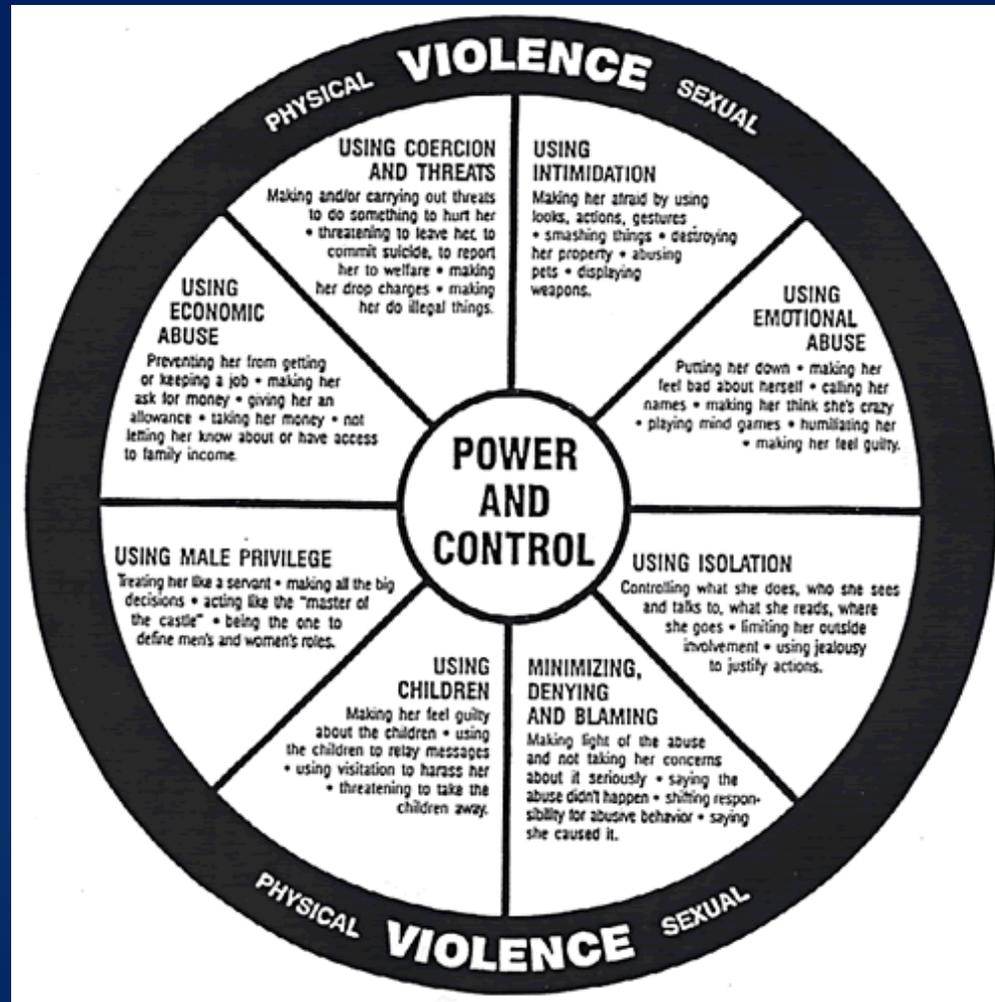
- ▶ 1 in 4 women and 1 in 10 men experience sexual violence, physical violence and/or stalking by an intimate partner during their lifetime with 'IPV-related impact' such as being concerned for their safety, PTSD symptoms, injury, or needing victim services (CDC).
- ▶ “Among victims of intimate partner violence, more than 1 in 3 women experienced multiple forms of rape, stalking, or physical violence; 92.1% of male victims experienced physical violence alone, and 6.3% experienced physical violence and stalking” (CDC).
- ▶ About 1 in 4 women (24.3%) and 1 in 7 men (13.8%) have experienced severe physical violence by an intimate partner at some point in their lifetime (CDC).
- ▶ COVID-19 pandemic exacerbated domestic violence. During the month of March, the New York City Police Department responded to a 10% increase in DV reports compared to March 2019

# Prevalence Worldwide



2005

# Dynamics of Domestic Violence



Domestic Abuse  
Intervention Project,  
Duluth, 1981

# Tactics of power and control



- Physical Abuse
- Psychological Abuse
- Economic Abuse
- Legal Abuse
- Sexual Abuse
- Stalking

# Physical Abuse



- Grabbing, choking, pushing, kicking, slapping, punching, biting, hair-pulling, burning
- Use of objects/weapons
- Forcing alcohol or drug abuse
- Withholding access to medication, medical care, and/or sleep

# Psychological Abuse



- Name-calling, constant criticism
- Threats to harm family members or take away children
- Blackmail
- Brandishing weapons
- Restricting access to the phone, transportation, and outside world
- Sabotaging a victim's relationship with the children

# Economic Abuse



- Preventing the victim from working or attending school
- Demanding the victim turn over earnings
- Not listing victim on lease or on car, home, or insurance policies
- Destroying the victim's credit
- Concealing marital assets

# Legal Abuse

- Falsely reporting the victim to law enforcement
- Threatening deportation
- Falsely reporting the victim to child welfare agencies
- Initiating retaliatory order of protection and/or custody cases
- Instituting frivolous legal proceedings that the victim cannot afford to fight

# Sexual Abuse



- Sex when the victim is unwilling
- Assaults to victim's genital area or breasts
- Forcing victim to watch pornography
- Pressuring victim into sexual activity with another person

# Stalking



- Following
- Sending unsolicited letters, messages, and/or gifts
- Destroying or vandalizing the victim's property
- Threatening to harm the victim's family members or friends

# Cyber Stalking



- Sending defamatory messages about the victim through e-mail and/or social networking websites
- Tracking the victim through her/his cell phone's GPS locator service
- Installing spyware on victim's computer to intercept communications and personal information
- Spoofing (setting up a false online profile of victim to destroy her/his reputation)
- Cyber sexual abuse ("revenge porn")

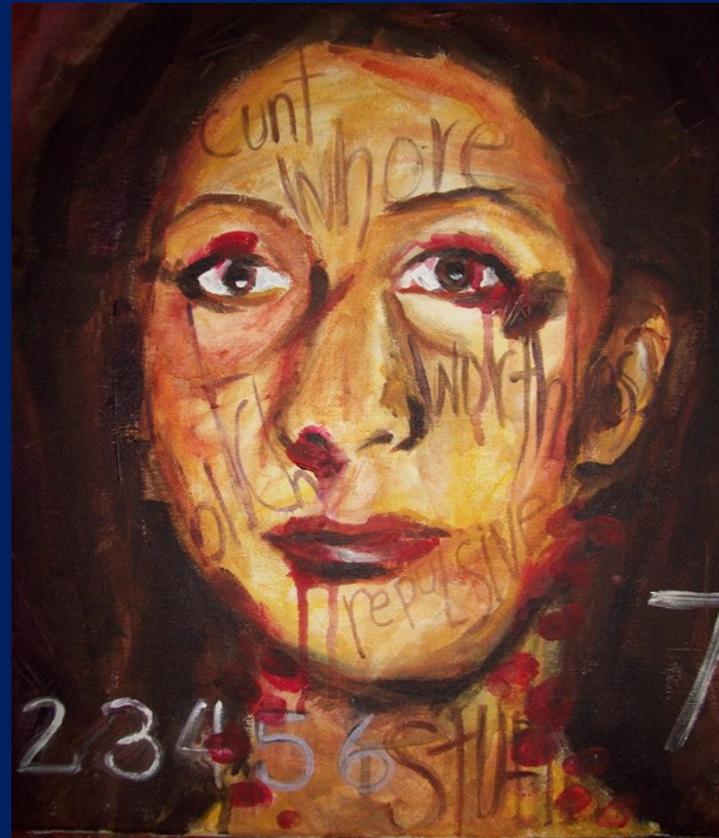
# Effects of Domestic Violence



- Physical effects
- Psychological effects
- Economic effects
- Effects on the victim's children

# Psychological Effects of Domestic Violence

- High levels of anxiety
- Depression
- Minimization/denial
- Numbness/flattened affect
- Memory loss
- Dissociation
- Shame, self-blame
- Self-medication (drug, alcohol abuse)



"Portrait of Terror" painted by a domestic violence survivor

# Psychological Effects of Domestic Violence

- **Post-traumatic stress disorder (PTSD)**
- **Intrusion:** emotional reactions, flashbacks, images, nightmares
- **Avoidance:** dissociation, minimizing, numbing, denial
- **Arousal:** anger, difficulty concentrating and sleeping

# What is Trauma?

- ▶ **Trauma** is the response to a deeply distressing or disturbing event that overwhelms an individual's ability to cope, causes feelings of helplessness, diminishes their sense of self and their ability to feel the full range of emotions and experiences.

*Trauma is subjective. Someone might experience something as traumatic, where another may not.*

- ▶ An individual's physical or emotional well-being is threatened. It is often accompanied by intense feelings of helplessness and a lack of control (Center for Substance Abuse Treatment, 2014).
- ▶ Trauma changes a person's perception of themselves, their environment and community, and their sense of safety and trust.

# What is Trauma?

## ▶ **Examples of trauma:**

- ▶ Events associated with actual or threatened death
- ▶ Neglect
- ▶ Isolation
- ▶ Physical/sexual violence
- ▶ Interpersonal violence/domestic violence

# The Impact of Trauma?

- ▶ Trauma affects us physiologically in both the short term and long term.
- ▶ • Immediate impact: fight, flight, freeze
  - ▶ Rush of hormones
  - ▶ Interruption in how body normally codes memory
- ▶ This impacts people of all ages when asked to recall traumatic events, or when triggered to relive traumatic events as may happen within our cases.

# Mortality as a result of Domestic Violence

- Jacqueline Campbell's Danger Assessment identifies factors that may explain which victims are most at risk of homicide
- Laura Aceves, killed in December 2012 by her ex-boyfriend, would have scored an 18 – in “extreme danger” – on Campbell's danger assessment



# Lethality Indicators



- Increase in severity or frequency of violence
- Use of or threats to use weapons
- Threats to kill partner, children, and/or self
- Abuse of drugs or alcohol
- Stalking, choking, or forced sex
- Unemployment
- Separation

Campbell, Danger Assessment, 2003

# A common question



If domestic violence has all of these negative effects on the victim and her children, why doesn't she just leave?

# Leaving an Abuser



Victims typically try 6 to 8 times to end an abusive relationship before they finally succeed.

(Nat'l Domestic Violence Hotline)

# Domestic Violence and the Law

The criminal  
justice system  
can assist victims  
and hold  
perpetrators  
accountable.



# Custody and Domestic Violence

- For victims, legal custody can prevent abduction and protect rights, but...
- A court battle can keep victims under scrutiny and control; keep them frightened and intimidated; keep them involved with abuser; enable the abuser to locate their whereabouts after they have fled.

# Custody and Domestic Violence

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# Trauma & Memory



- ▶ May also see difficulty in recalling things.
- ▶ Our memories are fallible, the recall of memories impacted by trauma might have gaps and inconsistencies.
- ▶ Why is this? During trauma, we protect ourselves, our brain goes into “survival mode”. Encoding just happens differently.
- ▶ It can impact the memory related to the trauma, and, when experiencing trauma or triggers, memories unrelated.

# Trauma & Memory



- ▶ Trauma effects can be short or long-term, and can resurface over time
- ▶ Responses to traumatic stress may include:
  - ▶ Feelings of or a sense of helplessness
  - ▶ Becoming aggressive
  - ▶ Disassociating
  - ▶ Emotional numbing
  - ▶ Nervousness
  - ▶ Avoidance and withdrawal
  - ▶ Drug abuse and substance addiction
- ▶ Victims of psychological abuse often experience depression, post-traumatic stress disorder, suicidal ideation, low self-esteem, and difficulty trusting others.” (NCADV, 2015)

# For more information



- [www.sanctuaryforfamilies.org](http://www.sanctuaryforfamilies.org)
- [www.probono.net/ny/family](http://www.probono.net/ny/family)
- [www.nycourts.gov/ip/womeninthecourts/publications.shtml](http://www.nycourts.gov/ip/womeninthecourts/publications.shtml)



2020

## Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment

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<https://ssrn.com/abstract=3575843>

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Seton Hall Law Review, Vol. 51, Issue 2, Pp. 289-329.

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## Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment

Deborah Epstein\*

*For decades, federal and state laws have prohibited sexual harassment on the job; despite this fact, extraordinarily high rates of gender-based workplace harassment still permeate virtually every sector of the American workforce. Public awareness of the seriousness and scope of the problem increased astronomically in the wake of the #MeToo movement, as women began to publicly share countless stories of harassment and abuse. In 2015, the Equal Employment Opportunity Commission's Task Force on the Study of Harassment in the Workplace published an important study analyzing a wide range of factors contributing to this phenomenon. But the study devotes only limited attention to a factor that goes straight to the heart of the problem: our reflexive inclination to discount the credibility of women, especially when those women are recounting experiences of abuse perpetrated by more powerful men. We will not succeed in ending gender-based workplace discrimination until we can understand and resist this tendency and begin to appropriately credit survivors' stories.*

*How does gender-based credibility discounting operate? First, those charged with responding to workplace harassment—managers, supervisors, union representatives, human resource officers, and judges—improperly discount as implausible women's stories of harassment due to a failure to understand either the psychological trauma caused by abusive treatment or the practical realities that constrain women's options in its aftermath. Second, gatekeepers unjustly discount women's personal trustworthiness, based on their demeanor (as affected by the trauma they often have suffered); on negative cultural stereotypes about women's motives for seeking redress for harms; and on our deep-rooted cultural belief that women as a group are inherently less than fully trustworthy.*

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\*Professor and Co-director of the Domestic Violence Clinic, Georgetown University Law Center. I am deeply indebted, in this as in so many of my professional endeavors, to Lisa Goodman, my longtime partner in investigating and conceptualizing issues centered on violence against women. I would also like to thank Anna Harty, Nadia Finkel, and Elana Orbuch for their valuable research assistance.

*The impact of such unjust and discriminatory treatment of women survivors of workplace harassment is exacerbated by the larger “credibility economy”—the credibility discounts imposed on many women-victims can only be fully understood in the context of the credibility inflations afforded to many male harassers. Moreover, discounting women’s credibility results in a particular and virulent set of harms, which can be measured as both an additional psychic injury to survivors, and as an institutional betrayal that echoes the harm initially inflicted by harassers themselves.*

*It is time—long past time—to adopt practical, concrete reforms to combat the widespread, automatic tendency to discount women and the stories they tell. We must embark on a path toward allowing women who share their experiences of male abuses of workplace power to trust the responsiveness of their employers, judges, and our larger society.*

I. INTRODUCTION .....	291
II. CREDIBILITY DISCOUNTS BASED ON STORY PLAUSIBILITY .....	295
A. The Plausibility of Women’s Stories of Workplace Harassment .....	295
1. Women Who Don’t Report, or Don’t Report Immediately .....	299
2. Women Who Remain on the Job .....	303
III. CREDIBILITY DISCOUNTS BASED ON STORYTELLER TRUSTWORTHINESS...	305
A. Survivor Demeanor .....	305
B. Survivor Motive .....	307
C. Survivors as Women .....	311
IV. CREDIBILITY INFLATION AWARDED TO MALE PERPETRATORS OF SEXUAL HARASSMENT .....	316
V. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS OF WORKPLACE HARASSMENT .....	319
VI. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING GENDER-BASED CREDIBILITY DISCOUNTING IN THE WORKPLACE HARASSMENT CONTEXT .....	325
VII. CONCLUSION .....	329

## I. INTRODUCTION

Long after federal law prohibited sexual harassment on the job, extraordinarily high rates of gender-based workplace harassment still permeate virtually every sector of the American workforce.<sup>1</sup> Public awareness of the seriousness and scope of the problem increased astronomically in the wake of the #MeToo movement, as women began to publicly share countless stories of harassment and abuse.<sup>2</sup>

Surveys show that a substantial majority of working women experience gender-based, discriminatory harassment at work.<sup>3</sup> Such harassment includes a wide range of behaviors, including sexual

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<sup>1</sup> Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017, 4:59 PM), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>.

<sup>2</sup> Emma Brockes, *#MeToo Founder Tarana Burke: 'You Have to Use Your Privilege to Serve Other People'*, GUARDIAN (Jan. 15, 2018, 23:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>. The movement, which exploded in scope in the fall of 2017, grew out of a phrase used twelve years earlier by social activist Tarana Burke, whose work focused on abuse experienced by women of color. *Id.*

<sup>3</sup> See, e.g., ABC News/Wash. Post Poll: Sexual Harassment (Oct. 17, 2017), <https://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf>; Barbara Frankel & Stephanie Francis Ward, *Little Agreement Between the Sexes on Tackling Harassment, Working Mother/ABA Journal Survey Finds*, A.B.A. J. (July 24, 2018), [http://www.abajournal.com/news/article/tackling\\_harassment\\_survey\\_women\\_men](http://www.abajournal.com/news/article/tackling_harassment_survey_women_men); STOP STREET HARASSMENT, *THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 7-8* (2018), <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf> (online survey found that 81 percent of women experience some form of sexual harassment during their lifetime; 38 percent in the workplace). Survey results differ depending on the operative definitions used. Smaller percentages of women report being victims of "sexual harassment," narrowly defined. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC at 8-9 (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [hereinafter "EEOC TASK FORCE REPORT"]. But close to 60 percent of women report having experienced harassment when the term is used more broadly, to include not only sexual attention and coercion but also gender-based abuse such as the use of sexually crude epithets and posting of pornography. *Id.* at 9-10. Gender-based harassment is the most common form of harassment reported to researchers, and a clear gender differential exists in these cases: women are disproportionately the victims of sexual harassment, and men are disproportionately the perpetrators. *Id.* at 10; Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NAT'L PUB. RADIO (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>.

comments or jokes, gender-based disparagement, displays or discussions of pornography, pressure for dates or sex, “accidental” or unwelcome touching, indecent exposure, or sexual assault.<sup>4</sup> Such findings are consistent with the kinds of behavior men categorize as acceptable on the job. For example, a recent Harris Poll survey shows that close to 25 percent of men in eight countries, including the United States, believe it is acceptable for an employer to expect an employee to have “intimate interactions such as sex with them, a family member or a friend.”<sup>5</sup> In a 2017 New York Times survey of male workers of varied age, job type, political affiliation, and marital status, close to 25 percent reported that they had told crude jokes or shared inappropriate videos at work; and 10 percent reported having imposed unwanted sexual attention on female colleagues, such as touching, commenting on a woman’s body, or persisting in requesting dates after being turned down.<sup>6</sup> Two percent admitted having coerced others into sex by threatening retaliation or offering an employment-related benefit.<sup>7</sup>

Why have we been so slow to impose meaningful change in response to this serious and deeply gendered harm? In March 2015, the Equal Employment Opportunity Commission (EEOC) sought to address this question head-on, creating a Task Force on the Study of Harassment in the Workplace.<sup>8</sup> The Task Force Co-Chairs defined their goals as follows:

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage

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<sup>4</sup> Feminist Majority Foundation, *Sexual Harassment Fact Sheet*, <http://www.feminist.org/911/harasswhatdo.html> [<https://web.archive.org/web/20191231153231/http://www.feminist.org/911/harasswhatdo.html>].

<sup>5</sup> *New Global Poll: Significant Share of Men Believe Expecting Intimate Interactions, Sex from Employees Is Ok*, CARE (Mar. 8, 2018), <https://care.org/news-and-stories/press-releases/new-global-poll-significant-share-of-men-believe-expecting-intimate-interactions-sex-from-employees-is-ok/>.

<sup>6</sup> Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html>.

<sup>7</sup> See Patel et al., *supra* note 6. These results are particularly disturbing in light of the fact that this survey was based on self-reports—a type of research notorious for artificially deflated results, due to the human tendency to minimize one’s own negative behavior. See, e.g., Robert Rosenman, Vidhura Tennekoon & Laura G. Hill, *Measuring Bias in Self-Reported Data*, 2(4) INT. J. BEHAV. HEALTHCARE RES. 320, 330 (Oct. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4224297/> (“There are many reasons individuals might offer biased estimates of self-assessed behavior, ranging from a misunderstanding of what a proper measurement is to social-desirability bias, where the respondent wants to ‘look good’ in the survey, even if the survey is anonymous.”).

<sup>8</sup> Press Release, U.S. Equal Employment Opportunity Commission, EEOC to Study Workplace Harassment (Mar. 30, 2015) <https://www.eeoc.gov/newsroom/eeoc-study-workplace-harassment>.

industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years—is there something we’ve been missing?<sup>9</sup>

The Task Force report identifies several necessary structural changes in our systemic response to sexual harassment, each of which requires serious focus and reform. But it devotes only limited attention to a factor that goes straight to the heart of the problem: our reflexive inclination to discount the credibility of women, especially when those women are recounting experiences of abuse perpetrated by more powerful men.<sup>10</sup> We will not succeed in ending gender-based workplace discrimination until we can understand and resist this tendency, and begin to appropriately credit survivors’ stories.

The systematic undermining of women’s reports of mistreatment flows directly from the instinctive, even unconscious methods we use to assess both the plausibility of the stories we hear and the trustworthiness of the people who tell them.<sup>11</sup> When women share stories of abuse, they encounter a pervasive societal tendency to discount their credibility concerning both factors—story plausibility and individual trustworthiness. Credibility discounting silences many survivors, who accurately predict the limited likelihood that they will be believed upon coming forward. This, in turn, diminishes the accountability of those who harass, creating a vicious, permission-giving cycle of abuse of women in the workplace.<sup>12</sup>

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<sup>9</sup> EEOC TASK FORCE REPORT, *supra* note 3, at ii.

<sup>10</sup> In fact, during the height of the #MeToo movement, from 2017–18:

The share of American adults responding that men who sexually harassed women at work 20 years ago should keep their jobs has risen from 28% to 36% . . . . And 18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with [a previous] 13% . . . .

*After a Year of #MeToo, American Opinion has Shifted Against Victims*, ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-me-too-american-opinion-has-shifted-against-victims>.

<sup>11</sup> See Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019). As Lauren Rikleén, an expert in the anti-discrimination field, puts it: “[W]omen do not tell their stories because they can’t. Silence has long been the fuel that perpetuates bad conduct, but reporting that conduct has been weaponized against the victim in the form of character assassination, shaming, and disbelief.” LAUREN RIKLEÉN, *THE SHIELD OF SILENCE: HOW POWER PERPETUATES A CULTURE OF HARASSMENT AND BULLYING IN THE WORKPLACE* 9 (2019).

<sup>12</sup> See, e.g., RIKLEÉN, *supra* note 11, at 9.

Credibility discounting<sup>13</sup> similarly undermines women in the related contexts of domestic violence<sup>14</sup> and sexual assault.<sup>15</sup> In other words, credibility discounting occurs in every major context where (primarily) men are victimizing (primarily) women. This begs the question: Why do we routinely discount women's credibility, rather than according women the same level of trust and belief that we instinctively give to men?<sup>16</sup>

Part II of this Article analyzes how those charged with responding to workplace harassment—managers, supervisors, union representatives, human resource officers, and judges—improperly discount as implausible women's stories of harassment due to a failure to understand either the psychological trauma caused by abusive treatment or the practical realities that constrain women's options in its aftermath. Part III explores how we unjustly discount women's personal trustworthiness, based on their demeanor (as affected by the trauma they often have suffered); negative cultural stereotypes about women's motives for seeking redress for harms; and our deep-rooted cultural belief that women as a group are inherently less than fully trustworthy. Part IV explains the way gender-based credibility discounting fits into a larger "credibility economy"—the credibility discounts imposed on many women-victims must be understood in the context of the credibility inflations afforded to many male harassers. Part V examines the particular harms inflicted by discounting women's credibility. These harms can be measured as both an additional psychic injury to survivors, and as an institutional betrayal that echoes the harm initially inflicted by harassers themselves. Finally, Part VI offers suggestions for initial efforts to combat these unjust, gender-based credibility discounts. Adopting these reforms would set us on a path toward allowing women who are subjected to male abuses of workplace

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<sup>13</sup> The term "credibility discount" was originally coined by Deborah Tuerkheimer, in a thoughtful analysis of women's experiences of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 3 (2017). I used the same term in an article co-authored by Dr. Lisa Goodman, with a focus on how credibility discounts affect women survivors of domestic violence. I use the same term here in part to advance a dialogue about the universality of credibility discounting across contexts where women attempt to resist male abuses of power. Epstein & Goodman, *supra* note 11, at 402.

<sup>14</sup> For an extensive discussion of credibility discounting in the domestic violence context, see Epstein & Goodman, *supra* note 11.

<sup>15</sup> See Tuerkheimer, *supra* note 13.

<sup>16</sup> This Article examines credibility discounting in the context of sexual harassment, drawing on the analysis presented in a previous piece, co-authored with Dr. Lisa Goodman, focused on domestic violence. Epstein & Goodman, *supra* note 11, at 399.

power to trust the responsiveness of their employers, judges, and our larger society.

## II. CREDIBILITY DISCOUNTS BASED ON STORY PLAUSIBILITY

### A. *The Plausibility of Women's Stories of Workplace Harassment*<sup>17</sup>

Research tells us that the human brain is wired for stories.<sup>18</sup> As we learn facts, we instinctively organize them into stories, in part to understand and test their plausibility.<sup>19</sup> We “are, as a species, addicted to story. Even when the body goes to sleep, the mind stays up all night, telling itself stories.”<sup>20</sup>

But when women survivors of workplace harassment tell their stories to employers, seeking protection, or to the justice system, seeking legal relief, their narratives often sound implausible, triggering a response of skepticism and disbelief. What are the reasons for this disconnect?

One factor contributing to story plausibility is internal consistency—we expect stories to ring true in terms of their linear development, as well as their logical and emotional nature.<sup>21</sup> But many survivors are unable to articulate such stories about their experience. Their truthful recollections of workplace harassment are often imprecise and emotionally incongruous. And a major reason that survivor stories often fail to meet the test of internal consistency can be found in the psychological consequences of harassment itself.

Survivors of sexual harassment frequently experience psychological trauma, most often when the harassment is particularly degrading or frightening, or when it continues over an extended time.<sup>22</sup>

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<sup>17</sup> This introductory discussion of story plausibility is taken largely from Epstein & Goodman, *supra* note 11, at 406.

<sup>18</sup> CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS* 15–16 (2017); *see also* LISA CRON, *WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE* 185–99 (2012); DAVID CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 93–94 (2002); Kay Young & Jeffrey L. Saver, *The Neurology of Narrative*, 30 *SUBSTANCE* 72, 74 (2001).

<sup>19</sup> H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 44 (2d ed. 2008). “For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes.” *Id.* at 3.

<sup>20</sup> JONATHAN GOTTSCHALL, *THE STORYTELLING ANIMAL: HOW STORIES MAKE US HUMAN* xiv (2012).

<sup>21</sup> Epstein & Goodman, *supra* note 11, at 407.

<sup>22</sup> “The more degrading, frightening and sometimes physically violent, and the more frequently [sexual harassment] occurs over time’ . . . ‘the greater chance of you having sustained mental health effects.” Meera Jagannathan, *These Are All the Ways Sexual*

Indeed, most survivors of workplace harassment meet the diagnostic criteria for Post-Traumatic Stress Disorder (PTSD).<sup>23</sup>

The symptoms associated with PTSD undermine survivors' ability to provide internally consistent accounts to co-workers, supervisors, human resource officers, and judges. Psychologically traumatic memories encode the physical and psychic harms that generate them in a way that often lacks verbal narrative detail and context, and that exist simply in the form of sensations, flashes, and images.<sup>24</sup> Thus, PTSD inhibits a survivor's ability to link parts of a traumatizing story together; she may not be able to recall events in linear sequence or logically articulate her experience.<sup>25</sup>

In addition, an inability to recall key features of the traumatic event is common among those who develop PTSD.<sup>26</sup> This undermines survivors' capacity to produce consistent and fully coherent narratives about their experiences in a way that can easily be improperly attributed to a lack of credibility.<sup>27</sup>

Thus, to a trauma expert, a woman's disconnected, inconsistent way of talking about her experience of harassment constitutes a strong indication that she was harassed and now suffers from PTSD. Indeed, this aspect of her story may well be evidence of the truth of her narrative

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*Harassment Can Make Your Life Miserable*, MARKETWATCH (Feb 15, 2018, 11:46 PM) <https://www.marketwatch.com/story/these-are-all-the-ways-sexual-harassment-can-make-your-life-miserable-2018-02-15> (quoting clinical psychologist Joan Cook).

<sup>23</sup> Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 166 (W. O'Donohue ed., 1997); William Wan, *Sexual Harassment Can Make Victims Physically Sick, Studies Reveal*, CHICAGO TRIBUNE, (Feb. 8, 2018), <https://www.chicagotribune.com/lifestyles/health/ct-sex-harassment-victims-health-20180208-story.html>. Sexual harassment also gives rise to other serious psychological symptoms, including reduced self-esteem, emotional exhaustion, lower life satisfaction, and substance abuse. *Id.*

<sup>24</sup> JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 38 (1997).

<sup>25</sup> See, e.g., Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 *DIALOGUES CLINICAL NEUROSCIENCE* 263, 263 (2011) ("Several pathological features found in PTSD patients overlap with features found in patients with traumatic brain injury . . ."); National Institute for the Clinical Application of Behavioral Medicine, *How Trauma Impacts Four Different Types of Memory*, <https://www.nicabm.com/trauma-how-trauma-can-impact-4-types-of-memory-infographic/> (explaining that trauma can significantly impair the formation and storage of memories, and can result in incapacitation of episodic memory and lead to memories that are fragmented in terms of event sequencing).

<sup>26</sup> See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271–72 (5th ed. 2013) [hereinafter *DSMD*].

<sup>27</sup> Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims vs. Facts*, *PSYCHOL. TODAY* (Jan. 22, 2018), <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts> [<https://perma.cc/RG6P-EX38>].

and make it all the more plausible. But the gatekeepers responsible for handling a woman's workplace harassment claim are likely to draw the opposite conclusion. To the untrained ear, these same features make her story sound suspect and *implausible*. Accordingly, those with the power to help her become safe or obtain justice are likely to impose a credibility discount: a manager, who is deciding whether to help her make a report; a human resource officer, who is deciding whether to take corrective or punitive action against her accused perpetrator; or a judge, who is deciding the outcome of her lawsuit. The more she tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance, protection, and legal relief.<sup>28</sup>

Another major aspect of story plausibility is external consistency—the degree to which a story accords with how we expect the world to work.<sup>29</sup> If a person, arriving late for a meeting in Washington, D.C., on a hot and humid summer day, explained that she was delayed because it took a long time to scrape the ice off her car, her story would not fit within a listener's sense of normalcy. To be externally consistent, she should be talking about how the weather created problems with her air conditioner, not the ice on her windshield.<sup>30</sup>

But our understandings of how the world works are deeply affected by a variety of unconscious processes and biases. Perhaps the greatest culprit here is “false consensus bias”—our unconscious propensity to wrongly see one's “own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate.”<sup>31</sup> False consensus bias tricks us into believing—mistakenly—that our personal experiences, attitudes, desires, and preferences are not individual, but

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<sup>28</sup> See Epstein & Goodman, *supra* note 11, at 410.

<sup>29</sup> GROSE & JOHNSON, *supra* note 18, at 15–16; Epstein & Goodman, *supra* note 11, at 412 n.43. As with internal consistency, the importance of external consistency in the related context of courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. See, e.g., PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 62 (5th ed. 2013).

<sup>30</sup> See GROSE & JOHNSON, *supra* note 18, at 16.

<sup>31</sup> Lee Ross, David Greene & Pamela House, *The “False Consensus Effect”: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXP. SOC. PSYCHOL. 279, 280 (1976); see also Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) (“People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information.”); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008) (“Psychologists call the propensity to believe that one's views are the pre-dominant views, when in fact they are not, ‘false consensus bias.’”).

are universal.<sup>32</sup> We believe that our own thinking is just basic common sense and that, as a result, if we believe a certain thing or would behave in a certain way, other people will (or at least should) do the same. The pervasive and powerful nature of this bias is supported by extensive data across a wide variety of research studies.<sup>33</sup>

In truth, our experiences and the ways we understand the world are rarely as generalizable as we assume them to be.<sup>34</sup> As noted by Epstein and Goodman,<sup>35</sup> passengers who have experienced a serious car crash tend to react quite differently when a driver suddenly slams on the brakes than do those who have experienced only routine car rides.<sup>36</sup> Veterans who have experienced military conflict often react quite differently to loud, unexpected noises than do civilians who have lived peaceful lives.<sup>37</sup> And such expectations tend, in turn, to provoke diverse responses.

In the sexual harassment context, a crucial experiential gap exacerbates the scope of false consensus bias. On the one hand, there are those who have suffered workplace harassment, particularly harassment inflicted by someone with the ability to influence a survivor's job or career; on the other hand, there are those fortunate enough to have worked only in environments free from abuse.

It can be a real stretch for those who have not survived workplace harassment to comprehend many aspects of that experience, especially when the perpetrator seems, from an outside perspective, to be a decent

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<sup>32</sup> Epstein & Goodman, *supra* note 11, at 412 n.46; Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987); Ross, Greene & House, *supra* note 31, at 280; Solan, Rosenblatt & Osherson, *supra* note 31, at 1280.

<sup>33</sup> Marks & Miller, *supra* note 32 (noting that over a 10-year period, "over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others").

<sup>34</sup> Epstein & Goodman, *supra* note 11, at 412-13 n.47.

<sup>35</sup> The examples below are drawn from Epstein and Goodman, *supra* note 11, at 412-13.

<sup>36</sup> See J. Gayle Beck and Scott F. Coffey, *Assessment and Treatment of Posttraumatic Stress Disorder After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 PROF. PSYCHOL. RES. & PRAC. 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of PTSD and may experience intrusive symptoms or avoid driving altogether).

<sup>37</sup> See, e.g., Cariñez Dela Cruz Fajarito & Rosalito G. De Guzman, *Understanding Combat-Related PTSD Symptom Expression Through Index Trauma and Military Culture: Case Studies of Filipino Soldiers*, 182 MILITARY MED. e1665 (2017), <https://academic.oup.com/milmed/article-pdf/182/5-6/e1665/21833747/milmed-d-16-00216.pdf>. For a vivid visual/aural exposition of the triggers veterans face in daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), <https://www.youtube.com/watch?v=bgpRw92d1MA>.

guy. Because survivors' stories can seem to lack external consistency, they again appear less plausible.

### 1. Women Who Don't Report, or Don't Report Immediately

To see the real-world impact of this interpretive gap, consider common expectations about whether and when a victim of sexual harassment will report the abuse. Recent #MeToo stories of past harassment triggered a flurry of questions, presumably primarily from non-survivors, about why the victims did not report.<sup>38</sup> Research demonstrates that non-survivors tend to assume that, if they were to find themselves in an abusive workplace environment, they would report the experience, and would do so immediately.<sup>39</sup> This view does not appear to have changed significantly since now-Justice Clarence Thomas' confirmation hearings, when Senator Dennis DeConcini exclaimed, "If you've been sexually harassed, you ought to complain! . . . I mean, where's the gumption?"<sup>40</sup>

And this non-survivor assumption holds for women as well as men. In a study where researchers conducted realistic job interviews with women, they asked members of one group how they thought they would react if a male interviewer asked them questions such as "Do you think it is important for women to wear bras to work?"<sup>41</sup> The women predicted that they would feel angry and would report the interviewer for sexual harassment.<sup>42</sup> But when these inappropriate interview questions were actually posed to the other research group, the women reacted quite differently.<sup>43</sup> They reported feeling predominantly fear, rather than anger, and they made no effort to report.<sup>44</sup> As the

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<sup>38</sup> E.g., Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

<sup>39</sup> See, e.g., Douglas D. Baker, David E. Terpstra and Kinley Larntz, *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 SEX ROLES 305, 315 (1990); James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 544 (1995); David E. Terpstra and Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORG. BEH. 1 (1989).

<sup>40</sup> Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 117 (1995) (quoting Senator Dennis DeConcini).

<sup>41</sup> Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Harassment*, 57 J. SOC. ISSUES 15, 20–21 (2002).

<sup>42</sup> *Id.* at 21.

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.*

researchers concluded, “anticipated behavior did not mesh with actual behavior.”<sup>45</sup>

Court decisions reflect this same false consensus bias. Judges routinely hold that it is inherently unreasonable for a victim to fail to file a formal report of sexual harassment with her employer.<sup>46</sup> And all too frequently, these judges refuse to consider any aspect of the particular circumstances as relevant to a reasonableness determination, creating a de facto assumption that a failure to report is unreasonable per se.<sup>47</sup> As Professor Joanna Grossman explains, courts take “a strict and entirely unrealistic view of how quickly and assertively employees must complain about harassment and how many obstacles they must overcome to do so.”<sup>48</sup>

Non-survivors also tend to assume that a victim will report immediately after the first episode of harassment. Courts reinforce this false assumption, holding that even brief delays between an incident of harassment and the victim’s report are “unreasonable” under the law.<sup>49</sup> In one case, for example, the plaintiff took seventeen days after the first incident of sexual harassment before filing a complaint.<sup>50</sup> On September 28, her supervisor rubbed up against the side of her breasts; on October 11 or 12, he put her head between his knees in a headlock. Three to four days after this last escalation, on October 15, she filed a formal complaint pursuant to the company’s sexual harassment policy.<sup>51</sup> The court held that the length of the period between the first incident and

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<sup>45</sup> *Id.*

<sup>46</sup> See David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1286 (2001).

<sup>47</sup> See Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 *B.U. L. REV.* 1029, 1045 (2015).

<sup>48</sup> *Id.*; see also *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1181–82 (9th Cir. 2001); *Hulsey v. Pride Restaurants*, 367 F.3d 1238 (11th Cir. 2004) (court made no effort to investigate or explain why the plaintiff failed to report her supervisor’s sexually harassing conduct under the particular circumstances that occurred).

<sup>49</sup> See *Shaba v. IntraAction Corp.*, No. 02 C 5173, 2004 WL 42350, at \*1, \*5 (N.D. Ill. Jan. 6, 2004) (finding unreasonable a two-month delay in reporting a supervisor’s sexual harassment, during which the employee kept a log of incidents and discussed the issue with co-workers).

<sup>50</sup> *Conatzer v. Medical Professional Building Services*, 255 F. Supp. 2d 1259, 1270 (N.D. Okla. 2003).

<sup>51</sup> *Id.* at 1264.

the formal complaint was unreasonable.<sup>52</sup> Similar decisions have been handed down by judges in jurisdictions across the country.<sup>53</sup>

As these examples demonstrate, for decades, most of us have assumed that the way the world works, and therefore what is externally consistent, is that a “real” victim would report and would do so quite quickly. But this is simply not the case. A meta-analysis of multiple studies found that only between a quarter and a third of those harassed ever report their experience to a supervisor or union representative, and only 2 to 13 percent file a formal complaint.<sup>54</sup> Multiple studies have found that approximately 70 percent of individuals who experienced harassment never even discussed it with a supervisor, manager, or union representative.<sup>55</sup> A recent survey of businesses and law firms found that although 68 percent of women respondents indicated that they had experienced workplace harassment, only 30 percent reported

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<sup>52</sup> *Id.* at 1270.

<sup>53</sup> *See, e.g.*, *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1057, 1063 (10th Cir. 2009) (finding a reporting delay of approximately two months unreasonable when a supervisor asked the employee about her breast size, inquired if she masturbated, shared that he liked her skirt, and made comments about her ex-husband and children); *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 454, 458 (6th Cir. 2008) (finding a reporting delay of approximately two months unreasonable when a supervisor sexually harassed an employee for over two years, culminating in the employee having to take a leave of absence); *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1292–93 (11th Cir. 2003) (concluding that a three-month delay was unreasonable as a matter of law where an employee was sexually harassed and raped by her supervisor on more than one occasion); *Benson v. Solvay Specialty Polymers*, No. 1:16-cv-04638, 2018 WL 5118615, at \*18–19 (N.D. Ga. Jul. 3, 2018) (concluding that the employee’s delay in reporting the harassment “equated to unreasonably failing to take advantage” of harassment policies where the employee was harassed by three colleagues on separate occasions and reported immediately the first time, within 15 days the second time, and within 2 months the third time); *Mankowski v. Men’s Warehouse*, No. 04 C 6603, 2006 WL 208714, at \*6 (N.D. Ill. Jan. 24, 2006) (concluding that a delay of approximately one month in reporting the harassment was unreasonable); Timothy M. Barber, *Wisconsin Employment Law Letter: Sexual Harassment, When Can You Fire An Employee Who Fails to Timely Report Alleged Sexual Harassment*, 26 No. 1 WIS. EMP. L. LETTER 4 (Jan. 2017) (citing a case which concluded that an employee’s reporting of an incident of butt slapping within one month was unreasonable because he was instructed to report immediately). Professor Grossman points out that the courts have placed survivors in a double bind: they must report harassment immediately to preserve their legal claims, but they will have no protection from retaliation if they report too early—at a point that the court subsequently determines is not yet legally actionable. Grossman, *supra* note 47, at 1045–46.

<sup>54</sup> Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 25 SAGE HANDBOOK OF ORGANIZATIONAL BEHAV. 469, 485 (2008), [https://pdfs.semanticscholar.org/a41c/9c91cc084fede9faca785bf099ec7adb8264.pdf?\\_ga=2.174325154.1215970955.1601413114-1520509921.1601413114](https://pdfs.semanticscholar.org/a41c/9c91cc084fede9faca785bf099ec7adb8264.pdf?_ga=2.174325154.1215970955.1601413114-1520509921.1601413114).

<sup>55</sup> *Id.*

the incidents.<sup>56</sup> And a similar picture emerged from a 2016 study in the United Kingdom, which found that four in five women do not report sexual harassment.<sup>57</sup>

Why do women choose not to report? One of the (many) frequently-cited reasons is trepidation that their claims will not be believed.<sup>58</sup> And this concern is realistic; an ABA survey showed that of those women who did report sexual harassment on the job, only 27 percent found that their complaints were taken seriously.<sup>59</sup> As Professors Johanna Grossman and Deborah Rhode explain:

[Women] wait to see whether the behavior will stop on its own, or they keep silent because they fear that reporting will be futile . . . . Rather than filing internal or external complaints, harassment targets tend to resort to informal and nonconfrontational remedies. They vent, cope, laugh it off, treat it as some kind of less threatening misunderstanding, or simply try to get on with their jobs (and lives). They may blame themselves, pretend it is not happening, or fall into self-destructive behaviors like eating disorders or drinking problems.<sup>60</sup>

Whatever the reason, the reality is clear: women rarely report even serious incidents of sexual harassment in the workplace.

Thus, a profound gap in understanding arises from the difference between non-survivor expectations and actual survivor behavior with respect to reporting. And this gap in comprehension creates real obstacles for survivors, who are likely to be met with skepticism when they do not conform to the expectations of others. Extensive and often high-profile media coverage, as well as a massive proliferation of laws, regulations, training programs, and anti-harassment policies, have not yet realigned the way many managers, union representatives, human

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<sup>56</sup> Frankel & Ward, *supra* note 3.

<sup>57</sup> TRADES UNION CONGRESS, STILL JUST A BIT OF BANTER? SEXUAL HARASSMENT IN THE WORKPLACE IN 2016 (2016), <https://www.tuc.org.uk/research-analysis/reports/still-just-bit-banter>.

<sup>58</sup> See, e.g., *Workplace Harassment: Examining the Scope of the Problem and Potential Solutions: Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace* (June 15, 2015), [https://www.eeoc.gov/eeoc/task\\_force/harassment/testimony\\_cortina.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm) (written testimony of Lilia M. Cortina).

<sup>59</sup> Frankel & Ward, *supra* note 3.

<sup>60</sup> Joanna L. Grossman & Deborah L. Rhode, *Understanding Your Legal Options If You've Been Sexually Harassed*, HARV. BUS. R. (June 22, 2017), <https://hbr.org/2017/06/understanding-your-legal-options-if-youve-been-sexually-harassed>. The EEOC Report reached similar conclusions, finding that women are far more likely to pursue alternative strategies, such as avoiding the abusive co-worker, minimizing or denying their experience, or continuing to tolerate the harassment. EEOC TASK FORCE REPORT, *supra* note 3.

resource offices, and judges go about making sense of what is, in fact, plausible survivor behavior.<sup>61</sup>

## 2. Women Who Remain on the Job

The pronounced disconnect between survivor and non-survivor perspectives on the world also strongly shapes common expectations about women's decisions to stay in their jobs and tolerate even terribly abusive treatment. Their reasons for staying vary. Some may remain on the job out of a realistic fear that their harasser will retaliate or blacklist them with other potential employers, causing real harm to their job prospects or careers.<sup>62</sup> Others stay due to economic dependence; they have no other options that will allow them to pay the bills or support their children.<sup>63</sup> Others remain to preserve their professional ambition, understanding that they are dependent on their harasser for mentorship and professional advancement.<sup>64</sup> For all of

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<sup>61</sup> Seventy percent of employers provide sexual harassment training; 98 percent of companies have sexual harassment policies. SIMPLIFY COMPLIANCE TRAINING, *Federal Training Requirements* (citing a Bureau of Labor and Statistics (BLS) survey), <https://simplifytraining.com/article/federal-training-requirements/> (last visited Sept. 29, 2020). Nonetheless, more than 12,000 sexual harassment claims were filed with the EEOC in 2015. U.S. EQUAL EMP. OPPORTUNITY COMM'N, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY2010–FY2019, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019>.

<sup>62</sup> See, e.g., Joshua Barajas & Elizabeth Flock, *They Reported Sexual Harassment. Then the Retaliation Began*, PBS NEWS HOUR (Mar. 1, 2018), <https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began> (women members of the California Forest Service face a choice of either reporting harassment and facing retaliation, or staying on the job); Jim Rutenberg, Emily Steel & John Koblin, *At Fox News, Kisses, Innuendo, Propositions and Fears of Reprisal*, N.Y. TIMES (Jul. 23, 2016), <https://www.nytimes.com/2016/07/24/business/at-fox-news-kisses-innuendo-propositions-and-fears-of-reprisal.html?module=inline> (when the New York Times spoke with women who experienced sexual harassment by supervisors at Fox News, the women requested to remain anonymous for “fear of retribution,” getting fired, and/or “damage [to] their careers”); Bernice Yeung, *Rape on the Night Shift*, FRONTLINE (Jun. 23, 2015), <https://www.pbs.org/wgbh/frontline/article/rape-on-the-night-shift/> (women janitors are easy targets for sexual abuse on the job but are not likely to leave).

<sup>63</sup> See, e.g., Danya Evans, *Don't Leave Their Jobs After They've Been Sexually Harassed*, CUT (Aug. 5, 2016), <https://www.thecut.com/2016/08/why-women-stay-at-jobs-after-sexual-harassment.html> (telling story of one woman who stayed in a job despite harassment because she needed the salary; she was a “single mom with two kids” and there was “no way [she] was going to quit;” and another who stayed at her job because she needed the health insurance to support her baby and did not have the time to do a job search); Alissa Quart, *What's the Common Denominator Among Sexual Harassers? Too Often, it's Money*, GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/us-news/2017/nov/09/sexual-harassment-economic-inequality-harvey-weinstein> (a woman stayed at her job for a decade despite harassment because she needed to support her family).

<sup>64</sup> For example, women who were harassed and assaulted when working for Charlie Rose explained that they stayed on the job for professional advancement reasons. Amy

these reasons, those who have experienced workplace harassment understand that a decision to stay on the job and tolerate continued abuse is just how the world works for many women; it is a normal response to a difficult situation where, in reality, few options exist.

But many of those who are privileged enough to have not experienced workplace harassment, or who have numerous available job options, or who have a substantial financial cushion, find that they cannot understand the choice to stay. Donald Trump echoed this failure in comprehension when he was asked to imagine his daughter being subjected to workplace harassment. He said this would pose no problem; Ivanka would simply find another company to work for or would start another career.<sup>65</sup> Eric Trump also echoed this gap in experiential understanding, saying that his sister would just never allow sexual harassment to happen to her.<sup>66</sup>

In other words, for many who are not survivors of sexual harassment, a woman's decision to tolerate harassment and stay in her job is deeply inconsistent with how they expect people to act in the world. It simply does not make sense; to them, it sounds as unlikely as ice on a car windshield during a D.C. summer. When these listeners hear stories of women who are behaving as a prototypical survivor would, they wrongly perceive these stories to be externally inconsistent and thus impose an unfair, discriminatory credibility discount.

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Brittain & Irin Carmon, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping, and Lewd Calls*, WASH. POST (Nov. 20, 2017), [https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d\\_story.html](https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html). One woman stated that she stayed because “there are so few jobs” in the television industry and that if she didn’t stay, someone else would get this scarce position. *Id.* Another said she stayed because she was told that “personal time with Rose was a key to becoming part of the team.” *Id.* Similarly, many women stayed in their jobs at the Ford Union plant in Chicago, despite harassment, because a “job at Ford was considered a golden ticket.” Susan Chiara & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

<sup>65</sup> Scott Bixby, *Eric Trump: ‘Strong, Powerful Women’ Don’t Allow Sexual Harassment to Occur*, GUARDIAN (Aug. 2, 2016), <https://www.theguardian.com/us-news/2016/aug/02/eric-trump-donald-ivanka-sexual-harassment>. See also, e.g., *Sexual Harassment in the Workplace, A CASE FOR WOMEN*, <https://www.acaseforwomen.com/sexual-harassment/> (“[T]here is this completely maddening myth widely circulated in the media that goes something like: ‘Strong women don’t get sexually harassed at work; strong women stand up for themselves at work, and so they are protected.’”).

<sup>66</sup> Bixby, *supra* note 65.

This creates a problematic dichotomy. Both survivors and experts in the field are likely to recognize a woman's story about her response to harassment as realistic and fully plausible.<sup>67</sup> But that same woman is likely to find that her actions are perceived as implausible by many in her workplace and in the larger society who lack either experience or expertise, and who then discount her credibility.<sup>68</sup>

### III. CREDIBILITY DISCOUNTS BASED ON STORYTELLER TRUSTWORTHINESS

In addition to discounting the plausibility of the stories told by women survivors, we also discount the individual trustworthiness of women as narrators of stories.<sup>69</sup> In other words, *regardless of the content* of her story, a woman may be considered an unreliable reporter of her own experiences. Our assessment of women's personal trustworthiness suffers from skepticism rooted in (1) uneducated expectations regarding a survivor's "appropriate" demeanor; (2) prejudicial stereotypes regarding the false motives of women seeking material assistance; and (3) the long-standing cultural tendency to disbelieve women simply because they are women.

#### A. Survivor Demeanor

When a survivor tells the story of the harassment she has experienced, her demeanor may be symptomatic of psychological trauma induced by the abuse itself. Three core aspects of PTSD—numbing, hyperarousal, and intrusion—can influence demeanor in obvious ways. This, in turn, can cause system gatekeepers to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of workplace harassment.<sup>70</sup>

First, a survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly-constrained affect.<sup>71</sup> This symptom can profoundly shape the way a woman appears when making a report and, in turn, how a manager, human resource officer, union representative, or judge perceives her. Numbing may cause many survivors to talk or

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<sup>67</sup> Epstein & Goodman, *supra* note 11, at 419.

<sup>68</sup> See, e.g., Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter ROUTLEDGE HANDBOOK].

<sup>69</sup> Epstein & Goodman, *supra* note 11, at 420.

<sup>70</sup> DSM-5, *supra* note 26, at 271–72. This discussion of the various aspects of PTSD borrow heavily from Epstein & Goodman, *supra* note 11, at 421.

<sup>71</sup> DSM-5, *supra* note 26, at 272.

testify about emotionally charged incidents with an entirely flat affect.<sup>72</sup> A woman may tell a story about how her supervisor sexually assaulted her in the same tone she would use to describe what she ate for dinner. This disconnect between affect and story can be jarring and can result in the imposition of a credibility discount.

PTSD also alters demeanor via hyperarousal: a state of feeling overly alert, keyed-up, paranoid about danger, easily agitated, overly aggressive, or threatened even when not really in danger.<sup>73</sup> Symptoms of hyperarousal can result in a victim appearing “highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents.”<sup>74</sup> In the office, for example, a harassing supervisor may make a particular comment or adopt a particular tone of voice when speaking to a victim. Others may not notice anything out of the ordinary, but the target-victim does: she knows that he is communicating a message of intimidation or threat. This may cause her to react in ways that appear, on the surface, out of control—perhaps even crazy.<sup>75</sup> She now fits the stereotype of a hysterical female—an image commonly associated with exaggeration and unreliability.<sup>76</sup> Those around her are therefore more likely to apply a credibility discount and assume that, regardless of the content of her story, the survivor is not a fully trustworthy person.

Finally, PTSD symptoms affect demeanor through intrusion: experiencing vivid memories or flashbacks that make the survivor feel as though the trauma is recurring.<sup>77</sup> These symptoms can be so overwhelming that a survivor cannot coherently tell her story.<sup>78</sup>

All of this places sexual harassment victims in a double bind. The very symptoms of their trauma—the reliable indicators that abuse has occurred—are wielded against them to damage their credibility. Because PTSD symptoms can make women appear unusually hysterical,

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<sup>72</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 41 (1999); see also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198 n.36 (1993); HERMAN, *supra* note 24, at 45.

<sup>73</sup> Epstein, *supra* note 72, at 41.

<sup>74</sup> *Id.*

<sup>75</sup> See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078–79 (2011).

<sup>76</sup> See *id.* at 1079 (“Female jurors, according to one study, already believe that women are generally ‘less rational, less trustworthy, and more likely to exaggerate than men.’”).

<sup>77</sup> DSM5, *supra* note 26, at 275.

<sup>78</sup> Epstein, *supra* note 72, at 41.

angry, paranoid, flat, or numb, they contribute to credibility discounts that may be imposed by system gatekeepers at all levels.<sup>79</sup>

And the skeptical reactions of system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts. The more a human resource officer, manager, or judge appears to doubt a survivor's credibility, the more likely she is to feel upset, destabilized, or even (re)traumatized.<sup>80</sup> This reaction may trigger an increase in the intensity of her emotionally "inappropriate" demeanor, making her appear even less credible.<sup>81</sup>

### B. *Survivor Motive*

To assess the trustworthiness of a woman's account of gender-based harassment, employers and others are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of workplace relationships.<sup>82</sup> Although individuals vary in the stereotypes they hold, certain fundamental cultural tropes about women's motives to lie and manipulate tend to resonate in situations where women assert that they have been harmed by the men in their lives.<sup>83</sup>

One of the most persistent and virulent stereotypes about women's false allegations about male behavior is the "grasping, system-gaming woman on the make."<sup>84</sup> We tend to discount the trustworthiness of

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<sup>79</sup> See, e.g., Epstein, *supra* note 72, at 41–42.; Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

<sup>80</sup> See Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 68, at 238.

<sup>81</sup> *Id.*

<sup>82</sup> Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 242–43 (2011). Sexual harassment is typically a manifestation of a broader pattern of inequality and discrimination in the workplace. See generally Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018). "Without the power and safety that comes with equal representation and numbers, women cannot effectively counter stereotypes or[, in turn,] deter or resist harassment." *Id.* at 24.

<sup>83</sup> Professor Amy Ronner identified five stereotypes about women as liars in the context of sexual harassment litigation: the woman who asked for it, the woman scorned, the woman who lusts after money, the woman of hyperbole, and the woman of delusions. Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in Jones v. Clinton*, 31 U.C. DAVIS L. REV. 123, 134–38 (1997). This article will explore one of these five in depth: the "gold digger."

<sup>84</sup> Epstein & Goodman, *supra* note 11, at 425. The "woman scorned" is another gender-based stereotype commonly applied to women claiming sexual harassment. The

women who appear motivated by the desire to get something from the men in their lives.

The “grasping woman” stereotype was popularized in the film *Gold Diggers of 1933*, which portrayed a group of aspiring actresses seeking to marry millionaire bachelors during the Great Depression.<sup>85</sup> Since then, the gender makeup of the American workplace has undergone a seismic change: 49 percent of employed women now report that they are the primary breadwinners in their households.<sup>86</sup> Although this reality stands in sharp contrast to the gold digger myth, the stereotype

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proverb, “hell hath no fury like a woman scorned,” is adapted from a line in an eighteenth-century English drama:

Heav’n has no Rage, like Love to Hatred turn’d,  
Nor Hell a Fury, like a Woman scorn’d.

William Congreve, *The Mourning Bride* (1697), reprinted in *THE MOURNING BRIDE, POEMS, & MISCELLANIES BY WILLIAM CONGREVE* 125 (Bonamy Dobree ed. 1928). During Anita Hill’s congressional testimony about her experiences with Clarence Thomas when he supervised her, Senator Howell Heflin (an Alabama Democrat) asked her, “Are you a woman scorned?” Erin Blakemore, *How Anita Hill’s Confirmation Hearing Testimony Brought Workplace Sexual Harassment to Light*, HISTORY (Apr. 23, 2018), <https://www.history.com/news/anita-hill-clarence-thomas-sexual-harassment-confirmation-hearings>. Women branded with this stereotype are assumed to be motivated by a desire to punish a man for rejecting her. “Society depicts her as wielding the sexual harassment claim as a retributive workplace sword. . . . [T]he underlying assumption is that she is not the harmed but rather the harmer.” Ronner, *supra* note 83, at 136. This stereotype that women lie out of a desire for revenge after being romantically or sexually rejected is alive and well today. See, e.g., Meghan Grant, *Alexander Wagar Says Woman Accusing Him of Sexual Assault is Out for “Revenge,”* CBC NEWS (Nov. 8, 2016), <https://www.cbc.ca/news/canada/calgary/alexander-wagar-sexual-assault-trial-cross-examination-1.3841965>. And after Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, was convicted on multiple counts, he submitted a sentencing letter to the court using the phrase, “hell hath no fury like a woman scorned,” to claim that—despite the jury verdict against him—his accusers were not credible. Des Bieler, *Here are the Larry Nassar Comments that Drew Gasps in the Courtroom*, WASH. POST (Jan. 24, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/01/24/here-are-the-larry-nassar-comments-that-drew-gasps-in-the-courtroom/?utm\\_term=.d624fa23a0b1](https://www.washingtonpost.com/news/early-lead/wp/2018/01/24/here-are-the-larry-nassar-comments-that-drew-gasps-in-the-courtroom/?utm_term=.d624fa23a0b1). For more information about the Larry Nassar case, see Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018, 10:23 PM), <https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/>.

<sup>85</sup> GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands). “[I]t’s a weird form of gaslighting to deny women the right to earn money, vote, or own property, education or anything else that would allow them to earn on par with men—and burden them with total responsibility for child rearing—but then accuse them of being ruthlessly shallow when they look for a guy with plenty of money to go around.” Tracy Moore, *What’s Does [sic] ‘Gold Digger’ Mean These Days?*, MEL MAG. (Apr. 6, 2018), <https://melmagazine.com/en-us/story/whats-does-gold-digger-mean-these-days>.

<sup>86</sup> Shawn M. Carter, *More Women are the Breadwinner at Home, But Most Still Say Men Treat Them Differently at Work*, CNBC (Mar. 23, 2018, 12:44 PM), <https://www.cnbc.com/2018/03/23/more-women-are-breadwinners-but-are-still-treated-differently-at-work.html>.

persists. As one example, in Silicon Valley, tech magnates swap warnings about women they refer to as “founder hounders” who pursue relationships with wealthy men who head start-up companies.<sup>87</sup> Although the idea that a significant number of such women exist is at best debatable, the stereotype is alive and well, at least among the wealthy men who fear they might fall victim.<sup>88</sup>

The social myth of the gold digger is particularly lethal for women seeking protection and redress for workplace harassment. This ugly term has been applied to many women who have come forward as part of #MeToo, and it has served as a powerful tool to undermine their credibility. Here is how it typically plays out: Many women who report workplace harassment are subject to real retaliatory harms, many of which have attendant financial implications.<sup>89</sup> Such retaliation may take a variety of forms such as depressed job evaluations, denials of raises and promotions, unwelcome transfers, or poor references to other employers.<sup>90</sup> Moreover, evidence suggests that those who respond most

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<sup>87</sup> See Emily Chang, “Oh My God, This Is So F---ed Up”: Inside Silicon Valley’s Secretive, Orgiastic Dark Side, VANITY FAIR (Jan. 2, 2018), <https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum>.

<sup>88</sup> *Id.*

<sup>89</sup> A 2016 Trades Union Congress study, conducted in the United Kingdom with the Everyday Sexism Project, found high rates of both management passive inaction and active retaliation against women who reported sexual harassment. See generally TRADES UNION CONGRESS, *supra* note 57, at 20. Among women who reported, 70 percent found that their situations remained unchanged; 16 percent said that their situations got worse. *Id.* at 19. Another study of public-sector employees found that two-thirds of workers who complain about mistreatment experience retaliation. Carly McCann, Donald Tomaskovic-Devey & M.V. Lee Badgett, *Employer’s Responses to Sexual Harassment*, U. MASS. AMHERST: CENT. FOR EMP. EQUITY, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> (“most employers react punitively to people who file sexual harassment charges” and 68% of the harassment charges filed with the EEOC also allege retaliation); Janet Nguyen & David Brancaccio, *Survey Finds that in Tech, Retaliation for Speaking Up about Workplace Discrimination is Common*, MARKETPLACE (Jul. 24, 2018) <https://www.marketplace.org/2018/07/24/business/retaliation-workplace> (survey of over 4,000 tech company employees showed over 40% faced retaliation after reporting harassment).

<sup>90</sup> See, e.g., Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018); Fitzgerald, Swan & Fischer, *supra* note 40, at 122–23; Joshua Barajas & Elizabeth Flock, *They Reported Sexual Harassment. Then the Retaliation Began*, PBS: NEWS HOUR (Mar. 1, 2018, 5:14 PM), <https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began> (retaliation through verbal threats, bullying, stripping of duties, negative performance review, and demotion); Yuki Noguchi, *Advice for Dealing With Workplace Retaliation: Save Those Nasty Emails*, NAT’L PUB. RADIO: MORNING EDITION (Sept. 14, 2016, 4:51 AM), <https://www.npr.org/2016/09/14/493788339/advice-for-dealing-with-workplace-retaliation-save-those-nasty-emails> (retaliation may take the form of demotion, bad evaluation, or undesirable assignment); see also RIKLEEN, *supra* note 11, at 44; Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U.

assertively to harassment—for example, by filing formal complaints—receive the most negative retaliatory treatment.<sup>91</sup> In recognition of this fact, the law entitles victims to various forms of financial compensation.

But many women who pursue such compensation through the courts end up being perceived as “gold diggers” who are exaggerating or fabricating their story of harassment for money.<sup>92</sup> The gold digger stereotype, in turn, results in women being treated with skepticism about their credibility. In fact, all these women are actually doing is seeking the full scope of remedies that the law provides and trying to regain the position they would have been in but for the discriminatory harassment to which they were subjected.

[Only a] tiny fraction of the workforce files a discrimination suit in any given year. . . . Available social science evidence does not support any significant faker problem. Instead, it actually shows that employees are reluctant to believe that their employers discriminated against them.<sup>93</sup>

Despite this fact, the idea that women survivors of workplace harassment are “gold diggers” motivated by something other than safety and fairness tends to fall on receptive ears in our society in general, and in our justice system in particular, because of this virulent, derogatory stereotype. An important lesson from Taylor Swift’s successful sexual harassment suit against a disk jockey is that by filing the suit for the

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PA. J. LAB. & EMP. L 603, 611–12 (2007) (retaliation took the form of reputation-damaging misrepresentations and more stringent tenure requirements).

<sup>91</sup> TRADES UNION CONGRESS, *supra* note 57, at 18–24.

<sup>92</sup> This stereotype is often paired with the misogynist assumption that only young, attractive women could be sexually harassed. There are websites abounding with vicious comments about plaintiffs in workplace discrimination suits being too old or too ugly (“hardly a virgin or a hottie”) to be credible as victims. *Why Are Women Filing So Many Frivolous Sexual Harassment Lawsuits?*, BLOT MAG. (Aug. 4, 2014), <https://www.theblot.com/women-filing-many-sexual-harassment-lawsuits-greedy-just-7755878> (stating that a forty-year-old professor at Columbia Business School who filed a sex discrimination suit was “hardly a hottie or a virgin”). In Italy, a fifty-year-old woman president of a female soccer club sued Carlo Tavecchio, head of Italy’s national soccer federation, for twice groping her breasts, once while he was being videotaped by a hidden camera police had suggested that she wear. Subsequently, however, prosecutors dropped the case, in part based on their conclusion that she was “too old to be distressed by his advances.” Lorenzo Tondo & Stephanie Kirchgaessner, *Italian Groping Case Dropped Because Alleged Victim was “Too Old to be Scared,”* GUARDIAN (June 14, 2018), <https://www.theguardian.com/world/2018/jun/14/italy-groping-case-carlo-tavecchio-prosecutors-report>; see also Lux Alptraum, *Sexual Assault Isn’t a “Pretty Girl Problem,”* SPLINTER (Oct. 14, 2016, 9:04 AM), <https://splinternews.com/sexual-assault-isn-t-a-pretty-girl-problem-1793862809> (describing the discriminatory harm arising from understanding sexual harassment as a “pretty girl problem”).

<sup>93</sup> SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 143, 145 (New York: Oxford University Press, 2017).

symbolic amount of one dollar she substantially bolstered her credibility in ways that most women cannot afford to do.<sup>94</sup>

What is the practical result for a woman who experiences workplace harassment? She often faces an untenable and unfair choice. On the one hand, she could go to trial and seek the full panoply of relief she needs to obtain justice and hold her harasser accountable, but in doing so risk being found incredible and losing her entire case. On the other hand, she could severely limit the financial relief she seeks simply to be found credible. Finally, she could sign a legal nondisclosure agreement to obtain the financial relief she needs but give up on telling her story publicly and protecting other women from future harassment. No one should have to face such an untenable set of choices.

Gender stereotypes are, of course, also shaped by stereotypes about race, class, and other identities.<sup>95</sup> As with all stereotypes, those that affect women as women are not monolithic in their impact: gender discounts are racialized (for example, the unrapeable black woman) and racial discounts are gendered. Despite this diversity of impact and complexity of harm, the bottom line remains the same: we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something.

### C. *Survivors as Women*

Cognitive psychologists know that our culture—as translated by the media, authority figures, family members, etc.—teaches us stereotypes that we then adopt on a deep, unconscious level.<sup>96</sup> The most ubiquitous derogatory stereotypes include many that devalue the credibility of women, people of color, those living in poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counter-evidence.<sup>97</sup>

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<sup>94</sup> See, e.g., Hilary Weaver, *Taylor Swift Has Finally Been Sent the Symbolic Dollar She Won in Court*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/style/2017/12/former-dj-david-mueller-says-he-sent-taylor-swift-dollar-payment>.

<sup>95</sup> Epstein & Goodman, *supra* note 11, at 427.

<sup>96</sup> See, e.g., RACHEL D. GODSIL ET AL., 2 THE SCIENCE OF EQUALITY: THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf> (“Popular culture plays an important part in reinforcing these gendered associations. Implicit biases are not the result of individual psychology—they are a social phenomenon that affects us all.”).

<sup>97</sup> Jeremy Wanderer, *Varieties of Testimonial Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 68, at 28.

The stereotype most directly relevant here relates to the persistent practice of discounting *women's* credibility *as women*. The idea that women are more likely than men to dissemble, manipulate, and misinform goes back as far as Aristotle, who attributed what he saw as the female tendency to lie to the “fact” that women were created as inferior versions of men.<sup>98</sup> He claimed that women were less logical and more emotionally dysregulated than their male counterparts.<sup>99</sup>

Today, strong messages about women's lack of trustworthiness still abound. A stark example of this gender-based difference can be seen through the work of women organizers who have created a catharsis-focused online project called *That's What She Said*.<sup>100</sup> Through this project, women submit first-person narratives of experiences that revolve around their gender.<sup>101</sup> Then, at campus events, men take the stage one at a time and are handed an envelope containing one of the stories.<sup>102</sup> They read the women's stories in their male voices, creating a sense of cognitive dissonance that highlights the absurdity of this gendered credibility discounting.<sup>103</sup> One example:

I was waiting in line with friends at a club in Boston. When it came time for us to enter, the bouncer ranked us by our “hotness,” letting the “hot” ones in first.

When it was finally my turn, he wouldn't let me enter until I “smiled.” I asked why, and he said that I was only pretty when I smiled. I told him I didn't feel like smiling, told him that he shouldn't tell women to smile.

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<sup>98</sup> Aristotle claimed that women are “more mischievous, less simple, more impulsive . . . more compassionate . . . more easily moved to tears . . . more jealous, more querulous, more apt to scold and to strike . . . more prone to despondency and less hopeful . . . more void of shame or self-respect, more false of speech, more deceptive, of more retentive memory [and] . . . also more wakeful; more shrinking [and] more difficult to rouse to action” than men. ARISTOTLE, *HISTORY OF ANIMALS* (D'Arcy Wentworth Thompson trans.) <https://penelope.uchicago.edu/aristotle/histanimals9.html>.

<sup>99</sup> *Id.*; see also Elise Hu, *Why Some Survivors of Sexual Harassment and Assault Wait to Tell Their Stories*, NAT'L PUB. RADIO: ALL THINGS CONSIDERED (Nov. 15, 2017, 4:42 PM), <https://www.npr.org/2017/11/15/564443807/why-some-survivors-of-sexual-harassment-and-assault-wait-to-tell-their-stories>.

<sup>100</sup> THAT'S WHAT SHE SAID, <https://www.thatswhatsheaidco.org/> (last visited Sept. 13, 2020).

<sup>101</sup> *About*, THAT'S WHAT SHE SAID, <https://www.thatswhatsheaidco.org/about> (last visited Sept. 13, 2020).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

He didn't let me in the club.<sup>104</sup>

This tendency to discount women's credibility is particularly strong for women who are seen as physically attractive. A University of Colorado study found that study participants consistently viewed attractive women as less truthful than either those men or women whom crowdsourcing research rated as less attractive.<sup>105</sup>

In addition, there is a tendency to discount a woman's credibility when her views are accompanied by emotional expression. As the new discipline of psychology developed in the nineteenth century, experts agreed that emotion in women (but not in men) was "the enemy of true rationality."<sup>106</sup> This idea persists today. A 2016 study found that both men and women implicitly associate "male" with rationality and thinking and "female" with emotionality and feeling.<sup>107</sup> Similarly, Professor Joan Williams of the Center for WorkLife Law surveyed close to 3,000 lawyers about their experiences with emotional expression in the workplace. The white men in her sample reported feeling free to express anger at the office, in contrast to only 44 percent of white women and only 40 percent of women of color.<sup>108</sup> Indeed, most women reported being penalized for displaying anger at the office.<sup>109</sup>

The societal tendency to discount women as inherently overemotional, illogical, and even crazy, can also be seen in the etymology of our language. The word "hysterical" derives from the Latin *hystericus*, or "of the womb."<sup>110</sup> It was long believed that a dysfunction of the uterus could trigger insanity in women.<sup>111</sup> The word "lunacy" derives from a belief that women suffered from monthly insanity triggered by the cycles of the moon—which were viewed as

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<sup>104</sup> *Read What She Said*, THAT'S WHAT SHE SAID, <https://www.thatwhatshesaidco.org/read-what-she-said> (last visited Sept. 13, 2020).

<sup>105</sup> See Leah D. Sheppard & Stefanie K. Johnson, *The Femme Fatale Effect: Attractiveness is a Liability for Businesswomen's Perceived Truthfulness, Trust, and Deservingness of Termination*, 81 *SEX ROLES* 779 (2019).

<sup>106</sup> Stephanie A. Shields, *Passionate Men, Emotional Women: Psychology Constructs Gender Difference in the Late 19<sup>th</sup> Century*, 10 *HIST. OF PSYCH.* 92, 98, 102 (2007).

<sup>107</sup> See Olivia Pavco-Giaccia, *Rationality is Gendered: Using Social Cognition to Explore the Thinking/Feeling Bias* (Apr. 22, 2016) (unpublished B.A. thesis, Yale University), <https://cogsci.yale.edu/sites/default/files/files/Thesis2016PavcoGiaccia.pdf>.

<sup>108</sup> JOAN C. WILLIAMS ET AL., *YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* 25 (2018).

<sup>109</sup> *Id.* at 6; Victoria Brescoli & Eric Uhlmann, *Can an Angry Woman Get Ahead? Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19(3) *PSYCHOL. SCI.* 265 (2008).

<sup>110</sup> See, e.g., *Hysteria*, *MERRIAM-WEBSTER DICTIONARY*, <https://www.merriam-webster.com/dictionary/hysteria> (last visited Aug. 17, 2020).

<sup>111</sup> *See id.*

connected to women's menstrual cycles.<sup>112</sup> These terms underscore our fundamentally different understandings of "female and male mental states: men being historically associated with rationality, straightforwardness and logic; women with unpredictable emotions, outbursts and madness."<sup>113</sup>

Similarly, the Urban Dictionary defines "female logic" as:

An oxymoron of the greatest magnitude. Male logic (or just plain logic) follows a direct path, clearly tying the consequences of action to the actor. Female logic doesn't follow a direct path. Female logic always contains ... something to blame her actions on just in case something goes wrong .... Essentially, female logic is to do whatever you want and then justify it with unrelated ... excuses after the fact. It's actually reverse logic.<sup>114</sup>

In sum, the tendency to discredit women *because they are women* is deeply embedded in our culture.

People of color, particularly black people, have a similar experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.<sup>115</sup> And our culture has a long history of dehumanizing black women and girls, making it less likely that their stories of harm will be believed. Indeed, Oklahoma City police officer Daniel Holtzclaw, who was convicted of twenty-eight counts of stalking, sexual assault, and indecent exposure, appears to have purposefully selected poor black women as his targets because they were less likely

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<sup>112</sup> See, e.g., Gary Nunn, *The Feminisation of Madness is Crazy*, GUARDIAN (Mar. 8, 2012, 9:38 AM), <https://www.theguardian.com/media/mind-your-language/2012/mar/08/mind-your-language-feminisation-madness>; *Science Diction: The Origin of the Word 'Moon'*, NAT'L PUB. RADIO: TALK OF THE NATION (Jan. 20, 2012, 1:00 PM), <https://www.npr.org/2012/01/20/14525014/science-diction-the-origin-of-the-word-moon>.

<sup>113</sup> Nunn, *supra* note 112.

<sup>114</sup> *Female Logic*, URBAN DICTIONARY (Mar. 5, 2008), <https://www.urbandictionary.com/define.php?term=female%20logic>.

<sup>115</sup> See, e.g., Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016); see also SORAYA CHEMALY, RAGE BECOMES HER: THE POWER OF WOMEN'S ANGER 8-11 (2018) ("Gender-role expectations . . . dictate the degree to which we can use anger effectively in personal contexts and to participate in civic and political life . . . . A society that does not respect women's anger is one that does not respect women—not as human beings, thinkers, knowers, active participants, or citizens.").

to be believed.<sup>116</sup> Similarly, a juror in the R. Kelly sexual assault trial admitted that he did not credit black women's testimony in the case.<sup>117</sup> A 2007 study compared college student assessments of the credibility of a black and a white victim of sexual assault; the black victim was found less believable and more responsible for the harm she suffered.<sup>118</sup>

Based on all the above, it stands to reason that women who are members of minority groups risk being doubly disbelieved. And available data demonstrates that women of color experience higher levels of harassment than either white women or men of color do.<sup>119</sup>

Poor people also frequently suffer from targeted disbelief. Emily Martin, Vice President for Workplace Justice at the National Women's Law Center, explains that, in particular, "low-wage and poor women are often not believed when they report instances of sexual harassment . . . . If you're poor, you may be found less credible when you tell your story."<sup>120</sup> And for poor women, too, expression of emotion related to the experience of harassment likely contributes to credibility discounting. Writers as far back as the late Middle Ages saw peasant expression of anger as reflecting an "instinct opposed to thought."<sup>121</sup> Today, doctors are more likely to dismiss reports of pain presented by women living in poverty as simply being "all in their head."<sup>122</sup> For victims of sexual harassment who live at the intersection of all three of these identities—

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<sup>116</sup> Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019, 12:30 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non>.

<sup>117</sup> See Jacey Fortin, 'Surviving R. Kelly' Documentary on Lifetime Details Sex Abuse Accusations, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/arts/music/surviving-r-kelly.html>.

<sup>118</sup> R.A. Donovan, *To Blame or Not to Blame: Influence of Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOL. 722, 723–24 (2007).

<sup>119</sup> Jennifer L. Berdahl & Celica Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 426, 427 (2006); Jana L. Raver & Lisa H. Nishii, *Once, Twice, Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace Harassment*, 95(2) J. APPLIED PSYCHOL. 236, 240–49 (2010); Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185 (2014).

<sup>120</sup> Alana Semuels, *Low-Wage Workers Aren't Getting Justice for Sexual Harassment*, ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158/>.

<sup>121</sup> Paul Freedman, *Peasant Anger in the Late Middle Ages*, ANGER'S PAST: THE SOCIAL USES OF EMOTIONS IN THE MIDDLE AGES 179 (Barbara H. Rosenwein, ed., 1998).

<sup>122</sup> Interview by Gabrielle Levy with Maya Dusenbery, *Dying to be Heard*, U.S. NEWS, (Apr. 20, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-04-20/why-women-struggle-to-get-doctors-to-believe-them>.

those who are poor women of color—these stereotypes feed into each other to further undermine assumptions about their trustworthiness.<sup>123</sup>

#### IV. CREDIBILITY INFLATION AWARDED TO MALE PERPETRATORS OF SEXUAL HARASSMENT

Our credibility economy is a complex one.<sup>124</sup> Credibility assessments are inherently comparative in nature; there is an “intimate relationship” between the credibility *discounts* imposed on women-victims and the credibility *inflations* accorded to the men who harass them.<sup>125</sup> The former can only be fully understood and accounted for in the context of the latter.<sup>126</sup>

The relative epistemic authority of the accuser and the accused can be highly significant in sexual harassment cases. Male perpetrators benefit from the positive cultural preconceptions we associate with their gender and that lead us to be far more likely to believe their statements.<sup>127</sup> In other words, *positive* prejudice, connected to social identity, provides a substantial—and not necessarily warranted—boost to the credibility of men who abuse women in the workplace.<sup>128</sup>

This comparative lens clarifies how credibility hierarchies can set limits on our collective social imagination.<sup>129</sup> Jose Medina explores this idea through an analysis of the trial in the novel, *To Kill A Mockingbird*.<sup>130</sup> The story centers on the 1930’s criminal trial of Tom Robinson, a black man accused of raping Mayella Ewell, a white woman. The prosecution’s

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<sup>123</sup> Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 164–65 (Claire M. Renzetti et al. eds., 2001) (noting African American women are three times as likely as white women to be killed by an intimate partner).

<sup>124</sup> The term “credibility economy” derives from MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

<sup>125</sup> See Jose Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, *SOC. EPISTEMOLOGY* 15, 18 (2011) (“[B]eing judged credible to some degree is being regarded as more credible than others, less credible than others, and equally credible as others.”).

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, OHIO ST. UNIV., <http://kirwaninstitute.osu.edu/> for a compilation of the extensive literature on implicit bias based on gender, race, and numerous other identity-based factors.

<sup>128</sup> Audrey Yap, *Credibility Excess and the Social Imaginary in Cases of Sexual Assault*, 3(4) *FEMINIST PHIL. Q.* 1, 1–3 (2017). These positive stereotypes are complicated, of course, by other aspects of a man’s social location. A hierarchy of credibility arises, for example, from the interplay of gender and race: white women are presumed to be more credible than black men, but white men are presumed more credible than white women. See, e.g., Medina, *supra* note 125, at 22.

<sup>129</sup> Yap, *supra* note 128.

<sup>130</sup> Medina, *supra* note 125, at 22.

cross-examination of Tom includes questions about his motive in routinely stopping by Mayella's home, where he helped her with her chores.<sup>131</sup> Tom explains that he did so because he felt sorry for Mayella. The jurors are unable to credit his explanation because "this sentiment is unintelligible in their social context. Given the social background of presumed black inferiority, it is unimaginable for a black man to feel pity for a white woman."<sup>132</sup> Because this aspect of his story is beyond the then-existing social imagination, Tom's entire defense suffers a credibility discount.<sup>133</sup>

How does this translate into the sexual harassment context? The limited set of narratives available in our collective imagination may affect the credibility we afford to men accused of sexual harassment. As Audrey Yap explains, "Just as we might be confused and skeptical if we heard about a mutiny on a ship filled with even-tempered pacifists committed to norms of civil discourse, we might also be confused and skeptical if we hear about a male feminist sexually assaulting a woman."<sup>134</sup>

Examples of the effects of our limited imagination can be found in cases where male perpetrators with long-standing feminist bona fides engage in sexual harassment. Take comedian Louis C.K., who "was seen as a prophet of nice dudes, a guy who got it."<sup>135</sup> In his 2013 HBO special, for example, C.K. posed the question, "How do women still go out with guys, when you consider that there is no greater threat to women than men?"<sup>136</sup> Louis C.K.'s image made it particularly difficult for many fans to believe the accusations, made by five women, that he had engaged in serious sexual misconduct, including forcing them to watch as he took off his clothes and masturbated in front of them.<sup>137</sup> These women were all younger comedians; a person as well known as Louis C.K. could make or break their careers. And there is no dispute as to whether Louis C.K. used his considerable professional power to commit these acts; the

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<sup>131</sup> *Id.*

<sup>132</sup> Yap, *supra* note 128.

<sup>133</sup> See, e.g., Medina, *supra* note 125.

<sup>134</sup> Yap, *supra* note 128, at 4.

<sup>135</sup> Lindsey V. Thompson, *Louis C.K. and the Threat of Fake Male Feminists*, GLAMOUR (Nov. 10, 2017), <https://www.glamour.com/story/louis-ck-and-the-threat-of-fake-male-feminists>. See e.g., Stuart McGurk, *The Problem with Fake Male Feminists*, GQ (Apr. 5, 2018), <https://www.gq-magazine.co.uk/article/the-problem-with-fake-male-feminists>.

<sup>136</sup> Thompson, *supra* note 135.

<sup>137</sup> Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>.

comic ultimately admitted the truth of the allegations.<sup>138</sup> Nonetheless, his fans found it incredibly difficult to accept this reality.<sup>139</sup>

Similar reactions of shock and denial followed sexual harassment allegations against *Mad Men* creator Matthew Weiner, who wrote an episode about workplace sexual harassment and subsequently was accused of engaging in the same types of behavior in real life.<sup>140</sup> Limits on our collective imagination also interfere with our ability to accept stories of sexual harassment perpetrated by men who are widely viewed as repositories of the public trust, such as news analysts Matt Lauer and Charlie Rose.<sup>141</sup>

Even more recently, following a 2020 Democratic presidential debate, long-time MSNBC *Hardball* host Chris Matthews attacked Senator Elizabeth Warren for referencing allegations, made by a former female employee of candidate Michael Bloomberg, that when he learned she was pregnant he told her to “kill it.” The woman sued and the case—one of many sexual harassment lawsuits against Bloomberg—settled out of court. Matthews demanded to know whether Warren believed the woman’s allegation; Warren said that she did. Matthews exclaimed: “And why would he lie? . . . Just to protect himself?” Warren countered by asking why the woman would lie, and Matthews aggressively insisted: “You’re confident of your accusation?” Matthews appeared far less upset about the allegation against Bloomberg than he was that “Warren was making such a fuss about [believing] the woman was telling the truth.”<sup>142</sup>

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<sup>138</sup> Jackson McHenry, *Louis C.K. Releases Statement on Sexual-Misconduct Allegations: “These Stories Are True,”* VULTURE (Nov. 10, 2017), <https://www.vulture.com/2017/11/louis-c-k-on-sexual-misconduct-claims-stories-are-true.html>.

<sup>139</sup> Nosheen Iqbal, *A Mockery of #MeToo: The Rush to Rehabilitate Louis CK is Indecent,* GUARDIAN (Sept. 2, 2018, 3:00 PM), <https://www.theguardian.com/world/2018/sep/02/too-soon-rehabilitate-louis-ck-mockery-metoo> (noting the “crushing disappointment” his fans experienced and how this news left fans “reeling from processing the transformation of Louis CK, champion of women onstage, to Louis C.K., grotesque harasser of women in reality”).

<sup>140</sup> McGurk, *supra* note 135.

<sup>141</sup> See, e.g., Madhulika Sikka, *Goodnight Charlie Rose*, PBS Public Editor (Nov. 21, 2017), <https://www.pbs.org/publiceditor/blogs/pbs-public-editor/should-he-stay-or-should-he-go/>; Amanda Holpuch, *Behind Matt Lauer’s Lovable Image, the TV Host Was a Divisive Figure*, THE GUARDIAN (Nov. 29, 2017), <https://www.theguardian.com/media/2017/nov/29/behind-matt-lauers-loveable-image-the-tv-host-was-a-divisive-figure>.

<sup>142</sup> Heather Schwedel, *Why Would He Lie?*, SLATE (Feb. 26, 2020, 3:12 PM), <https://slate.com/news-and-politics/2020/02/elizabeth-warren-chris-matthews-msnbc-debate-interview-bloomberg.html>. Another MSNBC host, Chuck Todd, piled on, expressing disappointment that Warren “hasn’t gotten over her feelings” about Bloomberg’s history of sexual harassment. Media Matters (@mmfa), TWITTER (Feb. 26, 2020), <https://twitter.com/mmfa/status/1232811999937155074?s=20>.

The common result of this systemic disbelief is that it takes allegations from numerous women to tip the credibility scales against such men.<sup>143</sup> Professor Catharine MacKinnon has kept track of this gender-based credibility economy as it plays out in the context of campus sexual assault.<sup>144</sup> She notes that, for decades, “it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.”<sup>145</sup>

#### V. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS OF WORKPLACE HARASSMENT

Survivors suffer a wide range of credibility and experiential discounts when they seek protection, fair treatment, and legal relief. They may suffer these discounts because their true stories of sexual harassment do not sound plausible: they are perceived as personally untrustworthy, or the men who abuse them and deny culpability are automatically seen as far more trustworthy sources. All of this bias is made worse by the fact that anti-harassment policies and grievance procedures typically are designed to serve the organization as “litigation defense centers” that create records to demonstrate in court that the employer did everything possible, rather than to actually protect survivors.<sup>146</sup> Numerous scholars have explained that internal policies and procedures related to harassment are in fact “instruments of risk management and liability avoidance rather than true engines of change.”<sup>147</sup> As one group put it, “Existing structures that claim to address sexual harassment are inadequate and are built to protect institutions, not designed to bring justice to victims.”<sup>148</sup> In other words,

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<sup>143</sup> Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (Apr. 10, 2017) (quoting Anna-Maria Marshall, Professor of Soc., Univ. of Ill.), <https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html>.

<sup>147</sup> Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463, 487 (2018). See, e.g., TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 39 (2017); Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 494, 519 (2018).

<sup>148</sup> 500 Women Scientists Leadership, *When It Comes to Sexual Harassment, Academia Is Fundamentally Broken*, SCI. AM.: VOICES (Aug. 9, 2018) (emphasis omitted), <https://blogs.scientificamerican.com/voices/when-it-comes-to-sexual-harassment-academia-is-fundamentally-broken/>.

“[a]s nice and well-meaning as they may be, your colleagues in HR don’t work for you. Management signs their paychecks, and their No. 1 priority is to serve and protect the company.”<sup>149</sup>

All of this may feel like déjà vu for a survivor of workplace abuse.<sup>150</sup> Institution-based discounting closely replicates the typical dynamics of the survivor’s relationship with her harasser. Perpetrators of workplace harassment, like system actors, often discredit both the plausibility of a victim’s story and her trustworthiness as a truth teller. It is all too common for a woman to hear a routine refrain of: “No, that’s not what happened”; or “I would never have touched you if you hadn’t provoked me”; or “If you hadn’t dressed that way, this never would’ve happened.”<sup>151</sup>

Perpetrators of sexual harassment also often discredit their women targets based on their personal trustworthiness. Such comments tend to sound like: “You always exaggerate”; or “You’re hysterical and overemotional”; or “You’re crazy; nothing happened”; or “No one would believe you.”<sup>152</sup> Finally, victims frequently encounter dismissals of the weight or consequences of the abuse: “Why do you always make such a big deal out of everything?”<sup>153</sup>

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<sup>149</sup> Claire Zillman & Erika Fry, *HR Is Not Your Friend. Here’s Why*, FORTUNE (Feb. 16, 2018, 6:30 AM), <https://fortune.com/2018/02/16/microsoft-hr-problem-metoo/>.

<sup>150</sup> See Epstein & Goodman, *supra* note 11, at 446–47.

<sup>151</sup> See, e.g., Kim K.P. Johnson & Jane Workman, *Clothing and Attributions Concerning Sexual Harassment*, 21 HOME ECON. RES. J. 160 (1992); Dave McNary, *Angela Lansbury Says Women Must Accept Some Blame for Sexual Harassment*, VARIETY (Nov. 28, 2017, 9:29 AM), <https://variety.com/2017/film/news/angela-lansbury-women-blame-sexual-harassment-1202624492/>; *Hashtag Activism in 2014: Tweeting ‘Why I Stayed,’* NAT’L PUB. RADIO: ALL THINGS CONSIDERED (Dec. 23, 2014, 4:21 PM), <https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed> [hereinafter *Hashtag Activism*].

<sup>152</sup> As survivor and activist Beverly Gooden explains, such statements are “easy to believe when it’s just the two of you.” *Hashtag Activism*, *supra* note 151; see also Kat Chow, *Gaslighting: How a Flicker of Self-Doubt Warps Our Response to Sexual Harassment*, NAT’L PUB. RADIO (Nov. 25, 2017, 7:00 AM), <https://www.npr.org/2017/11/25/565729334/gaslighting-how-a-flicker-of-self-doubt-warps-our-response-to-sexual-harassment>; Alex French & Maximilian Potter, *Nobody Is Going to Believe You*, ATLANTIC (Mar. 2019), <https://www.theatlantic.com/magazine/archive/2019/03/bryan-singers-accusers-speak-out/580462/>; Sargam Jain, *Sexual Harassment Can Drive You Crazy*, PSYCHOL. TODAY (Nov. 21, 2017), <https://www.psychologytoday.com/us/blog/psychoanalysis-unplugged/201711/sexual-harassment-can-drive-you-crazy>; David Kahn, *Are You a Victim of Gaslighting? How to Avoid Being Manipulated by an Unethical Leader*, LEADX (Aug. 8, 2017), <https://leadx.org/articles/avoid-unethical-leaders>.

<sup>153</sup> See, e.g., Haley Swenson, *“That’s Just One More Barrier to Coming Forward”: A Professor Who Studies Teens and Sexual Violence on the Very Obvious Reason Girls Don’t Report These Crimes*, SLATE (Sept. 27, 2018, 2:20 PM), <https://slate.com/human-interest/2018/09/why-teenage-girls-dont-report-sexual-assault.html>.

In other words, the credibility discounts human resource officers and others impose on a woman often echo those that the actual harasser imposes. These institutional and personal betrayals operate in a vicious cycle, each compounding the effects of the other.<sup>154</sup> For a survivor on the receiving end of one credibility discount after another, these experiences coalesce into a single, powerful gut punch. Credibility discounts become a pervasive part of their existence. This experience can cause women to doubt their power to remedy their situations and—in more extreme cases—the veracity of their own experiences.

The consequences of such a broad web of credibility discounting include harms related to psychological wellbeing as well as attendant harms related to increased difficulty in accessing protection, fairness, and justice. When a survivor undertakes the considerable personal and professional risk involved in seeking help, she is looking for resources and protection. But she is also hoping for validation of the harm she has endured—in other words, to have her experience credited. As Rebecca Solnit puts it: “To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma.”<sup>155</sup>

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, her interview subjects named their most important goal as gaining validation or “an acknowledgment of the basic facts of the crime and an acknowledgment of harm.”<sup>156</sup>

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<sup>154</sup> Platt, Barton & Freyd describe the experience of institutional betrayal, in the related context of domestic violence, as follows:

[W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world in which her agency cannot be taken for granted. She has no personal role with respect to decision-making by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of domestic violence, the ‘secondary trauma’ from this experience can amplify the feelings of helplessness and loss of control elicited by abuse. . . . Betrayal in these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing in the community—the promise to protect, or heal, or provide for children’s welfare—are no less devastating than a partner’s betrayal

Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *Domestic Violence: A Betrayal Trauma Perspective*, in *VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VICTIMIZATION AND THE COMMUNITY RESPONSE* 185, 201–02 (Evan Stark & Eve S. Buzawa eds., 2009).

<sup>155</sup> Rebecca Solnit, *Cassandra Among the Creeps*, *HARPER’S MAG.* (Oct. 2014), <https://harpers.org/archive/2014/10/cassandra-among-the-creeps/>.

<sup>156</sup> Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 *VIOLENCE AGAINST WOMEN* 571, 585 (2005).

But when women tell their stories of sexual harassment in the workplace, they are routinely met with responses such as: “Are you sure? Maybe you misunderstand the situation”; or “Oh, he’s just like that; don’t make a big deal about it”; or “Where’s your sense of humor? Lighten up”; or “Stop getting offended so easily about everything.”<sup>157</sup> Such responses echo the doubts most women are already experiencing; research shows that women often tell themselves the harassment “is not really important”; that “he didn’t mean it”; or “I must have encouraged it myself.”<sup>158</sup> And in a series of interviews about sexual harassment in the legal employment context, women explained that, following their reports of misconduct, their supervisors exposed them to far closer scrutiny and shared negative feedback about purported errors that previously would never have merited discussion. This has a real impact on a woman’s belief in herself; as one woman noted: “The errors that were pointed out were so minor. But when you are in the thick of it, you just start to doubt yourself and your work quality.”<sup>159</sup> Together, such experiences can cause women to question their own memories and even their own realities.<sup>160</sup>

Survivors of harassment are likely to suffer a range of harms when they find that people repeatedly discredit and invalidate their experiences. First, survivors develop “a sense of powerlessness and futility,” expressed in statements such as: “I have taken this enormous risk to share my most vulnerable experiences in public—and they can’t/won’t hear/see me. I can’t find the right words to make them help me.”<sup>161</sup> Second, survivors develop “a sense of personal worthlessness,” wondering, when supervisors take little or no action in response to their stories, whether their experiences have worth or merit, whether their

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<sup>157</sup> See, e.g., Margaret Gardiner, *Why Women Don’t Report Sexual Harassment*, HUFFINGTON POST (July 21, 2016, 4:29 PM), [https://www.huffingtonpost.com/margaret-gardiner/why-women-dont-report-sex\\_b\\_11112996.html](https://www.huffingtonpost.com/margaret-gardiner/why-women-dont-report-sex_b_11112996.html); Elise Hu, *Why Some Survivors of Sexual Harassment and Assault Wait to Tell Their Stories*, NAT’L PUB. RADIO: ALL THINGS CONSIDERED (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564443807/why-some-survivors-of-sexual-harassment-and-assault-wait-to-tell-their-stories>; see also Complaint and Jury Demand at ¶ 20, *Carlson v. Ailes*, No. L00501616, 2016 WL 3610107 (N.J. Super. Ct. Law. Div. July 6, 2016).

<sup>158</sup> See Fitzgerald, Swan & Fischer, *supra* note 40, at 135.

<sup>159</sup> RIKLEEN, *supra* note 11, at 55.

<sup>160</sup> Hu, *supra* note 157.

<sup>161</sup> Epstein & Goodman, *supra* note 11, at 449; see also Jon Blistein, *Louis C.K. Accuser: ‘I Will Never Regret Telling the Truth,’* ROLLING STONE (May 24, 2018), <https://www.rollingstone.com/culture/culture-news/louis-c-k-accuser-i-will-never-regret-telling-the-truth-627813/> (an accuser of Louis CK notes that “[s]peaking out feels like standing in front of the world naked under fluorescent lights on a really bad day ...”).

pain matters, whether they themselves have real value.<sup>162</sup> Finally, survivors develop “a sense of self-doubt,” as credibility discounting takes effect: “They are twisting my story, casting doubt, maybe I didn’t remember it right, maybe it didn’t happen as I think it did. I must be crazy.”<sup>163</sup>

This dynamic is well-illustrated by the 1944 film *Gaslight*,<sup>164</sup> in which a man manipulates his wife’s routine experiences in a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory and ultimately accepts his story that she is delusional and mentally unsound.<sup>165</sup> Perpetrators of harassment inflict such harm on their targets when they express affection on the heels of sexual coercion, deny that certain promises or commitments were ever made, or simply deny that events in question ever took place. Over time, these incidents build

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<sup>162</sup> Epstein & Goodman, *supra* note 11, at 449. See, e.g., Kristen Houghton, *The Truth About Sexual Harassment and Why It’s Time We Stopped It*, HUFFINGTON POST (Apr. 13, 2017), [https://www.huffingtonpost.com/entry/the-truth-about-sexual-harassment-and-why-its-time\\_us\\_58ed3091e4b0ea028d568d98](https://www.huffingtonpost.com/entry/the-truth-about-sexual-harassment-and-why-its-time_us_58ed3091e4b0ea028d568d98); Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC NEWS (Oct. 13, 2017), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416>.

<sup>163</sup> Epstein & Goodman, *supra* note 11, at 449. The National Domestic Violence Hotline website warns survivors of intimate partner abuse to pay attention to this sort of dynamic:

“You’re crazy—that never happened.”

“Are you sure? You tend to have a bad memory.”

“It’s all in your head.”

Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call “gaslighting.”

...

Gaslighting typically happens very gradually in a relationship; in fact, the abusive partner’s actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

*What is Gaslighting?*, NAT’L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), <http://www.thehotline.org/2014/05/29/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

<sup>164</sup> The film is based on a 1938 play of the same name, *Gas Light*. *Id.*

<sup>165</sup> *GASLIGHT* (Metro-Goldwyn-Mayer 1944).

until, like the wife in *Gaslight*, survivors may come to doubt their own memory, perceptions, and experience.<sup>166</sup>

This dynamic is particularly problematic in the workplace harassment context, where those who engage in harassing behavior often have closer professional ties to supervisors responsible for dealing with the problem. People are more likely to accept what might otherwise appear to be a suspicious narrative when the accused is someone whom they view with respect; the accuser-friendly version of what happened conforms with their preexisting view.<sup>167</sup> This can result in those closer to the top of the workplace hierarchy being “more inclined to take the side of the person accused of wrongful conduct, rather than serv[ing] as a neutral problem-solver.”<sup>168</sup> Expert Lauren Rikleen adds:

People at the top of an organization develop close relationships with individuals who have demonstrated loyalty. When the rumor mill begins to sound the alarm about inappropriate conduct among a close lieutenant, the natural tendency for the leader is to choose to believe in the person they see each day—someone who comports himself or herself as a trustworthy and loyal employee.<sup>169</sup>

Thus, the potential for gaslighting grows with the power and influence of the perpetrator.<sup>170</sup> When employers and other system gatekeepers effectively collaborate in the same patterns used by perpetrators of sexual harassment, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

The sense of institutional gaslighting described above has immediate and serious consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, protection. First, as previously discussed, credibility discounting may discourage women from continuing to pursue protection, prevention, or other forms of support. Having their claims met with systemic denial and disbelief gives women ample cause to distrust, and then possibly avoid,

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<sup>166</sup> Darlene Lancer, *How to Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), <https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting> [<https://perma.cc/634M-8CLF>].

<sup>167</sup> See, e.g., Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) (“People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information”).

<sup>168</sup> RIKLEEN, *supra* note 11, at 95.

<sup>169</sup> *Id.* at 52.

<sup>170</sup> HERMAN, *supra* note 25, at 8.

the institutions ostensibly there to help them.<sup>171</sup> As the EEOC Task Force Report puts it: “If weak sanctions are imposed for bad behavior, employees learn that harassment is tolerated . . . .”<sup>172</sup>

Credibility discounts harm women in an abundance of ways—up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. People devalue and gaslight women from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial part of the human experience. Together, these harms work to form a formidable obstacle to women’s healing, safety, and ability to obtain justice.

#### VI. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING GENDER-BASED CREDIBILITY DISCOUNTING IN THE WORKPLACE HARASSMENT CONTEXT

As the previous discussion demonstrates, credibility discounting inflicts deep and pervasive harm on women who experience workplace harassment. How can we change our response to female victims to eradicate the gauntlet of doubt and disbelief they face in their efforts to obtain protection, healing, and justice?

Some forms of credibility discounting may be responsive to fairly straightforward interventions—particularly those rooted in listeners’ failure to understand a woman’s experience of sexual harassment on the job.<sup>173</sup> The best way to cure knowledge gaps among system gatekeepers about the effects of psychological trauma on information processing and memory, about the ways that trauma can affect witness demeanor, and about the ways survivors act in the aftermath of harassment is, of course, to work on improving understanding. Intensive training could, at least in theory, allow managers, human resource officers, union representatives, and judges to better understand these correlates of the

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<sup>171</sup> Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOL. 575, 575 (2014). Researcher Rebecca Campbell described the secondary victimization of women seeking legal services in the aftermath of interpersonal violence and found that when survivors reach out for help, often at a time of great vulnerability and need, “they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.” Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOL. 702, 703 (2008); see also Heidi Grasswick, *Epistemic Injustice in Science*, in ROUTLEDGE HANDBOOK, *supra* note 68, at 313; Platt et al., *supra* note 154, at 201–02.

<sup>172</sup> EEOC TASK FORCE REPORT, *supra* note 3, at 34.

<sup>173</sup> Epstein & Goodman, *supra* note 11, at 453.

harassment experience. But training can only be effective if those receiving it are genuinely open and committed to absorbing new understanding.<sup>174</sup> For those who lack this commitment, training alone is unlikely to be enough.

And other forms of credibility discounting described above—particularly those rooted in negative stereotypes and bias—are more resistant to change and may require a more complex set of interventions. The cultural assumption that an outsized concern for financial gain tends to improperly motivate women, and the related assumption that women simply lack full capacity as truth tellers, are deeply embedded in our society.<sup>175</sup>

Remediating our societal tendency to discount the credibility of women will not be easy; it will require motivation, awareness, and effort. Each of us, in our role as listener, must take responsibility to intentionally and consciously shift our assumptions. In Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being nonsense or her being a fool, but rather to some sort of gap in [the existing interpretive] resources."<sup>176</sup>

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<sup>174</sup> This conclusion is based on my own extensive experience in conducting trainings with judges, police officers, and prosecutors in the field of intimate partner violence, as well as numerous conversations with other trainers in that field.

<sup>175</sup> See *supra* text accompanying notes 83–124. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, in fact, shaping their perceptions and decisions. See generally INT'L LABOR ORG.: ACT/EMP, BREAKING BARRIERS: UNCONSCIOUS GENDER BIAS IN THE WORKPLACE, (Aug. 2018) [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---act\\_emp/documents/publication/wcms\\_601276.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf). As long as these biases remain unconscious, change is unlikely. Psychologists interested in challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2008). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habit-breaking intervention." Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective taking, and counter-stereotypic imaging. *Id.* at 1270. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes in key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present in participants' thoughts, feelings, and behaviors. *Id.* at 1277. These changes endured two months following the intervention. *Id.*

<sup>176</sup> FRICKER, *supra* note 124, at 169.

The crucial first step is to shift away from an automatic, uninformed disbelief of women's stories—to begin, in other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."<sup>177</sup>

Of course, in distrusting one's instincts to distrust a survivor, system actors should not go to the other extreme and automatically credit all survivor stories. Instead, they need only resist the reflexive presumption *against* crediting women's stories, make an effort to overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. Philosopher Jose Medina calls this process one of cultivating a capacity for "virtuous listening."<sup>178</sup>

Workplace gatekeepers and judges can engineer this openness into their traditional approaches to assessing credibility. Contributing factors such as the internal and external consistency of story, as well as storyteller or witness demeanor, can easily expand to accommodate new understandings. For example, a human resource officer who notices temporal gaps in a woman's story can resist the urge to automatically discount her credibility. Instead, the officer might ask follow-up questions to obtain information about the impact of trauma on the witness. For example:

- Are you able to remember the full story of what happened, from beginning to end?
- It's fine if you can't tell me what happened in complete detail; just tell me any specific part of this experience that you *do* remember.
- How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

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<sup>177</sup> Karen Jones, *The Politics of Credibility*, in *A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 154, 164 (Louise M. Antony & Charlotte E. Witt eds., 2002).

<sup>178</sup> JOSE MEDINA, *Varieties of Hermeneutical Injustice*, in *ROUTLEDGE HANDBOOK*, *supra* note 68, at 26.

- (If not): What do you think explains the difference?

or:

- I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

To help counter the more general tendency to discredit women *as women*, a [listener] might take the issue on directly:

One of the most basic things a [manager/human resource officer/judge] has to do is to decide whose story to believe. In this case, like so many others, each of you may end up telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other [person involved]?<sup>179</sup>

In the end, the listener may find a woman personally untrustworthy or dismiss her story as implausible. But by engaging in a systematic reorientation of their beliefs, gatekeepers can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

Recent technological innovations have created reporting methods designed to reduce both the risk and the discounting associated with in-person reporting. Phone-based apps—such as Callisto and JDoe—now allow a woman to make an online, encrypted, and time-stamped report that she can either submit directly to workplace authorities or can keep on hold until she is ready to do so.<sup>180</sup> Perhaps most importantly, she has the option to keep it in a reporting escrow, where it will remain, uninvestigated, until another misconduct allegation is made against the same perpetrator.<sup>181</sup> This feature allows women to make timely reports without risking the credibility discounting associated with being the first to do so.<sup>182</sup>

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<sup>179</sup> The examples above are taken from Epstein & Goodman, *supra* note 11, at 455.

<sup>180</sup> See, e.g., *How Smartphone Apps Could Change the Way Sexual Assault is Reported*, NAT'L PUB. RADIO: ALL THINGS CONSIDERED (Aug. 21, 2018), <https://www.npr.org/2018/08/21/637122361/how-smartphone-apps-could-change-the-way-sexual-assault-is-reported>.

<sup>181</sup> See, e.g., Ian Ayres, *Meet Callisto, the Tinder-Like Platform that Aims to Fight Sexual Assault*, WASH. POST (Oct. 9, 2015), [https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699_story.html).

<sup>182</sup> *Id.*

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution in discounting women's credibility. But, as noted above, two prerequisite conditions—whether in reducing the “willful interpretive gap” in understanding women's experiences, in eradicating cultural stereotypes of women as inherently untrustworthy, or in taking women's experiences seriously—are the *acknowledgment of gender-based bias and the will to change*.

#### VII. CONCLUSION

Progress is possible. The #MeToo movement represents the beginning of a shift in cultural understanding and goodwill. The floodgate of stories from blue-collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace. It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform in the employment and justice systems. As Rebecca Solnit explains:

If the right to speak, if having credibility, if being heard is a kind of wealth, that wealth is now being redistributed. There has long been an elite with audibility and credibility, and an underclass of the voiceless.

As the wealth is redistributed, the stunned incomprehension of the elites erupts over and over again, a fury and disbelief that this woman . . . dared to speak up, that people deigned to believe her, that her voice counts for something, that her truth may end a powerful man's reign. These voices, heard, upend power relations.<sup>183</sup>

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<sup>183</sup> Rebecca Solnit, *Silence and Women's Powerlessness Go Hand in Hand—Women's Voices Must Be Heard*, GUARDIAN (Mar. 8, 2017), <https://www.theguardian.com/commentisfree/2017/mar/08/silence-powerlessness-womens-voices-rebecca-solnit>.



WISCONSIN LAWYER  
DECEMBER 13, 2018

## Domestic Abuse: Little Impact on Child Custody and Placement

A recent review of several years' family court orders in 20 Wisconsin counties confirmed many lawyers' suspicion. The statutory presumption regarding the effect of domestic abuse findings on child custody and placement orders is not impacting outcomes in many cases.

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In 2000, the Wisconsin Legislature joined a national trend by creating a presumption of joint legal custody and greater parity in physical placement time in family law cases involving children.<sup>1</sup> After the passage of 1999 Wis. Act 9, the statutes directed courts to nominally consider the best interests of the child when awarding legal custody; however, the newly passed legislation also created a presumption that “joint legal custody is in the best interests of the child.”<sup>2</sup>

This change alarmed domestic abuse victims and their advocates and lawyers. They believed this presumption would result in more joint custody arrangements for families, exposing victims and their children to ongoing control and abuse after separation. The legislation also directed courts to maximize physical placement for each parent. Many people believed the emphasis on joint decision-making would force victims and children into more contact with abusive parents.

### Statutory Presumption Regarding Effect of Domestic Abuse

In response to these concerns, the state legislature passed 2003 Wis. Act 130, which created a rebuttable presumption that when one party has engaged in a pattern or serious incident of interspousal battery, joint or sole custody to the abusive parent is contrary to the child’s best interest.<sup>3</sup> In these cases, the “safety and well-being” of the abused parent and child become “paramount concerns” when determining custody and placement, even if the custody presumption is rebutted.<sup>4</sup>

Regarding placement, Act 130 directs the court to “provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse” and to “impose” one or more enumerated safety conditions “as appropriate.”<sup>5</sup> Victims and their advocates hoped these and other provisions of Act 130 would counter the overall trend toward joint legal custody and more equalized physical placement in domestic abuse cases.

Although expected to do so, the passage of Act 130 did not alleviate concerns about custody and placement orders in cases involving domestic abuse.<sup>6</sup> End Abuse consistently hears about the ineffectiveness of Act 130 from advocates and family law attorneys. Many lawyers adhere to the notion that divorcing spouses must learn to cooperate. Thus, they might not see the relevance of raising the issue of domestic abuse, explain domestic violence presumptions to clients, or, for fear of “rocking the boat,” present evidence of domestic abuse to the court.

### Study of Family Law Cases Involving Domestic Abuse

To better understand what drives the custody and placement outcomes of cases involving domestic abuse, End Abuse researched cases with criminal convictions for domestic abuse felonies or misdemeanor battery. These cases were chosen not



**Tess Meuer**, U.W. 1983, recently retired as justice systems director after 24 years at [End Domestic Abuse Wisconsin](#), Madison.



**Tony Gibart**, U.W. 2009, is the associate director at [End Domestic Abuse Wisconsin](#).



**Adrienne Roach**, Brandeis Univ. MA 2013, is the organization’s policy and systems analyst.

from a belief that parents who commit serious acts of domestic abuse are always convicted; rather, these cases involved families with a known domestic abuse history, forming an optimal sample of cases.



The data is limited to documented outcomes as reported in case files. Information regarding the desired outcomes of the parties involved is not included. The research aimed to learn how criminal histories of domestic violence generally affect documented family law outcomes in the wake of Act 130, not to draw conclusions about specific cases.

Because all examined cases involve a documented history of domestic abuse before the divorce filing, researchers expected to find that prior adjudication of domestic abuse by one parent against the other would result in outcomes more likely to reflect the provisions of Act 130 and domestic abuse dynamics.

Specifically, researchers expected to find:

- Formal domestic abuse findings in more than one-half of cases reviewed;
- Guardian ad litem (GAL) recommendations of sole custody and at least primary placement with the victim in more than 75 percent of cases;
- Final orders resulting in sole custody with the victim in more than 75 percent of cases;
- Final orders resulting in at least primary placement with the victim in more than 75 percent of cases; and
- Final orders including at least one safety provision in more than 75 percent of cases.

“ Despite the rarity of formal findings, most cases should result in sole legal custody and primary placement to the victim, with safety provisions. Analysis suggests Act 130 does not have this effect. ”

**Data Collection and Analysis Parameters.** Because of resource constraints, data was collected in some but not all Wisconsin counties. To ensure an unbiased, representative dataset, 20 counties were randomly selected by population size, representing each judicial district. Higher population counties had a greater probability of selection, but random selection ensured smaller counties were also included.

Data collectors studied every divorce action involving children from 2010 to 2015 in which a court convicted one parent of a domestic abuse crime against the other parent within five years after the final order. Due to search limitations, researchers could only match family law cases with criminal convictions in the same county. These cases were matched with criminal convictions from 2008 to 2015. The data include convictions for felonies and misdemeanor battery; lesser convictions are not included. This study found 361 such cases in which the victim and the defendant had children in common.

## Key Findings of Study

**Domestic Abuse Findings Are Rarely Made.** Under Act 130, a court finding that one party engaged in a serious incident or pattern of interspousal battery or domestic abuse triggers the presumption that joint custody is not in the best interest of the child, whereupon the safety of the children and victim is a paramount concern in deciding custody and physical placement.<sup>7</sup> The law requires a finding of domestic abuse: these 361 cases contain previous convictions of no less than battery. Therefore, researchers expected findings in at least 50 percent of cases because the statutory factual predicates for the application of Act 130 were very likely in place for most if not all cases.

However, only 29 cases (8 percent) had a domestic abuse finding, likely because most family law cases are resolved before trial. In over 80 percent of cases, litigants reached stipulated agreements. Victims stipulate for many reasons. Some stipulate because they reached an acceptable solution with the other party. Others stipulate because they feel pressure to accept a GAL's recommendations, or they lack the legal knowledge and resources necessary to continue to trial.

“ Act 130 is not widely producing placement orders that explicitly attend to safety. ”

**Joint Custody is the Most Common Order.** In cases in which serious, documented domestic abuse occurs, Act 130 is designed to keep the victim and their children safe by presuming that sole legal custody should be awarded to the victim. Even if most cases are resolved without a domestic abuse finding, one would expect Act 130 to affect custody and placement outcomes as parties negotiate settlements.

Theoretically, family law litigants, knowing that Act 130 provisions apply, will

tend to negotiate settlements that reflect the legislation's intended outcomes: sole legal custody to the victim and safe placement arrangements. Therefore, despite the rarity of formal findings, most cases should result in sole legal custody and primary placement to the victim, with safety provisions. Analysis suggests Act 130 does not have this effect.

Researchers expected at least 75 percent of final orders to result in sole custody. Instead, 50 percent of cases resulted in joint custody. When impasse-breaking authority is included, it increased to 53 percent. These percentages are based on all known custody outcomes. Of the 361 cases reviewed, the custody order was documented in 95 percent of cases. ([See Figure 1, Frequency of Court Decisions on Child Custody.](#))

Recognizing the effect incarceration could also have on custody and placement outcomes, file reviewers noted whether the abuser was in prison. When the abusive parent was not in prison, the court orders for joint custody increased to 62 percent of cases.

In the 135 cases with a GAL, there were approximately as many orders of sole custody as there were of joint custody (including joint custody with impasse-breaking authority). Of the 135 cases with a GAL, 127 had documented custody outcomes.

When the abusive parent was not incarcerated, and a GAL was involved, the percentage of joint custody orders (including five orders with impasse-breaking authority) increased to 63 percent. Of the 135 cases with a GAL, the abuser was not in prison in 82 cases (61 percent); custody outcomes were documented in 78 of these cases. The court ordered joint custody in 44 cases and joint custody with impasse-breaking authority in five cases.

File reviewers searched for written records of the GAL's custody or placement recommendations in each case but found documentation in less than half. The lack of documentation made it difficult to determine the most frequent recommendation, though the available information tended to favor joint custody more than expected.

The higher-than-expected percentage of joint custody orders in this sample overall suggests that, at minimum, the existence of domestic abuse in a family does not appear to be a strong factor in deciding custody orders, despite Act 130.

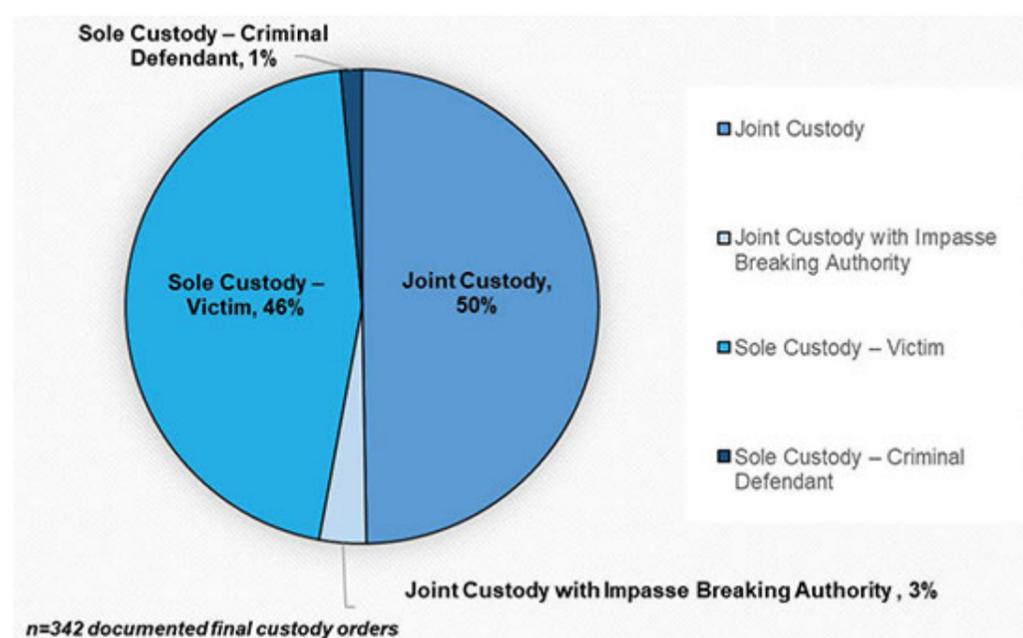
## Meet Our Contributors

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### Frequency of Court Decisions on Child Custody



*In cases with domestic abuse, researchers expected at least 75 percent of final orders to result in sole custody. Instead, 50 percent of cases resulted in joint custody.*

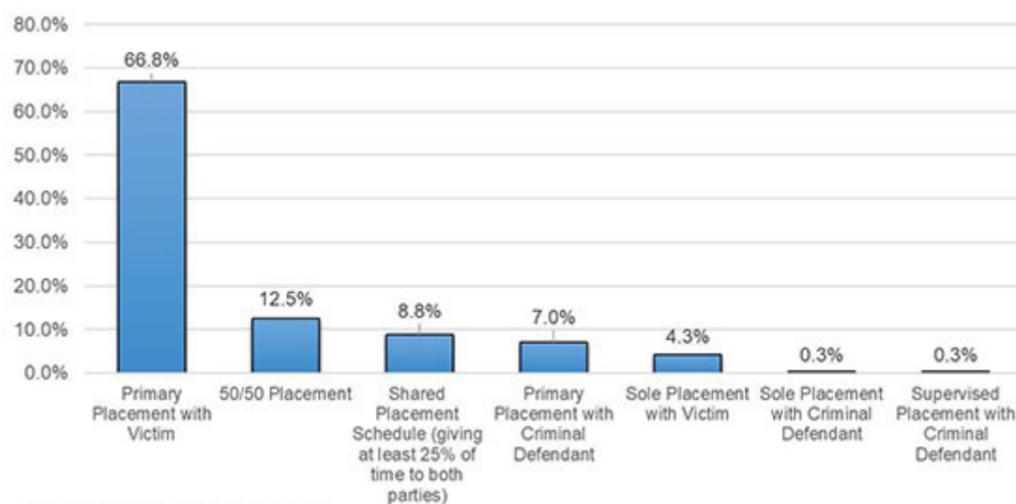
**Primary Placement With Domestic Abuse Victim Occurred in Majority of Cases.** Based on Act 130's emphasis on the safety of the child and the nonabusive parent, researchers expected to find high percentages of primary placement with the non-abusive parent. In cases with documented placement outcomes, the most common physical placement order was primary placement with the domestic abuse victim, which occurred in 219 cases (66.8 percent). Unlike custody orders, the data on placement orders came closer to meeting expectations, though it did not reach 75 percent. ([See Figure 2, Frequency of Court Decisions on Physical Placement.](#))

When the abuser was not incarcerated, orders for sole or primary placement with the victim decreased to 61 percent. Of the 239 cases in which the abuser was not in prison, 217 had documented placement orders. Of those cases, the court ordered sole or primary placement to the victim in 133 cases (61 percent). For comparison, according to the U.W. Institute for Research on Poverty, 50 percent of all 2010 placement orders resulting from divorce ended in shared or equal placement.<sup>8</sup> Therefore, victims in this sample appear to receive primary or sole placement more often than average. Although this trend is difficult to characterize, it is not dramatic enough to indicate a strong influence from Act 130.

What is more certain is that Act 130 is not widely producing placement orders that explicitly attend to safety. Most final orders in these

cases (80 percent) did not include any explicit safety provisions for the victim or children, such as ordering that placement exchange occur in a protected setting. The results show supervised placement is the most common safety provision, but courts only ordered supervised placement in 37 (10.2 percent) cases.

### Frequency of Court Decisions on Physical Placement



*n=328 documented placement outcomes*

*In cases with domestic abuse, researchers expected to find 75 percent of primary placement with the non-abusive parent. Unlike custody orders, the data on placement orders came closer to meeting expectations.*

**Other Findings Reflect Lack of Attention to Domestic Abuse.** Other findings also indicate Act 130’s limited influence on this sample. First, only 27.4 percent of all cases include a reference to domestic abuse. In 15 cases, documentation was inaccessible or missing. Therefore, data on the references to domestic violence in those cases is incomplete. While our file reviewers did not have access to sealed documents, nor could they access many transcripts, the lack of written references to domestic abuse appears significant. Institutions, especially courts, “are organized and coordinated, for the most part, by means of standardized texts or standardized protocols for producing texts.”<sup>9</sup> If acts of domestic abuse within a family are not routinely noted in family law case files, it suggests that Wisconsin family law case processing does not systematically account for abuse.

Second, even when a GAL or parties’ lawyers are involved, written references to domestic abuse are absent in more than one-half of cases. When the victim had a lawyer or a GAL was appointed, 39 percent and 42 percent of cases referenced domestic violence. Formal domestic abuse findings were much less frequent. Domestic abuse findings were made in only 17 percent (23) of cases with a GAL.<sup>10</sup> In over 60 percent of cases in which the victim had representation, the lawyer did not reference domestic violence. These statistics suggest that legal professionals tend to see histories of domestic abuse as irrelevant, unimportant, or unnecessary for courts to make decisions.

The lack of references to domestic abuse also shows that Act 130 exerts little influence on outcomes. The Wisconsin family law system does not appear to systemically attend to the dynamics of domestic abuse when making critical decisions regarding the lives of victims and their children.

“ If acts of domestic abuse within a family are not routinely noted in family law case files, it suggests that Wisconsin family law case processing does not systematically account for abuse. ”

**Child Exposure to Domestic Abuse Somewhat Ignored in Court Orders.** During the pilot test of the survey instrument, data collectors noticed many notations about children witnessing or experiencing abuse. The original research design did not include collecting data on child involvement in the criminal case, but because this study evaluates whether courts account for the best interest of the child, documentation of child exposure to domestic violence helped contextualize these cases. Some degree of child exposure is noted in nearly one-half (165) of cases in this sample. Incidents range from the child’s presence during the violence to physical victimization of the child. Surprisingly, less than one-half of those cases (63) had a GAL.

Exposure to domestic violence affects children’s health and well-being as they grow, and it continues to affect them later in life.<sup>11</sup> Therefore, attention to the child’s involvement in, or exposure to, a criminal case between the parents is crucial to determining the best interest of the child. Although courts were marginally more likely to order sole custody and sole or primary placement to the victim in cases with documented child exposure, researchers expected to find a greater difference.

### Roundtable Discussion of Study Results

On April 12 and 13, 2018, End Abuse conducted a roundtable discussion with family law practitioners and other individuals to review preliminary study results. Participants from all over Wisconsin, representing many family law disciplines, reviewed the findings. The

participants generated a list of barriers and possible solutions. For example, participants discussed barriers to effective GAL practice in domestic abuse cases and recommended steps such as enhanced training, formalized partnerships between GALs and subject matter experts, and heightened GAL practice requirements.

Practitioners also considered ideas such as creating a screening mechanism for domestic abuse in the family law system, differentiated procedural mechanisms for domestic abuse cases, and increased training for judges and lawyers regarding the impact of domestic abuse exposure on children. The roundtable participants also noted the difficulty of accounting for domestic abuse when victims appear in family court and represent themselves and articulated ideas for providing these litigants with resources and tools to better understand and use Act 130 and other legal protections that may apply to their cases. End Abuse will continue to engage with system stakeholders as it explores possible legislative, policy, and Supreme Court Rule changes to adopt some of the proposed solutions.

## Acknowledgements

For this study, End Abuse gratefully acknowledges assistance from the Director of State Court's Office, Office of Court Operations; the State Bar of Wisconsin Family Law Section for financial contributions to bring attendees together for the April roundtable discussion; and the many volunteers and Legal Action of Wisconsin family law attorneys statewide who assisted with data collection.

### Meet Our Contributors

#### What surprised you about your career?



After 23 years at End Domestic Abuse Wisconsin and more than 30 years of working in the domestic abuse movement, I retired in October 2018. What surprised me about my career is that I experienced as many highlights as disappointments in these years.

Disappointments included encountering legal professionals who refuse to identify the dynamics of domestic abuse or do not know enough about abuse to do so; minimize the abuse or blame the victim; act from the bias that children must be parented equally by both parents; believe the abuse will end when the relationship ends; or believe children are not affected by abuse between the parents.

Highlights include the many legal professionals, legal interns, and law students who work diligently to both understand the complexities of domestic abuse and to address them within the legal system, both in policy and in practice. For all of the latter, I am grateful: victims are more likely to be survivors when the legal system takes their life circumstances seriously.

**Teresa (Tess) Meuer**, [End Domestic Abuse Wisconsin](#), Madison (retired).

#### What is one of your favorite non-work activities?



One of my favorite non-work activities is taking long bike rides throughout southwest Wisconsin. I usually regret the choice halfway up one of the steep hills in the driftless region. But the second-guessing immediately ends on the way down and especially when sharing a beer with friends after the ride. In the depths of December, I'm counting down the days until spring!

**Tony Gibart**, [End Domestic Abuse Wisconsin](#), Madison.

#### What was the most memorable trip you ever took?



The most memorable "trip" I ever took was one semester long. As an undergraduate student, I studied at Harlaxton College in the United Kingdom and lived in a 19th-century manor house. Many factors made it a memorable experience, not least among them the fact that I will probably never live in such a grand house again.

More importantly, studying abroad introduced me to different cultures and new and diverse perspectives. It deepened my creativity and intellectual curiosity. The experience even inspired my graduate research at Brandeis University. Now, I relish any opportunity I have to travel. Every trip is memorable in its own unique way.

**Adrienne Roach**, [End Domestic Abuse Wisconsin](#), Madison.

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## Endnotes

<sup>1</sup> Herbie J. DiFonzo, "From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy," *Family Court Review* 215-16 (April 2014).

<sup>2</sup> [Wis. Stat. § 767.41\(2\)\(am\)](#).

<sup>3</sup> [Wis. Stat. § 767.41\(2\)\(d\)1](#).

<sup>4</sup> [Wis. Stat. § 767.41\(5\)\(bm\)](#).

<sup>5</sup> [Wis. Stat. § 767.41\(6\)\(g\)](#).

<sup>6</sup> Lauren Wu, "The Interplay Between Domestic Violence Victim Dynamics and Utilization of 2003 Act 130," *Wis. J. Family L.* 65-68 (2010).

<sup>7</sup> [Wis. Stat. § 767.41\(5\)\(bm\)](#).

<sup>8</sup> Maria Cancian & Daniel R. Meyer, UW-Madison Institute for Research on Poverty, "[Child Placement and Child Support](#)" slide 18, (Sept. 25, 2018).

<sup>9</sup> Ellen Pence & Dorothy Smith, National Institute of Justice, "[Workshops on Violence Against Women/Family Violence](#)" (Oct. 26, 2004).

<sup>10</sup> [Wis. Stat. § 767.407\(4\)](#).

<sup>11</sup> Governor's Council on Domestic Abuse & End Domestic Abuse Wisconsin, [Domestic Abuse Guidebook for Wisconsin Guardians Ad Litem](#) (2017).

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Survivors of spousal abuse have turned to each other for support in the face of a custody system that they say often disregards their safety. Andrea Wise/ProPublica; Photo: Taylor Glascock for ProPublica

## He Beat Her Repeatedly. Family Court Tried to Give Him Joint Custody of Their Children.

Wisconsin is considered a leader in the movement to treat fathers as equal caregivers when parents separate. Shared parenting is usually better for children — but the model fails for many women forced to co-parent with their abusers.

by **Megan O'Matz**

Sept. 16, 5 a.m. EDT

*ProPublica is a nonprofit newsroom that investigates abuses of power. [Sign up for Dispatches](#), a newsletter that spotlights wrongdoing around the country, to receive our stories in your inbox every week.*

Jennifer Moston was about seven months pregnant when, she said, her husband grabbed her by the arms, picked her up and threw her against the staircase. Each time she tried to get up, he pushed her down again.

Such abusive episodes continued for several years, she said, until 2016, when he allegedly tried to strangle her. She went to the police and filed for divorce.

It seemed obvious to Jennifer that her husband, Ryan, shouldn't get custody of their 3-year-old son, as Ryan now faced felony charges of domestic violence. How could someone with a violent history be trusted

with a child? How could she stay out of harm's way if she was interacting with him for drop-offs?

Jennifer assumed that the family court in her Wisconsin county would make her safety and that of her son a priority, and that the system would help her cut off contact with Ryan.

But it didn't.



Jennifer Moston Taylor Glascock for ProPublica

Court professionals handling her case disregarded or downplayed her allegations despite the pending criminal charges, plus 20 pages of notes she took describing more than 50 incidents in which she said Ryan had physically attacked or threatened her. On top of that, in a separate proceeding, he had admitted to abusing his first wife.

Jennifer Moston eventually got the protections she sought. But it took 2 1/2 years, and it wasn't in family court.

Following Ryan's 2018 conviction for assaulting her, she pleaded with a criminal judge to take a hard line. "Please," she said, "do not let this man around my son again ... keep me safe from him."

The judge listened. He ordered Ryan imprisoned for 8 1/2 years and barred from seeing his son for another 10.

Ryan Moston, who has maintained his innocence and is appealing his conviction, did not respond to a written request for an interview for this story.

Wisconsin is considered a leader in the movement to treat fathers as equal caregivers, and its percentage of cases with shared custody is among the highest in the nation. But that model, while based on altruistic goals, still has not adjusted to the realities of domestic violence.

To examine the impact, ProPublica interviewed a dozen survivors of domestic abuse in Wisconsin, reviewed court documents and police files, and talked to experts in the field. Spouses who've been abused say the courts seem unwilling to listen to their fears and then unable to keep them safe. Jennifer Moston, who has become a voice for survivors of domestic violence, was startled to find that the difficult decision to leave her abuser left her facing a new battle in court: a harrowing fight for credibility and protection.

Advocates for women in Wisconsin describe the family court system as unprepared for the complexities presented by domestic violence, often giving little consideration to the risk of harm to women and children and compounding the trauma they face. And experts from around the country say the court process is still influenced by outdated ideas about abuse and abusers — held not just by judges but by lawyers and social workers who assist victims.

“The culture prefers to cling to its belief that most men are fine, and a lot of women are liars or vengeful or crazy,” said Joan Meier, the lead author of a widely cited [2019 national study](#) of custody decisions involving alleged child abuse or domestic violence.

That's exactly what a group of mothers in La Crosse, Wisconsin, complained about last year when they began a campaign to draw attention to what they saw as the failure of local courts to take domestic violence accusations seriously. But they remain frustrated by a lack of action in their county.

Absent convincing proof of a parent hitting a child, some family courts seem to view domestic violence as unrelated to parenting, experts say. Judges who don't understand the complex dynamics of domestic violence sometimes conclude that once a couple splits up, the toxicity will end and the abusive spouse will be a decent parent, said Jenna Gormal, director of public policy at End Domestic Abuse Wisconsin, a statewide anti-violence coalition that trains judges and other legal professionals.

Yet even when the child is not at risk, the abused spouse can remain a potential target for more violence.

In Calumet County in January 2018, the local prosecutor asked that Robert K. Schmidt not be allowed contact with his three children while free on bail after allegedly holding a gun to his wife's head on New Year's Eve, tying her up with cord and duct tape and raping her. But the criminal court judge disagreed.

Schmidt's wife, Sara, who had filed for divorce after the New Year's Eve attack, was dropping off her children at her in-laws for a visit with Robert five days after the judge's decision when Robert emerged from the house with a gun. He fatally shot her, then used the same gun to kill himself.

# The Law and the Reality

Like most other states, Wisconsin uses what it determines is in “the best interest of the child” in deciding custody cases. Domestic violence is one of more than a dozen factors the courts must weigh, including such things as the child’s wishes, whether the parents can cooperate and whether a parent has a drug or alcohol problem.

The state presumes that parents will share the responsibility of legal custody — making major decisions for a child — unless there is a “pattern or serious incident” of domestic violence. Similarly, for deciding the proportion of time a child spends with each parent, domestic violence should upend the goal of giving both parents “regularly occurring, meaningful periods” of time with their children. In such cases, state law says, the safety of the abuse survivor and the children must be “paramount.”

But the current law, passed in 2003, leaves a lot of room for interpretation. It does not specify that an abusive spouse cannot have any interaction with their child. Courts can provide for the safety of survivors of abuse by requiring children to be exchanged “in a protected setting” or insisting that visits be supervised by a relative or a social worker.

Dolores Bomrad, who heard custody cases in Washington County, said it can be “hard to reach the level of proof” needed to show that a parent is unsafe.

“It’s very, very difficult in Wisconsin law for there to be no contact between a parent and a child,” said Bomrad, who was a court commissioner, someone appointed by a judge to help handle family law matters. “The general rule is it’s best for children to have contact with both parents, but that’s as long as it’s safe. And as long as it’s in the best interest of the child and isn’t placing the child at risk.”

A 2018 study by End Domestic Abuse Wisconsin concluded that decisions in family court are not sufficiently accounting for domestic violence.

Researchers in 20 Wisconsin counties reviewed every divorce case between 2010 and 2015 in which one parent had a prior conviction for felony domestic abuse or misdemeanor battery against the other parent. There were a total of 361.

They found that half the cases resulted in joint legal custody, requiring victims to cooperate in decision-making with their abusers, despite the law’s protections. The study’s authors were surprised that so many survivors ended up working jointly with their abusers to make legal decisions for their children. In more than 80% of all cases reviewed, the parties reached negotiated settlements. Researchers concluded that family court lawyers “adhere to the notion that divorcing spouses must learn to cooperate.”

When it came to apportioning time with children, final custody orders placed them solely or primarily with the abuse survivor in about two-thirds of the cases, but the courts typically did not include any safety provisions for visits, the study found.

The reviewers also found that only 27% of the cases made any reference at all to domestic violence, despite the prior criminal convictions.

“It suggests that Wisconsin family law case processing does not systematically account for abuse,” the findings, published by the State Bar of Wisconsin, concluded.

Wisconsin for Children and Families, a support group made up largely of fathers who’ve gone through family court, gives little weight to the End Domestic Abuse study. Tony Bickel, the group’s president, said the results shouldn’t be seen as a failure of the court system, because the majority of custody decisions are made through voluntary agreements between two parents.

Bickel said that people with domestic violence convictions often can co-parent effectively and that many parents agree to do just that. He said that the courts must distinguish between someone who makes a “one-time mistake” and a habitual abuser.

“We feel shared parenting is best in most cases for our kids, and we have to find a way to safely do that,” Bickel said, pointing to a [2018 Wake Forest University review](#) of 60 studies showing that children in joint custody arrangements fare extremely well. If need be, safety provisions could include exchanging kids at police stations or public places with many cameras, he said.

To an abused spouse, such arrangements can seem incomprehensible. Many can’t afford a lawyer or the court fees to fight drawn-out legal battles, so they reluctantly settle.

“Can you imagine if you are a survivor who was beaten or raped or hurt by this person and now you have to turn over your child? It’s a reasonable reaction, I think, to be afraid and to be cautious, and many women are put in that position,” said Carmen Pitre, president and CEO of the Sojourner Family Peace Center, in Milwaukee. The center is the largest nonprofit service provider for survivors of domestic abuse in Wisconsin.

Jennifer Moston, who suffered from regular abuse, found the court system’s safeguards flimsy. At least once, she told a judge, she had to hand over her son in the early morning at a small-town police station. At that hour, it was unstaffed.

## **“He Wishes I Were Dead”**

Jennifer was not the first woman to allege abuse by Ryan.

His first wife, Tracy, won a restraining order against him in 2008 after she described the terror she felt when he lashed out. She detailed how Ryan had threatened her, slapped her and spit on her during their brief marriage. He did not dispute her allegations.

“On one occasion after an argument Ryan grabbed a rock we have in the bathroom and said I would like to smash you in the head with this,” Tracy wrote. “He has also said on several occasions that he wishes I were dead.”

In their 2008 divorce, a Jefferson County court commissioner had expressed concerns about Ryan's "ability to control his rage and impulses."

He was ordered into a lengthy batterers' treatment program because of the incidents with Tracy. The program consisted of six individual therapy sessions and 28 group sessions, court records state.

While Ryan was in treatment, Jefferson County allowed him frequent visits with his eldest child, including overnights to be supervised by Ryan's dad.

Then, after he completed the batterers' program, under the terms of his divorce settlement with Tracy, he was allowed to spend a few hours unsupervised with the boy one or two weeknights and overnight two weekends a month.

Tracy Taylor Glascock for ProPublica

Those visits filled Tracy with fear. Fear that her son might be harmed by a man she knew to be violent. Fear that her son might witness violence in the new relationships Ryan was forming.

"You bring this beautiful child into the world," said Tracy, who asked that her last name not be published to protect her family's privacy. "The last thing you want to do is put them in an environment where they're getting hurt."

Ryan, at the time a school teacher, married Jennifer, the managing director of a financial services firm, in 2013. She had three children from a

prior marriage and soon bore another son with Ryan.

In the spring of 2014, while dropping off her stepson at Tracy's, Jennifer confided to her: "I'm being abused by Ryan. I'm scared. I don't know what to do."

Tracy said she understood Jennifer's concerns, and didn't hesitate when it came to helping her. At Tracy's suggestion, Jennifer secretly began keeping a journal of the abuse she endured. She emailed detailed, dated entries to herself, in case she needed evidence later for a restraining order or, worse, if she was found dead. She noted when Ryan made his hand into the shape of a gun and pretended to shoot her in the head. When he called her vulgar names and threatened her. And how he broke her wrist in a 2015 incident.

One night in January 2016, police were summoned to their home in Waukesha County. Jennifer alleges that Ryan tried to strangle her in bed, she screamed and her brother, who was visiting, rushed to her aid. Ryan and the brother fought. When police questioned Jennifer and Ryan together, she denied being attacked.

Ryan's older son, who had been in his father's home that night, told Tracy about the police visit, and Tracy became alarmed. She obtained the police report, then called Jennifer. The call prompted Jennifer to go to the Oconomowoc police station to admit she had lied about not having been attacked by Ryan, and to ask for help. Tracy met her at the police station for emotional support.

Jennifer petitioned the Waukesha County court for a restraining order against her husband and attached what a judge later described as a "diary of domestic violence." The court granted the order of protection.

Five days later, Tracy filed a motion asking the family court in neighboring Jefferson County to restrict Ryan's parenting time with the son they shared. She included a copy of Jennifer's restraining order and excerpts from a 2014 deposition given by an earlier girlfriend of Ryan's who testified he had threatened to slit her throat with a buck knife.

Jefferson County held a family court hearing in March 2016 and issued an order barring Ryan from being alone with his older son, citing the "number of incidents of battery and domestic abuse, the severity of the incidents, and the dimensions and pattern of domestic abuse alleged." Eventually he was allowed supervised visits for two hours once a week.

In Waukesha County, in Jennifer's case, the district attorney charged Ryan with one count of strangulation in April 2016 for the alleged attack on Jennifer. Jennifer filed for divorce the following month.

Initially a court commissioner allowed Ryan to spend alternate weekends and Tuesdays overnight with the boy. As with Ryan's oldest son, these would be supervised by Ryan's dad.

Only after prosecutors in Waukesha County filed nine additional criminal counts against Ryan in August 2016, including stalking, false imprisonment and numerous incidents of battery, did the Waukesha family court tighten its conditions. Ryan Moston could spend one evening

a week visiting with his son at a local library for two hours, under the supervision of a social worker.

## **When Women Are Not Believed**

In Wisconsin family court, judges rely heavily on the input of attorneys appointed to advocate for the best interest of the child.

By law, these “guardians ad litem” have a vital task: to investigate whether there’s evidence of domestic violence and report back to the judge.

A 2021 University of Wisconsin report on family court cases involving domestic abuse described the challenges guardians ad litem face. They do not have enough resources for evidence collection or expert help, and they lack training about domestic abuse.

These court-appointed advocates, concluded the study produced by the university’s Robert M. La Follette School of Public Affairs, “are often asked to do a job that exceeds the original boundaries of their role, one in which they do not currently have the expertise and resources to achieve. This can make addressing a large societal problem, like domestic abuse, very difficult or nearly impossible in some situations.”

The researchers surveyed guardians and published some of their anonymous comments. Said one: “Some GALs meet with scared kids for 15 minutes at their office and then think they know everything about the children, and then the court takes the GAL’s recommendation as gospel. It’s frightening, really.”

That respondent said the inconsistent approach of guardians turns the process into a “free-for-all”: “There’s no clear definitions of what is in the best interests of the children, so it leaves it up to each individual GAL to define for themselves.”

As a result of the End Domestic Abuse study, the state Supreme Court agreed as of Jan. 1 of this year to require guardians ad litem to obtain at least three credit hours of training in family violence. Compliance, however, is not tracked by the state.

And throughout the system, even in the aftermath of the #MeToo movement, there remains distrust of women’s stories of abuse, according to women’s advocates.

In Dane County, a family court judge denied a restraining order requested by a woman who claimed her partner tried to throw her off a balcony and pointed a gun at her in front of a child. The judge told her to “take a deep breath and try to co-parent more effectively” because “injunctions make family cases worse,” according to a 2019 report by Domestic Abuse Intervention Services, a nonprofit in the county, summarizing observations from its Court Watch program. Staff in the program monitor proceedings to gauge how well courts respond to requests for restraining orders.

According to the report, the judge reasoned that the pain documented in the woman’s medical records was “not severe” and that the petition

detailed “only one incident.”

Kimberly Theobald has represented parents as an attorney and has been an advocate for children as a guardian ad litem. She represented Ryan Moston in family court when Tracy sought to limit his contact with their son. Theobald told ProPublica she believes that, at times, men and women lie in custody cases. She noted there can be a financial incentive to lie: The parent awarded more time may receive more in child support.

“Be very clear on this: that someone who has truly been abused is not worrying about the money from that angle. They’re worrying about their safety, and they are worrying about their child’s safety,” Theobald said in an interview. “What I am saying is there are people who make the allegation where there’s not even smoke, much less fire, in order to gain an upper hand in the custody and placement wars.”

She said of Jennifer Moston’s claim to police of being strangled: “It was an act.”

Joan Meier, a professor of law at George Washington University, set out to gather data on the outcomes of family court cases in which parents accuse each other of abuse or alienation from their kids. Her 2019 report studied a 10-year period and found 222 published court opinions across the nation where fathers claimed mothers were lying about abuse to keep them away from their children. In those instances, the researchers found the tactic was highly successful in deflecting the abuse allegations. The courts were almost twice as likely to disbelieve the mothers’ claims of abuse in those scenarios.

What’s more, in half of the cases the moms lost custody.

The study urged greater awareness of the bias and dangers in outright rejecting abuse claims and called for “new and mandated trainings to return the courts to their most important mission: protecting at-risk children.”

In Waukesha County, Jennifer felt first rejection during her court case, and then outrage.

By April 2017, Waukesha County family court social worker Deanna Stevlingson and Lori Fabian, the guardian ad litem for Jennifer’s son, had listened to Jennifer’s litany of abuse and seen her documentation. They were aware of the serious charges Ryan was facing.

Yet their report to the family court judge recommended that the Mostons share legal decision-making for their child and that Ryan be allowed to spend two weekends a month and every Wednesday overnight unsupervised with his son. (Attempts to reach Stevlingson and Fabian for comment for this story were unsuccessful.)

“We are jaws on the floor,” Jennifer’s lawyer, Scott Schmidlkofer, recalled of hearing the report’s recommendation. He found it inexplicable. But he said anybody, even an accused abuser, can be charming in an hourlong interview.

The report lists Stevlingson’s numerous record checks and interviews with people in Ryan and Jennifer’s lives. But that list did not include the

district attorney prosecuting Ryan, the detective in the criminal case, Ryan's first wife nor the girlfriend who in 2012 filed for a restraining order against Ryan in Dane County but settled for a mutual no-contact order.

The report mentions that Stevlingson reviewed records from three police departments and the Dane County Sheriff's Office. But it makes no specific mention of the criminal case against Ryan in Waukesha County.

"This recommendation is based on the information available to me at this time," Stevlingson wrote. "I believe it is in the child's best interest."

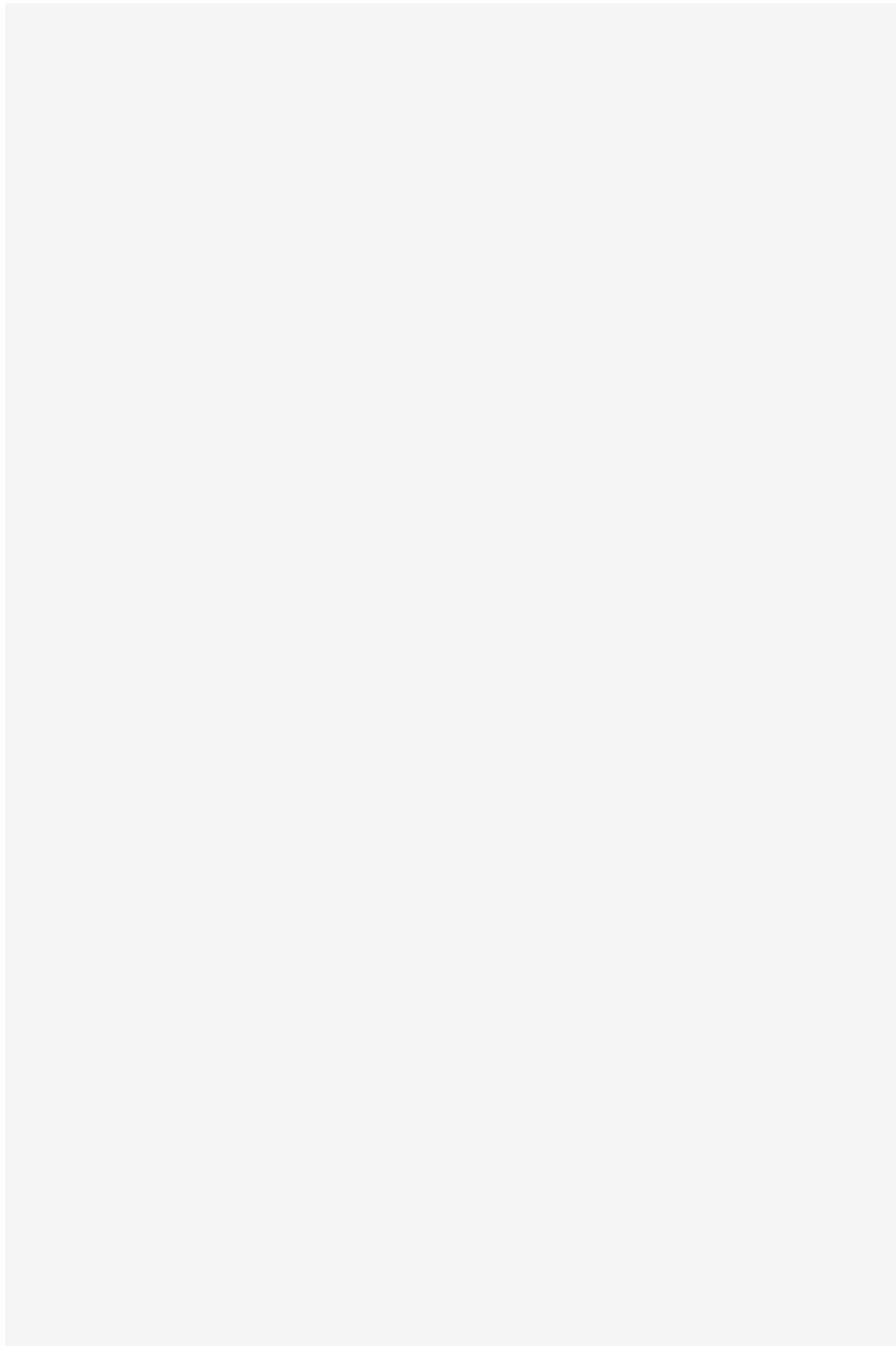
Stevlingson wrote that she attempted to obtain unspecified records from the Waukesha County Sheriff's Department but was told "they could not provide these records to me at this time." The sheriff's office is part of the same county — and in the same building — as Family Court Services, her employer.

In Jennifer's view, the system had once again favored Ryan.

## **Under Attack in Family Court**

Jennifer Moston did have one important ally, however: her husband's first wife.

The two women supported each other in parallel custody battles against Ryan in their neighboring Wisconsin counties.



Jennifer and Tracy Taylor Glascock for ProPublica

Tracy's custody case in Jefferson County, reopened because of the criminal charges, went to trial first. Jennifer was the first witness called by Tracy's lawyer so she could recount what Ryan had done to her.

Ryan's attorney was Theobald, the part-time guardian ad litem for children but in this case serving in her other capacity as a legal advocate for a parent. In closing arguments in June 2017, Theobald did everything in her power to discredit Jennifer, casting her as a desperate, conniving woman.

The diary Jennifer had kept? Fabricated, the lawyer claimed.

The pictures she took of her injuries? Too grainy to discern the marks or even say for sure the photos were of Jennifer.

Her support of Ryan's first wife? Deceitful collusion.

Finally, Jennifer was dumbfounded to hear Theobald tell the judge that she had attempted to bait her estranged husband by wearing a "tight blouse" on the stand, "complete with her nipples being incredibly pronounced."

"It literally made me want to throw up," Jennifer recalled. "The thought of someone trying to accuse me of trying to come on to the man who tried to kill me."

Theobald, in an interview, stood by her remarks in court, saying, "It was inappropriate attire unless she was going out clubbing somewhere."

Theobald argued in court that Ryan Moston was a caring father and should continue to have contact with Tracy's son. Ryan himself testified, "I love my son, and we have a great relationship. I never harmed him. I never would bring harm to him ever."

Ultimately, the judge in Jefferson County sided with Tracy.

Calling it the "most significant case of domestic violence that I have ever experienced," Judge Jennifer Weston expressed doubt that Ryan would change. He'd already gone through two certified batterer's programs by then: in 2009 and voluntarily during the pending of his criminal charges.

"We're not proactive. Is there a point at which we have to become proactive because there's so much history that supports that the next 10 years are going to be the same as the past 10 years?" Weston asked.

Two months later, Weston issued a 28-page decision stripping Ryan, "a chronic batterer," of all contact with his eldest son. "This is a full denial, to include no telephone contact or contact by any other means," the judge wrote.

"The trauma to Tracy, and now to Jennifer, is recurring every day they are required to release their children" to Ryan, Weston wrote, "even into the hands of a supervisor."

The boy "is in danger — physically, mentally and emotionally — every time he is with his father," the judge concluded, finding that Ryan "is able to snap at any second having failed to learn how to cope."

It had taken Tracy a decade of court hearings and legal negotiations to get what she thought was best for her son.

Jennifer, however, remained skeptical of what would happen in her case in the adjacent county. The April 2017 report from the guardian ad litem and the social worker, as well as her conversations with them, made her concerned about how a judge would rule.

On the advice of her lawyer, Jennifer and Ryan did not go to trial over their divorce but arrived at a settlement in October 2017.

Ryan agreed to give Jennifer sole legal custody of their son, then nearly 4, according to the divorce decree. He was allowed phone calls three times a week with the boy and hourlong weekly visits to be supervised at Parents Place, a social service agency.

Schmidtkofer considered it the best deal he could get for Jennifer, given the position of the guardian ad litem and the social worker and the likely influence this would have on the court. Had Jennifer gone to trial, he said, her total legal fees could have easily reached \$50,000.

In custody cases, he said, “99.9% of people get joint legal custody. She got sole.”

Still, it was not enough to ease Jennifer’s fears.

## Fixing the System

Family court drama typically is hidden from public view. But it garnered attention in Wisconsin recently when a group of nearly 30 women in La Crosse, a small city on the Mississippi River, joined forces to speak out about the system and call for change.

On their [website](#), and in public forums, the women described their frustration with court-appointed evaluators, including guardians ad litem, who recommend parents cooperate in child rearing even when there are accusations of domestic violence. The women had hoped that county officials would listen and begin to make reforms. But that hasn’t happened.

“When we look at the family court system, there are no checks and balances,” said Elizabeth Cline, one of the La Crosse moms, whose own court battle has stretched over six years.

Wisconsin Judge Ramona Gonzalez, a past president of the National Council of Juvenile and Family Court Judges, is among those who believe family courts should respond more effectively. The emphasis by courts on shared parenting does not work in cases involving “coercive, controlling people,” said Gonzalez, who is based in La Crosse.

For instance, the law in Wisconsin talks about a pattern or serious incident of interspousal battery. But there are a whole host of behaviors that many consider abusive that do not involve violence, including a spouse restricting another’s access to money, tracking their movements, monitoring their emails or cutting them off from friends and family.

Advocates also are trying to address what they describe as other blind spots in the state law. For instance, [a bill pending in Madison](#) would allow family court judges to check their own criminal court system to learn whether a parent had any prior conviction for domestic violence or child abuse or was subject to a restraining order.

The goal is to address an information gap that can hinder family court judges when litigants are not represented by attorneys or when the reports from evaluators are thin. Under the Wisconsin Code of Judicial Conduct, judges are prohibited from conducting independent investigations. As neutral parties they can only consider evidence the parties bring to them, though they are allowed to question litigants.

The bill’s sponsor, Rep. Robert Brooks, said in an April committee hearing that the legislation would enable the judges to “have all of the relevant

information” when deciding custody cases. The bill has passed out of the state Assembly but still needs approval from the Senate.

“The court,” he said, “is frequently unaware if a family has a history of domestic violence, even when a parent has a conviction or injunction that is publicly available in court records.”

## **Free of Fear, for a Time**

On Sept. 14, 2018, a Waukesha County jury came back with its verdict against Ryan Moston. He was acquitted on the strangulation charge against him. (A police officer had testified that he saw no marks or redness on Jennifer’s neck.) But the jury found Ryan guilty of felony charges of stalking, false imprisonment and battery with intent of bodily harm, as well as six misdemeanor charges.

At sentencing the following month, Jennifer and Tracy urged Waukesha Judge Michael P. Maxwell to incarcerate Ryan for the maximum time possible. The women wanted years free of violence, manipulation and fear.

“I beg of you,” Jennifer told the judge. “Family court is not going to save [my child] or me.”

The judge’s sentence fell short of the maximum, but he still gave Ryan 8 1/2 years in prison and another 10 years of “extended supervision” in the community, during which time Ryan can have no contact with Jennifer or their son.

There have been no allegations that Ryan ever tried to hurt his children. But Maxwell rejected any notion that Ryan was a good and devoted father.

“The first job that a father has to do with a son is to demonstrate to that son how to treat women,” the judge wrote in his opinion. “The first place you do that is how you treat that child’s mother. Whether you show that child’s mother respect, whether you show that child’s mother kindness and caring, those are the first things that a boy picks up on. In this case, based upon the evidence that was brought in, Ryan Moston failed that job miserably.”

Ryan Moston is incarcerated at the Oakhill Correctional Institution in Dane County.

Jennifer is working, raising her family and trying to help raise awareness on issues related to violence against women. She testified at a 2019 hearing in Madison on the need for more training for guardians ad litem and, more recently, shared the story of her marriage for a [Milwaukee Journal Sentinel article](#) about the rise of domestic abuse during the pandemic.

Now twice divorced, Jennifer said she will never remarry “because he had so much control over me ... and I don’t want to be that close to someone again.”

She is pro-gun, supports concealed carry laws and plans to get a firearm for self-defense. “He’s going to be out in six years,” she said. “One hundred percent I am having a gun to protect my family. It’s scary. I think about it every single day.”

Jennifer knows that the boy, now 7, may want to see his dad when he becomes an adult. She doesn't want her son exposed to Ryan's hostile treatment of women, to perpetuate a cycle of abuse.

"I do not want to say it's better for him growing up without a father," she said. "It's better for him to not have *that* father."

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2019

## Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal

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### Recommended Citation

Debra Pogrund Stark, Jessica M. Choplin & Sarah E. Wellard, *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1 (2019).  
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PROPERLY ACCOUNTING FOR DOMESTIC  
VIOLENCE IN CHILD CUSTODY CASES: AN  
EVIDENCE-BASED ANALYSIS AND REFORM  
PROPOSAL

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*Jessica M. Choplin, Ph.D.\*\**  
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ABSTRACT

*Promoting the best interests of children and protecting their safety and well-being in the context of a divorce or parentage case where domestic violence has been alleged has become highly politicized and highly gendered. There are claims by fathers' rights groups that mothers often falsely accuse fathers of domestic violence to alienate the fathers from their children and to improve their financial position. They also claim that children do better when fathers are equally involved in their children's lives, but that judges favor mothers over fathers in custody cases. As a consequence, fathers' rights groups have engaged in a nationwide effort to reform the custody laws to create a presumption of equal parenting time, with no exception when one of the parents has engaged in domestic violence. Domestic violence survivors and their advocates, however, claim that the needs of survivors of domestic violence and their children to be*

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*safe and free from further abuse are not being met in custody cases, that their claims of abuse are not being believed, and that the harm when a parent commits domestic violence against the other parent is not being recognized and addressed by judges and the family law professional upon whom they rely.*

*This Article first presents a literature review, with articulated scientific standards applied to each of the pieces of research cited in this review, on what is happening outside of court and in court relating to domestic violence and best practices for taking domestic violence into account in these child custody cases. Among the key findings from this literature review are: (1) when a parent commits domestic violence against the other parent, this can cause serious long-term harm to children, (2) custody judgments tend to favor fathers over mothers because greater weight is placed on claims of alienation than on domestic violence claims, (3) long-term harms can be mitigated by evidence-based best practices, most notably, supporting non-abusive parents in their efforts to protect themselves and their children from further domestic violence, (4) family law judges and professionals must be trained on domestic violence and its nuances, as well as how to screen for domestic violence, to adequately support them, and (5) a component of this training is learning how to distinguish mutual “situational couple violence” for which “parallel parenting” custody arrangements might be feasible, from a pattern of “coercive abuse,” where sole decision-making and primary parenting time should be ordered to the non-abusive parent, and protective restrictions on parenting time should be ordered to the abusive parent.*

*The Article then reports on a fifty-state review of custody-related laws (laws determining which parent makes major decisions relating to the child, who is allocated primary parenting time, and whether protective restrictions shall be placed on the parenting time of a parent who has engaged in domestic violence). This review found serious gaps between what evidence-based best practices suggest, and what is currently required by law in many states. These gaps in the law, including the failure of the law to require domestic violence screening and training for judges and other family law professionals, contribute to poor custody decision-making by them that compromises the safety and welfare of domestic violence survivors and their children.*

*The Article then proposes nuanced law reforms that would align custody-related laws with evidence-based best practices for taking domestic violence into account in custody cases, including creating rebuttable presumptions, burdens of proof, and definitions of domestic violence that conform with these evidence-based best practices.*

## TABLE OF CONTENTS

INTRODUCTION	• 4
I. A REVIEW OF THE LITERATURE ON “DOMESTIC VIOLENCE” IN CHILD CUSTODY CASES	• 9
A. <i>Exposure to Domestic Violence Can Cause Serious, Long-Term Harm to Children, but Can Be Mitigated When Protective Factors are Present or Pursued</i>	• 11
1. Scientific Standards for Inclusion of Articles in this Literature Review	• 20
2. The Effects of Child Exposure to Domestic Violence	• 22
B. <i>Professionals Involved in Child Custody Decision-Making Need Special Training to Recognize, Understand, and Properly Evaluate Evidence of Domestic Violence and Claims of Alienation</i>	• 26
C. <i>Proper Screening for Domestic Violence Is Necessary to Prevent Children from Continued Exposure to Domestic Violence or Direct Abuse and Neglect</i>	• 35
D. <i>Evidence of Domestic Violence Requires Protective Features Relating to Custody</i>	• 42
E. <i>Importance of Appropriately Assessing and Addressing Mental Health Issues and Seeking Appropriate Intervention Programs</i>	• 45
F. <i>An Evidence-Based Analysis of Fathers’ Rights Group Claims Relating to Domestic Violence and Custody Issues</i>	• 53
II. AN EXAMINATION OF THE EXTENT THAT IDENTIFIED BEST PRACTICES ARE REQUIRED BY LAW	• 64
A. <i>To What Extent Do States Require Family Law Judges to Receive Training on Domestic Violence?</i>	• 65
B. <i>To What Extent Do States Require Guardians ad litem, Child Representatives, or Other Custody Evaluators to Receive Training on Domestic Violence and to Screen for Domestic Violence in Their Child Custody Cases?</i>	• 70

- C. *To What Extent Do State Laws Relating to Child Custody Cases Take Domestic Violence Into Account Consistent with Evidence-Based Best Practices?* • 77
  - 1. A Survey of the States • 78
  - 2. Illinois: A Case Study • 98
    - a. “the wishes of the child’s parent or parents as to his custody” • 103
    - b. “the wishes of the child as to his custodian” • 103
    - c. “the interaction and interrelationship of the child with his parent, his siblings and any other person who may significantly affect the child’s best interests” • 104
    - d. “the child’s adjustment to his home, school, and community” • 104
    - e. “the mental and physical health of all individuals involved” • 104
    - f. “the physical violence or threat of physical violence by the child’s potential custodian, whether directed against the child or directed against another person but witnessed by the child” • 105
  - 3. Arizona: A Case Study • 109
- III. NECESSARY LAW REFORMS TO IMPLEMENT EVIDENCE-BASED BEST PRACTICES • 111
- CONCLUSION • 116

## INTRODUCTION

There is substantial evidence that family law judges, child representatives, guardians *ad litem*, and other family law professionals are not adequately taking domestic violence into account in child custody determinations.<sup>1</sup> Survivors of domestic violence are often either not believed or are viewed as being alienating rather than protective of their children.<sup>2</sup> When a father claims that the mother is alienating him from his children, that father is much more likely to obtain the custody order they are seeking (joint or sole custody of their children), even when the courts are aware that the father has committed domestic violence or di-

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1. See *infra* Section I.

2. Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311, 332 (2017).

rect abuse of the children.<sup>3</sup> Mothers are much less likely to obtain the custody order they are seeking (sole custody and protective restrictions on the parenting time of the other parent) when they allege domestic violence or direct abuse of their children and the father alleges alienation.<sup>4</sup> An estimated 58,000 children a year in the United States are court ordered into unsupervised contact with physically or sexually abusive parents following divorce.<sup>5</sup> The failure to protect children and domestic violence survivors continues even when one parent has been convicted beyond a reasonable doubt of domestic violence against the other parent. According to one study, joint legal custody orders (for shared decision-making by the parents) are the most common custody outcome—primary physical custody (physical placement) is given to the domestic abuse victim in only 60 percent of the cases.<sup>6</sup> There are no explicit provisions for the safety of the victim or children (such as ordering that placement exchange occur in a protected setting) in 70 percent of these cases.<sup>7</sup> These results are particularly problematic since there is strong evidence that exposure to domestic violence often causes long-term, serious harm to children, but can be mitigated when protective factors are present or pursued.<sup>8</sup>

As discussed in Section I, to reduce the harms to children from further exposure to domestic violence, courts need to grant custody orders that empower the non-abusive parent to protect their children from further harm. As explained in Sections I and II, when the domestic violence is based upon a pattern of coercive abuse, the custody orders should provide sole legal custody (i.e., decision-making) and primary physical custody (i.e., parenting time) to the non-abusive parent, unless that parent is not fit to parent. In addition, the custody orders should contain other protective measures, such as supervised exchanges of the children, attending and completing partner abuse intervention programs, and, in some cases, supervision or suspension of parenting time.<sup>9</sup>

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3. *Id.* at 320.

4. *Id.* at 328.

5. *Id.* at 313.

6. See Adrienne Roach, *Will Data Drive Change? Research Shines a Light on the Family Law System*, COALITION CHRONICLES (End Domestic Abuse WI, Madison, Wis.), June 2018, at 9; Tony Wilkin-Gibart, *Wisconsin Family Law and Domestic Abuse: Summary of Research Findings*, COALITION CHRONICLES (End Domestic Abuse WI, Madison, Wis.), June 2018, at 11.

7. See Wilkin-Gibart, *supra* note 6, at 11.

8. See *infra* Section I.A.

9. See *infra* Section I.

So why are guardians *ad litem* and child representatives recommending, and courts ordering, sole or joint custody and unrestricted parenting time to parents when there is evidence those parents have been engaging in a pattern of coercive abuse of the other parent that seriously endangers their children's health, safety, and well-being? To what extent is this due to gender bias and a lack of training on the dynamics of domestic violence? To what extent are judges failing to order protective conditions on parenting time because they are unaware of the danger of serious harm to children when one parent engages in domestic violence against the other parent? To what extent is it due to a failure to screen for and make findings on domestic violence? How do the various custody laws among the fifty states contribute to judges failing to order necessary protections?

As discussed in Section II, the presence of domestic violence is a factor in determining the "best interests of the child" in virtually every state's custody laws.<sup>10</sup> In addition, in 21 states and the District of Columbia, there is a rebuttable presumption against sole custody or joint legal custody to a parent who has engaged in "domestic violence."<sup>11</sup> And, 34 states expressly and clearly provide that domestic violence is a basis to order conditions and restrictions on parenting time.<sup>12</sup> To what extent are the statutory pre-conditions in these laws hindering a judge's ability to grant custody orders that adequately protect children and the parent victim of domestic violence? This question, along with those above, are key questions and problems that this Article will address.

Fathers' rights groups, on the other hand, view the situation very differently. They claim that courts favor mothers over fathers,<sup>13</sup> that mothers routinely falsely allege domestic violence or child abuse as part of a "gamesmanship of divorce"<sup>14</sup> to gain an economic advantage in the divorce or parentage case,<sup>15</sup> to get custody,<sup>16</sup> or to alienate the father

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10. See AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (hereinafter "ABA 50 STATE REVIEW"), <http://www.ambar.org/cdsv>; see also discussion *infra* Section II.

11. See notes 446–467 *infra*.

12. See notes 513–546 *infra*.

13. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, UNEQUAL JUSTICE IN THE CRIMINAL JUSTICE SYSTEM 1, 2 (2013), <http://www.saveservices.org/wp-content/uploads/SAVE-Criminal-Justice-System.pdf>.

14. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, INCENTIVES TO MAKE FALSE ALLEGATIONS OF DOMESTIC VIOLENCE 1, 2 (2010), <http://www.saveservices.org/pdf/SAVE-Incentives-for-False-Allegations.pdf> [hereinafter INCENTIVES TO MAKE FALSE ALLEGATIONS].

15. *Id.* at 3.

16. *Id.* at 4.

from the child.<sup>17</sup> Fathers' rights groups also claim that children are harmed when they are separated from their father.<sup>18</sup> Furthermore, over the past few years, fathers' rights groups such as the National Parents Organization<sup>19</sup> and Stop Abusive and Violent Environments<sup>20</sup> have used these arguments to mount a national push for law reform that would create rebuttable presumptions of equal or shared parenting time and shared decision-making, without adding an exception for situations where one parent has engaged in domestic violence or direct child abuse.<sup>21</sup> To what extent are these claims valid and these policy proscriptions prudent or reckless?

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17. Richard Gardner argues that "when bona fide abuse is present, the [parental alienation syndrome] diagnosis is not applicable," but his concept has been applied even in situations where there has been abuse. Compare Richard A. Gardner, *Family Therapy of the Moderate Type of Parental Alienation Syndrome*, 27 AM. J. FAM. THERAPY 195, 201 (1999), with Meier & Dickson, *supra* note 2, at 316–18 (2017) ("In some cases, even expert validations of child abuse and comprehensive guardian *ad litem* confirmations of the validity of the abuse claims have been insufficient to overcome the seemingly irrebuttable presumption of falsity that flows from the label 'alienator.'").
  18. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, WHAT IS THE COST OF FALSE ALLEGATIONS OF DOMESTIC VIOLENCE? 1, 4 (2010), <http://www.saveservices.org/downloads/False-DV-Allegations-Cost-20-Billion>.
  19. *About NPO: Who We Are*, NATIONAL PARENTS ORGANIZATION, <https://nationalparentsorganization.org/about-npo> (last visited Dec. 29, 2018).
  20. *About SAVE*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS, <http://www.saveservices.org/info/about> (last visited Dec. 29, 2018).
  21. Michael Alison Chandler, *More Than 20 States in 2017 Considered Laws to Promote Shared Custody of Children after Divorce*, WASH. POST, Dec. 11, 2017, [https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512\\_story.html?utm\\_term=.dfe444c72175](https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512_story.html?utm_term=.dfe444c72175). See, e.g., KY. REV. STAT. ANN. § 403.270(2) (Westlaw through 2018 Reg. Sess.) (creating a "presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child," although domestic violence is still listed as one of a number of factors that the court shall consider). A bill was introduced in 2017 in Illinois to create a rebuttable presumption for equal parenting time with no exception for domestic violence. H.R. 4113, 100th Gen. Assemb., Reg. Sess. (Ill. 2017). Although it was adjourned *sine die*, another bill was introduced in 2019, amending the Illinois Marriage and Dissolution of Marriage Act by "recognizing that the involvement of each parent for equal time is presumptively in the children's best interests." H.R. 185, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). No definite exception is listed for domestic violence, but the bill requires the court to "acknowledge that the determination of children's best interests, and the allocation of parenting time and significant decision-making responsibilities, are among the paramount responsibilities of our system of justice, and to that end . . . recognize that, in the absence of domestic violence or any other factor that the court expressly finds to be relevant, proximity to, and frequent contact with, both parents promotes healthy development of children." H.R. 185. In 2016, although the bill was ultimate-

The goal of this Article is to present the highest-quality, objective, scientific research<sup>22</sup> available to propose law reforms to the process of how child custody decisions are made. The term “child custody,” as used throughout this Article, refers to a court order on whether one parent will be granted the primary parenting time and decision-making of their child, or whether instead, the court orders that the parents will have more of a shared arrangement on parenting time and decision-making. The term “child custody” also sometimes refers to court orders on whether there should be any conditions or restrictions ordered on a parent’s parenting time to protect the child and other parent from the danger of serious harm that could occur without these protections in place.

Section I of this Article contains a literature review<sup>23</sup> of the harms to children when one parent engages in domestic violence against the other parent; ways to mitigate this harm and reduce the likelihood of co-occurrence of domestic violence and child abuse; and other best practices for taking domestic violence into account in child custody cases. Section I also includes an evidence-based analysis of fathers’ rights groups’ claims relating to domestic violence and child custody decisions. Section II explores the extent to which best practices have been implemented by state legislatures and state supreme courts. It also identifies gaps in mandating such best practices. In Section III, this Article proposes specific reforms to the laws among the 50 states and the District of Columbia relating to child custody that implement evidence-based best practices to better protect children and survivors of domestic violence from the danger of further serious harm. Among these best practices would be distinguishing “situational couple violence” from a “pat-

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ly vetoed by the governor and did not become law, a proposal for equal time sharing was approved overwhelmingly by Florida’s state legislature. S. 668, 118th Leg. (Fla. 2016).

22. We describe, in footnotes to each cited study, the limitations of the study to put the conclusions into proper context. In some cases, the results have been used in misleading ways and we indicate this issue in the text or footnote citing it.
23. Various forms of research have been included: meta-analyses (which statistically combine the results of many studies and are often considered to be the gold-standard in research), qualitative literature reviews (which describe the research that is reported in the literature, but do not combine results together as meta-analyses do), empirical results of original studies such as experiments (studies in which variables are manipulated to see how those manipulations affect measured outcomes), correlational research (studies that take data from a variety of measures and statistically parses the relationships between the measures) with regression analyses (statistical analyses that look at the relationships between measured variables), and structural equation modeling (a statistical analysis technique that is used to analyze the structural relationships between measured variables and latent constructs).

tern of coercive abuse,”<sup>24</sup> with different kinds and levels of protections to be put in place for each.

### I. A REVIEW OF THE LITERATURE ON “DOMESTIC VIOLENCE” IN CHILD CUSTODY CASES

First, it is important to be clear on the definition of “domestic violence.” The Centers for Disease Control and Prevention (CDC) notes the importance of applying a uniform definition when studying domestic violence<sup>25</sup> and taking steps to prevent it. We adopt the CDC definition:<sup>26</sup> “The term ‘intimate partner violence’ describes physical violence,<sup>27</sup> sexual violence,<sup>28</sup> stalking<sup>29</sup> and psychological aggression (including coercive acts)<sup>30</sup> by a current or former intimate partner.” This CDC definition of intimate partner violence is gender neutral, and domestic violence happens to men as well as women, but statistics reflect that women are primarily the victims of domestic violence and men are primarily the abusers.<sup>31</sup> In addition to this precise definition of domestic violence, the CDC classifies domestic violence as a “serious, preventable

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24. See discussion of these terms *infra* Section I.

25. The CDC actually uses the term “intimate partner violence” rather than “domestic violence,” but in this Article we refer to the phenomenon as “domestic violence” unless quoting from a source that uses another phrase such as “intimate partner violence.”

26. *Intimate Partner Violence: Definitions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html> (last updated Oct. 23, 2018) [hereinafter “CDC Definition of DV/Intimate Partner Violence”].

27. “Physical violence includes a range of behaviors from slapping, pushing or shoving to severe acts that include hit with a fist or something hard, kicked, hurt by pulling hair, slammed against something, tried to hurt by choking or suffocating, beaten, burned on purpose, used a knife or gun.” *Id.*

28. “Sexual violence: includes rape, being made to penetrate someone else, sexual coercion (non-physically pressured sex), unwanted sexual contact (such as groping), and noncontact unwanted sexual experiences (such as verbal harassment). Contact sexual violence is a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact.” *Id.*

29. “Stalking: victimization involves a pattern of harassing or threatening tactics used by a perpetrator that is both unwanted and causes fear or safety concerns in the victim.” *Id.*

30. “Psychological Aggression: includes expressive aggression (such as name calling, insulting or humiliating an intimate partner) and coercive control, which includes behaviors that are intended to monitor and control or threaten an intimate partner.” *Id.*

31. See *infra* Section I.F.

public health problem that affects millions of Americans.”<sup>32</sup> Legislators, judges, and other family law professionals need to be aware of this statement from a highly regarded government agency and research center.

Second, the scientific literature distinguishes different types or patterns of domestic violence.<sup>33</sup> Several taxonomies have been proposed, but we will primarily distinguish between two types: “situational couple violence” and “coercive abuse.” “Situational couple violence” can be a dangerous type of violence that happens by and between *both* intimate partners (i.e., it is mutual) that does not involve pervasive power and control.<sup>34</sup> It is often used to influence or even coerce the partner to do something in particular situations,<sup>35</sup> but coercion does not pervade the entire relationship.<sup>36</sup> Some believe it is the type of violence most frequently observed in the population at large,<sup>37</sup> but, as explained later in this Article, this belief is based upon certain general surveys of the population that have methodological flaws.<sup>38</sup> “Coercive abuse,” by contrast, involves one intimate partner engaging in patterns of controlling behavior that are not limited to particular situations; and instead, the coercion is pervasive in the relationship.<sup>39</sup> Coercive abuse involves violence, but extends beyond violence to include at least some of the following behaviors: intimidation; emotional abuse; isolation; minimizing, denying, and blaming; use of children; asserting male privilege; economic abuse; and

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32. CDC Definition of DV/Intimate Partner Violence, *supra* note 26.

33. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008) (conducting a literature review on the distinctions between different types of domestic violence and how differentiating among the different patterns of domestic violence clarifies apparent paradoxes in the field); *see also* GOVERNOR’S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., DOMESTIC ABUSE GUIDEBOOK FOR WISCONSIN GUARDIANS AD LITEM: ADDRESSING CUSTODY, PLACEMENT, AND SAFETY ISSUES (2017), <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf>.

34. Kelly & Johnson, *supra* note 33, at 481.

35. Evan Stark, *Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1024 (2006) [hereinafter Stark, *Commentary on Johnson*] (conducting a literature review on the distinctions between different types of domestic violence and how domestic violence cannot be viewed as simply a combination of discrete acts, but as a pattern of abuse).

36. Kelly & Johnson, *supra* note 33, at 479.

37. *Id.* at 485.

38. *See infra* Section I.F.

39. Kelly & Johnson, *supra* note 33, at 481.

coercion and threats.<sup>40</sup> Both situational couple violence and coercive abuse are harmful to children, but as we discuss in this Article, these two different types of domestic violence can have different implications for the kinds of protections courts should order in child custody cases.

A. *Exposure to Domestic Violence Can Cause Serious, Long-Term Harm to Children, but Can Be Mitigated When Protective Factors are Present or Pursued*

Based upon our review of the evidence-based literature, we conclude that the professionals involved in making “custody”<sup>41</sup> related decisions must be better educated<sup>42</sup> as to how exposure to domestic violence and granting custody to abusive parents can cause serious, long-term

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40. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 3 (1993).

41. We use the term “custody” to refer to parenting time and decision-making during the legal process of separation and divorce and thereafter.

42. See Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 60 JUV. & FAM. CT. 57, 62 (2003) [hereinafter Jaffe et al., *Common Misconceptions*] (presenting qualitative case studies of 62 adult female victims and 95 child victims of domestic violence, defined by separation from an abuser). Although the sample in this study was not chosen at random, it is representative of the population at hand and adds depth to ideas addressed in the literature; see also MICHAEL S. DAVIS ET AL., N.Y. LEGAL ASSISTANCE GROUP, CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 84–85 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf> (describing multivariate regression analysis of 69 cases). Generalizability may be an issue in that all cases were from one state (New York), and all individuals studied were represented by informed counsel specializing in domestic violence, which may exemplify best-case scenarios). DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 116–35 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> [hereinafter SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS] (discussing a two-part study, including multivariate analysis of surveys of 1187 professionals in fields related to custody cases—for example, judges, attorneys, and custody evaluators—and qualitative, semi-structured case-study interviews of 24 domestic violence survivors). Extensive analysis of findings showed robust statistical power and strong validity of measures used. ELLEN PENCE ET AL., BATTERED WOMEN’S JUSTICE PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 37 (2012), <http://www.bwjp.org/resourcecenter/resource-results/mind-the-gap-accounting-for-domestic-abuse-in-childcustody-evaluations.html> (detailing qualitative case analysis of 18 domestic violence-related custody evaluation reports from five states). Although sample size may limit generalizability of findings, the inquiry nevertheless provides useful insight.

harm to children.<sup>43</sup> Common misconceptions include the notions (1) that domestic violence is typically not an issue for couples who are in the process of divorce and are disputing child custody because once they are separated the violence will not continue; (2) that amongst women who are victims, domestic violence results in eventual separation; (3) that children exposed to domestic violence are not harmed so long as they are not directly injured; (4) that domestic violence is exclusively between adults and should not play a role in deciding child custody; (5) that assessment of needs of abused women and their children, and the effects caused by the perpetrator, can be satisfactorily conducted by family courts, attorneys, and mediation or other court services; (6) that legal and mental health services for female victims and their children who are separating from the perpetrator are readily available; and (7) that solutions and community assistance when separating from the perpetrator are limited for victims of domestic violence and their children.<sup>44</sup>

A thorough understanding of domestic violence and an appreciation for its importance in child custody determinations are necessary to produce better and safer determinations for children's welfare.<sup>45</sup> Additionally, professionals need better education on the protective factors

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43. See generally AMERICAN ACADEMY OF PEDIATRICS, ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA (2014), [https://www.aap.org/en-us/Documents/ttb\\_aces\\_consequences.pdf](https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf) (analyzing research supporting conclusions from a 1998 study by the Centers for Disease Control and Prevention documenting the negative long-term physiological and psychological effects of adverse childhood experiences on more than 17,000 middle-class Americans). Analysis suggests that adverse childhood experiences can “contribute significantly to negative adult physical and mental health outcomes and affect more than 60 [percent] of adults.” *Id.* at 1.

44. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 58–64.

45. See Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs about Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1695–97 (2011) (discussing an experiment in which 23 custody evaluators were interviewed, and answers were coded for analysis to determine potential variables related to outcomes of evaluations and recommendations). Although the study is insightful, concerns arise based on ambiguous operational definitions, unclear criteria, and unexplored, potentially confounding, third variables; see also Nancy S. Erickson & Chris S. O'Sullivan, *Doing Our Best for New York's Children: Custody Evaluations When Domestic Violence is Alleged*, 23 N.Y. ST. PSYCHOLOGIST 9, 10–11 (2011) (analyzing a meta-analysis of three recent studies, each of which found to a reasonable degree of scientific certainty that an evaluator's lack of knowledge can lead to harm of the child or children involved in the dispute, and that domestic violence training is essential for custody evaluators to prevent this kind of lasting damage); SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 116–25.

that can mitigate these harms.<sup>46</sup> Having a protective parent is particularly important,<sup>47</sup> but too often protective parents lose custody,<sup>48</sup> while

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46. See, e.g., Norman Garnezy & Ann Masten, *Chronic Adversities*, in CHILD & ADOLESCENT PSYCHIATRY 191, 194 (Michael Rutter et al. eds., 1994); Sandra A. Graham-Bermann et al., *Factors Discriminating Among Profiles of Resilience and Psychopathology in Children Exposed to Intimate Partner Violence (IPV)*, 33 CHILD ABUSE & NEGLECT 648 (2009) (presenting findings from multivariate cluster analysis of scores obtained from a sample of 219 children exposed to intimate partner violence within the last year). The study used validated measures of functioning and demonstrated statistical reliability. Ashley E. Owen et al., *Family Variables that Mediate the Relation Between Intimate Partner Violence (IPV) and Child Adjustment*, 24 J. FAM. VIOLENCE 433, 434 (2009) (detailing results of a study of 129 low-income, African-American mothers and children). While valuable, findings should be considered in limited context as data were collected from a single demographic group, results have an unclear direction of causality, and study authors warn of the potential for an inflated Type I Error rate; Emmy E. Werner, *High-Risk Children in Young Adulthood: A Longitudinal Study from Birth to 32 Years*, 59 AM. J. ORTHOPSYCHIATRY 72 (1989) (discussing longitudinal case studies of 698 individuals born on the island of Kauai, Hawaii in 1955.) Findings may be limited in terms of generalizability outside of this cohort. EMMY E. WERNER & RUTH S. SMITH, OVERCOMING THE ODDS: HIGH RISK CHILDREN FROM BIRTH TO ADULTHOOD 173–87 (1992) (further analyzing Werner, *supra*).
47. Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e236 (2012), <http://pediatrics.aappublications.org/content/pediatrics/early/2011/12/21/peds.2011-2663.full.pdf> (exploring a review of the literature, drawing conclusions from 99 sources regarding the long-term consequences of psychological and physiological wellbeing).
48. Family courts are too often denying custody to protective mothers. See INTER-AM. COMM'N ON HUMAN RIGHTS, PETITION IN ACCORDANCE WITH INTER-AMERICAN COMMISSION ON HUMAN RIGHTS at ¶¶ 6–33, 444 (2007), <http://www.protectiveparents.com/Petition-on-Human-Rights.pdf> (petitioning for consideration based on reviews of academic literature and research studies finding that current child-custody practices are inherently biased against women/mothers to the extent that they constitute violation of the Charter of the Organization of American States, a Pan-American treaty); AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY WOMEN ARE RUNNING FROM THE FAMILY COURTS-AND WHAT CAN BE DONE ABOUT IT (2005) (examining cases in which mothers who believed that their children had experienced sexual abuse at the hands of their fathers were doubted, distrusted, or punished for reporting their concerns to the court); NEUSTEIN & LESHER, *supra*, at xiii–xix; Joan S. Meier, *Getting Real about Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 228–29 (2010) (presenting anecdotes from five cases in different state court systems in which mothers and children were not believed by the courts, with the children being removed in three of the five cases); Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 244 (2009) [hereinafter Meier, *A Historical Perspective*] (presenting criticisms of both Parental Alienation Syndrome and non-syndrome feelings of alienation in light of historical evidence of the resilient nature of parent-child

abusive parents receive custody,<sup>49</sup> because courts do a poor job of evaluating evidence.<sup>50</sup> In this section, we review and assess the scientific rigor

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relationships and studies showing a lack of empirical basis for alienation claims); Joaquin Sapien, *Call in Congress for Family Court Reform*, PROPUBLICA (Sept. 13, 2016), <https://www.propublica.org/article/call-in-congress-for-family-court-reform> (calling for family court reform after court-appointed psychologist failed to recognize a father's potential for dangerousness and failed to limit unsupervised visitation, despite the mother's pleas to the contrary and allegations of abuse, and the father drowned all three children during an unsupervised custody visit); Joaquin Sapien, *For New York Families in Custody Fights, a 'Black Hole' of Oversight*, PROPUBLICA (Mar. 17, 2017), <https://www.propublica.org/article/for-new-york-families-in-custody-fights-a-black-hole-of-oversight> (detailing an individual case study example in which injustice and a destructive aftermath arose from a court-appointed evaluator's lack of professional oversight or established professional standards for making custody determinations); Laurie Udesky, *Custody in Crisis: How Family Courts Nationwide Put Children in Danger*, 100REPORTERS (Dec. 1, 2016), <https://100r.org/2016/12/custody-2> (describing three cases wherein abusers gained custody over mothers despite objective evidence of child sexual and child abuse); GERALDINE B. STAHLY ET AL., ABUSE ALLEGATIONS IN CUSTODY DISPUTES: THE EXPERIENCE OF PROTECTIVE MOTHERS (2011), <https://www.cprotectiveparents.org/research> (follow hyperlink under "California Protective Parents Association" section) (last visited Apr. 28, 2017) (examining survey of 66 mothers and one father, self-selected as "protective parents," of whom 98 [percent] felt discredited for trying to protect their children, and over 60 [percent] lost custody); Jennifer Backer, *The Strange Advocacy for "Parental Alienation Syndrome,"* PSYCHOL. TODAY: FOR THE LOVE OF WISDOM (Dec. 17, 2015), <https://www.psychologytoday.com/us/blog/the-love-wisdom/201512/the-strange-advocacy-parental-alienation-syndrome> (expounding on the idea that courts' consideration of so-called Parental Alienation Syndrome poses a risk to children as it lacks sufficient basis for reliability and there are "no studies that test the effectiveness of their recommended treatments").

49. See 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, 668–71 (2002) [hereinafter Meier, *Domestic Violence*] (examining two case studies in the context of current literature). Courts are too often awarding custody to abusive fathers. See Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody and the Courts: Findings from Five Studies*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 6-2 to 6-31 (Mo Therese Hannah & Barry Goldstein eds., 2010) (exploring ideas garnered from small-scale survey experiment involving 34 victims of domestic violence from the Alaska court systems and meta-analysis of similar, related studies conducted in other states; alone, each study's generalizability may be limited, but in considered in conjunction they provide useful qualitative insight); SALLY F. GOLDFARB, UNITED NATIONS DIV. FOR THE ADVANCEMENT OF WOMEN, THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN IN THE UNITED STATES OF AMERICA: RECENT REFORMS AND CONTINUING CHALLENGES 9 (2008), [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf) ("[I]t remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence."); LUNDY BANCROFT ET AL., THE BATTERER AS PARENT:

of the studies and data and discuss how to implement measures that protect children.

The American Academy of Pediatrics has documented that a parent committing domestic violence against the other parent in front of the child is a form of child abuse<sup>51</sup> that significantly contributes to negative physical and mental health outcomes in adulthood.<sup>52</sup> A home with daily violence wherein one partner (most commonly a man in cases of coercive abuse)<sup>53</sup> physically or verbally assaults the other partner (most commonly a woman)<sup>54</sup> in front of his or her children turns those children into victims of that violence as well.<sup>55</sup> Such environments negatively affect children who grow up in them,<sup>56</sup> and children who witness more family violence tend to suffer as a result.<sup>57</sup> However, child adjustment to domestic violence depends on factors associated with the child,

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ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 189–90 (2nd ed. 2012); Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 296–99 (2009) [hereinafter Stark, *Rethinking Custody*] (reviewing literature analyzing outcomes and responses of family courts in domestic violence cases).

50. See Stark, *Rethinking Custody*, *supra* note 49, at 290 (noting that victims and children are not believed, even when police corroborate abuse).
51. See generally AMERICAN ACADEMY OF PEDIATRICS, *supra* note 43, at 1–5.
52. *Id.*
53. See *infra* Section I.F. for analyses of this gender difference.
54. According to statistics from 2015, in the United States, one out of every four women and one out of every ten men experienced “sexual violence, physical violence, and/or stalking by an intimate partner and reported an intimate partner violence-related impact during their lifetime.” CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF - UPDATED RELEASE 7 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> (detailing findings from the National Intimate Partner and Sexual Violence Survey (NISVS) obtained from 10,081 completed random-digit-dial telephone surveys conducted in 2015). Although statistical validity analyses were performed to evaluate findings and reported data were found to be reliable, the findings should be considered in light of the self-selective nature of telephone surveys and the likelihood of a lowered response-rate or non-response bias due to factors such as stigma, current or continuing instances of abuse and trauma, and/or extant concerns related to safety. *Id.* at 12–14. Approximately 36.4 percent of women, or 43.6 million women, have experienced some type of intimate partner violence in their lifetime, with physical violence by an intimate partner being the most common type. *Id.* at 8. More than 36.4 percent of women reported “experienc[ing] psychological aggression by an intimate partner during their lifetime.” *Id.* at 7.
55. See AMERICAN ACADEMY OF PEDIATRICS, *supra* note 43.
56. See Roberta Hibbard et al., *Psychological Maltreatment*, 130 PEDIATRICS 372, 373–74 (2012) (reviewing the literature from 49 sources, placing emphasis on the recognition and identification of psychological maltreatment as a form of ACE, and the potential negative consequences it can have on child development).
57. Graham-Bermann et al., *supra* note 46.

the mother, and the family as a whole, as parental functioning is critical to the child's well-being.<sup>58</sup> Children who are more resilient tend to experience less violence, have fewer worries and fears, and tend to have mothers with more stable emotional health and better parenting skills.<sup>59</sup> At the other extreme, devastatingly, sometimes these children are murdered by the abusive parent.<sup>60</sup> As a result, contrary to current practices,<sup>61</sup> reducing children's exposure to domestic violence within a home needs to be one of the most important goals in determining custody. In determining what is in the best interests of the child, this should come first when considering whether to require protective measures that restrict or deny parenting time based upon a judgment that it would cause "serious endangerment" to the child's welfare. Courts are not doing this well within the United States<sup>62</sup> or internationally.<sup>63</sup> These circumstances

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58. *Id.*

59. *See id.*

60. *See* R. Dianne Bartlow, *Judicial Response to Court-Assisted Child Murders*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 12-1 to 12-42 (Mo Therese Hannah & Barry Goldstein eds., 2016) (presenting interviews with family court judges across 21 states, with emphasis on jurisdictions that had experienced child homicide at the hand of a parent who had been accused of domestic violence); Barry Goldstein, *What Can Be Learned From Court-Assisted Murder Cases?*, 5 FAM. & INTIMATE PARTNER VIOLENCE 369, 370 (2013) (analyzing errors in management and consideration of family court cases and the potential for this mishandling to have devastating consequences for the children whom the process is intended to protect); *U.S. Divorce Child Murder Data*, CTR. FOR JUDICIAL EXCELLENCE, <http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data> (last visited Jan. 12, 2019) (reviewing archival data collected by the Center for Judicial Excellence, finding that at least 665 children have been murdered by a parent since 2008). Cases were included based on news coverage mention of "divorce," "separation," "custody," "visitation," and/or "child support." *Id.*; *see also* 12/5/16 Press Release: 58 Children Murdered by a Parent Who Could Have Been Saved, CTR. FOR JUD. EXCELLENCE (Dec. 5, 2016), <http://www.centerforjudicialexcellence.org/2016/12/05/12516-press-release-58-children-murdered-by-a-parent-who-could-have-been-saved> (recounting 44 cases, including 58 children from across the United States between 2008 and 2016 in which the children were killed during court-ordered unsupervised contact with a parent, when the court had been made aware of allegations of that parent's dangerousness).

61. *How Many Children are Court-Ordered into Unsupervised Contact with an Abusive Parent after Divorce?*, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (Sept. 22, 2008), <http://www.leadershipcouncil.org/1/med/PR3.html> (estimating that each year, 58,500 children are put at risk of physical or psychological harm during court-ordered unsupervised visitation with an abusive parent). While useful for illustrative purposes, the report uses a formula of estimations to reach a best-guess. STAHLY, *supra* note 48.

62. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 57–58.

63. International Association of Victims of Parental Alienation, FACEBOOK (last visited Apr. 3, 2017), <https://www.facebook.com/groups/249283921943335>.

highlight the dire need to support parents who are making efforts to protect their children.<sup>64</sup>

In addition to seeking to reduce future domestic violence, courts need to consider protective factors that can reduce the harm to children who have already been exposed to domestic violence. Children tend to be harmed less when they are protected by a supportive, non-abusive parent<sup>65</sup> or have parents with good parenting skills.<sup>66</sup> Other factors such as family support; secure attachment to other caregivers; living in a supportive, safe, and close community;<sup>67</sup> and not experiencing other forms of trauma<sup>68</sup> contribute to children enduring less harm. These protective factors need to be considered in custody evaluations and evaluator recommendations.

Judges and other professionals (child representatives, guardians *ad litem*, or custody evaluators) cannot rely on intuition in these cases, as many aspects of domestic violence are counterintuitive.<sup>69</sup> Instead, those

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64. See Stark, *Rethinking Custody*, *supra* note 49, at 297–98; Lundy Bancroft, *Organizing in Defense of Protective Mothers: The Custody Rights Movement*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 17-1 to 17-13 (Mo Therese Hannah & Barry Goldstein eds., 2010) (qualitatively investigating the underpinnings of the parents' rights/custody rights movement which undermine women's success in obtaining favorable outcomes in family court determinations).
65. Shonkoff & Garner, *supra* note 47.
66. Abigail H. Gewirtz, David S. DeGarmo & Amanuel Medhanie, *Effects of Mother's Parenting Practices on Child Internalizing Trajectories Following Partner Violence*, 25 J. FAM. PSYCHOL. 29 (2011) (detailing correlational research with regression analyses of findings from a short-term, longitudinal study of 35 mother-child pairs—with eligibility defined as mother's exposure to physical intimate partner violence within the past one to three weeks, where her child witnessed the incident—including interviews and parent-child observational task). Constructs were measured with validated instruments and results of prediction models use estimates with robust standard errors giving confidence to the reliability of findings. Graham-Bermann et al., *supra* note 46.
67. Garmezy & Masten, *supra* note 46; Graham-Bermann et al., *supra* note 46; Owen et al., *supra* note 46; Werner, *supra* note 46; Werner & Smith, *supra* note 46.
68. Graham-Bermann et al., *supra* note 46.
69. See Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 242–50 (1992); see generally Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733 (2002) (documenting situations in which incorrect intuitions on the dynamics of domestic violence, its causes, and impacts, affect judicial decisions on orders of protection and other legal decisions involving domestic violence); Debra Pogrud Stark & Jessica M. Choplin, *Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence*, 32 WIS. J.L. GENDER & SOC'Y 13 (2017) (review of how incorrect

in charge of making custody decisions need to rely upon well-designed, validated research. They need to be educated and trained on practices informed by this greater depth of validated understanding, rather than practices from poor intuition.<sup>70</sup> Thus, these professionals must be able to determine whether studies have been well-designed. For example, professionals should understand how science accumulates knowledge over time and give particular attention to meta-analyses that synthesize and assemble evidence accumulated by many scientific studies. They should also examine the definitions used in studies and how those definitions can impact policy implications; they must be aware when previous research has been invalidated (i.e., Parent Alienation Syndrome)<sup>71</sup> and must reject incorrect assumptions that are often held by the public at large (such as the belief that courts favor mothers).<sup>72</sup> Finally, they

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intuitions about domestic violence affect decisions on whether to grant emergency orders of protection and the cognitive psychology behind this).

70. There are many misconceptualizations and misunderstandings of domestic violence that lead to poor decision-making by courts. See Jaffe et al., *Common Misconceptions*, *supra* note 42 (finding that domestic violence is often overlooked by family courts in the decision-making process); Stark, *Rethinking Custody*, *supra* note 49, at 290.
71. DIANE M. PRANZO, CHILD CUSTODY AND VISITATION DISPUTES IN SWEDEN AND THE UNITED STATES: A STUDY OF LOVE, JUSTICE, AND KNOWLEDGE 67–83 (2013) (comparing the effects of cultural and social settings of the U.S. and Sweden, which use comparable legal standards in contested family court cases, on the perception of cases involving child custody and/or visitation rights); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 L. & INEQ. 5, 24–25 (2011) (exploring archival data from Minnesota courts to determine the effect of consideration of the concept of Parental Alienation Syndrome on family court cases decided by Minnesota court systems). Analysis of data reflects an “anti-mother gender bias.” However, it appears that the sample size is low, and data have not been analyzed to determine validity, reliability, or general applicability. Meier & Dickson, *supra* note 2, at 311 (reviewing literature on the concept of “Parental Alienation,” and exploring a multivariate empirical-mapping analysis of the ways in which family court systems have used it in custody determination cases). Study authors caution, however, that cases analyzed were selected because they had all progressed to the appeals process, which often does not occur in child custody cases, and thus the research may not be representative of the majority of family court cases (for example, these cases tend to skew towards the party with the financial resources to mount appeals and thus favor men). Additionally, findings were derived from coding of variables and conclusions completed by a single researcher rather than from a composite of scores by two or more independent researchers, potentially skewing results towards that lone researcher’s inevitable biases.
72. In fact, courts tend to favor fathers. See BATTERED MOTHERS’ TESTIMONY PROJECT, WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 3 (2002), <https://www.wcwoonline.org/vmfiles/execsumm4.pdf>. This report discusses a four-part study of one-to-one interviews of 40 battered mothers who had experienced family court litigation; analysis of written

must look beyond veneers of friendliness.<sup>73</sup> Knowing how to correctly evaluate studies ensures that professionals are relying on validated bodies of knowledge. There have been a great number of previous psychological research studies on the effects of domestic violence, child well-being, and child custody; however, not all of that research has equal validity. For instance, retrospective self-report studies are often conducted in this field of research, but findings must be taken in light of concerns about

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surveys completed by 31 advocates for battered women; five focus groups, comprising a total of 23 advocates and survivors of domestic violence, exploring the possible effects of demographic considerations on outcomes; and one-hour interviews of 16 individual state actors selected based on either identification by the women and/or advocates, or on the fact that they possessed specific knowledge of the family court system. *Id.* at 4. The study examined incidents in which the Massachusetts family courts violated basic human rights standards, and found that fathers who seek custody are favored over women because “mothers are held to a different and higher standard than fathers.” *Id.* at 3. Although the study is valuable, its authors note that the results are not corroborated for statistical validity, and also may not be generalizable outside of the state of Massachusetts. *Id.* at 5. Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1017 (2005) (detailing a retrospective cohort study of 324 cases with intimate partner violence and 532 cases without intimate partner violence that examined the effects of a history of intimate partner violence and determination of child custody agreements, as moderated by substantiation of the history of intimate partner violence (defined by a history of police reports, court records related to protection orders filed prior to the dissolution, and/or a notation of allegations or substantiation in the dissolution case file)). The ability to generalize findings, however, may be limited based on the fact that the study population consisted of individuals specifically from Seattle, where the male partner was the perpetrator of intimate partner violence and the female partner was the victim. MASS. SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, reprinted in 24 NEW ENG. L. REV. 745, 748, 825 (1990) (reporting on The Gender Bias Study of the Court System in Massachusetts, an official report from the Massachusetts Supreme Judicial Court, which found that, despite the pervasive belief that mothers are favored in custody disputes, “[f]athers who actively seek custody obtain either primary or joint physical custody over 70 [percent] of the time”) (emphasis in original).

73. Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (2005) (discussing correlational research with regression analysis, finding that the presumption against custody to batterers was superseded by a heuristic in favor of the “friendly parent”). Scores were obtained from examination of 393 custody and visitation orders across six states in situations where the father had perpetrated intimate partner violence against the mother, as well as from a survey of 60 judges selected for having entered those orders. *Id.* at 1076. Extensive analysis of the relationships suggests statistical significance, although several of the measures used to survey the judges in this study have yet to be empirically validated.

the accuracy of the individual's report.<sup>74</sup> The goal of this Section is to identify the best available information about issues related to custody in cases that involve domestic violence, and analyze the policy implications and best practices for professionals suggested by that research.

### 1. Scientific Standards for Inclusion of Articles in this Literature Review

This Article presents the highest-quality objective, scientific research available. There are a few instances, however, where there are insufficient objective scientific studies on a topic, and we rely on preliminary scientific evidence or expert opinion gained over many years of working in the field. To address concerns over the robustness of the research, we have included notes on its quality in our footnotes. The best evidence for conclusions comes from meta-analyses that mathematically capture the results of many experiments and represent the gold standard in the field of psychology. This is followed by qualitative literature reviews.<sup>75</sup>

We also cite the empirical results of original studies such as experiments,<sup>76</sup> correlational research<sup>77</sup> with regression analyses,<sup>78</sup> and structural equation modeling.<sup>79</sup> For every study cited, we note whether it is (1) a meta-analysis; (2) a qualitative literature review; (3) an experiment; (4)

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74. Retrospective study designs are those in which “participants are required to evaluate exposure variables retrospectively using a self-reporting method, such as self-administered questionnaires.” Alaa Althubaiti, *Information Bias in Health Research: Definition, Pitfalls, and Adjustment Methods*, 9 J. MULTIDISCIPLINARY HEALTHCARE 211, 213 (2016).

75. Anthony Petrosino & Julia Lavenberg, *Systematic Reviews and Meta-Analyses: Best Evidence on “What Works” for Criminal Justice Decision Makers*, 8 W. CRIMINOLOGY REV. 1 (2007).

76. Experiments are studies in which variables are manipulated to see how those manipulations affect measured outcomes. See C. JAMES GOODWIN, *RESEARCH IN PSYCHOLOGY: METHODS AND DESIGN* 522 (4th ed. 2005).

77. Correlational research involves taking two or more variables and statistically parsing the relationships between them. KENNETH BORDENS & BRUCE ABBOTT, *RESEARCH DESIGN AND METHODS: A PROCESS APPROACH* 28 (8th ed. 2013).

78. Regression analysis is a statistical analysis that looks at the relationships between measured variables. GOODWIN, *supra* note 76, at 527.

79. Structural equation modeling is a method of multivariate statistical analysis which uses multiple regression analyses and factor analyses to analyze structural relationships between measured and latent variables, and to evaluate the dependencies between, and independent of, the factors. See TENKO RAYKOV & GEORGE A. MARCOULIDES, *A FIRST COURSE IN STRUCTURAL EQUATION MODELING* 1–2 (2000).

correlational research with regression analyses or structural equation modeling;<sup>80</sup> or (5) a case study.<sup>81</sup>

For literature reviews, we identify the number of studies evaluated. For original research such as experiments, correlational research, and case studies, we note the sample size and characteristics of the sample. We assess whether the sample is appropriate for the research question. We note operational definitions where appropriate. For example, if our analysis relied upon a study of victims/survivors, we note whether this classification was based upon self-identification or was there external verification (i.e., police calls to 911). If our analysis relied upon correlational research with all of the well-known shortcomings of correlational research, we note these shortcomings and whether the researchers collected the data themselves or whether it was archival,<sup>82</sup> as well as the source of the archival information (i.e., court cases). We note odd operational definitions, especially if they might have biased the conclusions. For example, we would be particularly skeptical of research that would classify cases where accusations of abuse could not be verified by independent, objective evidence as instances where the accused abuser was exonerated. We note any violations of established research design standards, confounding variables in experiments, obvious third variable issues in correlational research for which the researchers did not control, and validity issues (internal validity,<sup>83</sup> external validity,<sup>84</sup> face validity,<sup>85</sup> construct validity,<sup>86</sup> study mortality issues,<sup>87</sup> etc.). Lastly, we note any concerns over statistical significance and reliability.<sup>88</sup>

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80. Structural equation modeling is a statistical analysis technique used to analyze the structural relationships between measured variables and latent constructs. *Id.* at 1.

81. A case study discusses a specific instance of something or a small subset. These studies often serve to demonstrate the existence of a phenomenon without necessarily generalizing that phenomenon to the broader population. GOODWIN, *supra* note 76, at 520.

82. Both researcher-collected and archival data have benefits. When researchers collect their own data, often more is known and reported about the data collection processes, which can affect how data are interpreted. Archival data sets are often larger, which by the law of large numbers should produce more accurate means. *Id.* at 336–39.

83. Internal validity is a measure indicating that an experiment successfully isolated the factor of interest, meaning that no other variables could have created the observed effects on the dependent measures. *Id.* at 524.

84. External validity means that the study results apply broadly to the general population of interest, not just to the particular circumstances of that study. *Id.* at 522.

85. Face validity “occurs when a measure appears to be a reasonable measure of some trait.” *Id.*

86. Construct validity “occurs when the measure being used accurately assesses some hypothetical construct” and “refers to whether the operational definition used for independent and dependent variables are valid.” *Id.* at 520–21.

## 2. The Effects of Child Exposure to Domestic Violence

***Emotional effects.*** A common myth associated with domestic violence is that if children are merely exposed to domestic violence, and not physically harmed, there will be no serious, long-term adverse effects on these children. This notion is false. Children who witness domestic violence can suffer serious emotional symptoms including internalizing symptoms (e.g., anxiety, depression, fear, shame, social withdrawal, somatic complaints, bedwetting, poor concentration) and externalizing symptoms (e.g., aggression, impulsivity, bullying, criminal behaviors).<sup>89</sup> Several meta-analyses have been conducted that discuss the effects on children who witness domestic violence between parents.<sup>90</sup> Two studies led by CDC researchers found long-term negative effects on people who had adverse childhood experiences. The first, a study by Shanta R. Dube, found that there is a greater likelihood of adolescent substance use.<sup>91</sup> The second, a study led by Daniel P. Chapman, found a greater

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87. Sometimes participants leave a study early, and results can be explained by which participants left rather than any differences in independent or predictor variables. KENNETH S. BORDENS & BRUCE B. ABBOTT, *RESEARCH DESIGN AND METHODS: A PROCESS APPROACH* 265–66 (4th ed. 1999).
88. Sometimes results can happen by chance. Statistical analyses measure the likelihood that the obtained results were due to chance; if it is unlikely that the results are due to chance, then it is likely that they were due to differences in the independent or predictor variables. *Id.* at 442–44.
89. Jacquelyn C. Campbell & Linda A. Lewandowski, *Mental and Physical Health Effects of Intimate Partner Violence on Women and Children*, 20 *PSYCHIATRIC CLINICS N. AM.* 353, 361–62 (1997), [https://doi.org/10.1016/S0193-953X\(05\)70317-8](https://doi.org/10.1016/S0193-953X(05)70317-8).
90. See, e.g., Sarah E. Evans et al., *Exposure to Domestic Violence: A Meta-Analysis of Child and Adolescent Outcomes*, 13 *AGGRESSION & VIOLENT BEHAV.* 131, 131 (2008) (analyzing the results of six studies demonstrating a significant relationship between a child's exposure to domestic violence and his or her internalizing and externalizing of trauma symptoms); Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 *CHILD ABUSE & NEGLECT* 797, 797 (2008) (reviewing findings from 11 years of studies indicating that children exposed to domestic violence in the home are at greater risk for behavioral and emotional problems); Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 339, 339 (2003) (discussing findings from 118 studies demonstrating a significant relationship between exposure to domestic violence and harm to children); David A. Wolfe et al., *The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, 6 *CLINICAL CHILD & FAM. PSYCHOL. REV.* 171, 171 (2003) (detailing indications from 41 studies finding that children's exposure to domestic violence is significantly correlated with emotional and behavioral problems).
91. Shanta R. Dube et al., *Adverse Childhood Experiences and the Association with Ever Using Alcohol and Initiating Alcohol Use during Adolescence*, 38 *J. ADOLESCENT HEALTH* 444, 444 (2006) (examining a retrospective self-report cohort-study of

risk of depression among adults who reported witnessing their mother being abused as children.<sup>92</sup>

Studies have found a relationship between adverse childhood experiences and emotional and physical health problems in adulthood.<sup>93</sup> Adverse childhood experiences include events such as children witnessing their mother being treated violently. This can result in physical and emotional consequences for the child when the body's stress response is repeatedly triggered by such events, and there is an absence of availability of adult protection.<sup>94</sup> For example, adverse childhood experiences have been associated with health concerns and lower life satisfaction, more frequent symptoms of depression and anxiety, tobacco product use, problematic alcohol use,<sup>95</sup> behaviors that place adults at risk for HIV infection, disabilities caused by health problems, as well as diabetes, heart attack, stroke, and heart disease.<sup>96</sup>

***Physiological effects.*** Biological responses to stress caused by domestic violence are not only immediately harmful to the child's health,

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8,417 adults across California who completed surveys about adverse childhood experiences). While the results seem to indicate a negative correlation between the number of adverse childhood experiences experienced and the age at which the individual first consumed alcohol, the study fails to account for confounding third variables outside of the family environment which may influence early introduction to alcohol.

92. Daniel P. Chapman et al., *Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood*, 82 J. OF AFFECTIVE DISORDERS 217, 221 (2004) (examining a retrospective self-report cohort-study of 9,508 adults in California and found an increased risk of depressive disorders among those whose mothers had been battered).
93. Jennifer A. Campbell et al., *Associations Between Adverse Childhood Experiences, High-Risk Behaviors, and Morbidity in Adulthood*, 50 AM. J. PREVENTIVE MED. 344, 344–46 (2016) (analyzing data from the Behavioral Risk Factor Surveillance System, a telephone survey of 48,526 adults across five states, conducted by the CDC). Relationships between scores measuring ACE and risky behavior or comorbidity in adulthood were analyzed using multiple logistic regression analysis, controlling for covariates and relevant confounding variables. *Id.* at 344. Joshua Patrick Mersky et al., *Impacts of Adverse Childhood Experiences on Health, Mental Health, and Substance Use in Early Adulthood: A Cohort Study of an Urban, Minority Sample in the U.S.*, 37 CHILD ABUSE & NEGLECT 917, 917–20, 923 (2013) (reviewing adult survey data obtained from 1,142 participants (74.2% of all participants) from the Chicago Longitudinal Study, which tracks development of a cohort of individuals from low-income, urban families, born between 1979-1980). The main effects were analyzed with multivariate logistic regression and OLS regression, and the findings are statistically robust. *Id.* at 917. However, despite the longitudinal nature of the CLS study, adverse childhood experiences and outcomes were measured cross-sectionally for each individual, which means that results are “more safely interpreted as correlational than as causal.” *Id.* at 923.
94. Campbell et al., *supra* note 93 at 344; Mersky et al., *supra* note 93, at 917.
95. Mersky et al., *supra* note 93, at 917.
96. Campbell et al., *supra* note 93, at 345.

but the effects can also become chronic.<sup>97</sup> Adult health conditions, such as heart disease, obesity, and substance use disorders have been linked to adverse childhood experiences.<sup>98</sup> The release of the stress hormone, cortisol, is associated with adverse health effects among children who witness domestic violence.<sup>99</sup> The “fight or flight” response can be activated

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97. Shonkoff & Garner, *supra* note 47, at 235.

98. *Id.* at 237.

99. See Leah C. Hibbel et al., *Maternal Sensitivity Buffers the Adrenocortical Implications of Intimate Partner Violence Exposure During Early Childhood*, 23 DEV. & PSYCHOL. 689 (2011) (detailing a longitudinal study of 1,102 mother-infant pairs to examine children’s levels of cortisol (measured from saliva samples collected after an activity intended to stimulate an emotional response) between infancy and early childhood, with relation to intimate partner violence exposure). Findings indicate that children exposed to domestic violence did not have a normal decrease in cortisol reactivity after exposure to a stressful event and were not able to recover as quickly as compared to children who had not been exposed to violence in the home. *Id.* at 689. Limitations include the fact that this study examines only the epidemiological impact without relation to other potential extant psychobiological or psychological factors, and therefore many not afford a look at the whole picture. *Id.* at 698–99. On the other hand, the sample used in this study was representative of the population from which it was drawn, a lack of which presents a concern for generalizability in similar studies. *Id.* at 691. Melissa Sturge-Apple et al., *Interparental Violence, Maternal Emotional Unavailability, and Children’s Cortisol Functioning in Family Contexts*, 48 DEV. PSYCHOL. 237 (2012) (discussing findings from a study of 201 sets of mother-toddler dyads who had been exposed to domestic violence, in order to explore the relationships between the child’s adrenocortical response stimulated by emotional stress (as measured by salivary tests on three separate occasions), domestic violence (as measured by maternal report), and the mother’s emotional availability to the child (as measured by maternal report and objective observer evaluation)). Findings indicate that domestic violence and maternal emotional unavailability are both correlated with a child’s experienced adrenocortical response. *Id.* at 237. However, since the present inquiry only examined the mother-child relationship and does not take into account mediating or moderating effects of the child’s relationship with his or her father, conclusions cannot be generalized to instances where the father is the victim of domestic violence. Jennifer H. Suor et al., *Tracing Differential Pathways of Risk: Associations Among Family, Adversity, Cortisol, and Cognitive Functioning in Childhood*, 86 CHILD DEV. 1142 (2015) (discussing continued assessment of Sturge-Apple et al., *supra*, in the context of a prospective longitudinal study of 201 mother-child pairs where data were collected at 3 annual intervals). Findings suggest that exposure to greater amounts of domestic violence and maternal emotional unavailability are both predictive factors of cortisol reactivity, which is in turn correlated with lower levels of cognitive functioning by the time the child reaches the age of four. *Id.* at 1142. Nissa R. Towe-Goodman et al., *Interparental Aggression and Infant Patterns of Adrenocortical and Behavioral Stress Responses*, 54 DEV. PSYCHOL. 685 (2012) (examining a study and latent profile analysis of 735 infants from low socioeconomic status circumstances (selected from an already ongoing longitudinal research study of family dynamics and child development in low-income communities) exploring the relationships between physiological cortisol stress responses and domestic violence from both physiological and behavioral perspectives). Statistical analysis using a latent profile model

as the child experiences stressors throughout his or her life, causing the nervous system to overreact to any future stressful event.<sup>100</sup> This inhibits the child's ability to process their environment clearly and respond adaptively to minor, everyday stressors, as any environmental stressor is likely to trigger the child's stress response.<sup>101</sup>

***Transmission of Domestic Violence Trauma.*** Childhood exposure to domestic violence can result in the transmission of trauma- and stress-related symptoms. Several reviews and meta-analyses<sup>102</sup> have discussed the fact that domestic violence can become normalized and lead to intergenerational transmission of domestic violence as the child grows into adulthood and has a family of his or her own.<sup>103</sup> Behavioral

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showed that children who had been exposed to greater levels of domestic violence were more likely to have a greater cortisol stress response. *Id.* at 685. Nevertheless, study authors caution that methods used were both "exploratory and sample dependent." *Id.* at 695.

100. See Hibel et al., *supra* note 99; Sturge-Apple et al., *supra* note 99; Suor et al., *supra* note 99; Towe-Goodman et al., *supra* note 99.
101. See Hibel et al., *supra* note 99; Sturge-Apple et al., *supra* note 99; Suor et al., *supra* note 99; Towe-Goodman et al., *supra* note 99.
102. See generally Constance L. Chapple, *Examining Intergenerational Violence: Violent Role Modeling or Weak Parental Controls?*, 18 VIOLENCE & VICTIMS 143 (2003) (examining data from a 200-question self-report survey of 980 students in grades nine through eleven in Southerntown, Arkansas, who reported prior dating experience). Multivariate and bivariate analyses were performed to evaluate the relationships between parental violence, parental control, and dating violence. *Id.* at 151. See also Amy R. Murrell et al., *Characteristic of Domestic Violence Offenders: Associations with Childhood Exposure to Violence*, 22 J. FAM. VIOLENCE 523 (2007) (detailing a study of 1,099 adult male batterers ordered for assessment at a center for domestic violence to assess the correlation between type, severity, frequency of violent behavior perpetrated, and the amount of exposure to violence experiences during childhood (measured through retrospective self-report)). Although the results obtained in this study are congruent with findings from previous studies (positive correlation between experiencing violence as a child and perpetrating domestic violence as an adult), a shortcoming of this study is a lack of comparison/control group of non-violent individuals who had been exposed to violence as a child. *Id.* at 528–29. See also Kimberly A. Rhoades, *Children's Responses to Interparental Conflict: A Meta-Analysis of Their Associations with Child Adjustment*, 79 CHILD DEV. 1942 (2008) (expounding upon a meta-analysis of 71 studies coded to examine the relationship between scores obtained from measures of children's responses to interparental conflict and scores from measures of children's adjustment). Study authors note, however, that interpretation of the results is constrained by unclear direction of causality, and some methods of data collection used have not been empirically evaluated for accuracy. *Id.* at 11.
103. See generally Sandra M. Stith et al., *The Intergenerational Transmission of Spouse Abuse: A Meta-Analysis*, 62 J. MARRIAGE & FAM. 640 (2000) (detailing meta-analysis of 39 studies, totaling 12,981 individuals, examining the relationship between growing up in a home with violence and becoming part of a violent heterosexual marital relationship as an adult).

modeling is a type of intergenerational transmission whereby children who witness or experience violence engage in abusive behaviors themselves and may develop future psychopathology.<sup>104</sup> A study led by Amy R. Murrell, a member of the Clinical Psychology faculty at the University of North Texas in Denton, Texas, found that males who witness domestic violence in childhood tend to commit domestic violence later on in their lives in the same way that males who were abused during their own childhoods tend to abuse children in adulthood and commit more acts of general violence.<sup>105</sup> Similarly, offenders of dating violence tend to have a history of witnessing parental violence.<sup>106</sup>

These issues affect juvenile delinquency. Female juvenile delinquents are more frequently victims of physical and sexual abuse, neglect, and maltreatment as compared to males.<sup>107</sup> Male juvenile offenders, however, tend to commit more sexual and felony offenses against others, and the association between childhood victimization and later offending was found to be stronger among males.<sup>108</sup>

B. *Professionals Involved in Child Custody Decision-Making Need Special Training to Recognize, Understand, and Properly Evaluate Evidence of Domestic Violence and Claims of Alienation*

The counterintuitive aspects of domestic violence not only make it critical that scientific evidence—rather than intuition—is used in these child custody cases, but also that professionals use well-designed scientific research to set policy and to identify and follow best practices. Thus, professionals need to be educated and trained on topics related to domestic violence because untrained evaluators often make unwarranted

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104. Murrell et al., *supra* note 102, at 525.

105. *Id.*

106. Chapple, *supra* note 102, at 151–52.

107. Jessica J. Asscher et al., *Gender Differences in the Impact of Abuse and Neglect Victimization on Adolescent Offending Behavior*, 30 J. FAM. VIOLENCE 215, 215 (2015) (examining hierarchical logistic regression analysis of scores obtained on the Washington State Juvenile Court Assessment instrument by 10,111 minors ages 12 to 18 who had been found guilty of a criminal act by a juvenile court and were self-reported victims of abuse). Based on the nature of the study, findings must be considered in light of the fact that each individual in the sample was selected based on having committed a criminal offense, which may result in inflated apparent strength of the relationship between having experienced abuse and engaging in criminal behavior. *Id.* at 216.

108. *Id.* at 215.

assumptions, misinterpret evidence, and make poor decisions.<sup>109</sup> For example, untrained evaluators often assume that divorce will solve the domestic violence problem when, in fact, the purpose of domestic violence is often a desire for control, and separation from the abuser can actually exacerbate the problem.<sup>110</sup> Not understanding the long-term effects of exposure to domestic violence, these untrained evaluators assume that an abuser's relationship with children is separate from the relationship with the spouse and that domestic violence should not play a role in deciding child custody.<sup>111</sup> They may be unaware of the complexities of domestic violence that make family court, attorneys, and mediation or other court services inadequate assessors of the needs of abused women and their children.<sup>112</sup>

Untrained evaluators will also often overlook evidence due to erroneous beliefs about the nature of domestic violence incidences and their underlying causes.<sup>113</sup> Evaluators and judges tend to believe that survivors of domestic violence make false allegations, and this belief is correlated with these professionals holding other erroneous beliefs.<sup>114</sup> For example, a belief in false allegations of child abuse and/or domestic violence tends to vary based on a person's professional role. Judges, private attorneys, and custody evaluators are inclined to believe that mothers make false allegations, while professionals such as domestic violence workers and legal aid attorneys tend to believe that fathers make false allegations.<sup>115</sup>

Likewise, Michael S. Davis, Ph.D., Chris S. O'Sullivan, Ph.D., Kim Susser, JD, and Hon. Marjory D. Fields, JD, investigated the beliefs, the custody assessment process, and the recommendations of court-appointed psychologists, psychiatrists, and social workers who evaluated cases where allegations of domestic violence were present.<sup>116</sup>

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109. Erickson & O'Sullivan, *supra* note 45, at 10–11 (stating evaluators in the latter category tend to have “patriarchal” beliefs, which dictate their interpretations of the information they acquire); Haselschwerdt et al., *supra* note 45, at 1695–97; *see also* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

110. Haselschwerdt et al., *supra* note 45, at 1712.

111. *Id.* at 1708–09.

112. *See* Jaffe et al., *Common Misconceptions*, *supra* note 42, at 62.

113. *Id.* at 59–62.

114. *See* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 8 (finding that examples of these inaccurate beliefs include the ideas that survivors of domestic violence wish to alienate children from the other parent; that domestic violence is not important in custody decisions; and that the child is affected when domestic violence survivors do not wish to co-parent).

115. LEORA N. ROSEN & MICHELLE ETLIN, THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES 99–119 (1996).

116. DAVIS ET AL., *supra* note 42, at iii.

The Davis et al. study found that evaluators' assessments were predicted by knowledge of domestic violence, and the parenting plans developed by evaluators did not reflect greater safety in cases where there was more severe physical, emotional, and social abuse between the couple.<sup>117</sup> Custody and visitation conclusions were influenced more by the evaluator's knowledge of domestic violence than the facts of the individual cases. This indicated that the outcome in court is largely dependent upon the evaluator rather than the circumstances of the case.<sup>118</sup>

Other investigations found that custody evaluators fail to determine whether domestic violence occurs as a result of a pattern of inflicting control and abuse by the perpetrator.<sup>119</sup> Custody evaluators then minimize the effects of domestic violence on children and are unable to gauge whether the perpetrator had the ability to engage in a parenting or co-parenting role.<sup>120</sup> This context can contribute to scenarios in which the best interests of the child are not adequately assessed. Instead, custody is recommended based on the presence of domestic violence, rather than on how children were affected by the violence.<sup>121</sup> All of these unwarranted assumptions, misinterpretations, poor decisions, and overlooked evidence can cause untrained evaluators to fail to believe victims.

Perhaps the most problematic of these erroneous beliefs is the now-invalidated Parental Alienation Syndrome framework, which posits that mothers invent allegations of abuse for the purpose of alienating children from their fathers and gaining custody.<sup>122</sup> This theory has been re-

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117. *Id.* at vii.

118. *See id.* at vii–viii.

119. *See id.* at vii.

120. PENCE ET AL., *supra* note 42, at 33.

121. *See id.* A number of studies have found that many custody evaluators lack meaningful expertise in domestic violence and child abuse, and often make recommendations that fail to fully take the abuse into account. *See* DAVIS ET AL., *supra* note 42, at i; PENCE ET AL., *supra* note 42, at 6; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS *supra* note 42, at 120–21. Several other studies have found that custody evaluators tend to fall into two distinct groups: those who understand domestic violence and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations, and believe the allegations are evidence of alienation. *See also* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 6 (finding that professional roles affected these judgments); HASELSCHWERDT ET AL., *supra* note 45, at 1967–69 (finding a difference between feminist custody evaluators and family violence custody evaluators); ERICKSON & O'SULLIVAN, *supra* note 45, at 10–11 (presenting evidence for the importance of expertise among custody evaluators).

122. *See* PRANZO, *supra* note 71, at 67, 69; Meier & Dickson, *supra* note 2, at 311; Berg, *supra* note 71, at 5.

peatedly discredited,<sup>123</sup> yet it continues to affect judicial decision-making.<sup>124</sup> An analysis of the outcomes of 238 cases of custody disputes that involved allegations of domestic violence and child abuse found that alienation claims were more likely to be raised by fathers than by mothers.<sup>125</sup> Proof of domestic violence and child abuse by the father did not improve a mother's chances of winning.<sup>126</sup> Claims of alienation were much more likely to lead to successful outcomes for fathers than proof of domestic violence and child abuse were likely to lead to successful outcomes for mothers.<sup>127</sup> Even today, the discredited Parental Alienation Syndrome framework causes courts to label the survivor parent as uncooperative or emotionally unstable.<sup>128</sup> As a result, the evaluator may erroneously conclude that the survivor will not establish a positive relationship with the other parent (i.e., the perpetrator) and may recommend that the abusive parent obtain custody or unsupervised visitation with the children despite a known history of violence.<sup>129</sup> These circumstances can occur particularly in situations where the evaluator minimizes the effect that violence can have on the children involved or believes that the survivor's behaviors and responses during the evaluation are a result of psychopathology, rather than an expected response by a person who has endured domestic violence.<sup>130</sup> There appears to be a heuristic bias in favor of the "nice," "friendly" parent who cooperates and does not "bad mouth" the other parent, even when the facts presented in such "bad mouthing" are demonstrated to be true.<sup>131</sup>

In addition to this heuristic bias, other counterintuitive features of domestic violence create situations wherein courts fail to recognize the dangers that victims experience and the dangers that persist even after separation. Courts also fail to see how children are harmed by exposure to domestic violence. Examples of the counterintuitive aspects of domestic violence include that domestic violence can happen to anyone

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123. CLARE DALTON ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 14 n.28 (2006), [http://www.ncjfcj.org/sites/default/files/navigating\\_cust.pdf](http://www.ncjfcj.org/sites/default/files/navigating_cust.pdf); see also Meier, *A Historical Perspective*, *supra* note 48, at 239; Meier & Dickson, *supra* note 2, at 317.

124. Meier & Dickson, *supra* note 2, at 317.

125. *Id.* at 321, 323.

126. *Id.*

127. *Id.*

128. DALTON ET AL., *supra* note 123, at 25.

129. *Id.*

130. *Id.*

131. See Morrill et al., *supra* note 73, at 1101 (finding that the presumption against custody to batterers was superseded by a provision that favors the "friendly parent").

from any socioeconomic status and is often not due to the perpetrator having anger management problems, but rather a need for coercive control.<sup>132</sup> Not all domestic violence is physical, as there are several forms of abuse. A typical pattern of violence occurs in a cyclical trend where tension builds, abuse takes place, and the perpetrator makes apologies/excuses or amends to the victim.<sup>133</sup> The passage of time between instances of domestic violence does not indicate an end to danger for the victim and the notion that the victim has the choice to leave his/her spouse/partner or to call the police is a common misconception.<sup>134</sup>

Counterintuitively, victims of domestic violence often have numerous barriers that prevent them from fleeing abuse or ending the relationship, even when it is in order to ensure their safety. Women who have recently separated from an intimate partner report experiencing violent episodes at a rate 40 times greater than those who are still married.<sup>135</sup> Separation assault is a threat that keeps many victims from seeking safety.

Also counterintuitively, in addition to direct harms inflicted on victims, children can be severely harmed from exposure to domestic violence. It is unfortunately common for people to be uninformed about the numerous counterintuitive facts about domestic violence, which can cause them to fail to believe victims; underestimate the danger that victims endure, especially after having separated from their spouse/partner; and fail to understand the ways in which children can be harmed by exposure to domestic violence.

Untrained evaluators are also at risk of misinterpreting self-defense on the part of the victim as mutual fighting. Women in domestic violence situations tend to use violence as a form of self-defense more often than men need to use violence in self-defense.<sup>136</sup> Women report primary

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132. See Shannon Catalano, *Intimate Partner Violence in the United States*, U.S. BUREAU OF JUSTICE STATISTICS (2007), <https://www.bjs.gov/content/pub/pdf/ipvus.pdf> (demonstrating that domestic violence can happen to anyone by presenting information compiled by the U.S. Department of Justice, Bureau of Justice Statistics, including data from the National Crime Victimization Survey interviews with victims of crimes and the FBI's Supplementary Homicide Reports on the income of victims); see also GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33, at 27.

133. See Catalano, *supra* note 132.

134. Catalano, *supra* note 132.

135. *Id.*

136. L. Kevin Hamberger & Sadie E. Larsen, *Men's and Women's Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples: Part I*, 30 J. FAM. VIOLENCE 699 (2015) (discussing a systematic qualitative review of literature from 2002-2013 related to gender differences in intimate partner violence

reasons for intimate partner violence as being for the purposes of self-defense and retaliation, while both genders report emotional deregulation as a reason for intimate partner violence.<sup>137</sup> Many female perpetrators of domestic violence have experienced violence by their male partner in the past.<sup>138</sup> In domestic violence situations, women have a greater likelihood of being injured even if the male partner uses violence that contributes to a lesser likelihood for injury, such as slapping or pushing.<sup>139</sup> Female perpetrators are not necessarily more violent than male domestic violence perpetrators, but one study found that female perpetrators tend to use weapons against male victims more so than do male perpetrators.<sup>140</sup> Evaluators must be careful not to misinterpret self-defense on the part of the victim as mutual fighting.

Gender bias often takes place in custody dispute resolutions due to the belief that women are more likely to make false allegations of child abuse and domestic violence in order to alienate children from their fathers. These stereotypes are associated with sexist beliefs,<sup>141</sup> the notion that the world is a just place,<sup>142</sup> and the tendency to disbelieve,

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as measured in clinical samples). Study authors note that, since their research focused only on clinical samples, the findings may not be generalizable to the overall, non-clinical population. *Id.* at 715.

137. Jody M. Ross, *Personality and Situational Correlates of Self-Reported Reasons for Intimate Partner Violence Among Women Versus Men Referred for Batterers' Intervention*, 29 BEHAV. SCI. & L. 711 (2011) (examining results from a study of 30 women and 56 men referred for intervention after having committed an intimate partner violence offense). Results were obtained from a 45-minute computer survey and individual interview regarding relationship conflict. *Id.* at 714. Although findings afford useful insight, authors of this study warn that, because the sample of individuals studied were selected based on involvement in the criminal legal system, they may not be generalizable to the greater population of intimate partner violence offenders. *Id.* at 725.
138. Caroletta A. Shuler, *Male Victims of Intimate Partner Violence in the United States: An Examination of the Review of Literature Through the Critical Perspective*, 5 INT'L J. CRIM. JUST. 163, 166 (2010) (recounting a review of literature related to male victims of intimate partner violence perpetrated by female partners).
139. *Id.* at 166.
140. *Id.* at 169.
141. Daniel G. Saunders et al., *The Inventory of Beliefs About Wife-Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes*, 2 VIOLENCE & VICTIMS 39 (1987) (reporting on stages of development and evaluation of validity, reliability, and scale dimensionality of an assessment measuring attitudes about "wife beating" (intimate partner violence) using data from 675 participants). Although five of the subscales constructed had sufficient internal reliability, three scales did not demonstrate robust internal reliability. *Id.* at 52.
142. Zick Rubin & Letitia Anne Peplau, *Who Believes in a Just World?*, 31 J. SOC. ISSUES 65 (1975) (reflecting on the concept of "Belief in a Just World" and findings which suggest that subscribers to the idea of a Just World are more likely to admire fortunate persons and disparage victims to preserve the internal consistency of the belief in

minimize, or disregard evidence of abuse.<sup>143</sup> As a result of these beliefs, evaluators often recommend that abusive fathers be given sole or joint custody or unsupervised visits with the children.<sup>144</sup> Mothers are often punished for reporting abuse and are held to stricter standards than are fathers.<sup>145</sup>

To accurately perform assessments to evaluate the best interests of the child and potential serious endangerment, evaluators must be aware of several factors: gender bias and domestic violence is an important issue in custody evaluations; post-separation violence occurs; screening and assessment can be dangerous; false allegations by a parent are rare; gender and personal biases can exist when investigating false allegations or when making recommendations; children's safety must be a priority emphasized over co-parenting; and coercive-controlling violence is a form of domestic violence.<sup>146</sup> It is critical to utilize evaluators that satisfy a representative sample of professionals to reduce any effects of bias.<sup>147</sup> Naïve evaluators of child custody tend to believe that parents falsely claim abuse. To avoid this error, evaluators need to be knowledgeable about domestic violence, and they need to be selected by appropriate

that Just World); Janet K. Swim, Wayne S. Hall & Barbara A. Hunter, *Sexism and Racism: Old-Fashioned and Modern Prejudices*, 68 J. PERSONALITY & SOC. PSYCHOL. 199 (1995) (discussing confirmatory factor analyses and subsequent replication study evaluating measures of gender and racial prejudice). Generalizability may be limited, as study participants were 683 and 788 (respectively) individuals who received extra credit in college courses for their participation in the study, and therefore their attitudes may not accurately reflect those of the general population. *Id.* at 201, 205.

143. Daniel G. Saunders, Richard M. Tolman & Kathleen C. Faller, *Factors Associated with Child Custody Evaluators' Recommendations in Cases of Intimate Partner Violence*, 27 J. FAM. PSYCHOL. 473, 477 (2013) (detailing a multivariate statistical analysis of responses to surveys completed by 465 child custody evaluators, used to assess the relationships between evaluators' background, beliefs, knowledge, and custody recommendations). Limitations of generalizability should be noted in terms of the fact that it is not known whether the sample provides a reasonable estimate of representativeness, and as a result of uncertainties regarding the direction of causality of results.
144. Meier & Dickson, *supra* note 2, at 313.
145. Rosen & Etlin, *supra* note 115 (detailing information on 206 cases (with a focus on five representative examples) of child maltreatment after courts acted with bias against the mother); Molly Dragiewicz, *A Left Realist Approach to Antifeminist Fathers' Rights Groups*, 54 CRIME L. & SOC. CHANGE 197, 201 (2010) (reviewing the Left Realist Approach to criminology, feminist criticisms of the approach, and Left Realist responses to those criticisms); Meier, *Domestic Violence*, *supra* note 49; SAUNDERS, ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.
146. Haselschwerdt et al., *supra* note 45; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42; *see also* GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.
147. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

means.<sup>148</sup> Evaluators should also understand the concept of the two types of violence (controlling and conflict-based) in order to make adequate recommendations, since they can often vary depending on the perspective of the evaluator.<sup>149</sup> Awareness can increase an assessor's focus on safety or can minimize the evaluator's perspective of the danger of domestic violence in custody cases.<sup>150</sup> Abuse allegations during custody evaluations should be investigated thoroughly. If credible testimony or other credible evidence supports allegations—taking into account the dynamics of domestic violence—the allegations should be afforded substantial weight in determining and pursuing the best interests of the child.

While it appears that many family law practitioners and custody evaluators falsely believe that fabricated allegations of domestic violence are common,<sup>151</sup> it is estimated that 35 percent of fathers and 18 percent of mothers make false allegations of domestic violence during custody cases.<sup>152</sup> In addition, evaluators often confuse an unsubstantiated allegation with a false allegation. An unsubstantiated allegation occurs when an accusing party cannot provide documentation of domestic violence as required by courts,<sup>153</sup> and there is evidence to believe that the child has not been abused or mistreated.<sup>154</sup> False allegations, on the other hand, include alleging domestic violence in order to gain an unfair advantage in a custody case or to alienate the other parent from the child/children.<sup>155</sup> In these cases, the person making the false claim does so maliciously and knowingly.<sup>156</sup> Regardless of the distinction, a requirement for substantiation of an abuse claim is contrary to the dynamics of domestic violence.<sup>157</sup> Survivors of domestic violence, specifically women, often do not report domestic violence to law enforcement

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148. *Id.*

149. Haselschwerdt et al., *supra* note 45, at 1712.

150. *Id.* at 1707.

151. *See id.*; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 14.

152. *Id.*

153. Haselschwerdt et al., *supra* note 45.

154. Nico M. Trocmé, *Major Findings from the Canadian Incidence Study of Reported Child Abuse and Neglect*, 27 CHILD ABUSE & NEGLECT 1427, 1430 (2003) (presenting findings from the Canadian Incidence Study of Reported Maltreatment, focusing on a subsample of 3,786 cases in which maltreatment was substantiated). The study provides enormous insight, but it should be noted that information was gathered from administrative reports, which, though they constitute records kept in the regular course of business, cannot be independently substantiated. *Id.* at 1433.

155. *See* Haselschwerdt et al., *supra* note 45, at 1698.

156. *See* Trocmé et al., *supra* note 154, at 1430.

157. *See* Haselschwerdt et al., *supra* note 45, at 1698.

or healthcare professionals before separating from their partner,<sup>158</sup> as they correctly fear that the report could be used against them.<sup>159</sup>

It is also important for the evaluator to be educated in the ways that coercively abusive intimate partners can often project a non-abusive image, can express denial, deflect blame, or minimize the abuse, and can resort to making false allegations (i.e., Parental Alienation Syndrome or child abuse/neglect)<sup>160</sup> in order to undermine the victim's credibility. Evaluators should also be cautious to not make unwarranted assumptions regarding a survivor's presentation, as not all victims will appear as scared or weak. Instead, they may demonstrate characteristics such as anger, irritability, strength of character, or even impassivity.<sup>161</sup> In cases where a couple reports to the evaluator that there has been fighting by both partners, the evaluator should assess for patterns of abuse from the interview and from legal records. Additionally, the evaluator should look for evidence of "defensive wounds," which are injuries sustained by a victim of a violent attack due to attempts at defending themselves against a perpetrator and are often found on the hands and forearms.<sup>162</sup> The evaluator should determine each partner's level of fear as well as any presence of post-traumatic stress symptoms.<sup>163</sup>

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158. *Id.*

159. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 21.

160. Meier, *Getting Real About Abuse and Alienation*, *supra* note 48, at 228–30.

161. LEIGH S. GOODMARK, AMERICAN BAR ASSOCIATION, PROMOTING COMMUNITY CHILD PROTECTION: A LEGISLATIVE AGENDA (2002); Meier, *Domestic Violence*, *supra* note 49; Morrill et al., *supra* note 73; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 1, 116–35; BATTERED MOTHERS' TESTIMONY PROJECT, *supra* note 72.

162. LESTER ADELSON, THE PATHOLOGY OF HOMICIDE: A VADE MECUM FOR PATHOLOGIST, PROSECUTOR AND DEFENSE COUNSEL 490 (1974); KATHLEEN M. BROWN & MARY E. MUSCARI, QUICK REFERENCE TO ADULT AND OLDER ADULT FORENSICS: A GUIDE FOR NURSES AND OTHER HEALTH CARE PROFESSIONALS 28 (2010); BARRY A. J. FISHER & DAVID R. FISHER, TECHNIQUES OF CRIME SCENE INVESTIGATION 387 (2004); JOHN J. MILETICH & TIA LAURA LINDSTROM, AN INTRODUCTION TO THE WORK OF A MEDICAL EXAMINER: FROM DEATH SCENE TO AUTOPSY SUITE 26 (2010).

163. See Daniel G. Saunders, *Evaluating the Evaluators: Research-Based Guidance for Attorneys Regarding Custody Evaluations in Cases Involving Domestic Abuse*, 47 MICH. FAM. L.J. 8, 10 (2017).

C. *Proper Screening for Domestic Violence Is Necessary to Prevent Children from Continued Exposure to Domestic Violence or Direct Abuse and Neglect*

The first step toward protecting children who have been exposed to domestic violence is to identify when it has occurred. To identify these cases, allegations must be taken seriously. Statistics have demonstrated that a parent making intentionally false allegations of child maltreatment is a rare occurrence.<sup>164</sup> Based on countrywide data compiled annually by the Canadian Centre for Justice Statistics, there were an estimated 135,573 investigations into child maltreatment conducted in Canada in 1998.<sup>165</sup> In this study, information about alleged mistreatment was gathered from a random sample of child welfare service jurisdictions across Canada. Of the 7,672 cases analyzed, only four percent were judged by child welfare service workers to be intentionally false claims.<sup>166</sup>

In addition, allegations of domestic violence should be carefully evaluated and considered since there is a strong co-occurrence of child abuse/neglect and domestic violence; it has been found that among approximately 30 percent to 60 percent of families where domestic violence or child maltreatment has been identified, there is a significant likelihood that both forms of abuse occur.<sup>167</sup> Taking allegations seriously is critical to reducing harm to both the children and the non-abusive parent. Due to the dynamics of domestic violence, however, victims may not report incidences of abuse and violence even when they are questioned during an evaluation.<sup>168</sup>

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164. Trocmé et al., *supra* note 154, at 1435.

165. *Id.* at 1430.

166. *Id.* It is important to note that statistics on marital status and divorce rates were not considered in this study.

167. H. LIEN BRAGG, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE (2003), <https://www.childwelfare.gov/pubPDFs/domesticviolence.pdf>.

168. Chris O'Sullivan, *Estimating the Population at Risk for Violence During Child Visitation*, 5 DOMESTIC VIOLENCE REP. 65 (2000) (reporting findings from a study of archival custody (n=1692) and visitation cases (n=222), counselors' case records in felony domestic violence cases (n=97), and interviews with attorneys (n=20) who represented victims of domestic violence in the same jurisdictions); RICHARD B. FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 15 (2005) (examining trends of survey data from the National Violence Against Women Survey conducted by computer-assisted telephone interview, with a sample of 6,291 persons who had experienced physical assaults and 1,787 who had experienced sexual assaults, to examine the

Domestic violence survivors often correctly fear that they will not be believed and will be seen as alienating parents.<sup>169</sup> As in cases of childhood sexual assault, many children are hesitant to report or refrain from reporting altogether, but when asked directly about any abuse, children are more likely to disclose this information.<sup>170</sup> Often, reporting domestic violence can be dangerous, harmful, or used against the victim. At times the victim's attorney or mediator may advise him or her to refrain from disclosing domestic violence.<sup>171</sup> It is also common for victims to lack insight into how damaging child exposure to domestic violence is and believe that family separation is more damaging.<sup>172</sup> Thus, routine screening should be conducted. Appropriate screening for domestic violence in custody cases can help prevent further harm to the child, as intimate partners may use parenting time to abuse, neglect, or otherwise adversely affect the child and use the time spent in the exchange of the children as an opportunity to abuse their ex-spouse/partner.

According to recent findings, households in which domestic violence occurs have a 41 percent correlation with households also experiencing critical injuries or deaths due to child abuse and neglect.<sup>173</sup> To screen for domestic violence and assess the risk of future domestic violence, it is often necessary to employ diverse methods.<sup>174</sup> Interviews and observations can be conducted with children, parents, and other signifi-

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effects that the genders of perpetrator and victim, as well as their relationship to one another, have on likelihood of reporting the incident to the police); *see also* Michael A. Rodriguez et al., *Implications for Health Care Professionals*, 169, 337, 339 W.J. MED. (1998) (detailing results from a qualitative study of 51 women, divided into eight focus groups, who had been victims of domestic violence within the prior two years, where information about attitudes was elicited in the form of semi-structured, open-ended discussion questions posed to focus groups).

169. *See* Meier & Dickson, *supra* note 2, at 328–32.

170. Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 197 (2005) (reviewing recent empirical data and literature related to patterns of abuse disclosure among adults, as compared to children's abuse disclosure patterns).

171. Meier & Dickson, *supra* note 2, at 328–32.

172. Rodriguez et al., *supra* note 168, at 339.

173. SUSAN SCHECHTER & JEFFREY L. EDLESTON, IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES 5 (1994); WASH. STATE SUPREME COURT GENDER & JUSTICE COMM'N., DOMESTIC VIOLENCE MANUAL FOR JUDGES 2-49 (rev. ed. 2016), <https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index> (follow the hyperlink for Chapter 2).

174. American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 866 (2010).

cant figures in the children's lives.<sup>175</sup> In addition, screening and assessment should involve reviewing criminal and civil court records, examining child protective service records, and using validated screening tools to determine risk.<sup>176</sup> Reports of abuse are significantly more likely in court settings where self-report intake questionnaires are administered.<sup>177</sup> Professionals in healthcare settings only need information from a few screening questions to detect domestic violence,<sup>178</sup> and normalizing statements are often effective in helping patients disclose any problems with domestic violence.<sup>179</sup> For example, healthcare professionals can ask a normalizing question in the following way: "I don't know if this is (or ever has been) a problem for you, but many of the clients I see are dealing with abusive relationships. Some are too afraid or uncomfortable to bring it up themselves, so I've started asking about it routinely."<sup>180</sup> These questions can lower an interviewee's defenses and allow the individual to tell evaluators what is really taking place.

Validated screening instruments should also be regularly and systematically employed to help detect domestic violence. The Spouse Assault Risk Assessment<sup>181</sup> and the Danger Assessment<sup>182</sup> are assessment

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175. See KATHLEEN C. BASILE ET AL., CTNS. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE VICTIMIZATION ASSESSMENT INSTRUMENTS FOR USE IN HEALTHCARE SETTINGS: VERSION 1.0 (2007), <https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf> (detailing available instruments and tools for assessing intimate partner violence and sexual violence victimization in clinical and healthcare settings); *but see* Miriam K. Ehrensaft & Dina Vivian, *Is Partner Aggression Related to Appraisals of Coercive Control by a Partner?*, 14 J. FAM. VIOLENCE 251 (1999) (addressing the idea that asking questions about coercive control, rather than physical assault, may produce inconsistent results based on the subjective nature of the perception of coercion and relationship control). While this study is useful, concerns about the external validity/generalizability of its results arise based on the fact that its sample exclusively included young college students in dating relationships, and findings may not apply to different demographic populations. *Id.* at 251.
176. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 107–10.
177. See Robin H. Ballard, Amy Holtzworth-Munroe, Amy G. Applegate, and Connie J. A. Beck, *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 PSYCHOL. PUB. POL'Y L. 1, 20 (2011).
178. See, e.g., BASILE, *supra* note 175, at 66, 108.
179. See Daniel G. Saunders, *Research Based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence*, 12 J. CHILD CUSTODY 71, 73 (2015) [hereinafter Saunders, *Research Based Recommendations*].
180. *Id.*
181. P. Randall Kropp, *Intimate Partner Risk Assessment*, in VIOLENT AND SEXUAL OFFENDERS: ASSESSMENT, TREATMENT AND MANAGEMENT 36, 44 (Jane L. Ireland et al., eds., 2009) (reviewing literature on measures of Intimate Partner Violence risk assessments).

protocols developed for front-line workers and provide specific, standardized questions to detect past occurrences of domestic violence or degree of risk for future abuse. Lethality potential is measured with the validated Danger Risk Assessment,<sup>183</sup> while the validated Ontario Domestic Assault Risk Assessment (ODARA) measures non-lethal domestic violence<sup>184</sup> and the Spousal Assault Risk Assessment is a validated instrument used to measure assault risk.<sup>185</sup>

Coercive control can be evaluated by asking questions such as:

What happens when you try to make decisions that seem like your personal/private matters (like what to wear, how to handle something at work)? How does your spouse react? . . . What kind of freedom does your husband/wife give you to decide for yourself the things that you want to do, or places you want to go? . . . [and] in general, do you feel your husband/wife tries to control you? Please explain.<sup>186</sup>

Non-validated measures should not be used to screen for domestic violence. An example of such a non-validated measure includes the “5 P” model, which can incorrectly find that victims were making false statements or were too pathological to care for their own children. Using non-validated measures can lead to sole or joint custody being granted to abusers.<sup>187</sup> Certain questions on this measure (i.e., questions

182. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT'L INST. JUST. J., NOV. 2003 at 14, 15, <https://www.ncjrs.gov/pdffiles1/jr000250e.pdf> (discussing the Danger Assessment Tool and its abilities and limitations). Scores should be interpreted with caution: “83 percent of the women who were killed had scores of 4 or higher, but so did almost 40 percent of the women who were not killed. This finding indicates that practitioners can use the Danger Assessment (like all intimate partner violence risk assessment tools) as a guide in the process rather than as a precise actuarial tool.” *Id.* at 16.

183. *Id.*

184. See N. Zoe Hilton & Grant T. Harris, *How Nonrecidivism Affects Predictive Accuracy: Evidence from a Cross-Validation of the Ontario Domestic Assault Risk Assessment (ODARA)*, 24 J. INTERPERSONAL VIOLENCE 326, 330–35 (2008) (detailing methods and measures of accuracy for the ODARA, as re-tested on a sample of 391 individuals drawn from police incident archives in Canada). Results from this study demonstrate statistically significant cross-validation of the ability for results to differentiate domestic violence recidivists from non-recidivists. *Id.* at 334.

185. Kropp, *supra* note 180, at 44.

186. Saunders, *Research Based Recommendations*, *supra* note 179, at 75.

187. JANET JOHNSTON, VIVIENNE ROSEBY & KATHRYN KUEHNLE, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 317 (2009); see also SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

relating to being followed) have improperly led evaluators to conclude that victims were suffering from personality disorders or other psychopathology (i.e., paranoia that someone is following her) when she is, in fact, not pathological, but is instead dealing with the reality and trauma of the abuse (i.e., abuser actually is stalking her).<sup>188</sup> Thus, because the results can make it appear as if the victim is suffering from pathology when she is not,<sup>189</sup> it may give her abuser an inappropriate advantage in court.<sup>190</sup>

As another important evidence-based recommendation in assessing whether a family suffers from domestic violence, evaluators should look for patterns of controlling and coercive behavior, rather than emphasizing isolated incidences of physical violence.<sup>191</sup> Studies have documented the fact that when evaluators conduct assessments that place particular focus on coercive-controlling violence, the parenting plans that result from those assessments provide a higher level of safety against domestic violence.<sup>192</sup> In addition, such emphasis typically results in a grant of custody to domestic violence-surviving mothers.<sup>193</sup>

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188. See KENNETH S. POPE, JAMES N. BUTCHER & JOYCE SEELEN, *THE MMPI, MMPI-2, & MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS* (3d ed. 2006).

189. See Fariha I. Khan, Toni L. Welch & Eric A. Zillmer, *MMPI-2 Profiles of Battered Women in Transition*, 60 *J. PERSONALITY ASSESSMENT* 100, 100 (1993) (examining a study in which the scores of 31 women residing in a domestic violence shelter in Pennsylvania obtained on an MMPI-2 protocol were compared and found to be significantly elevated on a number of particular scales). This may provide a good indication of psychological distress related to intimate partner violence, but may also provide the basis for misdiagnosis of pathology. The study authors caution that the sample size was too small to conduct meaningful statistical analysis on results and did not control for all considered confounding variables. *Id.* at 109–10. See also Lynne Bravo Rosewater, *A Critical Analysis of the Proposed Self-Defeating Personality Disorder*, *J. PERSONALITY DISORDERS* 190 (1987) (reviewing literature as to the importance of differentiating between the experience of situational distress and the existence of an enduring personality disorder).

190. Kay Bathurst, et al., *Normative Data for the MMPI-2 in Child Custody Litigation*, 9 *PSYCHOL. ASSESSMENT* 205, 209–10 (1997) (examining a study in which normative data were derived from archival records of child custody litigants in California to whom the MMPI-2 had been administered during the course of child custody determinations); POPE ET AL., *supra* note 188.

191. SAUNDERS ET AL., *CHILD CUSTODY EVALUATORS' BELIEFS*, *supra* note 42, at 8–11.

192. DAVIS ET AL., *supra* note 42.

193. SAUNDERS ET AL., *CHILD CUSTODY EVALUATORS' BELIEFS*, *supra* note 42.

Experts in the field recommend that evaluators meet with each parent separately on different interview days and times.<sup>194</sup> They recommend that parents should be asked pointed questions, including:

- 1) whether they would feel safe if the other parent was in the room;
- 2) whether they can recall the last time they and their partner were able to sit down together and have a conversation about the children;
- 3) how the relationship ended;
- 4) how well the child gets along with the other parent;
- 5) the types of activities in which the child enjoys participating with the other parent;
- 6) whether they would feel comfortable participating in a joint meeting at the child's school;
- 7) whether there have been any incidences of physical or verbal abuse;
- 8) whether there has ever been an order of protection filed; and
- 9) whether there are any restrictions from access to joint money/finances.<sup>195</sup>

Additionally, these experts recommend that the evaluator begin by developing a rapport with the child by discussing issues unrelated to the family discord.<sup>196</sup> After establishing a rapport with the child, the evaluator should explain to the child the evaluator's role and extent of confidentiality and emphasize that his or her main role is to help the child feel safe and protected.<sup>197</sup> In addition, the evaluator should ask the child several open-ended questions to gauge certain behavior patterns of the parents including: (1) what the child's favorite aspects are of going to their mom/dad's house; (2) how the child would feel if they were in the same room with their mom and dad; and, (3) if the child could have three wishes, what they would be.<sup>198</sup> It is also important for the evaluator to assess the child for any obvious signs of abuse, such as visible

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194. E-mail from Nicole Centracchio, Owner & Managing Partner, Reed Centracchio & Associates, LLC (Feb. 12, 2018) (on file with author). This information should be considered expert opinion without scientific verification. Future research should scientifically investigate the merit of these recommended practices.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

bruises, torn clothing, or presenting as withdrawn and refusing to speak.<sup>199</sup> Research indicates that drawing may facilitate young children's ability to talk about emotional experiences in clinical and legal contexts.<sup>200</sup> Drawings can help the child to communicate with the evaluator, meaning that having paper and crayons available can be helpful during the interview process.<sup>201</sup>

While screening children for domestic violence, child representatives must obtain the child's permission to share specifics of what is disclosed;<sup>202</sup> in the event that the evaluator is unable to obtain consent from the child, the evaluator must still advocate on the child's behalf and present a report to the court regarding ways to keep the child safe.<sup>203</sup> The only exceptions to this are cases that involve Rule 1.6.<sup>204</sup> In such cases, if a child representative reasonably believes that disclosure could prevent death or substantial bodily harm, disclosure is thereby necessary.<sup>205</sup> If the evaluator is a guardian *ad litem*, then he or she has an absolute right to tell attorneys and the court exactly what the child has stated during the evaluation. However, as a child representative or guardian *ad litem*, the evaluator has no duty of confidentiality for what is said by the parents during an evaluation.<sup>206</sup>

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199. Amy Swerdlin, Carol Berkowitz & Noah Craft, *Cutaneous Signs of Child Abuse*, 57 J. AM. ACAD. DERMATOLOGY 371, 373, 383 (2007) (reviewing literature relevant to “differentiating cutaneous signs of child abuse, including physical and sexual abuse, from mimickers of inflicted injury”); Centracchio, *supra* note 194.

200. Centracchio, *supra* note 194. *See generally* CATHY A. MALCHIODI, BREAKING THE SILENCE: ART THERAPY WITH CHILDREN FROM VIOLENT HOMES (2d. ed. 2004) (presenting art therapy techniques for children who have witnessed violence in their homes); Julien Gross & Harlene Hayne, *Drawing Facilitates Children's Verbal Reports of Emotionally Laden Events*, 4 J. EXPERIMENTAL PSYCHOL.: APPLIED 163 (1998). The work details a two-part study of New Zealanders of European descent, results of which indicated that engaging in the act of drawing increases a child's tendency to verbalize and facilitates communication of information about their own past experiences. *Id.* at 174–76. However, as authors note, subjects in the present study were from a non-clinical population. *Id.* Therefore, the findings cannot be generalized to situations in which a child has experienced or witnessed a traumatic event.

201. *Id.*

202. Centracchio, *supra* note 194.

203. *Id.*

204. *Id.*; *see also* Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n, 1983).

205. *Id.*

206. *Id.*

D. *Evidence of Domestic Violence Requires Protective Features  
Relating to Custody*

Well-designed research on domestic violence also has important implications for best practices that judges and other professionals should follow in how they react to allegations of domestic violence in child custody cases. When allegations of domestic violence or other evidence of domestic violence exist that are consistent with the dynamics of domestic violence, custody evaluators should determine the extent to which children have already been harmed by exposure to domestic violence or harmed by direct abuse and neglect by the abusive parent, the likelihood of it continuing, and which of the following protective custody-related measures to recommend: (i) allocation of primary parenting time to the non-abusive parent; (ii) allocation of sole decision-making to the non-abusive parent; (iii) supervised parenting time and payment for supervision; (iv) supervised exchanges; (v) requiring exchanges to occur in protected settings; (vi) treatment programs, possibly including substance abuse programs, and requiring parents to not be under the influence of drugs or alcohol when children are placed with them; (vii) prohibitions on overnight physical placement of the child with the abusive parent; and (viii) requiring abusers to post bond for the safe return of the child, and other conditions the court determines necessary for the safety and well-being of the child and the victim.<sup>207</sup>

Using these protective measures is critical because of the strong evidence that coercively abusive intimate partners often use court proceedings over parenting time and decision-making, not to look out for the welfare of their children, but rather to further abuse or punish the other parent, or to induce their ex-spouse/partner to return to the relationship. As Brittany E. Hayes, an Associate Professor in the Department of Criminal Justice and Present Criminology at Sam Houston State University, pointed out, “in relationships where the abusive partner has children with his victim, the children can serve as tools for the abuser to continue his abusive behavior.”<sup>208</sup> Because the goal is to control and

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207. GOVERNOR’S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33, at 91, 98, 131, 137, 140.

208. Brittany E. Hayes, *Abusive Men’s Indirect Control of Their Partner During the Process of Separation*, 27 J. FAM. VIOLENCE 333, 333 (2012) (reviewing a study and logistical regression analysis of 168 women in New York City who were involved in the family court system and had at least one child with a person against whom she had obtained an order of protection).

manipulate the mother, rather than to parent, abusers will use legal means to harass and manipulate. This starts as a bid for parenting time and involvement in decisions that they often ignore during the relationship. An example of this was pointed out by Rita Smith and Pamela Coukos in an article they co-authored while at the National Coalition Against Domestic Violence: “An abusive partner will often threaten to take the children in order to keep the mother in the relationship. If she leaves, he may continue efforts to harass and control her by manipulating custody litigation.”<sup>209</sup> This is why coercively abusive fathers are significantly more likely to seek sole custody of their children than non-coercively abusive fathers. They seek joint custody and more parenting time, not because they want to spend more time with the children, but rather, to perpetuate contact with the mother, monitor the mother’s actions, and exert control over. Thus, as Smith and Coukos reported, “Fathers who batter the mother are twice as likely to seek sole custody of their children than are nonviolent fathers.”<sup>210</sup> And they are often successful, because as Smith and Coukos also noted, “Despite a perception that the courts disproportionately favor mothers, one study has shown that fathers who fight for custody win sole or joint custody in 70 percent of these contests.”<sup>211</sup>

The manipulative behavior does not end with the court battle for the order of custody. Joint decision-making power gives the abuser a never-ending means to further the abuse and harassment. Both parents cannot provide authentic input into decisions under such circumstances, because equality between them is rare.<sup>212</sup> As Dana Harrington Conner, Associate Professor of Law and Director of the Delaware Civil Law Clinic, Widener University School of Law, noted, “The rarity of equality in decision-making between an abuser and his victim renders joint decision-making [on behalf of the child] unworkable.”<sup>213</sup> Under such conditions, the decision-making process is shaped more by the abuser’s

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209. Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES’ J. 38, 40 (1997) (reviewing the literature on this phenomenon, including government reports and reports from the American Psychological Association).

210. *Id.*

211. *Id.*

212. Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL’Y 223, 227 (2011).

213. *Id.* at 227.

attempts at control than by the welfare of the child, because abusers can use decisions as leverage.<sup>214</sup> As Conner noted:

When that joint custodian craves control, as batterers often do, the non-residential batterer may use his legal custodial power to exert control over the most ordinary decisions. Further, if he is not consulted about these commonplace issues a batterer may intimidate the victim, threaten her with legal action, or file with the court in an attempt to harass her through the legal process.<sup>215</sup>

Thus, an abuser may withhold consent for the child to receive counseling or medical procedures or for the child to participate in extra-curricular school activities until the victim concedes to his demands. And the manipulative behavior does not end with the mother, because as experts Lundy Bancroft, Jay G. Silverman, and Daniel Ritchie noted, batterers tend to be controlling and coercive in their direct interactions with children.<sup>216</sup> Likewise, abusers will frequently seek modifications to custody arrangements, and often fail to comply with court orders just to get at the mother.<sup>217</sup> As Smith and Coukos noted, an abusive parent is “likely to disrupt court-ordered visitation schedules as a way to continue the abuse of his former partner” and is “three times as likely to be arrear in child support.”<sup>218</sup> In short, when abusers are granted decision-making powers, decisions are not based on the child’s best interest, but are rather focused on perpetuating the abuse. Abusers can use courtroom conflicts over parenting decisions as a forum to do so.<sup>219</sup>

It is also a bad idea to involve abusive intimate partners in the decision-making process. As Conner pointed out:

A grant of joint legal custody assumes that both parents will make good choices about the welfare of their children. Such an assumption, however, is ill advised in cases involving batterers. A parent who makes poor decisions with regard to his own life is also likely to make poor decisions about his children . . . . Batterers often engage in other risky behavior, including abuse of drugs and alcohol, criminal behavior and

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214. *Id.* at 227, 258.

215. *Id.* at 258.

216. BANCROFT ET AL., *supra* note 49, at 8.

217. Smith & Coukos, *supra* note 209, at 40.

218. *Id.*

219. *Id.*

abuse of children. They fail to comply with court orders and have a general disregard for the law.<sup>220</sup>

Consequently, to protect children and the non-abusive parent from further harm in custody cases where one parent has been engaging in coercive abuse, the non-abusive parent should be granted the sole right to make decisions relating to their children, and courts should order appropriate protective measures to be placed on the parenting time of the coercively abusive parent.

*E. Importance of Appropriately Assessing and Addressing Mental Health Issues and Seeking Appropriate Intervention Programs*

Well-designed research has important implications for determining best approaches to handling mental health issues of domestic violence survivors and their children, as well as recommending various types of intervention programs for abusive parents. When domestic violence is detected, an evaluator should recognize that the survivor has experienced trauma and will be more likely to display symptoms of depression and anxiety.<sup>221</sup> These symptoms may be reactions to violence and controlling behavior by the perpetrator.<sup>222</sup> Survivors of domestic violence endure abuse, harassment, and threats of abuse, which often continue after the couple has separated.<sup>223</sup> In addition to the trauma associated with domestic violence, the survivor must also cope with the overwhelming stress and accompanying emotional symptoms related to the idea that they could potentially lose their children to the perpetrator.<sup>224</sup> Many times, a survivor's symptoms can be severe enough to meet criteria for complex PTSD: a severe form of PTSD characterized by symptoms such as difficulty regulating emotion, explosive anger, episodes of dissociation, negative self-perception, perception of the perpetrator as having total power over the survivor,

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220. Conner, *supra* note 212, at 256.

221. Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87, 97 (2006) (finding women who have experienced intimate partner violence have elevated scores on the 2 and 7 scales, depression and anxiety, respectively).

222. *Id.* at 89 (“[R]esearch tends to support the hypothesis that a battered woman’s MMPI-2 profile often is a result of the abuse she has suffered.”).

223. Smith & Coukos, *supra* note 209, at 38–40.

224. Erickson, *supra* note 221, at 89 (“[The MMPI-2 profile] should not be viewed by child custody evaluators as evidence that [the mother] has personality traits indicating that she would not be a fit parent.”).

isolation and distrust of others, feelings of hopelessness, and a sense of despair.<sup>225</sup> These symptoms can overlap with Borderline Personality Disorder and Paranoid Personality Disorder traits, which may in turn be triggered or exacerbated by domestic violence experiences, as well as the survivor's own history of childhood abuse.<sup>226</sup> It is common for survivors of domestic violence to have a childhood history of abuse and trauma.<sup>227</sup> When they are able to achieve some measure of security in their lives, the symptoms of PTSD and depression often diminish, adding further support to the idea that symptoms are related to the trauma as opposed to underlying psychosis.<sup>228</sup>

Recognizing that the survivor has experienced trauma will help professionals avoid making tragic mistakes. For example, perhaps due to the failure to recognize the trauma that survivors have endured, evaluators are much more likely to recommend sole custody to the perpetrator if the survivor is portrayed as hostile and are also more likely to refer the survivor to counseling, parenting classes, and anger management classes.<sup>229</sup> During evaluations, when the survivor presents as guarded and engages with the evaluator in a negative manner, evaluators and judges often interpret this behavior as personality dysfunction even when the behaviors are a result of the survivor's fears and other symptoms of being victimized.<sup>230</sup>

When mothers struggle with depression, trauma symptoms, and other psychopathology, children also tend to have more problems themselves,<sup>231</sup> but attending to mental health needs can enhance protective factors. Children who have been exposed to domestic violence do better when they are protected by a supportive, healthy, non-abusive parent<sup>232</sup> with good parenting skills.<sup>233</sup> Situational factors such as family support and secure attachment to other caregivers, living in a supportive, safe,

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225. *Id.* at 104–08.

226. *Id.* at 88.

227. See generally Stith et al., *supra* note 103, at 640, 648–49.

228. Saunders, *Research Based Recommendations*, *supra* note 179, at 71, 73.

229. Jennifer L. Hardesty et al., *The Influence of Divorcing Mothers' Demeanor on Custody Evaluators' Assessment of Their Domestic Violence Allegations*, 12 J. CHILD CUSTODY 47, 55 tbl.1 (2015).

230. PRANZO, *supra* note 71, at 48.

231. Gewirtz et al., *supra* note 66, at 36; Graham-Bermann et al., *supra* note 46, at 649; Owen et al., *supra* note 46, at 434.

232. Shonkoff & Garner, *supra* note 47, at 237.

233. Gewirtz et al., *supra* note 66, at 30; Graham-Bermann et al., *supra* note 46, at 650.

and close community,<sup>234</sup> and not experiencing other forms of trauma<sup>235</sup> contribute to greater resiliency in children.

In addition to allocating primary parenting time to the non-abusive parent, the non-abusive parent can be referred to appropriate treatment if he or she is suffering from depression, PTSD, or other struggles that can impact parenting. Appropriate interventions can also be recommended for the children and the abusive parent; therapies such as Trauma-Focused Cognitive Behavioral Therapy (TF-CBT) appear to be the most effective.<sup>236</sup>

It is also important for evaluators to assess the typologies of perpetrators who commit intimate partner violence in order to identify appropriate interventions.<sup>237</sup> For example, an evaluator should examine

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234. Garnezy & Masten, *supra* note 46, at 194; Gewirtz et al., *supra* note 66, at 36; Owen et al., *supra* note 46, at 438; Werner, *supra* note 46, at 74.

235. Graham-Bermann et al., *supra* note 46, at 658.

236. Colleen E. Cary & J. Curtis McMillen, *The Data behind the Dissemination: A Systematic Review of Trauma-Focused Cognitive Behavioral Therapy for Use with Children and Youth*, 34 CHILD & SERVS. REV. 748 (2012) (detailing findings of three meta-analyses of 10 studies to determine if Trauma-Focused Cognitive Behavioral Therapy (TF-CBT) was effective in reducing symptoms of Post-Traumatic Stress Disorder (PTSD), depression, and behavioral problems). Findings were consistent amongst meta-analyses: although immediately after the completion of treatment it appeared that TF-CBT was efficacious for reducing symptoms of all three conditions, only symptoms of PTSD continued to be ameliorated a year after treatment completion. Study authors caution that limitations include the fact that both the number of studies included in the meta-analysis and number of subjects in each study sample were relatively small, as well as the fact that none of the studies examined the effect of the length of time spent in treatment, on treatment outcome. *Id.*; Judith A. Cohen, Anthony P. Mannarino & Satish Iyengar, *Community Treatment of Posttraumatic Stress Disorder for Children Exposed to Intimate Partner Violence: A Randomized Controlled Trial*, 165 ARCHIVES PEDIATRIC & ADOLESCENT MED. 16, (2011) (reviewing randomized double-blind control trial of 124 7-14 year-old children with five or more intimate partner violence-related PTSD symptoms and whose mother was the victim of intimate partner violence, in order to evaluate the effectiveness of TF-CBT as compared to standard treatment for children with intimate partner violence-related PTSD). Although the findings indicate that TF-CBT is more effective in reducing symptoms, they are limited in terms of internal validity as a result of a significantly high (39.5 percent) rate of attrition. *Id.*

237. Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476 (1994) (reviewing available literature and studies on domestic violence to determine via factor analysis if batterers can be typified). Although corroboration exists to support the notion that there are three main batterer typologies, these findings cannot be empirically validated, and their value lies primarily in the qualitative analysis they provide. *Id.* Olga Cunha & Rui Abrunhosa Gonçalves, *Intimate Partner Violence Offenders: Generating A Data-Based Typology of Batterers and Implications for Treatment*, 5 EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT 131 (2013) (discussing

whether an abusing parent is only committing the abuse within the family or whether he or she is violent in all of their relationships, including those outside of the home (i.e., engaging in road rage).<sup>238</sup> Abuse of an intimate partner is often correlated with alcohol or substance abuse behaviors and disorders, and is also associated with an escalation of violence.<sup>239</sup> By knowing the typology of the abuser, an

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a study in which data were obtained from the self-reports of 187 adult males criminally sentenced for intimate partner violence-related offenses.) Concurrent with Holtzworth-Munroe & Stuart, *supra*, cluster analysis (Ward's method) indicated the presence of three empirical subtypes; nevertheless, as with the imprecise nature of cluster analysis conclusions are subject to the clustering methods used. *Id.* Charlie Stoops et al., *Development and Predictive Ability of a Behavior-Based Typology of Men Who Batter*, 25 J. FAM. VIOLENCE 325, (2009) (examining a study in which information was gathered from a biopsychosocial assessment and from archival records from offender databases maintained by both the county and the state for 671 men who had been convicted of crimes related to battering their female partners). Similarly, and in accord with Holtzworth-Munroe & Stuart, *supra*, cluster analysis signaled the existence of three typologies of batterers; however, authors note that the sample examined is not typical of the intimate partner violence perpetrator, and that data were collected by a number of different probation officers, and a lack of uniformity of and/or control over the process may have influenced the results. *Id.*

238. Holtzworth-Munroe & Stuart, *supra* note 237, at 481–93.

239. Kenneth E. Leonard, *Domestic Violence and Alcohol: What is Known and What Do We Need to Know to Encourage Environmental Interventions?*, 6 J. SUBSTANCE USE 235 (2001) at 235 (reviewing a comprehensive analysis of available literature, surveys, and research studies related to the effect of alcohol on domestic violence). While this study makes a compelling case for the positive correlation between alcohol use and domestic violence, conclusions rest on the premise that there is a causal or even facilitative relationship. *Id.* The study's author concedes that it is not actually established by stating "[t]he case for this rests on whether alcohol has any causal or facilitative effects on domestic violence." *Id.* Additionally, operational definitions are somewhat muddled in that differentiation is not made between alcohol use, amount of alcohol consumed, the presence of alcohol abuse disorders, intoxication, and/or other potentially confounding factors. *Id.* Nevertheless, the analysis provides significant benefit in identifying critical areas for future research. *Id.* See also Gregory L. Stuart et al., *Examining a Conceptual Framework of Intimate Partner Violence in Men and Women Arrested for Domestic Violence*, 67 J. STUD. ON ALCOHOL 102 (2006) at 102 (discussing a survey study of 409 men and women referred to batterer intervention programs). Structural equation modeling was used to analyze interrelationships between the perpetrator's gender and a number of measured characteristics; although findings strongly suggest that problematic alcohol use contributes to the perpetration of domestic violence, authors note that they did not corroborate participants self-reports of either their own alcohol use and intimate partner violence or their partner's use of alcohol. *Id.* See also Gregory L. Stuart et al., *The Role of Drug Use in a Conceptual Model of Intimate Partner Violence in Men and Women Arrested for Domestic Violence*, 22 PSYCHOL. ADDICTIVE BEHAV. 12–24 (2008) at 12 (discussing results from further analysis of Stuart et al., *Examining a Conceptual Framework*, *supra*, to determine if problematic drug use is likewise statistically correlated with perpetration of intimate

evaluator can better recommend appropriate interventions. In particular, evidence has been found to support the notion that there are three types of batterers: (1) Family-Only batterers, (2) Dysphoric/Borderline batterers, and (3) Generally Violent/Antisocial batterers.<sup>240</sup> Family-Only batterers are found in up to 50 percent of domestic violence cases,<sup>241</sup> and are primarily violent within the family.<sup>242</sup> They have few, if any, pathologies, and they are the least likely of all domestic violence perpetrators to have witnessed or been victimized during their own childhood.<sup>243</sup> They perpetrate the least severe forms of violence/abuse and are described as “normal” by others.<sup>244</sup> Dysphoric/Borderline batterers are found in approximately 25 percent of cases and are typically violent within the family, but may also commit general violence.<sup>245</sup> This type of batterer also is likely to have psychiatric problems, is emotionally volatile, and is likely psychologically distressed, often with depression or anger issues.<sup>246</sup> These batterers may have substance abuse issues and may have been victims or witnesses of domestic violence during their own childhoods.<sup>247</sup> For these individuals, batterer intervention programs may need to be combined with additional mental health services and substance abuse programs to increase the likelihood of change, improve future behavior patterns, and decrease the rate of recidivism.<sup>248</sup> Generally Violent/Antisocial batterers are present in approximately 25 percent of cases of domestic violence, with family violence being only part of the general violence that is committed by these individuals.<sup>249</sup> Antisocial batterers often have criminal records, have significant psychiatric problems, abuse substances, are the most likely to have been victimized or witnessed domestic violence in childhood, and perpetrate the most severe and chronic violence/abuse.<sup>250</sup> These individuals require criminal justice

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partner violence for both male and female offenders). Interpretation of conclusions should take into consideration that measured variables were based on the “perpetrators’ perceptions of partner behavior.” [emphasis in original]. *Id.*

240. Holtzworth-Munroe & Stuart, *supra* note 237, at 481.

241. *Id.* at 481–82.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Mike Feinerman, Working with People Who Batter (Feb. 15, 2012) (unpublished PowerPoint presentation).

249. Holtzworth-Munroe & Stuart, *supra* note 237, at 482.

250. *Id.*

intervention and intense mental health and substance abuse services, as they are often very dangerous to others.<sup>251</sup>

Partner Abuse Intervention programs seek to change the attitudes and behaviors of abusive intimate partners. Some studies have suggested that these programs are helpful in reducing incidences of domestic violence,<sup>252</sup> while other studies question the utility of these programs.<sup>253</sup>

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251. Feinerman, *supra* note 248.

252. See, e.g., Julia C. Babcock, et al., *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004); Martha Coulter & Carla VandeWeerd, *Reducing Domestic Violence and Other Criminal Recidivism: Effectiveness of a Multilevel Batterer's Intervention Program*, 24 VIOLENCE & VICTIMS 139 (2009) (expounding on a nine-year analysis of recidivism (as measured by re-arrest rates) of 17,999 batterers assigned to one of six batterers' intervention programs). Although findings strongly suggest that these Batterer Intervention Programs (BIPs) are correlated with lower rates of re-offense than for individuals who had not completed treatment, this must be considered in light of the potential confounding fact that the type of individuals who are not diligent with program completion are also the type more likely to reoffend, as well as the consideration that re-arrest rates are not tantamount to re-offense rates, and may instead reflect a better ability to avoid detection. *Id.*; Christopher Eckhardt et al., *The Effectiveness of Intervention Programs for Perpetrators and Victims of Intimate Partner Violence*, 4 PARTNER ABUSE 196 (2013) (discussing meta-analysis of 39 randomized or quasi-experimental studies in which the research design compared a particular BIP to a pertinent comparison group). Study authors found that current research in this area is extremely limited, and that the current available research is often fraught with methodological problems, implementation problems, and other limitations. *Id.*; Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL CRIMINOLOGY 239 (2005) (examining meta-analysis of 15 research studies (representing four experimental and six quasi-experimental studies) evaluating the effectiveness of post-arrest mandated BIPs (each of which had a rigorous experimental or quasi-experimental design, as well as a sufficient amount of data to conduct statistical analysis of effect size); results were mixed, but study authors express concern over generalizability, bias, and validity of the findings); Nicola McConnell, et al., *Caring Dads Safer Children: Families' Perspectives on an Intervention for Maltreating Fathers*, 7 PSYCHOL. VIOLENCE 406 (2017) (reviewing results of the Caring Dads Safer Children (CDSC) (a weekly intervention program designed to change behavior of abusive fathers in order to protect partners and children) and data obtained from 121 partners and 26 children of abusive men in England, Northern Ireland and Wales, as well reports of those men's attitudes and behavior towards their children). Although the inferences of this analysis provide evidence to support the notion that CDSC may reduce risks to the family, limitations include the facts that findings are based on a small sample of children, and that one of the measures used to evaluate fathers' attitudes has not been evaluated for statistical validity or reliability. *Id.* Daniel G. Saunders, *Group Interventions for Men Who Batter: A Summary of Program Descriptions and Research*, 23 VIOLENCE & VICTIMS 156 (2008) (reviewing recent research related to components, methods, effectiveness, and cultural sensitivity of BIPs). The study's author concludes that there are few available studies which provide reliable conclusions,

The reasons behind the small effects in some studies of partner abuse intervention programs include factors such as: (i) unidentified and untreated substance abuse,<sup>254</sup> (ii) lack of full time employment and income,<sup>255</sup> (iii) ethnicity and culture,<sup>256</sup> and (iv) a lack of a “stake in conformity” wherein individuals who have less to lose and are not in danger of losing a job, a marriage, or a stable home, are less motivated to conform to the expectations of intervention programs.<sup>257</sup> Whether

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- although the concepts of matching offender-type to treatment-type, as well as increasing cultural appropriateness, have shown promising results. *Id.* Katreena L. Scott & Vicky Lishak, *Intervention for Maltreating Fathers: Statistically and Clinically Significant Change*, 36 CHILD ABUSE & NEGLECT 9 (2012) (discussing a study of 98 fathers who had neglected or abused their children or who had exposed their children to domestic violence in the Caring Dads (CDSC) batterers’ intervention program in Ontario, Canada, to determine the efficacy of community-based group-treatment for this population). The amount of change from pre-intervention to post-intervention was analyzed for statistical significance; although results from this study are encouraging in that they suggest the possibility of effective treatment. *Id.* Nevertheless, findings need to be interpreted in light of the fact that data obtained came from the fathers’ own unsubstantiated reports. *Id.* Gabrielle Davis, *Custody Evaluators’ Beliefs About Domestic Violence*, BATTERED WOMEN’S JUST. PROJECT (2011) (reviewing meta-analysis of 22 studies on the effectiveness of BIP treatment for adult male domestic violence perpetrators; authors note a high level of variability in the quality and validity of studies in this area of research, as well as an overall trend of small effect sizes in studies that have been conducted).
253. See, e.g., Babcock et al., *supra* note 252; Eckhardt et al., *supra* note 252; Feder & Wilson, *supra* note 252.
254. LARRY BENNETT ET AL., PROGRAM COMPLETION, BEHAVIORAL CHANGE, AND RE-ARREST FOR THE BATTERER INTERVENTION SYSTEM OF COOK COUNTY ILLINOIS: FINAL REPORT TO THE ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY 3 (2005), <http://www.icjia.state.il.us/assets/pdf/ResearchReports/CookCountyDVInt.pdf>.
255. *Id.* at 35–36.
256. *Id.* at 36 (demonstrating more effectiveness for Latinx individuals than for whites or African Americans).
257. LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992) (analyzing studies of the efficacy of mandatory arrest in cases of domestic violence, demonstrating that arrest does not necessarily reduce the incidence of domestic violence among unemployed individuals); JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1995), <https://www.ncjrs.gov/pdffiles/crimdom.pdf>; Richard A. Berk et al., *The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOC. REV. 698 (1992) (Overview of six studies examining whether arrests for domestic violence discourage future violence and/or protect victims). Although the majority of data support both of the hypotheses, two of the six do not support these conclusions, meaning that Bayesian Analysis was conducted only on studies confirming a given premise. *Id.*

culturally-matched intervention programs provide increased efficiency is controversial and more research is needed.<sup>258</sup>

A partner abuse intervention program in Cook County, Illinois, has demonstrated promising results.<sup>259</sup> There has been a 73.4 percent completion rate in the studied programs,<sup>260</sup> and completion of the program has contributed to a reduction in incidences of re-arrest by 63 per-

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258. See, e.g., Samuel R. Aymer, *A Case for Including the "Lived Experience" of African American Men in Batterers' Treatment*, 15 J. AFR.-AM. STUD. 352 (2011) (reviewing literature on the cultural experiences that shape the beliefs and attitudes of African American men regarding domestic violence, how culturally-promoted chauvinistic attitudes contribute to perpetration of domestic violence, and how consideration of these societal influences should be incorporated into treatment and intervention for African American male batterers). Evidence of race-related stress exists to substantiate the idea that sociocultural influences from African American culture may impact the likelihood of intimate partner violence. *Id.* Congruent with Williams, *infra*, the study's author notes that more studies are needed to better understand and address the needs of this particular population. *Id.* José Rubén Parra-Cardona et al., "En el Grupo Tomas Conciencia (In Group You Become Aware)": *Latino Immigrants' Satisfaction With a Culturally Informed Intervention for Men Who Batter*, 19 VIOLENCE AGAINST WOMEN 107 (2013) (reviewing a qualitative study of interviews of 21 Latino adult males who participated in batterer intervention programs designed to be culturally informed). Findings are limited by the fact that information gathered from batterers' self-reports was not corroborated, and that the study's small sample size prevents generalizability of conclusions to greater populations. *Id.* Bernadine Waller, *Broken Fixes: A Systematic Analysis of the Effectiveness of Modern and Postmodern Interventions Utilized to Decrease IPV Perpetration Among Black Males Remanded to Treatment*, 27 AGGRESSION & VIOLENT BEHAV. 42 (2016) (exploring findings from a systematic review of studies including African American male offenders' recidivism and attrition rates). Although many current interventions have enormous benefit, many are also disproportionately ineffective for African American individuals as a result of a failure to properly accommodate considerations related to ethnic and racial sociocultural influence. *Id.* Oliver J. Williams, *Ethnically Sensitive Practice to Enhance Treatment Participation of African American Men Who Batter*, 73 FAMILIES IN SOC'Y 588 (1992) (examining whether ethnically sensitive approaches to standard BIPs have an effect on the success of those interventions for African American males). As the author notes, literature in this area is lacking, but this provides a useful qualitative overview and direction for future research. *Id.* But see Edward W. Gondolf, *Outcomes of Case Management for African-American Men in Batterer Counseling*, 23 J. FAM. VIOLENCE 173 (2008) (examining a quasi-experimental evaluation of an archival sample of 482 cases of African American adult males who had previously been enrolled in BIPs to determine whether the implementation of case management had an effect on outcomes of intervention). Although findings suggest that case management does not lead to a significant improvement on the effects of intervention, multivariate analysis was unable to control for the characteristics of offenders in either the case-management or no-case-management conditions. *Id.*

259. BENNETT ET AL., *supra* note 254, at 4.

260. *Id.*

cent.<sup>261</sup> Issues related to having a “stake in conformity” were the most important correlates of success in the intervention programs.<sup>262</sup>

F. *An Evidence-Based Analysis of Fathers’ Rights Group Claims  
Relating to Domestic Violence and Custody Issues*

The claim by fathers’ rights groups that courts favor mothers over fathers is based on studies that have found “gender parity” in anonymous surveys wherein women report committing violence against their partners at the same rate that men report committing violence against their partners.<sup>263</sup> Thus, they reason that while only 50 percent of perpetrators are male, 77 percent of those who are arrested are male.<sup>264</sup> From this, they claim that there is a gender bias against men.<sup>265</sup> There is indeed a large scientific literature demonstrating “gender parity” including meta-analyses.<sup>266</sup> The studies on which these meta-analyses and other literature reviews showing “gender parity” use questionnaires wherein women’s answers did not differ from men’s answers, apparently because those questions reflected situational couple violence.<sup>267</sup> Many researchers have made the distinction between situational couple violence and coercive abuse, finding that men are more likely to perpetrate violence involving coercive abuse.<sup>268</sup> As a counter-argument to the evidence of a coercive abuse distinction, fathers’ rights groups point to studies that asked about motivation for situational couple violence, and women as well as men say that they commit violence to try to get their partners to do something (i.e., coerce their partners).<sup>269</sup> However, trying to get

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261. *Id.* at 51–52.

262. Berk et al., *supra* note 257; Sherman et al., *supra* note 257; Fagan, *supra* note 257.

263. See, e.g., STOP ABUSIVE AND VIOLENT ENVIRONMENTS, PREDOMINANT AGGRESSOR POLICIES: LEAVING THE ABUSER UNACCOUNTABLE? 6 (2013) [hereinafter PREDOMINANT AGGRESSOR POLICIES], [http://www.saveservices.org/pdf/SAVE-Predominant\\_Aggressor.pdf](http://www.saveservices.org/pdf/SAVE-Predominant_Aggressor.pdf).

264. MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, FAMILY VIOLENCE STATISTICS 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

265. PREDOMINANT AGGRESSOR POLICIES, *supra* note 263.

266. John Archer, *Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review*, 126 PSYCHOL. BULL. 651 (2000).

267. See generally Michael P. Johnson et al., *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required*, 20 VIOLENCE AGAINST WOMEN 186 (2014).

268. See, e.g., Suzanne Swan, et al., *A Review of Research on Women’s Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301 (2008).

269. Murray A. Straus, *Dominance and Symmetry in Partner Violence by Male and Female University Students in 32 Nations*, 30 CHILD. & YOUTH SERV. REV. 252, 254 (2007).

partners to do something is not the same as the type of constant surveillance and threats described as coercive abuse by victims of domestic violence.<sup>270</sup> Even Murray A. Straus, a “gender parity” advocate, admitted that “the adverse effects of being a victim of domestic violence are much greater for women than for men” with greater injuries and economic vulnerabilities;<sup>271</sup> that women have more reasons to be afraid;<sup>272</sup> that cultural norms sanctioning violence against women must be changed;<sup>273</sup> and that because of women’s greater injuries and legitimate fear, police and hospital statistics reflect greater levels of abuse of women by men.<sup>274</sup>

Because of these factors, even if there were “gender parity” in initiating violence against intimate partners, greater levels of abuse of women by men would rise to the level of violating the law. Furthermore, recently-developed questionnaires have found differences in levels of violence perpetrated by men versus women, indicating that the questionnaires which suggested “gender parity” were not well-designed and missed critical ways in which violence is gendered.<sup>275</sup> It is also noteworthy that the concept of “gender parity” focuses only on measuring the amount of abuse that men and women commit, and does not address whether family law courts apply the same standards to women as to men. Nevertheless, fathers’ rights groups allege that courts favor women over men in divorce and parentage cases without any valid empirical support, while a careful review of actual court cases (rather than the questionable calculations suggested by the fathers’ rights group analyses) demonstrate that courts are actually biased against women.<sup>276</sup> Research found that raising abuse claims worked against women; that fathers were

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270. Kimberly A. Crossman & Jennifer L. Hardesty, *Placing Coercive Control at the Center. What Are the Processes of Coercive Control and What Makes Control Coercive?*, 8 PSYCHOL. VIOLENCE 196 (2018).

271. Murray A. Straus, *Thirty Years of Denying the Evidence on Gender Symmetry in Partner Violence: Implications for Prevention and Treatment*, 1 PARTNER ABUSE 332, 336 (2010).

272. *Id.* at 347.

273. *Id.* at 348.

274. *Id.* at 347.

275. See Sherry Hamby, *Self-Report Measures That Do Not Produce Gender Parity in Intimate Partner Violence: A Multi-Study Investigation*, 5 PSYCHOL. VIOLENCE (2014). Examination of wording of items on behavioral checklists and self-report measures found that earlier-established methods tend to be worded in such a way that they fail to adequately take into account the high occurrence of false-positives that produce asymmetrical reflections of victimization scores based on gender. *Id.* By contrast, wording that reduces false positives (e.g., qualifiers like “not including horseplay or joking around”, “when my partner was angry”, or “not joking”) provides more accurate results and gender parity in measurement. *Id.*

276. Meier & Dickson, *supra* note 2, at 228–31.

more likely to win when abuse claims were raised than when no abuse claims were raised because abuse claims were seen as attempts by mothers to “alienate” fathers from children. Claims of “alienation” trumped claims of abuse even when courts accepted the evidence of abuse and were much more likely to be successful when raised by fathers than when raised by mothers (demonstrating a gender bias in favor of fathers).<sup>277</sup>

The next problematic claim of the fathers’ rights groups is that mothers routinely falsely allege domestic violence or child abuse. They have gone so far as to claim that, “In about 70 [percent] of cases, the allegation is deemed to be unnecessary or false.”<sup>278</sup> They often base claims like this on studies like the one conducted by experts Janet R. Johnston, Soyoung Lee, Nancy W. Olesen, and Marjorie G. Walters in 2005, which looked at rates in which claims could be substantiated from court records.<sup>279</sup> The unjustified inference is that 100 percent of all cases that could not be substantiated from court records alone were false, and not just false, but rather “deemed” to be false (a claim the authors never made).<sup>280</sup> These unsubstantiated cases were never deemed to be false.<sup>281</sup> A comparable methodology on the opposite side of this debate is to look at conviction rates for false allegations, cases where allegations were proven to be false. One such study from the United Kingdom found six convictions for false allegations out of 111,891 cases where there were allegations of domestic violence, or a false allegation rate of 0.005 percent.<sup>282</sup> Neither of these methods of estimating frequencies of false allegations is a good estimate of the prevalence of false allegations in the population.<sup>283</sup>

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277. *Id.*

278. INCENTIVES TO MAKE FALSE ALLEGATIONS, *supra* note 14, at 1.

279. Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283–94 (2005).

280. *Id.*

281. *Id.* at 284–85. “Child protection workers substantiated 27 [percent] of allegations against fathers, suspected another 27 [percent], believed that 1.3 [percent] were false, and the remainder unfounded.” *Id.* The authors made a clear distinction here between the 73 percent of allegations that were unsubstantiated and the 1.3 percent that were deemed to be false. *Id.* For the fathers’ rights groups to ignore this difference and claim that all 73 percent of allegations were false is not intellectually honest.

282. Alison Levitt, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*, CROWN PROSECUTION SERVICE EQUALITY AND DIVERSITY UNIT 3 (2013).

283. *See id.* One method ignores all allegations that could not be proven true using unreasonably difficult criteria and the other ignores all allegations that could not be proven false using unreasonably difficult criteria.

The actual methodology used by Johnson et al. in *Allegations and Substantiations of Abuse in Custody-Disputing Families* was to have three clinical psychologists and three clinical social workers review court documents from the divorce proceedings of highly conflicted families.<sup>284</sup> These trained raters looked for evidence of domestic violence in court documents such as child protective service reports, self-admissions, eyewitness reports taking into account the credibility of the witnesses, expert testimony, medical records, police reports, arrests, plea bargains, and criminal convictions.<sup>285</sup> The researchers then looked at whether these ratings lined up with allegations.<sup>286</sup> They found that there were allegations against the father in 55 percent of cases, and 41 percent of those cases were substantiated.<sup>287</sup> By contrast, there were allegations against the mother in 30 percent of cases, and 15 percent of those cases were substantiated. The actual levels of substantiation are of secondary interest here because, given the private contexts in which much domestic violence is perpetrated, it is not surprising that many cases could not be substantiated. The question was whether allegations were well-founded.<sup>288</sup> Not every case of actual abuse would have child protective service reports, self-admissions, and eyewitness reports taking into account the credibility of the witnesses, expert testimony, medical records, police reports, arrests, plea bargains, or criminal convictions. For fathers' rights groups to then automatically claim that 100 percent of those unsubstantiated cases are false is intellectually dishonest.

The more interesting result from the Johnson et al. study is that, contrary to the claims of the fathers' rights groups, not only were there more allegations against fathers than against mothers, but the allegations against fathers were substantiated at a higher rate than the allegations against mothers.<sup>289</sup> These differences were statistically significant.<sup>290</sup> Furthermore, the motivations that the fathers' rights groups ascribe to women (i.e., that it is all part of a "gamesmanship of divorce," to gain an economic advantage in the divorce or parentage case, or to get custody) are all based upon anecdotes and arguments that incentives are in

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284. Johnston et al., *supra* note 279, at 286.

285. *Id.* at 287.

286. *Id.*

287. *Id.* at 288–89.

288. *Id.* at 283.

289. *Id.* at 288–89.

290. *Id.* at 289.

place for women to do so.<sup>291</sup> They offer no proof that women actually do so.<sup>292</sup>

The fathers' rights group claim that is most directly relevant to the policy prescriptions that we advocate in this Article, however, involves research on the well-being of children under joint versus sole custody. There have been many studies demonstrating that children are often better off in joint custody situations (defined in most of these studies as spending at least 25 percent of the parenting time with each parent).<sup>293</sup> But these studies—even if they looked at the degree of conflict in the marriage or in the divorce, and even if they looked at violence in the relationship—have not looked at the degree of abusive, coercive control in the relationship.<sup>294</sup> One study published in 2015 by Swedish experts Malin Bergström, Emma Fransson, Bitte Modin, Marie Berlin, Per A. Gustafsson, and Anders Hjern, used a large national survey of children in Sweden to investigate the well-being of children in joint physical custody (“approximately equal”) compared to children living only or mostly with one parent and to children in nuclear families.<sup>295</sup> They found that children in joint physical custody were better off than children living only or mostly with one parent (with children in intact nuclear families best off).<sup>296</sup> A key limitation with this study is that it did not separate out many of the variables that previous research indicated affects both the viability of joint physical custody and outcomes for children.<sup>297</sup> They did not control for parents' mental health, addictions, violence, or abuse.<sup>298</sup> This study did look at socio-economic status, but the study measured it by asking the children to rate their satisfaction with

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291. INCENTIVES TO MAKE FALSE ALLEGATIONS, *supra* note 14, at 2.

292. *Id.*

293. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91 (2002).

294. Linda Nielsen, *Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*, 23 PSYCHOL., PUB. POL'Y, & L. 211, 212 (2017).

295. Malin Bergström et al., *Fifty Moves a Year: Is There an Association between Joint Physical Custody and Psychosomatic Problems in Children?*, 69 J. EPIDEMIOLOGY & COMMUNITY HEALTH 769 (2015) (correlational study of survey results). Primary problems with this study include the possibility of reverse causation and third variables; of note, this study had an extremely large sample size (N = 147,839), increasing confidence in results. *Id.*

296. *Id.*

297. *Family Law Reform Conference Gathers Leading Researchers and Practitioners*, NATIONAL PARENTS ORGANIZATION (Nov. 19, 2014), <https://nationalparentsorganization.org/component/content/article/16-latest-news/22067-family-law-reform-conference-gathers-leading-researchers-and-practitioners> (last visited Dec. 29, 2018).

298. *See* Bergström et al., *supra* note 295.

their material resources, rather than using objective measures of socio-economic status.<sup>299</sup> Nevertheless, even using this measure to control for socio-economic status caused a large reduction in the effect of joint physical custody on positive outcomes for children.<sup>300</sup>

Notwithstanding the weaknesses in this study, fathers' rights groups, such as the National Parents Organization, have pointed to these results to argue that courts should place children in joint physical custody.<sup>301</sup> Meta-analyses of children's well-being in joint versus sole custody situations are consistent with the view that children who come from families where joint custody is a viable option, taking into account all relevant factors, are better off, but the inference that courts should, therefore, place children with abusive parents without considering the abuse is not justified. Joint custody is only likely to be a viable option when there has not been coercive control in the relationship. Bergström et al. and the other studies that have looked at this topic have failed to look at or control for levels of coercive control. The benefits of joint custody have not been supported and have been shown to be contradicted in these very different types of situations.<sup>302</sup> For example, a large-scale study of joint physical custody (defined as 35 percent or more nights with each parent) versus sole physical custody arrangements in Australia found that children did less well in joint than in sole custody situations when mothers "expressed safety concerns."<sup>303</sup>

A number of studies have looked at the degree of "conflict" in the marriage or post-divorce and how it affects the well-being of children in joint legal custody versus sole legal custody situations.<sup>304</sup> Note that "conflict" cannot serve as a proxy for either situational couple violence or coercive abuse, since the studies failed to distinguish between them. These studies have generally found that even controlling for such conflict, children are still better off in joint custody situations.<sup>305</sup> Sometimes situational conflict can be reduced post-divorce after decisions are laid out

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299. *Id.* at 769.

300. *Id.*

301. NATIONAL PARENTS ORGANIZATION, *supra* note 297.

302. Linda Nielsen, *Shared Physical Custody: Summary of 40 Studies on Outcomes for Children*, 55 J. DIVORCE & REMARRIAGE 613, 623 (2014).

303. JUDY CASHMORE ET AL., SOCIAL POLICY RESEARCH CENTER, SHARED CARE PARENTING ARRANGEMENTS SINCE THE 2006 FAMILY LAW REFORMS 52 (2010), [https://www.sprc.unsw.edu.au/media/SPRCFile/2\\_AG\\_Shared\\_Care.pdf](https://www.sprc.unsw.edu.au/media/SPRCFile/2_AG_Shared_Care.pdf).

304. Marjorie Linder Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors that Predispose a Sole Maternal Versus Joint Legal Award*, 25 L. & HUM. BEHAV. 25 (2001); Bauserman, *supra* note 293.

305. Gunnoe & Braver, *supra* note 304, at 25; Bauserman, *supra* note 293, at 91.

in the parenting decree and the parents have fewer issues to disagree over, such that children can benefit from joint legal custody arrangements.<sup>306</sup> These studies, however, did not seek to identify situational couple violence or coercive abuse situations, let alone to control for them.<sup>307</sup> Furthermore, the studies that have tried to control for conflict shed no light on the benefits of joint versus sole legal custody in divorces that involve coercive control, because victims of coercive control are often afraid to report conflict when doing so could infuriate the abusive intimate partner and lead to heightened abuse.<sup>308</sup>

Even situational couple violence can harm children. The interactions necessary to coordinate joint custody create new, additional instances where violence can occur, and individuals who resort to violence to resolve conflicts are more likely to be deficient or abusive parents and poor role models.<sup>309</sup> In situations involving coercive abuse as we have defined it earlier,<sup>310</sup> there is no way to make joint legal custody (joint decision-making) or joint physical custody (equal or roughly equal parenting time) tenable, because abusers will use continuing interactions to attempt to undermine the other parent and to continue the coercive abuse.<sup>311</sup>

In 2008 Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks, and Nicholas Bala published a review of the scientific literature on the different types of domestic violence and situations in which there has been domestic violence and their risks.<sup>312</sup> They then proposed different parenting arrangements that might be possible under these different situations.<sup>313</sup> Per Jaffe et al., joint legal and joint physical custody is only appropriate in a situation where there has been very low levels of violence, the violence was situational and is now in the past, the traumas have been resolved, and there has been a substantial history of successful co-parenting.<sup>314</sup> They describe another possible parenting arrangement

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306. Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 502, 511 (2008) [hereinafter Jaffe et al., *Custody Disputes*].

307. Kelly & Johnson, *supra* note 33.

308. See Smith & Coukos, *supra* note 209.

309. Jaffe et al., *Custody Disputes*, *supra* note 306, at 502 (reviewing the most pertinent research on custody issues in cases involving domestic violence, paying particular attention to the different subtypes of domestic violence and how each subtype affects custody issues).

310. See *supra* notes 39, 40 and accompanying text.

311. Jaffe et al., *Custody Disputes*, *supra* note 306.

312. Jaffe et al., *Common Misconceptions*, *supra* note 42.

313. *Id.*

314. See *id.* at 511 tbl.2.

called “parallel parenting” that can be appropriate for situational couple violence cases (as contrasted with coercive abuse cases) where the domestic violence was moderate to low on potency.<sup>315</sup>

Jaffe et al. provide numerous details on when parallel parenting is appropriate and how it should be structured to promote the best interests of the child and protect the parent who is a survivor of domestic violence.<sup>316</sup> Under a parallel parenting arrangement, the parenting plan is drawn up by dividing decision-making responsibilities between the parents, with different decision-making issues allocated to each parent. The basic idea is that the parenting plan should provide for clear boundaries and separation between the parents, and a time-sharing schedule that requires minimal communication between the parents and seeks to avoid direct parent-parent contact, but still provide stability and continuity in the child’s life.<sup>317</sup> The parallel parenting can provide joint or sole legal and physical custody (if joint, the time-share schedule should meet all of the above described criteria).<sup>318</sup> Each parent’s access to the child would include unsupervised day or overnight visits, with a range of time sharing between the parents as specified by the court.<sup>319</sup> The access would also be structured for natural transition times and to minimize disruption to the child’s school, social, and extra-curricular activities.<sup>320</sup> The court order for access should explicitly detail the times, dates, places of exchange, holidays, etc., so that after the plan is drawn up, little communication is required and the parents can avoid as much direct face-to-face contact as possible.<sup>321</sup> The court order on parenting time would require adherence to the details of the order and not require flexibility or compromise regarding exchanges of the children.<sup>322</sup> The protocols would be in place to avoid conflict and to prohibit threats of any violence and sabotage between parents. Permanent restraining orders would remain in place, including restraints from taking the child out of the area without the other parent’s consent, neutral places of exchange that are safe and comfortable for the child (such as a neutral relative, visiting center, school, or library) and structured telephone access to the child.<sup>323</sup> The court order on parenting time would also include rules for

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315. *See id.* at 512 tbl.2.

316. *See id.*

317. *See id.*

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

communicating emergency and other necessary information between the parents using technology that enables the communications to be monitored by the court.<sup>324</sup> Parents would not be allowed to communicate through the child.<sup>325</sup> Finally, the parenting order would include a procedure (such as use of a parenting coordinator) for resolving any new issues not addressed in the parenting order.<sup>326</sup>

The authors agree with all of these aspects of parallel parenting as described by Jaffe et al., but have a concern with their statement that parallel parenting emphasizes consistent, safe child-care practices within separate homes, rather than common practices. Without sufficient common practices within the two separate homes, the child's life may become so inconsistent between two households that the child could be harmed by this lack of consistency. We thus recommend that the goal of creating adequate common practices also be emphasized under parallel parenting. To reflect this goal, we recommend that the term "parallel parenting" be revised to "structured independent parenting time" to emphasize that the parenting order on parenting time will include adequate details and structure to promote common practices sufficient to safeguard the child's emotional and physical well-being. Research has demonstrated that the absence of a consistent bedtime routine can negatively impact child development and behavior.<sup>327</sup> Similarly, a lack of uniformity in rules and explanations across settings has also shown to be consistent with the development of child behavioral problems.<sup>328</sup>

In other situations, Jaffe et al. argue that the best evidence to date on the well-being of children in cases involving domestic violence is sole legal and primary physical custody to the non-violent parent.<sup>329</sup> Jaffe et al. also addressed how to respond to cases involving higher levels of situational couple violence, and concluded that in such cases, supervised exchange may be sufficient to reduce the likelihood of further abuse during the exchange of the child.<sup>330</sup> Per Jaffe et al., there might be some cases where there has been coercive abuse when supervised visiting time

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324. *See id.*

325. *See id.*

326. *See id.*

327. Jodi A. Mindell et al., *Developmental Aspects of Sleep Hygiene: Findings from the 2004 National Sleep Foundation Sleep in America Poll*, 10 SLEEP MEDICINE 771, 771–78 (2009); *see also* Ronald E. Dahl & Daniel S. Lewin, *Pathways to Adolescent Health Sleep Regulation and Behavior*, 31 J. ADOLESCENT HEALTH 175, 175–81 (2002).

328. Alejandra Ros Pilarz & Heather D. Hill, *Unstable and Multiple Child Care Arrangements and Young Children's Behavior*, 29 EARLY CHILD. RES. Q. 471, 471–82 (2015).

329. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 61–62.

330. *Id.* at 514.

might be sufficient to protect the child, such as when there has been treatment for substance abuse or acute mental illness and the child wants contact or will gain from the parent's continued involvement.<sup>331</sup> In most cases where there has been coercive abuse, however, contact between the parents or between the abusive parent and the child should be suspended, until the causes for the coercive abuse have been addressed.<sup>332</sup>

To distinguish between situational couple violence and coercive abuse, it is best to look beyond singular violent episodes, as both types of domestic violence involve violent episodes.<sup>333</sup> In coercive abuse, abusers typically blame the victim for the violence as well as the injuries, hospital or emergency room visits, or 9-1-1 calls; or they use jealousy to justify what happened.<sup>334</sup> Coercive abuse often involves intimidation, such as looks, actions, or gestures to make the victim afraid, smashing things or destroying property to send a signal to the victim, abusing pets to send a signal to the victim, or displaying weapons to send a signal to the victim.<sup>335</sup> Coercive abuse often involves threats: making or carrying out threats to do something or to hurt the victim, threats to commit suicide, threats to get the victim to drop charges, or threats to get the victim to do illegal things.<sup>336</sup> There is also often emotional abuse, such as put-downs or name-calling, humiliating the victim (especially in public), use of insults to make the victim feel bad about herself or himself, mind games, and guilt trips for common behaviors.<sup>337</sup> Coercive abusers also often strive to isolate the victim, limit their access and involvement in the outside world, control what they do, who they see or talk to, what they read, and where they go.<sup>338</sup> They often treat victims as servants.<sup>339</sup> The victim of coercive abuse is often afraid of the abuser.<sup>340</sup> There is often financial abuse, such as not allowing the victim to work outside the home.<sup>341</sup> Bank accounts or other financial assets may only be in the abuser's name, such that the victim does not have any access to

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331. *Id.*

332. *Id.* at 515.

333. Stark, *Commentary on Johnson*, *supra* note 35 (reviewing literature on the distinctions between different types of domestic violence and how domestic violence should not be viewed as simply a combination of discrete acts, but rather as a pattern of abuse).

334. PENCE & PAYMAR, *supra* note 40, at 3.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

money.<sup>342</sup> Victims are sometimes kept ignorant of family income and denied access to that family income.<sup>343</sup> If the victim has some income of her own, the abuser may take it.<sup>344</sup> If the victim needs money, she may be required to ask for it, or she might be given an allowance.<sup>345</sup>

Abusers in coercive abuse cases also often abuse the judicial system.<sup>346</sup> They might threaten to report the victim to child protective services or other government agencies when the supposed infraction would not have normally led to such an action.<sup>347</sup> They might threaten to use the court system to get custody and take the children, not because they are interested in parenting, but rather to keep the victim in the relationship.<sup>348</sup> They will often use court proceedings over parenting time and decision-making, not to look out for the welfare of their children, but rather to further abuse or punish the other parent, or to induce their ex-spouse/partner to return to the relationship.<sup>349</sup> They might file court petitions that are nominally in the children's interest, but are better explained as an attempt to coerce the former spouse.<sup>350</sup> They might request court motions that perpetuate contact with the mother, allow them to monitor the mother's actions, and allow them to exert control over the mother.<sup>351</sup> They may likewise use court-ordered joint decision-making as leverage to get the victim to act as the abuser wishes or threaten to bring legal action when the abuser is not consulted about commonplace parenting issues.<sup>352</sup> They may withhold consent for the child to participate in activities such as extracurricular school activities or procedures, such as counseling or medical procedures, until the victim concedes to the abuser's demands.<sup>353</sup> They may disrupt court-ordered visitation schedules as a way to continue coercion or abuse.<sup>354</sup> They are also often in arrears in court-ordered child support and they

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342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. Smith & Coukos, *supra* note 209 (reviewing the literature on this phenomenon including government reports and reports from the American Psychological Association).

347. PENCE & PAYMAR, *supra* note 40, at 3.

348. Smith & Coukos, *supra* note 209, at 38.

349. *Id.*

350. *Id.*

351. Jaffe et al., *Custody Disputes*, *supra* note 306, at 503.

352. Smith & Coukos, *supra* note 209, at 38.

353. Jaffe et al., *Custody Disputes*, *supra* note 306, at 503.

354. Smith & Coukos, *supra* note 209, at 38.

disobey court orders.<sup>355</sup> They are often controlling and coercive in their direct interactions with children, such as requiring children to act in ways that are not associated with common good parenting practices.<sup>356</sup> Finally, coercive abuse often correlates with other behaviors, such as poor decision-making for him or herself and the children, drug and alcohol abuse, criminal behavior, abuse of children, failure to comply with court orders, and general disregard for the law.<sup>357</sup> Thus, coercive abuse can be differentiated from situational couple violence when one looks at the entire pattern of the relationship and other personal traits.

## II. AN EXAMINATION OF THE EXTENT THAT IDENTIFIED BEST PRACTICES ARE REQUIRED BY LAW

As detailed in Section I, in order to properly take domestic violence into account in custody cases, professionals who work on custody cases (family law attorneys, judges, guardians *ad litem*, child representatives, and other custody evaluators) should be required to receive special training on the nature and dynamics of domestic violence, preferably as provided in the Wisconsin Guide<sup>358</sup> or other evidenced-based resources.<sup>359</sup> In addition to this mandatory training, best practices would also include requiring that guardians *ad litem*, child representatives, and other custody evaluators properly screen for domestic violence and child abuse and investigate any allegations of domestic violence or child abuse, per evidence-based training. Finally, guardians *ad litem*, child representatives, and other custody evaluators should be required to recommend one or more protective measures when there is evidence that children have been exposed to domestic violence or child abuse. The level of protection should be tailored to address past harm experienced and to help prevent the danger of future serious harms to the child or non-abusive parent.

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355. *Id.*

356. PENCE & PAYMAR, *supra* note 40, at 3.

357. Conner, *supra* note 212, at 223, 227.

358. See GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.

359. This includes the counter-intuitive nature of domestic violence, its impact on survivors, the danger of serious harm to children from exposure to domestic violence, how to properly screen for and investigate claims of domestic violence and child abuse, and many other aspects as detailed in Wisconsin's Domestic Abuse Guidebook. See GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.

Previous research found that when judges received Specialized Domestic Violence Training and recommendations for some of the Protective Measures from family law professionals, they were more likely to see the need for at least some of the Protective Measures and to order and enforce some Protective Measures (i.e., they were more likely to give mothers sole physical custody, but less likely to restrict fathers' visitation).<sup>360</sup> This result demonstrates both the benefits of training and the need to further educate judges on why the remaining Protective Measures are so important.

This Section reviews the extent to which states have enacted legislation or supreme court rules that require Specialized Domestic Violence Training, Domestic Violence Screening and Investigation, and Protective Measures in child custody cases. It also identifies gaps among the states in mandating these evidence-based best practices.

*A. To What Extent Do States Require Family Law Judges to Receive Training on Domestic Violence?*

Based upon a review of state legislation and supreme court rules, we have found that only the District of Columbia<sup>361</sup> and 11 states clearly require, without waiver, that family law judges receive domestic violence training: California,<sup>362</sup> Connecticut,<sup>363</sup> Kentucky,<sup>364</sup> Nevada,<sup>365</sup> New

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360. Morrill et.al, *supra* note 73, at 1097.

361. D.C. CODE ANN. § 11-1104(c) (Westlaw through Jan. 11, 2019) (“The chief judge, in consultation with the presiding judge of the Family Court, shall carry out an ongoing program to provide training in family law and related matters for judges . . . and shall include in the program information and instruction regarding the following: . . . (B) Family dynamics, including domestic violence . . . (E) Recognizing the risk factors for child abuse.”); D.C. CODE ANN. § 11-1732A(f) (Westlaw through Jan. 11, 2019) (“The chief judge, in consultation with the presiding judge of the Family Court of the Superior Court, shall ensure that all magistrate judges of the Family Court receive training to enable them to fulfill their responsibilities, including specialized training in family law and related matters.”).

362. CAL. R. CT. 10.464(a) (“Each judge . . . who hears criminal, family, juvenile delinquency, juvenile dependency, or probate matters must participate in appropriate education on domestic violence issues as part of his or her requirements and expectations under rule 10.462. Each judge or subordinate judicial officer whose primary assignment is in one of these areas also must participate in a periodic update on domestic violence as part of these requirements and expectations.”).

363. CONN. GEN. STAT. ANN. § 46b-38c(j) (Westlaw through Jan. 1, 2019) (“The Judicial Department shall establish an ongoing training program for judges . . . to inform them about the policies and procedures of sections 46b-1, 46b-15, 46b-38a to 46b-38f, inclusive, and 54-1g, including, but not limited to, the function of the family violence intervention units and the use of restraining and protective orders.

Jersey,<sup>366</sup> New Mexico,<sup>367</sup> New York,<sup>368</sup> Oklahoma,<sup>369</sup> South Carolina,<sup>370</sup> Tennessee,<sup>371</sup> and West Virginia.<sup>372</sup> Minnesota requires that domestic

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Such training program shall include an examination of the factors that contribute to a family being at risk for episodes of domestic violence within the family.”).

364. KY. REV. STAT. ANN. § 21A.170 (Westlaw through 2018 Reg. Sess.) (“The Supreme Court shall provide, at least once every two (2) years, in-service training programs for Circuit Judges, District Judges, and domestic relations and trial commissioners in: . . . (2) Dynamics of domestic violence, effects of domestic violence on adult and child victims, legal remedies for protection, lethality and risk issues, model protocols for addressing domestic violence, available community resources and victims services, and reporting requirements.”).
365. Admin. Office of the Courts, *Judicial Education Overview*, NEV. JUDICIARY, [https://nvcourts.gov/AOC/Programs\\_and\\_Services/Judicial\\_Education/Overview](https://nvcourts.gov/AOC/Programs_and_Services/Judicial_Education/Overview) (last visited Feb. 14, 2019) (“Continuing judicial education on the causes, effects, and dynamics of domestic violence for all District Court judges, Justices of the Peace, Municipal Court Judges, and Domestic Relations Masters”); *see also* JUD. EDUC. REQUIREMENTS: ST. OF NEV. APP. A, [https://nvcourts.gov/AOC/Programs\\_and\\_Services/Judicial\\_Education/Documents/Important\\_Documents/Judicial\\_Education\\_Requirements/](https://nvcourts.gov/AOC/Programs_and_Services/Judicial_Education/Documents/Important_Documents/Judicial_Education_Requirements/) (last updated Nov. 2018) (stating that “[a]ll District Court Judges, Justices of the Peace, Municipal Court Judges, and Domestic relations Masters” must have as part of required training “continuing judicial education on the causes, effects, and dynamics of domestic violence”).
366. N.J. STAT. ANN. § 2C:25-20b(1) to (2) (Westlaw through L.2018, c. 169 and J.R. No. 14) (“The Administrative Office of the Courts shall develop and approve a training course and a curriculum on the handling, investigation and response procedures concerning allegations of domestic violence . . . . The Administrative Director of the Courts shall be responsible for ensuring that all judges and judicial personnel attend initial training within 90 days of appointment or transfer and annual inservice training as described in this section.”).
367. N.M.R.A. 18-204G(2) (“Annual training for metropolitan, district and appellate court judges, domestic violence special commissioners and domestic relations hearing officers shall include appropriate training in understanding domestic violence, as determined by the Judicial Continuing Education Committee.”).
368. N.Y. CT. R. § 17.4 (“Each judge or justice in a court that exercises criminal jurisdiction, including town and village justices, each judge of the Family Court, and each justice of the Supreme Court who regularly handles matrimonial matters shall attend, every two years, a program approved by the Chief Administrator of the Courts addressing issues relating to domestic violence.”).
369. There is a statute in place requiring the Oklahoma Supreme Court to establish a rule that requires training that “includes” domestic violence training. OKLA. STAT. ANN. tit. 10A, § 1-8-101A (Westlaw through 2d Legis. Sess. of 58th Leg.) (“The Supreme Court is required to establish by rule, education and training requirements for judges, associate judges, special judges, and referees who have juvenile docket responsibility. Rules shall include, but not be limited to, education and training relating to juvenile law, child abuse and neglect, foster care and out-of-home placement, domestic violence, behavioral health treatment, and other similar topics.”). However, the Supreme Court rules regarding Mandatory Judicial Continuing Legal Education do not contain any specific requirements regarding domestic violence training. OKLA. M.C.L.E.R. 1.

violence training be provided but does not state whether family court judges are required to attend such training, so it is not included on the list.<sup>373</sup> Texas' requirements for the training of judges on domestic violence are unclear in terms of whether a judge in a divorce or parentage child custody case would be included in the requirement.<sup>374</sup>

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370. S.C. CODE ANN. § 16-25-100 (Westlaw through 2018 Reg. Sess.) (“Magistrates, municipal court judges, family court judges, and circuit court judges shall receive continuing legal education on issues concerning domestic violence. The frequency and content of the continuing legal education is to be determined by the South Carolina Court Administration at the direction of the Chief Justice of the South Carolina Supreme Court.”).
371. TENN. CODE ANN. § 38-12-107 (Westlaw through 2018 Reg. Sess.) (“All state and local court administrators, court clerks, and judges, with personnel who are likely to encounter situations involving domestic violence, shall adopt a policy regarding domestic violence and provide initial and continuing education concerning the dynamics of domestic violence, and the handling and response procedures concerning allegations of domestic violence to all judges and court personnel who are likely to encounter allegations of domestic violence.”); TENN. CODE ANN. § 38-12-109 (Westlaw through 2018 Reg. Sess.) (“The administrative office of the courts shall establish a policy regarding, and a continuing education curriculum concerning, domestic violence and shall provide continuing education on domestic violence to all judges and court personnel throughout the state who are likely to encounter situations of domestic violence. The administrative office of the courts may adopt the policy and training curriculum developed by the domestic violence state coordinating council, and may revise the policy and training curriculum at its discretion.” § 38-12-109).
372. W. VA. CODE ANN. § 48-27-1104 (Westlaw through 2018 1st Extraordinary Sess.) (“All circuit court judges may and magistrates and family courts [sic] shall receive a minimum of three hours training each year on domestic violence which shall include training on the psychology of domestic violence, the battered wife and child syndromes, sexual abuse, courtroom treatment of victims, offenders and witnesses, available sanctions and treatment standards for offenders, and available shelter and support services for victims.”).
373. MINN. STAT. ANN. § 480.30 (Westlaw through 2018 Reg. Sess.) (“The Supreme Court’s judicial education program must include ongoing training for district court judges on child and adolescent sexual abuse, domestic abuse, harassment, stalking, and related civil and criminal court issues. The program must include the following: (1) information about the specific needs of victims; (2) education on the causes of sexual abuse and family violence; (3) education on culturally responsive approaches to serving victims; (4) education on the impacts of domestic abuse and domestic abuse allegations on children and the importance of considering these impacts when making parenting time and child custody decisions under chapter 518; and (5) information on alleged and substantiated reports of domestic abuse, including, but not limited to, Department of Human Services survey data.” § 480.30).
374. TEX. GOV’T CODE ANN. § 22.110 (2017 Reg. and 1st Called Sess. of 85th Leg.) (“The court of criminal appeals shall assure that judicial training related to the problems of family violence, sexual assault, trafficking of persons, and child abuse and neglect is provided.”). A judge is exempt from the training requirements if the judge “files an affidavit stating that the judge or judicial officer does not hear any cases

The training statutes in the District of Columbia,<sup>375</sup> Minnesota,<sup>376</sup> Texas,<sup>377</sup> and West Virginia<sup>378</sup> combine domestic violence training with required training related to forms of abuse. The state of Washington has tested pilot programs which contain mandatory domestic violence training.<sup>379</sup> Both Georgia and Idaho allow for the creation of courts focused on domestic violence issues and provide for certain domestic violence training for the judges in those courts.<sup>380</sup> While we did not engage in a multi-county search within any state for any county level mandatory domestic violence training, we did discover one in Georgia.<sup>381</sup> We assume there may be other counties in other states that require domestic violence training for their family law judges.

Arizona is not included in the list of 11 states with mandatory training of family law judges on domestic violence because there is the possibility of waiving it, but this waiver is only in limited circumstances and temporary in nature, so this approach is much better than merely

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involving family violence, sexual assault, trafficking of persons, or child abuse and neglect.” § 22.110. It appears this training is intended for judges in criminal cases or in child abuse and neglect cases.

375. See D.C. CODE ANN. § 11-1104(c) (Westlaw through Jan. 11, 2019); D.C. CODE ANN. § 11-1732A(f) (Westlaw through Jan. 11, 2019).

376. See MINN. STAT. ANN. § 480.30 (Westlaw through 2018 Reg. Sess.).

377. See TEX. GOV'T CODE ANN. § 22.110 (2017 Reg. and 1st Called Sess. of 85th Leg.).

378. See W. VA. CODE ANN. § 48-27-1104 (Westlaw through 2018 1st Extraordinary Sess.).

379. WASH. REV. CODE ANN. § 26.12.804 (Westlaw through 2018 Reg. Sess.) (stating that the judges of the superior judicial districts with unified family court pilot programs shall require initial training and continuing training for judges in unified family court regarding “childhood development . . . and mental illness”); N.Y. JUD. LAW § 212.2(n) (LexisNexis through 2019) (repealed 2018) (requiring “[t]raining about domestic violence” for judges hearing orders of protection in family court).

380. IDAHO CODE ANN. § 32-1409(a) (Westlaw through 2018 2d Reg. Sess. of 64th Leg.) (stating that in Idaho “the district court in each county may establish a domestic violence court,” and if such a court is created, a “committee shall recommend policies and procedures for domestic violence courts addressing eligibility, identification and screening, assessment, treatment and treatment providers, case management and supervision, judicial monitoring, supervision of progress and evaluation. The committee shall also solicit specific domestic violence court plans from each judicial district, recommend funding priorities for each judicial district and provide training to ensure the effective operation of domestic violence courts.” § 32-1409(a).); GA. COMM'N ON FAMILY VIOLENCE, GEORGIA DOMESTIC VIOLENCE COURTS BEST PRACTICES (2017).

381. SUPER. CT. FULTON CTY. FAM. DIV. R. 1000-3 (“Each Judicial Officer shall receive twenty (20) hours of training, including four (4) hours of domestic violence training.”).

“recommending” domestic violence training for judges handling child custody cases.<sup>382</sup>

The following five states recommend that judges obtain training on domestic violence but do not absolutely require it: Alabama,<sup>383</sup> Georgia,<sup>384</sup> Idaho,<sup>385</sup> Illinois,<sup>386</sup> and Maryland.<sup>387</sup> For example, the

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382. Under Arizona law, training of judges on domestic violence is required as part of New Judge Orientation and can only be waived under limited circumstances. ARIZ. CODE OF JUD. ADMIN. § 1-302(F)(2) (“Upon request, the chief justice, the chief judge, the presiding judge of the superior court in each county, or their designees may grant exemptions to judges and employees of their court for temporary circumstances, including but not limited to: (a) Medical or other physical conditions preventing active participation in educational programs; (b) Extended, approved leave of absence; (c) Military leave; (d) Extended jury duty; (e) Temporary medical waivers for defensive tactics courses, in accordance with ACJA § 6-107.”). See ARIZ. SUP. CT., DOMESTIC VIOLENCE TRAINING FOR JUDGES, (2007), [http://azmag.gov/Portals/0/Documents/pdf/cms.resource/RDVC\\_2007\\_08-16\\_DV-Training-for-Judges71064.pdf?ver=2007-08-16-105700-000](http://azmag.gov/Portals/0/Documents/pdf/cms.resource/RDVC_2007_08-16_DV-Training-for-Judges71064.pdf?ver=2007-08-16-105700-000).
383. ALA. R. MANDATORY JUD. EDUC. I.1, II.2, <http://judicial.alabama.gov/docs/library/rules/ManJEd.pdf> (providing that judicial training credits will be given for programs that address a variety of topics and domestic violence is an approved topic).
384. GA. COMM’N ON FAM. VIOLENCE, *supra* note 380.
385. IDAHO CODE ANN. § 32-1409(1) to (2) (West through 2018 2d Reg. Sess. of 64th Leg.) (stating that each county can establish a “domestic violence court” and that “[t]he committee shall also solicit specific domestic violence court plans from each judicial district, recommend funding priorities for each judicial district and provide training to ensure the effective operation of domestic violence courts”); IDAHO DOMESTIC VIOLENCE CTS., IDAHO DOMESTIC VIOLENCE CT. POLICIES & GUIDELINES, ATTACHMENT A [https://isc.idaho.gov/dv\\_courts/DV\\_Court\\_Policies\\_and\\_Guidelines\\_revised\\_4.15.pdf](https://isc.idaho.gov/dv_courts/DV_Court_Policies_and_Guidelines_revised_4.15.pdf) (last updated April 2015) (“It is critical that a judge selected to serve on a domestic violence court be highly interested in taking on the job and willing to be educated on the complex issues surrounding domestic violence.”).
386. ILL. SUP. CT. R. 908(c) (“Judges who, by specific assignment or otherwise, may be called upon to hear child custody or allocation of parental responsibilities cases should participate in judicial education opportunities available on these topics, such as attending those sessions or portions of the Education Conference, presented bi-annually at the direction of the Supreme Court, which address the topics described in paragraph (a) of this rule. Judges may also elect to participate in any other Judicial Conference Judicial Education Seminars addressing these topics, participate in other judicial education programs approved for the award of continuing judicial education credit by the Supreme Court, complete individual training through the Internet, computer training programs, video presentations, or other relevant programs. ILL. SUP. CT. R. 908(c). The Chief Judges of the judicial circuits should make reasonable efforts to ensure that judges have the opportunity to attend programs approved for the award of continuing judicial education credit by the Supreme Court which address the topics and issues described in paragraph (a) [allocation of child custody and parental responsibility] of this rule.” ILL. SUP. CT. R. 908(c).).
387. IN THE COURT OF APPEALS OF MARYLAND: ADMINISTRATIVE ORDER ON CONTINUING EDUCATION OF JUDGES, MAGISTRATES, AND COMMISSIONERS (2016),

Illinois Supreme Court Rules state that judges hearing child custody or allocation of parental responsibilities cases “should” participate in judicial education opportunities on the topics of domestic violence issues and child sexual abuse issues, but does not require that such training sessions be provided and attended.<sup>388</sup> Some states require judicial continuing education without specifying whether it includes domestic violence.<sup>389</sup>

The results of this research, with only 11 states clearly requiring family law judges to receive training on domestic violence without waiver, reflect a profound failure to apply evidence-based best practices to achieve the goal of adequately taking domestic violence into account in child custody cases. Requiring such training is a major part of the law reform recommended in Section III.

B. *To What Extent Do States Require Guardians ad litem, Child Representatives, or Other Custody Evaluators to Receive Training on Domestic Violence and to Screen for Domestic Violence in Their Child Custody Cases?*

Based primarily upon a review of the legislation and state supreme court rules in each state, 13 states clearly require guardians *ad litem*, child representatives, or other custody evaluators, without waiver, to receive domestic violence and/or child abuse and neglect training in a child custody case: Arkansas,<sup>390</sup> California,<sup>391</sup> Connecticut,<sup>392</sup> Idaho,<sup>393</sup>

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<https://mdcourts.gov/sites/default/files/admin-orders/20160606continuingedofjudgesmagistratescommissioners.pdf> (stating that the training program “shall focus” on issues including “domestic violence”).

388. ILL. SUP. CT. R. 908.

389. For example, the state of Wisconsin requires all judges to complete continuing education. WIS. SUP. CT. R. 33.02. There is a section named “Required programs” that only covers attending the “Wisconsin judicial college, the criminal law-sentencing institute and the prison tour.” WIS. SUP. CT. R. 32.04. Wisconsin also requires Municipal judges to complete training at a “municipal judge orientation institute, review institute or graduate institute developed by the judicial education office.” WIS. SUP. CT. R. 33.04. The Maine Commission on Domestic and Sexual Abuse “may make recommendations on legislative and policy actions, including training of the various law enforcement officers, prosecutors and judicial officers responsible for enforcing and carrying out the provisions of this chapter, and may undertake research development and program initiatives consistent with this section.” ME. REV. STAT. ANN. tit. 19-A, § 4013 (Westlaw through 2017 2d Reg. Sess. and 2d Spec. Sess. of 128th Leg.).

390. ARK. ADMIN. ORD. § 15.1(b)(1) (2016) (Westlaw through 2016).

391. CAL. GOV'T CODE § 68555 (Westlaw through 2018 Reg. Sess.) (“The Judicial Council shall establish judicial training programs for individuals who perform duties

Indiana,<sup>394</sup> Maine,<sup>395</sup> Minnesota,<sup>396</sup> Missouri,<sup>397</sup> New Hampshire,<sup>398</sup> New York,<sup>399</sup> Ohio,<sup>400</sup> Oklahoma,<sup>401</sup> and Virginia.<sup>402</sup> The following states only recommend domestic violence and/or child abuse training: Alaska,<sup>403</sup> Illinois,<sup>404</sup> Kansas,<sup>405</sup> Maryland,<sup>406</sup> and Wisconsin.<sup>407</sup>

In Alaska,<sup>408</sup> Arizona,<sup>409</sup> Kansas,<sup>410</sup> and Maryland,<sup>411</sup> the initial training can be waived. Among the group of 20 states with required or

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in domestic violence matters, including, but not limited to, judges, referees, commissioners, mediators, and others as deemed appropriate by the Judicial Council . . . . The training programs shall include a domestic violence session in any orientation session conducted for newly appointed or elected judges and an annual training session in domestic violence.”); CAL. R. OF CT. 10.464(a) (Westlaw through Dec. 15, 2018).

392. Conn. Gen. Stat.

393. IDAHO JUV. R. 35(e) (2018), <https://isc.idaho.gov/ijr35>.

394. IND. CODE ANN. § 31-9-2-50 (Westlaw through 2018 Second Regular Session and First Spec Session of the 120th General Assembly).

395. ME. R. GUARDIAN AD LITEM R. 2(b)(2)(A)(iv) (Westlaw through amendments received through March 1, 2019).

396. Minn. Guardian Ad Litem Program Requirements and Guidelines, [https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS\\_tcm27-364018.pdf](https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS_tcm27-364018.pdf) (Last revised Dec. 19, 2018).

397. Standards with Comments for Guardians Ad Litem in Missouri Juvenile and Family Court Matters, (complete text of an Order entered by the Supreme Court of Missouri en banc on September 17, 1996 establishing standards for GALS in Missouri courts) <http://mija.org/images/resources/publications/GALStd.doc>.

398. N.H. R. CH. GAL 303.02(b)(1)(k), [http://www.gencourt.state.nh.us/rules/state\\_agencies/gal300.html](http://www.gencourt.state.nh.us/rules/state_agencies/gal300.html).

399. Become an Attorney for the Child, N.Y. App. Div. 4th Jud. Dep’t.

400. OHIO SUP. R. 48(D)(11) (Westlaw through amendments received through February 15, 2019).

401. OKLA. STAT. ANN. tit. 43 § 1-8-101(A)(1) (LEXIS through Nov. 1, 2013); Guardian Ad Litem Bd. Laws and Rules §303.02(b)(1)(k) (last visited Mar. 18, 2019) [http://www.gencourt.state.nh.us/rules/state\\_agencies/gal300.html](http://www.gencourt.state.nh.us/rules/state_agencies/gal300.html).

402. Standard to Govern the Appointment of Guardians Ad Litem Pursuant to Section 16.1-266, Code of Va., Judicial Council of Va., [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf).

403. ALASKA R. CINA 11(c) (Westlaw 2006).

404. ILL. SUP. CT. R. 906(c).

405. KAN. SUP. CT. R. 110A.

406. MD. RULES ANN. tit. 9, Ch. 200, App. § 4 (Westlaw 2018).

407. WIS. SUP CT. R. 35.03.

408. ST. OF ALASKA, GUIDELINES FOR CONT. AND CT. APPOINTED GUARDIANS AD LITEM IN CHILD IN NEED OF AID PROC. 5–6 (2007), [http://doa.alaska.gov/opa/pdfs/07\\_contract\\_gdlines.pdf](http://doa.alaska.gov/opa/pdfs/07_contract_gdlines.pdf) (The Office of Public Advocacy “may waive all or part of the initial training requirement for a new guardian ad litem depending on background or experience.”).

409. ARIZ. REV. STAT. ANN. § 40.1.J (West 2014) (“Attorneys shall provide the judge with an affidavit of completion of the six (6) hour court approved training requirement

recommended training on domestic violence or child abuse, the number of hours of initial training for these topics ranged from six to 18.<sup>412</sup> The following are the 20 states<sup>413</sup> where the guardian *ad litem*, child representative, or child's attorney is required or recommended to receive training on domestic violence or child abuse (with footnotes for each state containing the language requiring or recommending such training): Alaska,<sup>414</sup> Arizona,<sup>415</sup> Arkansas,<sup>416</sup> California,<sup>417</sup> Connecticut,<sup>418</sup>

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prior to or upon their first appointment as attorney or guardian ad litem for a child after the adoption of this rule unless a waiver of this requirement has been obtained from the presiding judge of the juvenile court in which the appointment is to be made.”).

410. KAN. SUP. CT. R. 110A (“The appointing judge may waive the prerequisite education when necessary to make an emergency temporary appointment. The educational requirements must be completed within 6 months after appointment.”).
411. MD. RULES ANN. TIT. 9, CH. 200, APP. § 4 (West 2018) (stating that “[u]nless waived by the court, an attorney appointed as a Child’s Best Interest Attorney, Child’s Advocate Attorney, or Child’s Privilege Attorney should have completed at least six hours of training that includes the following topics: . . . (e) recognizing, evaluating, and understanding evidence of child abuse and neglect; (f) family dynamics and dysfunction, domestic violence, and substance abuse”).
412. ARIZ. ST. JUV. CT. R. 40.1(j) (requiring 6 hours of initial guardian ad litem training); CAL. ST. FAM. JUV. R. 5.242(c)-(d) (initially requiring “at least 12 hours of applicable education and training” with an additional requirement that counsel “must complete during each calendar year a minimum of eight hours of applicable education and training”); IDAHO JUV. R. 35(e)(1) (requiring “at least 30 hours” of “pre-service training”); ILL. SUP. CT. R. 906 (stating that “[p]rior to appointment the attorney shall have 10 hours in the two years prior to the date the attorney qualifies for appointment”); KAN. SUP. CT. R. 110A(b)(1)(A) (requiring 6 hours of initial training); LA. SUP. CT. R. XXXIII, pt. 3, sub. I, §3(A)(3) (requiring 6 hours of training each year); OHIO SUP. CT. R. 48(E)(2) (requiring 6 hours of initial training); ME. R. FOR GUARDIANS AD LITEM 2(b)(2)(B) (requiring 18 hours of initial training); MD. RULES ANN. tit. 9, Ch. 200, App. § 4 (Westlaw 2018) (requiring 6 hours of initial training).
413. This list also includes Arizona, a state that requires training but permits waiver of that requirement in limited circumstances.
414. ALASKA R. CT. 11(C), (2016) <https://public.courts.alaska.gov/web/rules/docs/cina.pdf> (“(2) The guardian ad litem should have an understanding of the following as appropriate to the case: (A) child development from infancy through adolescence; (B) the impact of child abuse and neglect on the child.”).
415. ARIZ. REV. STAT. ANN. § 40.1J (West 2014). “All attorneys and guardians ad litem shall complete at least eight (8) hours each year of ongoing continuing education and training.” § 40.1(J). The “[e]ducation and training shall be on juvenile law and related topics, such as . . . the effects of the trauma of parental domestic violence upon children and other issues concerning abuse and/or neglect of children.” § 40.1(J). However, the initial training requirement can be waived by the court. § 40.1(J).
416. ARK. ADMIN. ORDER 15.1(B)(1) (2016) (stating that “[p]rior to appointment,” to represent children “an attorney shall have” initial and continuing training and the “[i]nitial training must include: . . . Dynamics of abuse and neglect; . . . Family dy-

Idaho,<sup>419</sup> Illinois,<sup>420</sup> Indiana,<sup>421</sup> Kansas,<sup>422</sup> Maine,<sup>423</sup> Maryland,<sup>424</sup> Minnesota,<sup>425</sup> Missouri,<sup>426</sup> New Hampshire,<sup>427</sup> New York,<sup>428</sup> Ohio,<sup>429</sup> Oklahoma,<sup>430</sup> Virginia,<sup>431</sup> West Virginia,<sup>432</sup> and Wisconsin.<sup>433</sup>

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namics, which may include but is not limited to, the following topics: substance abuse, domestic violence and mental health issues”).

417. CAL. R. OF CT. ANN. § 5.242(C) (West 2018). “[B]efore being appointed as counsel for a child in a family law proceeding, counsel must have completed at least 12 hours of applicable education and training which must include all the following subjects: . . . (3) Spec issues in representing a child, including the following: . . . (C) Recognizing, evaluating and understanding evidence of child abuse and neglect, family violence and substance abuse, cultural and ethnic diversity, and gender-specific issues; (D) The effects of domestic violence and child abuse and neglect on children.” § 5.242(C).
418. CONN. GEN. STAT. ANN. CH. 815(E) § 46B-38C(J) (West 2019). “The Judicial Department shall establish an ongoing training program for . . . guardians ad litem . . . to inform them about the policies and procedures of sections 46b-1, 46b-15, 46b-38a to 46b-38f, inclusive, and 54-1g, including, but not limited to, the function of the family violence intervention units and the use of restraining and protective orders. Such training program shall include an examination of the factors that contribute to a family being at risk for episodes of domestic violence within the family.” CH. 815(E) § 46B-38C(J).
419. GUARDIAN AD LITEM PROGRAMS, 35 IDAHO JUV. R. § (E) (2012) (“(1) Each [guardian *ad litem*] Program shall require that volunteers complete at least 30 hours of required pre-service training and 12 hours of required in-service training per year (2) Pre-service training shall include the following topics: . . . (C) Dynamics of families including mental health, substance abuse, domestic violence, and poverty.”).
420. ILL. SUP. CT. RULE ANN. § 906(C) (West 2018) “Certification requirements may address minimum experience requirements for attorneys appointed by the court to represent minor children.” § 906(C) “In addition, the qualifications may include one or all of the following which are recommended: (1) Prior to appointment the attorney shall have 10 hours in the two years prior to the date the attorney qualifies for appointment in approved continuing legal education courses in the following areas: . . . family dynamics, including substance abuse, domestic abuse, and mental health issues. (2) Periodic continuing education in approved child related courses shall be required to maintain qualification as an attorney eligible to be appointed.” § 906(C).
421. IND. CODE ANN. § 31-9-2-50(B) (West 2018). “‘Guardian ad litem’ . . . means an attorney . . . who: . . . (3) has completed training appropriate for the person’s role, including training in: (A) the identification and treatment of child abuse and neglect.” § 31-9-2-50(B).
422. KAN. SUP. CT. R. ANN. 110A § (B)(1)(B) (West 2019) “Areas of education [for a Guardian *ad litem*] should include, but are not limited to: dynamics of abuse and neglect . . .” R. ANN. 110A § (B)(1)(Kansas requires initial and continuing training although initial training can be waived for an emergency temporary appointment. R. ANN. 110A § (B)(2).
423. ME. CT. RULES FOR GUARDIANS AD LITEM § 2(B) (West 2018) (stating that guardian ad litem “must have attended” a core training program which covers the “dynamics of domestic abuse and its effect on children”).

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424. MD. CODE ANN., FAM. LAW § 9-200, app § 4 (Westlaw through all legis. from the 2018 Reg. Sess. of the General Assembly) (“Unless waived by the court, an attorney appointed as a Child’s Best Interest Attorney, Child’s Advocate Attorney, or Child’s Privilege Attorney should have completed at least six hours of training that includes the following topics: . . . (e) recognizing, evaluating, and understanding evidence of child abuse and neglect; (f) family dynamics and dysfunction, domestic violence, and substance abuse.”).
425. MINN. GUARDIAN AD LITEM PROGRAM REQUIREMENTS & GUIDELINES (Non-statutory) (2015), [https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS\\_tcm27-364018.pdf](https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS_tcm27-364018.pdf) (requiring at least 6 hours of “training on domestic and family violence”).
426. See Standards *supra* note 395, at 16.0 (“No person shall be appointed as guardian ad litem without first completing twelve hours of specialized training. Thereafter, to continue to be appointed as a guardian ad litem a person shall complete six hours of specialized training annually . . . . The specialized training shall include . . . Dynamics of child abuse and neglect issues . . . Family and Domestic Violence issues”).
427. N.H. REV. STAT. ANN. § 490-C:6 (West 2018). “Court Appointed Special Advocates (CASA) of New Hampshire shall be accountable to the guardian ad litem board for complying with the training requirements established by the board under RSA 490-C:5, I(d) and for the actions of its volunteer members who are appointed by the court as guardians *ad litem*.” § 490-C:6.; see also Office of Prof'l Licensure and Certification, GUARDIAN AD LITEM BD. RULES § 302.02 (stating that training shall “[e]ncompass instruction in at least the following areas: . . . Domestic violence training”).
428. See N.Y. RULES OF THE CHIEF JUDGE ANN. LAW § 7.1(A) (West 2018) (“Each of the Appellate Divisions shall by January 1, 1980 promulgate rules pertaining to the establishment and operation of a panel of lawyers qualified for assignment as law guardians to represent minors in proceedings in Family Court.”); see also N. Y. App. Div., 4th Jud. Dep’t, *Become an Attorney for the Child*, <https://ad4.nycourts.gov/afcl/prospective>. (“When you are accepted to the training program you will be given access to the domestic violence videos on-line. You must view four segments of domestic violence training online to be eligible for designation to a county panel.” *Id.*).
429. OHIO ADMIN. CODE 48 (West 2018) (stating that the “pre-service course shall include training on all the following topics: . . . (c) Preventing child abuse and neglect including, but not limited to, assessing risk and safety; (d) Family and child issues including, but not limited to, family dynamics, substance abuse and its effects, basic psychopathology for adults and children, domestic violence and its effects”).
430. OKLA. STAT. tit. 43, § 107.3(A)(4) (Westlaw through legis. of the Second Reg. Sess. of the 56th Legislature 2018) (“[T]he Administrative Director of the Courts shall develop a standard operating manual for guardians ad litem which shall include, but not be limited to, legal obligations and responsibilities, information concerning child abuse, child development, domestic abuse, sexual abuse, and parent and child behavioral health and management including best practices.”).
431. Standard to Govern the Appointment of Guardians Ad Litem Pursuant to Section 16.1-266 I.B.1.f.
432. W. VA. RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT. app. § B(1) (Guidelines for Guardians Ad Litem in Fam. Ct.) (stating that, “Every guardian ad litem shall complete eight (8) hours of continuing legal education credits every two years provided by the West Virginia Supreme Court comprising of: understanding

Wisconsin is the only state where the guardian *ad litem*, child representative, or custody evaluator is clearly required by supreme court rule or legislation to screen for domestic violence in the divorce or parentage custody cases on which they are working.<sup>434</sup> Finding only one state that requires screening to be performed by a professional that courts rely upon in making child custody decisions is shocking in light of the prevalence of domestic violence within society and its harmful impact on children. As explained in Section I, screening for domestic violence in child custody cases is necessary since many survivors of domestic violence do not self-report. In addition, it is not difficult or time-consuming to perform basic screening for domestic violence, especially when trained on how to do it. Several states suggest that screening should be done but do not clearly require it to be done.<sup>435</sup>

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the stages of child development from early childhood through adolescence; recognizing the signs and symptoms of abuse and neglect and their effects upon children; recognizing the signs and characteristics of domestic violence and their effects upon children”).

433. WIS. SUP. CT. R. 35.03 (2003) (Approval of Guardian Ad Litem Education) (stating that “[t]he board of bar examiners shall approve, as family court guardian ad litem education, courses of instruction at a law school in this state and continuing legal education activities that the board determines to be on any of the following subject matters: . . . 4. The dynamics and impact of family violence”). However, the statute does not specifically require guardians ad litem to be trained in domestic violence. See WIS. STAT. § 767.407(4) (Westlaw through 2017 Act 370) (stating “[t]he guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), and shall report to the court on the results of the investigation.”).

434. *See id.*

435. In Delaware, the guardian ad litem statute requires the guardian ad litem to represent the best interests of the child and to “[p]resent evidence to the court in support of his or her position” DEL. CODE tit. 29, § 9007A(c) (Westlaw through 82 Laws 2019); DELAWARE COURTS, CHILD ADVOCATE MANUAL 13–15 (2007), [https://courts.delaware.gov/childadvocate/trmanual/Chapter5\\_073107.pdf](https://courts.delaware.gov/childadvocate/trmanual/Chapter5_073107.pdf). In Georgia, a guardian ad litem is required to ascertain the child’s best interests and “[i]n determining a child’s best interests, a guardian ad litem shall consider and evaluate all of the factors” that include “(3) Evidence of domestic violence in any current, past, or considered home for such child” GA. CODE ANN. § 15-11-105(b) (Westlaw through the 2018 reg. and Spec legis. sess. 2014). In Maine, the guardian ad litem has additional powers that can be granted by a court including: “Arranging for the assessment of any physical, sexual, developmental, and/or emotional risks to or abuse of the child by utilizing risk assessment tools; evaluations, assessments, and reports; medical records; observation; and interviews with appropriate persons” ME. CT. RULES FOR GUARDIANS AD LITEM, R. 4. In West Virginia, the court can appoint a [guardian *ad litem*] and “[t]he court shall specify the terms of the appointment, including the lawyer’s role, duties and scope of authority.” W. VA. CODE § 48-9-302(a) (Westlaw through legis. of the 2018 First Extraordinary Sess.); If there are “substantial allega-

Two states do not require screening but state that screening can be court-ordered.<sup>436</sup> As noted in Section I, there are many reasons why survivors of domestic violence might not self-report but may in fact share this information when domestic violence screening is properly performed. For these reasons, it is problematic that domestic violence screening by a guardian *ad litem* does not clearly appear to be a requirement (and thus unlikely to be performed) in any states other than Wisconsin.

In summary, research found only 13 states that require guardians *ad litem*, child representatives, or other custody evaluators to receive domestic violence and/or child abuse and neglect training without waiver in child custody cases. Only one state explicitly requires domestic violence screening. These results reflect a disturbing failure to apply evidence-based best practices to achieve the goal of protecting children and survivors of domestic violence from further harm in child custody cases. It is critical that these family law professionals receive training on domestic violence and screen for domestic violence in *every* child custody case. This goal cannot be achieved without at least clearly mandating these requirements and providing a mechanism to ensure that the mandated requirements are being performed.

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tions of domestic abuse have been made, the court shall order an investigation under section 9-301 or make an appointment under subsection (a) or (b) of this section, unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such order or appointment.” *Id.*; see also W. VA. FAM. CT. R. 47 (stating that when “the court is presented with substantial allegations of domestic abuse, serious allegations of abuse and neglect, serious issues relating to the child’s health and safety, or allegations involving disproving a child’s paternity, a guardian ad litem shall be appointed by the court for the children” and that in regard to “[i]nvestigations by Guardians Ad Litem,” W. Va. Code § 48-9-301, § 48-9-302, and the Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules shall govern investigations by guardians ad litem”).

436. ME. CT. RULES FOR GUARDIANS AD LITEM (2015), [https://mebaroverseers.org/regulation/bar\\_rules.html?id=638955](https://mebaroverseers.org/regulation/bar_rules.html?id=638955) (stating that one of the guardian ad litem’s “Additional Powers” that require a court order include “(G) Arranging for the assessment of any physical, sexual, developmental, and/or emotional risks to or abuse of the child by utilizing risk assessment tools; evaluations, assessments, and reports; medical records; observation; and interviews with appropriate persons); W. VA. CODE § 48-9-302 (c) (Westlaw through legis. of the 2018 First Extraordinary Sess.) (stating that “[w]hen substantial allegations of domestic abuse have been made, the court shall order an investigation under section 9-301 or make an appointment under subsection (a) or (b) of this section, unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such order or appointment”).

*C. To What Extent Do State Laws Relating to Child Custody Cases  
Take Domestic Violence Into Account Consistent with  
Evidence-Based Best Practices?*

Requiring family law professionals involved in child custody cases to be trained on domestic violence and to screen for domestic violence is a necessary, but not sufficient, step to better protect children and parent survivors of domestic violence. It is also necessary to apply evidence-based practices to the child custody laws in each state. Custody laws should empower family law judges to make child custody decisions that protect both children and their parent survivors of domestic violence.

As described in the evidence-based literature review in Section I, when there is a pattern of coercive abuse, it would be harmful and dangerous to award primary or shared parenting time and shared parenting decision-making to an abusive parent. A parent who has engaged in a pattern of coercive abuse is likely to use the parenting time and parenting decision-making as a means to further harm the parent victim of domestic violence, rather than act in the best interests of the child.<sup>437</sup> There is also evidence that such parents will engage in violence or other forms of abuse against the other parent during their parenting time with their children, particularly during the exchange of the children, and in communicating about or with their children.<sup>438</sup> They are also more likely to neglect or directly abuse their children during their parenting time as a means to punish the other parent or seek to induce that parent to return to them.<sup>439</sup>

For these reasons, it is important that courts order primary parenting time (referred to by some states as “physical custody”) and sole decision-making (referred to by some states as “legal custody”) to the parent survivor of domestic violence, and order protective measures relating to the parenting time (referred to by some states as “visitation”) of the parent who has engaged in a pattern of coercive abuse.<sup>440</sup> In this Section, we review the child custody laws in each state to determine to what extent their child custody laws recognize and adequately address these dangers and harms.

The key standard that judges apply in determining physical and legal custody in the custody statutes is the “best interests of the child.”<sup>441</sup>

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437. See *supra* Section I.

438. See *supra* Section I.

439. See *supra* Section I.

440. See ABA 50 STATE REVIEW, *supra* note 10.

441. See *id.*

The “best interests of the child” standard is the term used to encompass all of the various specific factors noted in the statutes that courts should consider when determining child custody, and any other factors that might apply to the custody case before them.<sup>442</sup> In recognition of the harm to children from exposure to domestic violence, according to the an American Bar Association 50 State Review, domestic violence is a factor in determining the “best interests of the child” in virtually every state’s custody laws.<sup>443</sup> But, this factor is just one factor. Other factors, such as the “friendly parent factor” (the extent to which a parent fosters a cooperative relationship with the other parent when it comes to making decisions on their children and parenting generally) have been demonstrated to override the domestic violence factor, especially when the person accused of domestic violence or child abuse has alleged parental alienation.<sup>444</sup>

### 1. A Survey of the States

In recognition of the importance of the impact of exposure to domestic violence on the “best interests of the child,” 21 states and the District of Columbia have created a rebuttable presumption against sole or joint legal or physical custody to a parent who has engaged in

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442. *See id.* Although Louisiana does not have domestic violence listed as a factor, it does have a rebuttable presumption that specifically references “family violence” and “domestic abuse.” LA. STAT. § 9:364(A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[t]here is created a presumption that no parent who has a history of perpetrating family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403(A)(4)(b), or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, shall be awarded sole or joint custody of children”).

443. Minnesota does not list domestic violence as a best interest factor, but it does have a separate rebuttable presumption that it is not in the best interest of the child for a parent who has committed domestic violence to have custody. MINN. STAT. ANN. § 518.17(b)(9) (Westlaw through the end of the 2018 Regular Sess.); South Dakota does not list domestic violence as a factor, but it does have a rebuttable presumption based on “assault” or “domestic abuse.” S.D. CODIFIED LAWS § 25-4-45.5 (Westlaw through the 2018 Reg. and Spec Sess.) (stating that “[t]he conviction or history of domestic abuse creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor”).

444. Meier & Dickson, *supra* note 2, at 328–32.

domestic or family violence, as defined in their statutes.<sup>445</sup> They include: Alabama,<sup>446</sup> Alaska,<sup>447</sup> Arizona,<sup>448</sup> Arkansas,<sup>449</sup> California,<sup>450</sup> Delaware,<sup>451</sup> District of Columbia,<sup>452</sup> Florida,<sup>453</sup> Hawaii,<sup>454</sup> Idaho,<sup>455</sup> Iowa,<sup>456</sup>

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445. This information is based upon THE ABA 50 STATE REVIEW, *supra* note 10, from which we began our research for this information. We checked the statutes noted in that review and checked for accuracy and for any updates as of August 30, 2018.
446. In Alabama, there is a rebuttable presumption that applies to “sole custody, joint legal custody, or joint physical custody” and as to which parent the child resides with. ALA. CODE § 30-3-131 (Westlaw through 2018-579) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence”); § 30-3-133 (2017) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent’s choice, within or outside the state”).
447. ALASKA STAT. § 25.24.150(g) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.) (stating that “[t]here is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child”).
448. ARIZ. REV. STAT. ANN. § 25-403.03 D (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that “[i]f the court determines that a parent who is seeking sole or joint legal decision-making has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child’s best interests”).
449. ARK. CODE ANN. § 9-13-101(c)(2) (Westlaw through 2018 Fiscal Sess. and Second Extraordinary Sess. of the 91st Ark. General Assembly) (stating that “[t]here is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse”).
450. CAL. FAM. CODE § 3044(a) (Westlaw through Ch. 1016 if the 2018 Reg. Sess.) (stating that “[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011”).
451. DEL. CODE ANN. tit. 13 § 705A(a)(b) (Westlaw through 82 Laws 2019) (stating that “there shall be a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child” and that “there shall be a rebuttable presumption that no child shall primarily reside with a perpetrator of domestic violence”).
452. D.C. Code Ann. § 16-914(2) (Westlaw through Jan. 11, 2019) (stating that “there shall be a rebuttable presumption that joint custody is not in the best interest of the

Louisiana,<sup>457</sup> Massachusetts,<sup>458</sup> Minnesota,<sup>459</sup> Mississippi,<sup>460</sup> Nevada,<sup>461</sup> North Dakota,<sup>462</sup> Oklahoma,<sup>463</sup> Oregon,<sup>464</sup> South Dakota,<sup>465</sup> Texas,<sup>466</sup> and Wisconsin.<sup>467</sup>

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child or children, if a judicial officer finds by a preponderance of the evidence that an intrafamily offense as defined in § 16-1001(8) . . . has occurred.” “Intrafamily offense” is defined as “interpersonal, intimate partner, or intrafamily violence.”) D.C. Code Ann. § 16-1001 (Westlaw through Jan. 11, 2019).

453. FLA. STAT. ANN. § 61.13(2)(c)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25th Leg.) (stating that “[e]vidence that a parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child”).
454. HAW. REV. STAT. ANN. § 571-46 (a)(9) (Westlaw through the end of the 2018 Second Spec. Sess.) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence”).
455. IDAHO CODE ANN. § 32-717B (5) (Westlaw through the 2018 Second Reg. Sess. of the 64th Idaho Leg.) (stating that “[t]here shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code”).
456. IOWA CODE ANN. § 598.41(1)(b) (Westlaw through legislation from the 2018 Reg. Sess.) (stating that “if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists”).
457. LA. STAT. ANN. § 9:364(A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[t]here is created a presumption that no parent who has a history of perpetrating family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403, or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, shall be awarded sole or joint custody of children”).
458. MASS. GEN. LAWS ANN. ch. 208, § 31A (Westlaw through Act 450 of the 2018 Legis. Sess. 2018) (stating that “[a] probate and family court’s finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent”).
459. MINN. STAT. ANN. § 518.17 subdiv. 1(b)(9) (Westlaw through the end of the 2018 Reg. Sess.) (stating that “the court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents”).
460. MISS. CODE ANN. § 93-5-24 (9)(a)(1) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (stating that “[i]n every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child

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- and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence”).
461. NEV. REV. STAT. ANN § 125C.230(1) (Westlaw through all 608 Chapters of the Seventy-Ninth Reg. Sess. 2017), (stating that “[e]xcept as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child”).
462. N.D. CENT. CODE ANN. § 14-09-06.2 (1)(j) (Westlaw through the 2017 Reg. Sess. of the 65th Legis. Assemb.) (stating that “[i]f the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child”).
463. OKLA. STAT. ANN. tit. 43 § 109.3 (Westlaw through legis. of the Second Reg. Sess. of the 56th Leg. 2018) (stating that “[i]n every case involving the custody of, guardianship of or visitation with a child, the court shall consider evidence of domestic abuse, stalking and/or harassing behavior properly brought before it” and “[i]f the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence, there shall be a rebuttable presumption that it is not in the best interest of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established”).
464. OR. REV. STAT. ANN § 107.137(2) (Westlaw through the emergency legis. of the 2018 Reg. Sess. and all Legis. of the 2018 1st Spec Sess.) (stating that “if a parent has committed abuse as defined in ORS 107.705, other than as described in subsection (6) of this section, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse”).
465. S.D. CODIFIED LAWS § 25-4-45.5. (Westlaw through 2018 Reg. and Spec. Sess.) (stating that “[t]he conviction or history of domestic abuse creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor”).
466. TEX. FAM. CODE ANN. § 153.004(b) (Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.) (stating that “[i]t is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child”).
467. WIS. STAT. ANN. § 767.41(2)(d) (Westlaw through 2017 Act 370) (stating that “if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the

It is important to note the varying definitions of “domestic violence,” “family violence,” or other similar terms used in the state statutes among the 21 states and District of Columbia that have created a rebuttable presumption against custody to the abusive parent. Some states narrowly define “domestic violence,” “family violence,” or other term used in the child custody statute that would trigger the rebuttable presumption. For example, the statute might require a criminal conviction for a crime relating to domestic violence or the grounds for termination of parental rights, as in Florida.<sup>468</sup> This requirement is highly problematic since, for a variety of reasons, it is very rare that domestic violence will lead to a criminal conviction when it occurs.<sup>469</sup> In addition, of the 21 states that create the rebuttable presumption that it is not in the best interest of the child to grant legal or physical custody to a parent who has engaged in domestic violence, some only include instances of physical violence (or placing someone in reasonable fear of such physical violence) or sexual assault.<sup>470</sup>

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child and contrary to the best interest of the child to award joint or sole legal custody to that party”).

468. FLA. STAT. ANN. § 61.13(2)(c)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25th Leg. 2018) (stating that “[e]vidence that a parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child”).
469. Many domestic violence survivors do not report or assist with the prosecution of a domestic violence related crime due to a variety of reasons, including economic dependence on the abuser or fear of the abuser. A 2015 survey by the National Domestic Violence Hotline found that a quarter of women who had called police to report domestic violence or sexual assault would not call again in the future, with 80 percent reporting they feared the police would not believe them or would not do anything about the violence. TK Logan & Roberta Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE (April 2015), <http://www.thehotline.org/resources/law-enforcement-responses>. From 2006 to 2015, only 56 percent of non-fatal domestic violence incidents were reported to the police according to the Bureau of Justice statistics. Catalano, *supra* note 132.
470. ARK. CODE ANN. § 9-15-103(4) (Westlaw through all laws of the 2018 Fiscal Sess. and 2018 Second Extraordinary Sess.) (stating, “[d]omestic abuse’ means: (A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or (B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state.”); IOWA CODE ANN. § 236.2(2) (Westlaw through legis. from the 2018 Reg. Sess. of the 87th Gen. Assemb.). “Domestic abuse’ means committing assault as defined in section 708.1 [criminal assault] under any of the following circumstances: (a) The assault is between family or household members who resided together at the time of the assault; (b) The assault is between separated spouses or persons divorced from each other and not residing together at

Indeed, the North Dakota Supreme Court in *Zuraff v. Reiger* affirmed a ruling by the lower court granting primary residential custody to the father, despite evidence of domestic violence, because the domestic violence did not cause serious bodily injury, and, therefore, did not trigger a presumption against sole or joint custody to the father.<sup>471</sup> Narrowly defining the kind of abusive conduct that triggers the rebuttable presumption to either physical violence or physical violence that causes serious bodily injury is highly problematic. It fails to take into account evidence of the serious harm to children and the non-abusive parent from the many other forms of coercive. In addition, this definition for domestic violence might not be met if the physical violence has not taken place recently, under statutes which add a timing requirement.<sup>472</sup>

Another problem with requiring physical or sexual abuse is that there may be a lack of evidence of abuse that took place a long time ago. In addition, as explained in Section I, when there has been a pattern of coercive abuse, the act of separating alone can be the basis for future physical violence, even though no recent act of physical or sexual violence has occurred.<sup>473</sup> As the authors have explained in prior articles,

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the time of the assault; (c) The assault is between persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time; (d) The assault is between persons who have been family or household members residing together within the past year and are not residing together at the time of the assault.” *Id.*; MASS. GEN. LAWS ANN. ch. 208, § 31A (Westlaw through Act 450 of the 2018 Legis. Sess.). “For the purposes of this section, ‘abuse’ shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. “Serious incident of abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress.” *Id.*; OR. REV. STAT. ANN. § 107.705(1) (Westlaw through the emergency legis. of the 2018 Reg. Sess. and all Legis. of the 2018 1st Spec Sess.). Abuse means the occurrence of one or more of the following acts between family or household members: (a) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury; (b) Intentionally, knowingly or recklessly placing another in fear of imminent bodily injury.” *Id.*

471. *Zuraff v. Reiger*, 911 N.W.2d 887, 892 (N.D. 2018).

472. CAL. FAM. CODE § 3044 (a) (Westlaw through Ch. 1016 of 2018 Reg. Sess.) (stating that rebuttable presumption applies to “domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child’s siblings”); N.D. CENT. CODE ANN. § 14-09-06.2 (1)(j) (Westlaw through the 2017 Reg. Sess. of the 65th Legis. Assemb) (stating that the presumption is triggered when “there exists a pattern of domestic violence within a reasonable time proximate to the proceeding”).

473. *See supra* Section I.

there is often a looming danger that will likely ignite after a domestic violence survivor leaves a coercively abusive intimate partner.<sup>474</sup> Some states require more than one act of domestic violence, or one serious physical injury from the domestic violence, as a precondition to applying the rebuttable presumption.<sup>475</sup> In contrast, some states pick up and more fully develop the concept of a pattern or history of domestic violence as the basis for the rebuttable presumption, or in the alternative, apply the presumption not only for one serious physical injury but also for attempts to cause serious injury.<sup>476</sup> Some states

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474. See Stark & Choplin, *supra* note 69.

475. ALASKA STAT. ANN. § 25.24.150(g)(h) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.) (stating that presumption only applies when a “parent has a history of perpetrating domestic violence,” which exists if “the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence”); LA. STAT. ANN. § 9:364 (A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that the presumption is limited to when there is “a history of perpetrating family violence” which is when the court “finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence”).

476. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.03(D) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that the presumption only applies if “a person commits an act of domestic violence” which occurs “if that person does any of the following: (1) Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury; (2) Places a person in reasonable apprehension of imminent serious physical injury to any person; (3) Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child’s siblings”); ARK. CODE § 9-13-101 (C)(1)(2) (Westlaw through law pass in the 2018 Fiscal Sess. and the Second Extraordinary Sess. of the 91st Ark. Gen. Assemb.) (providing for rebuttable presumption when there is a “pattern of domestic abuse”); IDAHO CODE ANN. § 32-717B(5) (West 2018) (limiting rebuttable presumption to when “one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence”); IOWA CODE ANN. § 598.41(1)(b) (Westlaw through legislation from the 2018 Reg. Sess.) (limiting rebuttable presumption to when there is “a history of domestic abuse”); MASS. GEN. LAWS ANN. ch. 208 § 31A (Westlaw through Act 450 of the 2018 Leg. Sess. (requiring a “pattern or serious incident of abuse” for the presumption); MISS. CODE ANN. § 93-5-24 (9)(A)(1) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (limiting presumption to when there is “a parent who has a history of perpetrating family violence”). The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party.” *Id.*; TEX. FAM. CODE ANN. § 153.004(b) (Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.) (limiting rebuttable presumption to when there is “a history or pattern of past or present child neglect, or physical or sexual abuse”); WIS. STAT. ANN. § 767.41(2)(D) (Westlaw through 2017

exclude from the presumption situations where both parents have been abusive,<sup>477</sup> but seek to distinguish true mutual fighting from a situation where one parent is the primary aggressor and the other parent is the primary victim.<sup>478</sup> Excluding from the presumption situations where both parents have been abusive is appropriate when there is true mutual fighting. This would be in contrast to the situation where one party is the predominant aggressor, and the other's use of violence is primarily defensive in nature or consists of occasional acts of retaliation. Even when there is mutual fighting, one state applies the rebuttable

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Act 370) (stating that rebuttable presumption applies only when "a party has engaged in a pattern or serious incident of interspousal battery").

477. ARIZ. REV. STAT. ANN. § 25-403.03(D) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that "this presumption does not apply if both parents have committed an act of domestic violence"); *see also* ARIZ. REV. STAT. ANN. § 13-3601(B) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that "an act of self-defense that is justified under chapter 4 of this title is not deemed to be an act of domestic violence.").
478. DEL. CODE ANN. tit. 13, § 705A(d) (Westlaw through 82 Laws 2019, ch. 2, 4). "In those cases in which both parents are perpetrators of domestic violence, the case shall be referred to the Division of Family Services of the Department of Services for Children, Youth and their Families for investigation and presentation of findings." *Id.* "Upon consideration of such presentation, and all other relevant evidence, including but not limited to, evidence about the history of abuse between the parents and evidence regarding whether [one] parent has been the primary aggressor in the household, the court shall decide custody and residence pursuant to the best interests of the child." *Id.*; NEV. REV. STAT. ANN. § 125C.230(2) (Westlaw through all 608 Chapters of the Seventy-Ninth Reg. Sess.). "[I]f after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor." *Id.* "[I]f it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties." *Id.* "If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor." *Id.*; WIS. STAT. ANN. § 767.41(2) (Westlaw through 2017 Act 370). If "both parties engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), the party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the court determines was the primary physical aggressor." *Id.* "If the court must determine under subd. 2. which party was the primary physical aggressor and one, but not both, of the parties has been convicted of a crime that was an act of domestic abuse, as defined in s. 813.12(1)(am), with respect to the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor." *Id.* "The presumption under subd. 1. does not apply if the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse but the court determines that neither party was the primary physical aggressor." *Id.*

presumption in favor of the parent who is determined to be less likely to commit domestic violence again.<sup>479</sup> One state statute does not impose a rebuttable presumption against custody to a parent who has engaged in domestic violence, and instead prohibits custody (joint or sole) to a parent who has been convicted of murder in the first or second degree against the other parent or a sibling.<sup>480</sup>

A slightly larger number of states, however, do not create a rebuttable presumption against custody by the parent who has committed domestic violence, with the following 28 states providing that domestic violence is only a factor in determining the best interests of the child: Connecticut,<sup>481</sup> Georgia,<sup>482</sup> Illinois,<sup>483</sup> Indiana,<sup>484</sup> Kansas,<sup>485</sup>

479. ALASKA STAT. ANN. § 25.24.150(i) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.). “If the court finds that both parents have a history of perpetrating domestic violence under (g) of this section, the court shall either (1) award sole legal and physical custody to the parent who is less likely to continue to perpetrate the violence and require that the custodial parent complete a treatment program; or (2) if necessary to protect the welfare of the child, award sole legal or physical custody, or both, to a suitable third person if the person would not allow access to a violent parent except as ordered by the court.” *Id.*; LA. STAT. ANN. § 9:364(D) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[i]f the court finds that both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence”); MISS. CODE ANN. § 93-5-24(9)(b)(ii) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (stating that “[i]f the court finds that both parents have a history of perpetrating family violence, but the court finds that parental custody would be in the best interest of the child, custody may be awarded solely to the parent less likely to continue to perpetrate family violence”).

480. N.Y. DOM. REL. LAW § 240 1-c(a) (Westlaw through 2019) (stating that “no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding”).

481. CONN. GEN. STAT. ANN. § 46b-56 (a),(c) (Westlaw through 2018 Reg. Sess.) (stating that in making or modifying an order for “custody or care of minor children” the court must consider “the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child”).

482. GA. CODE ANN. § 19-9-3 (a)(3) (Westlaw through the 2018 Extra Sess. of the Gen. Assemb.) (listing 17 factors in determining the best interest of the child, with one factor being evidence of family violence).

483. 750 ILL. COMP. STAT. 5/602.7 (b)(11) (Westlaw through P.A. 100-1179, of the 2018 Reg. Sess. of the 100th Gen. Assemb.) (stating that in making a decision concerning the “allocation of parental responsibilities: parenting time” the court must consider “the physical violence or threat of physical violence by the child’s parent directed against the child or other member of the child’s household”); 750 ILL. COMP. STAT. 5/602.7 (b)(14) (West 2018) (“the occurrence of abuse against the child or other

Kentucky,<sup>486</sup> Maine,<sup>487</sup> Maryland,<sup>488</sup> Michigan,<sup>489</sup> Missouri,<sup>490</sup>  
 Montana,<sup>491</sup> Nebraska,<sup>492</sup> New Hampshire,<sup>493</sup> New Jersey,<sup>494</sup> New

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- member of the child's household"); and 750 ILL. COMP. STAT. 5/602.5 (13)(West 2018) ("the occurrence of abuse against the child or other member of the child's household").
484. IND. CODE ANN. § 31-17-2-8(7) (West 2018). "The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent." *Id.* "The court shall consider all relevant factors, including the following: . . . (7) Evidence of a pattern of domestic or family violence by either parent." *Id.*
485. KAN. STAT. ANN. § 23-3203(A) (Westlaw through the 2018 legis. sess.) (stating that "[i]n determining the issue of legal custody, residency and parenting time of a child, the court shall consider all relevant factors, including, but not limited to: . . . (9) evidence of domestic abuse"); "There shall be a rebuttable presumption that it is not in the best interest of the child to have custody or residency granted to a parent who: (b) is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto." KAN. STAT. ANN. § 23-3205 (Westlaw through the 2018 legis. sess.).
486. KY. REV. STAT. ANN. § 403.270 (2) (West 2018) <http://www.lrc.ky.gov/statutes/statute.aspx?id=48320> (stating that the court shall consider domestic violence when making custody decisions).
487. ME. REV. STAT. tit. 19-A, § 1653(3)(L) (Westlaw through the 2017 Second Reg. Sess. and Second Spec Sess. of the 128th Leg.) (stating that the court must consider "domestic abuse between the parents" and "child abuse").
488. MD. CODE ANN., FAM. LAW § 9-101.1(b) (Westlaw through all legis. from the 2018 Reg. Sess. of the Gen. Assemb.) (stating that the court must consider "evidence of abuse by a party against: (1) the other parent of the party's child; (2) the party's spouse").
489. MICH. COMP. LAWS ANN. § 722.23 (Westlaw through P.A.2018, No. 545 of the 2018 Reg. Sess., 99th Michigan Leg., 2018) ("[B]est interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court: . . . (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.").
490. MO. ANN. STAT. § 452.375(2) (Westlaw through the end of the 2018 Second Reg. Sess. and First Extraordinary Sess. of the 99th Gen. Assemb.). "When the parties have not reached an agreement on all issues related to custody, the court shall consider all relevant factors and enter written findings of fact and conclusions of law, including, but not limited to, the following: . . . (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved."
491. MONT. CODE ANN. § 40-4-212(1) (Westlaw through chapters effective, Oct. 1, 2017 sess.). "The court shall determine the parenting plan in accordance with the best interest of the child." *Id.* "The court shall consider all relevant parenting factors, which may include but are not limited to: . . . (f) physical abuse or threat of physical abuse by one parent against the other parent or the child." *Id.*
492. NEB. REV. STAT. ANN. § 43-2923(6) (Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. 2018). "In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and: . . . (d) Credible evidence of abuse inflicted on any family or household member." *Id.*

Mexico,<sup>495</sup> New York,<sup>496</sup> North Carolina,<sup>497</sup> Ohio,<sup>498</sup> Pennsylvania,<sup>499</sup> Rhode Island,<sup>500</sup> South Carolina,<sup>501</sup> Tennessee,<sup>502</sup> Utah,<sup>503</sup> Vermont,<sup>504</sup>

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493. N.H. REV. STAT. ANN. § 461-A:6 (Westlaw through Chapter 379 of the 2018 Reg. Sess., 2018) (“In determining parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider the following factors: . . . (j) Any evidence of abuse, as defined in RSA 173-B:1, I or RSA 169-C:3, II, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
494. N.J. STAT. ANN. § 9:2-4(C) (Westlaw through L.2018) (“In making an award of custody, the court shall consider but not be limited to the following factors: . . . the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent.”).
495. N.M. STAT. ANN. § 40-4-9.1 (A-B) (Westlaw through the end of the Second Reg. Sess. of the 53rd Leg.). “There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination.” *Id.* “In determining whether a joint custody order is in the best interests of the child, in addition to the factors provided in Section 40-4-9 NMSA 1978, the court shall consider the following factors: . . . (9) whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member.” *Id.* Although domestic violence is only a factor, the statute does provide that “[I]f a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.” *Id.*
496. N.Y. DOM. REL. LAW § 240(1)(a) (Westlaw through 2019) (“Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child.”).
497. N.C. GEN. STAT. ANN. § 50-13.2(a) (Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.). “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.” *Id.* “In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.” *Id.*
498. OHIO REV. CODE ANN. § 3109.04(F)(2) (Westlaw through Files 115 to 117, 119, 120, 122 to 154, 156, 158, 159, 162 to 165, 167, 169, 170 and 172 of the 132<sup>nd</sup> Gen. Assemb. (2017-2018).) (“In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors: . . . (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent.”).
499. 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a) (Westlaw through 2018 Reg. Sess. Act 164) (“In ordering any form of custody, the court shall determine the best inter-

Virginia,<sup>505</sup> Washington,<sup>506</sup> West Virginia,<sup>507</sup> and Wyoming.<sup>508</sup> As explained earlier, a statutory approach that makes domestic violence

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- est of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following: . . . (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.”)
500. 15 R.I. GEN. LAWS ANN. § 15-5-16(g) (Westlaw through Chapter 2 of the Jan. 2019 Sess.) (“[T]he court, when making decisions regarding child custody and visitation, shall consider evidence of past or present domestic violence.”).
501. S.C. CODE ANN. § 63-15-40(A) (2008) (“In making a decision regarding custody of a minor child, in addition to other existing factors specified by law, the court must give weight to evidence of domestic violence.”).
502. TENN. CODE ANN. § 36-6-106(A) (Westlaw through the end of the 2018 Second Reg. Sess. of the 110th Tenn. Gen. Assemb.). “In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child.” *Id.* “The court shall consider all relevant factors, including the following, where applicable: . . . (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person.” *Id.*
503. UTAH CODE ANN. § 30-3-10.2(2) (Westlaw through the 2018 Second Spec Sess.) (“In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors: . . . (i) any history of, or potential for, child abuse, spouse abuse, or kidnaping.”).
504. VT. STAT. ANN. tit. 15, § 665 (Westlaw through the end of the 2017 adjourned sess. and the first Spec. sess. 2018) (stating that in entering “an order concerning parental rights and responsibilities of any minor child of the parties . . . the court shall be guided by the best interests of the child and shall consider at least the following factors: . . . (9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
505. VA. CODE ANN. § 20-124.3 (Westlaw through the end of the 2018 Reg. Sess. and 2018 Sp. Sess. I) (“In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following: . . . (9) Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse.”).
506. WASH. REV. CODE ANN. § 26.09.191(1) (West 2017) (stating that “[t]he permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: . . . (c) a history of acts of domestic violence as defined in RCW 26.50.010(3)”).
507. W. VA. CODE ANN. § 48-9-209(a) (West 2005) (stating that “[i]f either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan: . . . (3) Has committed domestic violence, as defined in section 27-202.”).
508. WYO. STAT. ANN. § 20-2-201(c) (Westlaw through chapters effective March 15 of the 2019 Gen. Sess. of the Wyo. Leg.). “The court shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children.” *Id.* “If the

only a factor in determining the best interests of the child, versus creating a rebuttable presumption about what is in the best interest of the child, fails to adequately take domestic violence into account, particularly in situations where the domestic violence includes a pattern of coercive abuse.<sup>509</sup> Colorado takes a position in between creating a rebuttable presumption and providing for domestic violence to be just a factor in determining the best interests of the child. Colorado's statute requires the court to consider as its "primary concern" the safety and well-being of the child and the abused party when the other party has committed domestic violence.<sup>510</sup>

In addition to a rebuttable presumption to grant sole decision-making and primary parenting time to the survivor of domestic violence, courts should also consider whether to order further protective measures relating to the parenting time of parents who have engaged in domestic violence. This is due to the large body of evidence that children exposed to domestic violence are in danger of serious and long-term harm when a protective parent is not being supported.<sup>511</sup> As detailed and documented in Section I, there is a likelihood of further domestic violence if the parents continue to have significant contact with each other in situational couple violence situations. There is also a likelihood that abuse will escalate after the couple separates when there has been a pattern of coercive abuse.

To what extent do states, in their child custody laws, require courts to order restrictions or conditions on parenting time to protect children and the parent survivor of domestic violence from further harm? Based on a review of the Resource Center on Domestic Violence: Child Protection and Custody, a Project of the Family Violence and Domestic Relations Program of the National Council of Juvenile and Family Court Judges (2013) (hereinafter the "NCJFCJ Chart"), and a review of state legislation,<sup>512</sup> the following 34 states expressly and clearly refer to

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court finds that family violence has occurred, the court shall make arrangements for visitation that best protects the children and the abused spouse from further harm."

*Id.*

509. *See supra* Section I.D.

510. COLO. REV. STAT. ANN. § 14-10-124 (West 2017).

511. *See supra* Section I.

512. DALTON ET AL., *supra* note 123. The NCJFCJ Chart is labeled "CONDITIONS ON VISITATION IN CASES INVOLVING DOMESTIC AND FAMILY VIOLENCE" and lists 42 states and the District of Columbia with statutory cites and statutory language. It appears to have excluded states that did not contain the subject matter of the chart. We have independently researched the laws in the chart and the additional eight states not in the chart, and the results of this research are included in this article. In some cases, the laws reflected in the chart have been repealed

domestic violence, domestic abuse, or family violence (including abuse of the other parent) as a basis to restrict or provide conditions on parenting time to protect the child or parent victim of domestic violence: Alabama,<sup>513</sup> Alaska,<sup>514</sup> Arizona,<sup>515</sup> California,<sup>516</sup> Colorado,<sup>517</sup> Florida,<sup>518</sup>

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or the statutory language has been modified. In some cases, the statutory language is from a state's order of protection/domestic violence statute rather than from their domestic relations/divorce statute. Thus, the list of states we present for providing domestic violence as a basis to restrict or provide conditions on visitation/parenting time is less than the 42 states listed in the chart. We also found some examples of states not in the list that provide for domestic violence as a basis to restrict or provide conditions on visitation/parenting time.

513. ALA. CODE § 30-3-135 (Westlaw through Act 2018-579) (“A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.”).
514. ALASKA STAT. ANN § 25.20.061 (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.). “If visitation is awarded to a parent who has committed a crime involving domestic violence, against the other parent or a child of the two parents, within the five years preceding the award of visitation the court may set conditions for the visitation, including: (1) the transfer of the child for visitation must occur in a protected setting; (2) visitation shall be supervised by another person or agency and under specified conditions as ordered by the court; (3) the perpetrator shall attend and complete, to the satisfaction of the court, a program for the rehabilitation of perpetrators of domestic violence that meets the standards set by the Department of Corrections, or other counseling; the perpetrator shall be required to pay the costs of the program or other counseling; (4) the perpetrator shall abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours before visitation; (5) the perpetrator shall pay costs of supervised visitation as set by the court; (6) the prohibition of overnight visitation; (7) the perpetrator shall post a bond to the court for the return and safety of the child; and (8) any other condition necessary for the safety of the child, the other parent, or other household member.” *Id.*
515. ARIZ. REV. STAT. ANN. § 25-403.03(F) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018). “If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court’s satisfaction that parenting time will not endanger the child or significantly impair the child’s emotional development.” *Id.* “If the parent meets this burden to the court’s satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm.” *Id.* “The court may: (1) Order that an exchange of the child must occur in a protected setting as specified by the court; (2) Order that an agency specified by the court must supervise parenting time. If the court allows a family or household member to supervise parenting time, the court shall establish conditions that this person must follow during parenting time; (3) Order the parent who committed the act of domestic violence to attend and complete, to the court’s satisfaction, a program of intervention for perpetrators of domestic violence and any other counseling the court orders; (4) Order the parent who committed the act of domestic violence to abstain from possessing or consuming alcohol or controlled substances during parenting time and for 24 hours before parenting time; (5) Order the parent who committed the act of domestic violence to pay a fee for the costs of supervised parenting time; (6) Prohibit overnight parenting time; (7) Require

Georgia,<sup>519</sup> Hawaii,<sup>520</sup> Indiana<sup>521</sup> Kentucky,<sup>522</sup> Louisiana,<sup>523</sup> Maine,<sup>524</sup> Maryland,<sup>525</sup> Massachusetts,<sup>526</sup> Michigan,<sup>527</sup> Minnesota,<sup>528</sup> Mississippi,<sup>529</sup>

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- a bond from the parent who committed the act of domestic violence for the child's safe return; (8) Order that the address of the child and the other parent remain confidential; (9) Impose any other condition that the court determines is necessary to protect the child, the other parent and any other family or household member." *Id.*
516. CAL. FAM. CODE § 3100(c) (Westlaw through all laws through Ch. 1016 of 2018 Reg.Sess.) ("If visitation is ordered in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the visitation order shall specify the time, day, place, and manner of transfer of the child so as to limit the child's exposure to potential domestic conflict or violence and to ensure the safety to all family members.").
517. COLO. REV. STAT. ANN. § 14-10-124(4)(IV)(e) (Westlaw through laws effective Sept. 1, 2018 of the Second Reg. Sess. of the 71st Gen. Assemb.) ("When the court finds by a preponderance of the evidence that one of the parties has committed child abuse or neglect or domestic violence, in formulating or approving a parenting plan, the court shall consider conditions on parenting time that ensure the safety of the child and of the abused party.").
518. FLA. STAT. ANN. § 61.13(C)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25<sup>th</sup> Leg.) ("If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility and makes such arrangements for time sharing as specified in the parenting plan as will best protect the child or abused spouse from further harm. Whether or not there is a conviction of any offense of domestic violence or child abuse or the existence of an injunction for protection against domestic violence, the court shall consider evidence of domestic violence or child abuse as evidence of detriment to the child.").
519. GA. CODE ANN. § 19-9-7(a) (Westlaw through the 2018 Reg. and Spec Legis. Sess.) ("A judge may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.").
520. HAW. REV. STAT. ANN. § 571-476 (Westlaw through the end of the 2018 Second Spec Sess.) ("(10) A court may award visitation to a parent who has committed family violence only if the court finds that adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the parent who is a victim of family violence; (11) In a visitation order, a court may" listing several protective measures including supervised parenting time and supervised exchanges).
521. IND. CODE ANN. § 31-17-2-8.3 (West 2017) ("If a court finds that a noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child there is created a rebuttable presumption that the court shall order that the noncustodial parent's parenting time with the child must be supervised.").
522. KY. REV. STAT. ANN. § 403.320(2) (West 2011) ("If domestic violence and abuse . . . has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.").
523. LA STAT. ANN. § 9:364(E) (Westlaw through the 2018 Third Extraordinary Sess.) ("If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent").

Missouri,<sup>530</sup> Nebraska,<sup>531</sup> Nevada,<sup>532</sup> New Hampshire,<sup>533</sup> New Mexico,<sup>534</sup>  
North Carolina,<sup>535</sup> North Dakota,<sup>536</sup> Oklahoma,<sup>537</sup> Pennsylvania,<sup>538</sup>

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524. ME. REV. STAT. ANN. tit. 19, § 1653(6) (Westlaw through the 2017 Second Reg. Sess. and Second Spec Sess. of the 128th Leg.) (“Conditions of parent-child contact in cases involving domestic abuse. The court shall establish conditions of parent-child contact in cases involving domestic abuse . . . . In an order of parental rights and responsibilities, a court may: [statute lists six specific conditions on parenting time and a general catch all].”).
525. MD. CODE ANN., FAM. LAW § 9-101.1(c) (Westlaw through 2018 Sess.) (“If the court finds that a party has committed abuse against the other parent or the party’s child, the party’s spouse, or any child residing within the party’s household, the court shall make arrangements for custody or visitation that best protect (1) the child who is the subject of the proceeding; and (2) the victim of the abuse.”).
526. MASS. ANN. LAWS ch. 208 § 31A(i) (LEXIS through Act 450 of the 2018 Leg. Sess.) (“Imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.”).
527. MICH. COMP. LAWS ANN. § 722.23(k) (Westlaw through 2018 Leg. Sess.) (“Domestic violence, regardless of whether the violence was directed against or witnessed by the child.”).
528. MINN. STAT. ANN. § 518.175 (Subd. 1a)(a) (Westlaw through 2018 Sess.) (“If a parent requests supervised parenting time under subdivision 1 or 5 and an order for protection under chapter 518B or a similar law of another state is in effect against the other parent to protect the parent with whom the child resides or the child, the judge or judicial officer must consider the order for protection in making a decision regarding parenting time.”).
529. MISS. CODE ANN. § 93-5-24(9)(d)(ii) (Westlaw through the 2018 regular and first extraordinary session) (“A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.”).
530. MO. ANN. STAT. § 452.410(2)(6) (Westlaw through the end of the 2018 Second Regular Session and First Extraordinary Session of the 99th General Assembly) (“Custody and visitation rights shall be ordered in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, and the parent or other family or household member who is the victim of domestic violence from any further harm.”).
531. NEB. REV. STAT. ANN. § 43-2934(2) (Westlaw through the end of the 2nd Regular Session of the 105th Legislature 2018) (“When making an order or parenting plan for custody, parenting time, visitation, or other access in a case in which domestic abuse is alleged and a restraining order, protection order, or criminal no-contact order has been issued, the court shall consider whether the best interests of the child, based upon the circumstances of the case, require that any custody, parenting time, visitation, or other access arrangement be limited to situations in which a third person, specified by the court, is present, or whether custody, parenting time, visitation, or other access should be suspended or denied.”).
532. NEV. REV. STAT. ANN. § 125C.230(1)(b) (Westlaw through the end of the 2nd Regular Session of the 105th Legislature 2018) (“Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.”).

Rhode Island,<sup>539</sup> South Carolina,<sup>540</sup> Texas<sup>541</sup> Vermont,<sup>542</sup> Washington,<sup>543</sup> Wisconsin,<sup>544</sup> West Virginia,<sup>545</sup> and Wyoming.<sup>546</sup> Providing specific stat-

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533. N.H. REV. STAT. ANN. § 461-A:6(1)(j) (Westlaw through 2018 Sess.) (“Any evidence of abuse, as defined in RSA 173-B:1, I or RSA 169-C:3, II, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
534. N.M. STAT. ANN. § 40-4-9.1(B)(9) (Westlaw through the end of the Second Regular Session of the 53rd Legislature) (“If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child.”).
535. N.C. GEN. STAT. ANN. § 50-13.2(b) (Westlaw through S.L. 2018-145 of the 2018 Regular and Extra Sessions of the General Assembly) (“Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3).”).
536. N.D. CENT. CODE ANN. § 14-09-29(2) (Westlaw through the 2017 Regular Session of the 65th Legislative Assembly and results of the Nov. 6, 2018, election) (“If the court finds that a parent has perpetrated domestic violence and that parent does not have residential responsibility, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, the court shall allow only supervised parenting time with that parent unless there is a showing by clear and convincing evidence that unsupervised parenting time would not endanger the child’s physical or emotional health.”).
537. OKLA. STAT. tit. 43, § 111.1(3) (Westlaw through legislation of the Second Regular Session of the 56th Legislature 2018) (“The court may award visitation by a noncustodial parent who was determined to have committed domestic violence . . . if the court is able to provide for the safety of the child and the parent who is the victim of that domestic violence.”).
538. 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a)(2) (Westlaw through 2018 Regular Session Act 164) (“The present and past abuse committed by a party or member of the party’s household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.”).
539. tit. 15 R.I. GEN. LAWS § 15-5-16 (g)(1) (2018) (“[T]he court, when making decisions regarding child custody and visitation, shall consider evidence of past or present domestic violence. Where domestic violence is proven, any grant of visitation shall be arranged so as to best protect the child and the abused parent from further harm.”).
540. S.C. CODE ANN. § 63-15-50(A) (Westlaw through 2018 Act No. 292) (“A court may award visitation to a person who has been found by a general sessions, magistrates, municipal, or family court to have committed domestic violence . . . or in cases in which complaints were made against both parties, to the person found by a general sessions, magistrates, municipal, or family court to be the primary aggressor . . . only if the court finds that adequate provision for the safety of the child and the victim of domestic violence can be made.”).
541. TEX. FAM. CODE ANN. § 153.004(c) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“The court shall consider the commission of

utory support to impose protective conditions and restrictions on parenting time based upon domestic violence is a strong way to take domestic violence into account in child custody cases. It would help empower domestic violence survivors to protect themselves and their

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- family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.”); TEX. FAM. CODE ANN. § 153.004(d)-(d)(1) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that: (1) there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit.”); TEX. FAM. CODE ANN. § 153.004(d-1)-(d-1)(2) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“Notwithstanding Subsection (d), the court may allow a parent to have access to a child if the court: (1) finds that awarding the parent access to the child would not endanger the child’s physical health or emotional welfare and would be in the best interest of the child; and (2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that”) (proceeding to list four protective measures including supervised parenting time and supervised exchanges of the child).
542. VT. STAT. ANN. tit. 15, § 665a(a) (Westlaw through all acts of the Adjourned Session of the 2017-2018 Vermont General Assembly and all acts of the First Spec Session of the Adjourned Session of the 2017-2018 Vermont General Assembly 2018) (“If within the prior ten years, one of the parents has been convicted of domestic assault or aggravated domestic assault against the other parent, or has been found to have committed abuse against a family or household member . . . the court may award parent-child contact to that parent if the court finds that adequate provision can be made for the safety of the child and the parent who is a victim of domestic violence.”).
543. WASH. REV. CODE ANN. § 26.10.160(2)(a) (Westlaw through Chapter 4 of the 2019 Regular Session) (“Visitation with the child shall be limited if its found that the parent seeking visitation has engaged in any of the following conduct: . . . (iii) a history of acts of domestic violence as defined in RCW 26.50.010(3)”).
544. WISC. STAT. ANN. § 767.41(6)(g) (Westlaw through 2017 Act 370) (“If the court finds . . . that a party has engaged in . . . domestic abuse . . . And the court awards periods of physical placement to both parties, the court shall provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court . . . shall impose one or more of the following appropriate”) (proceeding to list seven specific protective conditions on parenting time and an eighth catch all).
545. W. VA. CODE § 48-27-509(a) (Westlaw through legislation of the 2018 First Extraordinary Session) (“A court may award visitation of a child by a parent who has committed domestic violence only if the court finds that adequate provision for the safety of the child and the petitioner can be made.”).
546. WYO. STAT. ANN. § 20-2-201(c) (Westlaw through March 15 of the 2019 General Session) (“The court shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children. If the court finds that family violence has occurred, the court shall make arrangements for visitation that best protects the children and the abused spouse from further harm.”).

children from further harm. But as noted earlier in the context of states with rebuttable presumptions against custody to an abusive parent, some of these states narrowly define domestic violence, which can reduce the ability of domestic violence survivors to obtain protective conditions or restrictions on parenting time.<sup>547</sup>

In addition to these 34 states, four other states' custody laws could be construed to be referring to domestic violence as a basis to impose protective restrictions or conditions on parenting time, but the language in their statutes is not as clear as in the statutes of the 34 states noted above. These four states are: Arkansas,<sup>548</sup> Oregon,<sup>549</sup> New York,<sup>550</sup> and Virginia.<sup>551</sup>

547. See *supra* notes 446-467 and accompanying text.

548. ARK. CODE ANN. § 9-13-101(c)(1) (Westlaw through the 2018 Fiscal Session and the Second Extraordinary Session of the 91st Arkansas General Assembly) (If a party to an action concerning custody of or a right to visitation with a child has committed an act of domestic violence against the party making the allegation . . . the circuit court must consider the effect of such domestic violence upon the best interests of the child . . . together with such facts and circumstances as the circuit court deems relevant in making a direction pursuant to this section.”).

549. As previously noted, Oregon creates a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to a parent who committed abuse against a family or household member. OR. REV. STAT. ANN. § 107.137(2) (Westlaw through 2018 Regular Session). In OR. REV. STAT. ANN. § 107.101 (Westlaw through 2018 Regular Session), “It is the policy of this state to: . . . (5) Consider the best interests of the child and the safety of the parties in developing a parenting plan.” OR. REV. STAT. ANN. § 107.101 (Westlaw through 2018 Regular Session). While this language does not explicitly refer to “domestic violence” or other forms of intimate partner abuse, when it refers to the “safety of the parties” (which parties would typically be the parents) it seems likely it is including safety concerns due to domestic violence. This would then serve as the basis to condition parenting time by directing courts to consider the safety of the parents when determining how parenting time should be structured.

550. N.Y. DOM. REL. LAW § 240(1)(a) (Westlaw through L.2019) (In any action or proceeding brought . . . (3) for a divorce . . . . Where either party to an action concerning custody of or a right to visitation with a child alleges . . . the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction.”). The statutory language does not make clear whether the direction referred to in this statute includes denial of or restriction of the right to visitation.

551. VA. CODE ANN. §20-124.3 (Westlaw through 2018 Regular Session) (“In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to §20-103, the court shall consider the following: . . . 9. Any history of family abuse as that term is defined in

The 34 states that have expressly and clearly required or authorized their courts to condition or restrict the parenting time of a parent who engages in domestic violence much better enable domestic violence survivors to protect themselves and their children from further abuse and harm than do the following 12 states that fail to do so in their divorce or parentage statutes: Connecticut,<sup>552</sup> Delaware,<sup>553</sup> Idaho,<sup>554</sup> Illinois,<sup>555</sup> Iowa,<sup>556</sup> Kansas,<sup>557</sup> New Jersey,<sup>558</sup> Montana,<sup>559</sup> Ohio,<sup>560</sup> South Dakota,<sup>561</sup> Tennessee,<sup>562</sup> and Utah.<sup>563</sup>

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§16.1-228 or sexual abuse.”). The reference to “visitation arrangements” could include ordering protective measures due to the family violence, which would include domestic violence. But the statute is not clearer.

552. CONN. GEN. STAT. ANN. § 46b-56(a) (Westlaw through P.A. 14-3) (discussing the court’s ability to “award custody to either parent or a third party . . . subject to such conditions and limitations as it deems equitable,” without specifically referencing domestic violence as a basis for such conditions or limitations).
553. DEL. CODE ANN. tit. 13, § 728(a) (Westlaw through 82 Laws 2019) (requiring courts to “permit and encourage the child to have frequent and meaningful contact with both parents unless the Court finds, after a hearing, that contact of the child with 1 parent would endanger the child’s physical health or significantly impair his or her emotional development,” and further stating that “[t]he court shall specifically state in any order denying or restricting a parent’s access to a child the facts and conclusions of such a denial or restriction,” without expressly referencing domestic violence as a basis for such a finding).
554. IDAHO CODE ANN. § 32-717E (Westlaw through First Reg. Sess. of 65th Leg.) (failing to mention domestic violence in this section where it refers to cases in which a court has ordered supervised parenting time or supervised exchanges or transfers of the children). *But see* IDAHO CODE ANN. § 32-717B(5) (Westlaw through First Reg. Sess. of 65th Leg.) (mentioning a presumption that joint custody is not in the best interests of a minor child if one of the parents is found to be a habitual perpetrator of domestic violence, but not directly referencing a need for restrictions on parenting time based upon domestic violence).
555. 750 ILL. COMP. STAT. ANN. 5/603.10(a) (Westlaw through P.A. 99-90) (explaining that “[a]fter a hearing, if the court finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child’s mental, moral, or physical health or that significantly impaired the child’s emotional development, the court shall enter orders as necessary to protect the child,” and specifying a non-exhaustive list of eight specific restriction on parenting time, plus a ninth catch-all, without express reference to domestic violence as the kind of conduct that would trigger this finding); *but see id.* at (a)(8) (“requiring a parent to complete a treatment program for perpetrators of abuse . . . or for other behavior that is the basis for restricting parental responsibilities under this Section,” and thus opening the door for the argument that such abuse could be the basis for restricting parenting time).
556. While the Iowa Code requires courts to “consider, in the award of visitation to a parent of a child, the criminal history of the parent if the parent has been convicted of a sex offense against a minor,” IOWA CODE ANN. § 598.41A (Westlaw through Feb. 19, 2019), and provides that courts shall not “[a]ward visitation rights to a child’s parent who has been convicted of murder in the first degree of the child’s other parent, unless the court finds that such visitation is in the best interest of the child,”

## 2. Illinois: A Case Study

Another way to evaluate the different approaches to taking domestic violence into account in child custody laws is to consider two specific states and the ability of a domestic violence survivor in each state to pro-

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- IOWA CODE ANN. § 598.41B (Westlaw through Feb. 19, 2019), there was no express reference to domestic violence as the basis for conditions or restrictions on visitation or parenting time under the Iowa Code.
557. KAN. STAT. ANN. § 23-3208 (Westlaw through 2018 Reg. Sess.) (explaining parents are entitled “to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the child’s physical, mental, moral or emotional health,” without referencing domestic violence as a basis for this finding).
558. N.J. STAT. ANN. § 9:2-4.1 (Westlaw through L.2019, c. 35) (specifying sexual assault of a child as a basis to deny visitation rights); *compare* N.J. STAT. ANN. § 9:2-4 (Westlaw through L.2019, c. 35) (listing domestic violence as a factor for determining custody, but not as a basis to condition or restrict parenting time).
559. MONT. CODE ANN. § 40-4-218 (Westlaw though chapters effective, Oct. 1, 2017 sess.) (explaining “if the court finds that in the absence of the order the child’s physical health would be endangered or the child’s emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent,” without referencing domestic violence as a basis for supervised visitation).
560. OHIO REV. CODE ANN. § 3109.051(D) (Westlaw through Files 115 to 117, 119, 120, 122 to 154, 156, 158, 159, 162 to 165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. 2018) (listing factors to be considered when determining whether to grant parenting time to a parent pursuant to this section, none of which directly refer to domestic violence, although one factor addresses criminal convictions involving an act that resulted in a child being an abused child or a neglected child).
561. S.D. CODIFIED LAWS §25-4A-10 (Westlaw through 2018 Reg. and Spec Sess.) (“Supreme Court to promulgate guidelines for noncustodial parenting time.”). This contains no reference to domestic violence in its charge to the South Dakota Supreme Court to promulgate guidelines to be used statewide for minimum noncustodial parenting time in divorce or any other custody action or proceeding. *Id.*
562. TENN. CODE. ANN. §36-6-301 (Westlaw through the end of the 2018 Second Reg. Sess, of the Tenn. Gen. Assemb.) (“If the court finds that the non-custodial parent has physically or emotionally abused the child, the court may require that visitation be supervised or prohibited until such abuse has ceased or until there is no reasonable likelihood that such abuse will recur.”). There is no reference to domestic violence as the basis for supervising or prohibiting visitation. *Id.*
563. UTAH CODE ANN. §30-3-34.5 (Westlaw through the 2018 Second Spec. Sess.). (Under the “Supervised parent-time” heading: “Considering the fundamental liberty interests of parents and children, it is the policy of this state that divorcing parents have unrestricted and unsupervised access to their children. When necessary to protect a child and no less restrictive means is reasonably available however, a court may order supervised parent-time if the court finds evidence that the child would be subject to physical or emotional harm or child abuse . . . from the noncustodial parent if left unsupervised with the noncustodial parent.”) There is no reference to domestic violence being the basis for ordering supervised parenting time. *Id.*

protect themselves and their children from further harm. Illinois broadly defines what conduct constitutes domestic violence and can trigger an order of protection, and it provides very protective temporary orders on child custody under its orders of protection.<sup>564</sup> However, the child custody laws in Illinois that apply in a divorce or paternity action are quite different.<sup>565</sup> The child custody laws in Illinois that apply in a divorce or paternity action make it very difficult for survivors of domestic violence to obtain needed protections for themselves and their children.

A parent perpetrating domestic violence is just one of many factors that courts are required to consider when determining the best interests of the child for purposes of ordering custody in a divorce or parentage case in Illinois.<sup>566</sup> There is no rebuttable presumption in Illinois against joint or sole decision-making or primary or significant parenting time to a parent who engages in domestic violence as there are in 21 other states. And, because there is evidence that courts accord much more weight to the “friendly parent” factor (which parent better fosters a

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564. 750 ILL. COMP. STAT. 60/103(1) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (“‘Abuse’ means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation”); 750 ILL. COMP. STAT. 60/214(b)(5)—(6) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (each section contains a rebuttable presumption that awarding physical care and possession of the minor child, or the temporary allocation of parental responsibilities and decision-making, respectively, to a respondent in an order of protection who has engaged in “Abuse” would not be in the minor child’s best interest); 750 ILL. COMP. STAT. 60/214(b)(7) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (provides that: “the court shall restrict or deny respondent’s parenting time with a minor child if the court finds that respondent has done or is likely to do any of the following: (i) abuse or endanger the minor child during parenting time; (ii) use the parenting time as an opportunity to abuse or harass petitioner or petitioner’s family or household members; . . . (iv) otherwise act in a manner that is not in the best interest of the minor child.”). *Id.*

565. 750 ILL. COMP. STAT. 5/602.5, /602.7, /603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.).

566. *See* CH. 750 ILL. COMP. STAT. ANN. 5 / 602.5(C)(13) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). § 602.5 is entitled “Allocation of parental responsibilities: decision-making” and provides: “(c) Determination of child’s best interests. In determining the child’s best interests for purposes of allocating significant decision-making responsibilities, the court shall consider all relevant factors, including, without limitation, the following: . . . (13) the occurrence of abuse against the child or other member of the child’s household.” *Id.*; CH. 750 ILL. COMP. STAT. ANN. 5 / 602.7(B)(14) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). § 602.7 is entitled “Allocation of parental responsibilities: parenting time” and provides: “In determining the child’s best interests for purposes of allocating parenting time, the court shall consider all relevant factors, including, without limitation, the following: . . . (14) the occurrence of abuse against the child or other member of the child’s household.” *Id.*

positive relationship of the child with the other parent), than the factor of domestic violence,<sup>567</sup> not having a rebuttable presumption against custody to a parent who has engaged in domestic violence makes it less likely that a court will accord appropriate weight to the domestic violence.<sup>568</sup>

As discussed in Section I, there is substantial evidence that judges place more weight on the “friendly parent” factor and claims of alienation than they do to claims of domestic violence, and even claims of direct abuse of the child. Judges in a divorce or paternity case often view claims of domestic violence skeptically<sup>569</sup> and wonder whether the parent alleging the domestic violence is lying or exaggerating, either to gain an economic advantage in the divorce or parentage case or out of animus. This has been documented to lead judges to treat a protective parent as an alienating parent and to order child custody in line with what the abusive parent has sought, rather than the abused parent.<sup>570</sup> As explained in Section I, when a parent is a survivor of domestic violence, especially a pattern of coercive abuse, it is not appropriate for a court to require that parent to “cooperate” with the abusive parent. This is because the abusive parent often uses parenting time and decision-making as a means to further abuse the other parent rather than act in the best interests of the child. Furthermore, the contacts necessary to cooperate can lead to dangerous interactions and abusive communications.<sup>571</sup>

Another key problem with domestic violence being just a factor, versus creating a rebuttable presumption, is that judges and the professionals they rely upon fail to realize how harmful repeated and/or severe domestic violence by one parent against the other parent is to children. With a rebuttable presumption, a court would have to accord significant weight to domestic violence in its child custody decisions.

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567. See Meier & Dickson, *supra* note 2, at 315, 331.

568. See CH. 750 ILL. COMP. STAT. ANN. 5 / 602.5(C)(11) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) and CH. 750 ILL. COMP. STAT. ANN. 5 / 602.7(B)(13) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (both including as a factor “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.”).

569. One anecdote on this is quite telling. One author of this Article, Stark, presented on the topic of taking domestic violence into account in child custody cases in a training session for child representatives. The first question she received, from a family a law judge also in attendance, was: How can we know when a person claiming domestic violence is telling the truth and not making the claim to get a better deal in the divorce?

570. Meier & Dickson, *supra* note 2, at 328, 331.

571. See *supra*, Section I.D.

In an extreme example of what can go wrong without a rebuttable presumption against custody to a parent who has committed domestic violence, an Illinois appellate court affirmed child custody to a father convicted of voluntary manslaughter for strangling to death the mother of his children.<sup>572</sup> Upon release from prison, the father brought an action for child custody against the maternal aunt and uncle who had been caring for their two nieces while the father was incarcerated.<sup>573</sup> The case is also an example of what can go wrong when judges and other family law professionals involved in custody decisions fail to be trained on the nature and dynamics of domestic violence and its harmful impact on children.

There was ample evidence in the case described by the appellate court that the father, James, had been violent with the mother, Carol, and with their children, Dana and Tracy, in ways that were harmful to the children and deadly to the mother. Carol had filed a petition for dissolution of marriage and obtained an ex parte order of protection on December 21, 1984, based upon her sworn allegation that the day before, James had grabbed and thrown her in a violent manner to the floor and struck her.<sup>574</sup> A neighbor of James and Carol who baby-sat for the children testified at the custody case that on the evening James killed Carol, the children ran into her house and begged her to go over to their house because James was choking Carol.<sup>575</sup> Both children were crying and screaming.<sup>576</sup> The neighbor further testified that when she went to the house James told her that there had been a fight but that everything was all right.<sup>577</sup> The children then went inside the house with James.<sup>578</sup> The witness also testified that Dana had told her about another fight between Carol and James, at which point the other daughter, Tracy, told Dana she should not have said anything to her.<sup>579</sup> Another person who had known Carol and James for many years—and had a child of the same age—testified that prior to December 1984, she observed Dana with a black eye and both children with bruises on their buttocks.<sup>580</sup> The marks were black and blue and Carol showed her a paddle that had been

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572. *In re Lutgen*, 532 N.E.2d 976, 987 (Ill. App. Ct. 1988).

573. *Lutgen*, 532 N.E.2d at 979.

574. *Lutgen*, 532 N.E.2d at 977.

575. *Lutgen*, 532 N.E.2d at 978.

576. *Lutgen*, 532 N.E.2d at 978.

577. *Lutgen*, 532 N.E.2d at 978.

578. *Lutgen*, 532 N.E.2d at 978.

579. *Lutgen*, 532 N.E.2d at 979.

580. *Lutgen*, 532 N.E.2d at 979.

broken.<sup>581</sup> This witness also testified that she observed injuries on Carol, but had not personally witnessed the incidents in which these injuries were inflicted.<sup>582</sup> One of Carol's brothers testified that he observed bruises on Carol's arm and knee but had no personal knowledge as to how these were inflicted. He testified that Carol was afraid of James and that as a result she appeared very uneasy, scared, and nervous, and she also was losing weight.<sup>583</sup>

James testified at the custody case that he observed Carol and a man sitting in a pick-up truck hugging and kissing the night of the killing, but upon his return at home he did not say anything to her about what he had observed and instead telephoned his father.<sup>584</sup> He stated that later Carol told him he could not take the children out for the evening as they had planned.<sup>585</sup> James stated that he insisted that he was going to take them out as planned, while Carol again stated that he was not going to take them.<sup>586</sup> James stated at the time of his arrest and testified that Carol grabbed him and began choking him; he grabbed her and pushed her back; she came at him again and he grabbed her neck and choked her and then threw her down to the floor; he told the children to stay out in the living room because he did not want them to see what was happening; Carol got up again and started choking him; he kept choking her until she fell down a second time and began bleeding through the nose; he called his father who advised him to call the paramedics; and she was pronounced death at the hospital.<sup>587</sup>

To a person trained on the nature and dynamics of domestic violence, these statements would not be credible. In light of the evidence of Carol's prior injuries, and her statement to her brother of her fear of her husband, it was highly unlikely that she would have initiated violence against him. There was no reference to any evidence presented by James that Carol had ever attacked and injured him before. There was no evidence discussed in the opinion on any wounds to James from Carol trying to strangle him, or of the size and weight of each parent and how that impacted the likelihood that Carol could have strangled James or put him in reasonable fear that she could do so. And yet, notwithstanding this, and voluntary manslaughter conviction,<sup>588</sup> the court's descrip-

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581. *Lutgen*, 532 N.E.2d at 979.

582. *Lutgen*, 532 N.E.2d at 979.

583. *Lutgen*, 532 N.E.2d at 979.

584. *Lutgen*, 532 N.E.2d at 977-78.

585. *Lutgen*, 532 N.E.2d at 978.

586. *Lutgen*, 532 N.E.2d at 978.

587. *Lutgen*, 532 N.E.2d at 978.

588. *Lutgen*, 532 N.E.2d at 978.

tion of what happened that night implied that this was a mutual fighting situation. For example, the court stated: “Other than the *tragic circumstances* [emphasis added by the authors] which resulted in the death of Carol, James has an unblemished record.”<sup>589</sup> It is also odd that the court found that James had an unblemished record in light of the emergency order of protection granted against him the day he killed his wife.

In determining who should have custody of the children upon James’ release from prison, the trial court applied the following six best interests of the child factors using the standard under Illinois law:<sup>590</sup>

- a. “the wishes of the child’s parent or parents as to his custody”

This case balanced the wishes of a parent who strangled and killed the other parent, against the wishes of the maternal aunt and uncle of the children with whom the children had been living in a peaceful and healthy home without domestic violence while the father was incarcerated.

- b. “the wishes of the child as to his custodian”

There was testimony that the two girls loved their father and their aunt and uncle, with one child stating she preferred their father and the other ultimately stating a preference for the aunt and uncle, but wanting to be with her sister no matter what.<sup>591</sup> At first blush it might seem puzzling that the children expressed a desire to live with their father, without describing any fear. After all, they had seen their father strangling their mother. They had also been punished by their father with corporal punishment that left bruise marks visible to others.

It appears there are several possible reasons for the children not expressing fear to live with their father after he returned from prison. Although the children had in fact seen or heard some of what happened on the night their father killed their mother (testimony of the neighbor the children ran to her crying and screaming that their father was choking their mother), what they were told later by their paternal grandmother appears to have been a sanitized/normalized version of

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589. *Lutgen*, 532 N.E.2d at 986.

590. 750 I.L.C.S. 5/602, IL ST ch. 750, § 5/602 (repealed by P.A. 99-90, § 5-20, eff. Jan. 1, 2016).

591. *Lutgen*, 532 N.E.2d at 982.

what their father had done. The paternal grandmother testified that she told the children it was wrong that their mother would not let them go out as they had planned to (i.e., the mother was at fault for the fight).<sup>592</sup> The father testified in the custody case that if his children asked him about what happened to their mother, he would tell them that their mother and he “had an argument; that there was pushing and shoving; and he ‘took her (Carol) to the floor.’”<sup>593</sup> This is an unlikely story by the father of mutual fighting, and the father’s attempt to justify and normalize the deadly domestic violence he perpetrated that killed their mother.

c. “the interaction and interrelationship of the child with his parent, his siblings and any other person who may significantly affect the child’s best interests”

There was little testimony noted in the appellate decision that focused on this factor. James’s counsel stipulated that the aunt and uncle were proper custodial parents for the children. There was little discussion of the father’s relationship to his children.

d. “the child’s adjustment to his home, school, and community”

There was remarkably positive evidence of how the children were doing after their mother was killed by their father, while living with their aunt and uncle. There was testimony from a child mental health specialist who performed a psychiatric evaluation that “[t]he children had benefitted from their placement with the Tranel. The Tranel handled the children well.”<sup>594</sup> The principal of the school testified that the children had adjusted well to the school.<sup>595</sup>

e. “the mental and physical health of all individuals involved”

There was little discussion and no evidence of any issues with the mental and physical health of the aunt and uncle. The child mental health specialist hired to evaluate the mental and physical health of the

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592. *Lutgen*, 532 N.E.2d at 981.

593. *Lutgen*, 532 N.E.2d at 982.

594. *Lutgen*, 532 N.E.2d at 983. (Eugene and Debra Tranel, Carol’s brother and sister-in-law, were award custody of Tracy and Dana while James was incarcerated.)

595. *Lutgen*, 532 N.E.2d at 979.

children did not find either child suffering from any diagnosable psychiatric illness.<sup>596</sup> The same mental health specialist met with the father and reported that he was shy, anxious, and a bit of a “perfectionist.”<sup>597</sup> It is unclear what testing the mental health specialist ran to determine the mental and physical health of the children and the father. The expert’s observation that the father was a “perfectionist” might be more accurately perceived as being coercively controlling by someone trained on domestic violence, depending upon what exactly was happening in the home when things were not done precisely in the way the father expected.

f. “the physical violence or threat of physical violence by the child’s potential custodian, whether directed against the child or directed against another person but witnessed by the child”

The trial court’s ultimate ruling to provide custody to the father, and the appellate court’s review of this ruling, placed very little weight upon evidence presented that the mother had been the victim of physical violence by her husband (both the night she was strangled to death by her husband and the evidence of physical violence before then).<sup>598</sup> There was also little weight placed or concern raised with the level of corporal punishment that the father inflicted on his children.<sup>599</sup> This is the case even though the father acknowledged that he was the sole person to discipline the children, and there was evidence that his discipline was sometimes performed in ways that left bruise marks. There was no exploration of the circumstances, the need to discipline the children in this fashion to determine, or if the corporal punishment was reasonable or abusive under the law.

In affirming the trial court’s decision, the appellate court noted that the determination of child custody rests largely within the broad discretion of the trial court and its decision will not be disturbed on appeal unless the award is contrary to the manifest weight of the evidence or unless the court abused its discretion.<sup>600</sup> The key evidence that the appellate court focused on when affirming the trial court were: (i) the wishes of the “sole surviving parent” (an ironic way to describe a hus-

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596. *Lutgen*, 532 N.E.2d at 983.

597. *Lutgen*, 532 N.E.2d at 983.

598. *Lutgen*, 532 N.E.2d at 987.

599. *Lutgen*, 532 N.E.2d at 986 (“The attempt to show that James was an abusive parent is not supported by the evidence.”).

600. *Lutgen*, 532 N.E.2d at 986.

band who has strangled his wife to death) who was determined to be a fit parent; (ii) the wishes of the children (per the appellate court, while the aunt and uncle used best efforts to provide for the children, still the children felt they did not receive equal treatment with their cousins); (iii) the recommendation of the child representative for custody to the father; and (iv) that psychological testing that did not argue against placing the child with the father.<sup>601</sup>

In terms of the best interest factor relating to physical violence, the appellate court stated: “While the court did hear testimony regarding the circumstances of Carol’s death, that is still only one of the factors . . . had the legislature wished to make this factor all controlling, it could have done so by appropriate legislation.”<sup>602</sup> The appellate court stated that another court had already punished James for the wrong he committed in the criminal case, but this case involves a decision as to the custody of his children where the key focus is on what is in the best interests of the children.<sup>603</sup> The appellate court, the trial court, and the attorney for the children failed to see how being ordered to live with a father who engaged in prior violence against the mother, and then deadly domestic violence against her in the presence of the children, would not be in the best interests of the children. The appellate court seemed to buy into the father’s story that the killing was an accident as a result of mutual fighting by referring to James killing Carol as the “tragic circumstances which resulted in the death of Carol.”<sup>604</sup> By misunderstanding what likely happened here, that the father engaged in repeated violence against Carol, placing Carol in fear of James, rather than mutual fighting, the court failed to appreciate the likelihood that the children would be exposed to further violence by their father with future intimate partners.<sup>605</sup> This in turn led the court to fail to see the connection of James’s violence future harm to the children.

This case is a good illustration of the need for judges and child representatives to be trained on the nature and dynamics of domestic vio-

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601. *Lutgen*, 532 N.E.2d at 987.

602. *Lutgen*, 532 N.E.2d at 987.

603. *Lutgen*, 532 N.E.2d at 987.

604. *Lutgen*, 532 N.E.2d at 970.

605. As explained in Section I, those who perpetrate a pattern of coercive abuse often continue to do so after separation. This can be the case even when there is an order of protection in place. “Among jail inmates convicted of family violence, 45 [percent] had been subject to a restraining order at some point in their life.” Matthew R. Durose et al., *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, BUREAU OF JUSTICE STATISTICS, 3, June 2005, <https://www.bjs.gov/content/pub/pdf/fvs08.pdf>.

lence, its harmful impact on children, and best practices to protect children and the non-abusive parent from further harm. This training should include how to distinguish a mutual fighting situation from a domestic violence situation where one person is the victim and the other is the primary aggressor. This case is also an example of why courts need a rebuttable presumption against sole or joint custody to a parent who has engaged in a pattern of coercive domestic violence. Creating this rebuttable presumption against granting primary parenting time to a parent who engages in domestic violence will help courts apply appropriate weight to this type of harmful conduct. It can also help children who have been exposed to domestic violence learn that such conduct is not acceptable for them to live with or to engage in when they grow up. It should also make it less likely they will be exposed to further domestic violence, especially if the parenting time of the parent who engages in domestic violence is conditioned on the ordering of protective measures designed to reduce the children's exposure to further domestic violence.

As explained in Section I, even when the parent survivor of domestic violence is granted primary parenting time and sole decision-making, evidence-based best practices would counsel the ordering of protective restrictions or conditions on the parenting time of the abusive parent tailored to the nature of the domestic violence that has occurred. But, under Illinois law, the burden of proof of showing harm to the child is on the parent seeking protective measures.<sup>606</sup> There is no presumption of serious harm to children from exposure to domestic violence, as is consistent with the large body of data discussed in Section I, and as articulated in some states' child custody laws.<sup>607</sup> As noted earlier, this forces the survivor of domestic violence to bring in an expert to testify on the body of data (noted in Section I) of the serious harms that children experience from exposure to domestic violence. A typical survivor of domestic violence would not know how to do that or be able to afford to do that.

The Illinois statute fails to explicitly refer to domestic violence in the section establishing the standards for restricting parenting time, in contrast to the 35 states that do.<sup>608</sup> This failure to even refer to domestic

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606. See *In re Marriage of Fields*, 283 Ill. App. 3d 894, 904–05 (1996) (holding, in a case involving allegations and evidence of sexual assault of a minor by her father, that the custodial parent carries the burden of proving by a preponderance of the evidence that visitation with the non-custodial parent would seriously endanger the child).

607. See CH.750 ILL. COMP. STAT.§ 5/603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (detailing restrictions of parental responsibilities).

608. CH.750 ILL. COMP. STAT.§ 5/603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). However, §603.10(a)(8) refers to orders that include “requiring a parent

violence as a basis for ordering restrictions on parenting time makes arguing for such a result even more difficult. Section 603.10(a) of the Illinois Marriage and Dissolution of Marriage Act provides that the court shall enter orders as necessary to protect the child “if the court finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child’s mental, moral, or physical health or that significantly impaired the child’s emotional development.”<sup>609</sup> Section 602.7 states: “it is presumed both parents are fit and the court shall not place any restrictions on parenting time as defined in Section 600 and described in Section 603.10,<sup>610</sup> unless it finds by a preponderance of the evidence that a parent’s exercise of parenting time would seriously endanger the child’s physical, mental, moral, or emotional health.”<sup>611</sup>

In light of these serious gaps in taking domestic violence into account in the statutory standards set for allocating parenting decision-making and parenting time, and of requiring or even permitting restrictions on parenting time, it is highly unlikely that a family law judge would order any type of protective measures that could be construed as restrictions on parenting based solely upon a parent’s commission of domestic violence against the other parent. This is the case especially if the judge and the family law professionals they rely upon lack adequate training on domestic violence and on the danger of serious harms to children when it is occurring. And as noted earlier, under Illinois law, judges, guardian *ad litem*, and child representatives are not required to receive training on domestic violence. Instead, the Illinois Supreme Court Rules only recommend such training.<sup>612</sup> Family law judges in Illinois historically have not ordered significant restrictions or conditions on parenting time, such as supervised parenting time, based solely on exposure to domestic violence. However, there have been cases in which

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to complete a treatment program for perpetrators of abuse” CH.750 ILL. COMP. STAT. §5/ 603.10(A)(8) (West 2018). By providing this as an example of an order for the protection of a child implies that parents who commit such abuse can be subject to this type of order when such abuse is considered to seriously endanger a child’s mental, moral, or physical health, or significantly impair the child’s emotional development (the standard set forth for orders as necessary to protect the child).

609. 750 ILCS 5/603.10.

610. CH. 750 ILL. COMP. STAT. § 603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). It is important to note that the restrictions listed in 603.10 do not include only supervised parenting time, but also includes less invasive conditions such as the exchange of children through an intermediary and the restraining of a parent’s communication with or proximity to other parents or the child.

611. 750 ILCS 5/602.7.

612. See *supra* notes 386 and 404.

they might order supervised parenting time when a parent is engaged in direct physical abuse or sexual abuse of their child.<sup>613</sup>

### 3. Arizona: A Case Study

The state of Arizona falls on the other end of the spectrum in terms of legal protections to domestic violence survivors and their children in custody cases. Like Illinois, Arizona broadly defines domestic violence in its custody laws.<sup>614</sup> However, unlike Illinois, Arizona is among the 21 states whose laws create a rebuttable presumption against primary parenting time or joint or sole decision-making to a parent who has engaged in domestic violence. Equally important, under Arizona law, once a court finds that domestic violence has occurred, the court places the burden on the parent who has committed the domestic violence to prove that any parenting time to them will not endanger the child or significantly impair their child's emotional development.<sup>615</sup> Indeed, even

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613. The author listed first on the heading of this piece has worked with many family law attorneys in Illinois. Many of these attorneys have reported to her that it is conventional wisdom that judges will not order restrictions on parenting time, and in particular, supervised visitation, based solely on the children being exposed to domestic violence, but might due to direct abuse of the child, in particular, proven sexual abuse of the child.

614. The Arizona custody law expansively defines domestic violence to include any one of the following: "(1) Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury. (2) Places a person in reasonable apprehension of imminent serious physical injury to any person. (3) Engages in a pattern of behavior for which a court may issue an *ex parte* order to protect the other parent who is seeking child custody or to protect the child and the child's siblings." A.R.S. § 25-403.03D. To give a sense of how the standard for an order of protection is satisfied, which in turn affects the definition of domestic violence under § 25-403.03(D)(3), see, *Ralph v. Alberti*, 2015 Ariz. Super. LEXIS 1643 (father regularly and excessively sent the mother harassing text messages and acted in a threatening manner to her at the time of exchanges of the children, had been arrested with large amounts of weapons and narcotics, had threatened her, had in the past threatened suicide, and vandalized her property and stalked her, leading the court to find that there had been significant domestic violence or child abuse pursuant to § 25-403.03 due to the father's threatening, intimidating and harassing behavior under A.R.S. § 25-403.03(D)(2) and (3), that this evidence of domestic violence is contrary to the best interest of the children, and that the father had not met his burden of proof to the court's satisfaction that his unsupervised parenting time will not endanger the children nor significantly impair the child's emotional development).

615. AZ REV. STAT. § 25-403.04(F) (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg, 2018). "If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the

when the parent satisfies the burden to show that some form of parenting time will not endanger their child or significantly impair the child's emotional development, under Arizona law, the court must then "place conditions on parenting time that best protect the child and the other parent from further harm."<sup>616</sup> The combination of these laws in Arizona should make it much easier for a survivor of domestic violence to obtain court orders with features designed to protect them and their children from further abuse through the parenting time and parenting decision-making of the parent who has perpetrated domestic violence.

The Arizona statute lists nine conditions on parenting time that a court may order when a parent has engaged in domestic violence: (1) exchanges of the child in a protected setting; (2) supervised parenting time and the conditions during that parenting time; (3) order the person who committed the domestic violence to attend and complete a program of intervention for perpetrators of domestic violence; (4) abstain from alcohol or controlled substances during parenting time and for 24 hours before parenting time; (5) to pay a fee for the costs of parenting time; (6) prohibit overnight parenting time; (7) require a bond from the parent who committed the domestic violence for the child's safe return; (8) order that the address of the child and the other parent remain confidential; or (9) impose any other condition that the court determines is necessary to protect the child, the other parent and any other family or household member.<sup>617</sup> These conditions enable a court to tailor its order of protective measures to address the specific forms of abuse that have occurred already or are likely to occur in the future.

In many respects, the child custody laws in Arizona are the complete opposite of the child custody laws in Illinois. And, in light of these differences in laws, it is far more likely for a court to order one or more of the protective measures described above under Arizona law than under Illinois law when a parent commits domestic violence.

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child's emotional development." *Id.* "If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm." *Id.*

616. *Id.*

617. AZ REV. STAT. § 25-403.04(F) (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018). "If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development." *Id.* "If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm." *Id.*

It should also be noted that in Arizona, training judges on issues related to domestic violence is required as part of New Judge Orientation and can only be waived under very limited, temporary-in-nature circumstances.<sup>618</sup> Under Illinois law, such training of judges is only recommended—not required.<sup>619</sup> Thus it is far more likely that family law judges are trained on domestic violence in Arizona than in Illinois. Arizona law also requires attorneys and guardians *ad litem* to receive training that would include domestic violence, but provides that such training can be waived without clarifying the basis for a waiver.<sup>620</sup> So, depending upon the basis accepted for waiving this requirement and how often it is waived, it is unclear to what extent Arizona’s required training on domestic violence for guardians *ad litem* leads to more training than in Illinois where such training is recommended but not required. As discussed earlier, training on domestic violence is very important for judges, and the family law professionals they rely upon, to make decisions consistent with the nature, dynamics, and realities of domestic violence and its impact on children. But legislation that is based upon best practices for taking domestic violence into account could be another way to provide “training” to judges and other family law professionals. Such legislation should also help lead to better outcomes. The best approach would be to combine required training with protective laws that properly take domestic violence into account.

### III. NECESSARY LAW REFORMS TO IMPLEMENT EVIDENCE-BASED BEST PRACTICES

Based upon the Literature Review in Section I and the summary and analysis of laws among the states in Section II, we recommend the following law reforms:

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618. See Ariz. Admin. Code of Jud. Admin. § 1-302(F)(2) (2016) (stating that “[u]pon request, the chief justice, the chief judge, the presiding judge of the superior court in each county, or their designees may grant exemptions to judges and employees of their court for temporary circumstances, including but not limited to: (a) Medical or other physical conditions preventing active participation in educational programs; (b) Extended, approved leave of absence; (c) Military leave; (d) Extended jury duty; (e) Temporary medical waivers for defensive tactics courses, in accordance with ACJA § 6-107.”; see also DOMESTIC VIOLENCE TRAINING FOR JUDGES, *supra* note 382).

619. See *supra* note 386, ILL. SUP. CT. R. 908(c).

620. See *supra* note 409, ARIZ. REV. STAT. ANN. § 40.1.J (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018).

1. Each state should require its family law judges, child representatives, guardians *ad litem*, and custody evaluators to receive initial training on domestic violence and continuing training each year to cover the topics in Section I and in the Wisconsin Guidebook and to incorporate evolving evidence-based best practices.
2. Each state should require its child representatives, guardians *ad litem*, and custody evaluators to screen for domestic violence in each of their custody cases using the best practices noted in Section I.
3. Each state's child custody laws should define "domestic violence" broadly, as in the CDC definition, and should also take into account the subcategories of: (a) "situational couple violence," which may include mutual violence that is situational in nature and far more likely to end once the couple is no longer living together if contacts between the parents are minimized, and (b) a pattern of coercive abuse, which can include physical or sexual violence, and other forms of coercive abuse as described in Section I, which abuse is far more likely to continue or escalate after the separation.
4. Each state's child custody laws should provide for a rebuttable presumption that sole or joint decision-making and primary parenting time is not in the best interests of children and should not be granted to a parent who has engaged in domestic violence when it includes a pattern of coercive abuse against the other parent.
5. Each state's custody laws should provide that for cases involving situational couple violence, there is a rebuttable presumption to structure parenting time under the concept of "parallel parenting" as detailed in Jaffe et al. and described in Section I of this article (minimal contacts between the parents), but with a stronger emphasis on the goal of requiring more common practices within the two households as necessary for the child's physical and emotional well-being (this type of parenting plan, which would include further parenting time details to achieve

this goal, could be called “structured independent parenting time” to better capture this emphasis).

6. Each state should provide in its child custody laws that if a parent engages in a pattern of coercive abuse, that parent has the burden of proving to the court’s satisfaction that any parenting time with that parent will not endanger the child or significantly impair the child’s emotional development. If the parent meets this burden to the court’s satisfaction, the court shall place conditions on parenting time that best protect the child, the other parent, and other members of the household, from further harm. The child custody law should then require the court to determine which conditions should be placed on the parenting time of the parent who has engaged in domestic violence, to protect the child, other parent, and other members of the household, from further harm. The child custody law should include a list of protective features from which the court may choose so the court can tailor the protections ordered to prevent further domestic violence and address the harms already experienced.<sup>621</sup>
7. The burden of proof in finding that domestic violence has occurred for purposes of child custody decisions should be preponderance of the evidence, as in other civil cases. The burden of proof should be on the party alleging the abuse. The burden of proof to rebut the presumptions described in suggested reforms 4 and 5 above should be on the party seeking to rebut those presumptions.

While not the focus of this article, the law reforms proposed should also cover situations of direct abuse of children, if they are not already

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621. The law reform described in paragraph six is already the approach under the child custody laws in Arizona. While only a few other states expressly place the burden of showing no endangerment or significant impairment to the child from parenting time on the parent who has engaged in domestic violence, a large number of the statutes among the 34 states that clearly identify domestic violence as a basis to condition or restrict parenting time word this in a way that in fact presumes this harm and directs the court to address it. For example, the statutes in Alabama, Mississippi, Georgia, South Carolina, Vermont, Virginia, and West Virginia state: “A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and parent who is a victim of domestic or family violence can be made.” *See supra* Section II.C.

adequately covered in the child custody laws, since there is a strong body of evidence that children suffer serious harm as a result of directly experiencing physical, sexual, and emotional abuse, committed by a parent.<sup>622</sup>

The studies reviewed in Section I support the above described law reform proposals. The 50-state review of laws in Section II supports the need for these reforms to address the gaps between evidence-based best practices and current laws in place among the 50 states and the District of Columbia.

As with any law reform, legislators will be concerned about the costs in implementing the reforms proposed. However, the costs for the screening and training described can be contained by the fashion in which it is implemented. The screening for domestic violence by child representatives, guardians *ad litem*, and custody evaluators can be completed as discussed in Section I by adding a few important questions to the interviews they normally perform. The act of screening for domestic violence should not add any costs to the process. When allegations of domestic violence come up through this screening, this would lead to extra efforts of investigation, which will add to the time and cost of the process for recommending custody arrangements. But this follow-up is a cost to prevent harm that would be no different than following up on any other alleged harms or unsafe conditions for children (such as allegations that a parent was intoxicated while caring for their child). And the cost to society in not screening for and protecting survivors of domestic violence and their children would far exceed the extra costs in time in investigating the allegations.<sup>623</sup> Furthermore, the domestic violence training recommended for judges, guardians *ad litem*, child repre-

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622. PSYCHOANALYTIC PSYCHOTHERAPY AFTER CHILD ABUSE: THE TREATMENT OF ADULTS AND CHILDREN WHO HAVE EXPERIENCED SEXUAL ABUSE, VIOLENCE, AND NEGLECT IN CHILDHOOD (Daniel McQueen et al. eds., Karnac 2008); Alexandra Cook et al., *Complex Trauma in Children and Adolescents*, 35 PSYCHIATRIC ANNALS 390 (2005); Tara Richards et al., *Intimate Partner Violence and the Overlap of Perpetration and Victimization: Considering the Influence of Physical, Sexual, and Emotional Abuse in Childhood*, 67 J. CHILD ABUSE & NEGLECT 240 (2017); Jerusha Sanjeevi et al., *A Review of Child Sexual Abuse: Impact, Risk, and Resilience in the Context of Culture*, 27 J. CHILD SEXUAL ABUSE 622 (2018).

623. According to the CDC, the lifetime per-victim cost from intimate partner violence is \$103,767 for women and \$23,414 for men, with a lifetime economic cost to the U.S. population of \$3.6 trillion, based on 32 million women and 12 million men who are victims of intimate partner violence during their lives. The \$3.6 trillion in economic cost estimate includes: \$2.1 trillion (59 percent) in medical costs, \$1.3 trillion (37 percent) in lost productivity among victims and perpetrators, \$73 billion (two percent) in criminal justice costs, and \$62 billion (two percent) in other costs, such as victim property or loss. *Intimate Partner Violence: Consequences*, *supra* note 27.

sentatives, and custody evaluators could be added to the existing annual training they receive. The training could be arranged by those who already organize such training conferences in collaboration with those who have been extensively trained on domestic violence as it relates to custody decision-making. Building on what already exists can reduce the added expenses from providing this essential training.

The recommendations on reforming child custody laws are nuanced and balanced. For certain situational couple violence, “parallel parenting” time as described in Jaffe et al. is recommended,<sup>624</sup> but with the adjustments we recommended in Section I. We call this parenting time arrangement “structured independent parenting time.”<sup>625</sup> For former couples who have engaged in mutual, situation based violence, but who have a good relationship with their children, this approach facilitates the goal of promoting safe and healthy parent-child relationships. With fewer opportunities to communicate, the former couple should have fewer conflicts that are harmful to their children and themselves.

However, when there is evidence of a pattern of coercive abuse, which is likely to continue and even escalate after the couple separates, heightened protections are recommended. In these situations, a series of law reforms should lead judges to order sole decision-making and primary parenting time to the survivor of this kind of domestic violence, with restrictions and conditions on parenting time for the parent engaged in this kind of domestic violence, tailored to the likely further abuse or violence that would occur if the protections were not in place. Courts should be required to consider whether ordering various types of preventative programs for parents who commit domestic violence would help reduce the likelihood of further domestic violence and whether ordering therapeutic programs for parent survivors of domestic violence and their children would help address the harms from prior domestic violence.

Courts and other family law professionals may be concerned with their ability to make the distinction between situational couple violence and a pattern of coercive abuse. But, this underscores the need for initial

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624. The parallel parenting time we recommend would be based upon what was described in Jaffe et al., 2008, *supra* note 306, but with a greater emphasis on a parenting plan that provides the details necessary to create common practices in the two independent households as needed for the child’s emotional and physical welfare. We refer to this modification of parallel parenting as “structured independent parenting time.”

625. See *supra* Section I (discussion of structured independent parenting time that also emphasizes some common practices during parenting time); *supra* note 327 and accompanying text (support for this need in the context of consistent bed time routines); *supra* note 328 and accompanying text (uniformity in rules and explanations).

and continuing domestic violence training to help these professionals make the best decisions possible for children and their parents when there is evidence of abuse and violence in the family. It is anticipated that fathers' rights organizations and their advocates will generally object to the proposed law reforms that take domestic violence into account in child custody cases and to better enable the non-abusive parent to protect themselves and their children from the danger of further domestic violence. They will likely claim that mothers often make up abuse allegations for financial gain and to alienate the children from their father, that judges already favor mothers in custody cases, and that children benefit from equal parenting time. However, as detailed in Section I, data do not support the claims that women often make up allegations of abuse and that courts favor women over men in custody cases. The data collected reflects the contrary. Judges place too much weight on alienation claims and fail to credit or place proper weight on evidence of domestic violence and child abuse. And, as detailed in Section I, there is substantial evidence that children are harmed from parenting time with a parent who engages in domestic violence.

Fathers' rights advocates may also claim that the proposed law reforms violate a parent's rights to their children. But the law reforms proposed are based in large part upon existing laws in many states. In addition, the law reforms proposed that would have the strongest impact on parenting would be triggered only by a pattern of coercive abuse, the type most likely to continue even after the couple separates. For cases of mutual, situational, domestic violence, if the parents have good relationships with their children, the proposal provides for the mutual, and less invasive protective measure of parallel parenting (using a structured, independent parenting time plan), to reduce the likelihood of future domestic violence and facilitate significant parent-child time with each parent. Thus, the law reforms proposed should not be construed as impermissible violations of parental rights.

#### CONCLUSION

Promoting the best interests of children and protecting them from serious endangerment in the context of a divorce or parentage case has become highly politicized and gendered. There are claims by fathers' rights groups that mothers often falsely accuse fathers of domestic violence to gain leverage in custody cases, to procure financial advantage,

or to alienate the fathers from their children.<sup>626</sup> They also claim that children do better when fathers are equally involved in their children's lives, but that judges favor mothers over fathers in custody cases.<sup>627</sup> Fathers' rights groups have engaged in a nationwide effort to reform the custody laws to create a presumption of equal parenting time, with no exception when one of the parents has engaged in domestic violence.<sup>628</sup> In the meantime, domestic violence survivors and their advocates claim that the needs of survivors of domestic violence and their children to be safe and free from further abuse are not being met in custody cases, that their claims of abuse are not being believed, and that the harm to their children from being exposed to domestic violence is not recognized and addressed by judges.<sup>629</sup>

This Article presented a literature review to assess treatment of domestic violence and best practices for taking domestic violence into account in child custody cases.<sup>630</sup> Our key findings include:

- (i) domestic violence can cause serious, long-term harm to children, and there is a strong co-occurrence of domestic violence with physical injury to children, and child abuse;
- (ii) judges favor fathers over mothers in custody cases (granting the custody in the fashion the fathers seek over what the mothers seek) by placing greater weight upon claims of alienation by fathers over claims of domestic violence by mothers, especially when the judges are not trained on domestic violence and hold traditional gender norms and believe the world is a just place;
- (iii) the long-term harms to children from domestic violence can be mitigated when protective factors are present or pursued, which include supporting the non-abusive parents in their efforts to protect themselves and their children from further domestic violence;
- (iv) to effectuate this support, family law professionals must be thoroughly trained on both the basics of domestic violence and the many counter-intuitive nuances of domestic

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626. *See supra* Section I.

627. *See supra* Section I.

628. *See supra* Section I.

629. *See supra* Section I.

630. *See supra* Section I.

violence, with custody evaluators, guardians *ad litem*, and child representatives needing to screen for domestic violence in all of their custody cases;

- (v) a key component of this training is learning how to distinguish situational couple violence, which might be able to be safely addressed through “parallel parenting” type custody orders, from situations where there has been a pattern of coercive abuse based upon a general goal of control in all matters, and which will likely continue and escalate after separation; and
- (vi) in cases with a pattern of coercive abuse there should be a rebuttable presumption that courts order sole decision-making and primary parenting to the non-abusive parent, and protective conditions and restrictions being placed on the parenting time of the coercively abusive parent.<sup>631</sup>

The review of state custody laws in the United States reflects substantial gaps between the practices and rules that evidence-based policies suggest, and the actual laws in place in most states.<sup>632</sup> Only one state requires custody evaluators, guardians *ad litem*, or child representatives to screen for domestic violence.<sup>633</sup> Only 11 states clearly require without waiver that family law judges—and only 13 states clearly require without waiver that custody evaluators, guardians *ad litem*, or child repre-

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631. *See supra* Section I. This proposal focuses on the situations where the domestic violence constitutes a pattern of coercive abuse or situational couple violence as we have defined these terms, and seeks to supplement and enhance existing statutory protections in child custody cases in those two situations. If the act(s) of domestic violence do not fit within those two categories, then they should be addressed under existing statutory standards relating to best interests of the child, any rebuttable presumptions on custody based upon domestic violence as defined in those statutes, the standard for the ordering of restrictions or conditions on parenting time due to domestic violence (if so referenced in the statute), or under the general standard for such restrictions or conditions on parenting time as worded in the applicable state. Having said that, we recommend that state legislation that clearly empowers courts to order restrictions or conditions on parenting time as necessary and appropriate to promote the safety and well-being of the child and the safety of the parent victim of domestic violence should be the norm, and states with legislation, like in Illinois, that require a higher level of harm before a court can order restrictions or conditions on parenting time should be modified to conform with this norm.

632. *See supra* Section II.

633. *See supra* Section II.

sentatives—receive training on domestic violence.<sup>634</sup> Only 21 states and the District of Columbia created in their custody statutes a rebuttable presumption against sole or joint custody to a parent who has engaged in domestic violence as defined in their statutes.<sup>635</sup> And, while 34 states clearly and explicitly refer to domestic violence (or domestic abuse or family violence against the other parent) as a basis to condition or restrict parenting time of a non-custodial parent,<sup>636</sup> some of these states' statutes that create rebuttable presumptions, or refer to domestic violence as a basis to condition or restrict parenting time, narrowly define domestic violence or do not require, but only permit, the court to order any conditions or restrictions.<sup>637</sup> These gaps in the law, and in requiring domestic violence screening and training, contribute to poor custody decision-making by judges to the detriment of the safety and welfare of domestic violence survivors and their children.<sup>638</sup> Nuanced and balanced law reforms would align the laws with evidence-based best practices for taking domestic violence into account in child custody cases.<sup>639</sup> If enacted and implemented, these law reforms should lead to safer, healthier, and better outcomes in child custody cases for families throughout the United States. ✿

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634. *See supra* Section II. Our searches relating to required training focused on custody statutes and state supreme court rules. It is possible that additional states require such training but from other sources of law; *see also supra* note 422 (Indiana requires training on child abuse and neglect but not on domestic violence).

635. *See supra* Section II.

636. *See supra* Section II.

637. *See supra* Section II.

638. *See supra* Section II.

639. *See supra* Section III.



THE CRIME REPORT, July 22, 2022

# Cultural Bias' and Wrongful Convictions of Women

By Audrey Nielsen | July 22, 2022

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Women are more likely than men to be wrongfully convicted of crimes, leading to complex legal battles—and sometimes extended prison sentences, legal experts told a recent panel sponsored by John Jay College's [Institute for Innovation in Prosecution](#).

Panelists called on prosecutors to take a closer at the implicit cultural biases that can lead to a misreading of evidence or faulty assumptions when women are brought to trial.

Valena Beety, a former federal prosecutor and deputy director of the [Academy for Justice](#) at Arizona State University, told the panel that “false confessions and the greater likelihood of women to internalize blame, even if there is no wrongdoing,” are among the reasons why women are wrongfully convicted.

According to Beety, many of the instances where women have been wrongfully convicted after a false confession are the result of their “internalizing a sense of responsibility” for offenses committed by significant others that brought them into involvement with the justice system.

Data on exonerations suggest that a disproportionate number of women were convicted in cases where it was ultimately found that no crime occurred.

Marissa Boyers Bluestine, assistant director of the Quattrone Center for the Fair Administration of Justice and former director of the Pennsylvania Innocence Project, shared data from the [National Registry of Exonerations](#) on the number of exonerations received by men and women.

Of 3,100 exonerations tracked by the registry, women made up only 8 percent.

But of the 280 exonerations received by women, 205 of them were “no crime” exonerations, that is, exonerations granted in a case where, ultimately, no crime was committed.

Examples include accidental fire cases charged as arson, or cases of child death where there was a natural or other non-criminal cause of death.

“That’s 73 percent of all the cases—an astonishing number,” Bluestine said.

“And that alone should give, I would hope, prosecutors great pause in terms of how we are approaching these cases.”

In cases where a crime was committed, panelists noted that in their experience, women who played accomplice or secondary roles were often more harshly charged and punished than the men who committed the crime at the center of their case.

The man who committed the crime doesn’t suffer nearly the same amount as the woman who was dragged into it as an accomplice

Bluestine recalled a woman who, when she entered a room after a fight between her boyfriend and her ex-boyfriend and discovered her ex-boyfriend’s body, was told by her boyfriend to “take care of it,” checked that he was dead, and wrapped his body in a carpet.

“That was her entire involvement; that’s all that came out at trial,”

Bluestine said.

But she was convicted of first degree murder and is currently serving a life sentence, while the man who committed the murder was sentenced to 6.5 to 15 years in prison after testifying against her at trial under a plea-bargain.

“We see those stories [often], that the person who actually committed or came up with the criminal activity does not suffer nearly the same amount as the woman who is dragged into it,” Bluestine said.

## **Inadequate Counsel**

Moreover, women are often underrepresented, or don’t receive the same quality of legal counsel as their male counterparts when pursuing deals with prosecution or approaching their legal case overall.

“They don’t have the same advocacy or the same attorney who says ‘hey, listen, let’s cut the deal fast. Let’s get you that third degree.’” Beety said.

“I hope that prosecutors become more aware of that discrepancy sadly between the severity of conduct by women and the sentence they receive.”

Before and after conviction, women may not receive the same support from family and friends offered to wrongfully convicted men.

“I get tons of letters from men in prison. And something that keeps me up at night is how few I get from women in prison,” Sunny Eaton, of the Nashville District Attorney’s Office, said.

“I also get a lot of letters from women advocating for men from their mothers, from their daughters, from their girlfriends, from their wives.

“I get none from men advocating for women in prison.”

Eaton said public pressure plays a significant role in pushing exonerations.

“The reality is that women just don’t have the same public advocacy or even family or friend advocacy in the same way that men tend to,” Eaton said.

## The World After Roe

Panelists warned that many issues faced by wrongly convicted women may come in to play as abortion becomes criminalized in states across the country, and as legal abortion protections are being dismantled since the Supreme Court's decision in [\*Dobbs v. Jackson Women's Health Organization\*](#).

Even before the decision, women were at risk of being “wrongly convicted of feticide when they have had a miscarriage,” Valena Beety said.

She cited the example of Rennie Gibbs, who, in 2006, was 16 years old when she gave birth to a stillborn child in Mississippi. The infant Gibbs named Samiya was delivered stillborn a month premature with the umbilical cord wrapped around her neck.

But Gibbs had taken cocaine during her pregnancy, and despite the evidence of how Samiya died, [Gibbs was charged with murder](#).

There are additional difficulties with prosecuting feticide, panelists explained, particularly unreliable forensic evidence.

One method in particular that is still used in courts is a ‘live birth test’ that checks the organs of a fetus to, ostensibly, test if a fetus took its first breaths and was therefore ‘alive’ before its death.

Beety condemned the method as a debunked test from the middle ages and, in another example relevant to the post-Roe landscape, pointed to a recent case that used it to charge a young woman with murder in Indiana.

[Purvi Patel](#) was convicted in 2013 of feticide for allegedly intentionally causing a miscarriage by taking an abortifacient, a kind of substance or medicine that induces abortion.

She was also charged with child neglect, hinging on the allegation that the fetus was alive when it was born and Patel abandoned it.

The prosecution's pathologist used a [pseudoscientific "lung float test,"](#) testing the buoyancy of lungs removed from the fetus.

This kind of "live birth test" is used almost exclusively in prosecutions of women as faulty proof that a woman killed her newborn child.

Faulty forensic or scientific evidence is not just limited to feticide cases, and it's present in an exceptional number of cases involving wrongfully convicted women, particularly in cases involving alleged abuse of a child.

The panelists also cited "shaken baby syndrome" and abusive head trauma cases across the country, which are often based on faulty science and have led to prosecutions and in some cases extreme sentences for mothers and caretakers.

Marisa Bluestine said she has been shocked by how many prosecutors will accept reports of shaken baby abuse or head trauma solely because a doctor told them a case looked like abuse.

"What does that do but completely hand over prosecutorial discretion and the duty of the prosecutor to independently evaluate a case to a medical expert?" Bluestine asked.

"Whenever you conflate doctors with homicide detectives, it becomes problematic."

"Whenever you conflate doctors with homicide detectives, it becomes problematic," Sunny Eaton said.

"There are prosecutions that continue to be brought based on shaken baby syndrome and abusive head trauma that don't even meet the internal standard within that diagnosis," Beety said, pointing to the case of Tasha Shelby in Mississippi.

Tasha Shelby was convicted of murder in 2000 for the death of her fiancé's toddler son and sentenced to life in prison. Shelby allegedly caused the child's death by "shaken baby syndrome," a determination with a now controversial and potentially pseudoscientific [diagnostic process](#).

The child had a history of seizures and, 16 years after Shelby was incarcerated, the medical examiner on her case reexamined his files and the boy's medical records and changed the cause of death to accidental. Despite the evidence, Shelby's conviction was [reaffirmed by the Mississippi court of appeals](#) in 2020. She remains incarcerated.

## Looking Forward

Panelists suggested that, since many no-crime wrongful convictions are linked to faulty forensic or scientific evidence, prosecutors raise the bar for the use of more reliable forensic evidence in criminal cases.

Bluestine argued that prosecutors need to acknowledge “that there's at least a possibility that the science presented at the trial was either flat out wrong or incorrectly understood.”

Sunny Eaton argued that there should be funding and allowances from judges for both sides to retain expert witnesses not just for testimony but for education.

“Why not provide everyone with the resources to get the best information in front of juries?” Eaton asked.

Bluestine recommended that interested prosecutors review the series on [improving conviction integrity](#) presented by the Sexual Assault Kit Initiative (SAKI) and forensics resources from federal agencies.

Eaton is optimistic that she's seeing change in her office, where as the head of the conviction review unit she holds a senior leadership role, in contrast to many similar units across the country.

“I have prosecutors coming to me and saying, ‘I think I might have committed a Brady violation. I understand why that can't happen. Can you help me fix it?’” Eaton said.

“That is culture change. That is how we get to this place of really prioritizing getting it right instead of getting it done.”

A recording of the panel [can be watched here](#).

**[The Institute for Innovation in Prosecution at John Jay College](#)** works to promote data-driven strategies, scholarship, and innovative thinking to a national body of prosecutors, policy experts and their communities.

**Valena Beety** has written a book on this topic available now: [Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights](#).

**Sunny Eaton** suggested audience members take a look at the [Conviction Review Unit's Report](#) on the case of Joyce Watkins and Charlie Dunn, where Watkins had been wrongfully convicted for the murder of her great-niece.

*Audrey Nielsen is a TCR Justice Reporting Intern.*

# DOMESTIC VIOLENCE REPORT™

LAW • PREVENTION • PROTECTION • ENFORCEMENT • TREATMENT • HEALTH

Vol. 27, No. 5

ISSN 1086-1270

Pages 69 – 84

June/July 2022

## *Book Review*

### Re-Set Needed on Parental Alienation

by Julie Saffren, JD

With the publication of *Challenging Parental Alienation: New Directions for Professionals and Parents*,<sup>1</sup> Professors Jean Mercer and Margaret Drew make a tremendous contribution to the work of professionals who are involved in child custody matters. As its title suggests, the book is intended for those professionals who are increasingly addressing parental alienation in child custody decision making. This book makes crystal clear, on multiple levels, the danger and harm of the entrenchment of the doctrine of parental alienation as well as the weak scientific and legal foundations upon which the concept of the parental alienation belief system rests. Indeed, a more apt book title might have been “Everything You Thought You Knew About Parental Alienation Is Wrong!”

This copiously researched and authoritative volume issues a clarion call to professionals in the child custody arena: Proclaim that collective corrective action is broadly needed in multiple areas. Parents alone cannot drive the changes that our systems and institutions require now. *Challenging Parental Alienation* helps researchers find topic areas where research is desperately needed, especially in areas

See PARENTAL ALIENATION, page 77

## Important Takeaways From the Murder of Gabby Petito

by Gael Strack, Casey Gwinn, Joe Bianco, Jerry Fineman and Dan Rincon

On body-camera footage — toward the end of their 75-minute contact — an officer approaches a young woman sitting in the back seat of a police vehicle.<sup>1</sup> She appears emotionally exhausted and anxious, not sure what will happen next or when the encounter will end. She receives good news. The patrol officer tells her she is not going to be cited or arrested for domestic violence. She is free to go. “You can take the van. We have made arrangements for your fiancé to stay at a hotel. We want you to take a break from each other. Do not talk or text each other tonight. I’m going to talk to your fiancé and tell him the same thing.” After her ordeal, the woman, who likely had never had an encounter with law enforcement before and after almost being arrested, was asked a question by the patrol officer: “Do you want me to say something anything to him? ... Do you want me to tell Brian you love him?” The young woman tears up, initially looks away but then slightly nods her head in a “yes” motion but only says: “Make sure he doesn’t forget his phone charger. It is definitely dead.”

It was August 21, 2021, when the officers concluded their interaction with Gabby Petito and Brian Laundrie in Moab, Utah, and deemed it a “mental health crisis.” The officer’s final comments to Gaby and Brian suggest he believed everything was going to be all right if they promised not to see each other until the next day and if each said they loved each other before he left.

And no law enforcement protocol in America justifies such an approach by an officer. Weeks later Gabby’s remains would be discovered, 485 miles away, in Grand Teton National Park. The cause of death was strangulation.

Gabby’s parents lost contact with their daughter on August 30 and were alarmed when Brian Laundrie returned to Florida in Gabby’s van on September 1, without Gabby. Gabby was 22 years old and had been traveling cross-country with her fiancé Brian Laundrie. On television news, after Gabby went missing, America witnessed the concerted effort of local and federal law enforcement agencies to find her.

Tragically, media attention and law enforcement collaboration could not save Gabby: eight days after her parents reported her missing, law enforcement officers found Gabby’s body. Then, Brian Laundrie disappeared, and local and federal authorities began a manhunt for him. Ultimately, Laundrie’s remains were found in a Florida nature reserve. The medical examiner ruled he died by suicide. In his notebook, he took responsibility for Gabby’s murder.

### What Happened to Gabby on August 12, 2021?

Earlier, on August 12, 2021, the Moab City Police Department responded to reports from concerned

See TAKEAWAYS, next page

## ALSO IN THIS ISSUE

Case Summaries .....	71
DV Hotline Recognizes Six Million Milestone.....	84

## TAKEAWAYS, from page 69

citizens about an enraged man with a young woman on the side of the road. One individual called 911 reporting that: “The gentleman was slapping the girl.” “They ran up and down the sidewalk” where “he proceeded to hit her, hopped in the car and they drove off.” Later that day, another witness reported that “Something wasn’t right” between a man and a woman.

Reeves, Captain Brandon Ratcliffe from Price City Police Department was asked by Moab Police Chief Bret Edge to conduct an independent investigation into the manner in which Moab Police Officers responded to reports of domestic violence involving Gabby Petito and Brian Laundrie. Captain Ratcliffe’s 99-page report consisted of findings and recommendations. Captain Ratcliffe identified what was done correctly, the mistakes that were

and policymakers can use to improve responses in similar incidents.<sup>4</sup>

**Coercive Control**

We conclude that the officers missed or dismissed evidence of the power and control that Brian Laundrie was exercising over Gabby Petito, both at the scene and in the context of their relationship. “Coercive control” is a pattern of behavior that unreasonably interferes with a person’s free will and personal liberty and includes, among other things, unreasonably isolating a victim from friends, relatives, or other sources of support, including “[d]epriving the other party of basic necessities,” and “[c]ontrolling, regulating, or monitoring the other party’s movements, communications, daily behavior, finances, economic resources, or access to services.”<sup>5</sup>

Brian had the keys to Gabby’s van, locked her out of the van, told her to take a walk and even started to walk away from her in a city where she had no friends, family, or resources. Under these circumstances—without access to her keys to the van, laptop, money, or even water—Gabby likely felt abandoned, isolated, and vulnerable. When she refused to leave and insisted on getting into the van (a safe place), Brian became loud, intimidating, and physically abusive.

See TAKEAWAYS, page 74

### *Strangulation is recognized as one of the most lethal forms of domestic violence: unconsciousness may occur within seconds and death within minutes.*

Aware of these reports, officers contacted Gabby Petito and Brian Laundrie. Hardly more than an hour later, they concluded the situation did not involve a domestic violence incident, but rather a “mental health crisis.” No arrest was made. No advocates were contacted or called to the scene. No safety planning was offered. No charges were filed. And no report was submitted to the local prosecutor for its evaluation of the case.<sup>2</sup>

**Moab Report**

In September 2021, in response to a formal complaint from Attorney Tanya

made, and the clues that were missed.<sup>3</sup> He listed his concerns and made recommendations for improvement.

We have reviewed his report from the August 12, 2021 incident, including body-camera footage. Unfortunately, the report did not include an interview with the original 911 caller, nor a print-out of the entire 911 call. It also did not include a written statement from the independent witness or an interview with Park Ranger Mellissa Hulls who was seen multiple times interacting with Gabby Petito. We offer our conclusions, takeaways, and recommendations that law enforcement officers

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Domestic Violence Report is published bimonthly by Civic Research Institute, Inc., 4478 U.S. Route 27, P. O. Box 585, Kingston, NJ 08528. Periodicals postage paid at Kingston, NJ and additional mailing office (USPS # 0015-087). Subscriptions: \$165 per year in the United States and Canada. \$30 additional per year elsewhere. Vol. 27, No. 5. June/July 2022. Copyright © 2022 by Civic Research Institute, Inc. All rights reserved. POSTMASTER: Send address changes to Civic Research Institute, Inc., P.O. Box 585, Kingston, NJ 08528. *Domestic Violence Report* is a trademark owned by Civic Research Institute and may not be used without express permission.

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## TAKEAWAYS, from page 70

The officers appear to have completely missed or disregarded the evidence of Brian's coercive control over Gabby, falling for his description of her as "just crazy" and "he was the one that was marked up." Through no fault of the officers, they also did not have the benefit of interviewing the independent eyewitnesses to the violence before they arrived or the opportunity to listen to the 911 call. These witnesses, including the park ranger, and the 911 call itself likely would have provided additional context to Laundrie's abuse. The lead officer's decision to simply separate Gabby and Brian

escalating violence. She appeared to minimize the situation and was willing to take responsibility for her actions in order to protect Brian and avoid upsetting him any further.

Most telling, however, were Brian's injuries. His injuries were more consistent with Gabby defending herself from being grabbed in the face than Gabby being the predominant physical aggressor (Harm/Rajs, 1981).<sup>6</sup> We also have the benefit of hindsight. Gabby was strangled to death. Given the research that most victims are strangled before they are murdered, all the clues lead us to conclude that Gabby was most likely strangled and/or suffocated by Brian before the police arrived on August 12, 2021.

officers to be trained on the identification, investigation, and documentation of non-fatal strangulation and suffocation cases. It is very likely the officers who investigated this case were not trained to recognize and record the signs and symptoms of non-fatal strangulation and suffocation assaults.

A lack of training in strangulation/suffocation assault would explain why no questions were asked about potential method of suffocation or strangulation, amount of pressure, length of pressure, what Gabby thought was going to happen or whether she was able to breathe normally. Officers did not document the injuries on Gabby, nor did they analyze the injuries on Brian as potentially the result of Gabby defending herself after being strangled or suffocated.

Strangulation is recognized as one of the most lethal forms of domestic violence: unconsciousness may occur within seconds and death within minutes.<sup>10</sup> It is known that victims may have no visible injuries at the time—yet may have many serious internal injuries or die days or several weeks later. Strangulation is indicative of a high level of domestic violence in a relationship that can escalate quickly to death and is considered the ultimate form of coercive control.<sup>11</sup> The inability to breathe can be terrifying. The trauma experienced from the assault and/or the lack of oxygen to the brain can make it difficult for victims of strangulation to tell what happened in a chronological order. Strangulation is the calling card of a killer. If a victim of domestic violence is strangled even one time, she is 750% more likely to be killed by the person who strangled her.<sup>12</sup> The majority of all women murdered in this country are strangled before they are murdered.<sup>13</sup> It is also known that stranglers who kill have likely done it to the victim before they kill her later with their hands or a firearm. In 2017, Utah recognized the act of strangulation and/or suffocation as an aggravated assault.<sup>14</sup> In 2019, the Utah Court of Appeals in *State v. Aires*, 438 P.3d 984 (Utah App. 2019), held that strangulation can cause serious bodily injury even when a victim does

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*The officers appear to have completely missed or disregarded the evidence of Brian's coercive control over Gabby, falling for his description of her as "just crazy" and himself "as the one that was marked up."*

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for the night, offer to convey words of love back to each of them, and offer no other resources was a missed opportunity to discern that Laundrie's abuse of Gabby was escalating.

### Strangulation and/or Suffocation

We believe that Gabby may have been strangled and/or suffocated by Brian Laundrie on August 12, 2021, weeks before she ended up being strangled to death in September. There were clues: They had been fighting all morning. Things were escalating. Gabby wanted to get water, work on her blog, and sit in the van. Brian, on the other hand, wanted to lock up the van, keep her from working, and make her take a walk. Gabby was upset and frustrated that Brian was yelling at her and preventing her from entering the van. Brian's rage was public. It was drawing the attention of concerned citizens. Brian grabbed Gabby's face, which is a common tactic by abusers to control their victims and keep them quiet. Gabby's demeanor and response when the officers contacted her were consistent with classic victim dynamics, a history of coercive control, and

Today, 48 states have passed some form of strangulation and suffocation felony laws. In addition to states, Congress amended Federal Code § 18 U.S.C § 113(a) in 2013 to include a specific charge of assault or attempted assault by strangulation or suffocation with sentencing recommendations of up to 10 years. The federal statute defines strangulation as intentionally, knowingly or recklessly impeding the normal breathing or circulation of blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there was any intent to kill or protractedly injure the victim under subsection (b)(4). The federal statute defines *suffocation* as intentionally, knowingly or recklessly impeding the normal breathing of a person *by covering the mouth of the person, the nose of the person or both*, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim under subsection (b)(5).

Yet, only Massachusetts,<sup>7</sup> Maryland<sup>8</sup> and Texas<sup>9</sup> require law enforcement

See TAKEAWAYS, next page

TAKEAWAYS, from page 74

not lose consciousness or experience severe physical symptoms.

### Predominant Physical Aggressor

We conclude the officers who interacted with Gabby and Brian did not properly apply or administer Utah's Predominant Physical Aggressor law. There are four key considerations for identifying the predominant physical aggressor under Utah's law: Prior domestic violence; assessment of injuries as being offensive or defensive in nature; assessment for future harm; and consideration of self-defense and/or defense of property.<sup>15</sup> The officers did not document their evaluation of any of these four required considerations. They also referred to Gabby as the "primary aggressor" citing her statement that she hit him first. Utah's law is not a "primary aggressor" law, and the first person to hit is not necessarily the predominant physical aggressor.

The officers found that Gabby did not pose a threat to Brian. They considered Brian to be bigger, stronger, older, and in control of the relationship. Gabby was described as "tiny," "little," and "105 pounds soaking wet." While Gabby admitted to hitting Brian first, she also reported that she was trying to retrieve the keys to the van from Brian to get in the van. She also wanted Brian to stop yelling at her. Gabby had a right to retrieve her property. Gabby reported that Brian "grabbed her face" and caused injury. She even mentioned that his backpack may have "got" her and caused a bruise on her arm. Gabby was interrupted by the officer in trying to describe what happened as well. Had Gabby not been interrupted in telling the officer what happened and quickly dismissed as being in a mental health crisis with "high anxiety," she may have been able to explain much more, including any history of prior violence.

It is common for victims of strangulation and/or suffocation to defend themselves. Studies indicate victims of strangulation will defend themselves up to 65% of the time.<sup>16</sup> The injuries on Brian's face and body are consistent with defensive injuries caused by Gabby trying to protect

herself.<sup>17</sup> While they took photos of Brian's injuries, no photos were taken of Gabby's injuries. They did not look for any additional injuries, ask about pain, or offer her medical attention. They did not even confront Brian about "grabbing her face," causing her injury or the bruise on her arm. Based on their limited investigation and observations, officers concluded that "things were lining up" that Gabby was the "primary aggressor." However, they also did not want to arrest Gabby and chose to temporarily separate them instead.

### Recommendations

The Strangulation Prevention Institute (see n. 17), supports the recommendations of Captain Ratcliffe for additional training for all law enforcement officers, review of the report approval processes in Moab, follow-up with the independent witnesses who called 911, a review of the software used, and overall review of internal policy of the Moab Police Department (all law enforcement agencies) on domestic violence cases. We support the recommendations that the Moab Police Department: (1) adopt the Lethality Assessment Program; and (2) require every officer to receive specific training in (i) trauma-informed interviewing, (ii) investigating strangulation and/or suffocation cases, and (iii) how to identify the "predominant physical aggressor."

We also recommend that patrol officers either be given access to 911 calls in domestic violence cases or that dispatchers be trained to provide such information to the officers to enable them to conduct an adequate and effective investigation in domestic violence cases. The officers had eyewitnesses to the actual assault that they did not interview, and it appears they formed their conclusions without even speaking to the original 911 caller.

We recommend law enforcement agencies develop domestic violence response teams to support victims at the scene of the crime.<sup>18</sup> The presence of an advocate at the scene might have helped officers better support Gabby Petito and better assess the actual context of the incident and their relationship.

We recommend all communities—rural, suburban, and urban—consider the creation of a Family Justice Center or similar framework where potential victims of abuse can be referred one place for support and services.<sup>19</sup> There is no such model in Moab for officers to refer (or transport) victims to after a violent incident.<sup>20</sup> Brian was sent to a motel; Gabby was left on her own with no support of any kind.

We also recommend Utah's law on predominant physical aggressor be amended to include considerations such as other legal defenses, level of violence, non-fatal strangulation and/or suffocation, height/weight of parties, the presence and/or absence of fear, use of drugs and/or alcohol, corroborating evidence, detail of statement and/or document or undocumented prior violence or coercive control.

### Conclusion

Finally, we commend the Moab Police Department for their willingness to seek an independent review of their handling of this case and to make changes to improve their response going forward. We also acknowledge the need for more resources and training to be provided to law enforcement officers. **We do not seek to blame the officers for Gabby Petito's death.** The only person responsible for Gabby's death is Brian Laundrie. But we aspire to a day when officers utilize the best practices we have recommended here and see early intervention as the pathway to homicide prevention. International Association of Chiefs of Police Association and our Strangulation Prevention Institute have developed numerous resources and trainings to help law enforcement officers to effectively respond to domestic violence, strangulation and suffocation cases, and we stand ready to help.

### End Notes

1. See Gabby Petito Case: Full Utah Bodycam Video. Available on YouTube at <https://www.youtube.com/watch?v=fCGsW41aQEw>.

2. Investigative Review of Aug. 12, 2021, Petito-Laundrie Incident in Moab prepared by Captain Brandon Ratcliffe, Price City Police Department (unknown date of publication).

See TAKEAWAYS, next page

TAKEAWAYS, from page 75

Available at <https://moabcity.org/DocumentCenter/View/3432/Combined-Statement-and-Investigative-Report-Petito-Laundrie-Incident>. Accessed April 12, 2022.

3. **Id.**
4. This article is based on an evaluation of the August 12, 2021 incident by the listed authors as well as faculty members at the Institute including: Detective Mike Agnew (Ret.), Fresno Police Department, California; Megan Ahrens, Assistant District Attorney, Johnson County, Kansas; Brett Joann Engler, Chief, Domestic Violence Unit, Frederick County State's Attorney, Maryland; Detective Robert Frechette, Rochester Police Department, New Hampshire; Master Investigator Rachael Frost (Ret.), Riverside County Sheriff's Office, California; Josh Helton, Patrol Officer, Davis Police Department, California; Retired Judge Eugene Hyman, Santa Clara County Superior Court, California; Detective Nate Griese, Missoula Police Department, Montana; Senior Attorney Alexandria Ruden, Legal Aid Society of Cleveland, Ohio; and Assistant Public Defender Laura Zimm, Sixth Judicial District, Duluth, Minnesota.
5. See, for example, Cal. Fam. Code § 6320.
6. Harm, T. & Rajs, J. (Sept.-Oct. 1981). Types of injuries and interrelated conditions of victims and assailants in attempted and homicidal strangulation, *Forensic Sci. Int.* 18(2), 101-23. doi: 10.1016/0379-0738(81)90148-1.
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[texas.gov/tlodoes/86R/billtext/pdf/SB0097IF.pdf#naophanes=0](https://texas.gov/tlodoes/86R/billtext/pdf/SB0097IF.pdf#naophanes=0).

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13. Gwinn, C. and Hellman, C. (2019). Hope Rising: How the science of HOPE can change your life. New York, NY: Morgan James Pub.

14. See Utah Code 76-5-103. Available at <https://le.utah.gov/xcode/Title76/Chapter5/76-5-S103.html>. Accessed April 7, 2022.

15. See Utah Code 77-36-2.2. Available at <https://le.utah.gov/xcode/Title77/Chapter36/77-36-S2.2.html>. Accessed April 7, 2022.

16. Harm & Rajs, supra note 6.

17. Investigation and Prosecution of Strangulation Cases, California District Attorneys Association and the Training Institute on Strangulation Prevention (2020). Available at <https://www.familyjusticecenter.org/resources/cdaa-investigation-and-prosecution-of-strangulation-cases-manual/>. Accessed April 7, 2022.

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19. For more information about Family Justice Centers, go to: [www.familyjusticecenter.org](http://www.familyjusticecenter.org).

20. Our Family Justice Center Alliance program works with local communities to develop and sustain Family Justice Centers to serve victims of domestic and sexual violence. For more information, contact us at [info@allianceforhope.com](mailto:info@allianceforhope.com).

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## Document (1)

1. [DECONSTRUCTING THE "IMAGE" OF THE BATTERED WOMAN: DOMESTIC VIOLENCE AND THE CONSTRUCTION OF "IDEAL VICTIMS": ASSAULTED WOMEN'S "IMAGE PROBLEMS" IN LAW, 23 St. Louis U. Pub. L. Rev. 107](#)

**Client/Matter:** -None-

**Search Terms:** women's credibility in domestic violence cases

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Secondary Materials

**Narrowed by**

Jurisdiction:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Dist. of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming

# DECONSTRUCTING THE "IMAGE" OF THE BATTERED WOMAN: DOMESTIC VIOLENCE AND THE CONSTRUCTION OF "IDEAL VICTIMS": ASSAULTED WOMEN'S "IMAGE PROBLEMS" IN LAW

2004

## Reporter

23 St. Louis U. Pub. L. Rev. 107 \*

**Length:** 26507 words

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## Highlight

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[\*107]

In large part, the limits of current legal responses [to battered women] are rooted in the same persistent structural inequities and biases which underlie battering itself. <sup>1</sup>

## Text

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### I. Introduction

A significant amount of public attention and legal intervention in the past few decades has focused on the issue of violence against women and children, and especially on domestic violence. This attention and increased public concern is a direct achievement of several decades of activism, scholarship, and advocacy undertaken by those concerned both with ending violence against women and achieving equality rights for women generally. <sup>2</sup> Yet most mainstream social and legal responses to the problem of violence against women, especially violence against women in intimate relationships, remain inextricably bound up with and shaped by incomplete and distorted representations of the nature, causes, and effects of that violence. <sup>3</sup> As a result, some of the ways domestic

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<sup>1</sup> Evan Stark, Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control, [58 Alb. L. Rev. 973, 979 \(1995\)](#).

<sup>2</sup> See [id. at 976-77](#).

<sup>3</sup> [Id. at 979-80](#).

**violence** is addressed **in** the law - even those ways expressly aimed at remedying the defects and inadequacies of traditional legal responses - inadvertently end up reinforcing the problems they seek to rectify.

Two examples of this are found **in** stereotypical representations of women who are subjected to **violence in** their intimate relationships. Both of these representations rely on the construction of categories of victims of **domestic violence** that misapprehend and stigmatize **women's** ways of coping with [\*108] intimate **violence** and its effects on their lives. <sup>4</sup> The first of these is the legal deployment of the victim who suffers from the "battered woman syndrome," a diagnostic category sometimes used as evidentiary support for the self-defence claims of women who, **in** fear for their own lives, have killed their violent partners. It is specifically drawn upon to address the often asked question about why assaulted women who have ended up killing their violent spouses did not "just leave" their abusers instead. <sup>5</sup> The second is the victim who recants and/or who refuses to "cooperate" **in** the prosecution of her violent male intimate. <sup>6</sup>

Both of these categories of **domestic violence** "victims" share a set of problematic assumptions about how women who have experienced intimate **violence** typically react. They share, most fundamentally, a failure to recognize that the decisions made by assaulted women who kill their violent partners to save their own lives, and those who refuse to "cooperate" with criminal prosecutions of their batterers, may be making decisions which are both reasonable and rational when grasped within the particular circumstances of their lives and the social conditions which shape those circumstances. <sup>7</sup> Most importantly, these representations of **domestic violence** "victims" reveal fundamental discordances between the way **in** which **domestic violence** is understood and processed **in** criminal justice system and the way **in** which it is lived and negotiated **in** the context of assaulted **women's** lives. <sup>8</sup>

**In** this paper, I argue that the use of the "battered woman syndrome" **in** law represents a double-edged sword. To the extent that it captures the psychological dimensions and harms inflicted by being subjected to **violence in** an intimate relationship, the "syndrome" has provided critical evidence supporting the self-defence claims of battered women who kill their violent partners. But to the extent it explains the difficulties battered women have leaving their violent partners **in** terms of a purported psychological incapacity and lacks an acknowledgment of the powerful social forces which inhibit **women's** very opportunities for "leaving," the "syndrome" is a profoundly inadequate conceptualization. Given that there are more effective strategies for educating courts about the contexts and effects of intimate **violence**, I argue [\*109] that the use of the "battered woman syndrome" ought ultimately to be abandoned **in** the legal arena.

**In** the same way that the "battered woman syndrome" is an inadequate and distorted conceptualization of intimate **violence in women's** lives, there is a distinct impression, backed up by an academic literature on the subject, that many assaulted women are "uncooperative victims" **in** relation to the criminal justice system's processing of **domestic violence cases**. <sup>9</sup> Some researchers and, more prominently, many Crown attorneys, prosecutors, and judges express frustration with women who refuse to participate **in** the prosecution of **domestic violence cases**, recant while testifying, or otherwise impede the criminal prosecution of **domestic violence cases**. <sup>10</sup> But the idea

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<sup>4</sup> See *id. at 1000*; see, e.g., Linda G. Mills, Killing Her Softly: Intimate Abuse and the **Violence** of State Intervention, *113 Harv. L. Rev. 550, 589-90 (1999)*.

<sup>5</sup> Stark, *supra* note 1, at 973, 981.

<sup>6</sup> Mills, *supra* note 4, at 590.

<sup>7</sup> See generally Cheryl Hanna, No Right to Choose: Mandated Victim Participation **in Domestic Violence** Prosecutions, *109 Harv. L. Rev. 1849 (1996)* (discussing the difficulty of encouraging a more public response to **domestic violence** while preserving **women's** autonomy from excessive state intervention).

<sup>8</sup> See generally *id.*; Mills, *supra* note 4 (discussing the need to reconsider whether mandatory state intervention policies serve the best interest of all battered women).

<sup>9</sup> See Mills, *supra* note 4, at 589-90. See also Donna Wills, **Domestic Violence**: The **Case** for Aggressive Prosecution, *7 UCLA Women's L.J. 173, 176-77 (1997)*.

that "uncooperative victims" are part of the problem *in* legal responses to ***domestic violence*** represents a failure to grasp the dynamics and impact of ***domestic violence in women's*** lives. Moreover, it rests on an undisturbed assumption that the women who have experienced ***violence in*** their intimate relationships should be invested *in* - and therefore "cooperate" with - the process of criminalization, *in* support of the state's pursuit of this strategy.

The category of the "uncooperative victim" differs from the "battered woman syndrome" insofar as it is not an academically developed psychological descriptor of the impact of ***violence*** but is, instead, a (negative) characterization of a common response that some assaulted have to the criminal justice system.<sup>11</sup> Along with the "battered woman syndrome," however, the concept of the "uncooperative victim" *in domestic violence cases* has gained currency and legitimacy *in* legal circles.<sup>12</sup> However, both illustrate an inadequate understanding of intimate ***violence*** and its effects on ***women's*** lives, particularly the effects associated with victimization and the social conditions of inequality *in* which ***domestic violence*** takes place. To this extent, each of these "victim" categories typifies the kind of "image problem" that battered women face *in* law.<sup>13</sup>

Dominant images and legal representations of women who are victims of ***violence*** typically fail to apprehend the co-existence of ***women's*** victimization with ***women's*** agency that is often expressed through the context specific strategies of resistance which most women employ when they experience ***violence*** perpetrated against them.<sup>14</sup> A consequence of this analytical severing [\*110] of victimization from its co-existence with agency is a distorted understanding both of the particular problem of ***violence in*** individual ***women's*** lives and its effects, as well as the broader social conditions *in* which this ***violence*** takes shape and gets perpetuated. This, *in* turn, limits the efficacy of legal responses to and interventions *in domestic violence*.

The two classes of victims I analyse *in* this paper, the essentially helpless one with the syndrome and the overly active agent who is "uncooperative," are mirror-image and opposite examples of the difficulty incorporating acknowledgement of both victimization and agency *in* representations of ***women's*** experiences of intimate ***violence***. The "battered woman syndrome" describes a ***woman's*** utter helplessness *in* the face of ongoing abuse, e.g., her incapacity is such that she cannot plan for her own safety, and she cannot disentangle herself from her relationship with her abuser.<sup>15</sup> She is a victim whose agency has been obliterated by the abuse. The "uncooperative victim," on the other hand, is seen to have an excessive expression of agency.<sup>16</sup> By declining to participate or by not participating willingly and fully with the prosecution of ***domestic violence cases***, these "uncooperative" women are seen to be non-compliant victims whose assertion of agency *in* opposition to the needs of the criminal justice system undercuts their victim status and the supportive response they warrant.<sup>17</sup>

A critical examination of both of these categories of victims - those suffering from "battered woman syndrome" and those who are seen to be "uncooperative" or "reluctant" witnesses - sheds light on the larger complications which attach to legal images of assaulted women and the paradoxes and limitations of contemporary legal responses to ***domestic violence***. These limitations, *in* turn, necessarily impede the development of more adequate and nuanced accounts of the dynamics of ***domestic violence***, accounts which are able to grasp simultaneously the contours of

<sup>10</sup> Wills, *supra* note 9, at 178-79.

<sup>11</sup> Accord *id.*

<sup>12</sup> *Id.* at 176-79.

<sup>13</sup> The idea that battered women have an "image problem" *in* law is developed by Martha Mahoney *in* a seminal article on ***domestic violence***. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, [90 Mich. L. Rev. 1 \(1991\)](#).

<sup>14</sup> Hanna, *supra* note 7, at 1882-85; Mills, *supra* note 4, at 583 n.175.

<sup>15</sup> See, e.g., Stark, *supra* note 1.

<sup>16</sup> See Mills, *supra* note 4, at 589; Hanna, *supra* note 7, at 1883.

<sup>17</sup> See Hanna, *supra* note 7, at 1885.

women's victimization and the ways in which women negotiate, resist, and cope with this violence in the contexts of their lives.

## // The Social Context of Men's Violence Against Women

### A. Gender and Power

As has been demonstrated by a now significant body of research on the topic, the majority of violence against women takes place in the context of intimate heterosexual relationships, and among its more brutal manifestations, [\*111] includes repeated physical and sexual assaults.<sup>18</sup> At the micro level, men's violence against women in intimate relationships expresses the greater social power and control they wield; power which is also structured and entrenched at the macro-level of social relations, in terms of their overrepresentation in most positions of power and authority, including in the economic and political spheres.

Gendered violence is a phenomenon that emerges from and reinforces women's subordinate status in society.<sup>19</sup> This has been recognized by the Supreme Court of Canada in cases including R. v. Seaboyer,<sup>20</sup> Janzen v. Platy Enterprises,<sup>21</sup> and R. v. Osolin.<sup>22</sup> As Justice L'Heureux-Dube remarked in Seaboyer, "perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society."<sup>23</sup> In recent years there has been an increasing awareness of the prevalence of violence against women, including the specific problem of "woman abuse"<sup>24</sup> in the context of spousal relationships.<sup>25</sup> It has now become an accepted part of much of the [\*112] mainstream discourse on

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<sup>18</sup> Lori Haskell & Melanie Randall, Appendix A: The Women's Safety Project, in Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence - Achieving Equality app. A (1993); Lori Haskell & Melanie Randall, Private Violence/Public Fear: Rethinking Women's Own Safety (Solicitor General of Canada ed., 1994); Melanie Randall & Lori Haskell, Sexual Violence in Women's Lives: Findings from the Women's Safety Project, A Community Based Survey, 1 Violence Against Women 6, 24 (1995) [hereinafter Randall & Haskell, Sexual Violence]; Statistics Canada, The Violence Against Women Survey (1993). In the research analysed in these studies the perpetrators of the violence against women were overwhelmingly male.

<sup>19</sup> Numerous research studies confirm the gender based nature of this violence. For example, the Violence Against Women Survey conducted by Statistics Canada found that 39% of women reported at least one incident of sexual assault by a man since the age of 16. Julian Roberts, Criminal Justice Processing of Sexual Assault Cases, 14 Juristat 7 (1994). The Women's Safety Project found that 54% of respondents reported an experience of sexual assault or attempted sexual assault at some point in their lives. Randall & Haskell, Sexual Violence, supra note 18.

<sup>20</sup> R v. Seaboyer, [1991] 2 S.C.R. 577.

<sup>21</sup> Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252.

<sup>22</sup> R. v. Osolin, [1993] 4 S.C.R. 595.

<sup>23</sup> Seaboyer, [1991] 2 S.C.R. at 649 (L'Heureux-Dube, J., dissenting in part).

<sup>24</sup> I use this term to refer to what is perhaps more commonly recognized under the label "wife assault." In order to acknowledge the fact that this kind of violence takes place in a variety of intimate heterosexual relationships, including marital and common law spousal relationships, as well as "dating" relationships I prefer the descriptor "woman" to that of "wife." In order to capture the broad range of intrusive, controlling, and violent behaviours manifested in intimate relationships I prefer the more expansive term "abuse" to that of "assault."

<sup>25</sup> Stark, supra note 1, at 977. Some of the earliest key works on the topic were American and include: Susan Schechter, Women and Male Violence: The Visions and Struggles of the Battered Women's Movement (1982); Lenore A. Walker, The Battered Woman (1979).

violence against women, for example, that "power and control" are central explanatory concepts in accounting for this violence.<sup>26</sup>

Yet the concepts "power and control" can nevertheless run the risk of being understood in overly individualized terms if they are not linked to an analysis of the social relations of gender, specifically of the ways in which this violence expresses the imbalances of power embedded in those social relations of inequality. By this I mean that it is possible to think that the men who perpetrate violence against women are deviant individuals with an unhealthy need for power and control, understood in terms of distortions in their personal psyches. While attention to the factors which make some men act out violence towards women while others do not is of crucial importance, the larger point I am making here is that the problem of men's violence against women is too pervasive to be understood as a pathology of a few individual men. Instead, it must be analysed within the context of the larger patterns of presumed male entitlement, authority, and power constructed in the culture more broadly. The rationalizations used by men who are "batterers" to explain, minimize, or excuse their assaults on their female partners are most telling in this regard for what they reveal about the larger constructs of traditional masculine norms.<sup>27</sup> Studying the micropolitics of power, as these are expressed in individual and intimate relationships between men and women, therefore, throws into stark relief the larger patterns of gendered social inequalities and the way in which these shape the conditions of women's lives.

The pervasive social problem of violence against women, including sexual assault, sexual harassment, and physical and sexual assault in intimate relationships, exists on an international scale<sup>28</sup> and cannot be understood apart from the hierarchical and unequal relations of gender in which it is both situated and of which it is a product. Put differently, violence against women simultaneously expresses and reproduces sexual inequality on both individual and societal levels; it is both a cause and effect of sex inequality.

[\*113]

#### B. The Prevalence and Characteristics of Abuse in Intimate Heterosexual Relationships

Research has consistently demonstrated that approximately one in four women has experienced some kind of physical violence or physical assault in an intimate relationship with a male partner.<sup>29</sup> As these studies document, violence against women in intimate relationships can take a variety of forms.<sup>30</sup> It can include kicks, slaps, shoving, use of weapons, death threats, repeated punching and beating, the infliction of burns, damage to the woman's possessions, threats of harm against her, her friends, and her family, sexual assault, and a variety of other abusive behaviours.<sup>31</sup> Far too often the specifically sexual violence, including rape, used by men against

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<sup>26</sup> See generally Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989); Diana E. H. Russell, *Rape in Marriage* (1982); Liz Kelly, *Surviving Sexual Violence* (1988); Schechter, *supra* note 25; Elizabeth A. Stanko, *Intimate Intrusions: Women's Experiences of Male Violence* (1985); Mahoney, *supra* note 13.

<sup>27</sup> See generally R. Emerson Dobash et al., *Changing Violent Men* (2000); James Ptack, *Why Do Men Batter Their Wives?*, in *Feminist Perspectives on Wife Abuse* 133 (Kersti Yllo & Michele Bograd eds., 1988).

<sup>28</sup> See, e.g., Amnesty International, *Broken Bodies, Shattered Minds: The Torture and Ill-Treatment of Women 2* (2001), available at <http://web.amnesty.org/library/eng-373>; U.N. Centre for Social Development and Humanitarian Affairs, *Violence Against Women in the Family 3-4* (1989); Canada and the United Nations General Assembly, *Special Sessions: Women and Violence, Status of Women Canada*, Beijing +5: Factsheets (June 2002) at [http://www.swc-cfc.gc.ca/pubs/b5\\_factsheets/b5\\_factsheets\\_13\\_e.html](http://www.swc-cfc.gc.ca/pubs/b5_factsheets/b5_factsheets_13_e.html).

<sup>29</sup> Randall & Haskell, *Sexual Violence*, *supra* note 18, at 24. For example, the *Women's Safety Project* reports that 27% of women interviewed disclosed physical assault by a male intimate. *Id.* Similarly, the original large scale Statistics Canada survey on *women's experiences of violence in adulthood*, found that virtually the same proportion of women respondents, one in four (or 25%) reported at least one experience of physical assault perpetrated by a male intimate. Statistics Canada, *supra* note 18.

<sup>30</sup> See U.N. Centre for Social Development and Humanitarian Affairs, *supra* note 28, at 21.

their female intimates, is an ignored component of **violence** against women **in** spousal relationships because it remains even more privatized and stigmatized than physical assaults.<sup>32</sup>

Some women assaulted by their male intimates are subjected to prolonged and brutal beatings with great frequency; others have only been hit or assaulted a single time.<sup>33</sup> Yet the effects of this kind of **violence** cannot be measured only **in** relation to variables like the frequency or severity of assault. Instead, the way the **violence** operates as part of a larger pattern of coercion, control, and domination **in** the relationship must be taken into account, along, most importantly, with a **woman's** subjective experience of this **violence in** order to appreciate for any individual woman what impact the **violence** has on her and the meaning she makes of it.<sup>34</sup> As Lori Haskell has pointed out, a woman may only have been assaulted once **in** order to "learn" that she must thoroughly accommodate and adapt herself to the controlling tactics of her male partner to avoid further abuse.<sup>35</sup>

**[\*114]** The idea of "intimate partner terrorism" as a way of conceptualizing **violence** against women **in** intimate relationships has gained prominence.<sup>36</sup> Other scholars have compared the unsettling effects of **violence in** intimate relationships with the kind of destabilization of entire communities which results from acts of political terrorism. As Isabel Marcus sees it,

There are strong and striking parallels and similarities between terrorism as a strategy used to destabilize a community or society consisting of both women and men, and the abuse and **violence** perpetrated against women [by men] **in** intimate or partnering situations.<sup>37</sup>

Marcus's analogy draws the parallel between the disempowering and terrifying aspects and effects of political terrorism against specific communities and the sexual terrorism to which significant numbers of individual women are subjected **in** their intimate relationships with men.<sup>38</sup> This analogy, while powerful, should not eclipse attention to the fact that the compared contexts also differ **in** highly significant ways. Whereas acts of political terrorism typically take place **in** a context of declared war or at least overt hostilities between (relatively) clearly defined and

<sup>31</sup> See id. at 21-23.

<sup>32</sup> See, e.g., David Finkelhor & Kersti Yllo, License to Rape: Sexual Abuse of Wives 84-87 (1985); Russell, supra note 26, at 1-5.

<sup>33</sup> See Schechter, supra note 25, at 222-23.

<sup>34</sup> See U.N. Centre for Social Development and Humanitarian Affairs, supra note 28, at 21-22; Isabel Marcus, Reframing "**Domestic Violence**": Terrorism **in** the Home, **in** The Public Nature of Private **Violence**: The Discovery of **Domestic** Abuse 32 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Schechter, supra note 25, at 222.

<sup>35</sup> Lori Haskell, Remarks at Interviewer Training, **Women's** Safety Project Research (1991) (remarks on file with author).

<sup>36</sup> See, e.g., Michael Johnson, Patriarchal Terrorism and Common Couple **Violence**: Two Forms of **Violence** Against Women, 57 J. Marriage & Fam. 283, 283 (1995); Marcus, supra note 34, at 30-32.

<sup>37</sup> Marcus, supra note 34, at 32. Marcus elaborates upon this analogy **in** the following terms:

Like terror directed at a community, **violence** against women is designed to maintain domination and control, to enhance or reinforce advantages, and to defend privileges. Like other individuals or communities who experience politically motivated terrorism, women whose partnering and intimate relationships are marked by **violence** directed against them live **in** a world similarly punctuated by traumatic and/or catastrophic events, such as threats and humiliation, stalking and surveillance, coercion and physical **violence**. Within a family structure, women are likely to be the targets of **violence**, and men are likely to be the perpetrators. Whether the **violence** is identified as the imposition of discipline, as a strategy of family governance, or as an act of masculinity, the consequences are the same. Women learn that they can be kept **in** their culturally and socially designated "place" by the threat or imposition of physical injury.

Id.

<sup>38</sup> Id.

identified political groups, men's acts of sexual **violence** against women **in** intimate relationships take place **in** contexts which are, to the contrary, supposed to be characterized by affective emotional ties, partnership, allegiance, trust, loyalty, and safety.<sup>39</sup> This, at least, is what is promised by the dominant discourses surrounding heterosexual marriage and "romantic love."<sup>40</sup> To this extent, acts of sexual and physical **violence** against women **in** their intimate relationships are striking **[\*115]** aberrations from what the norm is supposed to be and could be understood as a form of "undeclared" intimate warfare.<sup>41</sup> This unnamed and isolating character of **violence in** intimate relationships makes the experience not only deeply traumatizing, but also deeply confusing for those women who find themselves **in** the position of trying to reconcile the **violence** perpetrated against them by the same person from whom they are supposed to receive love and, according to traditional gender scripts, "protection."<sup>42</sup>

**III.** Legal Images<sup>43</sup> of **Violence** Against Women: Conceptual Problems and Political Challenges Regarding the "Battered Woman Syndrome"

A. Recognition of the "Battered Woman Syndrome" **in** Canadian Law: The Lavallee Decision<sup>44</sup>

The reasonable man's claims to universality are under siege. The contest comes from those whose experiences are other than his. The problem for them is how to effect a point of entry into the legal discourse of common sense and reasonableness. That discourse, taken as belonging to everyone, is exclusive to those with power over knowledge. So the problem is epistemological: how to alter ways of seeing, understanding and defining the normalcy of the reasonable man.<sup>45</sup>

**In** Canada, it was R. v. Lavallee which provided a legal basis upon which to interject gender into the analysis of reasonableness brought to bear on criminal liability **in cases** of homicide perpetrated by "battered women."<sup>46</sup> Specifically, the Supreme Court of Canada decision **in** Lavallee is famous for entrenching legal recognition of the evidentiary support provided through the "battered woman syndrome" to a **woman's** self-defence claim **in** a criminal trial **in** which she stood accused of killing her violent male partner.<sup>47</sup>

**[\*116]** The defence of self-defence has been often used **in** Canada **in** the relatively few **cases** of spousal homicide perpetrated by women.<sup>48</sup> **In** Canadian law, as **in** most other jurisdictions, legal crime categories and

<sup>39</sup> See id. at 12; Martha R. Mahoney, Victimization or Oppression? **Women's** Lives, **Violence**, and Agency, **in** The Public Nature of Private **Violence**: The Discovery of **Domestic** Abuse, supra note 34, at 60.

<sup>40</sup> See Mahoney, supra note 39, at 32; Marcus, supra note 34, at 32.

<sup>41</sup> Marcus, supra note 34, at 32.

<sup>42</sup> Accord Mahoney, supra note 39, at 60; Schechter, supra note 25, at 222-24.

<sup>43</sup> Mahoney, supra note 13, at 1-3 (using this descriptor to refer to the image of women, particularly battered women, created by the publicized courtroom trials **in domestic violence cases**).

<sup>44</sup> R. v. Lavallee, [1990] 1 S.C.R. 852.

<sup>45</sup> Katherine O'Donovan, Law's Knowledge: The Judge, the Expert, The Battered Woman, and Her Syndrome, [20 J.L. & Soc'y. 427, 429 \(1993\)](#).

<sup>46</sup> Lavallee, [1990] 1 S.C.R. 852.

<sup>47</sup> Id. It is important to note that "battered woman syndrome" is not itself a defence to a criminal charge. Instead, it is a psychological explanatory framework, introduced through expert evidence, through which a **woman's** self defence claims can be evaluated **in** light of her previous experiences of **violence**. Id.

<sup>48</sup> Alison Young, Conjugal Homicide and Legal **Violence**: A Comparative Analysis, 31 Osgoode Hall L.J. 761, 781 (1993). "There has been no **case in** English criminal law where a battered woman has successfully pleaded that the homicide of her abuser was **in** her self-defence." Id.

defences differentiate between types of killings to distinguish those considered the most heinous, such as homicides which are "planned and deliberate" for example from those which take place under a range of other circumstances. <sup>49</sup> *In* order to recognize the external exigencies and human "infirmities" which may contribute to or cause a killing, the law recognizes a number of defences to the crime of murder. <sup>50</sup> If successful, a self-defence claim excuses the offender from legal liability for the killing. <sup>51</sup> However, *in cases* of spousal homicide, this defence has not easily fit with dominant social perceptions of the kinds of circumstances *in* which this crime often takes place. <sup>52</sup> As Mewett and Manning remark, "defences carry with them, by necessary implication, the problem of the social acceptability of the parameters of such defences." <sup>53</sup> *In* terms of the self-defence claims of women who kill their violent male partners, the traditional model of the sudden bar room brawl which erupts between two men who engage *in* physical combat that ends *in* the death of one of them, is neither an appropriate nor a relevant analogy.

The Canadian Criminal Code contains several provisions relevant to the defence of self-defence. Section 34(1) refers to killings *in* self-defence which were carried out unintentionally. <sup>54</sup> The legal challenge *in* charges laid under this section lies *in* determining when an unintentional killing is justified and by what standard the determination is made, whether it be according to what the objective so-called "reasonable" person *in* the situation would assess or according to the subjective appraisal of the accused. <sup>55</sup> *In cases* of spousal homicide where battered women who have endured prolonged victimization [\*117] kill their abusers, this question is of critical importance because the "ordinary" person's perceptions of the actual incident or circumstances surrounding the killing may fail to grasp the context and the psychological effects of prolonged physical brutalization, the fear of further (often explicitly threatened) *violence* or death, and the perceived (and often very real) lack of options a battered woman may actually have *in* terms of protecting herself from her partner's *violence*.

Section 34(2) of the Criminal Code also deals with *cases in* which the accused killed *in* self-defence and specifies the extent of justification for this. <sup>56</sup> As Grant et al. point out, the Supreme Court of Canada decision *in* R. v. Lavallee, which was informed by the analysis offered *in* the expert testimony relating to "battered woman syndrome," has particularly had far reaching implications for Section 34(2). <sup>57</sup> The Lavallee decision has wide

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<sup>49</sup> Martin's Criminal Code, 219-36; 34-37 (2001) (Can.).

<sup>50</sup> Martin's Criminal Code, 34-37 (2001) (Can.).

<sup>51</sup> Lavallee, [1990] 1 S.C.R. at 852; R. v. Kandola, [1993] 27 B.C.A.C. 226.

<sup>52</sup> See Elizabeth Sheehy, Battered Women and Mandatory Minimum Sentences, [39 Osgoode Hall L.J. 529, 532-34 \(2001\)](#). See also Brenda M. Baker, Provocation as a Defense for Abused Women Who Kill, 11 Can. J.L. & Jurisprudence 193, 195 (1998).

<sup>53</sup> Mewett and Manning, Criminal Law 746 (3d ed. 1994).

<sup>54</sup> The section reads: "Everyone who is unlawfully assaulted without having provoked the assault is justified *in* repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to defend himself." Martin's Criminal Code, 34(1) (2001) (Can.).

<sup>55</sup> See generally R. v. Cinous, [2002] 2 S.C.R. 3; R. v. Hibbert, [1995] 2 S.C.R. 973; David M. Paciocco, Subjective and Objective Standards of Fault for Offenses and Defenses, 59 Sask L. Rev. 271, 306-07 (1995).

<sup>56</sup> The section reads:

Every one who is unlawfully assaulted and who causes death or grievous bodily harm *in* repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the *violence* with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Martin's Criminal Code, 34(2) (2001) (Can.).

ranging legal repercussions for what it means to be "unlawfully assaulted," the requirement that the accused exercised self-defence *in* response to an "imminent attack," the common law "duty to retreat," and the interpretation of "reasonableness" *in cases* of ***domestic violence***.

For example, at common law, the "assault" referred to *in* Section 34(2) from which the accused defends him or herself had been interpreted narrowly to exclude verbal threats to kill.<sup>58</sup> However, this kind of narrow reading, which failed to grasp the nature of the often repeated threats made against a battered woman as part of the ***violence*** perpetrated against her, was overturned by Lavallee.<sup>59</sup> *In* delivering the majority judgment for the Court, Justice Wilson clarified that "s. 34(2)(a) does not actually stipulate that the accused apprehend imminent danger when he or she acts" and further asserted that it is ***case*** law which has "read that requirement into the defence."<sup>60</sup> Justice Wilson [\*118] criticized the narrow interpretation of assault *in* Whynot, *in* the following terms:

The requirement imposed *in* Whynot that a battered woman wait until the physical assault is underway before her apprehension can be validated by law would, *in* the words of an American court, be tantamount to sentencing her to "murder by installment."<sup>61</sup>

This more expansive view of self-defence *in* Canadian jurisprudence is also evident *in* R. v. Whitten.<sup>62</sup> *In* this decision, Chief Justice Glube referred to the evidence that the accused, a battered woman, was at the point she killed her husband "fending off an attack from him, albeit basically a verbal attack at the time, but which I have no doubt *in* the past led to physical attacks on upon her."<sup>63</sup>

*In* addition to excising the "imminent attack" requirement, the Lavallee judgment is significant for undermining the idea that the "duty to retreat" means that a battered woman who kills is deprived of the defence of self-defence because she should have left her home. The Court clarified that:

Traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself ... . A man's home may be his castle but it is also the ***woman's*** home even if it seems to her more like a prison *in* the circumstances.<sup>64</sup>

Perhaps most significant *in* Lavallee, however, is the Supreme Court of Canada's acceptance of the evidentiary support of battered woman syndrome *in* the self-defence claims made by the accused.<sup>65</sup> This expert testimony was crucial *in* allowing for a new interpretation of "reasonableness" from the viewpoint of the battered woman who kills because she sees no other option and/or because she is protecting her own life. As Justice Wilson elaborated:

If it strains credulity to imagine what the "ordinary man" would do *in* the position of a battered spouse, it is probably because men do not typically find themselves *in* that situation. Some women do, however. The definition of what is

<sup>57</sup> Martin's Criminal Code, 34(2) (2001) (Can.); R. v. Lavallee, [1990] 1 S.C.R. 852; Isabel Grants et al., A Forum on Lavallee v. R.: Women and Self Defense, 25 U.B.C. 23 (1991); Martha Shaffer, The Battered Woman Syndrome Revisited: Some Complicating Thoughts Years after R. v. Lavallee, [47 U. Toronto L.J. 1, 1, 6 \(1997\)](#).

<sup>58</sup> See, e.g., Lavallee, [1990] 1 S.C.R. at 852; R. v. Reilly, [1984] 2 S.C.R. 396; R. v. Bogue, [1976] 70 D.L.R. 603; R. Whynot, [1983] 61 N.S.R. 33.

<sup>59</sup> See generally Lavallee, [1990] 1 S.C.R. at 852.

<sup>60</sup> Id. at 872-73.

<sup>61</sup> Id. at 853.

<sup>62</sup> R. v. Whitten, [1992] 110 N.S.R.2d 149, at 157.

<sup>63</sup> Id.

<sup>64</sup> Accord Lavallee, [1990] 1 S.C.R. at 856-57.

<sup>65</sup> Id.

reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."<sup>66</sup>

*In* this way, the Lavallee decision can be read as explicitly introducing gender into the "reasonable person" standard and as insisting upon a more contextual reading of what "reasonable" means from the particular life circumstances of the accused, when she is a woman who has been subjected to prolonged and ongoing ***violence*** and kills to save herself from this ***violence***.

**[\*119]** When women kill their spouses it is most often *in* the context of a relationship already characterized by extreme and/or repeated episodes of ***violence***. The killing usually takes place when the ***woman's*** strategies of resistance and/or other avenues of escape have failed to protect her from further ***violence***. The Supreme Court of Canada's holding *in* Lavallee reflects a judicial decision significantly more sensitized to the social and individual circumstances *in* which some "battered women" kill to save their own lives and more sensitized to the desperation and fear which usually flow from living with ongoing ***violence*** and being threatened with death. By removing the common law restrictions that had made self-defence virtually unavailable to battered women who kill, Lavallee offers a contextualized and gender sensitive reading of self-defence *in* relation to murder charges and an expanded legal understanding of the circumstances surrounding this particular form of spousal homicide. To this extent, this decision represents a significant, if not unequivocal, step forward.

#### B. The Battered Woman Syndrome and the "Cycle of ***Violence***"

Since its relatively recent acceptance *in* U.S. and Canadian ***case*** law, commentators from a variety of fields have expressed concern about the politically problematic aspects of the "battered woman syndrome."<sup>67</sup> Some have recommended ways of reconceptualizing this "syndrome" *in* order to avoid its most obvious limitations,<sup>68</sup> while others have described it as a "red herring" and called for its elimination *in* the legal arena altogether.<sup>69</sup> The trajectory of the "battered woman syndrome" and its reception *in* academic and legal circles cannot be traced without reference to the work of its originator, Lenore Walker, and her first articulation of the syndrome two decades ago.<sup>70</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> Shaffer, *supra* note 57, at 1.

<sup>68</sup> See, e.g., Mary Ann Dutton, Understanding ***Women's*** Responses to ***Domestic Violence***: A Redefinition of Battered Woman Syndrome, *21 Hofstra Law Review* 1191, 1193 (1993); Joan S. Meier, Notes from the Underground: Integrating Psychological and Legal Perspectives on ***Domestic Violence in*** Theory and Practice, *21 Hofstra L. Rev.* 1295, 1314 (1993); Shaffer, *supra* note 57, at 8-9; Stark, *supra* note 1, at 1009-11.

<sup>69</sup> See, e.g., Donald Downs, More Than Victims: Battered Women, the Syndrome Society and the Law 223 (1996); Julianne Parfett, Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence *in* Spousal Homicide ***Cases***, 12 Windsor Rev. Legal & Social Issues 55, 96 (2001).

<sup>70</sup> The identification and popularization of the category "battered woman" was most clearly and explicitly formulated *in* Walker's widely cited and influential book, entitled *The Battered Woman*. See generally Walker, *supra* note 25. This text has been regarded as a classic *in* the field, along with her subsequent books and many articles. See, e.g., Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989) [hereinafter Walker, *Terrifying Love*]; Lenore E. Walker, *The Battered ***Woman's*** Syndrome* (1984) [hereinafter Walker, *Battered ***Woman's*** Syndrome*].

Walker provided one of the earliest feminist accounts of the experiences of women abused by their male intimate partners. Her research on, and analyses of woman abuse, including her articulation of the "battered woman syndrome," contain both elements of radicalism *in* their original conception, as well as the conservative and stereotypical elements which remain so troubling today. For example, *in* her first book on the topic of woman battering, Walker outlines the various dimensions of this kind of abuse, including attention to ***women's*** experiences of both physical and sexual assaults, economic deprivation, and social isolation imposed by their male partners. *In* this way, Walker presents an expansive view of the features of ***violence*** against women *in* intimate relationships and identifies the ways *in* which violent men not only use physical assaults against the women with whom they live but also seek to exercise control over their female partners *in* a variety of other spheres. Walker also

[\*120] Central to Walker's explanatory account of the "battered woman syndrome" are the related concepts of "learned helplessness" and the "cycle of violence." <sup>71</sup> In Walker's view, "learned helplessness" is a constitutive component of the "battered woman syndrome." <sup>72</sup> Walker's original formulation of the "battered woman syndrome" drew on the work of Martin Seligman and a team of researchers who conducted research with animals to measure the behavioural effects of electric shocks administered to them while in captivity. <sup>73</sup> Based on his laboratory studies of dogs, Seligman postulated the theory of "learned helplessness" to explain their response to abusive stimuli over which they could not exercise any control. <sup>74</sup> As a result of the shocks, the dogs became listless, complacent, and passive and made no effort to escape their cages even when it was possible for them to do so. <sup>75</sup> Walker saw this situation as parallel to that experienced by "battered women," who, unable to [\*121] control or stop the violence perpetrated against them, "learned" to become "helpless" in the face of it. <sup>76</sup> This concept is a foundational component of the "battered woman syndrome." <sup>77</sup>

The concept of "learned helplessness" is one of the fundamental flaws which construct the problems associated with the "battered woman syndrome." The focus on a battered woman's so-called "helplessness," whether learned or not, not only over generalizes by stereotyping the experiences of women who experience violence in their intimate relationships, but it also reveals a deeper problem. Most fundamentally, it focuses the lens on the individual woman's perceived inability to react more effectively to her difficult circumstances and loses sight of two typically co-existing, more significant and determinative phenomena (as I elaborate more fully below). These are, first and foremost, the fact that most battered women are not helpless but are, in fact, actively engaged in a pursuing a variety of coping, help-seeking, and resistance strategies. <sup>78</sup> Second, the "learned helplessness" model entirely overlooks the myriad ways in which the social conditions of inequality so often limit or thwart battered women's help-seeking strategies.

According to Walker, there is also a "cycle of violence" which characterizes violence against women in their intimate relationships with men. <sup>79</sup> This cycle comprises three distinct phases: the tension building phase prior to an assault, the eruption of violence, and the period of contrition which typically follows, sometimes referred to as

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explicitly identifies sexual subordination as the cause and context of domestic violence. As she puts it, only where there is true equality between males and females can there be a society that is free from violence. Walker, *supra* note 25, at x. Writing over twenty years ago, Walker explicitly situated the problem of men's violence against women in intimate relationships within the larger social relations of gender inequality.

In spite of these progressive and more contextualized aspects of her analysis, Walker nevertheless describes her research as aimed at studying "battered women's problems" and as intended to illuminate the specific "psychology of battered women as victims." *Id.* To this end, the explanatory model of the "battered woman's syndrome" she developed to explore the special psychology of "battered women" has now become a dominant way of understanding the effects of this kind of violence in women's lives. In this way, then, Walker's work ultimately ends up reinforcing a focus on the "psychology of victims" in ascribing to "battered women" a distinct psychological profile which seems ultimately to attach to the women themselves instead of being understood as a normal response to abnormal external circumstances. Although it is arguably an inadvertent consequence of her research, Walker's work - and the way it has been taken up since it first appeared - has significantly contributed to pathologizing and psychologizing of the lives of women who are assaulted by their male intimates.

<sup>71</sup> See Walker, *supra* note 25, at 42-70.

<sup>72</sup> *Id.* at 47.

<sup>73</sup> *Id.* at 45-46.

<sup>74</sup> Martin E.P. Seligman et al., Alleviation of Learned Helplessness in the Dog, 73 J. Abnormal Psychol. 256, 258 (1968).

<sup>75</sup> *Id.* at 256.

<sup>76</sup> See Walker, *supra* note 25, at 48.

<sup>77</sup> *Id.* at 47.

<sup>78</sup> See, e.g., Edward Gondolf & Ellen Fisher, Battered Women as Survivors: An Alternative to Learned Helplessness (1988).

<sup>79</sup> *Id.* at 55.

the "honeymoon" period.<sup>80</sup> Yet the notion that violence in intimate relationships follows such a discernible pattern is a rather formulaic, and even static representation. Despite the fact that it is predicated on a view of the cyclical nature of violence, it overemphasizes the "violent event" itself, by defining all of the phases of the cycle in relation to the "violent episode."<sup>81</sup> In this way, the dynamic and ongoing ways in which violent and abusive men exercise control, domination, and coercion over their female partners are obscured in favour of overplaying the significance of the actual and discrete "incidents" of physical assault.<sup>82</sup> But for a woman living with a violent male partner, there may never be a period she experiences as a "honeymoon" phase, as the absence of physical assault does not eradicate its ongoing consequences, including the woman's need for hypervigilance in [\*122] guarding against/watching for "the next time" and the ways in which the domination is sedimented through multiple layers of everyday behaviours and areas through which his control is assumed and exerted.<sup>83</sup> In this way, the very notion of a "cycle of violence" strips away the complex, ongoing, and relational dimensions of the patterns of male control and domination of which the man's violence is only a part.

Evan Stark makes a similar point when he observes that:

Work with battered women ... suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work.<sup>84</sup>

Findings from the Women's Safety Project research confirm precisely this point, that in women's own subjective experience an episode of violence perpetrated by their male intimate partner can impose severe limitations on diverse areas of their lives.<sup>85</sup>

The more generalized patterns of control and subordination which underpin intimate violence, therefore, can be seen in the many areas in which assaulted women report feeling deeply constrained, limited, and restricted in their everyday lives.<sup>86</sup> To this extent, the "cycle of violence" postulated by Walker misses the ongoing relational aspects of women's subordination in their relationships with violent male partners, as well as the patterns of domination and subordination which do not evaporate in any so-called "honeymoon phase" and which extend beyond the immediate consequences of men's discrete acts of violence to powerfully restrain women's freedom and autonomy.

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<sup>80</sup> Id. at 56-70.

<sup>81</sup> Id. at 59-69.

<sup>82</sup> This is in no way to suggest that physical assaults are not highly significant and destructive events; rather, that physical violence is typically only one expression of a larger and often more insidious pattern of domination and control.

<sup>83</sup> See Walker, supra note 25, at 48.

<sup>84</sup> Stark, supra note 1, at 986.

<sup>85</sup> For example, a majority of the women interviewed for that study who disclosed an experience of physical assault in an intimate relationship with a man reported that as a result of the violence they felt unable to express any criticisms of their partners, ask for his participation in child care responsibilities, or have control over their own money. More specifically, in 53% of the cases in which women reported physical assault in an intimate relationship they also reported that they felt unable to disagree with their partner. In 42% of these cases women reported being unable to spend time apart from their male partners, and 25% reported that they could not wear the clothes they wanted to. Perhaps most telling and most disturbing is that in 40% of cases of physical assault in intimate relationships the women interviewed reported that they did not feel able to refuse unwanted sex, suggesting that they may have often accommodated unwanted sex with their abusive partners in order to avoid further conflict and/or physical assault. See Lori Haskell & Melanie Randall, Politics of Women's Safety: Sexual Violence, Women's Fear and the Public/Private Split, 26 Resources Feminist Res. 113, 141-42 (1999).

<sup>86</sup> Id. at 142.

C. Dysfunction, Deficits, and Other Pathologies: The Battered Woman and Her "Syndrome" <sup>87</sup>

Perhaps the most troubling aspect of the "battered woman syndrome" is the way it calls up and underlines the popular image of a woman who has been subjected to **violence** as a helpless and utter "victim" and as one who has been rendered totally passive and ineffective as a result of this **violence**. This image of the "battered women" has now been firmly inscribed **in** legal discourse surrounding "battered women" who kill, given the way **in** which expert evidence on the syndrome presented at trial is so often given and/or received. <sup>88</sup> Martha Shaffer's review of Canadian **case** law since Lavallee, **in** which battered woman syndrome has supported a self-defence claim for a woman accused of killing her violent spouse, indicates that the image of the helpless battered woman is potentially tied to the even more dangerous stereotype of the "authentic" and "deserving" battered woman. <sup>89</sup> Those "battered women" who fail to conform to this stereotype of incapacity, because they are seen as angry, aggressive, or "tough," may fail to have a jury or judge understand the applicability of the doctrine of self-defence and the Lavallee expansion of "reasonableness" to their defence claims. <sup>90</sup>

This tendency towards stereotyping of **women's** experiences that inheres **in** the syndrome has been soundly criticized by a variety of scholars. For example, **in** Evan Stark's view, the "battered woman syndrome" provides an "inaccurate, reductionist and potentially demeaning representation of woman battering" <sup>91</sup> insofar as it "emphasizes the disabling effects of **violence** rather than **women's** survival skills." <sup>92</sup> For Mary Dutton, a clinical psychologist, one of the major shortcomings of "battered woman syndrome" is that it is taken to represent the psychology of all battered women when, **in** her view, "battered **women's** diverse psychological realities are not limited to one particular 'profile'." <sup>93</sup> Further, according to Martha Shaffer, the "battered woman syndrome" represents battered women as "dysfunctional" and therefore as incapable of autonomy or rationality **in** their actions. <sup>94</sup>

These critiques are well founded for the emphasis on the psychological incapacitation of "battered women" is not accidental but is absolutely central to the definition of the syndrome itself. Walker, **in** fact, is explicit **in** expressing her view that battering produces the state of "learned helplessness" **in** women [\*124] and that the psychological effects of battering result **in** a form of psychological impairment, a diminished capacity **in** terms of the **woman's** emotions, cognitions, and behaviour. <sup>95</sup> As she explains **in** her book *Terrifying Love: Why Battered Women Kill and How Society Responds*, "the process of learned helplessness results **in** a state with deficits **in** three specific areas: **in** the area where battered women think, **in** how they feel, and **in** the way they behave." <sup>96</sup> There is no subtlety or ambiguity **in** this formulation. Walker is explicit that the psychological consequences of battering are such that the woman becomes psychically "damaged" and, by obvious inference, cannot make the kinds of decisions she would or should make if she were not suffering from the "syndrome." <sup>97</sup> To this extent, then, the "battered woman syndrome" is arguably little more than a more compassionate and gender sensitive version of the traditional psychiatric view of women as "irrational" or even "insane," <sup>98</sup> except that this version incorporates a recognition

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<sup>87</sup> See O'Donovan, *supra* note 45, at 427.

<sup>88</sup> See generally Shaffer, *supra* note 57; see also Mahoney, *supra* note 13, at 24-33.

<sup>89</sup> Shaffer, *supra* note 57, at 25.

<sup>90</sup> *Id.* at 30-32.

<sup>91</sup> Stark, *supra* note 1, at 975.

<sup>92</sup> *Id.* at 1000.

<sup>93</sup> Dutton, *supra* note 68, at 1195.

<sup>94</sup> Shaffer, *supra* note 57, at 19.

<sup>95</sup> Walker, *Terrifying Love*, *supra* note 70, at 50-51.

<sup>96</sup> *Id.* at 36 (emphasis added).

<sup>97</sup> See generally *id.* at 42-53.

that the women's alleged "irrationality" or psychological incapacity results from the infliction of abuse upon her by a male intimate. In other words, the abuse is seen to be wrong and not the woman's fault in the "battered woman syndrome," but it is also seen to have made her lack autonomy and rationality.

#### D. Making Women's Resistance Visible

Both of the formulations - "learned helplessness" and "battered women's syndrome" - emphasize passivity and powerlessness at the expense of recognizing women's struggles and resilience in the face of the conditions of their subordination, of which the violence forms only a part. Moreover, they entirely obliterate the varied and complex strategies of resistance that most women who experience violence actually devise and carry out.<sup>99</sup>

Research with women assaulted by their male partners has consistently demonstrated that women employ a range of creative ways through which they attempt to escape, avoid, minimize, or stop the violence against them.<sup>100</sup> In the Women's Safety Project study, for example, the majority of the 420 women [\*125] randomly surveyed reported using a variety of resistance strategies in relation to experiences of sexual violence.<sup>101</sup> Specifically, in 64% of the (134) cases of physical assault perpetrated by a male intimate, women expressed some form of resistance, as they did in 70.6% of the cases of sexual assault.<sup>102</sup> Even in terms of responding to experiences of sexual abuse and incest in childhood, in 68.8% of these (339) cases women reported that they mounted some kind of resistance.<sup>103</sup>

The problem is that the social conditions of inequality often impose severe limitations on the options which are actually available to women, including a lack of second stage housing, sex segregation and unequal pay in the labour market, a lack of available and affordable child care facilities, the social, ideological, and economic pressures to "keep the family together," and the stigmatizing and victim-blaming attitudes which still prevail and which often hold women accountable for the violence perpetrated against them.<sup>104</sup> For women from racialized groups, immigrant, or refugee women, these conditions are often exacerbated by the relations of racism and the fact that membership in a racial "minority" group and lower socio-economic status are often co-terminus.<sup>105</sup> These conditions of inequality, therefore, seriously constrain the extent to which women can exercise "choice" and autonomy and the extent to which they are able to resist the violence perpetrated against them. Yet in spite of these conditions, what is remarkable is that so many women still find creative and effective ways to resist violence and abuse.

<sup>98</sup> See Ann Jones, *Women Who Kill* 158-66, 288-89 (1980) (presenting an analysis of the courts' historical predilection for accepting pleas of insanity in cases of women who killed their violent male spouses over explanations which address the dynamics of the violence and the woman's lack of options).

<sup>99</sup> See Melanie Randall, *Agency and (In)Subordination: Victimization, Resistance and Sexual Violence in Women's Lives* (1996) (unpublished Ph.D. dissertation, York University) (on file with author) (analysing women's resistance strategies in the context of violence).

<sup>100</sup> See, e.g., Mary Ann Dutton, *Empowering and Healing the Battered Woman: A Model for Assessment and Intervention* 41-43 (1992); Gondolf & Fisher, *supra* note 78, at 28.

<sup>101</sup> See Randall, *supra* note 99, at 148 (discussing these results).

<sup>102</sup> *Id.* These figures exclude cases of sexual assault which also took place in the context of a relationship where the woman was also physically battered as these were included in the data set which documents physical assault in intimate relationships. These figures also refer only to the more "extreme" and narrowly defined cases of sexual violence, documented on the mini-questionnaires. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See Dutton, *supra* note 68, at 1232-40; Walker, *supra* note 25, at 14-15.

<sup>105</sup> Accord Dutton, *supra* note 68, at 1236-38.

In legal terms, instead of widening the lens through which women's experiences of violence are understood, the "battered woman syndrome" may ultimately replace one set of narrow stereotypes for another. This is because the use of "battered woman syndrome" as evidentiary support for a self-defence claim made by a woman who has killed her violent spouse "furthers a trend away from justification defenses for women defendants" by resting on an account of psychological incapacity.<sup>106</sup> It does this by answering the "why didn't she leave?" question with a psychological account of the battered woman's helplessness which results from her exposure to prolonged violence. As Donald Downs observes, "battered woman syndrome speaks the language of justification and situational excuse, [but] is at heart a defense based on [\*126] incapacity excuses."<sup>107</sup> In this way the image of the helpless, passive, and debilitated "battered woman" plays into pre-existing social and legal stereotypes about women's diminished capacities.

#### E. Misapplications of the "Battered Woman Syndrome" in Law

Battered woman syndrome is, among other things, a tool by which legal authorities, including juries, can bend or tailor stringent legal rules to achieve justice in individual cases.<sup>108</sup>

The battered woman syndrome was a watershed in social and legal understandings of domestic violence.<sup>109</sup>

The acceptance of the "battered woman syndrome" by the Supreme Court of Canada in Lavallee and its use in the Canadian legal system since that decision have not amounted to an unambiguous or unequivocal advance in the law's response in Canada to the problem of violence against women in intimate relationships generally or in supporting the defence of self-defence for women accused of killing their violent male partners specifically.<sup>110</sup> Even aside from its inherent limitations, in terms of achieving relief for individual women who have experienced extreme violence and killed in self-defence, the evidentiary support provided by the battered woman syndrome has made little difference.

In 1995, the Minister of Justice and the Solicitor General of Canada established a Self-Defence Review, headed by Judge Lynn Ratushny, to re-examine convictions of women in light of the Supreme Court of Canada's finding in Lavallee.<sup>111</sup> The Review's final report, released in 1997, recommended some kind of relief for only seven of the ninety-eight cases considered and did not result in the release of a single woman from jail, an outcome one commentator has described as "disturbing."<sup>112</sup>

Critically reviewing this review, Elizabeth Sheehy remarks that "feminist activists and lawyers will have to work to generate systematic changes out of the [Self-Defence Review]."<sup>113</sup> Additionally, based on a separate empirical analysis of the impact of Lavallee in the five years following the judgment, [\*127] Martha Shaffer argues that the decision "does not appear to have led to a dramatic increase in successful self-defence claims by women."<sup>114</sup>

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<sup>106</sup> Downs, supra note 69, at 226.

<sup>107</sup> Id. Downs is actually somewhat inaccurate in his language here because "battered woman syndrome" is not itself a defence but simply lends support to a defence of self-defence through the admission of expert testimony.

<sup>108</sup> Id. at 115.

<sup>109</sup> Meier, supra note 68, at 1305.

<sup>110</sup> See infra notes 113-15 and accompanying text.

<sup>111</sup> Gary Trotter, Justice Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review, 26 Queen's L.J. 339, 340-41 (2001).

<sup>112</sup> See id. at 341-42; see also Elizabeth Sheehy, Review of Self-Defence Review, 12 Can. J. Women & L. 197, 198 (1999).

<sup>113</sup> Sheehy, supra note 112, at 198-99.

<sup>114</sup> Shaffer, supra note 57, at 17.

Ironically, then, the "battered woman syndrome" has not had an especially major impact *in case* law, *in* Canada at least, certainly not *in* proportion to the ink which has been spilled *in* analysing its legal significance.<sup>115</sup>

The battered woman syndrome, however, has appeared *in* some legal *cases in* Canada and elsewhere *in* surprising and potentially quite troubling ways. For example, *in* the United States, Dr. Lenore Walker, who, because of her research and writing *in* the field is considered to be a leading expert on the condition, was scheduled and publicly announced as an expert witness for the defence *in* the trial of O.J. Simpson.<sup>116</sup> Her testimony was solicited by the defence *in* order to bolster the claim that the accused's history of battering his wife did not predict that he was a murderer.<sup>117</sup> Whether or not this is true is less relevant than the fact that a psychological construct developed to describe the experiences and psychological profile of women subjected to ongoing *violence* from their husbands was now being used as a predictor for whether or not men were likely to kill the women they assaulted.<sup>118</sup> Not only is the "battered woman syndrome" based on research with women, and therefore of no utility *in* explaining the behaviour of abusive men (who would need to be studied directly *in* order to develop a similar profile, such as a "male batterer's syndrome"), but its attempted utilization as evidence *in* a defence for a man accused of killing his wife represents a highly distorted and dangerous misapplication.<sup>119</sup>

*In* Canada *in* the infamous legal proceedings around the legal culpability of Karla Homolka for the sexual torture and killings of young women (including her own younger sister) which she alleged were perpetrated exclusively by her husband Paul Bernardo, the "battered woman syndrome" was invoked *in* her [\*128] defence.<sup>120</sup> While the *violence* perpetrated by Bernardo against Homolka may be relevant to a complete account of the situation, whether or not it could possibly exonerate Homolka's responsibility for at best not intervening to stop and at worst actively participating *in* these sexual crimes and murders is another question altogether. *In* her article on this topic, Melanie Griffith cites numerous other examples of this misapplication and warns that courts must strive to assess relevance and thereby avoid various misuses of "battered woman syndrome."<sup>121</sup> There are also disturbing reports of the "battered woman syndrome" being used to discredit *women's* parenting abilities *in cases* of custody disputes where there is a history of *domestic violence*.<sup>122</sup> While these misapplications of the "battered woman syndrome" do not necessarily inhere *in* the description of the syndrome itself, they do, nevertheless, point to troubling ways *in* which it can be engaged legally.

However, *in* spite of these more problematic applications of the "battered woman syndrome" there have also been some encouraging legal developments *in* how it has been understood. *In* R. v. Mallot, some members of the

<sup>115</sup> The Supreme Court of Canada recently determined that a self-defence claim must be based on a defendant's reasonable belief that there was no alternative course of action available, so that it was necessary for him to kill to protect himself from death or grievous bodily harm. While the *case* did involve a question of whether Lavallee created a right to "preemptive killings," the Court concluded that the defence was intended to cover situations of last resort. R. v. Cinous, [2000], 2 S.C.R. 3.

<sup>116</sup> Melanie Frager Griffith, Note, Battered Women Syndrome: A Tool for Batterers?, [64 Fordham L. Rev. 141, 148 \(1996\)](#).

<sup>117</sup> [Id. at 148-49.](#)

<sup>118</sup> See *id.* Dr. Walker ultimately did not testify at that trial, for reasons which are unclear. As Griffith points out, she may have been dropped by the defence or have withdrawn from the *case* for her own reasons, especially given the storm of negative publicity *in* the media generated by her announced appearance, criticism that was especially vocal from advocates for assaulted women. [Id. at 145 n.27.](#)

<sup>119</sup> See *id.* Griffith reports that Dr. Walker has *in* fact provided expert testimony for the defence *in* other trials *in* which men have been accused of killing their wife. See [id. at 146 n.26.](#)

<sup>120</sup> See Anne McGillivray, A Moral Vacuity *in* Her Which is Impossible to Explain: Law, Psychiatry and the Remaking of Karla Homolka, 5 Int'l J. Legal Prof. 255, 268 (1998).

<sup>121</sup> See Griffith, *supra* note 116, at 175-79.

<sup>122</sup> *Id.* at 80.

Supreme Court of Canada recognized many of the fundamental dilemmas involved *in* the use of the battered woman syndrome, *in* the separate opinion written by Justice L'Heureux-Dube, for herself and Justice McLachlin (as she was then).<sup>123</sup> *In* this opinion, Justice L'Heureux-Dube articulated a sophisticated feminist analysis which engaged the contemporary academic commentary on the hazards which can accompany the use of the battered woman syndrome and takes judicial note of some of the concerns raised therein.<sup>124</sup>

The *case* was not especially significant *in* terms of any new legal developments relating to the battered woman syndrome and the defence of self-defence, as it essentially involved an appeal dismissed unanimously by the Supreme Court, surrounding whether or not the trial judge's charge to the jury supported a conviction for second degree murder for a woman charged with killing her former common law spouse.<sup>125</sup> The facts of the *case* were relatively straightforward, and the Court found that the trial judge adequately dealt with the evidence relating to battered woman syndrome *in* relation to the accused's self-defence claim.<sup>126</sup> What is interesting about the judgment, however, is Justice L'Heureux-Dube's expanded articulation of the legal significance of [\*129] "battered woman syndrome" and the ways *in* which it should inform the legal inquiry into a *woman's* self-defence claim *in* a criminal proceeding.<sup>127</sup>

Justice L'Heureux-Dube explained, for example, that it was accepted *in* Lavallee that "a *woman's* perception of what is reasonable is influenced by her gender, as well as by her individual experience."<sup>128</sup> This must be the basis from which a self-defence claim is evaluated. Otherwise, Justice L'Heureux-Dube cautions, "it is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided."<sup>129</sup> Accepting that the "battered woman syndrome" can tend to reinforce a stereotypical view of the woman who has experienced *violence* as passive and helpless, Justice L'Heureux-Dube emphasizes the "other elements of a *woman's* social context which help to explain her inability to leave her abuser," including a lack of economic resources, fear of retaliation, responsibility for children, as well as inadequate social support.<sup>130</sup> Justice L'Heureux-Dube went on to stress that these very factors must "necessarily inform the reasonableness of a *woman's* beliefs or perceptions of, for instance, her lack of an alternative to the use of deadly force to preserve herself from death or grievous bodily harm."<sup>131</sup>

Finally, Justice L'Heureux-Dube advised courts on how they can give practical effect to the principles articulated *in* the Lavallee decision. *In* her words:

To fully accord with the spirit of Lavallee, where the reasonableness of a battered *woman's* belief is at issue *in* a criminal *case*, a judge and jury should be made to appreciate that a battered *woman's* experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a social and legal system which has historically undervalued *women's* experiences. A judge and jury should be told that a battered *women's* experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them *in* order to overcome the

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<sup>123</sup> R. v. Malott, [1998] 1 S.C.R. 123.

<sup>124</sup> Id. at 139-45 (L'Heureux-Dube, J., concurring).

<sup>125</sup> Id. at 139 (L'Heureux-Dube, J., concurring).

<sup>126</sup> Id. at 134.

<sup>127</sup> Id. at 139-45 (L'Heureux-Dube, J., concurring).

<sup>128</sup> Malott, [1998] 1 S.C.R. at 141 (L'Heureux-Dube, J., concurring).

<sup>129</sup> Id. at 142 (L'Heureux-Dube, J., concurring).

<sup>130</sup> Id. at 143-44 (L'Heureux-Dube, J., concurring).

<sup>131</sup> Id. at 144 (L'Heureux-Dube, J., concurring).

myths and stereotypes which we all share. Finally, all of this should be presented *in* such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.<sup>132</sup>

*In* this judicial pronouncement Justice L'Heureux-Dube demonstrated an acute sensitivity and nuanced appreciation of the need for legal recognition of both specificity and generality, the level of the individual and the social, *in* [\*130] assessing the self-defence claims of battered women who kill. Moreover, she exhorted those *in* the legal arena to acknowledge a general lack of awareness of the particularities of the experiences of women assaulted by their male intimates and to struggle against their own stereotypes.<sup>133</sup> While the effect of this kind of legal analysis coming from at least two members of the Supreme Court of Canada has yet to be seen, its very articulation is an encouraging and necessary development *in* correcting some of the stereotypical excesses of the syndrome. Yet it is not enough to signal that the battered woman syndrome should be retained *in* support of the self-defence claims of battered women who kill. The problems with the syndrome are too daunting, and its defects too entrenched. Moreover, there are more sophisticated methods for ensuring that the evidentiary record educates courts about the effects, impacts, and contexts of intimate violence in women's lives.

#### F. The "Battered Woman Syndrome": Can It Be Rehabilitated?

Given judicial notice *in* Canada of the problems with the "battered woman syndrome"<sup>134</sup> and given a considerable literature analysing and critiquing the syndrome,<sup>135</sup> can the concept be salvaged and still be of some utility *in* legal contexts *in* which domestic violence comes into play? There have been many critiques of the syndrome, and some attempts at reformulating it *in* a way that attempts to avoid its worst difficulties *in* legal contexts.<sup>136</sup>

Mary Dutton, for example, suggests an expanded version of "battered woman syndrome" which can be presented *in* evidence *in* legal contexts.<sup>137</sup> *In* her view a redefined "battered woman syndrome" can assist *in* supporting the self-defence claims of assaulted women who kill their abusers, through the provision of carefully crafted expert testimony which addresses factors beyond the psychological reactions to violence and which acknowledges that these psychological reactions do not fit neatly into one singular profile.<sup>138</sup> Specifically, Dutton advocates a "redefined" version of battered woman syndrome which comprises four elements: first, an account of the history and nature of the violence experienced by the woman; second, an exposition of the particular battered woman's psychological reactions to the violence she has experienced; third, an explication of the strategies she used (or did not use) to escape her abuser prior to killing him; and fourth, an elucidation of the [\*131] intervening and contextual factors which influenced the woman's psychological response and coping strategies *in* relation to the violence.<sup>139</sup>

Dutton's expanded version of the "battered woman syndrome" is a definite improvement over the original version espoused by Walker. By including attention to issues of social context through expert testimony provided to the Court, by highlighting women's resistance strategies, and by attending to differences *in* the experiences, psychologies, and material resources of women assaulted by their male intimates, Dutton's reformulation addresses and corrects many of the problems which accompany the "battered woman syndrome" *in* its original version. *In* particular, it more fully contextualizes the particular woman's experience and attempts to overcome the tendencies towards stereotyping which the original "battered woman syndrome" typically entails.

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<sup>132</sup> Id. (L'Heureux-Dube, J., concurring).

<sup>133</sup> See Malott, [1998] 1 S.C.R. at 144 (L'Heureux-Dube, J., concurring).

<sup>134</sup> Id. at 139-45 (L'Heureux-Dube, J., concurring).

<sup>135</sup> See supra notes 68-70.

<sup>136</sup> See, e.g., Dutton, supra note 68, at 1193 n.1 - n.5.

<sup>137</sup> Id. at 1193-94.

<sup>138</sup> Id. at 1195.

<sup>139</sup> Id. at 1202.

Following Dutton's recommendations, expert testimony on "battered woman syndrome" would be greatly improved, and an expanded view of the problem of violence against women in intimate relationships would be provided in legal proceedings dealing with it. However, Dutton's redefined version of the "syndrome" still accepts the language of syndromization, which suggests psychological disorder instead of social problem. Additionally, her redefinition is, although expanded, still an essentially psychologically focused account of women's reactions to violence with an emphasis on the individual psyches of women who have been battered by their male intimates. In this way it does not entirely avoid the pitfalls of the "battered woman syndrome" in its traditional version. Nor does it escape evoking the victim-blaming reactions which many judges or juries may have when they focus on and individual woman's reactions to violence and fail to understand her psyche or her actions as "reasonable."

Furthermore, Dutton's emphasis on strategies a "battered woman" has used with regard to the violence she has experienced can still lead to a reinforcement of the idea that it is a woman's responsibility to stop the violence perpetrated against her. This is not so much a reflection on any defect in Dutton's approach as it is a comment on the larger dilemmas surrounding discussions of women's resistance strategies in a society pervaded by victim blaming attitudes. Implicitly, then, a kind of victim-blaming could potentially seep into the legal inquiry if the focus becomes one of evaluating the number and efficacy of the resistance/avoidance strategies any "battered woman" has used. Instead, the inquiry must remain firmly focused on the systematic social failure to provide adequate resources and multiple options for women who are experiencing abuse to leave violent men and reconstruct their lives so that their safety is ensured, while recognizing any efforts a woman was able to make within these constraints.

**[\*132]** Dutton's proposed redefinition of the "battered woman syndrome" in legal contexts is a dramatically more sophisticated and contextualized approach to its traditional use and addresses many of the syndrome's fundamental flaws. In more recent writing, Dutton appears to have strengthened her critique of the "battered woman syndrome," though she continues to "suggest the need for a reformulation of this model" <sup>140</sup> instead of an outright rejection of it. I would argue, however, that the very flaws she identifies are such that any rehabilitative efforts ought to be abandoned in favour of the adoption of entirely new approaches, ones which expressly refuse to make reference to the "battered woman syndrome" at all. Instead of relying upon a formulation which mandates inclusions of certain "pathologies" and decontextualizes critical aspects of the experience of being assaulted to the detriment of grasping this experience in all of its complexity, expert evidence should be marshaled to educate judges and juries about the social causes, contexts, and impacts of intimate violence without reliance on the "battered woman syndrome."

#### G. Why the Battered Woman Syndrome Should Be Abandoned: Alternative Evidentiary Approaches

Among the most problematic elements of the so-called "battered woman syndrome" is the construct of "learned helplessness" which rests at the core of the syndrome. <sup>141</sup> In this view, the battered woman has learned to become helpless through her prolonged exposure to violence at the hands of her husband and is, in fact, characterized as mentally disordered as a result of the abuse she has suffered. <sup>142</sup> But in psychologizing and individualizing the issue in these terms, the focus is deflected away from recognition of first, the social conditions which often keep women trapped in relationships with violent men (including indifferent or inadequate police response, financial dependence, child care responsibilities, poverty, and the husband's threat to kill her and her children if she leaves, etc.); and second, the many ways in which women who are battered do actively struggle to survive, resist, and fight back against the violence they experience (hardly consistent with the traditional image of the passive, helpless victim which inheres in the battered woman syndrome). <sup>143</sup>

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<sup>140</sup> Mary Ann Dutton, Critique of the "Battered Woman Syndrome" Model, available at <http://www.vaw.umn.edu/documents/vawnet/bws/bws.html> (1996).

<sup>141</sup> Walker, *Terrifying Love*, supra note 70, at 49-53.

<sup>142</sup> See id. at 50.

<sup>143</sup> See id. at 10.

Most fundamentally, the "battered woman syndrome," both *in* its original conception and *in* the way it has been taken up *in* law, reflects a preoccupation [\*133] with victimization at the expense of any recognition of agency.<sup>144</sup> This is part of a larger social tendency to understand victimization and agency *in* dichotomous terms, as existing as binary opposites. Glaringly absent from most representations of *violence in* intimate heterosexual relationships, then, is attention to the many and complicated ways *in* which the *violence* is contested and resisted by assaulted women. Instead, the focus is typically on the ways *in* which battered women are rendered helpless victims.<sup>145</sup>

Equally absent is any acknowledgment of the larger failings of the very systems and institutions that are supposed to protect against and provide remedies for this *violence*, failings that undercut *women's* resistance strategies. More importantly still, the larger context of social inequality which produces this *violence in women's* lives *in* the first place is typically dropped out of view. This results *in* most dominant representations, including legal representations of the lives of women who experience ongoing *violence* and abuse from men,<sup>146</sup> failing to incorporate a view of *women's* lives which reflects both the structures of inequality which shape these lives and the possibilities and expressions of agency within these structures.

It is this broader and skewed depiction of *violence* against women which underpins the "battered woman syndrome" and its use *in* legal contexts. This reason, among others, means that the doctrine must ultimately be abandoned *in* favour of more contextualized and sophisticated psycho-social accounts which can be offered up by qualified experts giving evidence to courts, who grasp both the macro and micro levels of assaulted *women's* experiences.

If the "battered woman syndrome" should be abandoned because it is conceptually inadequate for the task of educating courts about the causes, contexts, and impacts of *domestic violence in women's* lives, what is a preferred approach? One Canadian commentator has suggested that critical attention should be paid to more skillful utilization of the already existing defences *in* criminal law that might assist those battered women who kill *in* self-defence.<sup>147</sup> Arguing for better use of the structures of the defences "already *in* place" to bring forth evidence of *domestic violence* when women [\*134] kill their violent male intimate, Julianne Parfett makes the *case* that, *in* addition to self-defence, provocation (to diminish culpability), and *in* some *cases* insanity, may support the claims of battered women who kill.<sup>148</sup> But *in* spite of her effective critique of the "battered woman syndrome," Parfett's recommendations remain, by her own admission, "individualistic."<sup>149</sup> While attention to the individual circumstances of any criminal defendant is essential, the set of recommendations Parfett proposes fails to engage with and advance an analysis of *domestic violence* and its impact that grasps its social contexts and consequences, as these are lived at the level of individual *women's* lives. Moreover, Parfett's recommended reforms would, *in* fact, aggravate the legal situation given the problematic nature of these defences, particularly provocation.

On a different strategic and evidentiary track, one that expressly engages social conditions, Evan Stark recommends the substitution of what he calls the "coercive control framework" for the current uses of the "battered

<sup>144</sup> Eliane Chiu, *Confronting the Agency in Battered Mothers*, [74 S. Cal. L. Rev. 1223, 1224-28 \(2001\)](#).

<sup>145</sup> [Id. at 1225](#).

<sup>146</sup> *In* this paper I restrict my analysis to *women's* experiences of *violence in* heterosexual relationships. The experiences of women *in* same-sex relationships with *violence* and abuse warrant a separate analysis which takes into account the social context of homophobia and the differing ways *in* which gender is and isn't salient *in* same-sex relationships. For a thoughtful exploration of these issues, see Mary Eaton, *Abuse by Any Other Name: Feminism, Difference and Intralesbian Violence, in* *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, *supra* note 34, at 195.

<sup>147</sup> Julianne Parfett, *Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases*, *12 Windsor Rev. Legal & Soc. Issues* 55, 79 (2001).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 56-65.

woman syndrome" *in* legal contexts. <sup>150</sup> For Stark, this alternative framework more fully captures the "hostage like" conditions of entrapment and subordination *in* which many "battered women" live. <sup>151</sup> Moreover, this framework, which "emphasizes the batterer's pattern of coercion and control rather than the violent acts of their effect on victim psychology" <sup>152</sup> shifts the focus to:

The basis of *women's* justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of *women's* oppression *in* particular relationship, and the harms associated with domination and resistance as it has been lived. <sup>153</sup>

Through this "coercive control framework," Stark claims that expert evidence can discourage stereotyping of "battered woman syndrome" and accommodate *women's* differences including not only their differing reactions to *violence* (which may include anger instead of passivity) but also their differences *in* social location, including along lines of class and race. <sup>154</sup>

**[\*135]** One concern is that Stark's "coercive control model" may be taken up and dismissed *in* legal contexts as mere "advocacy," a point raised by Joan Meier. <sup>155</sup> To the extent that courts seem to prefer expert testimony which can be characterized as "scientific," Stark's explicitly political model may carry less weight than more "scientific" psychological theories and accounts. <sup>156</sup> Still, this is a strategic issue to be worked out *in* the context of specific legal *cases*. At any rate Stark's vision of the kind of expert testimony to be offered *in* support of battered *women's* self-defence claims has the definite advantage of deflecting attention away from the "why did she stay" question and focusing more on providing a contextual analysis of *violence* against women *in* intimate relationships and its links to the very real and material conditions of sexual inequality *in* which it is situated and lived.

*In* addition to expert evidence to educate juries and the judiciary about these material conditions and the way *in* which they shape and constrain *women's* choices, a rich psychological literature is emerging, which, when integrated with a gender analysis goes a long way towards explaining the traumatic effects of intimate *violence in women's* lives. <sup>157</sup> Some of the ground breaking work *in* this area was undertaken by Judith Herman, whose book *Trauma and Recovery* began to develop an articulation of the intersections between the effects of privatized traumatic events *in women's* lives such as *domestic violence* and sexual assault and the way *in* which this trauma parallels some of the experiences of public, political terrorism. <sup>158</sup> Developing some of the themes *in* this area and expressly incorporating a gender analysis into the psychological trauma literature, some feminist

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<sup>150</sup> Stark, *supra* note 1, at 975-76.

<sup>151</sup> *Id.* at 975.

<sup>152</sup> *Id.* at 975-76.

<sup>153</sup> *Id.* at 976.

<sup>154</sup> Despite these very promising developments *in* Stark's alternative explanatory framework, he at times lapses into some problematic language *in* his analysis. For example, *in* advocating for the benefits of his own "coercive control framework" he refers to the relative advantage of explanations of battering which start with an affirmative conception of womanhood and proceed to describe how objective dimensions of entrapment have deconstructed the most essential facets of feminine identity. *Id.* at 1021. But what an "affirmative conception of womanhood" or the "essential" facets of a feminine identity are remain unidentified by Stark. Apart from the essentializing tendencies of this formulation, Stark also *in* places uses language which, despite his efforts to the contrary, reproduces the very problems of stereotyping he seeks to avoid. For instance, he begins one paragraph by speaking of "what creates a battered woman," terminology which still evokes that identifiable "class" of "victims" known as "battered women," itself an act of pathologizing. Stark, *supra* note 1, at 1026.

<sup>155</sup> Meier, *supra* note 68, at 1320.

<sup>156</sup> *Id.*; Stark, *supra* note 1, at 979.

<sup>157</sup> Meier, *supra* note 68, at 1321-22.

<sup>158</sup> Judith Herman, *Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror* 2-3 (1992).

psychologists are developing accounts of the ways *in* which post-traumatic stress is the normal response to abnormal events such as *violence* and abuse *in* an intimate relationship.<sup>159</sup> Contextualized evidence about post-traumatic stress "disorder"<sup>160</sup> is more appropriate insofar as "it shifts the focus away from the [\*136] 'personality' or 'character' of the battered woman, and describes her behaviours as a natural human response to trauma imposed from external sources."<sup>161</sup>

Expert evidence presented by qualified mental health professionals whose understanding of post-traumatic stress (a recognized diagnostic category *in* the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV")) expressly incorporates a recognition of gender (and other social) inequalities can be of significant assistance to legal proceedings relating to *domestic violence*.<sup>162</sup> Specifically, this kind of evidentiary record can enable legal factfinders to situate their knowledge of an individual assaulted woman within an analysis of the social contexts and dynamics of *domestic violence* generally and how these are relevant to the particular legal issues at play. These richer, socio-psychological accounts offer the opportunity to assist courts *in* coming to terms with and developing more sophisticated understandings of the conditions of the lives of assaulted women and the circumstances *in* which they make their individual choices and decisions.

#### IV. Uncooperative Victims and Criminal Justice System: Responses to *Domestic Violence*

##### A. Blaming Battered Women for Refusing to Cooperate with Criminal Prosecutions

It is well documented that many women who have experienced ongoing *violence* against them *in* their intimate relationships are reluctant to assist with the criminal prosecution of their partners.<sup>163</sup> *In* these situations, women do not cooperate with the Crown attorney or prosecutor *in* charge of the *case in* a variety of ways. Most often it is by failing to appear *in* criminal proceedings relating to the episodes of *domestic violence* they experienced or by recanting once on the witness stand.<sup>164</sup> The reasons for *women's* ambivalence about these criminal proceedings are varied and complex and range from (but are not [\*137] limited to) a belief that the criminal justice system will not meet their needs, fear of retaliation from the abuser, a commitment to reconciliation with the abuser, and a desire to protect him from sanctions.<sup>165</sup> Thus, there is a definite likelihood that the woman who has been the victim of the very *violence* requiring police intervention will choose not to actively engage with the ensuing processing of the charge through the court system.

It should be pointed out, however, that the emphasis on so-called "uncooperative victims" obscures the important fact that a great deal of women who report *violence* to the police do continue on and "cooperate" fully *in* the

<sup>159</sup> See, e.g., Lori Haskell, *First Stage Trauma Treatment: A Guide for Mental Health Professionals Working with Women* 1 (2003). For a more general discussion of *domestic violence* and post-traumatic stress, see generally Anita K. McGruden et al., *Interpersonal Violence and Post-Traumatic Symptomatology: The Effects of Ethnicity, Gender and Exposure to Violent Events*, 15 *J. Interpersonal Violence* 206 (2000).

<sup>160</sup> Haskell, *supra* note 159, at 6. The use of the term "disorder" has been appropriately criticized by feminist writers for its stigmatizing effects. Lori Haskell argues that "this label implies that there is something wrong with the person, rather than acknowledging that the person is dealing with typical and normal repercussions from having experienced a traumatic life event or events." *Id.* She recommends that the term post-traumatic stress "responses" replace the term "syndrome" or "disorder." *Id.*

<sup>161</sup> Meier, *supra* note 68, at 1313-14.

<sup>162</sup> American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 309.81 (4th ed. 1994).

<sup>163</sup> Tim Roberts, *Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives* (1996), available at <http://canada.justice.gc.ca/en/ps/rs/re/wd96-3a-e.html>; Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner*, 14 *J. Interpersonal Violence* 761, 762 (1999).

<sup>164</sup> Myrna Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 *Just. Q.* 593, 594, 596 (2001).

<sup>165</sup> Bennett, *supra* note 163, at 764-69.

ensuing criminal prosecution.<sup>166</sup> Nevertheless, the co-existing fact that many women do refuse to participate with the criminal prosecution of their violent male intimates, even after having initially called upon the police seeking intervention, causes considerable frustration, confusion, and resentment on the part of key players *in* the legal system (including police officers, prosecutors/Crown attorneys, and judges).

*In* some **cases**, there is a tendency on the part of court personnel to characterize women who refuse to cooperate as "manipulative" or as having lied about the abuse *in* the first place.<sup>167</sup> More generally, there is an explicit pinpointing of responsibility for the failure of **domestic violence cases** either to be processed fully or to result *in* a conviction, *in* the corresponding "failure" of the woman victim to assist the state by cooperating fully and testifying against the batterer.<sup>168</sup> As two Canadian researchers point out, "prosecutors often explain low rates of prosecution by emphasizing that victims of **domestic violence** tend to change their minds about pressing charges, often recanting their testimonies and/or becoming "non-cooperative witnesses."<sup>169</sup> This type of argument may be advanced from either a sympathetic or a critical viewpoint, but *in* either **case** it paradoxically assumes that assaulted women have a disproportionate amount of power over the functioning of the criminal justice system.

*In* any event, there is a perception that the women who are "reluctant" or "uncooperative" victims have not fulfilled their part of the bargain; *in* other words, they have enlisted the assistance of the state by calling upon the police for help but have then failed to follow through with the system's subsequent [\*138] requirements.<sup>170</sup> The difficulty with this view, however, is that it assumes that the "system" can, and typically does, effectively respond to the needs of assaulted women. Moreover, it fails to address the inadequacies *in* legal responses to **domestic violence** from the point of view of the woman whose rights it is supposed to protect.<sup>171</sup>

## B. Criminalizing "Bad" Victims

Some of the discourse surrounding "uncooperative victims" has revolved around and is directly connected to larger debates about relatively recent legal interventions into **domestic violence** such as mandatory arrest and mandatory, or "no-drop," prosecution policies.<sup>172</sup> There is a deeply held assumption, certainly one which is understandable, that a critical component of the strategy aimed at deprivatizing **domestic violence**, assuming social responsibility for the problem, and holding abusers accountable, requires aggressive criminalization of the problem of **domestic violence**.<sup>173</sup> Tied to this is the view that once contact with the police is made, abusers

<sup>166</sup> See, e.g., Dawson & Dinovitzer, *supra* note 164, at 610 (reporting that their review of criminal justice system processing of **domestic violence cases in** one specialized court *in* Toronto found that "approximately 55% of all victims cooperated with the prosecution").

<sup>167</sup> *In* a thoughtful article critically analysing the debates about mandated participation *in domestic violence* prosecutions, Cheryl Hanna relays stories of training fellow prosecutors about **domestic violence** and hearing reactions from her colleagues characterizing assaulted women reluctant to testify as "lying about the abuse or hiding something." Hanna, *supra* note 7, at 1882.

<sup>168</sup> See *id.* at 1883.

<sup>169</sup> Dawson & Dinovitzer, *supra* note 164, at 594.

<sup>170</sup> Angela Corsilles, No-Drop Policies *in* the Prosecution of **Domestic Violence Cases**: Guarantee to Action or Dangerous Solution?, [63 Fordham L. Rev. 853, 865 \(1994\)](#).

<sup>171</sup> While the criminal justice system is obviously not set up to vindicate individual rights *in* the way that private law is, there is, nevertheless, the idea that those victimized by crime will see justice done within this system.

<sup>172</sup> See generally, e.g., Erin L. Han, Note, Mandatory Arrest and No-Drop Policies: Victim Empowerment *in Domestic Violence Cases*, [23 B.C. Third World L.J. 159 \(2003\)](#).

<sup>173</sup> See Ruth Jones, Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser, [88 Geo L.J. 605, 629](#).

should be arrested and criminal prosecutions should be vigorously pursued.<sup>174</sup> This, *in* fact, has become a cornerstone of contemporary legal responses to ***domestic violence***, responses which are directly attributable to the advocacy efforts of those associated with social movements committed to ending ***violence in women's*** lives.<sup>175</sup>

[\*139] The debate about the merits of no-drop or mandatory prosecution *in domestic violence cases* is a complex one, with highly compelling arguments marshaled on each side of the divide.<sup>176</sup> The crux of the matter is often seen to be the tension between a legitimate social interest *in* eradicating ***domestic violence*** through criminalization and the contradictions inherent *in* further disempowering already disempowered women whose lives have been damaged by the harmful effects of intimate ***violence***, by stripping from them any choice *in* the decision to prosecute.<sup>177</sup> My point is not to engage these arguments directly, but is instead to excavate the underlying assumptions which shape the discourse surrounding the role of so-called "uncooperative victims" *in domestic violence cases in* the criminal justice system.

Some of the criminal law reforms made *in* the area of ***domestic violence*** prosecution address precisely the issue of ***women's*** "reluctance" to "cooperate" *in* the court system.<sup>178</sup> The most of important of these is the attempt to proceed with criminal prosecutions without reliance on the testimony of the victim by relying, for example, on other evidence such as 911 tapes, photographs of injuries, videotaped statements, and evidence from other witnesses (such as neighbours).<sup>179</sup> This form of "enhanced" or "vigorous" prosecution has been formally implemented *in* jurisdictions such as San Diego and is also one of the models on which the specialized ***domestic violence*** courts *in* Ontario, Canada are premised.<sup>180</sup> The efficacy of these reforms, however, and the extent to which they are actually operationalized has yet to be the subject of systematic or rigorous evaluation (although this has been repeatedly requested by community groups and other key stakeholders *in* Ontario).

Because "uncooperative victims" are seen to pose such a powerful obstacle to the successful prosecution of ***domestic violence cases***, significant attention has been paid to how they should be treated.<sup>181</sup> Some jurisdictions allow for a variety of legal remedies to be taken against women who fail to appear and/or refuse to

<sup>174</sup> Most jurisdictions *in* North America have implemented policies to this effect. See, e.g., Trevor Brown, Charging and Prosecution Policies *in Cases* of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses iii (2000), available at <http://canada.justice.gc.ca/en/ps/rs/rep/rr01-5a-e.pdf>.

<sup>175</sup> There is a voluminous literature analysing these policies from a variety of perspectives. It is impossible to reference even a fraction of it, but a few (arbitrary) selections include: Roberts, *supra* note 163; Statistics Canada, *supra* note 18; Jacqueline Faubert & Ronald Hinch, The Dialectics of Mandatory Arrest Policies, *in* Post Critical Criminology 230 (Thomas O'Reilly-Fleming, ed., 1996); J.E. Ursel, Mandatory Charging: The Manitoba Model, *in* Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research *in* Canada 73 (Kevin Bonnycastle & George S. Rikalos, eds. 1998); Hanna, *supra* note 7; Dennis P. Saccuzzo, How Should Police Respond to ***Domestic Violence***: A Therapeutic Jurisprudence Analysis of Mandatory Arrest, 39 Santa Clara L. Rev. 765 (1999); Lawrence Sherman et al., The Variable Effects of Arrest on Criminal Careers: The Milwaukee ***Domestic Violence*** Experiment, 83 *J. Crim. L. & Criminology* 137 (1992); Vito Nicholas Ciraco, Note, Fighting ***Domestic Violence*** with Mandatory Arrest, Are We Winning?: An Analysis *in* New Jersey, 22 *Women's Rts. L. Rep.* 169 (2001).

<sup>176</sup> See Corsilles, *supra* note 170, at 857.

<sup>177</sup> See generally Jessica Dayton, Essay, The Silencing of a ***Women's*** Choice: Mandatory Arrest and No Drop Prosecution Policies *in Domestic Violence Cases*, 9 *Cardozo Women's L.J.* 281, 288 (2003).

<sup>178</sup> See generally Corsilles, *supra* note 170.

<sup>179</sup> Tonya McCormick, Comment, Convicting ***Domestic Violence*** Abusers When the Victim Remains Silent, 13 *BYU J. Pub. L.* 427, 437-38 (1999).

<sup>180</sup> See Statistics Canada, *supra* note 18.

<sup>181</sup> See Han, *supra* note 172, at 161-62.

testify ***in domestic violence cases***.<sup>182</sup> One of the more disturbing of these is the punitive response witnessed ***in*** the attempt to criminalize women who refuse to appear or testify ***in domestic violence cases in*** which they are [\*140] victim-witnesses.<sup>183</sup> On this approach, the very women who are victimized by intimate ***violence in*** the first place, and who struggle to cope with this ***violence*** to the best of their abilities, paradoxically themselves become victims of the coercive power of the criminal law.

***In*** the United States, ***in*** a well publicized ***case in*** Alaska ***in*** 1983,<sup>184</sup> a woman was jailed for refusing to testify, a criminal justice system response which was subject to heated media debate.<sup>185</sup> While this is hardly a widespread reality, there have been numerous similar incidents since that time ***in*** North America.<sup>186</sup> Under a policy recently developed ***in*** the United Kingdom, the Crown Prosecution Service unveiled guidelines that are intended to see that ***domestic*** assaults are treated more seriously than random acts of ***violence***.<sup>187</sup> As part of that strategy, women who refuse to "cooperate" with prosecutions of ***domestic violence*** were officially put on notice that they may, ***in*** fact, find that they are themselves the subject of criminal prosecution.<sup>188</sup> Citing a study which reported that ***in*** eight out of ten times where criminal proceedings were dropped the reason was because the victim had "refused to co-operate," this policy is supposed to demonstrate the "tough on crime" approach to combating ***domestic violence in*** Britain.<sup>189</sup>

Arguments ***in*** favour of using the punitive powers of the criminal justice system against the very women who are the victims of ***domestic violence*** are premised on the idea that these "bad" victims need to be brought into line and compelled to assist the state. But this idea utterly fails to come to grips with the costs associated with "engaging the state" faced by assaulted women and the negative repercussions such an engagement often entails. As Elizabeth Schneider argues, the dilemma of the criminalization model ***in*** general - also seen ***in*** the dilemma of criminalizing battered women for "non-compliance" - is "the promise of an "autonomous liberal legal self" which does not encompass the human and material experiences of women who are battered or take into account the gendered realities of their lives."<sup>190</sup>

[\*141]

C.

"Helpless" Victims and Unhelpful Witnesses: The Costs of Prosecutions on Women

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<sup>182</sup> San Diego is just one example of this. See Hanna, *supra* note 7, at 1863.

<sup>183</sup> Casey Gwinn & Anne O'Dell, Stopping the ***Violence***: The Role of the Police Officer and the Prosecutor, [20 W. St. U. L. Rev. 297, 313 \(1993\)](#).

<sup>184</sup> See, e.g., Richard D. Friedman & Bridget McCormack, Dial ***in*** Testimony, [150 U. Pa. L. Rev. 1171, 1189](#) (2001-02).

<sup>185</sup> See Hanna, *supra* note 1, at 1866-67.

<sup>186</sup> See, e.g., Mark Anthony Drumbl, Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform, 12 Can. J. Fam. L. 115, 149 (1994-1995).

<sup>187</sup> See Crown Protection Service, Zero Tolerance for ***Domestic Violence***, at <http://www.cps.gov.uk/Home/archive/136-01.htm> (Nov. 28, 2001).

<sup>188</sup> Brit. Broadcasting Company, ***Domestic Violence*** Victims Face Jail, available at <http://news.bbc.co.uk/1/hi/england/1680069.stm> (Nov. 28, 2001).

<sup>189</sup> *Id.*

<sup>190</sup> Elizabeth M. Schneider, Battered Women and Feminist Lawmaking 188 (2000).

**Women's** voices are relatively absent from legal scholarship on the impact and efficacy of legal system **in** relation to **domestic violence**, but an emerging literature does reveal some important findings.<sup>191</sup> One of the most significant is that assaulted women are not a homogeneous group, and their reasons for their responses to the criminal justice system vary.<sup>192</sup> **In** spite of this, distinct themes emerge both from the perceptions of Crown attorneys, prosecutors, victim advocates, police officers, and other system personnel about assaulted **women's** reactions and, more importantly, from the small but important body of research **in** this area documenting **women's** own experiences within the criminal justice system.<sup>193</sup> One of these is the tension between many assaulted **women's** fear of her violent male intimate and the corresponding levels of fear and/or distrust of the criminal justice system.<sup>194</sup> Essentially, **in** trying to devise a survival strategy **in** the face of intimate **violence**, **women's** experiences of the criminal justice system reflect a deep ambivalence about its ability to offer a remedy that does not extract more from them than whatever relief or solution it potentially offers.

Studies of assaulted **women's** reactions to the criminal justice system **in** Canada show a fairly high degree of support for mandatory arrest but a significantly lower level of support for mandatory prosecution of **domestic violence cases**.<sup>195</sup> Why is this? One reason appears to lie **in** the assessments individual women make about the investment their participation requires [\*142] against the outcome it entails,<sup>196</sup> as it is essentially a paradigmatically rational cost-benefit analysis.

A British study, for example, based on interviews with assaulted women, found that for some of them the cost was often not worth the sentence.<sup>197</sup> As Carolyn Hoyle explains, **in** these **cases**, "victims made rational choices, within the constraints as they perceived them."<sup>198</sup> The three main reasons offered for not wanting police intervention and/or not wanting to assist with criminal prosecutions were as follows:

Some women did not want to break up the relationship or the family unit; secondly some were afraid of further retaliatory **violence**; and thirdly, some did not think that the likely sentence would be worth the "costs" incurred by

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<sup>191</sup> See generally Burth E. Fleury, Missing Voices: Patterns of Battered **Women's** Satisfaction with the Criminal Legal System, 8 **Violence Against Women**, 181 (2002); see also Edna Erez & Joanne Belknap, **In** Their Own Words: Battered **Women's** Assessment of the Criminal Processing System's Responses, 13 **Violence & Victims** 251 (1998) (examining the handling of **domestic violence cases** by the criminal justice system and the victim's perception of the responses of the system); Tammy Landau, **Women's** Experience with Mandatory Charging for Wife Assault **in** Ontario, Canada: A **Case** Against the Prosecution, 7 *Int'l Rev. Victimology* 141 (2000); Joanne C. Minaker, Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of **Women's** Needs, 13 *Can. J. Women & L.* 74 (2001).

<sup>192</sup> Minaker, *supra* note 191, at 81.

<sup>193</sup> See generally *id.*

<sup>194</sup> Erez & Belknap, *supra* note 191, at 260-61. The study reported that:

The victims were requested to rate the importance of various reasons for which they were unwilling to cooperate with prosecution. Fear of the batterer received the highest score, with a mean of 4.51 (on a scale of 1-5 where 5 is the highest score); followed by the ineffectiveness of the system (4.35), concern for the children (4.02), distrust of the criminal processing system (4.02), difficult experiences with the criminal processing system (3.87), emotional dependency on the batterer (3.74), economic dependency on the abuser (3.47), and the least influential factor was lack of support from the family (2.62).

*Id.*

<sup>195</sup> See Brown, *supra* note 174, at 3. See generally Landau, *supra* note 191, at 147.

<sup>196</sup> See generally Eve S. Buzawa & Carl G. Buzawa, **Domestic Violence**: The Criminal Justice System 177-89 (3d ed. 2003).

<sup>197</sup> Carolyn Hoyle, Negotiating **Domestic Violence**: Police, Criminal Justice and Victims 184 (Roger Hood ed., 1998).

<sup>198</sup> *Id.*

the process. All three reasons concern the high costs, of various sorts, that victims can incur by supporting a prosecution.<sup>199</sup>

*In* other words, the toll taken by participating *in* the criminal justice system would not be compensated by a sentence sufficiently serious to have made the effort worth it. Clearly this latter concern is quite an indictment of the criminal justice system response to **domestic violence** from the eyes of those it is supposed to serve.

Even the typically cited fear of reprisal as a reason for "non-cooperation" implicitly reveals a concern with the state's failure and/or inability to protect assaulted women from further or escalated **violence**. Studies have found that this fear is, *in* fact, a major reason cited for electing not to pursue or assist with criminal prosecution of batterers.<sup>200</sup> And, given that it has been repeatedly demonstrated that assaulted women are at greatest risk for **violence** and murder upon separating from violent male intimates, the fear of reprisal is often sufficient to deter an assaulted woman from pursuing prosecution and to keep her *in* a relationship with a violent man.

The trouble with the idea of the "uncooperative victim," then, is that the criminal justice system processing of **domestic violence cases**, with all of the critically important innovations and reforms which have been and continue to be implemented remains, *in* many instances, at odds with the needs of women coping with **violence** perpetrated by their male intimates. What is needed, therefore, is a reframe of the idea of the "uncooperative victim" or "reluctant witness," one that shifts the object of the inquiry away from the **woman's** responses and onto the barriers which interfere with and/or limit the possibility [\*143] of a successful prosecution. *In* this way, by changing the focus and adjusting the lens of the inquiry, it becomes possible to understand that the choices made by a so-called "uncooperative victim," *in* many instances, may be quite rational and reasonable ones given the particular circumstances of her life.

#### D. Enhancing the Likelihood of Prosecution Without Criminalizing Women Who Are Reluctant Witnesses

Given that "legal remedies are an essential tool *in* stopping **domestic violence**,"<sup>201</sup> at least part of the state's response will continue to be a criminalization strategy. The role of the assaulted woman as victim-witness, therefore, will also continue to be a pivotal one. A study from Toronto's K court, a specialized court established to process **domestic violence cases**, found that a **case** is seven times more likely to be prosecuted if the Crown perceives the woman to be a "cooperative" witness.<sup>202</sup> But the question of what to do about the "reluctant witness" and/or the "uncooperative victim" *in* this context should be reposed to focus on what can be done to enhance the possibility of successfully prosecuting **cases** of **domestic violence**, which *in* turn entails ongoing and critical scrutiny of the system itself.

One of the studies of assaulted **women's** experiences with the criminal justice system found that "the major reasons for willingness to cooperate with the criminal processing system were (1) stopping the abusive behaviour ... followed by (2) sending a message that the behaviour is criminal ... , and (3) punishing the abuser."<sup>203</sup> The first reason goes back to and requires a belief that the criminal justice system will actually provide an effective interruption into men's **violence** against women *in* intimate relationships. This belief can only be bolstered by the second and third reasons cited by the women interviewed, namely that a conviction will ensue to which a serious penalty will attach.

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<sup>199</sup> *Id.*

<sup>200</sup> Erez & Balknap, *supra* note 191, at 254; Barbara Hart, Battered Women and the Criminal Justice System, 36 *Am. Behavioural Scientist* 624, 625 (1993).

<sup>201</sup> Lisa G. Lerman, The Decontextualization of **Domestic Violence**, [83 \*J. Crim. L. & Criminology\* 217, 220 \(1992\)](#).

<sup>202</sup> Dawson & Dinovitzer, *supra* note 164, at 613.

<sup>203</sup> Erez & Belknap, *supra* note 191, at 262.

The same study showed that **women's** level of satisfaction with criminal justice system personnel was highest for victim assistance staff. <sup>204</sup> Other studies have confirmed the critically important role of advocates within the criminal justice system whose role is to inform victim-witnesses about the nature of the proceedings and support them throughout. For example, one study of the processing of **domestic violence cases in** Toronto found that a woman is three times more likely to be willing to testify and thereby aid the prosecution, if she met with someone from Victim Witness Program. <sup>205</sup> Other **[\*144]** research has confirmed this same thing. "Battered women who receive advocacy services ... are more likely than others to continue their **case** through to conviction." <sup>206</sup>

This points to the need for more resources within the criminal justice system to respond to the complexities and challenges these kinds of **cases** pose. As one commentator points out,

If the prosecutor adopts a policy of aggressively prosecuting abuse **cases** but fails to provide victim advocacy services to maintain contact with the victims, attend to their safety needs and help them to understand the law enforcement system, then the prosecutor often is doomed to frustration because the victims of abuse are less likely to remain available to testify. <sup>207</sup>

Widening the lens further still, a range of other legal reforms are required to deal with **domestic violence**, some of which are being implemented, and some of which are still to be devised. Along with these reforms, constant evaluation of our efforts to respond to **domestic violence** through legal means must be undertaken, **in** order to assess the efficacy of these reform and of the system overall. Wider still, we must keep **in** mind that legal responses to **domestic violence** can only ever be a part of a broader strategy aimed at ending a deeply entrenched and multiply constituted social problem such as men's **violence** against women and children.

#### E. Uncooperative Victims and **Women's** Agency

As Cheryl Hanna points out, "the question of what the battered **woman's** role **in** the prosecution process ought to be often masks ambivalence about what her role **in** the abusive relationship is." <sup>208</sup> She also points to characterizations of what a "real" or "ideal" victim of **domestic violence** is and how she behaves. <sup>209</sup> As Hanna continues:

Women who want to follow through with prosecution are seen either as the true victims of **domestic violence** or as manipulators with an agenda. Women who do not want to proceed are characterized either as agents **in** the battering - allowing it to continue because of their lack of cooperation with the state - or as true victims who have "learned helplessness." <sup>210</sup>

The "uncooperative victim," then, like those afflicted with the "battered woman syndrome," is part of the complex "image problem" assaulted women have **in** relation to legal responses to **domestic violence**.

**[\*145]** **In** each of these **cases**, the image problem regarding "victims" reflects the difficulty reconciling victimization with agency, a difficulty also reflected **in** law. Either the "uncooperative victim" is entirely helpless and fails to appear or refuses to testify about the abuse because she is paralyzed by fear and is thereby a "true victim," utterly without agency, or the "uncooperative victim" is a lying manipulator, expressing an excess of agency by exerting

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<sup>204</sup> Id.

<sup>205</sup> Dawson and Dinovitzer, *supra* note 164, at 614.

<sup>206</sup> Buzawa & Buzawa, *supra* note 196, at 192; see also Arlene Weisz, Legal Advocacy for **Domestic Violence** Survivors: The Power of an Informative Relationship, 80 *Fam. in Soc'y.* 138 (1999).

<sup>207</sup> Lerman, *supra* note 201, at 221.

<sup>208</sup> Hanna, *supra* note 7, at 1883.

<sup>209</sup> Id. at 1878.

<sup>210</sup> Id. at 1883.

her will in refusing to assist the prosecution, and thereby negates her status as a true victim. Even her credibility is in doubt, as perhaps she is to blame for what happened all along. The "uncooperative victim," therefore, like the "battered woman" with the "battered woman syndrome," exemplifies the polarized and antithetical extremes of the split between victim and agent in representations of assaulted women.

#### V. Reconciling the Victim / Agent Dichotomy in Legal Accounts of Domestic Violence

##### A. Reifying Victims/Obliterating Agency

Within broader discourses surrounding violence against women is the tendency to define women who have experienced violence exclusively in terms of this experience, a tendency sharply evident in dominant images of the "victims" of domestic violence. It is as if women's experiences of violence define something essential about who they are, as if being a victim becomes an identity in and of itself. Yet this category - "victim" - is one with which most women do not identify, and in which most women do not want to recognize themselves and their own lives. <sup>211</sup> As Elizabeth Stanko observes,

Creating a category "victim" is one way of dealing with women's experiences of male violence. The role and status of "victim" is separate from that of all women. "Victimism", the practice of objectifying women's experiences of male violence, serves to deny the commonality among sexually and/or physically assaulted women ... . <sup>212</sup>

For example, in the commonly used descriptor "battered woman," universalizing, homogenizing, and static tendencies inhere. In fact, a caricature of the "battered woman" as a particular type of "victim" is embodied within the "battered woman syndrome." Not only does it suggest that there is a uniformity to women's experiences of physical abuse in their intimate heterosexual relationships, it also linguistically constructs a category of women - battered women - who are defined in terms of the violence done to them, and who, as a result, are assumed to be in some fundamental way different and separate from all other ("normal"/non-battered) women.

[\*146] Researcher Donileen Loseke describes the gap between "official" definitions (and associated images) of "battered women" and the subjective labeling of experience on the part of women she interviewed who stayed at a shelter for assaulted women in the United States. <sup>213</sup> Loseke writes that "it sometimes seemed that women preferred any label other than "batterer" for their partners and any label other than "abused wife" for themselves." <sup>214</sup> As she explains,

Official definitions might not encourage social members to use these images as interpretive devices in the complex process of naming individual troubles. Just as most violence as experienced is not obviously the type defined as "wife abuse" [that is, violence in its most extreme and brutal forms], the morally condemned "killer drunk" image of drinking drivers does not match subjective interpretations where such persons often seem to be merely "social drinkers" who drive without luck. <sup>215</sup>

This resistance to seeing oneself as a "victim" of violence may very well be directly linked to the more troubling aspects of the prevailing representation of the category, in particular its attendant associations with utter helplessness and passivity. In this construction, women's strengths, survival skills, and strategies of resistance are rendered invisible because the dichotomous opposition of passive-victim/active-agent cannot accommodate victimization and resistance within the same conceptual framework. <sup>216</sup> Articulating this dilemma in terms of her

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<sup>211</sup> See generally Stanko, *supra* note 26, at 16-19.

<sup>212</sup> *Id.* at 16.

<sup>213</sup> Donileen R. Loseke, *Lived Realities and the Construction of Social Problems: The Case of Wife Abuse*, 10 *Symbolic Interaction* 229 (1987).

<sup>214</sup> *Id.* at 236.

<sup>215</sup> *Id.* at 240.

own refusal of the category "battered woman," feminist legal scholar Martha Mahoney reveals that one of the experiences of violence relayed in her article theorizing legal images of battered woman is her own.<sup>217</sup> But, she takes pains to emphasize that:

I do not feel like a "battered woman." Really, I want to say that I am not, since the phrase conjures up an image that fails to describe either my marriage or my sense of myself. It is a difficult claim to make for several reasons: the gap between my self-perceived competence and strength and my own image of battered women, the inevitable attendant loss of my own denial of painful experience, and the certainty that the listener cannot hear such a claim without filtering it through a variety of derogatory stereotypes.<sup>218</sup>

Mahoney's sudden and unexpected insertion of her own experience of violence in an intimate relationship, into her scholarly text analysing legal images of battered women, is a powerful and courageous discursive maneuver. It is an [\*147] intervention which effectively disrupts and then subverts the "us/them" dichotomy which implicitly runs through so much of the writing on violence against women by academics and "experts."

In fact, in the same article, Mahoney addresses the way in which professional distancing from the problem of domestic violence occurs in the legal system, as elsewhere, through a dominant ideology that denies the profound and personal impacts of oppression.<sup>219</sup> This is a form of the denial, silence, and minimization which so often takes place in society at large about the subject of violence against women and children, as if it is an unfortunate or impolite topic of conversation, as if it is something which affects other people, not "us." This denial also manifests itself within courtrooms as well as in the professional and scholarly discourses on the topic.<sup>220</sup> As Mahoney points out: "Despite the statistics on the epidemic incidence of domestic violence, there is almost no legal or social science scholarship that describes an author's experience of violence or even indicates that the author has had any such experience."<sup>221</sup> Yet "it is unlikely," she notes wryly, "that a disinterested body of social scientists is doing all this research."<sup>222</sup>

However, the idea persists that there exists a distinct category of women, identifiable by their experiences of physical assault in intimate relationships and the psychological effects of this violence.<sup>223</sup> It is visible in the very ease with which the category "battered women" is deployed, especially in the legal and psychological literature on the topic.<sup>224</sup> This classification is widely and easily used as if it speaks to a particular class of women.

It is commonly heard in popular discourse, including in the media where there are countless instances and examples. For example, in a CBC radio interview on the inquest recently completed in Ontario into the deaths of a number of "battered women,"<sup>225</sup> the reporter discussed the death of Arlene Mays, a woman whose common law spouse killed her after subjecting her to ongoing and escalating violence, and after every avenue of escape she had tried (including legal interventions and restraining orders) had failed to protect her.<sup>226</sup> In responding to the

<sup>216</sup> See Mahoney, *supra* note 39, at 62.

<sup>217</sup> Mahoney, *supra* note 13, at 8.

<sup>218</sup> *Id.* at 8.

<sup>219</sup> *Id.* at 13.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 14.

<sup>222</sup> Mahoney, *supra* note 13, at 14.

<sup>223</sup> Loseke, *supra* note 213.

<sup>224</sup> *Id.*

<sup>225</sup> Coroner's Inquest, Chief Coroner, Province of Ontario, Inquest Touching the Deaths of Arlene May and Randy Joseph Iles, Jury Verdict and Recommendations (1998), available at <http://www.owjn.org/archive/arlene3.htm>.

CBC interviewer's question, the reporter emphasized that "we" must understand how the system failed "women like this," indicating through this turn of phrase, that there is an identifiable type of [\*148] woman who needs "help" from "the system."<sup>227</sup> Note that the reporter did not refer to women who find themselves *in* a situation like this with a violent and dangerous man or use some other such phrase that would engage a very different representation of the same event.<sup>228</sup> This is no mere terminological quibble. Instead the reporter's choice of language, "women like this," speaks volumes about the unarticulated assumptions which pervade popular representations of *violence* against women and which play on implicit (sometimes explicit) stereotypes about which women and which "types" of women get battered.

Even many feminist writers deploy the category and language of "victims" uncritically, as if it were possible to speak of, analyse, and describe a sub-set of the female population that are victimized and brutalized by men *in* the "privacy" of their intimate heterosexual relationships and that to whom services, policy initiatives, and most of all, sympathy should be extended. However well meaning, there is usually an implicit sub-text operating *in* writings that address the needs, experiences or issues facing "battered women." It is that "they" are not us.

The language used to describe women who have experienced battering, therefore, is often problematic at best, patronizing at worst. *In* addition to the descriptions of "battered women" as helpless and passive advanced through the use "battered woman syndrome," some writers inadvertently reveal an attitude of condescension towards women who have been assaulted.<sup>229</sup> Donald Downs, for example, advances an analysis purportedly sympathetic to the dilemmas facing women who are assaulted.<sup>230</sup> Although he is harshly critical of the "battered woman syndrome" precisely because it denigrates women, *in* one part of his book he writes that "battered women may have broken wings."<sup>231</sup> While he is obviously speaking metaphorically here, through this language Downs is nevertheless guilty of evoking the stereotypical image of the damaged and "broken" "battered woman," an image he ostensibly seeks to overcome.

The very notion, therefore, that there exists a profile of a typical "battered woman" carries with it an implicit separation of women into groups, as they are divided into those who have been victimized *in* this way and those who have not. This not only homogenizes the diversity of women (from all age, ethnic, cultural, and socio-economic strata) who have experienced *violence in* an intimate relationship with a male partner, but it also stigmatizes those women identified as "victims" of this *violence* and discourages women from [\*149] disclosing their experiences for fear of this stigmatization. Mahoney's hesitations expressed immediately after identifying her own history of *violence* speaks powerfully to this dilemma.<sup>232</sup>

Dominant narratives commonly deployed to describe *violence* against women tend to engage *in* a totalizing discourse on "victims." Through the use of the "battered woman syndrome," for example, the *woman's* status as "victim" becomes reified. She is at once defined - the "battered woman" - entirely *in* terms of her relationship to the man's *violence* against her and at the same time pathologized through a psychological account of her incapacity and paralysis. *In* this way, an enduring stereotype of the "battered woman" is constructed, one which lumps together women from an incredible diversity of life situations, unites them solely by virtue of the commonality of the experience of *violence* perpetrated by their male partners, and obliterates recognition of their resistance, agency, and survival skills *in* one fell swoop.

#### B. Blaming "Battered Women" for "Failing to Exit:"<sup>233</sup> Rendering Inequality Invisible

<sup>226</sup> Reporter Mary Wiens, CBC Radio One (CBC radio broadcast, Mar. 20, 1998).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Loseke, *supra* note 213.

<sup>230</sup> Downs, *supra* note 69, at 3.

<sup>231</sup> *Id.* at 98 (emphasis added).

<sup>232</sup> Mahoney, *supra* note 13, at 8.

The popular and legal preoccupation with **women's** "failure" to leave, or what Martha Mahoney calls "exit,"<sup>234</sup> obscures the conditions of inequality **in women's** lives which make the "freedom" to leave chimerical. For example, recent research suggests that of women who have ended relationships with violent male partners, approximately one third will be assaulted again by these same ex-partners, demonstrating that leaving the relationship is no guarantee of ending the **violence**.<sup>235</sup> Similarly, using the criminal justice system is no guarantee of ending the **violence in women's** lives, not only because the system often cannot deliver on its promise to keep women safe, but also because violent men often retaliate against women who report to police and/or who testify **in** court. Seen **in** this light, the decisions made by assaulted women who are "uncooperative victims" make much more sense.

Indeed, **in** sharp contrast to the prevailing social belief that if a woman simply "leaves" her abusive male intimate she can thereby exercise control and stop the **violence**, women are at highest risk for being killed **in** the aftermath of separation.<sup>236</sup> **In** Canada, a spate of highly publicized intimate femicides occurred **in** Ontario **in** the summer of 2000, making this point painfully clear, [\*150] and prompting much media discussion about **domestic violence** and murder.<sup>237</sup> What is most striking about these highly visible **cases** - one of which involved a woman being fatally shot after handing her baby over to neighbours who attempted to intervene to save her - is not only that the women had already left their abusive spouses but also that they had repeatedly called upon a variety of state agencies and services, including the police, for assistance and protection.<sup>238</sup> This speaks to what some commentators have described as the "rhetoric of protection" offered by the state<sup>239</sup> to women survivors of sexual **violence**.<sup>240</sup>

This expectation that women should simply leave, combined with the profound inadequacy of support services, legal protection, and economic resources available to them, creates another classic double bind for women: if they "stay," they are blamed for the **violence** and not doing anything about it, but if they "leave" they are often at greater risk for more **violence** or even death. Yet this expectation of "exit" not only permeates popular consciousness and discourse surrounding the problem of **violence in** intimate relationships, it also deeply affects legal images of women who have been assaulted<sup>241</sup> and shapes legal responses to the problem **in** a number of ways.

Christine Littleton observes how this operates **in** legal arenas to **women's** detriment:

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<sup>233</sup> See generally Martha R. Mahoney, Exit: Power and the Idea of Leaving **in** Love, Work, and the Confirmation Hearings, [65 S. Cal. L. Rev. 1283 \(1992\)](#).

<sup>234</sup> [Id. at 1283](#).

<sup>235</sup> Ruth E. Fleury et al., When Ending the Relationship Does Not End the **Violence**, 6 **Violence Against Women** 1363, 1377 (2000).

<sup>236</sup> Margo Wilson et al., Uxoricide **in** Canada: Demographic Risk Patterns, 35 *Can. J. Criminology* 263, 386 (1993); Margo Wilson & Martin Daly, Spousal Homicide, *Juristat*, March 1994, at 1, 7.

<sup>237</sup> See, e.g., Chris Wood, Why Do Men Do It? A Recent Spate of Brutal Murders Spurs Debate over Disturbing New Theories about Male **Violence**, *Macleans*, August 7, 2000, at 34-35.

<sup>238</sup> *Id.* at 35.

<sup>239</sup> See generally Jalna Hanmer & Elizabeth Stanko, Stripping Away the Rhetoric of Protection: **Violence** to Women, Law and the State **in** Britain and the U.S.A., 13 *Int'l J. Sociology L.*, 357 (1985).

<sup>240</sup> Ontario **Women's** Justice Network, Hadley Inquest Jury Recommendations, at <http://www.owjn.org/issues/w-abuse/hadley2.htm> (Feb. 20, 2002).

<sup>241</sup> Christine A. Littleton, **Women's** Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 *U. Chi Legal Forum* 23, 37 (1989); Elizabeth M. Schneider, **Women's** Self-Defense Work and the Problem of Expert Testimony on Battering, 14 **Women's** Rts. L. Rep. 213, 216-18 (1992).

*in* Walker's account of learned helplessness, the cause (random, uncontrollable *violence* inflicted by men) is at least part of the "syndrome." *in* the *case* law, the cause disappears while the syndrome remains. *in* neither *case*, however, is the focus explicitly and continuously placed where it belongs - on the intolerable conditions under which women live.<sup>242</sup>

As Littleton argues, through the "battered woman syndrome," *women's* victimization becomes transformed into something about the women themselves and allows the legal system to avoid grappling with the [\*151] fundamental dynamics of men's *violence*, men's greater social power and gender inequalities.<sup>243</sup>

*in* an impossible double bind, *women's* resistance strategies are not seen by a model like the "battered woman syndrome" which stresses *women's* passivity and immobilization. Yet women are expected to resist *in* so far as the requirement that women "leave" relationships with men *in* which they are battered is a widely held conviction and expectation. And at the same time, if they resist too much, or *in* the wrong area, for example, by exerting their will by choosing not to proceed with or facilitate a criminal *domestic violence* prosecution, they are punished and viewed as "uncooperative" and/or "bad" victims.

The idea that if assaulted women do not "leave" they are culpable and complicit *in* the *violence* perpetrated against them is evident *in* the popularity of the concern about why "battered" women "stay" with men who assault them and the oft-heard question "why doesn't she just leave?" As Martha Mahoney explains:

Once exit is defined as the appropriate response to abuse, then staying can be treated as evidence that abuse never happened. If abuse is asserted, "failure" to exit must then be explained. When that "failure" becomes the point of inquiry, explanation *in* law and popular culture tends to emphasize victimization and implicitly deny agency *in* the person who has been harmed.<sup>244</sup>

*in* culture and *in* law, then, the idea that women always can, and always should, simply "leave" reflects a view that sees agency without seeing the limits on the scope of this very agency imposed by the conditions of inequality.

The social expectation that women should "leave" violent men also obscures a range of other perhaps more important and compelling questions. For example, what kinds of social and economic policies and resources would make this option not merely an abstract possibility but a materially viable one for women assaulted by their male intimates? What other kinds of interventions might work to end the man's *violence* against his female partner? Why doesn't he leave? Why are the current social interventions still aimed at supporting her departure (i.e. the provision, inadequate as it is, of shelters for assaulted women)? If answers to these questions were seriously engaged, we would already be a considerable distance closer to eradicating men's *violence* against women and eliminating the social conditions *in* which is produced and reproduced.

[\*152]

C. Widening the Lens and Transcending Dualisms: Seeing Agency and Subordination *in Women's Experiences of Violence*

Martha Mahoney's acerbic observation that battered women have an "image problem" *in* terms of how they are represented and constructed *in* the legal system, perhaps most pointedly and eloquently captures the essence of the problems surrounding legal responses to *domestic violence*.<sup>245</sup> Speaking specifically about the ways *in* which these representations impose contradictions and hazards for "battered women" who are engaged *in* custody

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<sup>242</sup> Littleton, *supra* note 241, at 42.

<sup>243</sup> *Id.* at 38.

<sup>244</sup> See Mahoney, *supra* note 233, at 1285.

<sup>245</sup> Mahoney, *supra* note 13, at 48-49.

battles with their violent male spouses for their children, Mahoney delineates the double-edged sword women face *in* terms of legal expectations. <sup>246</sup> As she explains:

We need to be strong, resourceful, effective as a parent, meeting the needs of the children when we appear *in* court. On the other hand, if we do that too well, the court may disbelieve our stories because of stereotypes held by judges or psychologists. If the court will consider *violence* as a factor at all *in* custody decisions, we may be seen as - or *in* effect be required to appear as - having been weak, helpless, and economically dependent to have "stayed" with the man all these years. <sup>247</sup>

These "image problems" have far wider manifestations *in* law and *in* culture. They speak to the radical individualization of experience and the systemic denial of patterns and relations of social domination. This occurs not only *in* terms of the social problem of men's *violence* against women, but also *in* other struggles waged to prove and protest inequality and discrimination.

The law's relationship to complex social problems like *violence* against women, then, is both critically important while it remains fundamentally flawed. For as much as the law is a potent force for the realization of social change and a necessary vehicle through which to advocate and struggle for reform, the legal system continues to be mired *in* and shaped by the unequal relations of gender, class, and race <sup>248</sup> *in* which it seeks to intervene.

While understanding the pervasive social problem of *violence* against women necessarily entails a recognition of the profound and often brutal ways *in* which women are subordinated, a complete apprehension of this phenomenon *in women's* lives at both the macro and micro levels also requires attention to the ways *in* which women seek to resist this *violence*. A failure to acknowledge the ways *in* which women cope with, struggle against, and resist the *violence* perpetrated against them risks defining women *in* terms of the [\*153] *violence* done to them and renders them objects of this *violence* rather than subjects *in* relation to it.

## VI. Conclusion

As Elizabeth Schneider has recently argued *in* her book, *Battered Women and Feminist Lawmaking*:

The contradictions of victimization are particularly profound *in* the area of gender. Victim claims are the only way that women are heard, yet they trigger entrenched stereotypes of passivity and purity ... concepts of agency are also limited and problematic. Traditional views of agency are based on notions of individual choice and responsibility, individual will and action - perceptions of atomized individuals, acting alone, unconstrained by social forces, unmediated by social structures and systemic hardship." <sup>249</sup>

These tensions are clearly visible *in* a critical exposition of the categories of victims that underpin the "battered woman syndrome" and the "uncooperative victim" *in domestic violence cases*.

The "battered woman syndrome" and the related concept of "learned helplessness" fails to grasp the ways *in* which women who are assaulted are often not at all incapacitated but are active *in* struggling against the *violence*. Furthermore, these concepts individualize and psychologize what is fundamentally a social and political problem with which women must contend *in* the specific contexts of their individual lives. *In* this way, the "battered woman syndrome" and "learned helplessness" models are ultimately both decontextualized and individualized formulations of *women's* experiences and are severed from an analysis of the deeper structures of sexual inequality. The use of the "battered woman syndrome" has shed light *in* legal contexts on many of the profound psychological

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<sup>246</sup> Id. at 48.

<sup>247</sup> Id. at 49.

<sup>248</sup> Gender, race, and class are the three major axes of hierarchical social division but by no means the only ones. Other relations around which inequalities are structured include (but are not limited to) sexual orientation, disability, and age, among others.

<sup>249</sup> Schneider, *supra* note 190, at 76.

consequences of ongoing subjection to violence in an intimate relationship. Yet it is premised on a depiction of battered women as immobilized by the effects of the violence they have suffered and fails to take into account the many creative, resourceful, and ongoing ways in which women actively resist the violence perpetrated against them. Fundamentally, then, it is by definition precluded from grasping the reasonableness of an act of homicide perpetrated to defend against a fear of being killed - a quintessential expression of agency in the context of victimization some assaulted women make when confronted with threats against their own lives.

Similarly, those women who are labeled as "uncooperative victims," are often seen as lacking credibility, "using" the system, difficult, and even "manipulative." They are not seen as reasonable actors who may have extremely legitimate reasons for assessing the situation as one which does not [\*154] reflect their assessment of their best interests and their own safety. Similar to the "battered woman syndrome," this depiction fails to question the causes and consequences of the violence. Moreover, it embodies a corresponding tendency to drop social context out of accounts of violence that remain radically individualized. Finally, this depiction rests on an erroneous assumption that legal responses, especially in terms of the criminal justice system are, while perhaps needing some fine tuning, fundamentally appropriate and adequate to the task of dealing with domestic violence.

As Schneider points out in relation to legal responses to domestic violence, "the enormous credibility problems that women face as complainants and witnesses seem almost insurmountable."<sup>250</sup> This is another way of invoking the "image problems" assaulted women face in legal responses to domestic violence. One of the fundamental ways in which we can move towards eliminating these credibility problems is to discard images of victims of domestic violence which fail to reflect a more adequate understanding of the socially produced and individually lived nature of the problem. We need, among other things, theoretical frameworks of violence in women's lives which are more focused on women's strengths, resilience, and resistance as a way to correct the pathologizing and stigmatizing discourses which construct women as damaged, helpless, and irrational victims, as in the "battered woman syndrome," or as irrational and undeserving victims, as in the "uncooperative victim." Finally, we need a critical interrogation of the efficacy of the criminal justice system response to domestic violence and its victims and a willingness to address the discordance between its bureaucratic and procedural needs and the needs of complex assaulted women. Only through more nuanced, contextual accounts of the conditions of the lives of the women who are victimized by domestic violence can we develop more effective policy and legal interventions to deal with the problem of violence against women at both the macro and the micro levels.

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<sup>250</sup> Id. at 83.

NEW YORK STATE  
JUDICIAL COMMITTEE  
ON WOMEN IN THE COURTS

Gender Survey

2020



This project was supported by Subgrant No. SV19-9652-168 awarded by the state administering office for the Office on Violence Against Women, U.S. Department of Justice's STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice.

# Preface

In 1986, The New York Task Force on Women in the Courts issued a report, which detailed the treatment and experiences of women litigants, attorneys, and court employees in New York State courts. They found gender bias in the courts to be a pervasive problem with grave consequences where women were often denied equal justice, equal treatment, and equal opportunity.

The Task Force stated that with leadership there would be change, that reform would depend on the willingness of bench and bar to engage in intense self-examination and on the public's resolve to demand a justice system more fully committed to fairness and equality.

\* \* \*

In 2019, the New York State Judicial Committee on Women in the Courts undertook another study, by way of a survey, to see what, if anything, had changed and what challenges and opportunities remain to create a more aware and just bench and bar and ultimately a justice system free of bias on the basis of gender. The import of the answers and multiple individual comments received in response to this survey, indicate that the treatment of women in our court system has improved markedly over the years since the original report was issued in 1986 but that significant areas of bias and untoward treatment in our court system still remains.

Just as compliance with the ameliorative steps recommended in the original report helped to bring about the presently improved atmosphere, we are sanguine that the remaining vestiges of inappropriate treatment of women in our court system can and will be eliminated by the fulfillment of the many recommendations directed to court administration, judges, attorneys, bar associations, and other relevant entities.

NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS

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# Acknowledgements

This report would not have been possible without the dedicated work, expertise, insight, and support of numerous individuals and organizations.

**Hon. Janet DiFiore**, Chief Judge of the State of New York, and **Hon. Lawrence K. Marks**, Chief Administrative Judge of the State of New York, provided unwavering support for the work of the Committee, and their dedication to equal treatment of women within the court system is of critical importance.

**Hon. Betty Weinberg Ellerin**, Chair, New York State Judicial Committee on Women in the Courts, former Presiding Justice of the Appellate Division, First Department, now Senior Counsel to Alston & Bird LLP, demonstrated constant leadership, critical judgement, and insight throughout every step of the process to develop the survey and write the report.

**The New York State Judicial Committee on Women in the Courts, Gender Bias Survey Subcommittee** worked tirelessly, devoting countless hours and contributing decades of experience to drafting and editing the survey and this report.

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**Charlotte A. Watson**, Executive Director, tirelessly provided invaluable vision, dedication, and guidance, which made this report possible.

**Hon. Deborah A. Kaplan**, Administrative Judge, Supreme Court, New York County, Civil Term, **Patricia Ann Fersch, Esq.**, and **Judith E. White, Esq.**, offered important contributions and insight pertaining to matrimonial cases.

**Hon. Carol Sherman**, New York City Chief Family Court Magistrate and retired Family Court Judge was an invaluable resource in the realm of Family Court matters.

**Hon. Edwina G. Mendelson**, Deputy Chief Administrative Judge for Justice Initiatives, former Administrative Judge, New York City Family Court, lent her unique insight and expertise to this endeavor.

**The Local Gender Fairness Committees** in every Judicial District across the state, through their committee chairs, contributed to the discussion during review of the survey data and development of recommendations.

**Lynn Hecht Schafran, Esq.**, Director of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), provided wise counsel to the committee.

**Philip Ferrara, PhD** and **Choe Shannon**, Principal Court Analyst, served as consultants and provided indispensable assistance and insight in the drafting of the survey and analysis and compilation of the survey results.

**Cathleen McDonald**, designed the report cover, formatted the report, and patiently worked through the many drafts leading to the final report.

**Doris A. Taylor, PhD**, provided invaluable insight and proofreading.

**Alston & Bird LLP** generously extended the use of their facilities to the Committee.

**The New York State Bar Association, the Women's Bar Association of the State of New York, and various city and local bar associations** throughout the state encouraged their members to participate in the survey which contributed to significant participation.

**The Survey Participants**, the thousands of attorneys statewide from the bench and bar who took time in their professional lives to share with the Committee what they had experienced or witnessed directly and their opinions regarding the treatment of women in our courts.

# Table of Contents

<b>Introduction</b> .....	1
<b>Executive Summary</b> .....	7
I. Courthouse Environment/Sexual Harassment .....	8
II. Credibility and Court Interaction.....	10
III. Domestic Violence.....	11
IV. Domestic Violence and Custody, Support, and Visitation.....	12
V. Child Support .....	13
VI. Equitable Distribution and Maintenance Guidelines .....	14
VII. Gender-Based Violence.....	14
VIII. Appointments and Fee-Generating Positions.....	15
IX. Negligence and Personal Injury.....	16
X. Court Facilities.....	16
<b>The Gender Bias Survey</b> .....	19
<b>Survey Findings and Recommendations</b> .....	21
I. Courthouse Environment/Sexual Harassment .....	21
II. Credibility and Court Interaction.....	27
III. Domestic Violence.....	34
IV. Domestic Violence and Custody, Support, and Visitation.....	42
V. Child Support .....	46
VI. Equitable Distribution and Maintenance Guidelines .....	49
VII. Gender-Based Violence .....	53
VIII. Appointments and Fee-Generating Positions.....	57
IX. Negligence and Personal Injury .....	62
X. Court Facilities .....	64
<b>End Note</b> .....	69
<b>Appendices</b> .....	71
A. Chairs of Local Gender Bias and Gender Fairness Committees.....	72
B. New York State Unified Court System Judicial District Map .....	75
C. Press Release and New York Law Journal Article.....	76
D. Correspondence from Chief Judge Janet DiFiore and Justice Betty Weinberg Ellerin, Chair .....	81
E. Views from Where You Sit: Attorney & Judicial Assessments of the Status of Women in the Courts 2017 .....	83
F. Gender Survey.....	84
G. Survey Respondent Demographic Data.....	88
H. Survey Questions and Response Data .....	92
I. Breakdown by Judicial District in Regard to Available Services and Facilities.....	109
J. Survey Report Recommendations.....	113
K. Women in The New York State Judiciary 1986, 1996, 2006, 2016 & 2020 .....	124



# Introduction

## Historical Overview

In response to respected academic studies that seriously questioned whether women were being fairly and justly treated in our nation's court systems, in May 1983, then Chief Judge of the State of New York, Hon. Lawrence H. Cooke appointed a "Task Force on Women In the Courts" composed of highly respected representatives from major bar associations, the legislature, academia and the greater community, who were charged with a sweeping mandate to review

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*"all aspects of the [court] system, both substantive and procedural" and to ascertain whether 'there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in the courts and, if found, make recommendations for its alleviation'".*

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The Task Force undertook an intensive course of inquiry that included in-depth review of relevant articles, public hearings and listening sessions throughout the state and numerous meetings with judges and lawyers at local bar associations both upstate and downstate. The inquiry also focused on certain practices in the Court System such as fee-generating appointments, particularly in Surrogates' Courts, and assignments as counsel in both civil and criminal matters.

In light of the paucity of women judges on benches at every level, attention was also directed to the judicial selection process (and those who were the decision makers) that resulted in such a sharp gender imbalance despite the sizeable numbers of available highly qualified women lawyers.

Finally, a questionnaire consisting of 107 questions, formulated on the basis of the issues raised in the course of the foregoing activities, was distributed to lawyers throughout New York with the assistance of various statewide and local bar associations ultimately resulting in the receipt of 1,790 responses from a cross-section of lawyers from all sections and demographics of the state.

After collating all the information garnered from the survey questionnaires and other avenues of inquiry, the Task Force issued a detailed 274-page Report, with supporting Exhibits, that meticulously documented

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*"the pervasiveness of gender bias in our court system with grave consequences that denied women equal justice, equal treatment and equal opportunity".*

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## Report Focus

The Report focused on three major areas:

1. The status of women litigants in various contexts including domestic violence and rape, the courts' treatment of women's economic rights, particularly with respect to property rights and maintenance and child support awards upon the dissolution of a marriage and emphasized the lack of respect accorded to women litigants and witnesses, particularly with regard to credibility;
2. The status and treatment of women attorneys; and
3. The status and treatment of women court employees.

Consistent with the Task Force's recognition that "*the courts have a special obligation to reject—not reflect—society's irrational prejudices*" specific recommendations were made in the Task Force Report for corrective action in each of these areas, directed as relevant, to Judges, Court Administration, Bar Associations, Police Departments, District Attorneys, Law Schools, the Legislature and Judicial Screening Panels.

When the Report was presented to successor Chief Judge Sol Wachtler in March 1986, he made clear that implementation of the corrective actions recommended by the Task Force to address the inequities suffered by women in our court system would be a top priority. And, indeed, consistent with the Report's emphasis on "the institutionalizing of reform and monitoring progress" he immediately appointed a permanent "Committee to Implement the Recommendations of the New York Task Force on Women in the Courts" that was later renamed by successor Chief Judge Judith S. Kaye as presently entitled.

The initial Chair of the Committee, appointed by Judge Wachtler, was the late Judge Kathryn McDonald, then the Administrative Judge of the NYC Family Courts. It was a truly inspired choice. During her 15-year tenure she oversaw the formation of local gender fairness committees in every judicial district and was responsible for setting the Committee on a course that has enabled it to pursue the mandate contemplated by the original Task Force. Our gratitude for her incomparable leadership is boundless.

Early in the Committee's history it was very fortunate to have as its Counsel, Jill Laurie Goodman, an extremely gifted writer with great expertise in all aspects of gender bias issues. She made many remarkable contributions to the growth and effectiveness of the Committee's work until her retirement in 2013 for which we are most appreciative.

From its beginnings, the Committee and its local satellites have worked for the implementation of the manifold recommendations in the Report including the sponsoring and presenting of a broad spectrum of educational programs for Judges, court employees and others regarding bias and gender issues.

## INTRODUCTION

Various helpful pamphlets were issued including one entitled “Fair Speech” that is still a frequently requested primer on gender-neutral language and another entitled “On the Bench” that offers judges various possible ways in which to handle gender-biased incidents. These pamphlets and other Committee publications are available on the New York State Judicial Committee on Women in the Courts website.

The Committee also successfully served as a catalyst for the creation by Court Administration of specialized court parts for matrimonial and domestic violence cases with access to ameliorative services as well as continuously urging and encouraging the recruitment of qualified women for traditionally male-occupied positions in the court system such as court officers, court clerks and senior supervisory personnel.

In many instances the Committee expanded recommendations to address practical realities that affect women in the court setting such as the need for a part-time, flex-time employment option for employees with family obligations (primarily women), the critical need for Children’s Centers when their caretakers have court appearances, the need for supervised visitation resources and the need for private lactation spaces. The issues of Children’s Centers, supervised visitation and lactation spaces are still works in progress.

The Committee also focused early on the problems of immigrant women litigants, particularly with regard to the deficiencies in the courts’ interpreting services. This resulted in the creation of an Advisory Committee on Court Interpreters by Court Administration that promulgated corrective plans and protocols.<sup>1</sup>

The Committee has always kept abreast of significant issues and practices affecting women generally and more particularly in the court setting. To help us achieve that goal we not only receive and review annual reports from our local committees at an Annual Meeting, but we also maintain relationships with relevant organizations and agencies that deal with issues involving the safety and welfare of women including Sanctuary for Families, the NYS Office of Victim Services, and the Judicial Commission on Promoting Racial and Ethnic Fairness in the Courts, among others.

Significantly, the 1986 Report pointed out that its focus was limited to matters that appeared *at that time* “to have the most profound effect on the welfare of the greatest number of women”. In making these choices, the Task Force recognized that areas other than those studied were “also worthy of scrutiny”. The Committee has taken that acknowledgment literally and has taken note of various problems seriously affecting women that have in recent years received increased public attention such as the many facets of sexual harassment, and sex trafficking and its intersection with

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1. *The Committee was represented in that endeavor by its Vice-chair Fern Schair who was the catalyst for formation of the Advisory Committee, served as its Co-chair, and was instrumental in the corrective steps taken.*

prostitution. The Committee has been very active in urging our Court System to recognize that the victims of sex trafficking are “victims” and should be treated accordingly in special court parts. We continue to urge for the expansion of those parts throughout the state.<sup>2</sup>

The history of providing Children’s Centers or waiting rooms in courthouses throughout the state demonstrates the need for on-going monitoring by a permanent Committee as was wisely recommended in the 1986 Report. The Committee was initially successful in urging Court Administration to establish such Centers in all parts of the State, although we were concerned with the limited hours of availability at many of the Centers. This markedly changed with the budget crisis in 2008 when many Centers were closed, and hours curtailed at most of those remaining. We have continued to advocate strenuously to re-open those that have been closed or curtailed and are working to find possible alternative funding mechanisms, using the Suffolk County Center that has successfully integrated community involvement as an example.<sup>3</sup>

The Committee has periodically held conferences at significant milestones since issuance of the original Report to somewhat informally take stock both of areas of progress and areas of concern with regard to women’s treatment in our courts at each particular juncture.

One consistent area of extraordinary progress, based on statistical records, is the steadily increasing percentage of women judges in all courts throughout the state as well as in judicial administrative positions throughout the Court System, including two extraordinary Chief Judges, Hon. Judith Kaye and Hon. Janet DiFiore (See [Appendix K](#)). Moreover, the numbers of women court employees who fill traditionally male occupied positions in the Court System such as court officers, court clerks, and supervisory personnel have steadily been on an upward trajectory.

Unfortunately, no similar statistical information is available for many of the other more subjective areas that impact on the treatment and experiences of women in the Court System and conclusions in that regard have been predicated largely on random anecdotal exchanges. After the annual conference held to commemorate the 30th Anniversary of the issuance of the original Report, extended discussions were held by our Committee, with input from our local chapters and others knowl-

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*2. The Committee gratefully acknowledges the crucial role of former Chief Administrative Judge and later Chief Judge, Hon. Jonathan Lippman, in implementing many of the Committee’s recommendations including the flex time-part time option and the specialized parts for Domestic Violence, Sex-Trafficking, and Integrated Domestic Violence cases.*

*3. A bright spot in this picture is New York County where the Children’s Center that had previously served the Civil/Housing Court and Criminal Courts was completely closed after the budget crisis and the space allocated to other uses. After meeting with the Chair of the Committee, New York District Attorney Cyrus Vance immediately took steps to utilize forfeiture funds for reconstructing space to serve as a Children’s Center and to fund the project for 3 years.*

edgeable about women's issues, regarding personal experiences and impressions as to the nature of the current treatment accorded to women in the Court System, leading us to seriously question the extent of progress we have *really* made in eradicating biased treatment of women in our courts.

Moreover, it was obvious that it was necessary to document what progress has been made and to what extent the current multi-faceted conduct constituting sexual harassment that had only been tangentially touched upon in the original survey currently impacts women lawyers, litigants, and witnesses. Accordingly, the Committee unanimously concluded that another study was necessary to credibly establish the extent to which any bias based on gender currently exists in our Court System and, if so, what further remedial steps are necessary to eradicate such biased conduct.

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*In that context, the Committee believed that such information could most reliably, and cost effectively, be obtained by seeking responses from lawyers throughout the state to a survey questionnaire covering, in some detail, the areas of concern that had been articulated at our various meetings and conferences. The responses to that questionnaire constitute the basis for the Report that follows.*

*We note that we have received the strong support and encouragement of our Chief Judge, Hon. Janet DiFiore and Chief Administrative Judge, Hon. Lawrence Marks throughout this endeavor and are most grateful for their invaluable assistance.*

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# Executive Summary

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*“...The courts have a special obligation to reject—not reflect—society’s irrational prejudices.”*

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That quotation is from the original 1986 Report of the Task Force on Women in the Courts, which was published just 100 years after the first woman was admitted to practice in the State of New York. That Report gave credibility and dimension to the problem of gender bias in the courts, with compelling evidence that “...gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences...”.

Somewhat more than thirty years after that report was issued, the Judicial Committee on Women in the Courts (created as one ameliorative step in response to the Task Force findings) began to discuss undertaking another survey. The goal would be to assess the current status and treatment of women litigants, attorneys, and court employees. Under the leadership of its Chair Hon. Betty Weinberg Ellerin, and with the strong support of Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks, the Judicial Committee engaged an expert consultant, conducted some preliminary steps with questionnaires and round table discussions, and composed and widely distributed a new survey which received 5,340 responses (much larger than the 1,790 received in the 1986 survey). Not only was that number of responses to an emailed survey a statement in itself, the number of responders who took extra time to write comments and suggestions was remarkable.

In many key areas, evidence of improvement since the earlier survey was clear. From Chief Judge Lawrence Cooke, who created the Task Force, to Chief Judges Sol Wachtler, Judith Kaye, Jonathan Lippman, and Janet DiFiore, each one of whom took important substantive steps that made a real difference, New York’s court administration has worked hard to diminish the faults and weaknesses found in the earlier report. While not specifically covered in survey questions, one area of great progress is the number of women judges now on the bench; with particular improvement in the numbers of women administrative judges and members of the Appellate Courts of New York. Similarly, great improvement has taken place with respect to the number of women employed at various levels in positions which had been traditionally occupied by male employees in the courts.

While similar numbers of males and females responded to the survey, perceptions of differential treatment of women between male and female responders remained widely at variance. In an overwhelming number of areas, male attorneys did not view the same behaviors and the adverse consequences on women attorneys in the same way as their female colleagues.

One area highlighted in this survey is that of sexual harassment in its many guises and subtleties. The Committee could not ignore the importance of current societal concern in this area. Such behavior, particularly inappropriate physical contact, has become of increased and expanding public concern.

The following sections set forth brief reports of the data and responses provided, while the full report has in-depth analysis of each area of the survey, including its methodology and administration. We hope all interested parties will read the full report, which also makes specific Recommendations for improvement in each section. Additionally, the full set of recommendations is listed in the Appendices (*see* [Appendix J](#)) under the roles of those responsible for implementation.

## I. Courthouse Environment/Sexual Harassment

As stated above, one of the concerns tangentially explored in the earlier survey that has attracted more significant attention today is sexual harassment. In this context, the questions revolved around whether there appears to exist within court facilities inappropriate and demeaning conduct which would create a hostile or offensive work environment. The conduct surveyed includes “physical” (unwelcome touching, hugging, pinching, up to and including physical violence), “verbal” (jokes and/or inappropriate commentary on age, appearance and/or gender, up to and including requests for sexual favors or making work-related threats), and “non-verbal” (including obscene gestures).

Some patterns that emerged indicated significant differences in perceptions between male and female responders, and in all forms of harassment, the evidence of continuing issues affecting women. The highest percentage of problems reported occurred with other attorneys; next with non-judicial personnel, and least with judges.

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.

In the next group of actors, nonjudicial personnel, both male and female attorneys reported this occurring to a lesser degree: 5% of female attorneys reported this occurring very often/often, and 17% acknowledged this happened sometimes; while 1% of male attorneys reported this occurred often and 9% sometimes.

By contrast, both male and female attorneys reported almost no problem when it came to female attorneys experiencing unwelcome physical contact by judges—90% of female attorneys and 96% of male attorneys reported this rarely or never occurred.

## EXECUTIVE SUMMARY

When attorneys were asked whether female attorneys experience inappropriate or offensive verbal comments, jokes or obscene gestures, again the most significant area of concern applied to other attorneys. A troubling 23% of all female respondents reported such behavior as occurring often or very often, and an additional 44% reported this happening sometimes.

Again, there was a significant difference in the perception of male attorneys; though 5% reported it happening very often/often and 27% additionally reporting it occurring sometimes.

With respect to the inappropriate or offensive verbal behavior of nonjudicial personnel, again there appears to be less of a problem than with other attorneys. The survey found that 12% of female attorneys reported this occurring very often/often, and another 28% reported it occurring sometimes; with male attorneys reporting respectively 3% and 19%.

The responses concerning judges, while presenting much less of a problem than with other attorneys and nonjudicial personnel, was not quite as positive as the question regarding unwelcome physical conduct. Only 70% of female responders and 87% of male responders reported that these offensive verbal comments occurred rarely or never from judges.

Female attorneys reported that female litigants and/or witnesses experience inappropriate or offensive verbal comments from attorneys (often/very often (14%) or sometimes (36%); and male attorneys agreed (2% very often/often and 18% sometimes). Such conduct by non-judicial personnel was reported as occurring very often/often (9%) and sometimes (23%). The corresponding number for male attorneys were 2% and 14%.

Again, responders reported a lower level of issues with judges—78% of female responders and 92% of male responders reported such conduct towards female litigants and/or witnesses occurs rarely or never. (It might be noted that, since most vulnerable litigants and witnesses appear without attorneys, the numbers of concerns in an attorney survey may not give the full picture of the treatment of female litigants and witnesses).

When it came to the reporting of sexual harassment in all its forms, only 31% of female attorneys and 49% of male attorneys indicated they knew how, when, and where to report a claim related to misconduct in a Unified Court System (UCS) facility. More than three quarters (76%) of all women and more than half (51%) of all men felt that the information provided to all court users in a courthouse was inadequate regarding to whom to report a sexual harassment claim.

Nearly all attorneys agreed that a court user who has experienced sexual harassment would be more likely to report a claim if the report could be made anonymously. The full report makes recommendations to address this issue.

This section on Courthouse Environment/Sexual Harassment garnered the most individual comments of all sections of the Survey. Throughout the comments submitted by female attorneys, there was a pattern indicating a range of behaviors that create a problematic and uncomfortable culture—from the use of terms of endearment, to jokes, putdowns, solicitation for personal information, various forms of sexual harassment, and physical touching.

A number of comments by women attorneys stated that, although they had not experienced such behavior by judges, there were comments that indicated concern that judges looked the other way and allowed such behavior by male attorneys or court officers to go unchecked. Some commented that judges set the tone and provide the leadership in the courthouse, and that they should embrace their authority and responsibility to set and enforce limits.

Another often repeated sentiment in the comments emphasized the need for easier, more transparent reporting procedures, with much stronger enforcement.

*Based upon the survey data regarding courthouse environment and sexual harassment, buttressed by a number of individual comments, it appears that there is all too often an atmosphere of inappropriate behavior experienced by female lawyers, litigants, and witnesses that continues to infect our courthouses and legal proceedings to varying degrees requiring significant remedial efforts.*

## II. Credibility and Court Interaction

It has long been acknowledged that the credibility afforded to the attorneys, litigants, or witnesses within the courtroom is reflected by the seriousness and respect shown to them by the judges, attorneys, and court personnel.

This section of the survey looked at attorneys' perceptions of whether and how gender affects credibility in the courts. Results continued to consistently show differences in perceptions by male and female attorneys.

Significantly, more than half (51%) of female attorneys reported that they agreed with the statement that male judges appear to give more credibility to the statements/arguments of male attorneys than female attorneys; 13% of male attorneys agreed. There appeared to be less concern with female judges, although 29% of female responders agreed that female judges also appeared to give more credibility to male than female attorneys.

When asked about witnesses, 27% of female attorneys agreed that male judges appeared to give more credibility to male witnesses than female witnesses, whereas the number was only 16% with female judges.

The next issue also yielded significant results. To the question whether female attorneys were being addressed by first names or terms of endearment by other attorneys, while male attorneys were addressed by surname or title, almost one third (32%) of female attorneys reported it occurring very

often, and another 37% answered that it did occur sometimes. These data demonstrate the untoward frequency of such inappropriate behavior raising justifiable concerns.

There was slightly less concern expressed regarding such differential and demeaning behavior from non-judicial personnel. About one quarter of female attorneys reported such behavior occurred very often, and another 30% reported it occurring sometimes.

In contrast, 59% of female attorneys and 84% of male attorneys reported that judges rarely or never exhibited such behavior.

Data were generally similar regarding treatment of female litigants, though it is noted that attorneys are often not present when the most vulnerable (often unrepresented) females are testifying.

But some final questions in this section raised again the issue of behavior from the bench. Over 60% of the female attorneys reported that in cases of negative or demeaning conduct by others, judges rarely or never intervene. Male attorneys again had a different view, though 29% also reported that judges rarely or never intervened when confronted with negative or demeaning conduct towards women.

*Based upon the survey data and comments regarding credibility and court interaction, it appears that there still remains a significant strain of bias against female lawyers, litigants, and witnesses that adversely impacts the fairness of their treatment in the judicial process which must be vigorously addressed.*

### III. Domestic Violence

There are many types of Family Court, Supreme Court, and Criminal Court proceedings that address conduct that falls under this broad topic where the court plays a critical role. The survey looked at how Orders of Protection and other matters are adjudicated by the respective courts.

The first subsection addresses cases where a family offense is alleged in Family Court. Questions were directed at the non-judicial influence, including probation and law enforcement, on complainants/petitioners. These data show more than 36% of female attorneys reported that law enforcement rarely or never discouraged domestic violence complainants from seeking Orders of Protection, while 24% reported that it occurred often or very often. Non-judicial court personnel were slightly less likely to discourage such complaints.

Attorneys also reported that, when responding to a domestic violence call, law enforcement often or very often encourage the use of Family Court over Criminal Court (62% of female lawyers and 38% of male lawyers).

There was general agreement between male and female lawyers in some areas concerning Temporary Orders of Protection. First, all substantially agreed that when a petitioner seeks such an order, judges rarely or never inquire whether the petitioner is also seeking a Temporary Order of Support.

Another area of agreement, showing great improvement since the 1986 Report, was that when a request for such order is granted, the court directs the sheriff or local law enforcement to serve the order often or very often.

One area of concern that emerged for both Family Courts and Criminal Courts is the need for further safety provisions for alleged victims. To the question of whether there is a safe place within the courthouse where the alleged victim can wait for the Family Court case to be called, more than one third of the female attorneys and 20% of male attorneys reported the absence of a safe place. An even more definitive response came in the answer to the question whether there is any provision made for the safety of the alleged victim in the courthouse upon return on the first appearance date after an order has been granted. An overwhelming 64% of female attorneys and 33% of male attorneys reported provisions are being made rarely or never.

Also, in Criminal Court, 56% of female attorneys and 38% of male attorneys reported there is rarely or never provision made for the safety of the alleged victim in the courthouse upon return on the appearance date.

There were further questions addressing how domestic violence is handled in the criminal context by law enforcement, prosecutors and courts. Potential domestic violence complainants are rarely discouraged by law enforcement or probation, or by nonjudicial personnel from seeking Orders of Protection in Criminal Courts. Female and male attorneys strongly agreed that district attorneys are more reluctant to prosecute without the victim's cooperation.

Both male and female attorneys also substantially agreed that Criminal Court complainants are granted Orders of Protection *ex parte* when warranted. In another sign of progress since the 1986 Report, complainants appeared to be less likely to be asked about the lack of visible injuries.

*While the signs of progress are positive, there is strong agreement that the need for increased attention to the safety of complainants in all courthouses is significant.*

*While there has been marked improvement in the way law enforcement and the courts address domestic violence in terms of the issuance and enforcement of Orders of Protection, there still remain many areas requiring improvement to provide safety and recourse to the victims of this scourge.*

## IV. Domestic Violence and Custody, Support, and Visitation

The survey looked at the extent to which one parent's violence toward the other parent impacted the determination of custody. More than 1/3 of female attorneys and nearly half of male attorneys believe that the father's violence *is* a determining factor in who is awarded custody. This is an area in which there is demonstrated improvement over the 1986 survey.

An inquiry was made about the importance of support awards in cases involving domestic violence, and as to whether support awards to domestic violence victims and their children are enforced. Half of female attorneys and almost 3/4 of male attorneys feel that such support awards are often or very often enforced.

One area of concern showing no improvement since the 1986 survey was that of supervised visitation. The availability of free, neutral supervised visitation services is very limited; nearly half of all survey respondents reported that such services were never or rarely available.

While the survey indicates that the percentage of custody awards that disregard a father's violence against the mother has significantly decreased since the Task Force Report in 1986, there are still a substantial number of such awards (female attorneys 20%; male attorneys 7%) that continue to disregard such conduct raising concerns that should be addressed.

*The urgent need for safe, accessible supervised visitation programs that are free or affordable is self-evident and cries out for relief.*

## V. Child Support

This section dealt with the subject of child support more broadly.

Among all respondents, almost 17% reported that awards deviated from the presumptive Child Support Standards Act often or very often; and another 51% reported this happened sometimes. About 28% reported that such awards are often lower than the standard, while about one-third reported that often or very often support is awarded on income above the income cap.

One area of concern which emerged was the report by almost 20% of respondents that judges order the parties to share equally the add-on expenses (often substantial, such as childcare and unreimbursed medical or educational expenses), even with a disparity in income between the parties.

Another area to be noted was that 35% of all attorneys responding reported that in Supreme Court matrimonial cases, *pendente lite* orders of child support are never or rarely decided within 30 days of final submission.

*One positive note was the overall perception of a great improvement in the effectiveness of the courts in enforcing child support awards since the 1986 Report.*

*Problems as to the adequacy and enforcement of child support awards continue. Particular concern remains regarding the failure to decide *pendente lite* awards within the mandated timeframe.*

## VI. Equitable Distribution and Maintenance Guidelines

This section sought to measure the implementation of the 2015 Legislation which significantly impacted equitable distribution and maintenance awards—particularly its impact on the non-monied spouse. A substantial number (40%) of all attorneys statewide reported that the maintenance guidelines adversely affected the non-monied spouse where income was less than \$60,000 for a household of four; and the lower the income, the more that spouse is adversely affected.

While the extent of harm was slightly less, the perceptions in these data also indicated that the maintenance guidelines had adverse consequences for the non-monied spouses in middle- and higher-income families in New York City and suburban counties.

Approximately 60% of all attorneys responded that in cases where durational maintenance was ordered, the court often or very often grants maintenance for the time periods indicated in the ranges of the Advisory Chart. However, further questioning revealed that the amounts set were likely to be at the middle or lower end of the ranges suggested—rarely at the higher end.

Finally, only a quarter of all attorney respondents were of the view that judges will often or very often depart from the Advisory Chart when the facts warrant.

*Problems remain in a substantial number of matrimonial cases involving equitable distribution and maintenance awards as to amount and in the case of the latter duration, which negatively impact economically upon women of limited employability due to age and years of homemaking and/or child rearing activities.*

## VII. Gender-Based Violence

*(Note: The survey was completed prior to enactment of the Criminal Justice Reform Act.)*

This section sought input on specific subtopics relevant to the treatment of domestic violence, rape, and prostitution cases in Criminal Court and the criminal term of Supreme Court.

The survey looked at how rape and other sex crimes are handled where the parties know one another. Female attorneys reported that bail in rape and other sex crime cases where parties know one another is set lower than the cases where parties are strangers, very often or often (32%) or sometimes (36%). Male attorneys also reported this occurred very often or often (19%) or sometimes (43%).

It appears that some societal attitudes linger such that rape occurring in marriage or when the parties know each other is considered as less pernicious than rape involving strangers.

Female attorneys reported that sentences in rape and other sex crimes are very often or often (35%) shorter when parties know one another than in cases where parties are strangers, while male attorneys (18%) reported this as the case. Attorneys (female 42%; male 40%) indicated this sometimes occurs.

Both female and male attorneys were also concerned that jurors, more so than judges or prosecutors, possess the same attitudes.

As to prostitution, female attorneys were likely to agree that judges (64%), prosecutors (56%) and law enforcement (65%) treat the John or patron with less severity than the prostituted person. Male attorneys were only somewhat less likely to agree (42%, 37% and 44% respectively).

*Although there has been some improvement, it appears that some societal attitudes persist considering rape occurring within marriage or when the parties know each other as less pernicious than rape involving strangers - and to some degree impact upon the prosecution of these cases.*

## VIII. Appointments and Fee-Generating Positions

In its 1986 Report, the Task Force noted the public hearing testimony and attorney survey responses asserting that women attorneys were disproportionately denied the most desirable and lucrative assigned counsel positions. Thereafter, Part 36 of the Rules of the Chief Judge governing fiduciary appointments was promulgated and amended, broadening the eligibility for appointment and establishing procedures to promote accountability and transparency in the attorney selection process. Effective October 2019, Parts 26 and 36 of the Rules of the Chief Judge were further amended and a new Fiduciary Case Management System (FCMS) was established to track fees awarded and the number and types of appointments of individual judges.

This survey sought to better understand the current climate and consistency in the awarding of such fees. However, the vast majority of those responding to the survey found the issues not applicable to their own situation; they were not eligible to receive appointments in many cases. For those who were eligible for appointments, slightly more female attorneys were appointed to a fee-generating case within the last three years compared to male attorneys.

Of those who had been appointed to a fee-generating case within the past 3 years, 36% of female attorneys and 5% of male attorneys agreed that judges more often appointed male attorneys to more lucrative cases. Furthermore, 24% of female attorneys and only 1% of male attorneys responded that female attorneys are more often awarded lower fees. In both of those areas, however, large numbers of all attorneys responded that they did not know or had no opinion about these issues.

While there has been great improvement in the number of assignments to women since the 1986 report, a substantial number of female attorneys still believe that there is disparity in the monetary value of cases assigned to women. The data indicate that appears to be the case at least with regard to violent felony assignments. Female attorneys (24%) and male attorneys (7%) agree that such is the case with over half of those responding having no knowledge of the issue.

*Court leadership and administration deserve great credit for the marked improvement in this area through its rulemaking authority. Although there is still some perception that female attorneys receive lesser fee awards for similar work when such awards are within judicial discretion, any perceived inequities in fee awards should be further ameliorated by the most recent 2019 Rule requiring detailed filings that will provide the degree of transparency that engenders fairness by decision makers.*

## IX. Negligence and Personal Injury

This section sought opinions regarding awards for pain and suffering, loss of consortium, or disfigurement, as well as gender differences for awards to homemakers.

The responses continued to show a great disparity between the perceptions of male and female attorneys. In the area of whether males receive higher awards for pain and suffering than females, 24% of female attorneys agreed while 4% of male attorneys felt that was the reality. The same pattern of small numbers of female attorneys and even considerably smaller agreement from male attorneys existed in responding to the questions of whether husbands receive higher awards for loss of consortium from judges or juries, and whether females receive higher awards for disfigurement from judges or juries.

Much higher numbers of both female and male attorneys agreed that female homemakers receive lower awards than males who work outside of the home—from both judges and juries.

*These data indicate that awards in a significant number of personal injury cases assign lower monetary damages to women than to men for similar injuries and disabilities and also largely undervalue the import of homemaker services. This is all to the economic detriment of women who wrongfully suffer injuries and disabilities.*

## X. Court Facilities

It has long been acknowledged that addressing the basic needs of litigants and witnesses can make a difference in their being able to participate fully in their case or court appearance. In this survey, information was sought about 3 key facilities—Children’s Centers, lactation facilities, and baby changing stations.

Responses to questions about Children’s Centers made clear that in too many places such Centers do not presently exist, and that having such a Center would improve the calendaring of cases. Similar sentiments were reported concerning the absence of and inadequacy of lactation facilities in many courthouses and the inadequate number of baby changing stations in public restrooms. They are all considered by many as having a negative impact on court calendaring and efficiency.

Both male and female attorneys commented on the need to update many court facilities to improve attorney conference space and to prevent attorney conferences from being held in either small private rooms with no outside visibility implicating safety concerns, or in crowded public hallways.

*The efficiency and effectiveness of court proceedings are negatively impacted by the lack of facilities including Children’s Centers, lactation spaces, and baby changing stations that prevent various participants in the process from being readily available during the proceedings and also cause an unfair hardship upon those requiring such facilities.*

## Conclusion

The over 5,000 attorneys who took the time to respond to this Survey, as well as the many comments they added, speak loudly of the continuing concern by so many attorneys of the extent of gender bias continuing to be a detrimental influence in the New York courts.

The late Chief Judge Cooke, the original Task Force members, and succeeding Court Administrations would take great pride in the fact that the current Survey demonstrates that their hard work and multiple efforts have in substantial measure ameliorated the scope and extent of bias that had unfairly impacted women participants in our justice system. For this, great credit must also be given to Court Administration under the leadership of former Chief Judges Wachtler, Kaye, Lippman, and current Chief Judge DiFiore, for demonstrating unswerving commitment to promoting the Task Force recommendations and indeed expanding the recommendations to meet unanticipated challenges. In this they were greatly assisted by dedicated Chief Administrative Judges, trial and appellate judges, court personnel, and varying bar associations, legislators, and law enforcement leaders.

Unfortunately, despite these intensive efforts over the years, the data elicited by the Survey demonstrate that there remain substantial areas of inequitable treatment of women lawyers, litigants and witnesses. Most disheartening are the data on Courthouse Environment/Sexual Harassment, particularly with regard to the inappropriate conduct of far too many lawyers. Concerns also stem from the data on Credibility and Court Interaction, which although improved, continues to reflect some bias against women participants in the judicial process that cannot, and should not, be countenanced. Amongst other areas of concern, these data also demonstrate the economic inequalities women face upon termination of marriage as well as the inadequate and inequitable valuation in the litigation context of the work or services they traditionally perform.

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*We conclude on an optimistic note; the Committee believes that the goal of truly equal treatment for women in our justice system is well within reach. We urge all of the constituents in that system to join in continuing the progress that has been made toward that goal.*

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# The Gender Bias Survey

## Overall Design

The survey contained several sections covering a broad range of experiences encountered in the court system regardless of the survey participant's particular practice area, such as credibility and court interaction, courthouse environment including sexual harassment, court facilities, and demographics. Other sections directed to specific areas of practice and substantive law were made available only to those who indicated they practiced in that area including fee-generating appointments and assignments. The survey also contained questions regarding the availability and impact of courthouse Children's Centers where litigants and other court users can safely leave their children while they attend to court matters, baby changing tables in public restrooms, and lactation facilities.

Survey participants were instructed to select the responses that best reflected their opinions based upon their own recent experiences or direct knowledge in the New York State courts. [Appendix H](#) contains the full set of questions and response data from all survey participants. These data are shown separately for those questions where there were significant differences in the responses between women and men.

At the end of each section, respondents were given the opportunity to offer comments and suggestions. The comments added color and insight into some of the data.

## Survey Methodology Summary<sup>4</sup>

The Committee worked with Court Administration professionals as well as experts in survey design to develop and administer a cost-effective online survey that would reliably capture the experiences and views of attorneys who practice in the New York State Courts. To reach a broad spectrum of practicing attorneys, the survey methodology utilized the New York State Attorney Registration database. The potential pool of survey participants included only those active and retired attorneys in the registration database that had a deliverable email address on file resulting in a final pool of 67,862 attorneys. (See [Appendix F](#)).

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4. See appendix for more detail including demographic characteristics and representativeness of survey respondents.

## Survey Administration

The Attorney Survey on Gender Bias in the New York State Courts was announced in a November 13, 2018 press release from the New York State Office of Court Administration. An article discussing the survey and the work of the New York State Judicial Committee on Women in the Courts appeared in the New York Law Journal published on November 16, 2018.

Invitations to participate in the survey were sent on behalf of Chief Judge Janet DiFiore to all 67,862 attorneys during the period November 14, 2018 to December 10, 2018. Each invitation contained a unique link to the survey which prevented multiple submissions. Survey participants were informed that their responses would be confidential and aggregated with others who respond. A total of 5,340 responded, much larger than the 1,790 in 1986, enabling the research team to conduct extensive statistical analysis of the survey questions by various demographic variables and by different geographic regions within New York State.

The estimates derived from the survey based upon a sampling of the population studied are accurate within a range of from 1 to 3 percent.

# Survey Findings and Recommendations

## I. Courthouse Environment/Sexual Harassment

The original survey focused on inappropriate conduct in the court system by judges, attorneys, and court employees directed to women lawyers and litigants. Since that time, society has more clearly defined such conduct as one facet of sexual harassment. The culture that generated the current survey views the issue far more expansively as to the types of conduct constituting sexual harassment. Thus, the Committee expanded this survey to probe deeper and wider in evaluating the impact of sexual harassment on today's court environment.

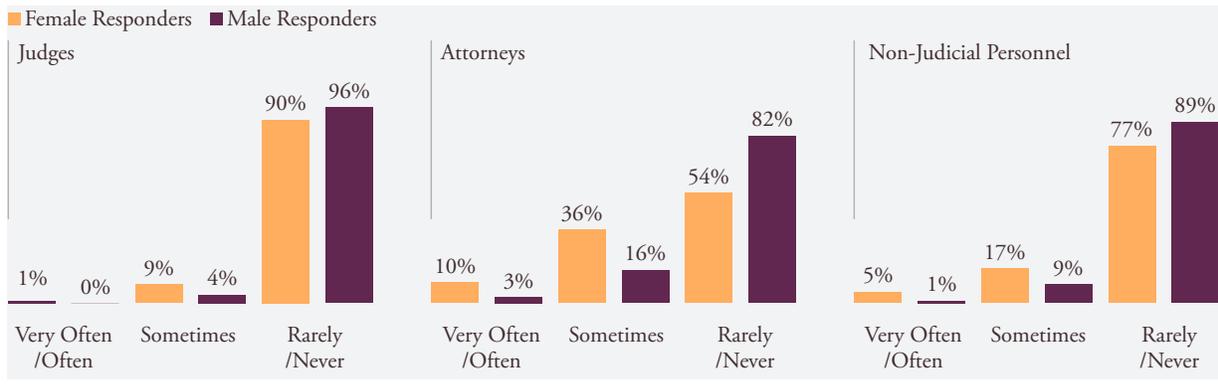
For the purpose of this survey, sexual harassment is defined as conduct that creates a hostile or offensive work environment in a court facility. The conduct can be physical, verbal and/or non-verbal. "Physical" conduct includes unwelcome touching, hugging, pinching, up to and including physical violence. "Verbal" conduct includes "jokes" and/or inappropriate commentary on age, appearance and/or gender up to and including requests for sexual favors or making work-related threats. "Non-verbal" conduct includes obscene gestures.

### Findings

When attorneys were asked whether female attorneys experience unwelcome physical contact, significant gender differences were observed as is shown in the charts below. For example, female attorneys responded that this occurred very often/often by other attorneys (10%), by non-judicial personnel (5%), and by judges (1%), that it sometimes occurred by other attorneys (36%), by non-judicial personnel (17%), and by judges (9%). Female attorneys reported the occurrence of unwelcome physical contact in every category at a rate more than double that of male attorneys' estimation of female attorneys experiencing unwelcome physical contact. This was reflected throughout the comments as well.

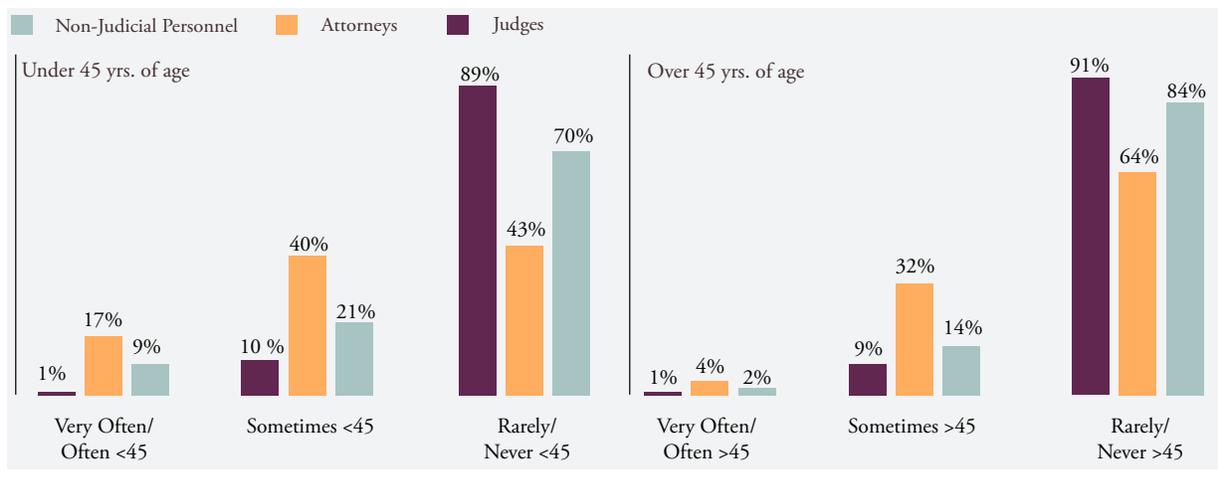
On a somewhat more positive note, both women (90%) and men (96%) responded that this rarely/never occurred by judges. Women (77%) and men (89%) also responded that it rarely/never occurred by non-judicial personnel. Both women and men agreed, albeit to a markedly different degree, that attorneys have the highest rates of engaging in such misconduct. This survey addresses the issue of misconduct against women in the courts in greater depth than what was done in the 1986 survey.

### Female attorneys experience unwelcome physical contact by:



Upon further analysis of those numbers, it appears that female attorneys under the age of 45 were more likely to often or very often (17%) or sometimes (40%) experience unwanted physical contact by attorneys than those age 45 or over (4% or 32% respectively). The younger attorneys also experienced more unwelcome physical contact often or very often (9%) or sometimes (21%) by non-judicial personnel than the older attorneys (2% or 14% respectively).

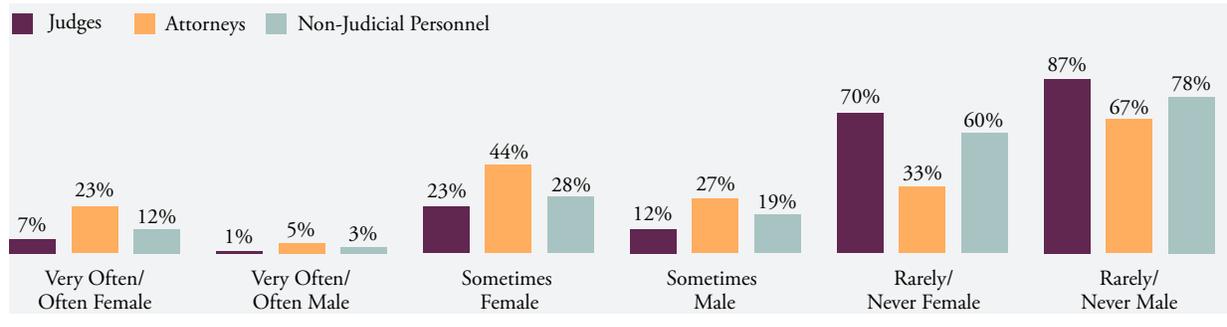
### Female attorneys experience unwelcome physical contact by:



As shown by the graphs below, when attorneys were asked whether female attorneys experience inappropriate or offensive verbal comments, jokes, or obscene gestures, again significant gender differences were observed. For example, female attorneys opined that with respect to attorneys this occurred very often/often (23%), sometimes (44%) by other attorneys; by non-judicial personnel this occurred very often/often (12%) and sometimes (28%); by judges this occurred very often/often (7%) and sometimes

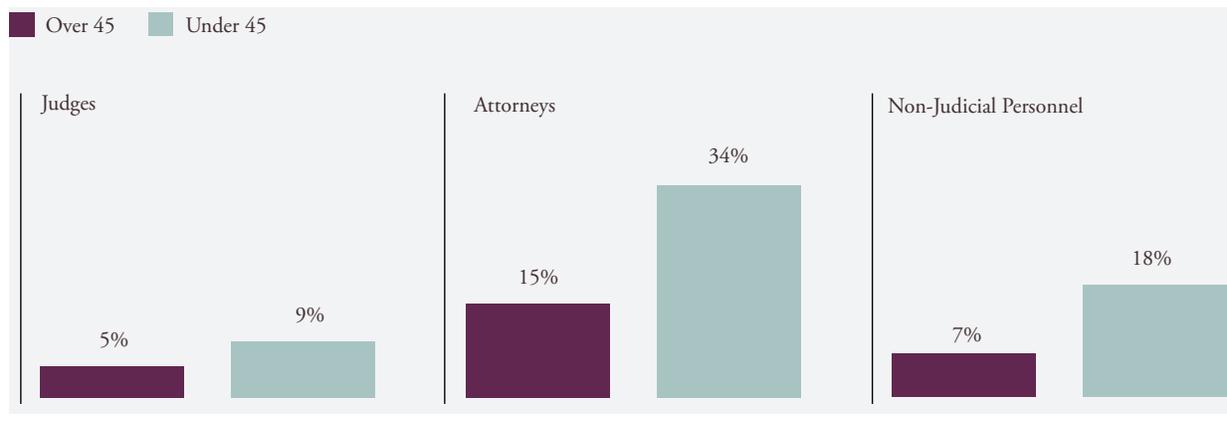
occurred (23%). Male attorneys opined that this occurred to female attorneys very often/often (5%), sometimes (27%) by other attorneys; by non-judicial personnel this occurred very often/often (3%) and sometimes (19%); by judges this occurred very often/often (1%) and sometimes occurred (12%).

**Female attorneys experience inappropriate or offensive verbal comments, jokes, or obscene gestures by:**



Again, female attorneys under the age of 45 were more likely to often or very often (9%) experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by judges than those age 45 or over (5%); by attorneys (34% vs 15%); by non-judicial personnel (18% vs 7%).

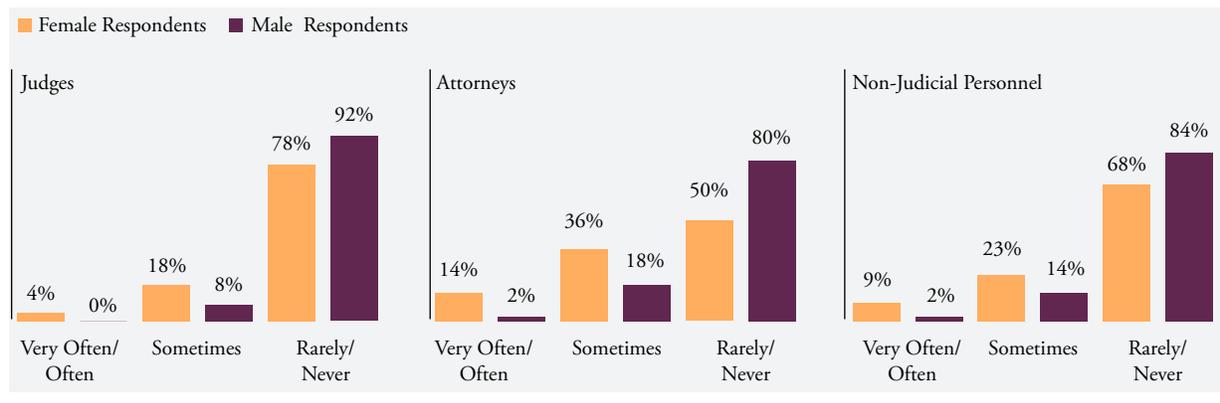
**Female attorneys experience inappropriate or offensive verbal comments, (including about personal appearance), jokes, or obscene gestures by:**



Among male attorneys who commented on courthouse environment, a third of these attorneys said they had not seen any of the reported behavior above toward female attorneys. Several male attorneys noted that as a man, they felt they might not recognize such behavior if it were to occur in front of them.

When attorneys are asked whether female litigants and/or witnesses experience inappropriate or offensive verbal comments, jokes or obscene gestures by other attorneys, non-judicial personnel, or judges, significant gender differences were again observed as is shown in the charts below. For example, female attorneys reported this occurred often or very often by other attorneys (14%), by non-judicial personnel (9%), and by judges (4%). Over 80% of men reported this rarely or never occurs and acknowledge that when this does happen, it is more likely to occur among attorneys than non-judicial personnel or judges.

**Female litigants and/or witnesses experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures, by:**



The Courthouse Environment section generated a substantial number of individual comments. A number of female attorneys described a culture that tolerates such behaviors as the use of terms of endearment<sup>5</sup> to subtly intimidate female attorneys. Inappropriate jokes, putdowns, solicitation for personal information, various types of sexual harassment, and physical touching were also identified in the survey responses.

A few female attorneys commented that they did not think that sexual harassment existed, in contrast to a substantial number of male attorneys who indicated they had not witnessed the behaviors above. A few male attorneys said the questions were “*silly*,” “*a witch-hunt*,” “*more imagined than real*,” while others reported they suspected that being male prevented them from recognizing the experiences of their female colleagues.

Specific behavior mentioned by female attorneys emphasized continued existence of an “old boys’ network” among male judges, male staff, and male attorneys. Additionally, concern was expressed in a few comments about verbal threats and physical touching or assault by male attorneys coupled with a concern about retaliation or retribution if they reported harassment of any type.

5. Addressing female attorneys, witnesses, and litigants by first names or terms of endearment is treated in detail at [Pg. 30](#) as part of the survey’s results on Credibility.

## Reporting Sexual Harassment

When it came to the knowledge of how, when, and where to report sexual harassment, 69% of female attorneys and 51% of male attorneys indicated they did not know how, when, and where to report a claim related to misconduct in a NYS Unified Court System facility. Approximately 3 out of 4 women (76%) and half of all men (51%) felt that the information provided to all court users in a courthouse was inadequate regarding to whom to report a sexual harassment claim related to misconduct in that courthouse. Also, a large proportion of female attorneys (44%) felt that the Court [UCS] website provides information for all court users that is inadequate regarding to whom to report a sexual harassment claim related to misconduct in a courthouse.

Many respondents commented they were unaware that the New York State Unified Court System's sexual harassment policy and rules applied to attorneys and all others in the courthouse. Other respondents emphasized the need for an easier, more transparent reporting process, greater dissemination of the UCS discrimination and harassment policies, and better directions on how to make a complaint. It was also suggested that there should be mandatory training and education on implicit gender-based bias.<sup>6</sup>

Nearly all attorneys (89% female; 84% male) agreed or strongly agreed that a court user who has experienced sexual harassment would be more likely to report a claim if s(he) could do so anonymously. When asked whether they have experienced or observed work related threats or promises of rewards in order to solicit sexual favors in the court environment, 9% of female attorneys and 3% of male attorneys agreed or strongly agreed.

Among the individual comments, the issue of anonymous complaints was discussed by both female and male attorneys. At a rate of four female attorneys to each male attorney commenting, female attorneys indicated that having a way to report bad behavior anonymously would be a useful tool to identify problems. "I think there has to be an anonymous way to raise issues because otherwise I would be concerned that it would impact my pending cases." Male attorneys were more than three times as likely to object across the board to anonymous reporting than were female attorneys. Some male attorneys thought it would be helpful but would raise insurmountable due process concerns.

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*Based upon the survey data regarding courthouse environment and sexual harassment, buttressed by a number of individual comments, it appears that there is all too often an atmosphere of inappropriate behavior experienced by female lawyers, litigants, and witnesses that continues to infect our courthouses and legal proceedings to varying degrees requiring significant remedial efforts.*

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<sup>6</sup> In 2018, the New York State Legislature amended Labor Law Section 201-G requiring the development of a model sexual harassment prevention policy that meets or exceeds minimum legal standards. NYS Unified Court System met the statutory requirements and created a policy consistent with Labor Law 201-G. Note: All Unified Court System employees received the interactive training component during the last quarter of 2019. This educational program will be repeated on an annual basis.

## Recommendations

### FOR COURT ADMINISTRATION

- a. Effectively publicize the procedure for filing sexual harassment and other types of complaints and the process for adjudication and follow-up which shall include notification to the complainant.
- b. Prominently display the Office of the Inspector General’s Toll-Free Bias Complaint Number in every courthouse and on the home page of the New York Courts website.
- c. Ensure all judges and court personnel in all state and local courts comply with the NYS Labor Law 201-G which requires training as to how to effectively address sexual harassment and other inappropriate behavior.
- d. Require regular training for all judges and court employees designed to make them aware of, and to recognize, gender bias and how to take appropriate immediate action when such behavior appears or is reported.
- e. Require that the training for judges on how to control their courtrooms include ways in which judges can address inappropriate gender-biased conduct on the part of attorneys and court personnel.
- f. Prepare and circulate a bi-annual report containing
  - the types and number of complaints, including those received anonymously, per type filed with the UCS Office of the Inspector General including the gender of the complainant, e.g., sexual harassment, gender bias, discrimination, and how such complaints were resolved.
  - any changes in NYS Unified Court System policies or procedures regarding such complaints.
- g. Promulgate specific uniform rules of the Chief Administrative Judge delineating how complaints should be handled administratively within the court system. Absent a showing of good cause, complaints shall be fully resolved within six months of the filing of a complaint with written notification to all parties.
- h. Create protocols to reduce the fear of reporting complaints by providing protective procedures for those who report instances of sexual harassment, bias, and other inappropriate behavior.

### FOR JUDGES AND QUASI-JUDICIAL EMPLOYEES

Set the tone and affirmatively communicate expectations regarding civility, how to address inappropriate behavior, and how to engage equally with all parties, eschewing familiarity, and how to treat women attorneys as equal participants in the legal process.

**FOR BAR ASSOCIATIONS**

- a. Effectively publish the procedure for filing complaints with the NYS Unified Court System Office of the Inspector General regarding sexual harassment, bias, and other inappropriate behavior in the court system.
- b. Generate programs for attorneys emphasizing civility and professional behavior at all times that includes the treatment of women as equal participants in the profession and the obligation to intercede when observing inappropriate behavior.

**FOR ATTORNEY DISCIPLINARY COMMITTEES**

Publish an annual report on attorney disciplinary complaints similar to that listed above for Court Administration and specifically detailing the number of complaints based upon allegations of sexual harassment, gender bias, discrimination, and how such complaints were resolved.

## II. Credibility and Court Interaction

One of the most critical elements affecting a litigant, witness, expert or attorney in the courtroom is being shown respect. The credibility afforded attorneys, litigants, or witnesses is reflected by how seriously they are treated by the judge, attorneys, and court personnel. This section of the survey sought attorneys' perceptions of whether, and how gender affects credibility in the courts.

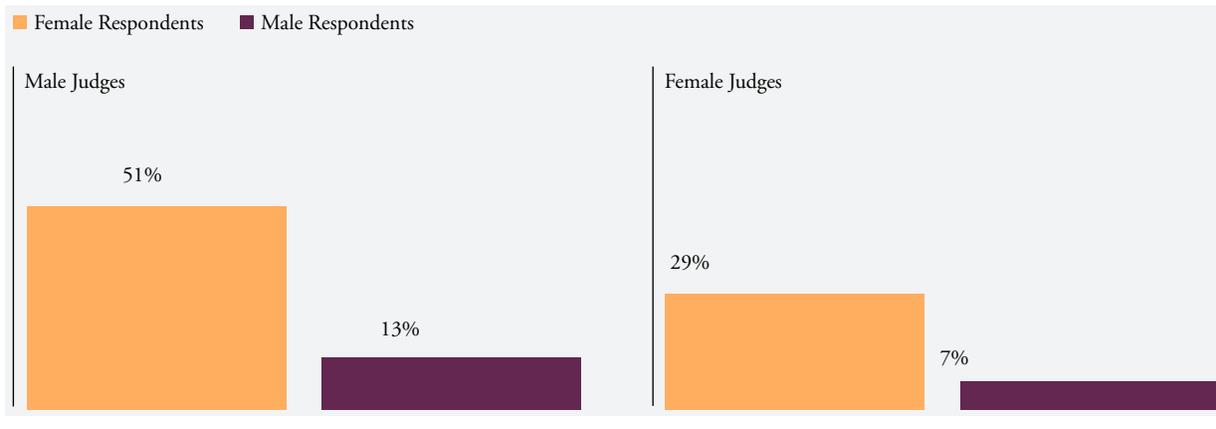
The initial questions focused on the extent to which male or female judges accord more credibility to the statements and arguments of male attorneys than to those of female attorneys, as well as, whether judges impose a greater burden of proof on female litigants and witnesses than on male litigants and witnesses. Responses to these questions are summarized in the charts below.

### Findings

Female and male attorneys responded differently to the statement: "Male judges appear to give more credibility to the statements/arguments of male attorneys than to those of female attorneys," with male attorneys being far less likely to agree to it than female attorneys (13% of male attorneys agree, vs. 51% of female attorneys).

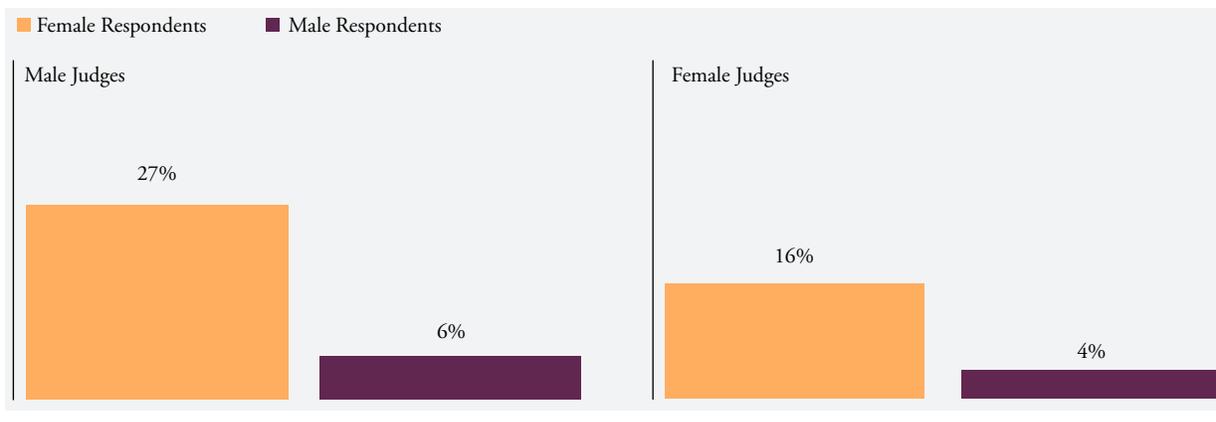
While this same pattern was observed when attorneys were asked this same question specifically about female judges, substantially fewer female attorneys (29%) as well as male attorneys (7%) agreed or strongly agreed that female judges appear to give more credibility to the statements and arguments of male attorneys than to those of female attorneys.

**Judges appear to give more credibility to the statements/arguments of male attorneys than female attorneys:**

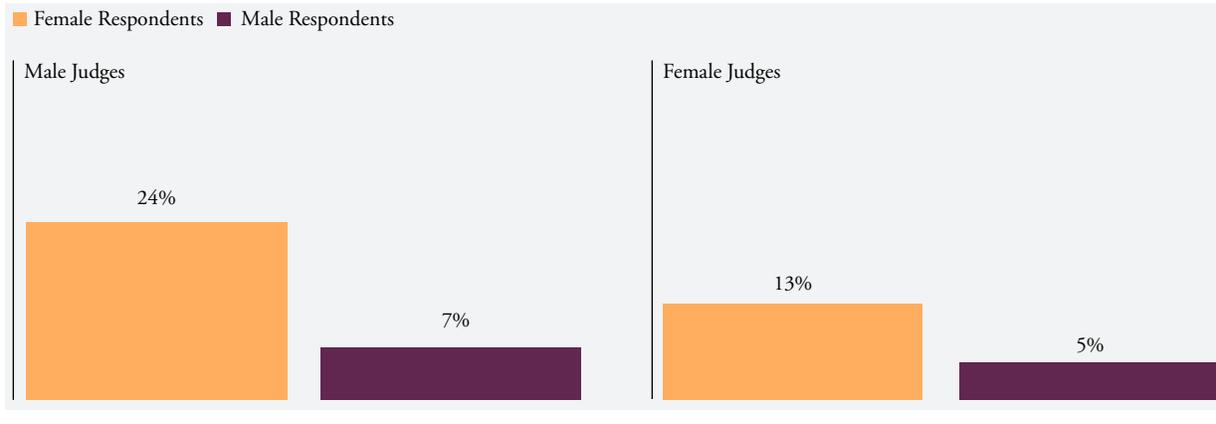


Among female attorney respondents, 27% agreed or strongly agreed that male judges appeared to give more credibility to the testimony of male witnesses than female witnesses, and another 24% agreed that male judges appear to give less credibility to female expert witnesses than to male expert witnesses. Again, agreement with these statements was considerably lower among female attorneys (16% and 13% respectively) when similarly asked about female judges. Male attorney respondents did not agree with these statements nor did they report any appreciable differences between the credibility afforded by either male or female judges. See the chart below for comparison.

**Judges appear to give more credibility to the testimony of male witnesses than female witnesses:**

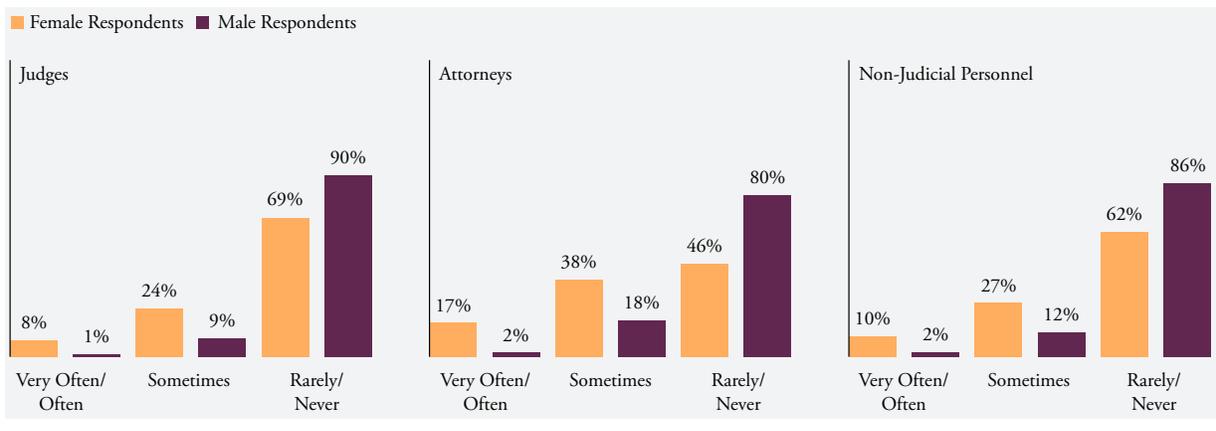


**Judges appear to give less credibility to female expert witnesses than male expert witnesses:**



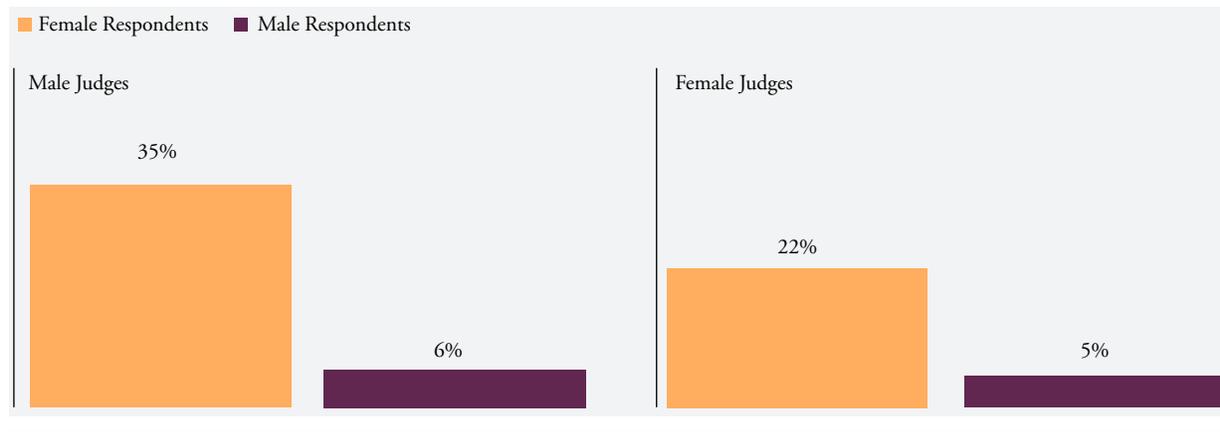
When attorneys are asked whether female litigants and/or witnesses are addressed by first names or terms of endearment while male litigants or witnesses are addressed by surname or title, significant gender differences were observed as is shown in the charts below. For example, female attorneys reported this occurred most often by other attorneys (17%), by non-judicial personnel (10%), and by judges (8%). Male attorneys reported this behavior rarely occurs regardless of the group.

**Female litigants and/or witnesses are addressed by first names or terms of endearment while male litigants and/or witnesses are addressed by surname or title, by:**



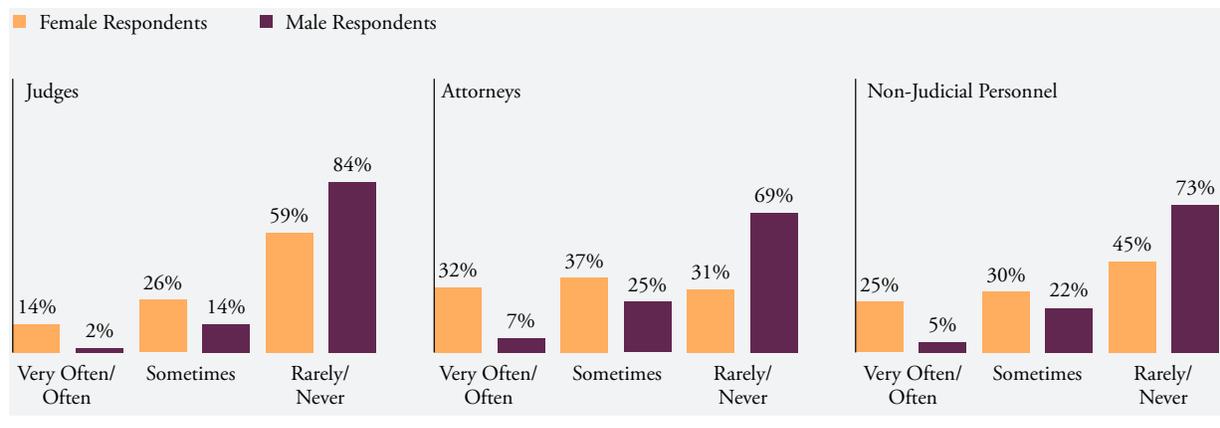
Another question in this section concerned the extent to which male and female judges impose a greater burden of proof on female litigants than on male litigants. Here, approximately 35% of female attorney respondents held the view that male judges impose a greater burden of proof on female litigants than on male litigants. Nearly one in four (22%) of these women attorneys agreed that this applied to female judges as well. Virtually all the male attorney respondents were in disagreement with these statements as to both male and female judges.

**Judges appear to impose a greater burden of proof on female litigants than on male litigants:**



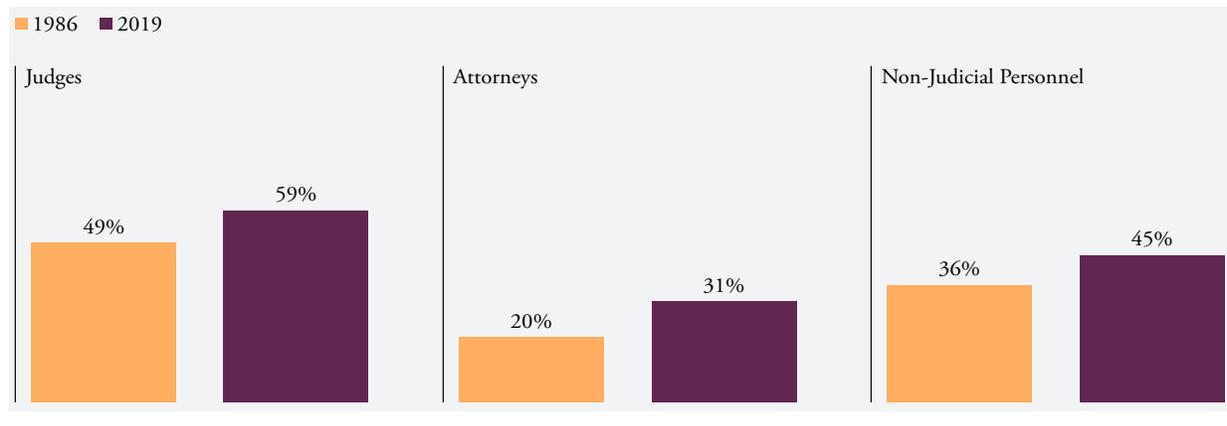
When attorneys are asked whether female attorneys are addressed by first names or terms of endearment while male attorneys are addressed by surname or title, significant gender differences were observed as is shown in the charts below. For example, among female attorneys, this occurred most often by other attorneys (32%), by non-judicial personnel (25%), and by judges (14%).

**Female attorneys are addressed by first names or terms of endearment while male attorneys are addressed by surname or title, by:**

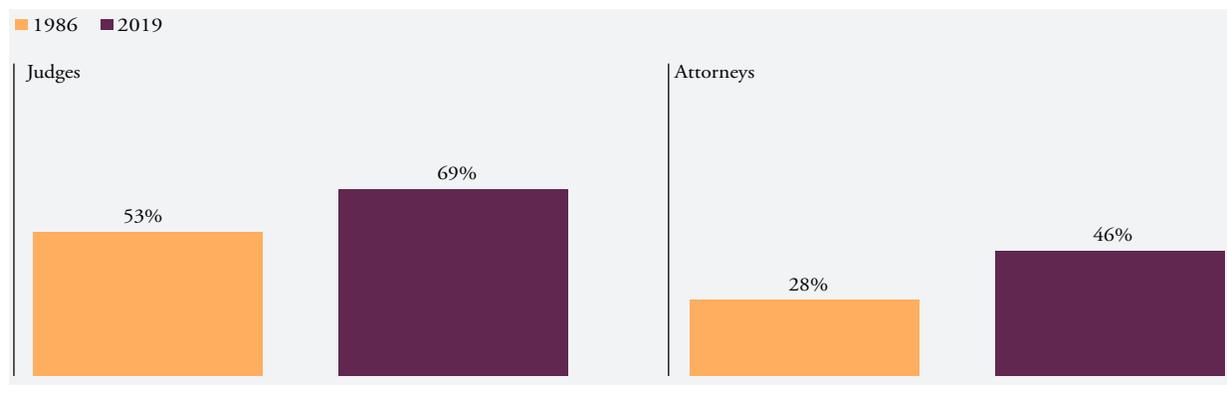


A comparison of the female survey responses from 1986 and 2019 showed that female attorneys in 2019 were less likely to be addressed by first names or terms of endearment by judges, attorneys, and non-judicial personnel than was the case in the earlier survey. Similar findings were also observed across the two survey periods when attorneys were asked about how female litigants and witnesses were addressed. These same positive trends were observed regarding female litigants and/or witnesses as shown below.

**Female attorneys are never/rarely addressed by first names or terms of endearment, by:**

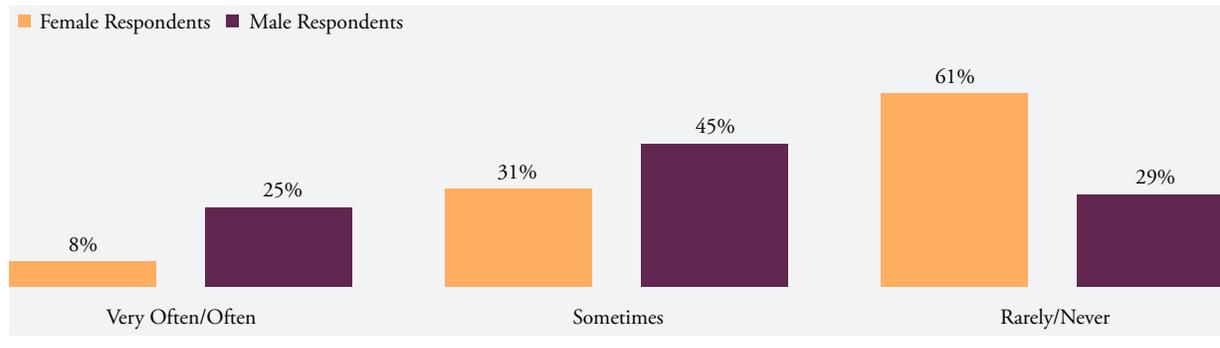


**Female litigants and/or witnesses are never/rarely addressed by first names or terms of endearment, by:**

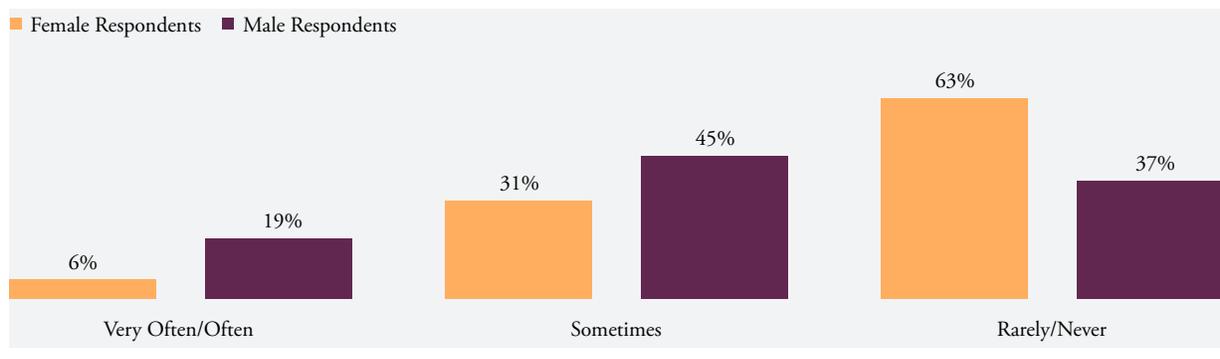


The final two questions in this section concerned the extent to which judges and attorneys would intervene to correct any negative conduct toward women. While only 25% of male attorneys indicated that judges often intervened to correct any negative conduct toward women, even fewer female attorneys (8%) felt similarly. Comparable gender differences were also noted for the question of whether attorneys would intervene to correct any negative conduct toward women. These data are shown in the two charts below.

### Judges intervene to correct any negative conduct toward women:



### Attorneys intervene to correct any negative conduct toward women:



Female attorneys generally commented about male attorneys interrupting them, talking over them, and belittling them without any judicial intervention. Many of the comments suggested judges should control their courtrooms and set a tone where this behavior would not be tolerated. Many of them also mentioned the feeling of an old boys’ club where male judges would appear familiar with male attorneys, joking together, discussing their golf game, and so on. While some felt this was a generational issue that would self-eliminate as these judges retire, others commented that they see this happening with younger attorneys as well.

Several female attorneys reported a reluctance to lodge complaints. However, women also reported the view that system-wide there has been great improvement in areas of bias while some individual courts and judges are still acting inappropriately. Women attorneys suggested that mandatory training is needed for all judges, court attorneys, court officers, and others to raise sensitivity levels and address unconscious biases. Male attorneys frequently commented that they had not observed any gender bias, however, they did report a lack of civility and courtesy.

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*Based upon the survey data and comments regarding credibility and court interaction, it appears that there still remains a significant strain of bias against female lawyers, litigants, and witnesses that adversely impacts the fairness of their treatment in the judicial process which must be vigorously addressed.*

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## Recommendations

### FOR COURT ADMINISTRATION

- a. Regular education and training should be required for all judges and UCS employees on implicit bias addressing gender, age, and race.
- b. Charge all Administrative and Supervising Judges with the responsibility of actively promoting a bias-free culture within their respective jurisdictions which includes the obligation to root out bias and ensure the meaningful inclusion of women in court proceedings on an equal footing. They should each be required to file an annual report with the Chief Administrative Judge detailing the specific programs and efforts undertaken to achieve these goals.
- c. Require judges to participate in education and training on their responsibility to promote civility, courtesy, and professionalism in their courtrooms with a particular focus on equal treatment of women as participants in the process.
- d. Provide readily visible multi or bi-lingual signage about where to complain at every entrance to the building. Use all available technology to advise court users and staff of such information.

### FOR JUDGES

- a. Actively promote civility, courtesy, professionalism, and equal treatment for all in the courtrooms.
- b. When instances of improper conduct arise, including gender bias, the judge shall appropriately intervene.

### FOR BAR ASSOCIATIONS

- a. Statewide Bar Associations including, the New York State Bar Association, Women's Bar Association of the State of New York, and the New York State Trial Lawyers Association, should develop toolkits, including educational modules addressing civility, comportment, and professional attire, and make available for bar associations of different sizes.
- b. Provide frequent CLE accredited educational programs addressing civility, comportment, professional attire, and bias-free behavior.

## FOR LAW SCHOOLS

Integrate content regarding civility, comportment, professional appearance, and bias-free behavior into curriculum.

# III. Domestic Violence

There are many types of Family Court, Supreme Court, and Criminal Court proceedings that address conduct that falls under this broad topic where the court plays a critical role. Input was sought on specific subtopics relevant to family law and matrimonial law practice. These categories include Orders of Protection and Custody, Support, and Visitation.

## Domestic Violence and Orders of Protection

In New York, there is not a distinct crime labeled domestic violence. The law defines the types of relationships that qualify under the definition of “family member”<sup>7</sup>. If a family member commits an act which would constitute one or more of the crimes enumerated in Section 812 of the Family Court Act, it is considered a “family offense”<sup>8</sup>. The Family Court and the Criminal Court have concurrent jurisdiction over family offenses. A party alleging a family offense may appear in either or both courts. Supreme Court may also issue an Order of Protection in a matrimonial proceeding when a family offense has been committed.

Of historic note, prior to 1977, the Family Court, except for limited circumstances, had exclusive jurisdiction over family offense cases with a stated goal of keeping the family together. In September 1977, the Family Court and Criminal Court were granted concurrent jurisdiction. The alleged victim was granted the “right of election” to proceed in only one of the courts and was allowed a 72-hour window to change the court within which they wished to proceed. In 1994, passage of the Family Protection and Domestic Violence Intervention Act allowed a family offense case to be heard in either or both of these two types of courts.

The survey looked at how Orders of Protection and other matters are adjudicated by the respective courts. This section is divided into two areas. The first subsection addresses cases where a family offense is alleged in Family Court. The second subsection addresses cases alleging a family offense in the Criminal Court.

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7. “Family member” is defined as individuals related by blood or marriage, individuals who were formerly married, or individuals who are unrelated but have a child together; and individuals who are unrelated who are or have been in an intimate relationship.

8. Family offenses include disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, unlawful dissemination or publication of an intimate image, menacing, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation, assault or attempted assault, stalking, criminal mischief, identity theft, grand larceny, or coercion.

## Findings Regarding Family Court

As shown in the table below, the questions were directed at the non-judicial influence on petitioners. While female attorneys (36%) reported that law enforcement or probation officers never or rarely discourage domestic violence complainants from seeking Orders of Protection, twenty-four percent reported that law enforcement or probation officers often or very often discourage seeking an Order of Protection. Female attorneys (62%) and male attorneys (38%) reported that law enforcement officers were to a greater extent likely to encourage the use of Family Court over the Criminal Court.

Non-judicial Influence on Complainants/Petitioners		Never	Rarely	Sometimes	Often	Very Often	
27a	Potential domestic violence complainants are discouraged by law enforcement or probation from seeking Orders of Protection	F	10.8	25.7	39.5	12.6	11.4
		M	28.0	37.6	28.0	4.4	2.0
27b	Potential domestic violence complainants are discouraged by non-judicial personnel from seeking Orders of Protection	F	24.2	33.2	32.9	6.4	3.4
		M	43.4	35.7	17.6	2.7	0.5
27c	When responding to a domestic violence call, law enforcement encourages the use of Family Court over Criminal Court	F	1.8	6.4	30.0	30.0	31.8
		M	10.6	14.3	37.0	24.3	13.8

The next series of questions in the survey examined the seeking and obtaining of Family Court Orders of Protection and judicial determinations. Female and male attorneys agreed to varying degrees that Family Court petitioners are granted Temporary Orders of Protection even when a matrimonial action is pending.

It appears that judges are less likely to issue an Order of Exclusion against the respondent when the relief is sought by a petitioner who is out of the home even due to domestic violence. Female attorneys are more likely than male attorneys to report that judges rarely or never inquire about whether the petitioner is also requesting an Order of Support.

Seeking and Obtaining Orders of Protection		Never	Rarely	Sometimes	Often	Very Often	
27d	Family Court petitioners are granted <i>ex parte</i> Temporary Orders of Protection when warranted	F	0.5	0.5	21.1	34.9	43.0
		M	0.7	0.3	12.2	28.0	58.7

SURVEY FINDINGS AND RECOMMENDATIONS

Seeking and Obtaining Orders of Protection			Never	Rarely	Sometimes	Often	Very Often
27h	Family Court will grant a Temporary Order of Protection when there is a pending matrimonial action	F	1.2	10.3	46.4	24.6	17.4
		M	2.6	8.8	31.3	24.7	32.6
27i	Temporary or Final Orders of Protection directing respondents to stay away from the home are granted when petitioners are endangered and seek such relief	F	0.3	2.0	26.6	31.6	39.6
		M	0.3	1.7	13.4	27.2	57.2
27l	When a petitioner is out of the family home because of domestic violence, judges also will issue an Order of Exclusion against respondent when such relief is sought	F	14.7	21.6	30.9	18.3	14.4
		M	2.5	13.1	29.1	23.6	31.7
27m	When a petitioner seeks a Temporary Order of Protection, the judge inquires whether the petitioner is also seeking a Temporary Order of Support	F	29.4	41.6	18.4	6.9	3.8
		M	16.7	29.0	32.1	13.6	8.6

Additional questions were asked pertaining to the issuance and effectiveness of mutual Orders of Protection. Female attorneys held different views from male attorneys about the effectiveness of mutual Orders of Protection. Female attorneys (43%) and male attorneys (23%) reported that mutual Orders of Protection are rarely or never effective.

Attorneys overall indicated that the court directs law enforcement to serve Temporary Orders of Protection, a great improvement over the situation addressed in the 1986 report. Both female and male attorneys overwhelmingly reported that the terms of the Order are read into the record by the judge or issuing authority.

Male attorneys (26%) are more likely than female attorneys (15%) to agree that violating an Order of Protection results in incarceration.

SURVEY FINDINGS AND RECOMMENDATIONS

Executing and Enforcing Orders of Protection			Never	Rarely	Sometimes	Often	Very Often
27e	When a Family Court Temporary Order of Protection is granted, the court directs the sheriff or local law enforcement to serve the Order on the respondent	F	3.5	5.4	16.9	24.8	49.3
		M	2.0	5.5	15.2	21.5	55.9
27j	The terms of the Temporary or Final Order of Protection are clearly read into the record by the judge or other issuing authority	F	3.1	12.7	22.5	27.6	34.1
		M	1.1	7.0	18.5	24.4	49.1
27o	Mutual Orders of Protection are issued in cases involving a family offense	F	6.3	22.6	53.8	12.5	4.9
		M	9.3	28.4	47.4	12.7	2.2
27p	Mutual Orders of Protection are effective in family offense cases	F	16.2	26.9	42.9	10.1	3.9
		M	7.5	15.8	50.2	15.4	11.1
27q	Violating an Order of Protection results in incarceration	F	6.5	42.3	36.3	9.0	6.0
		M	0.7	25.2	48.6	17.7	7.8

With respect to victims of domestic violence in Family Court proceedings, attorneys were asked if there is a safe place within the courthouse where the alleged victim can wait for the case to be called. Approximately 36% of female attorneys and 20% of male attorneys reported that there is rarely or never a safe place.

Likewise, 64% of female attorneys and 33% of male attorneys reported there is rarely or never a provision made for the safety of the alleged victim in the courthouse upon return on the appearance date when a Temporary Order of Protection has been granted. A female attorney commented, “I think the court should be more sensitive to how stressful and potentially dangerous it is for the litigants to share the same waiting room. The availability and ease to use the safe waiting spaces should be advertised and promoted.” *(Note: Upon inquiry to New York City Family Court administrative personnel, the Committee was advised that there are safe spaces available for domestic violence victims after the initial return date.)* (See [Appendix H, Pg 100, Question 27n](#))

On a positive note, four out of five attorneys observed that bilingual Orders of Protection are available and used when appropriate (sometimes 21%; often 23%; very often 35%). (See [Appendix H, Pg 99, Question 27k](#))

Among all attorneys who commented, there was agreement that there is a need for a more streamlined adjudicative process with quicker return dates on Temporary Orders of Protection and fewer adjournments. A number complained of a lack of enforcement of Orders of Protection by law enforcement especially in cases where the violation was not a physical assault. Some indicated that judges were reluctant to impose meaningful consequences for violating Orders of Protection and pointed to the need for training for judges and law enforcement personnel in this area.

### Findings Regarding Criminal Court

*(Note: The survey was completed prior to enactment of the Criminal Justice Reform Act which significantly impacted the types of cases in which cash bail could be applied.)*

This section addresses how domestic violence is handled in the criminal context by law enforcement, prosecutors, and courts. As shown in the table below, the first set of questions was directed at the non-judicial influence on complainants. A small percentage of female attorneys (15%) and even fewer male attorneys (6%) reported that law enforcement officers continue to discourage domestic violence complainants from seeking Orders of Protection in the Criminal Court.

Female and male attorneys agreed or strongly agreed (78% and 85% respectively) that District Attorneys will prosecute domestic violence cases but are more reluctant to prosecute without the victim’s cooperation (45% and 43% respectively).

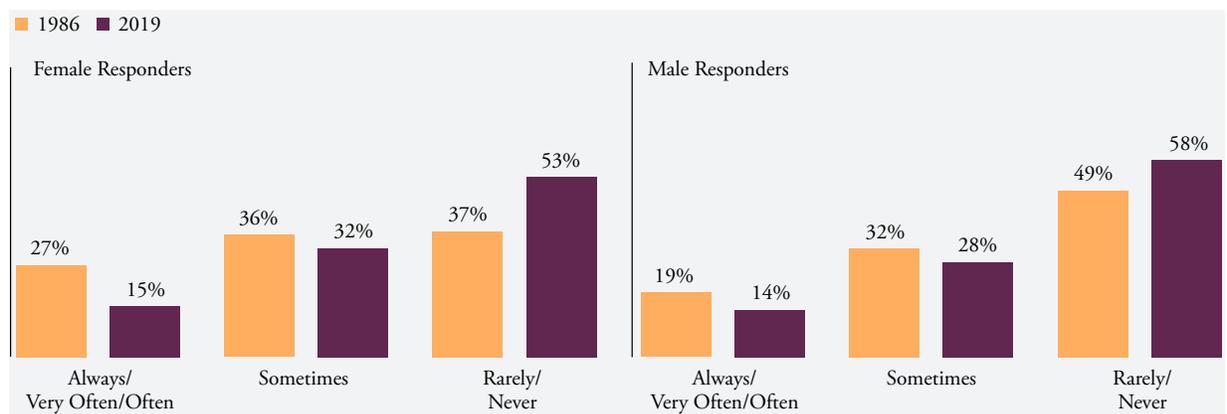
Non-Judicial Influence on Complainants			Never	Rarely	Sometimes	Often	Very Often
38a	Potential domestic violence complainants are discouraged by law enforcement or probation from seeking Orders of Protection in Criminal Courts	F	25.0	34.2	25.4	9.6	5.9
		M	41.8	36.4	16.2	4.0	1.7
38b	Potential domestic violence complainants are discouraged by non-judicial personnel from seeking Orders of Protection in Criminal Courts	F	31.1	38.6	17.8	9.1	3.3
		M	49.0	34.0	13.1	3.3	0.7
38h	District Attorneys will prosecute domestic violence complaints	F	0.0	5.1	17.2	25.1	52.7
		M	0.0	1.4	14.0	22.1	62.4
38i	District Attorneys will prosecute domestic violence cases without the victim’s cooperation	F	2.9	16.1	35.7	19.9	25.4
		M	2.2	18.2	36.7	23.9	19.0

The next series of questions in the survey examined obtaining and enforcing Orders of Protection and judicial determinations in the Criminal Courts regarding such Orders. Female and male attorneys agreed to varying degrees (63% and 78% respectively) that Criminal Court complainants are granted Orders of Protection *ex parte* when warranted. It appears that judges are likely to clearly read the terms of an Order of Protection into the record. Female attorneys are more likely than male attorneys to report that judges rarely or never incarcerate a defendant for violating an Order of Protection.

Obtaining and Enforcing Orders of Protection			Never	Rarely	Sometimes	Often	Very Often
38c	Complainants in criminal cases are granted <i>ex parte</i> Orders of Protection when warranted	F	6.4	10.1	20.8	25.5	37.2
		M	3.2	4.3	14.2	27.3	50.9
38d	The terms of the Temporary or Final Order of Protection are clearly read into the record by the judge or other issuing authority	F	1.5	12.3	27.0	25.8	33.3
		M	2.5	9.1	16.9	23.2	48.2
38e	Complainants in criminal cases are asked why they have no visible injuries	F	26.6	26.6	31.8	6.9	8.0
		M	32.1	25.9	27.6	8.2	6.2
38g	Violating an Order of Protection results in incarceration	F	2.8	23.6	44.2	16.2	13.1
		M	0.2	14.2	48.0	20.3	17.2

On an encouraging note, complainants are less likely to be asked about the lack of visible injuries now than they were in 1986.

### Complainants in criminal cases are asked why they have no visible injuries



Similar to findings in Family Court, in the Criminal Court, 56% of female attorneys and 38% of male attorneys reported there is rarely or never a provision made for the safety of the alleged victim in the courthouse upon return on the appearance date when a Temporary Order of Protection has been granted. (See [Appendix H, Pg 104, Question 38f](#))

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*While there has been marked improvement in the way law enforcement and the courts address domestic violence in terms of the issuance and enforcement of Orders of Protection, there still remain many areas requiring improvement to provide safety and recourse to the victims of this scourge.*

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## Recommendations Regarding Orders of Protection

### FOR JUDGES

- a. The terms of a Temporary Order of Protection must be clear, explicit, and read into the record in the courtroom at the time of issuance.
- b. Upon issuing a Temporary Order of Protection, inquire as to whether the petitioner also needs an Order of Support.
- c. When the defendant/respondent is before the court, ensure that the defendant understands the terms of the Temporary Order and consequences for its violation.
- d. Promptly set a hearing date for alleged violations of Orders of Protection.
- e. Consider establishing compliance calendars to address defendant's/respondent's adherence to the Court's Orders of Protection.
- f. In a matrimonial case where a prior Family Court Order is in place, including exclusion from the home, the matrimonial court shall hold a hearing as soon as possible before altering that Order or issuing a new Order.

### FOR COURT CLERKS

When a Temporary Order of Protection petition is submitted to the clerk, the clerk shall inquire of the petitioner whether the petitioner is also seeking an Order of Support. If so, the clerk must provide the appropriate form to the petitioner and assist in completing the form if necessary.

### FOR ATTORNEYS

- a. Attorneys should promptly bring violations of Orders of Protection to the attention of the court.
- b. When a Family Court Temporary or Final Order of Protection is granted and where a matrimonial case is pending, or subsequently filed, require the attorneys to disclose the existence of the Family Court Order of Protection in the matrimonial filing.
- c. Attorneys must disclose to the matrimonial judge and opposing counsel any Family Court Temporary or Final Order of Protection granted during the pendency of the matrimonial action.

### FOR LAW ENFORCEMENT

Require officers to remain neutral in referring a complainant to a particular court.

### FOR PROSECUTORS

Develop protocols to ensure Orders of Protection are extended through the pendency of a proceeding on a claim of a violation of the Order.

## Recommendations Regarding Domestic Violence Generally

### FOR COURT ADMINISTRATION

- a. Provide funds in the UCS budget for a dedicated domestic violence resource coordinator for every domestic violence and integrated domestic violence court to assist the Court in any case involving domestic violence.
- b. Promulgate a rule requiring that family offense cases involving domestic violence be heard without delay.
- c. To enhance safety, provide petitioners/complainants in domestic violence cases with a safe waiting area separate and inaccessible from respondents/defendants.
- d. In any court that hears cases involving family offenses, provide and require annual specialized education/training for all judges and non-judicial personnel regarding the dynamics of the crime of domestic violence and its impact upon the victims.

### FOR JUDGES

Calendar domestic violence cases promptly.

### FOR LAW ENFORCEMENT

Require comprehensive education and training for all law enforcement officers on all aspects of domestic violence.

### FOR PROSECUTORS

- a. Require education and training for prosecutors, paralegals, investigators, and intake staff on all aspects of domestic violence.
- b. Provide complainants with a victim's rights notice that includes information about the role of the prosecutor versus a private attorney and referral to victim advocacy services where appropriate.

### FOR THE LEGISLATURE

- a. Establish a funding stream dedicated to providing victim advocates in every Family Court and Criminal Court to assist domestic violence victims.
- b. Elevate family offenses to an aggravated form of the underlying crime to bump up the penalty one level. For example, an assault would be charged as an aggravated assault where the parties involved meet the statutory relationship definition for a family offense. The relationship should create an aggravating factor. Require a family offense indicator in the criminal history record.

### FOR LAW SCHOOLS

Ensure that courses provide accurate information about the dynamics of the crime of domestic violence.

## IV. Domestic Violence and Custody, Support, and Visitation

The survey looked at the extent to which one parent's violence toward the other parent impacted the determination of custody.

### *Custody*

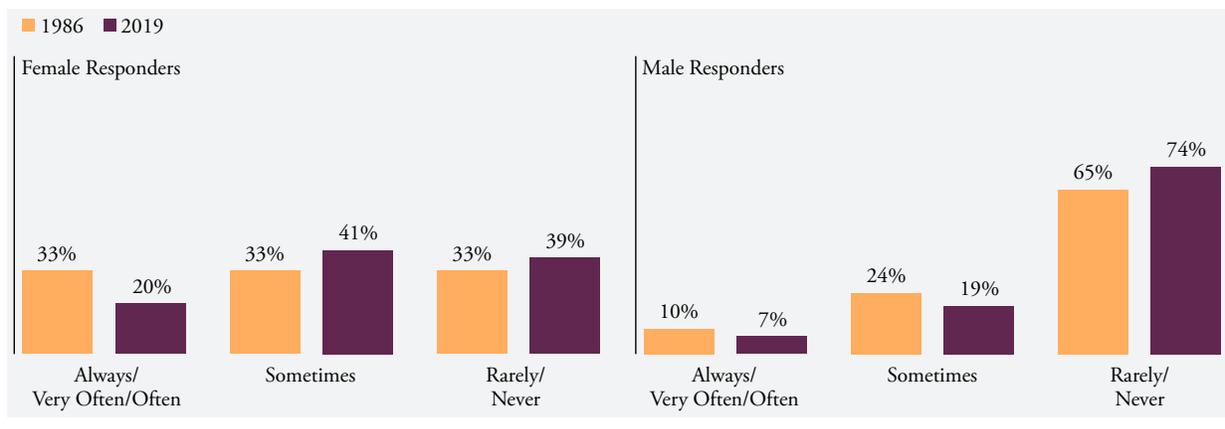
#### Findings

Twenty percent (20%) of female attorneys and 7% of male attorneys indicated that custody awards disregard the father's violence against the mother. However, another 34% of female attorneys and nearly half (49%) of male attorneys believe that the father's violence *is* a determining factor in who is awarded custody.

Responding to Allegations of Violence in Custody Determinations			Never	Rarely	Sometimes	Often	Very Often
29a	Custody awards disregard father’s violence against mother	F	10.2	28.8	40.8	13.5	6.6
		M	28.8	45.3	19.1	5.0	1.8
29b	Custody awards disregard mother’s violence against father	F	8.9	29.2	43.4	12.6	5.8
		M	16.8	28.7	31.9	8.6	14.0
29c	Father’s violence against mother is a determining factor in who is awarded custody	F	1.2	9.9	55.2	20.8	12.9
		M	1.1	6.0	44.0	24.8	24.1
29d	Mother’s violence against father is a determining factor in who is awarded custody	F	1.5	19.1	54.7	15.8	8.9
		M	5.8	25.6	43.7	15.2	9.7

When comparing attorney responses from the 1986 survey to the 2019 survey, courts are now more likely to consider the father’s violence against the mother for purposes of custody.

### Custody awards disregard father’s violence against mother



*While the survey indicates that the percentage of custody awards that disregard a father’s violence against the mother has significantly decreased since the Task Force Report in 1986, there are still a substantial number of such awards (female attorneys 20%; male attorneys 7%) that continue to disregard such conduct raising concerns that should be addressed.*

## Recommendations

### FOR OFFICE OF COURT ADMINISTRATION

Provide for judges and other court personnel who are involved in custody proceedings education and training on

- implicit bias, domestic violence, and the impact of the use of power and control tactics in an intimate relationship
- the immediate and long-term impact of domestic violence on the children and other members of the household
- best practices for presiding over cases with pro se litigants
- best practices for presiding over cases with interpreters.

### FOR THE LEGISLATURE

Amend DRL 240.1(a) and FCA Article 6 regarding child custody determinations as follows: where the court has found by a preponderance of the evidence that a family offense has occurred, this finding shall create a rebuttable presumption that it is not in the best interest of the child to be placed in sole custody, legal custody, or shared physical custody with the parent found to have committed a family offense. Such presumption may be rebutted if a preponderance of the evidence shows that such presumptive custody award would not be in the best interest of the child.

## *Support*

### Findings

The survey inquired about support awards in cases involving domestic violence including whether support awards to victims and their children are enforced. Female attorneys are more likely than male attorneys to report that judges rarely or never inquire about whether the petitioner is also requesting an Order of Support in Family Court. See [Appendix H, Pg 99, Question 27m](#). Half (49%) of female attorneys and three-quarters (72%) of male attorneys feel that support awards are often enforced. See [Appendix H, Pg 100, Question 29e](#).

A female attorney commented, “Having the alleged abuser leave the home, and issuing a temporary order of support will make it more likely that the abused party will not withdraw their petition for financial reasons or because they do not want to stay in a shelter.”

### *Supervised Visitation*

The availability of free, neutral, supervised visitation services are very limited with nearly half of all the survey respondents reporting such services are never or rarely available.

### Findings

Among female attorneys, nearly two-thirds indicated that existing neutral supervised visitation programs in their jurisdictions do not have adequate capacity to meet the need.

Supervised Visitation Programs			Never	Rarely	Sometimes	Often	Very Often
29g	In my jurisdiction, free, neutral, supervised visitation services are available	F	24.3	24.9	27.2	10.8	12.7
		M	14.9	21.7	27.7	17.3	18.5
29h	There is adequate capacity at neutral supervised visitation programs available in my jurisdiction	F	29.7	33.7	22.4	9.9	4.4
		M	15.4	29.4	26.2	18.2	10.7
29i	The supervised visitation program(s) staff in my jurisdiction have adequate knowledge and experience regarding domestic violence	F	7.7	16.1	31.8	23.1	21.3
		M	5.0	10.0	30.6	30.6	23.9
29k	In my jurisdiction, there are readily available safe exchange services where a petitioner/ plaintiff and respondent can safely meet visitation requirements	F	17.1	31.6	25.6	16.5	9.1
		M	9.7	21.1	27.8	24.2	17.2

Among all attorneys responding, 42% indicated that a request for supervised visitation is never or rarely refused or ignored in a case where a family offense has been alleged. (See [Appendix H, Pg 100, Question 29f](#)).

### Recommendations

#### FOR COURT ADMINISTRATION AND LEGISLATIVE LEADERS

Work together to establish accessible, supervised visitation and safe exchange programs at no cost for indigent and low and middle income litigants in all jurisdictions statewide.

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*The urgent need for safe, accessible supervised visitation programs that are free or affordable is self-evident and cries out for relief.*

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## V. Child Support

This section addresses child support generally.

### Findings

When asked whether child support awards deviate from the presumptive Child Support Standards Act amounts, attorneys responded that such awards often or very often (28%) deviate lower than the presumptive amount (female attorneys 30%; male attorneys 26%).

Thirty-five percent (35%) of all respondents reported that child support is awarded above the income cap either often or very often (female attorneys 32%; male attorneys 38%).

Child Support Standards			Never	Rarely	Sometimes	Often	Very Often
31a	Child support awards deviate from the presumptive Child Support Standards Act amount	F	1.1	26.2	55.0	12.7	5.0
		M	3.6	34.3	47.7	9.4	5.1
31b	When child support awards deviate from the presumptive Child Support Standards Act amount, they are lower than the presumptive amount	F	5.4	17.9	46.9	18.8	11.0
		M	3.5	22.0	48.6	18.9	6.9
31c	Child support is awarded on income above the income cap	F	3.6	21.1	42.9	21.8	10.6
		M	0.8	14.9	46.3	20.4	17.6

One area of concern which emerged was the report by almost 20% of respondents that judges order the parties to share equally the add-on expenses (often substantial, such as childcare and unreimbursed medical or educational expenses), even with a disparity in income between the parties.

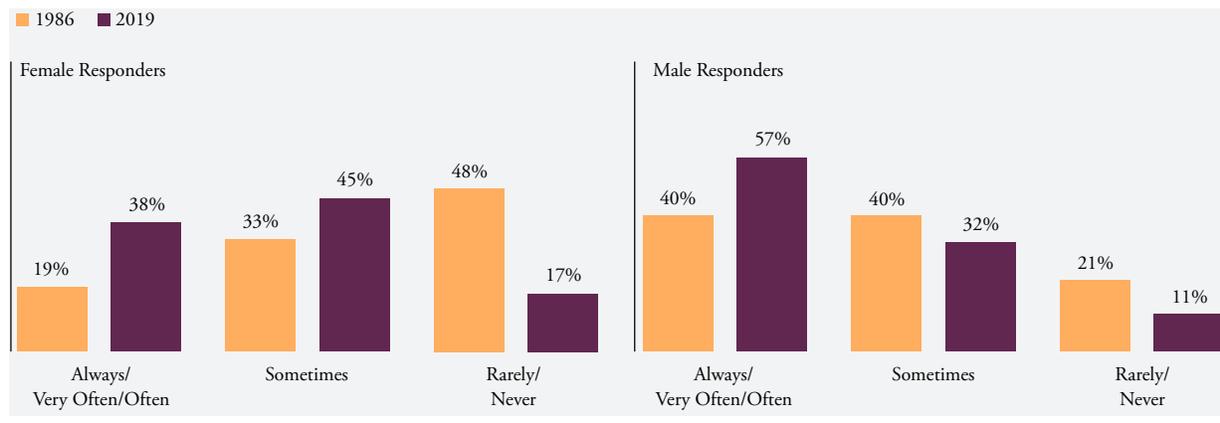
Child Support Standards			Never	Rarely	Sometimes	Often	Very Often
31d	Judges order the parties to share equally add-on expenses, such as child care, unreimbursed medical and educational expenses, etc., notwithstanding a disparity in the parties' income	F	6.4	33.4	38.4	15.1	6.7
		M	9.7	34.3	41.4	9.3	5.2
31f	When ordering maintenance under the statutory guidelines, judges order a downward modification of child support paid to the custodial parent	F	5.4	23.6	45.9	18.1	6.9
		M	5.3	27.9	51.0	11.1	4.8

Overall, a third (35%) of attorneys reported that in Supreme Court, *pendente lite* orders of child support in a matrimonial action are never or rarely decided within 30 days of final submission (female attorneys 42%; male attorneys 31%).

Judicial Orders and Court Services			Never	Rarely	Sometimes	Often	Very Often
31e	In Supreme Court, <i>pendente lite</i> orders of child support in a matrimonial action are decided within 30 days of final submission	F	10.2	31.3	37.7	12.8	7.9
		M	4.6	26.5	30.6	21.5	16.9
31h	Income execution orders issued by the court are effective	F	0.6	8.1	36.2	33.2	21.9
		M	1.2	3.9	32.3	34.3	28.3
31j	The court has services available to assist respondents in fulfilling child support obligations	F	23.8	37.6	26.2	7.1	5.3
		M	14.7	28.4	24.0	21.1	11.8

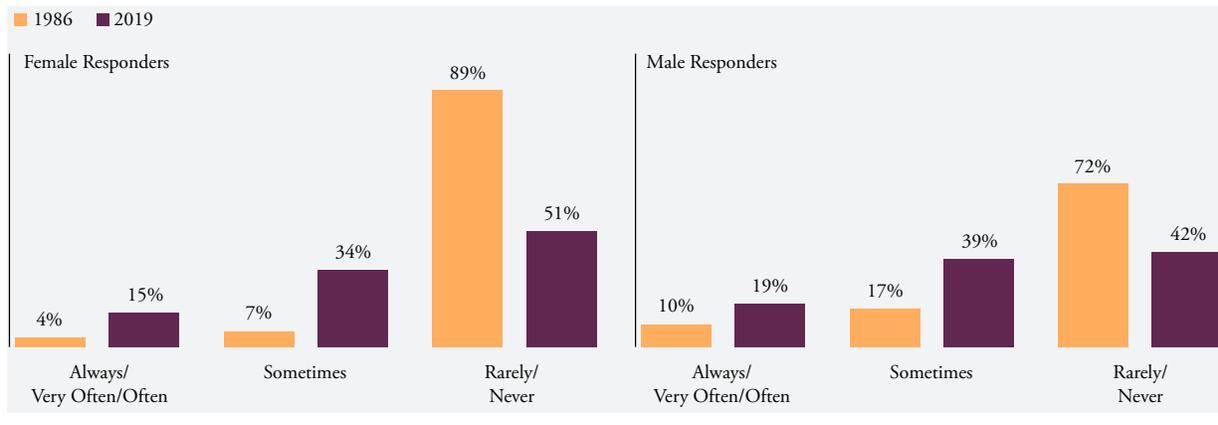
While gender differences remain among attorneys, dramatic improvements can be observed in the overall perception of the effectiveness of the courts in enforcing child support awards since 1986, as shown in the chart below.

### Courts effectively enforce child support awards



Similarly, significant change was found regarding whether respondents who intentionally fail to abide by court orders for child support are jailed for civil contempt. For example, among women, nearly 90% in 1986 reported that this rarely occurred as compared to 51% in 2019.

## Respondents who intentionally fail to abide by court orders for child support are jailed for civil contempt



*Although there has been some improvement, problems as to the adequacy and enforcement of child support awards still continue. Particular concern remains regarding the failure to decide pendente lite awards within the mandated timeframe.*

## Recommendations

### FOR OFFICE OF COURT ADMINISTRATION

- a. Take more rigorous measures to ensure that all *pendente lite* child-support decisions are rendered in compliance with the 30 days from the date of submission rule.
- b. Provide education and training for matrimonial judges, referees, and support magistrates on
  - the economic realities of raising children of various age groups
  - how to impute income in cases of small or cash businesses
  - accounting practices to address hidden sources of income and how to evaluate lifestyle spending practices
  - relevant Department of Labor regional statistics to assist in determining reasonable income expectations and business valuations.

## VI. Equitable Distribution and Maintenance Guidelines

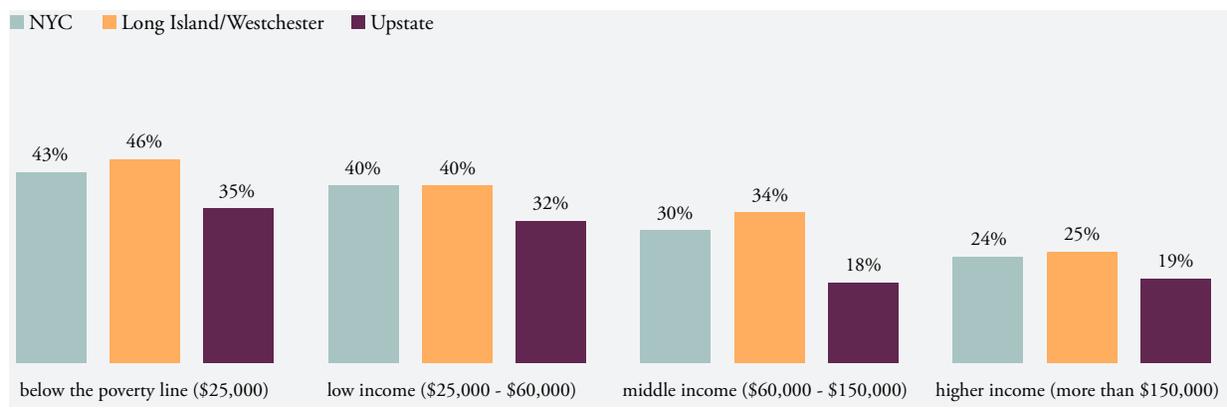
In 2015, the New York State legislature amended the Domestic Relations Law in a manner that significantly impacted equitable distribution and maintenance awards. Maintenance guidelines were adopted to guide judges in setting these awards with the stated intent of leveling the playing field across the spectrum of incomes. This section sought to generally measure the implementation of these guidelines and their impact on the non-monied spouse, usually a woman.

The survey explored the extent to which the maintenance guidelines adversely impact the non-monied spouse in a divorce action across different family income levels in accordance with state and federal guidelines.

### Findings

Nearly 40% of all attorneys statewide reported that the maintenance guidelines adversely affected the non-monied spouse where income was less than \$60,000 for a household of four. The lower the family income the more the non-monied spouse is adversely affected. However, similar adverse consequences were also noted in New York City and suburban counties for the non-monied spouses in middle income families (\$60,000 – 150,000) and even in higher income families (more than \$150,000), albeit to a lesser extent.

### The Maintenance Guidelines often/very often adversely impact the non-monied spouse in a divorce where the combined income for a family of four is:



Twenty percent (20%) of female attorneys and 21% of male attorneys responded that even when a party establishes the award is unjust or inappropriate, judges never or rarely deviate from the maintenance guidelines and adjust awards upon request on income up to the cap (\$184,000). When income exceeds the cap, 31% of female attorneys and 18% of male attorneys reported judges never or rarely award maintenance on the payor’s income above the cap.

SURVEY FINDINGS AND RECOMMENDATIONS

Equitable Distribution & Maintenance			Never	Rarely	Sometimes	Often	Very Often
34a	Judges deviate from the maintenance guidelines and adjust awards on income up to the cap (\$184,000) when a party establishes the award is unjust or inappropriate and requests an adjusted amount	F	2.4	17.3	58.7	15.9	5.8
		M	2.1	18.4	56.8	16.8	5.8
34b	Judges award maintenance to be paid on the payor's income that exceeds the cap (\$184,000)	F	6.0	25.1	48.2	14.1	6.5
		M	1.6	15.9	59.3	17.6	5.5

Female and male attorneys' views diverged on whether judges divide assets equally, including business assets. Female attorneys reported this as occurring never or rarely (25%) and sometimes (47%). Male attorneys reported this as occurring never or rarely (13%) and sometimes (44%).

Equitable Distribution & Maintenance			Never	Rarely	Sometimes	Often	Very Often
34c	Judges divide the assets equally, including business assets	F	1.7	22.8	47.4	19.4	8.6
		M	1.4	11.1	44.4	30.9	12.1

A series of questions asked attorneys about their experience with post-divorce durational maintenance and more specifically, how the court grants maintenance in accordance with the ranges within the Advisory Schedule as set forth in DRL 236B(6)(f). More than 60% of all attorneys (female attorneys 51%; male attorneys 71%) responded that in cases where durational maintenance is ordered, the court often or very often grants maintenance for the time periods indicated in the ranges of the Advisory Chart.

Equitable Distribution & Maintenance			Never	Rarely	Sometimes	Often	Very Often
34g	In cases where durational maintenance is ordered, the court grants maintenance for the time periods indicated in the ranges of the Advisory Chart DRL 236B(6)(f)	F	0.5	5.4	42.9	39.9	11.3
		M	0.0	1.7	27.8	47.2	23.3

SURVEY FINDINGS AND RECOMMENDATIONS

Attorneys were then asked whether the duration is set at the low, middle, or high end of each of the ranges within the Advisory Chart. Essentially, the same proportion (38%) of female attorneys indicated that the duration is often or very often set at either the middle of the range or at the low end. Among male attorneys practicing in this area, 42% indicated that the court will set the duration in the middle of the range and only 12% at the low end of the Advisory Chart range. About half (51%) of the female attorneys and 23% of their male colleagues indicated that the court would never or rarely set the duration at the high end of the range within the schedule. Finally, 16% of all attorney respondents (female attorneys 21%, male attorneys 12%) were of the view that judges will never or rarely depart from the Advisory Chart ranges even when the facts warrant. *See Appendix H, Pg 103, Question 35a-c, 36a.*

Female attorneys (54%) and male attorneys (35%) indicated that non-durational (permanent) maintenance is never or rarely awarded in long-term marriages of 20 years or more. This is so even in cases where the non-monied spouse has very limited work skills or employability, female attorneys (51%) and male attorneys (26%) indicated that non-durational maintenance was not awarded.

Non-Durational Maintenance			Never	Rarely	Some-times	Often	Very Often
34a	Judges deviate from the maintenance guidelines and adjust awards on income up to the cap (\$184,000) when a party establishes the award is unjust or inappropriate and requests an adjusted amount	F	2.4	17.3	58.7	15.9	5.8
		M	2.1	18.4	56.8	16.8	5.8
34d	In cases where the marriage is 20 years or more, nondurational (permanent) maintenance is ordered	F	11.9	42.0	36.3	8.8	0.9
		M	3.2	31.9	49.5	12.2	3.2
34e	In cases where the non-monied spouse has limited work skills and employability, nondurational maintenance is ordered	F	12.2	38.7	39.6	6.3	3.2
		M	4.6	21.1	53.6	16.0	4.6

Spouses Out of Workforce for Extended Period			Never	Rarely	Some-times	Often	Very Often
34f	The durational period realistically provides support for a non-monied spouse who has been out of the workforce for an extended period, including by reason of raising the family's children	F	4.4	27.2	49.1	15.4	3.9
		M	0.5	18.1	45.2	26.1	10.1
36b	Judges impute income to the spouse who has been out of the work force for an extended period to raise the child(ren) when calculating maintenance and child support	F	4.4	15.6	38.7	26.2	15.1
		M	4.8	22.3	48.9	17.0	6.9

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*The numerous comments and data from both female and male responders suggest durational maintenance to the non-monied spouse/homemaker/child-rearer is unrealistically limited. Others noted that the frequent unequal division of marital assets also indicates a continuing undervaluing of homemaker contributions to the marriage. Thus, problems remain involving equitable distribution and maintenance awards as to amount and in the case of the latter duration, which result in a negative impact on women of limited employability due to age and years of homemaking and/or child rearing activities.*

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## Recommendations

### FOR COURT ADMINISTRATION

Consistent with education recommended in the Child Support section, mandate education and training for judges on the imputation of income and accounting practices, including in cases of small or cash businesses, as well as, addressing hidden sources of income, evaluating lifestyle spending practices, and recognizing the economic realities of raising children of various age groups.

### FOR JUDGES

- a. The contributions of a spouse-homemaker should expressly be credited as a factor in determining equitable distribution and in awarding maintenance.
- b. In determining the amount and duration of maintenance, judges should expressly consider the impact of domestic violence on the issue of the spouse-victim's employability.

### FOR THE LEGISLATURE

- a. Amend the Domestic Relations Law maintenance formula to account for the change in the federal tax law which disallows the deduction of maintenance by the payor.
- b. Amend the Domestic Relations Law to increase upwards the guidelines durational limits, and expressly include the option of non-durational maintenance, to enable judges, in making such awards, to take into account the realities of a spouse's limited employability prospects due to domestic violence as well as the other criteria currently listed in the statute.

## VII. Gender-Based Violence

There are many types of conduct that fall under this broad topic where the criminal courts play a critical role. This section sought input on specific subtopics relevant to the treatment of domestic violence, rape, and prostitution cases in Criminal Court and the Criminal Term of Supreme Court.<sup>9</sup>

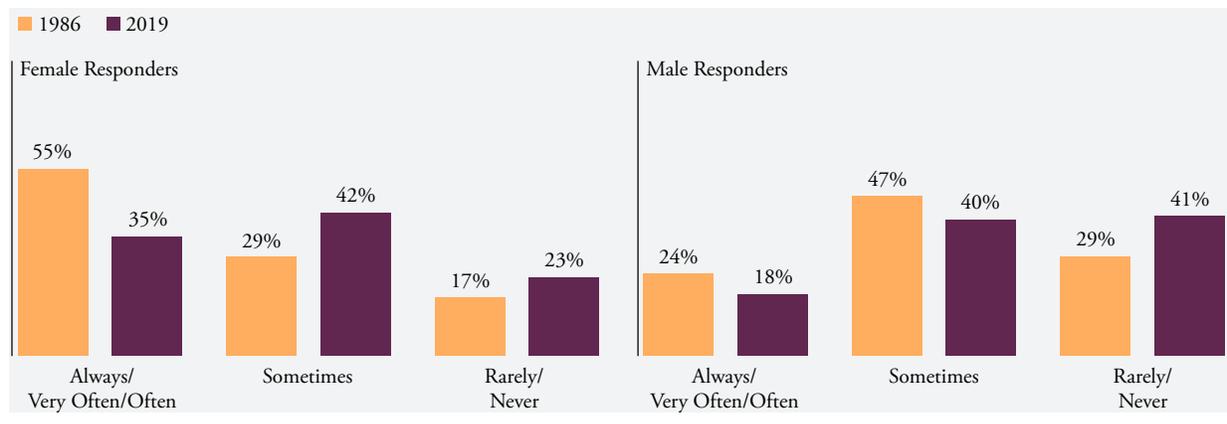
### Findings

#### RAPE AND OTHER SEX CRIMES

The survey looked at how rape and other sex crimes are handled where the parties know one another. Female attorneys (32%) and male attorneys (19%) reported that very often or often bail in rape and other sex crime cases where parties know one another is set lower than in cases where parties are strangers. On average, 39% of all attorneys responded that such is the case sometimes.

When asked if sentences in rape and other sex crime cases are shorter when parties know one another than in cases where parties are strangers, female attorneys (35%) and male attorneys (18%) reported that such is the case very often or often, while 41% of all attorneys responded that this is sometimes the case.

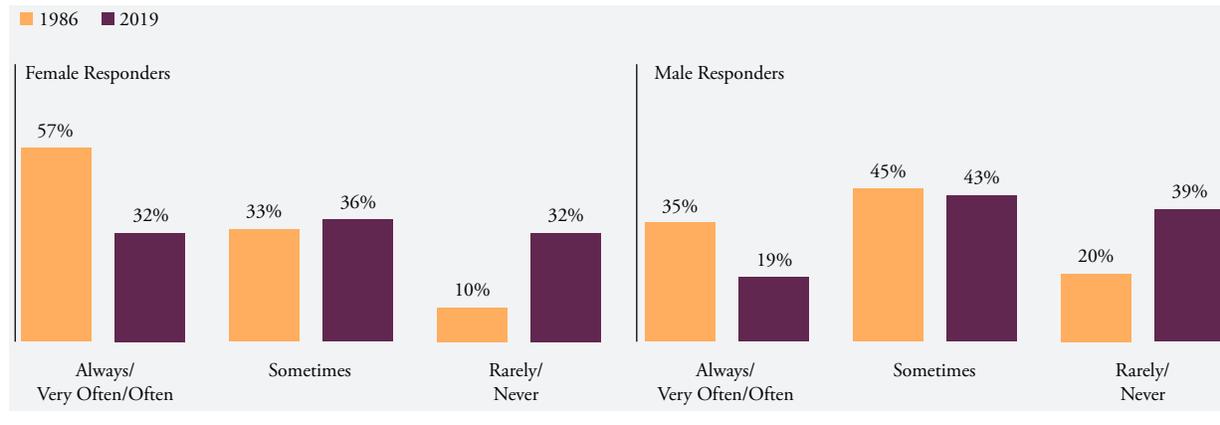
#### Sentences in rape and other sex crimes cases are shorter when parties know one another than in cases where parties are strangers



These questions were further analyzed by gender comparing attorney responses from 1986 to present day. The current survey demonstrates that both bail and sentencing determinations are significantly less impacted by the parties knowing each other than they were in 1986.

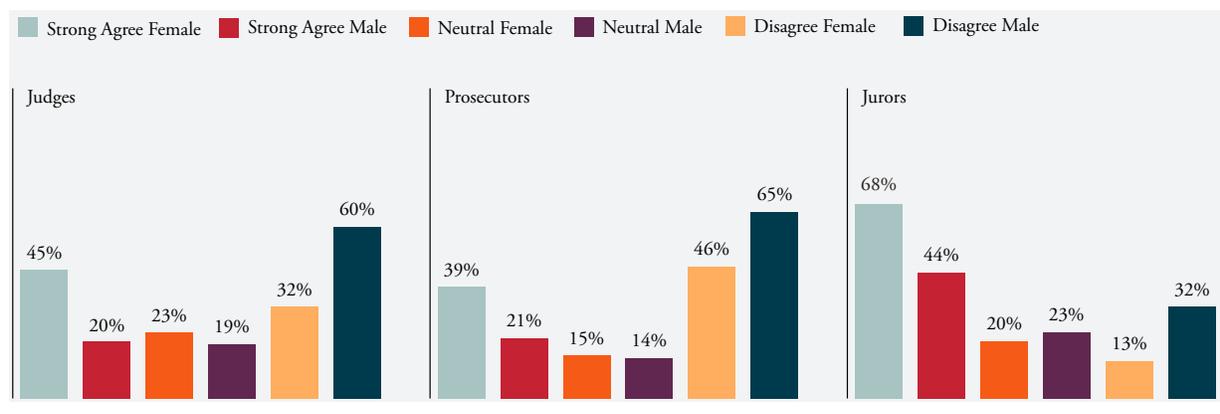
9. Information specific to addressing some domestic violence in the Criminal Court was reported above in [Section III. Domestic Violence](#).

### Bail in rape and other sex crimes cases where parties know one another is set lower than in cases where parties are strangers



The survey inquired about the extent to which judges or prosecutors showed less concern about rape cases where parties have a current or past relationship/acquaintance. Female attorneys are far more likely to agree (45%) when compared to male attorneys (20%) that judges show less concern. Similarly, female attorneys are far more likely to agree (39%) than male attorneys (21%) that prosecutors show less concern. Female attorneys agreed (68%) and male attorneys agreed (44%) that there is also less concern about such cases on the part of jurors.

### There is less concern about rape cases where parties have a current or past relationship/ acquaintance on the part of:



Female attorneys (42%) and male attorneys (59%) indicated that when there is improper questioning about the complainant’s prior sexual conduct, judges often or very often invoke the rape shield law sua sponte if the prosecutor does not.

Female attorneys (51%) and male attorneys (37%) agree that rape in the context of marriage is never or rarely addressed with the same severity as rape outside of marriage.

Criminal Court: Rape and Other Sex Crimes			Never	Rarely	Sometimes	Often	Very Often
40d	Rape in the context of marriage is addressed with the same severity as rape outside of marriage	F	11.9	39.4	24.8	13.3	10.6
		M	6.3	31.1	30.7	17.7	14.2

## PROSTITUTION

Overall, female attorneys were more likely to agree that judges (64%), prosecutors (56%), and law-enforcement (65%) treat the john or patron with less severity than the prostituted person than did male attorneys (42%, 37%, 44% respectively). See [Appendix H, Pg 105, Question 42a-c](#).

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*Although there has been some improvement, it appears that some societal attitudes persist considering rape occurring within marriage or when the parties know each other as less pernicious than rape involving strangers - and to some degree impact upon the prosecution of these cases.*

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## Recommendations

### FOR COURT ADMINISTRATION

- a. Ensure that every judge receives comprehensive and ongoing education and training on all aspects of sexual assault, including but not limited to the identification of special issues in cases of date rape, marital rape, and assault between those who know each other. The training should offer information supported by the latest research in the area.
- b. In a skill-based setting, educate judges on the difference between vigorous cross-examination that protects the defendant’s rights and questioning that includes improper stereotyping and harassment of the victim.
- c. Establish Human Trafficking Intervention Courts throughout the state.

### FOR JUDGES

- a. Treat acquaintance or intimate partner rape with the same seriousness and severity as rape involving strangers throughout the pendency of the case from arraignment through sentencing. Include instructions for jurors to apply the same standard.
- b. When appropriate, consider exercising the authority to invoke, sua sponte, Criminal Procedure Law Sec. 60.42, known as the Rape Shield Law when there is improper questioning about the complainant's prior sexual conduct in the event the prosecution fails to do so.
- c. In sentencing, take into consideration victim impact statements.

### FOR PROSECUTORS

- a. Ensure that all prosecutors receive education and training as to the particular areas recommended for judges as well as in how to engage victims to increase their cooperation and willingness to proceed against the defendant.
- b. Establish procedures that permit rape victims to deal with only one assistant district attorney through all stages of the proceedings where possible.
- c. Treat acquaintance or marital (intimate partner) rape with the same seriousness as rape involving strangers throughout the pendency of the case from arraignment through sentencing.
- d. Consider the availability of the rape shield law in response to improper questioning about the complainant's prior sexual conduct.
- e. Routinely prosecute patrons of prostitution, as well as, the traffickers and promoters.
- f. Work collaboratively with the Human Trafficking Intervention Court (where available).

### FOR LAW ENFORCEMENT

- a. Ensure that all law enforcement officers and policy makers receive the education and training on the dynamics of sexual assault and on the best practices for gathering and preserving crime scene evidence in such cases.
- b. Ensure that all rapes, whether by a stranger, acquaintance, intimate partner, or family member, are treated with equal seriousness.
- c. Maintain specialized units or a dedicated, specifically trained officer to deal sensitively with sex offenses.

### FOR HOSPITALS AND MEDICAL FACILITIES

- a. Ensure that all emergency room and other relevant staff are trained in gathering and preserving evidence including rape kit collection and storage as well as ascertaining whether the alleged rape is committed by an acquaintance, intimate partner, or family member.
- b. Encourage the victim to submit to a forensic rape exam.
- c. Inform the victim that the forensic rape exam may be paid for through the New York State Office of Victims Services.

### FOR THE LEGISLATURE

- a. Require and fund every emergency room to be equipped with the ability to identify, examine, and treat any victim of rape or sexual assault and to administer a rape kit.
- b. Define all sex crimes as aggravated where the parties meet the statutory definition for intimate relationship in family offense cases. The relationship should constitute an aggravating factor. This shall include an intimate partner harming any child in the family whether or not the child is the alleged offender's biological child.

## VIII. Appointments and Fee-Generating Positions

Some types of court proceedings require that the judge or judicial officer assign an attorney either when the party is indigent, or the case requires a particular appointment and thereafter the awarding of attorney fees for services rendered. Such appointments are made in Surrogate's Court, Supreme Court, Criminal Court, and Family Court where appropriate.<sup>10</sup>

The March 1986 Report of the New York Task Force on Women in the Courts set forth that public hearing witnesses and survey respondents asserted that women attorneys were disproportionately denied such assignments and rarely received the most desirable and lucrative assigned counsel positions, the appointments for which were vested in the discretion of individual judges.

In April 1986, Part 36 of the Rules of the Chief Judge was promulgated governing certain fiduciary appointments in the courts. On June 1, 2003, the rules were repealed and a new Part 36 was promulgated, creating a system with the goal of broadening the eligibility for appointment to a wide range of applicants well-trained in their category of appointment and establishing procedures to promote accountability and transparency in the selection process, insulating that process from the

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10. Appointments made pursuant to Part 36 of the Rules of the Chief Judge or Article 18B of the County Law include but are not limited to: guardians; guardians ad litem; attorneys for the child; court evaluators; attorneys for alleged incapacitated persons; court examiners; supplemental needs trustees; receivers; referees; specified persons performing services for guardians or receivers; and assigned counsel in criminal or Family Court cases.

appearance of favoritism, nepotism or politics. The names of appointees, appointing judges, and the amounts of approved compensation were made subject to periodic publication by the Chief Administrator of the Courts. Since 2003, Part 36 has been further amended.

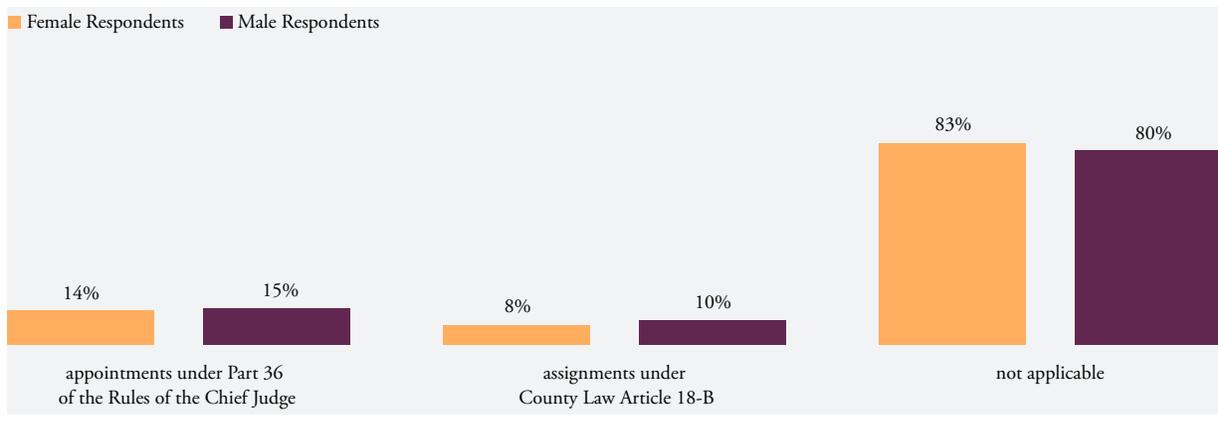
In October 2019, the Office of Court Administration released a new Fiduciary Case Management System (FCMS), reflecting amendments to Part 36 and Part 26 of the Rules of the Chief Judge. According to the FCMS Training Manual, the new system provides enhanced reporting, tracking and notification affording greater transparency on many issues, including the amount of fees generated by individual attorneys, the amount of fees granted by a judge, and the number of, and types of, appointments made by specific judges.

The 2019 survey sought to better understand the current climate and consistency in the awarding of attorney fees for similar work and the assignment of attorneys for representation.

## Findings

Attorneys were asked if they were eligible to receive appointments under Part 36 of the Rules of the Chief Judge or Article 18B of the County Law. Male and female attorneys indicated that they were eligible for appointments under Part 36 and assignments under Article 18B at essentially similar rates, as shown in the chart below.

### I am eligible for:



Of those who indicated that they were eligible for appointments under Part 36 of the Rules of the Chief Judge, more female attorneys (65%) were appointed to a fee-generating case within the last three years compared to male attorneys (57%). See [Appendix H, Pg 95, Question 14](#).

### Most Frequent Appointment Types Assigned in Past 3 Years

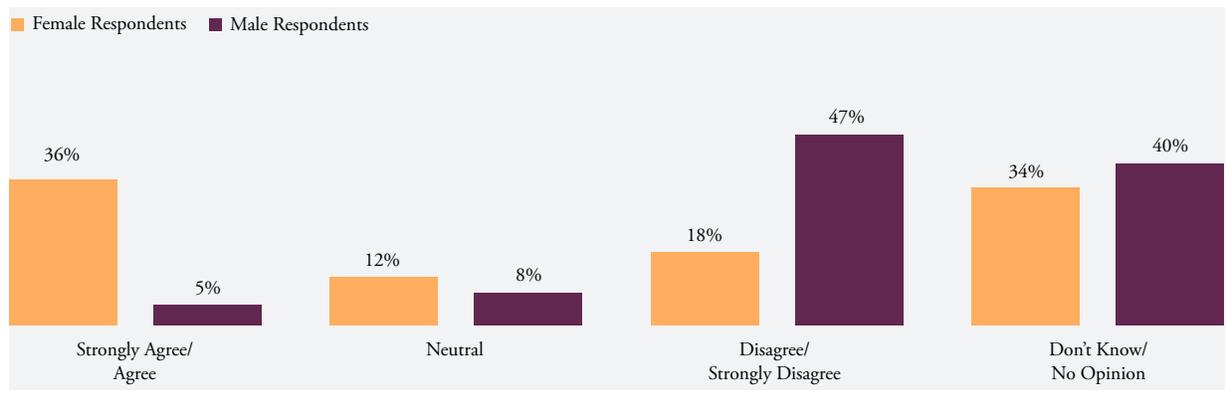
F			M		
Rank Ordered Appointment Type	*% appointed	**Average # Assignments	Rank Ordered Appointment Type	*% appointed	**Average # Assignments
1. Guardian Ad Litem	63%	3.1	1. Referee	79%	3.8
2. Referee	60%	3.8	2. Guardian Ad Litem	52%	3.1
3. Court Evaluator	45%	3.2	3. Court Evaluator	42%	2.6
4. Attorney for Alleged Incapacitated Person	40%	2.5	4. Attorney for Alleged Incapacitated Person	37%	2.2
5. Guardian	40%	2.8	5. Guardian	35%	2.8
6. Attorney for the Child	30%	3.5	6. Counsel	23%	2.5
7. Counsel	17%	3.1	7. Receiver	22%	1.9
8. Receiver	11%	2.0	8. Attorney for the Child	12%	3.5

\* This reflects the percentage of attorneys who received at least one appointment in the past 3 years.

\*\* The Average # Assignments provides the average number of assignments per appointment type only for those who indicated that they had received at least one assignment, as indicated in the “% with at least one assignment” column.

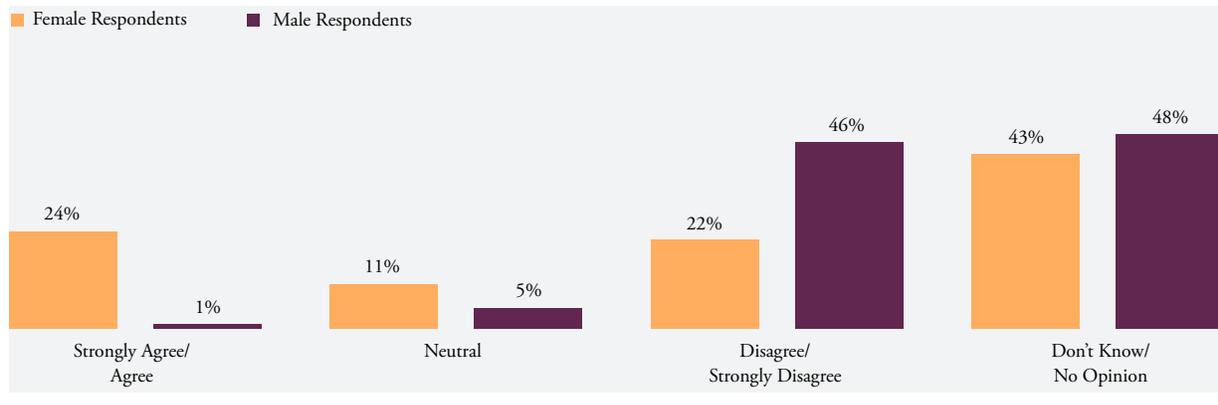
When asked whether judges more often appoint male attorneys to more lucrative cases than female attorneys, female attorneys who had received at least one appointment within the past three years strongly agree/agree (36%) or disagree/strongly disagree (18%) while such male attorneys strongly agree/agree (5%) or disagree/strongly disagree (47%).

### Judges more often appoint male attorneys to more lucrative cases than female attorneys:



When the fee awarded falls within judicial discretion, female responses (for those who received at least one appointment within the past three years) were almost equally divided with 24% agreeing that female attorneys are more often awarded lower attorney fees by the court than male attorneys for similar work while 22% disagree that such is the case. Of male attorneys who had received at least one appointment within the past three years, (46%) disagreed that such is the case.

**When the fee awarded falls within judicial discretion, female attorneys are more often awarded lower attorney fees by the court than male attorneys for similar work:**



While there has been great improvement in the number and range of assignments to women since the 1986 report, a substantial number of female attorneys still believe that there is disparity in the monetary value of cases assigned to women. These data indicate that appears to be the case at least with regard to violent felony assignments. Female attorneys (24%) and male attorneys (7%) agree that such is the case with over half of those responding having no knowledge of the issue.

See data in the chart below regarding assignments in felony cases.

Assigned Panels			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	DNK
21	Female attorneys on assigned panels are assigned more often to represent women and/or children than are male attorneys on such panels	F	15.3	16.6	16.6	12.1	5.7	33.8
		M	22.9	17.1	11.2	9.8	2.4	36.6
22	Female attorneys on assigned panels receive fewer violent felony assignments than male attorneys on such panels	F	5.8	9.0	9.6	12.2	11.5	51.9
		M	18.9	13.1	7.3	5.8	1.0	53.9

Assigned Panels			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	DNK
23	Female attorneys on assigned panels receive more assignments of rape and other sex crime cases than male attorneys on such panels	F	6.3	15.8	15.8	2.5	1.3	58.2
		M	18.7	14.3	9.4	3.0	0.0	54.7

The relevant data demonstrate that female attorneys currently, in contrast to the situation reported in 1986, do (for the most part) have equal access to and receive court assignments of all types with limited exceptions, e.g., certain felony assignments.

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*Court leadership and administration deserve great credit for the marked improvement in this area through its rulemaking authority. Although there is still some perception that female attorneys receive lesser fee awards for similar work when such awards are within judicial discretion, any perceived inequities in fee awards should be ameliorated by the most recent 2019 Rule requiring detailed filings that will provide the degree of transparency that engenders fairness by decision makers.*

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## Recommendations

### FOR COURT ADMINISTRATION

- a. Distribute FCMS customized reports that list fiduciary appointments and fees awarded by judges in each judicial district to relevant judges through the district offices. A new electronic system has been put in place that will allow such reporting going forward.
- b. Provide professional networking opportunities for judges to become acquainted with the members of the various panels that list those who are qualified for appointments.

### FOR BAR ASSOCIATIONS

- a. Provide professional networking opportunities for judges to become acquainted with panel members.
- b. Establish a mentoring program to assist female attorneys in building the skills and recognition to receive violent felony assignments.

## IX. Negligence and Personal Injury

This section sought input regarding awards for pain and suffering, loss of consortium, or disfigurement, as well as gender differences for awards to homemakers.

### Findings

Only 4% of male attorneys compared to 24% of female attorneys indicated that males often or very often receive higher awards than females for pain and suffering from judges. Seventy-three percent (73%) of male attorneys, however, indicated males never or rarely received higher awards than females for pain and suffering from judges as compared to 35% of the female respondents. The responses to this particular question generated one of the largest disparities between male and female attorneys in this survey.

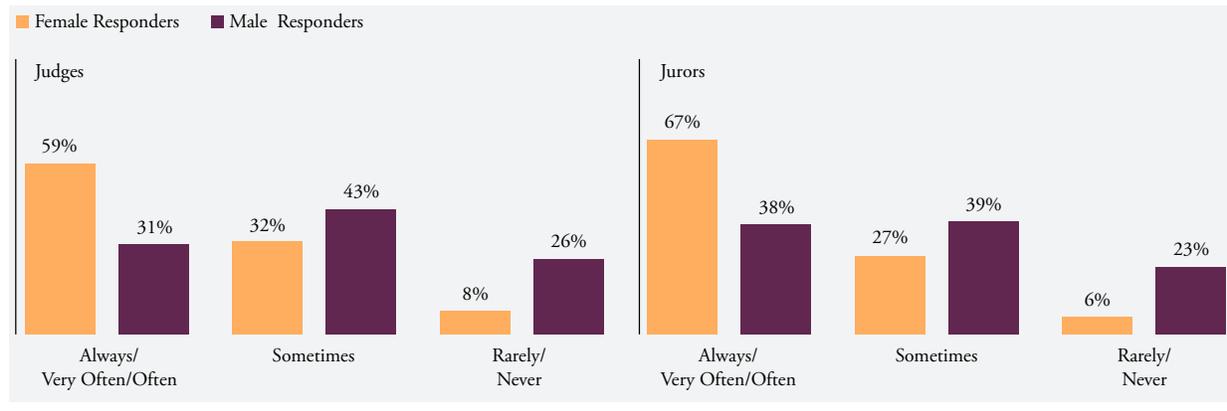
With regard to awards made by juries, women were equally divided as to whether such is the case while male attorneys overwhelmingly indicated that males did not receive higher awards.

When attorneys were asked if husbands receive higher awards than wives for loss of consortium from judges or juries, female attorneys felt this occurred far more often than male attorneys. Female attorneys (41%) and male attorneys (54%) felt that females received higher awards for disfigurement from judges. A similar pattern was found with respect to awards made by juries on this issue, as shown in the table below.

			Never	Rarely	Some-times	Often	Very Often
44a	Males receive higher awards than females for pain and suffering from judges	F	11.1	23.7	41.5	15.9	7.7
		M	43.7	28.9	23.0	2.9	1.5
44b	Males receive higher awards than females for pain and suffering from juries	F	8.8	21.3	41.0	19.2	9.6
		M	35.2	28.5	30.0	3.7	2.6
45a	Husbands receive higher awards than wives for loss of consortium from judges	F	11.7	28.3	32.8	18.9	8.3
		M	41.1	33.2	22.4	2.3	1.0
45b	Husbands receive higher awards than wives for loss of consortium from juries	F	10.3	21.5	37.9	20.5	9.7
		M	33.7	34.3	26.8	3.0	2.1
46a	Females receive higher awards than males for disfigurement from judges	F	3.5	9.6	46.1	27.2	13.6
		M	10.1	6.6	29.1	31.0	23.3
46b	Females receive higher awards than males for disfigurement from juries	F	2.6	4.9	42.5	32.3	17.7
		M	6.4	5.0	23.3	35.7	29.5

As shown in the chart below, female attorneys more often than male attorneys reported that female homemakers receive lower awards than males who work outside the home from both judges (female attorneys 59%; male attorneys 31%) and juries (female attorneys 67%; male attorneys 38%).

**Female homemakers receive lower awards than males who work outside the home from:**



*The data indicate that awards in a significant number of personal injury cases assign lower monetary damages to women than to men for similar injuries and disabilities and also largely undervalue the import of homemaker services. This is all to the economic detriment of women who wrongfully suffer injuries and disabilities.*

**Recommendations**

**FOR COURT ADMINISTRATION**

The pattern jury instructions should be modified to emphasize the monetary value of homemaker services.

**FOR BAR ASSOCIATIONS**

Offer CLE courses that provide guidance on the evidence necessary to establish the monetary value of homemaker services.

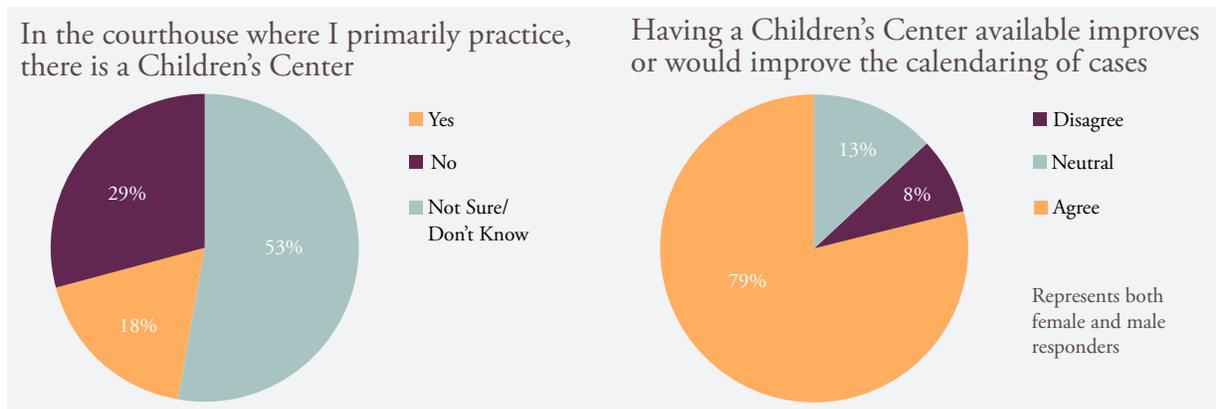
## X. Court Facilities

Addressing the basic needs of litigants, witnesses, and attorneys can make a difference in their ability to participate fully in their case or court appearance. This section sought information related to court-based Children’s Centers, lactation facilities for breastfeeding women who appear or work in the courts, and baby changing stations. As previously noted, there is a need for separate, safe waiting areas in courts where family offenses are heard. Those concerns are addressed in the Domestic Violence section of this report.

### Findings

When asked about the availability of Children’s Centers, lactation space, or baby changing tables, the response from survey participants documents the need to provide these facilities and make them accessible. Questions for each topic asked whether having a particular type of facility improves or would improve court calendaring. Especially among female respondents, the answer was strongly affirmative as illustrated in the charts below.

#### Children’s Centers

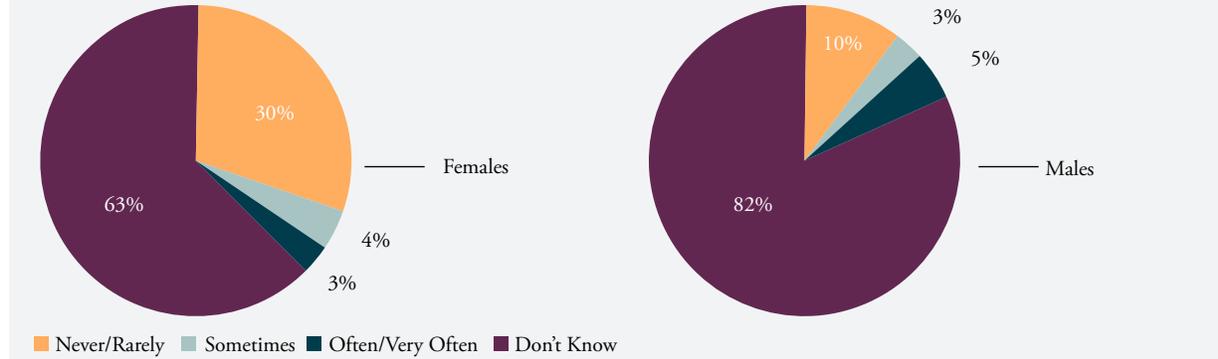


See the appendix for a breakdown by Judicial District.

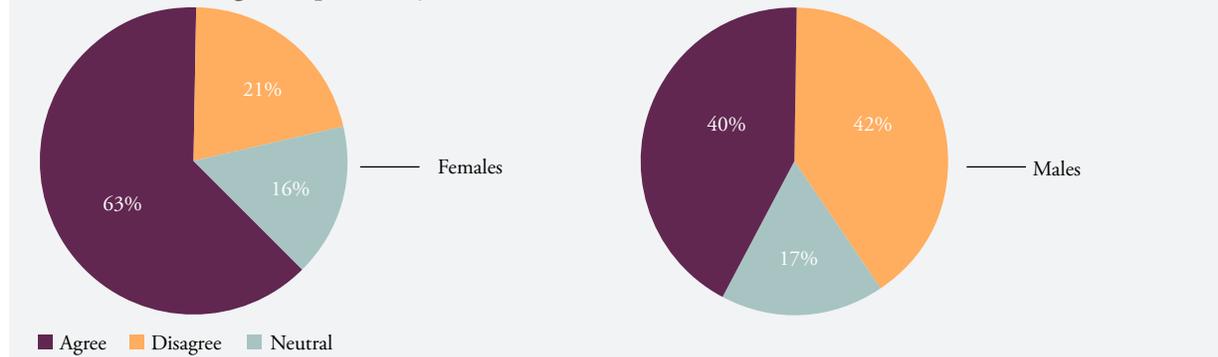
The majority of attorneys responding (73% female, 65% male) indicated that litigants will never or rarely leave a child in a Children’s Center located in a court facility different from the facility where their case is being heard. Attorneys disagreed or strongly disagreed (77% female, 53% male) that Children’s Centers in Family Courts will admit children of non-Family Court litigants. For these data as well as other questions related to Children’s Center operations, see [Appendix H, Pg 107, Question 49-53g](#).

## Lactation Facilities

In the courthouse(s) where you practice, onsite lactation facilities are available to court users, including attorneys, litigants, witnesses, and jurors:

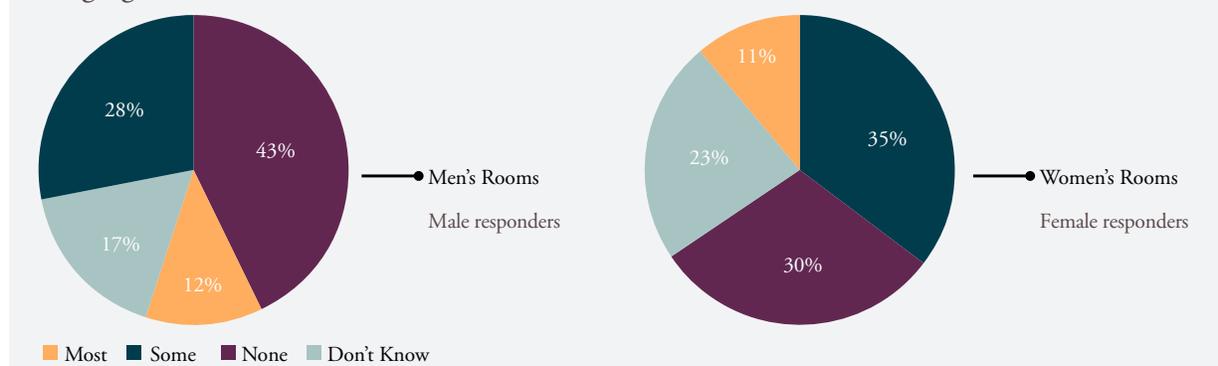


Court calendaring is impacted by the lack of lactation facilities:



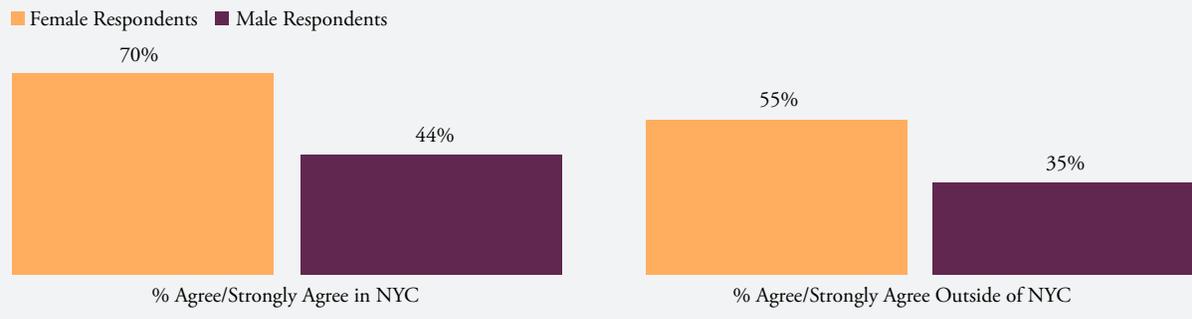
## Baby Changing Stations in Public Restrooms

In the courthouse(s) where you practice, there are public restrooms that have functional baby changing stations in:



See the appendix for a breakdown by Judicial District.

Court calendaring and efficiency are impacted by the lack of functional baby changing stations in public bathrooms for court users including attorneys, litigants, witnesses, and jurors:



In addition to the need for changing stations in public restrooms, female attorneys also commented on the need for updated, clean restrooms. “Courthouse bathrooms need to be more female-friendly. Many women’s bathroom stalls do not have waste bins for female hygiene products. At the court where I practice, the only waste bin is outside the bathroom...”

Additionally, both male and female attorneys commented on the need for court facilities to be updated to provide safe and appropriate space for attorney conferences.

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*The efficiency and effectiveness of court proceedings are negatively impacted by the lack of facilities including Children’s Centers, lactation spaces, and baby changing stations. This prevents litigants, witnesses, and attorneys from being readily available during the proceedings and results in unfair hardships for those requiring such facilities.*

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## Recommendations

### *Children's Centers*

#### FOR COURT ADMINISTRATION

- a. Provide a fully staffed, accessible Children’s Center in every courthouse. The Children’s Center hours should mirror the hours of court operations. The Center should provide age-appropriate programming and information regarding appropriate outside services.
- b. Ensure no child is turned away from a Children’s Center or forced to wait in hallways until his or her parents’ case is called. Center rules regarding hours of operation, usage, and age limitation should be flexible, accessible, and inclusive.

## FOR COURT ADMINISTRATION AND LEGISLATIVE LEADERS

Work together to establish free, accessible Children's Centers in all courthouses statewide.

### *Lactation*

#### FOR COURT ADMINISTRATION

- a. Provide a committed space in every courthouse statewide for lactation/breast-feeding use that meets New York State Department of Health regulations. This space may include commercially available pods designed for this purpose only where more appropriate space cannot be located in the courthouse or UCS facility. The amount of space available should be adequate to meet the demand by court personnel and court users. Notice of lactation/breast-feeding space shall be posted.
- b. Educate judges, district executives, and chief clerks about the law requiring time allowances and space for employees to address lactation needs.

### *Restrooms and Baby Changing Stations*

#### FOR COURT ADMINISTRATION

Work collaboratively and aggressively with municipalities to:

- update courthouse bathrooms, ensure sanitary conditions, provide feminine hygiene products, and inside each stall provide: hooks, working locks, and receptacles for waste.
- provide baby changing stations in all bathrooms including women's, men's, gender neutral, and family bathrooms.

### *General*

#### FOR COURT ADMINISTRATION

- a. Provide appropriate multi or bilingual signage in the court houses and educate the public through the UCS website as to the designated areas for Children's Centers, lactation, and diaper changing stations. Incorporate such information into any future technological programming for mapping courthouses to improve public access to such facilities.
- b. Educate judges and non-judicial staff regarding appropriate accommodations for the needs of pregnant and nursing mothers and as to the availability of Children's Centers, lactation facilities, and baby changing tables in the courthouses.
- c. As future courthouse renovations or buildings are planned, incorporate space for Children's Centers, lactation facilities, and include baby changing tables in every public restroom.
- d. Ensure that comment cards are readily available in every courthouse and that the online link to the comment card is publicized in courthouses.

## SURVEY FINDINGS AND RECOMMENDATIONS

- e. Produce and distribute an informational brochure(s) in multiple languages for people entering the courthouse. This should include the right to be treated fairly and respectfully. The brochure should inform court users about the location of the Children’s Center, lactation space, and baby changing tables. In addition, information should be made available regarding how to file a complaint of sexual harassment and/or bias or any other inappropriate behavior, as well as, the right to language access and how to request an interpreter.
- f. Court clerks and other designated court personnel should be responsible for providing the information. Such information should be effectively disseminated and prominently displayed in the court facility. A link to the brochure should also be on the UCS website main page in multiple languages. Incorporate such information into any future technological programming designed to inform court users about the courthouse.

# End Note

This survey by the New York State Judicial Committee on Women in the Courts was undertaken with a dual purpose. First, to ascertain whether the many detailed and specific recommendations made in 1986 by the New York Task Force to eliminate the bias against women in our legal system had succeeded and, if not, what vestiges of bias still remain. In that second event, what can and should be done to eliminate any lingering remnants of bias that continue to infect our court proceedings.

The late Chief Judge Cooke and the original Task Force members would take great pride in the fact that the current survey demonstrates that their hard work and efforts have in substantial measure ameliorated the scope and extent of bias that had unfairly impacted women in our judicial system. For this, great credit must also be given to Court Administration under the leadership of former Chief Judges Wachtler, Kaye, Lippman, and current Chief Judge DiFiore, for demonstrating unswerving commitment to promoting the Task Force recommendations and indeed expanding the recommendations to meet unanticipated challenges. In this, they were greatly assisted by dedicated Chief Administrative Judges, trial and appellate judges, court personnel, bar associations, and other participants in the judicial process such as law enforcement and various branches of government.

Unfortunately, despite these intensive efforts over the years, the data elicited by the current survey, as briefly summarized at the conclusion of each section, demonstrate that notwithstanding great improvement overall there remain substantial areas of inequitable treatment of women lawyers, litigants and witnesses. Most disheartening are the data on “Courthouse Environment (Sexual Harassment)”, particularly with regard to the inappropriate conduct of far too many lawyers which shows little improvement since the original survey. This is, of course, unacceptable in a legal system predicated upon fundamental fairness to all participants, especially when practiced by those who are bound by a Code of Professional Conduct that expressly precludes such conduct. Concerns also stem from the data on “Credibility and Court Interaction” which although much improved continue to reflect a strain of bias against women participants in the judicial process that cannot be countenanced.

While marked improvement is evident, for example, in cases involving domestic violence, these data demonstrate that women who are victims of violence continue to face adversity in the court system. These data also demonstrate the economic inequities women face upon termination of marriage as well as the inadequate and inequitable valuation in the litigation context for the work or services traditionally performed by women. We have made very specific and particularized recommendations for corrective actions.

## END NOTE

As made clear by Chief Judge DiFiore, expeditious resolution of the cases brought in our courts is the bedrock of excellence in the operation of our system of justice. While Court Administration, judges, court personnel and lawyers are critical to bringing about that result, there are auxiliary factors that can greatly assist in that regard such as facilities that enable litigants and others to participate in legal proceedings without delays. These include Children's Centers, baby-changing stations, and lactation spaces, all of which require the active assistance and participation of relevant legislative and local executive branch leaders. We urge their assistance in this endeavor at the earliest possible time.

We conclude on an optimistic note. The survey reveals a far more positive landscape regarding the status of women as part of our legal system than was the case in 1986. The great number of women judges of diverse backgrounds currently serving on all courts throughout the state, including at the highest appellate levels, as well as holding significant administrative positions in courts of almost every type where non-judicial female court employees occupy supervisory and other positions that were previously the sole province of male employees, is truly heartening. We are further encouraged by the increasing number of women lawyers actively practicing in every area of our court system and note that where court administrative action has played a significant role, as in the case of fee-generating assignments, women lawyers have participated on substantially equal footing.

This Committee believes that the goal of truly equal treatment for women lawyers and other women participants in our judicial system is well within reach and we urge all the constituents in that system to join in helping to achieve that goal which is critical to a fair and vibrant system of justice.

# Appendix

A. Chairs of Local Gender Bias and Gender Fairness Committees.....	72
B. New York State Unified Court System Judicial District Map .....	75
C. Press Release and New York Law Journal Article .....	76
D. Correspondence from Chief Judge Janet DiFiore and Justice Betty Weinberg Ellerin, Chair.....	81
E. Views from Where You Sit: Attorney & Judicial Assessments of the Status of Women in the Courts 2017.....	83
F. Gender Survey.....	84
G. Survey Respondent Demographic Data.....	88
H. Survey Questions and Response Data .....	92
I. Breakdown by Judicial District in Regard to Available Services and Facilities .....	109
J. Survey Report Recommendations .....	113
K. Women in The New York State Judiciary 1986, 1996, 2006, 2016 & 2020.....	124

# Chairs of Local Gender Bias and Gender Fairness Committees

## Courts Outside New York City

### THIRD JUDICIAL DISTRICT GENDER FAIRNESS COMMITTEE

**Hon. Rachel L. Kretser, Chair**  
Albany City Court (Ret.)  
RLK1ATT@yahoo.com

**John Caher, Vice Chair**  
Senior Advisor for Strategic Communication  
Office of Court Administration  
518-453-8669  
JCaher@nycourts.gov

### FOURTH JUDICIAL DISTRICT GENDER FAIRNESS COMMITTEE

**Hon. Polly A. Hoye, Chair**  
Fulton County Office Building  
Room 216

**Tatiana Coffinger, Vice Chair**  
Warren County Supreme Court  
1340 State Route 9, Lake George, NY 12845  
518-761-6547  
TCoffing@nycourts.gov

**Elena Jaffe Tastenson, Esq., Vice Chair**  
376 Broadway, Suite 16, Saratoga Springs, NY 12866  
518-587-4419  
ejt@ejtlaw.com

### FIFTH JUDICIAL DISTRICT COMMITTEE

**Hon. Deborah Karalunas, Chair**  
Supreme Court Onondaga County Courthouse  
401 Montgomery Street, Room 401, Syracuse, NY 13202  
315-671-1106  
DKaralun@nycourts.gov

### SIXTH JUDICIAL DISTRICT COMMITTEE

**Hon. Julie A. Campbell, Chair**  
Cortland County Supreme and County Court  
46 Greenbush Street, STE 301, Cortland, NY 13045  
607-218-3343  
JACampbe@nycourts.gov

### SEVENTH JUDICIAL DISTRICT COMMITTEE

**Hon. Teresa Johnson, Chair**  
Rochester City Court Hall of Justice  
99 Exchange Blvd., Rochester, NY 14614  
585-428-1904  
TJohnson@nycourts.gov

**Mary A. Aufleger, Chair**  
Deputy District Executive  
Seventh Judicial District Hall of Justice  
99 Exchange Blvd., Rochester, New York 14614  
585-371-3436  
MAuflege@nycourts.gov

### EIGHTH JUDICIAL DISTRICT GENDER & RACIAL FAIRNESS COMMITTEE

**Hon. E. Jeannette Ogden, Chair**  
Erie County Supreme Court  
50 Delaware Avenue, Buffalo, NY 14202  
716-845-2796  
EOgden@nycourts.gov

### NINTH JUDICIAL DISTRICT COMMITTEE TO PROMOTE GENDER FAIRNESS IN THE COURTS

**Hon. Terry Jane Ruderman, Chair**  
Supreme Court  
111 Dr. Martin Luther King, Jr. Boulevard  
White Plains, NY 10601  
914-824-5790  
TRuderma@nycourts.gov

### NASSAU COUNTY JUDICIAL COMMITTEE ON WOMEN IN THE COURTS

**Hon. Julianne Capetola, Chair**  
Nassau County Supreme Court  
100 Supreme Court Drive, Mineola, NY 11501  
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**SUFFOLK COUNTY WOMEN IN THE COURTS COMMITTEE****Mary Porter**

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**Sheryl Randazzo, Esq.**

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**Courts Within New York City****NYC FAMILY COURT COMMITTEES****Bronx County**

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**New York County**

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**Kings County**

*Vacant*  
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**Queens County**

**Hon. Elizabeth Fassler, Chair**  
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**BRONX COUNTY COMMITTEES****Gender Fairness Committee of the Twelfth Judicial District, Supreme Court Committee**

**Hon. Doris M. Gonzalez, Co-Chair**  
 851 Grand Concourse, Bronx, NY 10451  
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**Hon. Elizabeth Taylor, Co-Chair**  
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**Hon. Eddie J. McShan, Co-Chair**

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**Hon. Leticia Ramirez**  
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**Gender Bias Committee, New York County, Supreme Court, Criminal Term**

**Hon. Erika Edwards**  
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**New York County Criminal Court Committee**

**Hon. Charlotte Davidson, Co-Chair**  
 CHDavids@nycourts.gov

**Hon. Ilana Marcus, Co-Chair**

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**KINGS COUNTY COMMITTEES****Kings County Gender Fairness Committee****Hon. Miriam Cyrulnik**

Kings County Supreme Court, Criminal

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**Kings County Civil Court Committee****Hon. Consuelo Mallafre**

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**Kings County Criminal Court Committee****Hon. Abena Darkeh**

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**QUEENS COUNTY COMMITTEES****Queens County, Supreme Court, Civil & Criminal  
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**Queens County Criminal Court Committee****Hon. Gia Morris**

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**STATEN ISLAND COMMITTEE****Hon. Barbara I. Panepinto, Co-Chair**

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**Hon. Karen A. Wolff, Co-Chair**

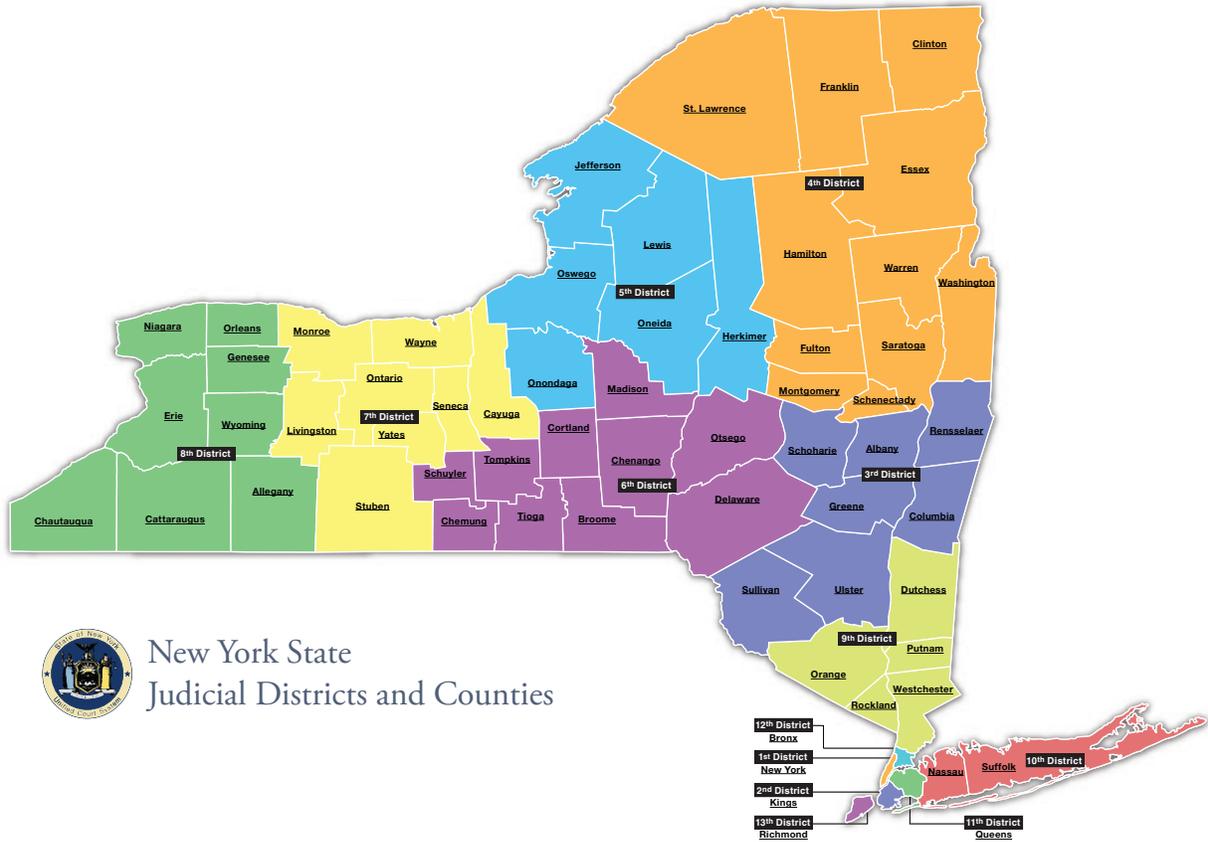
Richmond County Family Court

100 Richmond Terrace, Staten Island, NY 10301

718-675-8870

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# New York State Unified Court System Judicial District Map



New York State  
Judicial Districts and Counties

# Press Release and New York Law Journal Article



## PRESS RELEASE

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**New York State  
Unified Court System**

**Hon. Lawrence K. Marks  
Chief Administrative Judge**

**Contact:  
Lucian Chalfen, Public Information Director  
Arlene Hackel, Deputy Director  
(212) 428-2500**

[www.nycourts.gov/press](http://www.nycourts.gov/press)

**Date: November 13, 2018**

### **NYS Judicial Committee on Women in the Courts to Survey Attorneys, Including Judges and Nonjudicial Employees, Eliciting Their Insights on Gender Fairness in the New York State Courts**

**New York** – Some 32 years since the New York Task Force on Women in the Courts released its groundbreaking report on gender bias in the courts—based in part on the results of a survey soliciting attorneys’ experiences—the New York State Judicial Committee on Women in the Courts, an outgrowth of the Task Force, is conducting a new poll of lawyers, judges and court personnel to examine the progress made and work ahead in eliminating gender disparities in the courts.

The new poll builds on the original survey and other research conducted by the Task Force, which was established by the then Chief Judge of the New York State court system in 1984 in response to respected academic studies that questioned whether women were being fairly and justly treated in our nation’s court systems. The Task Force study focused primarily on three areas: the status and treatment of women litigants in various contexts including domestic violence and rape; the status and treatment of female attorneys; and the status and treatment of female court employees.

Following its comprehensive 22-month investigation, the Task Force reported “the pervasiveness of gender bias in our court system with grave consequences that denied women

equal justice, equal treatment and equal opportunity,” proposing specific recommendations for corrective action. The Committee was created to implement and monitor these reforms.

Led by the Hon. Betty Weinberg Ellerin (Alston & Bird LLP) and comprising a distinguished group that includes judges and attorneys from around the state, the Committee has worked vigorously to secure equal justice, treatment and opportunity in the courts: serving to establish a broad spectrum of educational programs for judges and court employees on gender and bias issues; promoting the recruitment of qualified women for senior management and other court positions that had traditionally been filled by males; and acting as a catalyst for the creation of specialized courts to help ensure equal justice in matrimonial matters and domestic violence cases, among other measures.

The group has also expanded upon the Task Force’s recommendations to address practical realities affecting women in the court setting, such as pay parity, sexual harassment, private lactation areas, and the intersection of prostitution with sex trafficking, with the latter spurring the establishment of a statewide network of human trafficking intervention courts.

More recently, the Committee members found themselves frequently engaged in discussion on the extent of the actual progress made in eradicating bias against women in the courts since the 1986 release of the Task Force report. These conversations led to a unanimous vote to conduct another survey to examine issues surrounding gender fairness in the courts, including further remedial steps to be taken.

The Committee has been working with experts to develop and distribute the survey, which will be emailed to a large, random sample of attorneys who have been admitted to practice law in New York State. Those attorneys selected will be able to complete the survey online. Their responses will be confidential and aggregated with others who respond. The Committee is also working with the State’s various bar associations to raise awareness about the survey and encourage attorneys, if selected, to participate.

The survey will address the experiences of attorneys and other court users. Some survey sections cover a broad range of experiences that may be encountered in the court system regardless of the survey participant’s practice area. Other sections ask about specific areas of practice and substantive law, such as family law, matrimonial law and criminal law.

Among the more general questions, the survey will query participants on whether and how gender affects courtroom interactions, the courthouse environment (sexual harassment) and

fee-generating appointments and assignments. The survey also contains questions regarding the availability and impact of courthouse children’s centers—where litigants and other court users can safely leave their children while they attend to court matters—baby-changing tables in public restrooms and lactation facilities.

Survey participants will be instructed to select the responses that best reflect their opinions based upon their own recent experiences or direct knowledge while handling matters in the New York State courts. At the end of each section, respondents will be given the opportunity to offer comments and suggestions.

“While we have come a long way in eliminating gender bias in the courts since the release of the Task Force’s seminal report, our work is not yet finished. We must continue, through study, education and reform, to open the doors of opportunity and tear down barriers to justice. This survey, combined with the many other efforts of the Committee, will help us identify and address the range of ongoing and emerging court-related concerns faced by women of diverse needs,” said Chief Judge Janet DiFiore.

“The New York State Judicial Committee on Women in the Courts has made tremendous strides over the past several decades to broaden opportunities for women in the courts and improve how women—whether court employees, attorneys, litigants, witnesses or other court users—are treated throughout the court system. I am grateful to Justice Ellerin and the Committee members for their ongoing efforts in the pursuit of justice for all and look forward to the survey findings and the reforms they will help spawn,” said Chief Administrative Judge Lawrence K. Marks.

“I believe the time is ripe for another survey, as the Committee looks to a new generation of attorneys for their insights—based on firsthand experiences and knowledge—to gauge the current state of gender fairness in the courts. The information to be gleaned from the survey will prove invaluable in guiding the Committee forward on the path to equal justice. In that regard, I want to especially thank the subcommittee that spearheaded this project, co-chaired by Court of Claims Judge Renee Minarik and retired Family Court Judge Marilyn O’Connor, both of Rochester, who worked tirelessly on the project, along with the other subcommittee members, including Judge Juanita Bing Newton, Dean of the New York Judicial Institute, Fern Schair, Vice Chair of the Committee, Westchester County Supreme Court Justice Terry Ruderman and attorneys Caroline Levy and Cheryl Zimmer, both of Suffolk County. Special thanks go to Charlotte Watson, Executive Director of the Committee, who has been of invaluable assistance to all of us,” said Justice Ellerin.

The survey will be administered online over a four to six-week period starting this month. It will take approximately 20 minutes to complete, depending on the attorney’s area of specialty. The Committee will begin to review the survey responses in the first quarter of 2019, followed by a preliminary report of findings and recommendations.

**NY LAW JOURNAL**  
Friday, Nov. 16, 2018  
p. 1, col. 3

## **OCA to Survey Attorneys About Sex Harassment, Gender Bias in Courts**

BY ANDREW DENNEY

More than 30 years since the release of a landmark report detailing pervasive discrimination against women in New York courts, an Office of Court Administration committee of judges and attorneys tapped to address bias issues is conducting a new survey to get a comprehensive look at gender fairness in the courts.

Starting this month, the New York State Judicial Committee on Women in the Courts will administer an online survey to a random sample of attorneys to see what progress has been made in eliminating gender bias in the courts and if there is more work to be done, according to a release from the OCA.

When conducting its survey on bias in the courts more than three decades ago, the task force that eventually gave rise to the women's committee focused its energies on assessing the treatment of women litigants, attorneys and court employees.

This time, the committee will focus on facility issues that affect female attorneys, such as making accommodations for lactation; and sexual harassment, said committee chairwoman Betty Weinberg Ellerin, a retired state Supreme Court justice who served on the Appellate Division, First Department and who is now senior counsel at Alston & Bird.

Over the past year, since the #MeToo movement has led to the ouster of powerful people in a wide array of institutions, sexual harassment and abuse has become a top priority in many workplaces.

New York's court system has not seen the kind of high-profile exits that have shaken up Hollywood and Washington, D.C., though as the Law Journal reported earlier this month, the court system, with more than 16,000 employees, has not gone without its own allegations of sexual misconduct.

Since the task force conducted its work in the mid-1980s, society has reframed its views of what is considered inappropriate behavior in the workplace.

"The fact is that in many instances the same kind of conduct maybe existed in the 80s," Ellerin said.

The women's committee is building off of work started by a task force created in 1984 at the behest of Sol Wachtler, then the chief judge of the state Court of Appeals, to study

how women are treated in the courts—as employees, judges, attorneys and litigants—and launched a 22-month investigation into the matter.

When the task force handed over its report in 1986, the picture it painted for what women endured in the court system was a dark one: bias against women was rampant, the report states, and women disproportionately faced a “climate of condescension, indifference and hostility.”

At the time, physical abuse was cited as the reason for divorces granted in almost 40 percent of cases, the report states. Yet some Family Court judges on the bench back then seemed underinformed about domestic violence. It was not uncommon for victims to be blamed for provoking attacks against them, and not to be believed that they were being abused unless their injuries were visible.

As for female attorneys, while their numbers were growing in the mid-1980s, with some reporting significant improvements in the way they’re treated, there was a “widespread perception” that judges, male attorneys and court employees did not treat female attorneys with the same dignity as their male counterparts.

The most commonly cited examples of inappropriate conduct toward female attorneys were being subjected to being addressed in familiar terms, comments about their appearance or sexual advances, according to the task force report.

“While we have come a long way in eliminating gender bias in the courts since the release of the task force’s seminal report, our work is not yet finished,” said Chief Judge Janet DiFiore in the news release. “We must continue, through study, education and reform, to open the doors of opportunity and tear down barriers to justice.”

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# Correspondence from Chief Judge Janet DiFiore and Justice Betty Weinberg Ellerin, Chair

From: Chief Judge Janet DiFiore <invites@mailers.surveygizmo.com>

To:

Subject: Survey on Gender Fairness in the New York State Courts

Dear Member of the New York State Bar:

Our courts have come a long way in promoting gender fairness since 1986 when the New York State Task Force on Women in the Courts issued a report concluding that “gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences.” Much of the progress we have made is attributable to the New York State Judicial Committee on Women in the Courts, which has worked tirelessly to promote equal justice, treatment and opportunity through educational programs and other measures designed to change attitudes, perceptions, laws and policies.

Now, more than three decades later, the Committee has developed a confidential online survey both to ascertain the actual progress we have made in eliminating gender bias and to identify the challenges that remain. I strongly encourage you to take a few minutes away from your busy schedule to complete this important survey. We rely on your prompt response within the next week. Your experiences and views will help us understand the extent to which gender bias remains a problem in our courts, and enable us to formulate appropriate solutions to guide us forward on the path to equal justice.

Please click [here](#) to begin the survey.

I thank you in advance for your cooperation.

Sincerely,

Janet DiFiore

Chief Judge of the State of New York

For more information regarding this survey, you may refer to:

Denny, A. (2018, Nov 15). Court System to Survey Attorneys About Sexual Harassment, Gender Bias in Courts. *New York Law Journal*, Retrieved from <https://www.law.com/newyorklawjournal/2018/11/15/court-system-to-survey-attorneys-about-sexual-harassment-gender-bias-in-courts/>

New York State Unified Court System. (2018, Nov 13). NYS Judicial Committee on Women in the Courts to Survey Attorneys, Including Judges and Nonjudicial Employees, Eliciting Their Insights on Gender Fairness in the New York State Courts [Press release]. Retrieved from [http://www.2.nycourts.gov/sites/default/files/document/files/2018-11/PR18\\_18.pdf](http://www.2.nycourts.gov/sites/default/files/document/files/2018-11/PR18_18.pdf)

## APPENDIX D

From: Hon. Betty Weinberg Ellerin <invites@mailersurveygizmo.com>  
To:  
Subject: Final Reminder: Survey on Gender Fairness in the New York State Courts

Dear Member of the New York State Bar:

If you practice in the New York state courts, I write as a final reminder to encourage you to complete the Attorney Survey on Gender Fairness in the Courts. If you have already completed the survey, please accept our gratitude. Your opinions and experiences are very important and are being sought at the highest levels of our judiciary. The beginning sections of the survey have been crafted to reflect an attorney survey from 1985 to allow us a means of measuring progress. Subsequent sections include new issues and focus on more practical considerations.

We know this a very busy time of year and ask that you please complete this fifteen-minute survey at your earliest convenience by clicking the link below. This link will expire by the end of the year. (We recognize that some of you do not practice in the New York state courts. If such is the case, please disregard this request.)

Please click here to begin the survey.

Again, thank you for your assistance. We wish you the very best holiday season.

Very truly yours,  
Hon. Betty Weinberg Ellerin, (ret.)  
Chair, NYS Judicial Committee on Women in the Courts

For more information regarding this survey, you may refer to:

Denny, A. (2018, Nov 15). Court System to Survey Attorneys About Sexual Harassment, Gender Bias in Courts. *New York Law Journal*, Retrieved from <https://www.law.com/newyorklawjournal/2018/11/15/court-system-to-survey-attorneys-about-sexual-harassment-gender-bias-in-courts/>

New York State Unified Court System. (2018, Nov 13). NYS Judicial Committee on Women in the Courts to Survey Attorneys, Including Judges and Nonjudicial Employees, Eliciting Their Insights on Gender Fairness in the New York State Courts [Press release]. Retrieved from [http://www2.nycourts.gov/sites/default/files/document/files/2018-11/PR18\\_18.pdf](http://www2.nycourts.gov/sites/default/files/document/files/2018-11/PR18_18.pdf)

# Views from Where You Sit: Attorney & Judicial Assessments of the Status of Women in the Courts 2017

## Summary

In 2017, the New York State Judicial Committee on Women in the Courts sought to determine the extent to which the issues examined in the 1986 Report of the New York State Task Force on Women in the Courts remained relevant. The Committee drafted an informal survey and distributed it electronically throughout local Gender Bias/ Gender Fairness Committees to determine the current status of the concerns raised originally. The survey received 203 responses from across 25 counties.

In the survey findings, the topics that remained of concern in March 2017 were ranked and used to guide development of an updated, more extensive survey than that deployed in 1985. While respondents noted in the comments that much progress had been made, it was clear from the comments and the ranking of the items that much remained to be done. Court interaction, violence against women, opportunities for advancement, women's credibility, and Children's Centers topped the list of concerns.

# Gender Survey

## Survey Methodology

The Committee worked with court administration professionals as well as experts in survey design to develop and administer a cost-effective online survey that would reliably capture the experiences and views of attorneys who practice in the New York State Unified Court System. To reach a broad spectrum of practicing attorneys, the survey methodology utilized the New York State Attorney Registration Data Base, which as of November 2018 had approximately 171,000 attorneys in “active or retired” status residing or with a place of business in New York, New Jersey, or Connecticut.

However, to administer the survey electronically via an online survey tool, the potential pool of survey participants included only those attorneys in the registration data base that had an email address on file. This resulted in a pool of 70,241 attorneys overall which included 61,075 attorneys from New York, as well as 7,022 from New Jersey and 2,144 from Connecticut, all locations where attorneys may reside and/or maintain a legal practice that involves the New York State Unified Court System. The final eligible pool of attorneys was further reduced to 67,862 after taking into consideration deliverable email addresses.

It is important to note that many attorneys who are registered in New York practice in a variety of workplace settings and courts outside the New York State Court System. Thus, it could not be determined in advance whether an attorney contacted to participate in the survey actually practiced and had direct knowledge and personal experience with the New York State Courts. To reach as many attorneys as possible with such experience, including capturing the experiences of attorneys working in different geographic regions and areas of practice, the invitation to participate in the survey was sent to all 67,862 attorneys or approximately 40% of the universe of active and retired attorneys registered in New York.

## Survey Administration

The Attorney Survey on Gender Bias in the New York State Courts was announced in a November 13, 2018 press release from the New York State Office of Court Administration. An article discussing the survey and the work of the New York State Judicial Committee on Women in the Courts appeared in the New York Law Journal published on November 16, 2018.

Invitations to participate in the survey were sent on behalf of Chief Judge Janet DiFiore to all 67,862 attorneys during the period November 14, 2018 to December 10, 2018. Each invitation contained a unique link to the survey which prevented multiple submissions. Survey participants were informed that their responses would be confidential and aggregated with others who respond. Two reminder emails followed the initial invitation; one from Chief Judge Janet DiFiore and one from Committee Chair Judge Betty Weinberg Ellerin. Each reminder email contained the same unique link to the online survey.

During early December the Committee contacted all Bar Associations statewide requesting they encourage their members who received an invitation to complete the survey and to check if their invitation may have been diverted to a spam folder due to their organizations IT structure, although this was rarely reported. The NYS Bar Association also sent the Notice to Bar Associations to their local bar association contacts statewide and included it in their weekly emails to members.

The survey submission period ended on January 21, 2019 with a total of 5,340 New York State registered attorneys having participated in the survey. As expected, varying numbers of attorneys responded to the different sections of the survey depending on their area of practice and the type of substantive law covered by the survey. Many attorneys submitted comments and made recommendations on the matters covered in the survey as well as other issues related to gender fairness such as work employment policies and working conditions, training and career opportunities, as well as specific challenges they encounter when representing their clients in cases in the New York State Courts.

The large sample of 5,340 attorneys responding to the survey, much greater than the 1,790 in 1985, enabled the research team to conduct extensive statistical analysis of the survey questions by various demographic variables and by different geographic regions within New York State. Although a very large pool of attorneys registered to practice in New York were invited to participate in the survey and chose not to, many of these attorneys may not regularly visit or even practice in the New York State Unified Court System. Furthermore, other factors that limit the survey response include a general reluctance of individuals to complete surveys, as well as, the extent to which the topic covered by the survey is of particular personal interest. For example, while more male attorneys responded to this survey overall, proportionally more female attorneys participated in this survey than would be expected based upon their relative composition among all attorneys registered in New York.

The estimates derived from the survey based upon a sampling of the population studied are accurate within a range of from 1 to 3 percent with 95% confidence depending on the subgroup studied. No differences were observed in the survey responses of those attorneys who responded after their first invitation of the survey compared to those responding after multiple follow-up communications, thus providing strong support for the stability of the findings.

### **Demographic Characteristics of Survey Respondents**

Nearly 75% of the survey participants also responded to the various demographic questions that were in the final section of the survey. These questions were designed to assess the degree to which the survey participants were representative of the larger pool of members of the New York Bar, as well as, to allow for further interpretation of the survey findings. [Appendix G](#) contains the complete array of participant demographic data collected on the survey.

## Representativeness of Survey Respondents

By examining the geographic location where attorneys practice as well as information on the number of years since being admitted to practice, a comparison was made between the survey participants and the larger pool of 70,241 attorneys who are registered to practice in New York and invited to participate in the survey. The table below shows these relevant comparisons. More upstate attorneys responded than those who practice in New York City. More older attorneys than younger attorneys and more female than male attorneys responded proportionally.

	Survey Respondents	Attorney Registration Database
<b>Practice Location</b>	(n=3,981)	(N=70,241)
New York State	94%	87%
Outside New York State	6%	13%
<b>NYS Practice Region</b>	(n=3616)	(N=70,241)
New York City - All Boroughs	52%	64%
Suburban:		
Judicial Districts 9, 10N, 10S	23%	21%
Upstate	25%	15%
<b>Years Since Admitted</b>	(n=3,995)	(N=70,241)
5 or less	11%	17%
6-10	12%	15%
11-15	10%	12%
16-20	10%	11%
21-25	11%	11%
Over 25	46%	34%

## Demographics

Approximately 94% reported that the location of their primary place of business or primary place of practice is in New York State. Among this group, approximately 52% practice in the New York City area with nearly 33% of these attorneys indicating that their practice is in New York County (Manhattan). In the larger New York City metropolitan area, Nassau and Suffolk Counties combined represented 14% and Westchester 6% of the attorney respondents. For the upstate areas, 6% of the attorneys indicated that they practice in Erie County and another 5% in Albany County.

When attorneys were asked about their employment in the past 3 years, 67% reported private practice, 20% government, 9% a public interest or not-for-profit organization, and 8% an in-house corporate setting. Among attorneys in private practice about a third (34%) reported being sole practi-

tioners and another 31% reported working in small firms of from 2-10 attorneys. Among government attorneys 37% worked for a public agency, 25% were prosecutors, and 6% worked in the role of public defender. Another 23% were UCS attorneys and 13% were judges.

Nearly three out of four attorneys (73%) reported being a member of a bar association, with many indicating that they held membership in multiple bar associations. Significant participation was found for the NYS Bar Association, various County Bar Associations, the New York City Bar, as well as a variety of other bar groups such as the NYS Trial Lawyers Association and various women's bar and minority bar associations.

Survey participants were asked how often they appeared in court or chambers within the New York State Unified Court System during the past three years. While 43% of the total sample reported having appeared either daily or weekly, a similar percent (44%) indicated that they appeared either monthly or a few times a year during this same three-year period. Another 13% reported not appearing in the New York Courts at all over the past three years but were still respondents to the survey.

Finally, equal numbers of both men (51%) and women (49%) responded to the survey. However, among each group there were a number of salient differences. Nearly 45% of female attorneys and only 22% of male attorneys reported being admitted to practice in the past 15 years. This pattern is also apparent when examining the age range of the survey participants. For example, 44% of the female respondents were less than 45 years of age as compared with only 19% of their male colleagues. Also, while 94% of the male respondents identified their race as White, for female respondents 89% identified as White and another 5% identified as Black, 4% Asian, and 2% two or more races. Regarding ethnicity, 3% of male respondents and 7% of female respondents identified as Hispanic or Latino. These demographics are consistent with the increasing participation of both women and minorities entering the legal profession.

# Survey Respondent Demographic Data

*Note: The section numbers in the tables below relate to the survey structure and will vary from the Gender Survey report section numbers.*

Gender	N	%
Female	1921	49%
Male	2017	51%
Unknown	1401	n/a

Age	Female		Male		Total	
	N	%	N	%	N	%
Under 35	316	17%	129	6%	450	11%
35-44	513	27%	254	13%	774	20%
45-54	442	23%	372	19%	828	21%
55-64	456	24%	615	31%	1088	27%
Over 65	185	10%	636	32%	837	21%

## Number of years admitted to practice law in New York

Years	Female		Male		Total	
	N	%	N	%	N	%
5 or less	273	14%	141	7%	422	11%
6-10	333	17%	150	8%	487	12%
11-15	257	13%	146	7%	408	10%
16-20	226	12%	180	9%	414	10%
21-25	231	12%	206	10%	445	11%
Over 25	597	31%	1185	59%	1819	46%

## During the past three years, how often have you appeared in court or chambers within the New York State Unified Court System?

	Female		Male		Total	
	N	%	N	%	N	%
Daily	398	21%	299	15%	706	18%
Weekly	498	26%	484	24%	1003	25%
Monthly	355	19%	384	19%	749	19%
Few times a year	438	23%	532	27%	985	25%
Not at all	215	11%	304	15%	531	13%

APPENDIX G

Race	Female		Male		Total	
	N	%	N	%	N	%
American Indian	2	0%	5	0%	7	0%
Asian	75	4%	28	1%	103	3%
Black	86	5%	42	2%	129	3%
Native Hawaiian Pacific Islander	2	0%	2	0%	4	0%
White	1601	89%	1773	94%	3422	92%
Two or More	37	2%	33	2%	71	2%

Ethnicity	Female		Male		Total	
	N	%	N	%	N	%
Not Hispanic	1792	93%	1951	97%	3839	95%
Hispanic	128	7%	67	3%	196	5%

**What is the location of your primary place of business or primary place of practice?**

	Female		Male		Total	
	N	%	N	%	N	%
New York State	1824	96%	1846	92%	3736	94%
Outside New York State	84	4%	156	8%	245	6%

**Judicial District**

	N	%
1	1196	33%
2	286	8%
3	221	6%
4	76	2%
5	150	4%
6	69	2%
7	143	4%
8	249	7%
9	339	9%
10N	283	8%
10S	207	6%
11	195	5%
12	158	4%
13	44	1%

**Most Populated Counties**

	N	%
New York County (Manhattan)	1196	33%
Kings County (Brooklyn)	286	8%
Nassau County	283	8%
Erie County	209	6%
Suffolk County	207	6%
Westchester County	217	6%
Queens County	195	5%
Albany County	170	5%
Bronx County	158	4%
Monroe County	108	3%
Onondaga County	105	3%

**Are you a member of a Bar Association?**

	N	%
Yes	2883	73%
No	1055	27%

**Employment during the last three years (select all that apply)**

	Female		Male		Total	
	N	%	N	%	N	%
Private Practice	1163	61%	1509	75%	2717	67%
<b># of Attorneys in Firm (Only for those who selected 'Private Practice')</b>						
One - Self	341	30%	564	38%	923	34%
2-10	375	33%	454	31%	842	31%
11-40	182	16%	196	13%	385	14%
41-70	64	6%	61	4%	125	5%
Over 70	190	17%	214	14%	411	15%
Corpo- rate/In-House	144	8%	168	8%	317	8%
Government	473	25%	307	15%	794	20%

**Employment during the last three years (select all that apply)**

	Female		Male		Total	
	N	%	N	%	N	%
<b>Role in Government (Only for those who selected 'Government')</b>						
Unified Court System Attorney	119	26%	60	20%	179	23%
Unified Court System Judge	49	11%	46	15%	98	13%
Public Defender	28	6%	20	7%	49	6%
Prosecutor	111	25%	70	24%	186	25%
Public Agency	169	38%	109	37%	281	37%
Public Interest/Nonprofit	275	14%	87	4%	368	9%
Law School Faculty or Administrator	34	2%	27	1%	64	2%
Retired	27	1%	76	4%	104	3%
Not Currently Employed	5	0%	11	1%	16	0%

**Bar Association Memberships**

	N	%
NYS Bar Association	1913	66%
County Bar	1305	45%
New York City Bar	573	20%
Women's Bar of NYS	335	12%
County Women's Bar	296	10%
American Bar Association	241	8%
NYS Trial Lawyers Association	231	8%
Out of State Bar	76	3%
Federal Bar Associations	56	2%
Ethnic Bar Associations	52	2%
LGBTQ-Related Bar Associations	18	0.6%
Local Bar Associations	11	0.4%

# Survey Questions and Response Data

*Note: The section numbers in the tables below relate to the survey structure and will vary from the body of the Gender Survey report section numbers.*

## I. Credibility and Court Interaction

			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1a	Male judges appear to give more credibility to the statements/ arguments of male attorneys than to those of female attorneys	F	6.4	24.8	17.5	36.0	15.2
		M	34.4	39.2	13.3	10.9	2.3
1b	Male judges appear to give more credibility to the testimony of male witnesses than to that of female witnesses	F	7.4	29.0	36.8	19.9	6.9
		M	38.6	38.7	16.5	5.1	1.0
1c	Female judges appear to give more credibility to the statements/ arguments of male attorneys than to those of female attorneys	F	8.8	36.0	26.1	22.0	7.2
		M	36.2	43.3	13.3	5.5	1.6
1d	Female judges appear to give more credibility to the testimony of male witnesses than to that of female witnesses	F	9.6	37.9	36.8	12.2	3.5
		M	38.5	42.0	15.6	2.8	1.0
1e	Male judges appear to give less credibility to female expert witnesses than to male expert witnesses	F	8.7	28.5	38.5	18.4	5.8
		M	37.5	37.7	17.9	5.5	1.3
1f	Female judges appear to give less credibility to female expert witnesses than to male expert witnesses	F	10.4	35.2	41.2	11.1	2.1
		M	38.1	39.7	17.6	3.5	1.1
1g	Male judges appear to impose a greater burden of proof on female litigants than on male litigants	F	8.5	32.2	24.7	24.8	9.9
		M	41.7	39.9	12.7	4.4	1.3
1h	Female judges appear to impose a greater burden of proof on female litigants than on male litigants	F	9.7	36.3	31.6	16.1	6.4
		M	41.5	40.3	13.6	3.5	1.1

## I. Credibility and Court Interaction

			Never	Rarely	Some-times	Often	Very Often
2	Judges intervene to correct any negative conduct toward women	F	19.9	40.8	31.5	5.3	2.5
		M	5.8	23.5	45.3	14.9	10.5
3	Attorneys intervene to correct any negative conduct toward women	F	19.3	43.9	30.5	5.0	1.3
		M	5.5	31.2	44.7	11.9	6.7
5a	Female attorneys are addressed by first names or terms of endearment while male attorneys are addressed by surname or title, by judges	F	25.4	34.0	26.4	8.9	5.3
		M	50.6	33.2	14.1	1.5	0.5
5b	Female attorneys are addressed by first names or terms of endearment while male attorneys are addressed by surname or title, by attorneys	F	11.1	20.3	36.7	19.3	12.6
		M	35.4	33.3	24.7	5.3	1.3
5c	Female attorneys are addressed by first names or terms of endearment while male attorneys are addressed by surname or title, by non-judicial personnel	F	17.5	27.8	29.9	14.5	10.2
		M	40.2	32.6	21.8	4.1	1.4
6a	Female attorneys experience unwelcome physical contact by judges	F	65.0	24.9	9.1	0.8	0.2
		M	78.3	17.9	3.6	0.1	0.1
6b	Female attorneys experience unwelcome physical contact by attorneys	F	28.9	25.5	35.5	6.5	3.6
		M	56.5	25.0	15.8	2.3	0.4
6c	Female attorneys experience unwelcome physical contact by non-judicial personnel	F	50.8	26.6	17.3	3.1	2.2
		M	67.8	21.5	9.2	1.3	0.2
7a	Female attorneys experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by judges	F	41.5	28.6	23.2	4.5	2.2
		M	60.1	26.9	11.6	1.1	0.3
7b	Female attorneys experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by attorneys	F	13.4	19.6	43.8	14.0	9.2
		M	36.5	30.9	27.4	4.0	1.2
7c	Female attorneys experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by non-judicial personnel	F	33.6	26.3	28.1	7.6	4.4
		M	51.3	26.7	18.6	2.6	0.8

## I. Credibility and Court Interaction

		Never	Rarely	Some- times	Often	Very Often	
8a	Female litigants and/or witnesses are addressed by first names or terms of endearment while male litigants and/or witnesses are addressed by surname or title, by judges	F	39.6	29.4	23.5	5.3	2.2
		M	62.9	26.9	9.1	0.6	0.5
8b	Female litigants and/or witnesses are addressed by first names or terms of endearment while male litigants and/or witnesses are addressed by surname or title, by attorneys	F	20.9	24.8	37.8	11.8	4.7
		M	48.5	31.7	17.8	1.7	0.4
8c	Female litigants and/or witnesses are addressed by first names or terms of endearment while male litigants and/or witnesses are addressed by surname or title, by non-judicial personnel	F	34.4	28.0	27.3	7.3	3.0
		M	57.6	28.0	12.3	1.6	0.6
9a	Female litigants and/or witnesses experience unwelcome physical contact by judges	F	75.1	21.1	3.4	0.3	0.0
		M	84.0	14.3	1.7	0.0	0.1
9b	Female litigants and/or witnesses experience unwelcome physical contact by attorneys	F	51.2	27.6	17.7	2.2	1.2
		M	70.9	21.7	6.5	0.6	0.3
9c	Female litigants and/or witnesses experience unwelcome physical contact by non-judicial personnel	F	62.8	24.8	10.4	1.2	0.9
		M	76.3	18.3	4.7	0.4	0.3
10a	Female litigants and/or witnesses experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by judges	F	50.1	28.3	18.0	2.3	1.3
		M	68.8	23.1	7.7	0.3	0.1
10b	Female litigants and/or witnesses experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by attorneys	F	25.8	23.7	36.5	9.4	4.6
		M	49.1	31.3	17.7	1.6	0.3
10c	Female litigants and/or witnesses experience inappropriate or offensive verbal comments (including about personal appearance), jokes, or obscene gestures by non-judicial personnel	F	41.3	26.7	23.0	6.0	3.0
		M	59.8	24.7	13.9	1.5	0.2

**II. Courthouse Environment**

			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
11a	I know how, when, and where to report a sexual harassment claim related to misconduct in a NYS Unified Court System facility	F	19.7	40.1	9.1	23.0	8.0
		M	11.2	28.7	11.1	34.9	14.0
11b	Adequate information is provided to all court users in a courthouse regarding to whom to report a sexual harassment claim related to misconduct in that courthouse	F	26.4	49.5	12.9	8.7	2.5
		M	14.2	36.6	21.0	19.9	8.4
11c	The Court website provides adequate information to all court users regarding to whom to report a sexual harassment claim related to misconduct in a courthouse	F	16.6	26.9	29.5	22.2	4.8
		M	6.7	17.5	26.2	35.4	14.2
11d	A court user who has experienced sexual harassment would be more likely to report a claim if s(he) could do so anonymously	F	2.4	1.9	6.6	41.4	47.8
		M	3.4	2.7	10.3	50.4	33.2
11e	I have experienced or observed work-related threats or promises of rewards in order to solicit sexual favors in the court environment	F	59.8	25.3	5.9	6.3	2.8
		M	78.5	15.5	2.7	1.7	1.6

**III. Fee-Generating Appointments and Assignments****13. I am eligible for: (check all that apply)**

	Female		Male	
	N	%	N	%
appointments under Part 36 of the Rules of the Chief Judge	258	14%	305	15%
assignments under County Law Article 18-B	158	8%	206	10%
not applicable	1,558	83%	1,573	80%

**14. Has a judge appointed you to a fee-generating case within the last three years?**

	Female		Male	
	N	%	N	%
Yes	168	65%	172	57%
No	90	35%	128	43%

APPENDIX H

15. For each of the following Part 36 categories, how many appointments have you received in the last three years?

	None		1-2		3-4		5 or more	
	N	%	N	%	N	%	N	%
<b>Guardian</b>								
Female	71	60%	26	22%	10	8%	12	10%
Male	73	65%	22	20%	7	6%	10	9%
<b>Guardian Ad Litem</b>								
Female	46	37%	30	24%	31	25%	18	14%
Male	60	48%	26	21%	21	17%	17	14%
<b>Attorney for the Child (Privately Paid)</b>								
Female	83	70%	13	11%	6	5%	17	14%
Male	96	88%	5	5%	1	1%	7	6%
<b>Court Evaluator</b>								
Female	68	55%	20	16%	19	15%	16	13%
Male	67	58%	27	24%	15	13%	6	5%
<b>Attorney for Alleged Incapacitated Person</b>								
Female	72	60%	31	26%	9	8%	8	7%
Male	72	63%	29	25%	12	11%	1	1%
<b>Court Examiner</b>								
Female	102	90%	0	0%	1	1%	10	9%
Male	92	87%	5	5%	3	3%	6	6%
<b>Supplemental Needs Trustee</b>								
Female	101	91%	9	8%	1	1%	0	0%
Male	95	93%	5	5%	2	2%	0	0%
<b>Receiver</b>								
Female	100	89%	10	9%	1	1%	1	1%
Male	83	78%	19	18%	3	3%	1	1%
<b>Referee</b>								
Female	56	40%	20	14%	18	13%	46	33%
Male	31	21%	29	19%	25	17%	66	44%
<b>Counsel</b>								
Female	93	83%	10	9%	1	1%	8	7%
Male	82	77%	16	15%	4	4%	5	5%

**16. Where the amount of the fee awarded falls within judicial discretion, how many appointments have you received in the last three years?**

	Female		Male	
	N	%	N	%
None	38	23%	51	30%
1-2	30	18%	40	23%
3-5	38	23%	33	19%
5 or more	60	36%	47	28%

**III. Fee-Generating Appointments and Assignments**

			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	DNK
17	Judges more often appoint male attorneys to more lucrative cases than female attorneys	F	5.4	7.8	12.8	22.1	15.9	36.0
		M	26.6	13.8	10.5	3.9	0.7	44.6
18	When the fee awarded falls within judicial discretion, female attorneys are more often awarded lower attorney fees by the court than male attorneys for similar work	F	5.8	10.1	11.7	18.7	7.8	45.9
		M	27.9	11.8	7.2	1.3	0.3	51.5
21	Female attorneys on assigned panels are assigned more often to represent women and/or children than are male attorneys on such panels	F	15.3	16.6	16.6	12.1	5.7	33.8
		M	22.9	17.1	11.2	9.8	2.4	36.6
22	Female attorneys on assigned panels receive fewer violent felony assignments than male attorneys on such panels	F	5.8	9.0	9.6	12.2	11.5	51.9
		M	18.9	13.1	7.3	5.8	1.0	53.9
23	Female attorneys on assigned panels receive more assignments of rape and other sex crime cases than male attorneys on such panels	F	6.3	15.8	15.8	2.5	1.3	58.2
		M	18.7	14.3	9.4	3.0	0.0	54.7
24	When the assignment is within the judge's discretion, male attorneys are more often selected than female attorneys for a similar assignment	F	7.0	13.4	12.1	15.9	10.8	40.8
		M	30.1	14.1	9.7	6.3	1.5	38.3

## IV. Family Court: Domestic Violence

		Never	Rarely	Sometimes	Often	Very Often	
27a	Potential domestic violence complainants are discouraged by law enforcement or probation from seeking Orders of Protection	F	10.8	25.7	39.5	12.6	11.4
		M	28.0	37.6	28.0	4.4	2.0
27b	Potential domestic violence complainants are discouraged by non-judicial personnel from seeking Orders of Protection	F	24.2	33.2	32.9	6.4	3.4
		M	43.4	35.7	17.6	2.7	0.5
27c	When responding to a domestic violence call, law enforcement encourages the use of Family Court over Criminal Court	F	1.8	6.4	30.0	30.0	31.8
		M	10.6	14.3	37.0	24.3	13.8
27d	Family Court petitioners are granted <i>ex parte</i> temporary Orders of Protection when warranted	F	0.5	0.5	21.1	34.9	43.0
		M	0.7	0.3	12.2	28.0	58.7
27e	When a Family Court Temporary Order of Protection is granted, the court directs the sheriff or local law enforcement to serve the Order on the respondent	F	3.5	5.4	16.9	24.8	49.3
		M	2.0	5.5	15.2	21.5	55.9
27f	There is a safe place within the courthouse where the alleged domestic violence victim can wait for the case to be called	F	13.4	22.7	23.0	13.4	27.6
		M	7.7	11.9	17.0	17.4	46.0
27g	When alleging a family offense in a petition for an Order of Protection, petitioners are asked why they have no visible injuries	F	30.6	24.5	35.4	5.7	3.8
		M	35.6	27.7	25.7	7.3	3.7
27h	Family Court will grant a Temporary Order of Protection when there is a pending matrimonial action	F	1.2	10.3	46.4	24.6	17.4
		M	2.6	8.8	31.3	24.7	32.6
27i	Temporary or Final Orders of Protection directing respondents to stay away from the home are granted when petitioners are endangered and seek such relief	F	0.3	2.0	26.6	31.6	39.6
		M	0.3	1.7	13.4	27.2	57.2
27j	The terms of the Temporary or Final Order of Protection are clearly read into the record by the judge or other issuing authority	F	3.1	12.7	22.5	27.6	34.1
		M	1.1	7.0	18.5	24.4	49.1

## IV. Family Court: Domestic Violence

		Never	Rarely	Sometimes	Often	Very Often	
27k	Bilingual Court Orders of Protection are available and used when appropriate	F	11.1	15.8	24.5	20.9	27.7
		M	4.0	11.4	15.9	23.3	45.5
27l	When a petitioner is out of the family home because of domestic violence, judges also will issue an Order of Exclusion against respondent when such relief is sought	F	14.7	21.6	30.9	18.3	14.4
		M	2.5	13.1	29.1	23.6	31.7
27m	When a petitioner seeks a Temporary Order of Protection, the judge inquires whether the petitioner is also seeking a Temporary Order of Support	F	29.4	41.6	18.4	6.9	3.8
		M	16.7	29.0	32.1	13.6	8.6
27n	When a Temporary Order of Protection is granted, provision is made for the safety of the alleged victim in the courthouse upon the return appearance date	F	27.2	36.7	20.1	9.5	6.6
		M	11.0	22.4	24.1	19.7	22.8
27o	Mutual Orders of Protection are issued in cases involving a family offense	F	6.3	22.6	53.8	12.5	4.9
		M	9.3	28.4	47.4	12.7	2.2
27p	Mutual Orders of Protection are effective in family offense cases	F	16.2	26.9	42.9	10.1	3.9
		M	7.5	15.8	50.2	15.4	11.1
27q	Violating an Order of Protection results in incarceration	F	6.5	42.3	36.3	9.0	6.0
		M	0.7	25.2	48.6	17.7	7.8

## IV. Family Court: Custody, Support and Visitation

		Never	Rarely	Sometimes	Often	Very Often	
29a	Custody awards disregard father's violence against mother	F	10.2	28.8	40.8	13.5	6.6
		M	28.8	45.3	19.1	5.0	1.8
29b	Custody awards disregard mother's violence against father	F	8.9	29.2	43.4	12.6	5.8
		M	16.8	28.7	31.9	8.6	14.0
29c	Father's violence against mother is a determining factor in who is awarded custody	F	1.2	9.9	55.2	20.8	12.9
		M	1.1	6.0	44.0	24.8	24.1
29d	Mother's violence against father is a determining factor in who is awarded custody	F	1.5	19.1	54.7	15.8	8.9
		M	5.8	25.6	43.7	15.2	9.7
29e	Support awards to domestic violence victims and their children are enforced	F	0.6	9.0	40.8	28.9	20.8
		M	1.1	2.3	24.4	32.1	40.1
29f	A request for supervised visitation is refused or ignored in a case where a family offense has been alleged	F	7.2	30.3	46.0	11.6	4.9
		M	10.6	38.1	40.7	8.4	2.2
29g	In my jurisdiction, free, neutral, supervised visitation services are available	F	24.3	24.9	27.2	10.8	12.7
		M	14.9	21.7	27.7	17.3	18.5
29h	There is adequate capacity at neutral supervised visitation programs available in my jurisdiction	F	29.7	33.7	22.4	9.9	4.4
		M	15.4	29.4	26.2	18.2	10.7
29i	The supervised visitation program(s) staff in my jurisdiction have adequate knowledge and experience regarding domestic violence	F	7.7	16.1	31.8	23.1	21.3
		M	5.0	10.0	30.6	30.6	23.9
29j	Judges consider who pays for the supervision as a factor in deciding to grant an order for supervised visitation	F	13.9	23.7	39.1	17.4	6.0
		M	19.6	23.3	37.0	11.4	8.7
29k	In my jurisdiction, there are readily available safe exchange services where a petitioner/plaintiff and respondent can safely meet visitation requirements	F	17.1	31.6	25.6	16.5	9.1
		M	9.7	21.1	27.8	24.2	17.2

## IV. Family Court: Child Support

		Never	Rarely	Sometimes	Often	Very Often	
31a	Child support awards deviate from the presumptive Child Support Standards Act amount	F	1.1	26.2	55.0	12.7	5.0
		M	3.6	34.3	47.7	9.4	5.1
31b	When child support awards deviate from the presumptive Child Support Standards Act amount, they are lower than the presumptive amount	F	5.4	17.9	46.9	18.8	11.0
		M	3.5	22.0	48.6	18.9	6.9
31c	Child support is awarded on income above the income cap	F	3.6	21.1	42.9	21.8	10.6
		M	0.8	14.9	46.3	20.4	17.6
31d	Judges order the parties to share equally add-on expenses, such as child care, unreimbursed medical and educational expenses, etc., notwithstanding a disparity in the parties' income	F	6.4	33.4	38.4	15.1	6.7
		M	9.7	34.3	41.4	9.3	5.2
31e	In Supreme Court, pendente lite orders of child support in a matrimonial action are decided within 30 days of final submission	F	10.2	31.3	37.7	12.8	7.9
		M	4.6	26.5	30.6	21.5	16.9
31f	When ordering maintenance under the statutory guidelines, judges order a downward modification of child support paid to the custodial parent	F	5.4	23.6	45.9	18.1	6.9
		M	5.3	27.9	51.0	11.1	4.8
31g	Courts effectively enforce child support awards	F	1.6	15.7	44.8	23.4	14.6
		M	1.8	9.4	31.7	30.9	26.3
31h	Income execution orders issued by the court are effective	F	0.6	8.1	36.2	33.2	21.9
		M	1.2	3.9	32.3	34.3	28.3
31i	Respondents who intentionally fail to abide by court orders for child support are jailed for civil contempt	F	8.9	41.9	33.8	8.1	7.3
		M	3.6	38.5	38.9	10.5	8.4
31j	The court has services available to assist respondents in fulfilling child support obligations	F	23.8	37.6	26.2	7.1	5.3
		M	14.7	28.4	24.0	21.1	11.8

## V. Equitable Distribution &amp; Maintenance

		Never	Rarely	Sometimes	Often	Very Often	
33a	The Maintenance Guidelines adversely impact the non-monied spouse in a divorce where the combined income for a family of four is below the poverty line (\$25,000)	F	8.8	18.4	32.0	17.0	23.8
		M	13.2	20.8	28.9	20.1	17.0
33b	The Maintenance Guidelines adversely impact the non-monied spouse in a divorce where the combined income for a family of four is low income (\$25,000 - \$60,000)	F	5.7	13.8	43.4	19.5	17.6
		M	10.9	18.8	38.8	17.6	13.9
33c	The Maintenance Guidelines adversely impact the non-monied spouse in a divorce where the combined income for a family of four is middle income (\$60,000 - \$150,000)	F	4.6	15.0	46.2	22.0	12.1
		M	11.7	24.6	47.4	7.6	8.8
33d	The Maintenance Guidelines adversely impact the non-monied spouse in a divorce where the combined income for a family of four is higher income (more than \$150,000)	F	7.7	24.9	39.8	14.4	13.3
		M	16.8	31.2	33.5	11.6	6.9
34a	Judges deviate from the maintenance guidelines and adjust awards on income up to the cap (\$184,000) when a party establishes the award is unjust or inappropriate and requests an adjusted amount	F	2.4	17.3	58.7	15.9	5.8
		M	2.1	18.4	56.8	16.8	5.8
34b	Judges award maintenance to be paid on the payor's income that exceeds the cap (\$184,000)	F	6.0	25.1	48.2	14.1	6.5
		M	1.6	15.9	59.3	17.6	5.5
34c	Judges divide the assets equally, including business assets	F	1.7	22.8	47.4	19.4	8.6
		M	1.4	11.1	44.4	30.9	12.1
34d	In cases where the marriage is 20 years or more, nondurational (permanent) maintenance is ordered	F	11.9	42.0	36.3	8.8	0.9
		M	3.2	31.9	49.5	12.2	3.2
34e	In cases where the non-monied spouse has limited work skills and employability, nondurational maintenance is ordered	F	12.2	38.7	39.6	6.3	3.2
		M	4.6	21.1	53.6	16.0	4.6

## V. Equitable Distribution &amp; Maintenance

		Never	Rarely	Sometimes	Often	Very Often	
34f	The durational period realistically provides support for a non-monied spouse who has been out of the workforce for an extended period, including by reason of raising the family's children	F	4.4	27.2	49.1	15.4	3.9
		M	0.5	18.1	45.2	26.1	10.1
34g	In cases where durational maintenance is ordered, the court grants maintenance for the time periods indicated in the ranges of the Advisory Chart DRL 236B(6)(f)	F	0.5	5.4	42.9	39.9	11.3
		M	0.0	1.7	27.8	47.2	23.3
35a	When the duration is within the Advisory Chart range, it is set at the low end	F	0.5	11.1	50.8	25.9	11.6
		M	2.4	17.7	68.3	6.7	4.9
35b	When the duration is within the Advisory Chart range, it is set at the middle	F	0.5	4.7	58.3	25.0	11.5
		M	0.6	1.2	56.3	30.5	11.4
35c	When the duration is within the Advisory Chart range, it is set at the high end	F	6.9	44.1	45.2	3.2	0.5
		M	1.2	22.1	68.1	4.9	3.7
36a	Judges depart from the Advisory Chart ranges when the facts warrant	F	1.0	19.5	58.0	14.5	7.0
		M	1.1	10.6	59.3	24.9	4.2
36b	Judges impute income to the spouse who has been out of the work force for an extended period to raise the child(ren) when calculating maintenance and child support	F	4.4	15.6	38.7	26.2	15.1
		M	4.8	22.3	48.9	17.0	6.9

## VI. Criminal Court: Domestic Violence

		Never	Rarely	Sometimes	Often	Very Often	
38a	Potential domestic violence complainants are discouraged by law enforcement or probation from seeking Orders of Protection in Criminal Courts	F	25.0	34.2	25.4	9.6	5.9
		M	41.8	36.4	16.2	4.0	1.7
38b	Potential domestic violence complainants are discouraged by non-judicial personnel from seeking Orders of Protection in Criminal Courts	F	31.1	38.6	17.8	9.1	3.3
		M	49.0	34.0	13.1	3.3	0.7
38c	Complainants in criminal cases are granted <i>ex parte</i> Orders of Protection when warranted	F	6.4	10.1	20.8	25.5	37.2
		M	3.2	4.3	14.2	27.3	50.9
38d	The terms of the Temporary or Final Order of Protection are clearly read into the record by the judge or other issuing authority	F	1.5	12.3	27.0	25.8	33.3
		M	2.5	9.1	16.9	23.2	48.2
38e	Complainants in criminal cases are asked why they have no visible injuries	F	26.6	26.6	31.8	6.9	8.0
		M	32.1	25.9	27.6	8.2	6.2
38f	When a Temporary Order of Protection is granted, provision is made for the safety of the alleged victim in the courthouse upon the return appearance date	F	24.3	31.8	24.7	11.7	7.5
		M	8.9	28.7	25.3	15.7	21.5
38g	Violating an Order of Protection results in incarceration	F	2.8	23.6	44.2	16.2	13.1
		M	0.2	14.2	48.0	20.3	17.2
38h	District Attorneys will prosecute domestic violence complaints	F	0.0	5.1	17.2	25.1	52.7
		M	0.0	1.4	14.0	22.1	62.4
38i	District Attorneys will prosecute domestic violence cases without the victim's cooperation	F	2.9	16.1	35.7	19.9	25.4
		M	2.2	18.2	36.7	23.9	19.0

## VI. Criminal Court: Rape and Other Sex Crimes

			Never	Rarely	Sometimes	Often	Very Often
40a	Bail in rape and other sex crime cases is set lower than that of other felonies in the same class	F	24.5	39.8	28.6	4.8	2.2
		M	40.8	43.1	11.4	3.6	1.0
40b	Bail in rape and other sex crime cases where parties know one another is set lower than in cases where parties are strangers	F	9.9	22.4	35.7	20.2	11.8
		M	16.5	22.2	42.8	14.5	4.0
40c	Sentences in rape and other sex crime cases are shorter when parties know one another than in cases where parties are strangers	F	6.7	16.5	42.4	19.6	14.9
		M	13.8	27.6	40.4	13.8	4.4
40d	Rape in the context of marriage is addressed with the same severity as rape outside of marriage	F	11.9	39.4	24.8	13.3	10.6
		M	6.3	31.1	30.7	17.7	14.2
40e	When there is improper questioning about the complainant's prior sexual conduct, judges invoke the rape shield law sua sponte if the prosecutor does not	F	5.0	20.6	32.2	17.8	24.4
		M	1.7	10.5	28.5	25.5	33.9
41a	There is less concern about rape cases where parties have a current or past relationship/acquaintance on the part of judges	F	14.1	17.8	23.2	34.1	10.9
		M	32.6	27.6	19.3	17.1	3.4
41b	There is less concern about rape cases where parties have a current or past relationship/acquaintance on the part of prosecutors	F	19.4	26.6	14.5	31.1	8.3
		M	34.3	30.7	14.0	17.0	4.0
41c	There is less concern about rape cases where parties have a current or past relationship/acquaintance on the part of jurors	F	4.3	8.2	19.6	43.5	24.3
		M	16.8	15.4	23.4	33.6	10.8
42a	In prostitution cases, judges treat the john or patron with less severity than the prostituted person	F	7.1	18.6	10.0	34.9	29.4
		M	20.4	21.4	15.8	31.9	10.5
42b	In prostitution cases, prosecutors treat the john or patron with less severity than the prostituted person	F	10.3	23.4	10.3	28.2	27.8
		M	21.6	25.5	16.3	28.0	8.5
42c	In prostitution cases, law enforcement treats the john or patron with less severity than the prostituted person	F	6.5	18.6	10.3	30.8	33.8
		M	18.2	21.5	16.4	32.1	11.7

## VII. Negligence &amp; Personal Injury

			Never	Rarely	Sometimes	Often	Very Often
44a	Males receive higher awards than females for pain and suffering from judges	F	11.1	23.7	41.5	15.9	7.7
		M	43.7	28.9	23.0	2.9	1.5
44b	Males receive higher awards than females for pain and suffering from juries	F	8.8	21.3	41.0	19.2	9.6
		M	35.2	28.5	30.0	3.7	2.6
45a	Husbands receive higher awards than wives for loss of consortium from judges	F	11.7	28.3	32.8	18.9	8.3
		M	41.1	33.2	22.4	2.3	1.0
45b	Husbands receive higher awards than wives for loss of consortium from juries	F	10.3	21.5	37.9	20.5	9.7
		M	33.7	34.3	26.8	3.0	2.1
46a	Females receive higher awards than males for disfigurement from judges	F	3.5	9.6	46.1	27.2	13.6
		M	10.1	6.6	29.1	31.0	23.3
46b	Females receive higher awards than males for disfigurement from juries	F	2.6	4.9	42.5	32.3	17.7
		M	6.4	5.0	23.3	35.7	29.5
47a	Female homemakers receive lower awards than males who work outside the home from judges	F	2.6	5.7	32.5	36.0	23.2
		M	15.3	10.5	43.1	20.1	11.0
47b	Female homemakers receive lower awards than males who work outside the home from juries	F	1.9	4.5	26.9	41.3	25.4
		M	12.1	10.6	39.3	26.4	11.6

## VIII. Court Facilities

			Yes	No			
49	In the courthouse where I primarily practice, there is a Children's Center	F	36.4	63.6			
		M	40.6	59.4			
			Never	Rarely	Some-times	Often	Very Often
50	Litigants will leave a child in a Children's Center located in a court facility different from the facility where their case is being heard	F	52.1	20.6	16.7	6.2	4.4
		M	41.5	23.7	20.1	7.4	7.4
51	In the courthouse where I practice, the Children's Center will not accept children of litigants with cases being heard in a different courthouse	F	36.2	8.6	7.8	8.6	38.8
		M	41.8	15.2	11.4	7.6	24.1
			Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
52	Having a Children's Center available improves or would improve the calendaring of cases	F	3.3	2.3	10.6	40.6	43.3
		M	5.2	5.5	15.3	48.3	25.6
53a	Litigants are informed about the existence of and how to access the children's center	F	6.9	21.2	11.2	43.8	16.9
		M	5.8	14.5	14.0	44.2	21.5
53b	The Center's capacity is sufficient	F	13.1	35.7	13.6	28.6	9.0
		M	5.3	26.3	23.3	28.6	16.5
53c	The Center's hours of operation are sufficient	F	14.3	28.6	16.1	33.5	7.6
		M	6.8	26.4	14.2	36.5	16.2
53d	The Center is flexible as to when the child(ren) can be left and picked up	F	18.9	30.0	21.6	22.1	7.4
		M	6.8	24.8	19.7	30.8	17.9
53e	Children's Centers in family courts will admit children of non-family court litigants	F	43.2	33.9	11.0	11.0	0.8
		M	22.8	29.8	14.0	15.8	17.5
53f	The Center is adequately staffed	F	7.9	19.1	25.7	38.8	8.6
		M	5.1	16.2	23.2	42.4	13.1
53g	The Center is sufficiently set up for a broad age range of children	F	10.3	16.1	25.8	34.8	12.9
		M	4.2	16.7	24.0	43.8	11.5

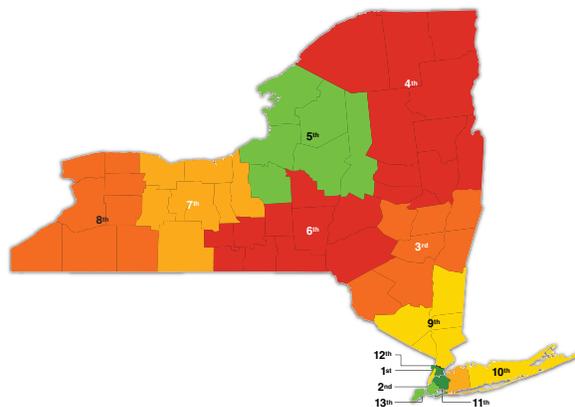
## VIII. Court Facilities

			Never	Rarely	Sometimes	Often	Very Often
55	In the courthouse(s) where I practice, onsite lactation facilities are available to court users including attorneys, litigants, witnesses, and jurors	F	65.2	16.4	10.5	5.2	2.7
		M	39.8	16.0	18.8	13.4	12.0
			<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly Agree</b>
56	Court calendaring and efficiency are impacted by the lack of onsite lactation facilities for court users including attorneys, litigants, witnesses, and jurors	F	7.3	13.4	16.1	40.5	22.7
		M	21.2	21.2	17.4	31.0	9.3
			<b>Most</b>	<b>Some</b>	<b>None</b>	<b>Don't Know/ No Opinion</b>	
57a	In the courthouse(s) where you practice, there are public restrooms that have functional baby changing stations in men's rooms	F	1.4	2.6	9.6	86.4	
		M	11.9	16.6	28.4	43.1	
57b	In the courthouse(s) where you practice, there are public restrooms that have functional baby changing stations in women's rooms	F	11.3	23.2	30.4	35.1	
		M	6.0	3.9	2.7	87.4	
			<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly Agree</b>
58	Court calendaring and efficiency are impacted by the lack of functional baby changing stations in public bathrooms for court users including attorneys, litigants, witnesses, and jurors	F	7.6	14.7	21.8	38.4	17.5
		M	18.6	27.9	19.9	26.4	7.3

# Breakdown by Judicial District in Regard to Available Services and Facilities

In my jurisdiction, free, neutral supervised visitation services are available

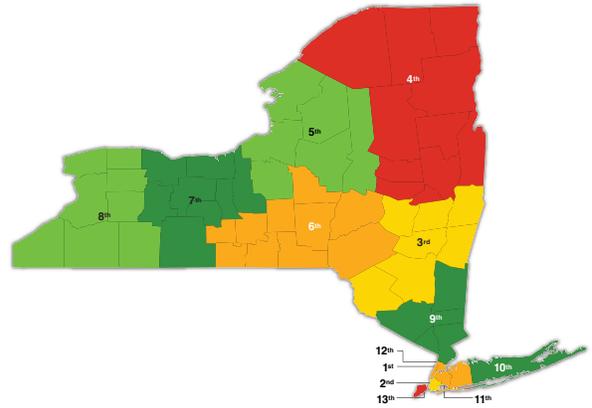
Judicial District	Never/Rarely	Sometimes	Often/Very Often
1st	33.8%	38.0%	28.2%
2nd	25.0%	41.7%	33.3%
3rd	50.0%	34.1%	15.9%
4th	70.8%	12.5%	16.7%
5th	45.7%	19.6%	34.8%
6th	63.0%	25.9%	11.1%
7th	50.0%	27.8%	22.2%
8th	63.9%	8.2%	27.9%
9th	46.3%	26.3%	27.5%
10th N	58.5%	15.1%	26.4%
10th S	45.3%	26.4%	28.3%
11th	13.5%	32.4%	54.1%
12th	23.8%	33.3%	42.9%
13th	22.2%	44.4%	33.3%



Colors represent “Often/Very Often” percentages

## Children’s Centers

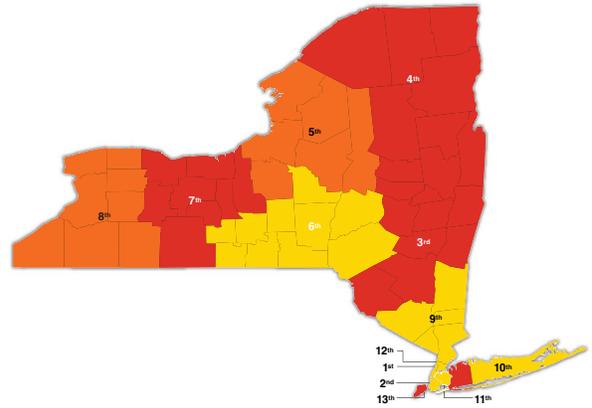
Judicial District	Percentage that were aware	Percentage that said yes
1st District	28%	25%
2nd District	59%	38%
3rd District	55%	30%
4th District	68%	6%
5th District	61%	47%
6th District	70%	23%
7th District	64%	58%
8th District	58%	47%
9th District	51%	68%
10th N District	48%	30%
10th S District	59%	64%
11th District	53%	31%
12th District	54%	31%
13th District	66%	17%



Colors represent “Often/Very Often” percentages

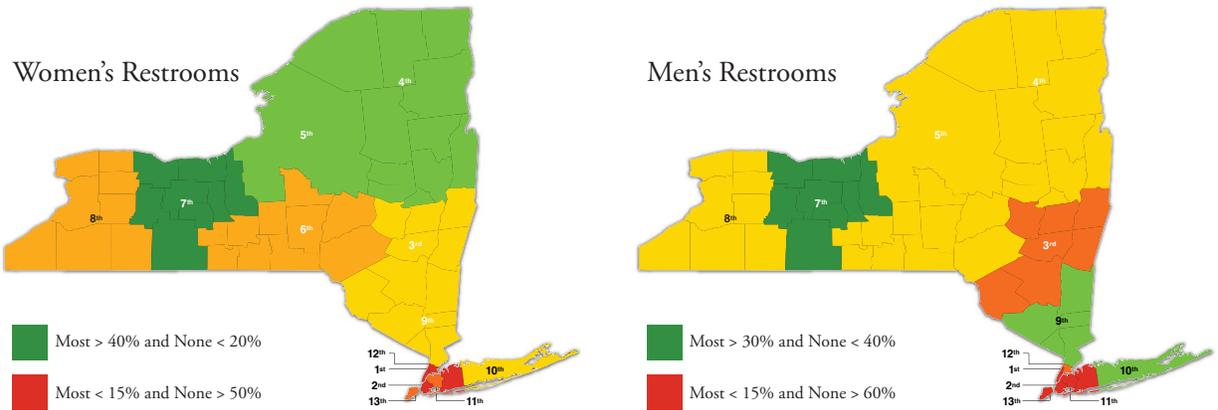
## Lactation Facilities

Judicial District	Never/Rarely	Some-times	Often/Very Often
1st District	65.3%	21.3%	13.4%
2nd District	73.1%	18.5%	8.4%
3rd District	79.1%	7.5%	13.4%
4th District	77.1%	11.4%	11.4%
5th District	70.6%	11.6%	17.6%
6th District	69.4%	5.6%	25.0%
7th District	80.4%	4.3%	15.2%
8th District	76.3%	11.3%	12.5%
9th District	70.5%	13.6%	15.9%
10th N District	82.5%	7.5%	10.0%
10th S District	75.9%	3.7%	20.4%
11th District	70.3%	18.8%	10.9%
12th District	68.3%	15.0%	16.7%
13th District	100.0%	0.00%	0.00%



Colors represent “Often/Very Often” percentages

## Baby Changing Stations



Colors represent “Often/Very Often” percentages

Women's		Judicial District	Men's	
Most	None		Most	None
11%	53%	1st District	9%	65%
13%	59%	2nd District	13%	69%
30%	26%	3rd District	17%	55%
26%	16%	4th District	16%	41%
46%	27%	5th District	28%	44%
32%	35%	6th District	21%	43%
44%	20%	7th District	48%	24%
20%	40%	8th District	17%	45%
40%	29%	9th District	38%	39%
12%	53%	10th N District	12%	62%
36%	23%	10th S District	39%	32%
22%	57%	11th District	11%	65%
15%	51%	12th District	22%	62%
39%	35%	13th District	11%	61%

# Survey Report Recommendations

## I. Courthouse Environment/Sexual Harassment

### FOR COURT ADMINISTRATION

- a. Effectively publicize the procedure for filing sexual harassment and other types of complaints and the process for adjudication and follow-up which shall include notification to the complainant.
- b. Prominently display the Office of the Inspector General's Toll-Free Bias Complaint Number in every courthouse and on the home page of the New York Courts website.
- c. Ensure all judges and court personnel in all state and local courts comply with the NYS Labor Law 201-G which requires training as to how to effectively address sexual harassment and other inappropriate behavior.
- d. Require regular training for all judges and court employees designed to make them aware of, and to recognize, gender bias and how to take appropriate immediate action when such behavior appears or is reported.
- e. Require that the training for judges on how to control their courtrooms include ways in which judges can address inappropriate gender-biased conduct on the part of attorneys and court personnel.
- f. Prepare and circulate a bi-annual report containing
  - the types and number of complaints, including those received anonymously, per type filed with the UCS Office of the Inspector General including the gender of the complainant, e.g., sexual harassment, gender bias, discrimination, and how such complaints were resolved.
  - any changes in NYS Unified Court System policies or procedures regarding such complaints.
- g. Promulgate specific uniform rules of the Chief Administrative Judge delineating how complaints should be handled administratively within the court system. Absent a showing of good cause, complaints shall be fully resolved within six months of the filing of a complaint with written notification to all parties.
- h. Create protocols to reduce the fear of reporting complaints by providing protective procedures for those who report instances of sexual harassment, bias, and other inappropriate behavior.

**FOR JUDGES AND QUASI-JUDICIAL EMPLOYEES**

Set the tone and affirmatively communicate expectations regarding civility, how to address inappropriate behavior, and how to engage equally with all parties, eschewing familiarity, and how to treat women attorneys as equal participants in the legal process.

**FOR BAR ASSOCIATIONS**

- a. Effectively publish the procedure for filing complaints with the NYS Unified Court System Office of the Inspector General regarding sexual harassment, bias, and other inappropriate behavior in the court system.
- b. Generate programs for attorneys emphasizing civility and professional behavior at all times that includes the treatment of women as equal participants in the profession and the obligation to intercede when observing inappropriate behavior.

**FOR ATTORNEY DISCIPLINARY COMMITTEES**

Publish an annual report on attorney disciplinary complaints similar to that listed above for Court Administration and specifically detailing the number of complaints based upon allegations of sexual harassment, gender bias, discrimination, and how such complaints were resolved.

**II. Credibility and Court Interaction****FOR COURT ADMINISTRATION**

- a. Regular education and training should be required for all judges and UCS employees on implicit bias addressing gender, age, and race.
- b. Charge all Administrative and Supervising Judges with the responsibility of actively promoting a bias-free culture within their respective jurisdictions which includes the obligation to root out bias and ensure the meaningful inclusion of women in court proceedings on an equal footing. They should each be required to file an annual report with the Chief Administrative Judge detailing the specific programs and efforts undertaken to achieve these goals.
- c. Require judges to participate in education and training on their responsibility to promote civility, courtesy, and professionalism in their courtrooms with a particular focus on equal treatment of women as participants in the process.
- d. Provide readily visible multi or bi-lingual signage about where to complain at every entrance to the building. Use all available technology to advise court users and staff of such information.

**FOR JUDGES**

- a. Actively promote civility, courtesy, professionalism, and equal treatment for all in the courtrooms.
- b. When instances of improper conduct arise, including gender bias, the judge shall appropriately intervene.

**FOR BAR ASSOCIATIONS**

- a. Statewide Bar Associations, including the New York State Bar Association, Women's Bar Association of the State of New York, and the New York State Trial Lawyers Association, should develop toolkits, including educational modules addressing civility, comportment, and professional attire, and make available for bar associations of different sizes.
- b. Provide frequent CLE accredited educational programs addressing civility, comportment, professional attire, and bias-free behavior.

**FOR LAW SCHOOLS**

Integrate content regarding civility, comportment, professional appearance, and bias-free behavior into curriculum.

**III. Domestic Violence****Regarding Orders of Protection****FOR JUDGES**

- a. The terms of a Temporary Order of Protection must be clear, explicit, and read into the record in the courtroom at the time of issuance.
- b. Upon issuing a Temporary Order of Protection, inquire as to whether the petitioner also needs an Order of Support.
- c. When the defendant/respondent is before the court, ensure that the defendant understands the terms of the Temporary Order and consequences for its violation.
- d. Promptly set a hearing date for alleged violations of Orders of Protection.
- e. Consider establishing compliance calendars to address defendant's/respondent's adherence to the Court's Orders of Protection.

- f. In a matrimonial case where a prior Family Court Order is in place, including exclusion from the home, the matrimonial court shall hold a hearing as soon as possible before altering that Order or issuing a new Order.

### FOR COURT CLERKS

When a Temporary Order of Protection petition is submitted to the clerk, the clerk shall inquire of the petitioner whether the petitioner is also seeking an Order of Support. If so, the clerk must provide the appropriate form to the petitioner and assist in completing the form if necessary.

### FOR ATTORNEYS

- a. Attorneys should promptly bring violations of Orders of Protection to the attention of the court.
- b. When a Family Court Temporary or Final Order of Protection is granted and where a matrimonial case is pending, or subsequently filed, require the attorneys to disclose the existence of the Family Court Order of Protection in the matrimonial filing.
- c. Attorneys must disclose to the matrimonial judge and opposing counsel any Family Court Temporary or Final Order of Protection granted during the pendency of the matrimonial action.

### FOR LAW ENFORCEMENT

Require officers to remain neutral in referring a complainant to a particular court.

### FOR PROSECUTORS

Develop protocols to ensure Orders of Protection are extended through the pendency of a proceeding on a claim of a violation of the Order.

## Domestic Violence Generally

### FOR COURT ADMINISTRATION

- a. Provide funds in the UCS budget for a dedicated domestic violence resource coordinator for every domestic violence and integrated domestic violence court to assist the Court in any case involving domestic violence.
- b. Promulgate a rule requiring that family offense cases involving domestic violence be heard without delay.

- c. To enhance safety, provide petitioners/complainants in domestic violence cases with a safe waiting area separate and inaccessible from respondents/defendants.
- d. In any court that hears cases involving family offenses, provide and require annual specialized education/training for all judges and non-judicial personnel regarding the dynamics of the crime of domestic violence and its impact upon the victims.

### **FOR JUDGES**

Calendar domestic violence cases promptly.

### **FOR LAW ENFORCEMENT**

Require comprehensive education and training for all law enforcement officers on all aspects of domestic violence.

### **FOR PROSECUTORS**

- a. Require education and training for prosecutors, paralegals, investigators, and intake staff on all aspects of domestic violence.
- b. Provide complainants with a victim's rights notice that includes information about the role of the prosecutor versus a private attorney and referral to victim advocacy services where appropriate.

### **FOR THE LEGISLATURE**

- a. Establish a funding stream dedicated to providing victim advocates in every Family Court and Criminal Court to assist domestic violence victims.
- b. Elevate family offenses to an aggravated form of the underlying crime to bump up the penalty one level. For example, an assault would be charged as an aggravated assault where the parties involved meet the statutory relationship definition for a family offense. The relationship should create an aggravating factor. Require a family offense indicator in the criminal history record.

### **FOR LAW SCHOOLS**

Ensure that courses provide accurate information about the dynamics of the crime of domestic violence.

## IV. Domestic Violence and Custody, Support, and Visitation

### Custody

#### FOR OFFICE OF COURT ADMINISTRATION

Provide for judges and other court personnel who are involved in custody proceedings education and training on

- implicit bias, domestic violence, and the impact of the use of power and control tactics in an intimate relationship
- the immediate and long-term impact of domestic violence on the children and other members of the household
- best practices for presiding over cases with pro se litigants
- best practices for presiding over cases with interpreters.

#### FOR THE LEGISLATURE

Amend DRL 240.1(a) and FCA Article 6 regarding child custody determinations as follows: where the court has found by a preponderance of the evidence that a family offense has occurred, this finding shall create a rebuttable presumption that it is not in the best interest of the child to be placed in sole custody, legal custody, or shared physical custody with the parent found to have committed a family offense. Such presumption may be rebutted if a preponderance of the evidence shows that such presumptive custody award would not be in the best interest of the child.

### Supervised Visitation

#### FOR COURT ADMINISTRATION AND LEGISLATIVE LEADERS

Work together to establish accessible, supervised visitation and safe exchange programs at no cost for indigent and low and middle income litigants in all jurisdictions statewide.

## V. Child Support

#### FOR OFFICE OF COURT ADMINISTRATION

- a. Take more rigorous measures to ensure that all *pendente lite* child-support decisions are rendered in compliance with the 30 days from the date of submission rule.
- b. Provide education and training for matrimonial judges, referees, and support magistrates on
  - the economic realities of raising children of various age groups

- how to impute income in cases of small or cash businesses
- accounting practices to address hidden sources of income and how to evaluate lifestyle spending practices
- relevant Department of Labor regional statistics to assist in determining reasonable income expectations and business valuations.

## VI. Equitable Distribution and Maintenance Guidelines

### FOR COURT ADMINISTRATION

Consistent with education recommended in the Child Support section, mandate education and training for judges on the imputation of income and accounting practices, including in cases of small or cash businesses, as well as, addressing hidden sources of income, evaluating lifestyle spending practices, and recognizing the economic realities of raising children of various age groups.

### FOR JUDGES

- a. The contributions of a spouse-homemaker should expressly be credited as a factor in determining equitable distribution and in awarding maintenance.
- b. In determining the amount and duration of maintenance, judges should expressly consider the impact of domestic violence on the issue of the spouse-victim's employability.

### FOR THE LEGISLATURE

- a. Amend the Domestic Relations Law maintenance formula to account for the change in the federal tax law which disallows the deduction of maintenance by the payor.
- b. Amend the Domestic/Relations Law to increase upwards the guidelines durational limits, and expressly include the option of non-durational maintenance, to enable judges, in making such awards, to take into account the realities of a spouse's limited employability prospects due to domestic violence as well as the other criteria currently listed in the statute.

## VII. Gender-Based Violence

### FOR COURT ADMINISTRATION

- a. Ensure that every judge receives comprehensive and ongoing education and training on all aspects of sexual assault, including but not limited to the identification of special issues in cases of date rape, marital rape, and assault between those who know each other. The training should offer information supported by the latest research in the area.

- b. In a skill-based setting, educate judges on the difference between vigorous cross-examination that protects the defendant's rights and questioning that includes improper stereotyping and harassment of the victim.
- c. Establish Human Trafficking Intervention Courts throughout the state.

### FOR JUDGES

- a. Treat acquaintance or intimate partner rape with the same seriousness and severity as rape involving strangers throughout the pendency of the case from arraignment through sentencing. Include instructions for jurors to apply the same standard.
- b. When appropriate, consider exercising the authority to invoke, sua sponte, Criminal Procedure Law Sec. 60.42, known as the Rape Shield Law when there is improper questioning about the complainant's prior sexual conduct in the event the prosecution fails to do so.
- c. In sentencing, take into consideration victim impact statements.

### FOR PROSECUTORS

- a. Ensure that all prosecutors receive education and training as to the particular areas recommended for judges as well as in how to engage victims to increase their cooperation and willingness to proceed against the defendant.
- b. Establish procedures that permit rape victims to deal with only one assistant district attorney through all stages of the proceedings where possible.
- c. Treat acquaintance or marital (intimate partner) rape with the same seriousness as rape involving strangers throughout the pendency of the case from arraignment through sentencing.
- d. Consider the availability of the rape shield law in response to improper questioning about the complainant's prior sexual conduct.
- e. Routinely prosecute patrons of prostitution, as well as, the traffickers and promoters.
- f. Work collaboratively with the Human Trafficking Intervention Court (where available).

### FOR LAW ENFORCEMENT

- a. Ensure that all law enforcement officers and policy makers receive the education and training on the dynamics of sexual assault and on the best practices for gathering and preserving crime scene evidence in such cases.
- b. Ensure that all rapes, whether by a stranger, acquaintance, intimate partner, or family member, are treated with equal seriousness.

- c. Maintain specialized units or a dedicated, specifically trained officer to deal sensitively with sex offenses.

#### FOR HOSPITALS AND MEDICAL FACILITIES

- a. Ensure that all emergency room and other relevant staff are trained in gathering and preserving evidence including rape kit collection and storage as well as ascertaining whether the alleged rape is committed by an acquaintance, intimate partner, or family member.
- b. Encourage the victim to submit to a forensic rape exam.
- c. Inform the victim that the forensic rape exam may be paid for through the New York State Office of Victims Services.

#### FOR THE LEGISLATURE

- a. Require and fund every emergency room to be equipped with the ability to identify, examine, and treat any victim of rape or sexual assault and to administer a rape kit.
- b. Define all sex crimes as aggravated where the parties meet the statutory definition for intimate relationship in family offense cases. The relationship should constitute an aggravating factor. This shall include an intimate partner harming any child in the family whether or not the child is the alleged offender's biological child.

## VIII. Appointments and Fee-Generating Positions

#### FOR COURT ADMINISTRATION

- a. Distribute FCMS customized reports that list fiduciary appointments and fees awarded by judges in each judicial district to relevant judges through the district offices. A new electronic system has been put in place that will allow such reporting going forward.
- b. Provide professional networking opportunities for judges to become acquainted with the members of the various panels that list those who are qualified for appointments.

#### FOR BAR ASSOCIATIONS

- a. Provide professional networking opportunities for judges to become acquainted with panel members.
- b. Establish a mentoring program to assist female attorneys in building the skills and recognition to receive violent felony assignments.

## IX. Negligence and Personal Injury

### FOR COURT ADMINISTRATION

The pattern jury instructions should be modified to emphasize the monetary value of home-maker services.

### FOR BAR ASSOCIATIONS

Offer CLE courses that provide guidance on the evidence necessary to establish the monetary value of homemaker services.

## X. Court Facilities

### *Children's Centers*

#### FOR COURT ADMINISTRATION

- a. Provide a fully staffed, accessible Children's Center in every courthouse. The Children's Center hours should mirror the hours of court operations. The Center should provide age-appropriate programming and information regarding appropriate outside services.
- b. Ensure no child is turned away from a Children's Center or forced to wait in hallways until his or her parents' case is called. Center rules regarding hours of operation, usage, and age limitation should be flexible, accessible, and inclusive.

#### FOR COURT ADMINISTRATION AND LEGISLATIVE LEADERS

Work together to establish free, accessible Children's Centers in all courthouses statewide.

### *Lactation*

#### FOR COURT ADMINISTRATION

- a. Provide a committed space in every courthouse statewide for lactation/breast-feeding use that meets New York State Department of Health regulations. This space may include commercially available pods designed for this purpose only where more appropriate space cannot be located in the courthouse or UCS facility. The amount of space available should be adequate to meet the demand by court personnel and court users. Notice of lactation/breast-feeding space shall be posted.
- b. Educate judges, district executives, and chief clerks about the law requiring time allowances and space for employees to address lactation needs.

## *Restrooms and Baby Changing Stations*

### FOR COURT ADMINISTRATION

Work collaboratively and aggressively with municipalities to:

- update courthouse bathrooms, ensure sanitary conditions, provide feminine hygiene products, and inside each stall provide: hooks, working locks, and receptacles for waste.
- provide baby changing stations in all bathrooms including women's, men's, gender neutral, and family bathrooms.

## General

### FOR COURT ADMINISTRATION

- a. Provide appropriate multi or bilingual signage in the court houses and educate the public through the UCS website as to the designated areas for Children's Centers, lactation, and diaper changing stations. Incorporate such information into any future technological programming for mapping courthouses to improve public access to such facilities.
- b. Educate judges and non-judicial staff regarding appropriate accommodations for the needs of pregnant and nursing mothers and as to the availability of Children's Centers, lactation facilities, and baby changing tables in the courthouses.
- c. As future courthouse renovations or buildings are planned, incorporate space for Children's Centers, lactation facilities, and include baby changing tables in every public restroom.
- d. Ensure that comment cards are readily available in every courthouse and that the online link to the comment card is publicized in courthouses.
- e. Produce and distribute an informational brochure(s) in multiple languages for people entering the courthouse. This should include the right to be treated fairly and respectfully. The brochure should inform court users about the location of the Children's Center, lactation space, and baby changing tables. In addition, information should be made available regarding how to file a complaint of sexual harassment and/or bias or any other inappropriate behavior, as well as, the right to language access and how to request an interpreter.
- f. Court clerks and other designated court personnel should be responsible for providing the information. Such information should be effectively disseminated and prominently displayed in the court facility. A link to the brochure should also be on the UCS website main page in multiple languages. Incorporate such information into any future technological programming designed to inform court users about the courthouse.

## Women in The New York State Judiciary 1986, 1996, 2006, 2016 & 2020

Court	1986	1996	2006	2016	2020
Court of Appeals	14%	30%	57%	57%	43%
Appellate Division	14%	19%	13%	44%	54%
Administrative Judges	5%	23%	35%	33%	34%
Supreme Court	8%	12%	27%	36%	37%
Acting Supreme Court*	16%	30%	30%	37%	44%
Surrogates Court	7%	15%	28%	35%	34%
Court of Claims Judges	10%	15%	16%	29%	36%
County Court (Outside NYC)**	4%	5%	10%	15%	20%
Family Court (Outside NYC)	10%	22%	48%	57%	62%
District Court (Nassau / Suffolk)	7%	11%	41%	34%	32%
City Court (Outside NYC)***	5%	12%	17%	23%	27%
NYC Family	54%	58%	71%	63%	70%
NYC Civil Court	20%	42%	48%	59%	71%
NYC Criminal Court	21%	48%	40%	43%	50%
Housing Court	20%	40%	49%	65%	60%
Statewide Totals	11%	20%	29%	38%	42%

\* Judges from other trial level courts who are designated to sit in Supreme Court.

\*\* Judges who sit in County Court only and judges who combine service on the County Court with service on Family and/or Surrogates Court.

\*\*\* City Court Judges, Acting City Court Judges, and Chief Judges of the City Court.  
Breakdown by Judicial District in Regard to Available Services and Facilities

## Women in the New York State Judiciary Leadership 2006 to 2020

Administrative Judges	2020			2016			2006		
	Total	Women	% Women	Total	Women	% Women	Total	Women	% Women
Presiding Justices Appellate Division	4	1	25%	3	1	33%	4	1	25%
Presiding Justice Court of Claims	1	0	0%						
Administrative Judges NYC	11	5	45%	12	3	25%	10	3	30%
Administrative Judges Upstate Judicial Districts 3 thru 9	7	2	29%	7	2	29%	7	2	29%
Administrative Judges 10th Judicial District Nassau/Suffolk	2	0	0%	2	0	0%	2	0	0%
Total	25	8	32%	24	6	25%	23	6	26%

## Court and District Officials and Administrators

Officials/Administrators	2020			2016			2006		
	Total	Women	% Women	Total	Women	% Women	Total	Women	% Women
County Clerks	5	2	40%	5	2	40%	5	2	40%
Clerk Court of Appeals	1	0	0%	1	0	0%	1	0	0%
Clerk of the Court Appellate Division	4	2	50%	4	3	75%	4	2	50%
Chief Clerk Appellate Term (1st & 2nd Dept.)	2	0	0%	2	0	0%	2	0	0%
Chief Clerk Court of Claims	1	1	100%	1	1	100%	1	0	0%
District Executives	9	2	22%	8	2	25%	7	3	43%
Chief Clerks NYC	20	8	40%	18	8	44%	16	4	25%
Chief Clerks - Upstate, Nassau, Suffolk	222	186	84%	216	181	84%	228	180	79%
Chief Clerk IV (JG-32)	27	14	52%	28	13	46%	34	18	53%
Chief Clerk III (JG-28)	32	22	69%	34	25	74%	33	23	70%
Chief Clerk II (JG-25)	59	50	85%	53	47	89%	68	57	84%
Chief Clerk I (JG-21)	104	100	96%	101	96	95%	93	82	88%







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**Job Number:** 177959651

## Document (1)

1. [ARTICLE: DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES, 167 U. Pa. L. Rev. 399](#)

**Client/Matter:** -None-

**Search Terms:** women's credibility in domestic violence cases

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Secondary Materials

**Narrowed by**

Jurisdiction:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Dist. of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming

# ARTICLE: DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES

January, 2019

## Reporter

167 U. Pa. L. Rev. 399 \*

**Length:** 10538 words

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## Highlight

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*In recent months, we've seen an unprecedented wave of testimonials about the serious harms women all too frequently endure. The # MeToo moment, the # WhyIStayed campaign, and the Larry Nassar sentencing hearings have raised public awareness not only about workplace harassment, domestic violence, and sexual abuse, but also about how routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories. This pattern is particularly disturbing in the justice system, where women face a legal twilight zone: laws meant to protect them and deter further abuse often fail to achieve their purpose, because women telling stories of abuse by their male partners are simply not believed. To fully grasp the nature of this new moment in gendered power relations--and to cement the significant gains won by these public campaigns--we need to take a full, considered look at when, how, and why the justice system and other key social institutions discount women's credibility.*

*We use the lens of intimate partner violence to examine the ways in which women's credibility is discounted in a range of legal and social service system settings. First, judges and others improperly discount as implausible women's stories of abuse, based on a failure to understand both the symptoms arising from neurological and psychological trauma, and the practical constraints on survivors' lives. Second, gatekeepers unjustly discount women's personal trustworthiness, based on both inaccurate interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance. Moreover, even when a woman manages to overcome all the initial modes of institutional skepticism that minimize her account of abuse, she often finds that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse.*

Amanda Norejko

Two distinct harms arise from this pervasive pattern of **credibility** discounting and experiential dismissal. First, the discrediting of survivors constitutes its own psychic injury--an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators. Second, the pronounced, nearly instinctive penchant for devaluing **women's** testimony is so deeply embedded within survivors' experience that it becomes a potent, independent obstacle to their efforts to obtain safety and justice.

The reflexive discounting of **women's** stories of **domestic violence** finds analogs among the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus. For these women, too, **credibility** discounts both deepen the harm they experience and create yet another impediment to healing and justice. Concrete, systematic reforms are needed to eradicate these unjust, gender-based **credibility** discounts and experiential dismissals, and to enable women subjected to male abuses of power at long last to trust the responsiveness of the justice system.

## Text

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### [\*401] INTRODUCTION

We are at something of a feminist watershed moment **in** our society. For months, women have been coming forward **in** large numbers to share their stories about sexual harassment and assault **in** the workplace; stories of events that occurred over the course of decades, stories that survivors kept private until now. <sup>1</sup> It is both painful and exhilarating.

But as we hear this slow drip of horror stories, many of us struggle with the acute awareness that we've been here before. Back **in** 1991, during the Anita Hill--Clarence Thomas hearings, <sup>2</sup> the whole country confronted the ugly dynamic of sexual harassment--most particularly, how men use their power **in** the workplace hierarchy to subordinate women. (Some of us still have our "I believe Anita" buttons.) And yet here we are today, more than twenty-five years later, experiencing a similar sense of abrupt revelation and shock.

How can we still be surprised by these stories? It's not that workplace assault took a hiatus **in** the intervening quarter century. There were women all around us, women reading this essay right now, who continued to be sexually harassed. Women seeking legal protection from this kind of discriminatory abuse filed hundreds of thousands of complaints of sexual harassment and assault with the Equal Employment Opportunity **[\*402]** Commission during that time. <sup>3</sup> But the broader culture stopped listening, relapsing into a long-standing tendency to trivialize **women's** experiences of abuse at the hands of powerful, predatory men.

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<sup>1</sup> See, e.g., Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017; Anna Codrea-Rado, #MeToo Floods Social Media With Stories of Harassment and Assault, N.Y. TIMES (Oct. 16, 2017), [https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?\\_r=0](https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?_r=0).

<sup>2</sup> When she was **in** her mid-twenties, Anita Hill worked for Clarence Thomas at the Equal Employment Opportunity Commission. When President George H.W. Bush nominated Thomas to replace Justice Thurgood Marshall on the U.S. Supreme Court, Hill testified that Thomas had subjected her to sexual harassment on the job. Millions watched the televised broadcast of the confirmation hearings, as members of the Senate Judiciary Committee, all male and all white, questioned Hill. Ultimately, Thomas was confirmed, with a vote of 52-48. See, e.g., JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994).

<sup>3</sup> See, e.g., Danielle Paquette, *Not Just Harvey Weinstein: The Depressing Truth About Sexual Harassment in America*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/10/12/not-just-harvey-weinstein-the-depressing-truth-about-sexual-harassment-in-america/?utm\\_term=.5ecb78df70a9](https://www.washingtonpost.com/news/wonk/wp/2017/10/12/not-just-harvey-weinstein-the-depressing-truth-about-sexual-harassment-in-america/?utm_term=.5ecb78df70a9).

Today's stories pouring out of Hollywood, Congress, and the media are just one facet of this long-simmering public scandal. After experiencing an initial victimization, many women also face a societal gauntlet of doubt, dismissal, or outright disbelief.

As more and more women stepped forward *in* all spheres of life to offer new testimonials to the # MeToo movement, we began to wonder about how this *credibility* discounting phenomenon plays out *in* the context of intimate partner *violence*<sup>4</sup>--another category of abuse that women primarily suffer at the hands of men.

The parallels are dramatic. Story after story demonstrates how, despite a substantial increase *in* public awareness of the problem, accompanied by improvements stemming from four decades of activism, scholarship, and training, women survivors of *domestic violence* face a persistent skepticism regarding both their accounts of abuse and their recitations of harm. Women find their *credibility* discounted<sup>5</sup> by the partners who abuse them, by the larger society *in* which they live, and by the gatekeepers of the justice and social service systems to which they turn for help.<sup>6</sup> This skepticism and suspicion compound the pre-existing, myriad harms inflicted via *domestic* abuse itself. And, perhaps even more important, the pronounced, nearly instinctive penchant for devaluing *women's* testimony is so deeply embedded within *women's* experience that it constitutes its own distinct obstacle to their ability to obtain safety and justice. Philosopher Alison Bailey captures, *in* part, the harm to which we refer: "Imagine living *in* an epistemic twilight zone, a world [\*403] where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable."<sup>7</sup> But even this capacious understanding fails to capture the full dimensions of the problem. Women also face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail *in* application, because women telling stories of abuse by their male partners are simply not believed.

This experience--the reflexive discounting of *women's* stories of *domestic violence*--offers a useful vantage point into the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus.<sup>8</sup> For all of these women, *credibility* discounts both deepen the harm they experience and create yet another obstacle to healing and justice.

This Article critically examines how the justice system and other key institutions of our society systematically discount the *credibility* of women survivors of *domestic violence*. Our analysis is based on a wide range of legal, psychological, philosophical, and cultural sources, including the more than twenty-five years of experience each of us has had, individually and *in* collaboration, representing survivors *in* civil protection order *cases*, conducting

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<sup>4</sup> We use the terms *intimate partner violence* and *domestic violence* interchangeably throughout this Article to describe a wide range of abuse--psychological, physical, sexual, or economic--inflicted by a partner or former partner.

<sup>5</sup> The term "*credibility* discount," used frequently *in* this essay, was originally coined by Deborah Tuerkheimer, *in* a thoughtful analysis of *women's* experiences of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017). We use the same term here *in* part to advance a dialogue about the universality of *credibility* discounting across contexts where women attempt to resist male abuses of power.

<sup>6</sup> This essay focuses on the *credibility* of straight women survivors *in* particular. We recognize, of course, that other survivor groups experience serious challenges *in* terms of achieving *credibility*. Male survivors, both *in* heterosexual and same-sex intimate relationships, are often dismissed or even ridiculed. Genderqueer survivors also face major *credibility* challenges. Our main objective here is to bring to light the persistent and particularized story of our cultural refusal to credit *women as women*, and especially those who have experienced relationship abuse at the hands of men. We also address the ways *in* which *women's* intersecting identities, on dimensions such as race, class, and sexual orientation, profoundly affect the likelihood that they will be discredited, as well as their experience of discrediting.

<sup>7</sup> Alison Bailey, *The Uneven Knowing Field: An Engagement with Dotson's Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

<sup>8</sup> See *infra* text accompanying notes 244-219.

empirical research with survivors of intimate abuse, and consulting with local and national **domestic violence** organizations.<sup>9</sup>

A central focus here is on the civil justice system, with particular attention paid to **women's** efforts to secure safety and a measure of redress **in** the form of civil protection orders--the legal remedy most commonly utilized by [**\*404**] **domestic violence** survivors.<sup>10</sup> Because the civil justice system offers no right to counsel, only those who can afford an attorney, or find a pro bono lawyer, are represented. These **cases** are quite different than those **in** the criminal courts, where the prosecution commands the investigative resources of the police and wields the full power of the state to subpoena corroborative evidence and compel witnesses to testify. **In** contrast, **in** approximately eighty percent of civil protection order and related family law **cases**,<sup>11</sup> neither the survivor nor the accused perpetrator has a lawyer, discovery is limited,<sup>12</sup> and virtually no one has the resources to retain a private investigator.<sup>13</sup> As a result, few survivors have access to potentially powerful corroborative evidence. Moreover,

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<sup>9</sup> Author Deborah Epstein has represented or closely supervised the representation of over 750 petitioners **in** civil protection order **cases in** D.C. Superior Court. She served as Co-Chair of the effort to create and implement the D.C. Superior Court's integrated **Domestic Violence** Unit, Co-Director of the D.C. Superior Court's **Domestic Violence** Intake Center, and Chair of the D.C. **Domestic Violence** Fatality Review Commission. She is the author of the D.C. Superior Court's **Domestic Violence Benchbook**, has trained hundreds of police officers, worked **in** close collaboration with prosecutors on intimate partner **violence cases**, and written numerous articles addressing **domestic violence** issues. She has been a member of the D.C. Mayor's Commission on **Violence** Against Women, and the National Football League Players' Association **Domestic Violence** Commission, and has served on the Board of Directors of the D.C. Coalition Against **Domestic Violence** and the House of Ruth. Author Lisa Goodman has published over one hundred peer-reviewed articles based on her extensive research on the experience of intimate partner survivors as they move through systems designed to help them, including social service and justice systems. She has also supervised scores of **domestic violence** advocates working **in** a residential setting; conducted numerous evaluations of **domestic violence** programs; led workshops on trauma-informed approaches to **domestic violence** services, survivor-defined approaches to advocacy, and evaluating **domestic violence** programs; and consulted to the National **Domestic Violence** Resource Center, The National **Domestic Violence** Hotline, Futures Without **Violence**, The Full Frame Initiative, and The Second Step.

<sup>10</sup> Caroline Vaile Wright & Dawn M. Johnson, *Encouraging Legal Help Seeking for Victims of Intimate Partner **Violence**: The Therapeutic Effects of the Civil Protection Order*, 25 J. TRAUMATIC STRESS 675, 675 (2012).

<sup>11</sup> See, e.g., Amy Barasch, *Justice for Victims of **Domestic Violence**: One Thing They Really Need Is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/02/domestic\\_violence\\_protection\\_victims\\_need\\_civil\\_court\\_s\\_and\\_lawyers.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_court_s_and_lawyers.html) ("[Eighty] percent of people **in** our civil courts do not have a lawyer . . ."); see also LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 52 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/KZL3-RGUD>] ("Low-income survivors of recent **domestic violence** or sexual assault received inadequate or no professional legal help for 86% of their civil legal problems **in** 2017."); STATE OF MD. ADMIN. OFFICE OF THE COURTS, **DOMESTIC VIOLENCE** MONTHLY SUMMARY REPORTING (2017), [http://portal.mdcourts.gov/dv/DVCR\\_Statewide\\_2017\\_1.pdf](http://portal.mdcourts.gov/dv/DVCR_Statewide_2017_1.pdf) [<https://perma.cc/4HCC-APE6>] (demonstrating that, **in** Maryland, 82.5% of petitioners were pro se **in** protective order **cases** during 2017) Beverly Balos, *Domestic Violence Matters: The **Case** for Appointed Counsel **in** Protective Order Proceedings*, 15 TEMP. POL. & CIV. RIGHTS L. REV. 557, 567 (2006) (noting that **in** Illinois, neither party was represented **in** 83.4% of protective order **cases**).

<sup>12</sup> **In** a recent survey of chief judges **in** courts across the United States, thirty-three percent reported that pro se litigants faced challenges related to discovery issues that were sufficiently problematic that they could affect the **case in** most or all **cases**. DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS **IN** U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21-23 (2011), <https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1> [<https://perma.cc/3WWE-N6RG>].

<sup>13</sup> Many survivors of **domestic violence**, and thus many petitioners **in** protection order **cases**, are low income. See *infra* text accompanying note 141.

they lack the benefit of legal advice about what types of more easily available evidence would be useful to bring to court.<sup>14</sup>

These forces all but guarantee that most civil protection order **cases** end up **in** the "he said/she said," or "word on word" realm. It's the survivor's testimony against that of her intimate partner. This testimonial structure places enormous pressure on individual **credibility**. **In** the end, most protection order **cases** boil [\*405] down to this: if a survivor is believed, the judge will award her protection. If she is not believed, the judge will deny it. This fact--the central importance of a survivor's **credibility in** the protection order and broader civil justice system--led us to focus on that system as a core area of inquiry.

We examine **credibility** discounting from a variety of perspectives. **In** Part I, we analyze the two essential ways **in** which justice and social service system gatekeepers discount the **credibility** of women survivors seeking safety. First, judges and others *improperly discount as implausible women's stories of abuse*, due to a failure to understand the symptoms arising from neurological and psychological trauma as well as the practical realities of survivors' lives. Second, gatekeepers *unjustly discount women's personal trustworthiness*, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance.

**In** Part II, we explore how these **credibility** discounts are reinforced by the broader context of legal and social service systems that are willing to tolerate the harmful impact of laws, policies, and practices on survivors. Even when a woman makes it through the **credibility** discount gauntlet, she often finds that the systems to which she turns for help *dismiss her experiences and trivialize the importance of her harms*, adopting and enforcing policies with little or no regard for the ways **in** which they operate to her detriment.

**In** Part III, we examine the harms inflicted by this combination of discounting **women's credibility** and dismissing **women's** experiences. First, these harms can be measured as an additional psychic injury to survivors, an institutional betrayal that echoes the psychological abuse imposed by individual perpetrators. Second, the pervasive nature of these harms creates a distinct obstacle to survivors' ability to access justice and safety, **in** addition to the many, more concrete stumbling blocks with which **domestic violence** victims are all too familiar.

Finally, **in** Part IV, we offer suggestions for initial efforts to eradicate these unjust, gender-based **credibility** discounts and experiential dismissals. Adopting these reforms would allow women subjected to male abuses of power to trust the responsiveness of the justice system and our larger society.

#### **I. TYPES OF GATEKEEPER-IMPOSED CREDIBILITY DISCOUNTS**

Women survivors of abuse inflicted by their intimate partners encounter doubt, skepticism, or disbelief **in** their efforts to obtain justice and safety from judges and other system gatekeepers.<sup>15</sup> First, their stories of abuse appear less plausible than other stories told **in** the justice system. We tend to believe stories [\*406] that are internally consistent--they have a linear thread and are emotionally and logically coherent. But **domestic violence** often results **in** neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible. **In** addition, we tend to believe stories that are externally consistent--that fit **in** with how we believe the world works. But many aspects of the **domestic violence** experience are foreign, and therefore incomprehensible, to most

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<sup>14</sup> A survivor may have access to some corroborative evidence, typically **in** the form of voice mails, photographs, texts, and social media posts. **In** many **cases**, however, a survivor no longer has access to such evidence; particularly **in** the absence of legal advice, she may have deleted the relevant files, either inadvertently or because they were too upsetting to retain. And because these **cases** are scheduled as emergency litigation, they typically move from filing to trial **in** two to three weeks--insufficient time to subpoena useful evidence **in** the absence of focused legal advice, even **in** jurisdictions providing nonlawyers with subpoena power.

<sup>15</sup> The most complete exploration of **credibility**-based obstacles to date can be found **in** the brief but insightful essay by Lynn Hecht Schafran, **Credibility in the Courts: Why Is There a Gender Gap?**, JUDGES' J., Winter 1995, at 42.

nonsurvivors. The result is a story that appears on its surface to lack external consistency, and therefore--again--to be less plausible. Second, our assessments of women's personal trustworthiness suffer from skepticism rooted in perceptions of survivors' apparent "inappropriate" demeanor, prejudicial stereotypes regarding women's false motives, and the longstanding cultural tendency to disbelieve women simply because they are women.

### A. Story Plausibility

Narrative theorists and cognitive scientists agree that human beings are hard-wired to organize facts into "meaningful patterns."<sup>16</sup> This "need for narrative form is so strong that we don't really believe something is true unless we can see it as a story."<sup>17</sup> And storytelling is central to the justice system as well;<sup>18</sup> it is the primary method judges and juries use to assess the reliability of facts presented at trial. Accordingly, any time a survivor needs to go through a gatekeeper to access resources or justice or safety, she has to tell some sort of story about her domestic violence experience. And if she is to succeed, her story must be a plausible one. So what makes a story plausible?

#### 1. Internal Consistency

First, we believe stories that are *internally consistent*. That is, we grant credibility to stories that make logical and emotional sense, have a continuous, [\*407] linear thread, form a coherent whole, and contain no significant, unexplained gaps in time or action.<sup>19</sup>

But for many domestic violence survivors, telling the truthful story of their abusive experience involves a narrative that is more impressionistic than linear, and that appears somewhat illogical or emotionally off-kilter. The tension between our desire for internal consistency and the realities of survivor stories can be explained in part by some of the neurological and psychological consequences of domestic violence itself, such as traumatic brain injury and posttraumatic stress disorder.

#### a. Neurological Trauma: Traumatic Brain Injury

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<sup>16</sup> CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS* 15-16 (2017); see also DAVID CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 93-94 (2002); LISA CRON, *WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE* 185-199 (2012); Kay Young & Jeffrey Saver, *The Neurology of Narrative*, *SUBSTANCE*, Mar. 2001, at 74.

<sup>17</sup> H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 44 (2d ed. 2008). "For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes." *Id.* at 3.

<sup>18</sup> "[T]he law is awash in storytelling." ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000).

<sup>19</sup> GROSE & JOHNSON, *supra* note 16, at 16. These correlations apply in the courtroom as well; research demonstrates strong correlations between courtroom credibility determinations and the internal consistency of stories. Numerous studies reveal a strong belief that inconsistencies indicate inaccuracies, and this perception guides juror decisionmaking. See, e.g., Garrett L. Berman, Douglas J. Narby & Brian L. Cutler, *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability, and Verdicts*, 19 *LAW & HUM. BEHAV.* 79 (1995); Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 *J. APPLIED PSYCHOL.* 170 (1996); Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 *APPLIED COGNITIVE PSYCHOL.* 297 (1999); Neil Brewer & R.M. Hupfeld, *Effects of Testimonial Inconsistencies and Witness Group Identity on Mock-Juror Judgments*, 34 *J. APPLIED SOC. PSYCHOL.* 493 (2004); Sarah L. Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 *LAW&HUM. BEHAV.* 470 (2009); Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour--Accuracy Relationships Held by Police, Lawyers and Mock Jurors*, 6 *PSYCHIATRY, PSYCHOL. & L.* 97, 101 (1999). The centrality of internal consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. See, e.g., PAUL BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* 58 (5th ed. 2013).

Traumatic Brain Injury (TBI) can result from either blunt-force trauma to the head (for example, being hit by an object, having your head smashed against something, or being violently shaken), or from reduced oxygen to the brain (for example, through strangulation).<sup>20</sup> Blows to the head can cause cranial bleeding or damage cranial blood vessels and nerves. A lack of oxygen can result *in* the decreased function or death of brain cells.<sup>21</sup>

*In domestic violence cases*, both blunt force trauma and strangulation are relatively common. One study of women *in* three New York *domestic violence* [\*408] shelters found that ninety-two percent of the women questioned had been hit *in* the head by their partners more than once; eighty-three percent had been hit *in* the head and shaken severely; and eight percent had been hit *in* the head over twenty times *in* the preceding year.<sup>22</sup> Forty percent of these women lost consciousness as a result of at least one of the assaults they endured.<sup>23</sup> *In* another study, emergency room data indicated that sixty-seven percent of women treated for intimate partner *violence*-related injuries reported problems consistent with a diagnosis of head injury.<sup>24</sup>

Even mild TBI--which can occur after only a short period without oxygen to the brain--can result *in* a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories (i.e., renouncing them as untrue after accurately reporting them to friends, family, police, or even judges).<sup>25</sup> *In* many ways, this is hardly surprising; people with an impaired sense of the consistency of their own experience are unlikely to produce consistent narratives of that experience on demand.

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<sup>20</sup> OR. DEP'T OF JUSTICE, TRAUMATIC BRAIN INJURY AND *DOMESTIC VIOLENCE*, [http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic\\_brain\\_injury\\_and\\_domestic\\_violence.pdf](http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf) [<https://perma.cc/7ZVD-XBWJ>] (last visited Jan. 23, 2018); PARTNERS FOR PEACE, *Understanding Traumatic Brain Injury, Concussion and Strangulation in Domestic Violence* (Oct. 11, 2016), <http://www.partnersforpeaceme.org/understanding-traumatic-brain-injury-concussion-strangulation-domestic-violence/> [<https://perma.cc/D7CX-V9F9>].

<sup>21</sup> NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, *Traumatic Brain Injury: Hope Through Research: How Does TBI Affect the Brain*, [https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218\\_2](https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218_2) [<https://perma.cc/C8HD-SBEL>] (last modified June 28, 2017).

<sup>22</sup> Helene Jackson, Elizabeth Philp, Ronald L. Nuttall & Leonard Diller, *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 PROF. PSYCHOL.: RES. & PRAC. 39, 41, 42 (2002) (showing that correlations between frequency of being hit *in* the head and severity of cognitive symptoms were statistically significant).

<sup>23</sup> *Id.* at 41.

<sup>24</sup> John D. Corrigan et al., *Early Identification of Mild Traumatic Brain Injury in Female Victims of Domestic Violence*, AM. J. OBSTETRICS & GYNECOLOGY, May 2003, at S71, S74. Yet another sampled women from both shelter and non-shelter populations who all had sustained at least one physically abusive encounter and found nearly seventy-five percent of the entire sample reported a *domestic violence*-related TBI. Eve M. Valera & Howard Berenbaum, *Brain Injury in Battered Women*, 71 J. CONSULTING & CLINICAL PSYCHOL. 797, 799 (2003).

<sup>25</sup> Valera & Berenbaum, *supra* note 24, at 801; Eve Valera, *Increasing Our Understanding of an Overlooked Public Health Epidemic: Traumatic Brain Injuries in Women Subjected to Intimate Partner Violence*, 27 J. *WOMEN'S HEALTH* 735, 735 (2018) ("[T]he greater the number and more recent . . . the TBIs, the more poorly women tended to perform on measures of memory, learning, and cognitive flexibility, and the higher . . . the levels [of PTSD symptoms]."); see also Gwen Hunnicut, Kristine Lundgren, Christine Murray & Loreen Olson, *The Intersection of Intimate Partner Violence and Traumatic Brain Injury: A Call for Interdisciplinary Research*, 32 J. FAM. *VIOLENCE* 471, 474 (2017); Maria E. Garay-Serratos, *A Secret Epidemic: Traumatic Brain Injury Among Domestic Violence Victims*, L.A. TIMES (Oct. 12, 2015), <http://beta.latimes.com/opinion/op-ed/la-oe-1012-garay-serratos-tbi-domestic-abuse-20151012-story.html>; Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, NEW YORKER (Dec. 30, 2015), <https://www.newyorker.com/news/newsdesk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence>.

Because research demonstrating the frequency of TBI *in* the **domestic violence** context is relatively new, however, few justice system gatekeepers are aware of its potential neurological effects.<sup>26</sup> Even *in* hospital emergency rooms, where medical professionals now routinely perform TBI screens when [\*409] a patient presents with certain kinds of athletic injuries, partner abuse victims are rarely screened.<sup>27</sup> And because most injuries caused by strangulation are internal, patients admitted *in* the absence of such screens are unlikely to be considered for a TBI diagnosis.<sup>28</sup> As a result, survivors themselves are unlikely to know that they are at risk for TBI, unlikely to get treatment, and unlikely to know about the possible symptoms they may later experience.<sup>29</sup> This creates a perfect storm of ignorance: a survivor is more likely to tell justice system gatekeepers a story that lacks internal consistency; the survivor herself is unlikely to be able to understand or explain this apparent failing; and those gatekeepers, *in* turn, are more likely to hear her story as less plausible and, accordingly, impose an unjust **credibility** discount on her narrative.

The following true story illustrates the problem.<sup>30</sup> Grace Costa<sup>31</sup> was diagnosed with mild TBI, caused when her ex-boyfriend strangled her with a telephone cord. She's inconsistent when she tries to tell the story: the date changes; sometimes she remembers the assault taking place *in* one year; other times, another. Her memory varies as to which of her adult children were present. Sometimes she thinks they were about to eat dinner, sometimes that they were talking about a half-eaten apple on the kitchen floor.

Grace can't tell her story with a linear narrative. She says memories of the incident come to her *in* flashes, one image at a time--apple, blood, cord--but the disparate pieces never fit together as a whole.

Grace's explanation of events is confused. Pieces of her story hang untethered *in* her mind. She remembers being inside, then outside; being down, then up, and maybe down again. The police weren't there, then they were. Half the time, she says, she doesn't "remember much of anything."

[\*410] To a trauma expert, the way Grace tells her story strongly indicates that she was, indeed, strangled and deprived of brain oxygen that night. The disjointed, incoherent way she tells her story makes it all the more plausible.<sup>32</sup>

<sup>26</sup> See Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, 98 *A.B.A. J.* 37, 37-38 (2012).

<sup>27</sup> See Eve Valera & Aaron Kucyi, *Brain Injury in Women Experiencing Intimate Partner-Violence: Neural Mechanistic Evidence of an "Invisible" Trauma*, 11 *BRAIN IMAGING BEHAV.* 1664, 1664 (2017) ("TBI treatments are typically absent and IPV interventions are inadequate."); see also Garay-Serratos, *supra* note 25; Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 *J. EMERGENCY MED.* 303, 308 (2001).

<sup>28</sup> This challenge is illustrated by a study of 300 nonfatal **domestic violence** strangulation **cases**, where researchers found that only fifteen percent of victims had injuries that were sufficiently visible for police officers to photograph; they further found that even where the injuries were visible, they were often minimized *in* police descriptions with terms such as "redness, cuts, scratches, or abrasions to the neck." Strack et al., *supra* note 27, at 303, 305-06.

<sup>29</sup> See Jacquelyn C. Campbell et al., *The Effects of Intimate Partner Violence and Probable Traumatic Brain Injury on Central Nervous System Symptoms*, 27 *J. WOMEN'S HEALTH* 761, 762 (2018) (noting that "for many abused women, head injuries occur multiple times, *in* an escalating pattern, and cognitive or psychological effects are often viewed within the context of abuse rather than as a specific medical injury" (i.e., cognitive effects are attributed to mental health conditions resulting from the abuse, rather than a TBI)); Valera & Kucyi, *supra* note 27; Valera, *supra* note 25, at 735 (majority of abuse-related TBI's *in* study sample "were considered to be mild TBIs for which medical attention [was] almost never sought").

<sup>30</sup> This story relies heavily on the account written by Rachel Louise Snyder, *supra* note 25.

<sup>31</sup> This is not her real name. *Id.*

<sup>32</sup> See *supra* text accompanying notes 20-25.

But the opposite is true when Grace is telling her story to justice system gatekeepers. To the untrained ear, her story's disjointed, inconsistent nature makes it sound *implausible*, and therefore she is likely to incur a ***credibility*** discount if she tells it to the police, deciding whether to make an arrest; to prosecutors, deciding whether to bring a criminal ***case***; or to a judge, deciding whether to issue a protection order. The more Grace tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance and protection.

b. *Psychological Trauma: Post-Traumatic Stress Disorder*

Psychological trauma can operate similarly to neurological trauma ***in*** undermining the internal consistency of a survivor's story; like TBI, it commonly produces memory lapses or dissociative states.<sup>33</sup> Research shows that a majority of survivors meet diagnostic criteria for Post-Traumatic Stress Disorder (PTSD),<sup>34</sup> and many more women exhibit serious symptoms of psychological trauma, though not enough to reach the threshold of a formal diagnosis. These symptoms are another common source of internal inconsistency ***in*** survivor accounts provided to police, judges, and other system gatekeepers.

The symptoms that comprise PTSD include avoidance, hyperarousal, and intrusive destabilizing experiences such as dissociative flashbacks and intense or prolonged emotional responses to reminders of the original traumatic event.<sup>35</sup> These reminders are commonly known as "triggers."<sup>36</sup> For many survivors, being ***in*** a courtroom, ***in*** close proximity to an abusive partner--particularly while being instructed to review his abusive behavior ***in*** detail--constitutes a potent trigger.<sup>37</sup> Instead of providing the judge with a clear, logical narrative, a **[\*411]** survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story--or, indeed, be unable to speak key elements of it out loud.<sup>38</sup> Again, this disconnected, inconsistent testimony is ***in*** fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.

Psychological trauma, or even extreme stress, can affect the memory as well. As Judith Herman puts it: "Traumatic memories have a number of unusual qualities. They are not encoded like the ordinary memories of adults ***in*** a verbal, linear narrative that is assimilated into an ongoing life story."<sup>39</sup> Instead, these memories often lack verbal

<sup>33</sup> See, e.g., Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 *DIALOGUES CLINICAL NEUROSCIENCE* 263, 263 (2011) ("Several pathological features found ***in*** PTSD patients overlap with features found ***in*** patients with traumatic brain injury . . .").

<sup>34</sup> A meta-analysis of eleven studies investigating the prevalence of PTSD among IPV survivors demonstrated a weighted mean prevalence of 63.8%. See Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 *J. FAM. VIOLENCE* 99, 116 (1999); see also Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 *TRAUMA, VIOLENCE, & ABUSE* 99, 100 (2001).

<sup>35</sup> AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271-72 (5th ed. 2013) [hereinafter *DSMD*].

<sup>36</sup> See, e.g., BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 182 (2014).

<sup>37</sup> NAT'L CTR. ON ***DOMESTIC VIOLENCE***, *TRAUMA AND MENTAL HEALTH, PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE: TIPS FOR CIVIL LAWYERS AND LEGAL ADVOCATES* 1 (2013), <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH-2013-Preparing-for-Court-Proceedings.pdf> [<https://perma.cc/2UDK-JPRL>].

<sup>38</sup> Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 *DEPAUL J. WOMEN, GENDER & L.* 1, 29 (2017) (testifying ***in*** court can cause a survivor to reexperience trauma and dissociate); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295, 1313 (1993) (noting that dissociation can make testimony appear "'plastic' or 'fake' while hyperarousal can make survivors appear overly excitable").

narrative detail and context; they are encoded *in* the form of sensations, flashes, and images, often with little or no story.<sup>40</sup> And as with neurological trauma, psychologically traumatic memories encode the physical and psychic harms that generate them *in* a way that is prone to create a steep **credibility** discount based on the seeming implausibility of a survivor's story.

The tendency to discount survivors' stories based on internal inconsistencies is not restricted to police and judges alone. Courthouse clerks, for example--whose essential function is to create and maintain **case** files--often take on the role of **credibility**-assessors and system gatekeepers.<sup>41</sup> This happens even though clerks have no formal authority to determine whether a complaint has merit; such power is reserved to members of the judiciary, through Article III of the Constitution. Here is one example, from attorney and law professor Jane Stoever:

*I* recall waiting *in* a **Domestic Violence** Unit clerk's office . . . and seeing a clerk confront an unrepresented abuse survivor about the lack of specific dates *in* her [\*412] petition. The clerk insisted that the litigant had to plead with specificity, which included identifying specific calendar dates. When the *pro se* survivor was unable to remember exact dates for the years of abuse she had endured, the clerk tore up her petition [and refused to let her file a protection order **case**].<sup>42</sup>

## 2. External Consistency

*In* addition to crediting stories based on their degree of *internal* consistency, we are far more likely to credit stories that are *externally* consistent--i.e., chronicles of abuse that resonate with our pre-existing and publicly sanctioned narratives about how the world works.<sup>43</sup> An example taken from Professors Carolyn Grose and Margaret Johnson underlines this dynamic:

A narrative that tells of a person entering a home and closing a wet, dripping umbrella while exclaiming, "I just walked through a fire!" would not fit with our sense of normal. To be externally consistent, she should have burnt clothes, not a dripping wet umbrella, or be coughing from the smoke.<sup>44</sup>

The demand for external **credibility**, however, is complicated by the unconscious process of "false consensus bias"--the tendency to see one's "own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate."<sup>45</sup> *In* other words, we tend to

<sup>39</sup> JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF **VIOLENCE**--FROM **DOMESTIC** ABUSE TO POLITICAL TERROR 37 (1997).

<sup>40</sup> *Id.* at 38. An inability to recall key features of the trauma is one criterion of the posttraumatic stress disorder diagnosis. See DSMD, *supra* note 35, at 271. As Dr. Jim Hopper explains: "Remembering always involves reconstruction and is never totally complete or perfectly accurate . . . [G]aps and inconsistencies are simply how memory works -- especially for highly stressful and traumatic experiences . . . where the differential encoding and storage of central versus peripheral details is the greatest. Such gaps and inconsistencies are never, on their own, proof of anyone's **credibility**, innocence, or guilt." Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims Vs. Facts*, PSYCHOL. TODAY (Jan. 22, 2018), <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuro-science-alarmist-claims-vs-facts> [<https://perma.cc/RG6P-EX38>].

<sup>41</sup> This observation is based on the first author's twenty-seven years of experience representing survivors *in* hundreds of civil protection order **cases**. See *supra* note 9.

<sup>42</sup> Interview with Jane Stoever, Clinical Professor of Law, Univ. Cal., Irvine Sch. of Law (Jan. 6, 2018).

<sup>43</sup> GROSE & JOHNSON, *supra* note 16, at 15-16. As with internal consistency, the importance of external consistency *in* courtroom **credibility** determinations is reflected *in* treatises advising litigators about how to attack and undermine the **credibility** of a witness for the opposing side. See, e.g., BERGMAN, *supra* note 19, at 62-63.

<sup>44</sup> GROSE & JOHNSON, *supra* note 16, at 16.

assume that our own personal experiences are universal: what we would likely do, say, and feel is what *all others* would do, say, and feel. <sup>46</sup>

*In* reality, of course, these assumptions are misleading. Passengers who have survived a serious car crash tend to react quite differently to a driver's sudden slamming of the brakes than those who have experienced only unremarkable [\*413] car rides. <sup>47</sup> Veterans who have spent time *in* military conflict tend to react quite differently to loud, unexpected noises than do civilians leading peaceful lives. <sup>48</sup> *In* each of these examples, a profound difference *in* experience results *in* fundamentally different expectations about how the world works. And such expectations tend, *in* turn, to provoke diverse behaviors.

The most consequential experiential gap that separates ***domestic violence*** survivors from gatekeepers of the justice system involves, of course, the behaviors that stem from suffering abuse at the hands of an intimate partner. Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent "gap *in* collective interpretive resources" that prevents the dominant culture from making sense of a particular kind of social experience. <sup>49</sup> *In* the intimate abuse context, this gap prevents most nonsurvivors from being able to make sense of how survivors might actually behave.

#### a. *Women Who Stay*

To see the real-world impact of this interpretive gap, consider a quandary that has assailed survivors since the early days of the anti--***domestic violence*** movement. <sup>50</sup> We know that many women stay with their abusive partners *in* the aftermath of violent episodes. This tends to occur *in* the context of relationships characterized by coercive control, a pattern of domination that [\*414] includes tactics to isolate, degrade, exploit and control the survivor. <sup>51</sup>

<sup>45</sup> Lee Ross, David Greene & Pamela House, *The "False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1976); see also Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987) (noting that over a ten-year period, "over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others"); Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) ("People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information"); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, [108 COLUM. L. REV. 1268, 1268 \(2008\)](#).

<sup>46</sup> See Marks & Miller, *supra* note 45; Ross, Greene & House, *supra* note 45; Solan, Rosenblatt & Osherson, *supra* note 45.

<sup>47</sup> See J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of PTSD After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 PROF. PSYCHOL. RES. & PRAC. 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of post-traumatic stress disorder and may experience intrusive symptoms or avoid driving altogether).

<sup>48</sup> See, e.g., Anke Ehlers, Ann Hackmann & Tanja Michael, *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 MEMORY 403, 407 (2004).

[M]any of the trigger stimuli are cues that do not have a strong meaningful relationship to the traumatic event, but instead are simply cues that were temporally associated with the event, for example physical cues similar to those present shortly before or during the trauma (e.g., a pattern of light, a tone of voice); or matching internal cues (e.g., touch on a certain part of the body, proprioceptive feedback from one's own movements). People with PTSD are usually unaware of these triggers, so intrusions appear to come out of the blue.

*Id.* (emphasis omitted) (citation omitted). For a vivid visual/aural exposition of the triggers veterans face *in* daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), <https://www.youtube.com/watch?v=bqpRw92d1MA>.

<sup>49</sup> MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007).

<sup>50</sup> See, e.g., Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 AGGRESSION AND VIOLENT BEHAV. 391 (1998).

The perpetrator creates and enforces a set of "rules" governing numerous aspects of his partner's life--"her finances, clothes, contact with friends and family, even what position she sleeps *in*." <sup>52</sup> Once a perpetrator of abuse has appropriated the power to verbally restrict his partner's day-to-day life choices, physical *violence* then serves as both the abuser's means of enforcing that control and the punishment for attempts to resist it. <sup>53</sup> Many of us, but perhaps especially those privileged enough to live lives untouched by *violence* and with easy access to supportive resources, respond to stories of women who stay by focusing obsessively on the question "Why didn't she leave?" <sup>54</sup> The question is really more of an accusation: "*In* her shoes, I would most definitely have left." Or, *in* the words of a judge presiding over a civil protection order *case*: "[S]ince I would not let that happen to me, I can't believe that it happened to you." <sup>55</sup>

*In* recent years, judges are less likely to make such explicit statements on the record, but many continue to perceive a *woman's* decision to stay as externally inconsistent. <sup>56</sup> Judges tend to express their belief *in* the connection between women staying and story plausibility *in* less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom. <sup>57</sup> And this failure of understanding affects *case* outcomes. *In* 2015, for example, one of the first author's clinic clients lost her civil protection order suit based on a judge's discrediting the *woman's* story. The judge explained that her *credibility* determination derived from photographs, introduced by the perpetrator boyfriend, showing that, not long after a particularly serious violent episode and just a few days after she obtained a temporary protection order, the woman had [\*415] gone to a Red Lobster restaurant with him. <sup>58</sup> The judge was not interested *in* hearing about why the woman had decided to have dinner with her abusive partner--whether it was because she believed that the best way to ensure her immediate safety was to comply with her boyfriend's requests, because she was struggling with the challenges of ending a long-term relationship, or because she wanted her children to be able to see their father. Instead, the judge simply concluded that the photographs proved her incredibility. <sup>59</sup>

This persistent interpretive gap separating survivor and nonsurvivor understandings of the world was a powerful theme of the recent # WhyIStayed movement. *In* the fall of 2014, Baltimore Ravens running back Ray Rice

<sup>51</sup> Evan Stark, *Re-Presenting Battered Women: Coercive Control and the Defense of Liberty* (2012) (unpublished manuscript), [http://www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_100812.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf) [<https://perma.cc/DJK3-LVW7>].

<sup>52</sup> Deborah Epstein & Kit Gruelle, *Should an Abused Wife Be Charged *in* Her Husband's Crime?* N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/opinion/noor-salman-vegas-shooting-trial.html>.

<sup>53</sup> Scholar Michael Johnson has developed a widely used typology of intimate partner *violence*, based on the extent to which coercive control is involved. Relationships that take the form of "intimate terrorism" are characterized by one partner's use of coercive control to exert power over the other. *In* contrast, "situational couple *violence*" is not embedded within a broader pattern of controlling behaviors. Survivors who tend to seek help from social services and the justice systems are more likely to be involved *in* relationships of coercive control than are survivors *in* the general population. See Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple *Violence*: Findings from the National *Violence Against Women Survey**, 26 J. FAM. ISSUES 322, 323-24, 347 (2005).

<sup>54</sup> See *infra* text accompanying notes 60-66.

<sup>55</sup> Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative *in Domestic Violence* Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993).

<sup>56</sup> This observation is based on the first author's twenty-seven years of experience representing survivors *in* hundreds of civil protection order *cases*. See *supra* note 9.

<sup>57</sup> The first author has observed or participated *in* several such conversations at judicial training sessions, conferences, and *in* informal social settings over the last ten years.

<sup>58</sup> Interview with Gillian Chadwick, Assoc. Professor, Washburn Univ. Sch. of Law (Jan. 1, 2018).

<sup>59</sup> *Id.*

assaulted his then-fiancée Janay Palmer *in* an elevator, knocking her unconscious. The video of the incident, which also showed Rice dragging Palmer's limp body out of the elevator, was made public.<sup>60</sup> Both the media and the general public focused their attention disproportionately on variations of the victim-blaming question, "Why didn't she leave?" Far more ink was spilled discussing whether Janay provoked the assault (she slapped Rice *in* the face) and on Janay's longer-term response to the incident (electing to stay with Rice and eventually marrying him) than was devoted to Rice's knock-out punch to her head.<sup>61</sup>

Frustrated with the media response to the Rice--Palmer story, survivor Beverly Gooden decided to share with her family and friends, for the first time, the abusive conduct that had besieged her own marriage.<sup>62</sup> She did so by sending out the following three tweets under the hashtag # WhyIStayed:

*I* tried to leave the house once after an abusive episode, and he blocked me.

He slept *in* front of the door that entire night - # WhyIStayed.

*I* stayed because my pastor told me that God hates divorce. It didn't cross my mind that God might hate abuse, too - # WhyIStayed.

He said he would change. He promised it was the last time. I believed him.

He lied - # WhyIStayed.<sup>63</sup>

[\*416] Much to Gooden's surprise--she had previously used Twitter only to make relatively mundane comments about the details of her day<sup>64</sup>--the hashtag was soon trending; it remained steadily active for weeks and continued to receive daily contributions for over a year.<sup>65</sup>

<sup>60</sup> See, e.g., Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), <https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html>.

<sup>61</sup> See, e.g., Greg Howard, *Does the NFL Think Ray Rice's Wife Deserved It?*, DEADSPIN (July 31, 2014), <https://deadspin.com/does-the-nfl-think-ray-rices-wife-deserved-it-1612138248> [<https://perma.cc/7D> MH-22R4]; Mel Robbins, *Lesson of Ray Rice Case: Stop Blaming the Victim*, CNN (Sept. 16, 2014), <http://www.cnn.com/2014/09/08/opinion/robbins-ray-rice-abuse/index.html> [<https://perma.cc/EV9Y-MF24>].

<sup>62</sup> *Hashtag Activism in 2014: Tweeting 'Why I Stayed'*, NAT'L PUB. RADIO (Dec. 23, 2014), <https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed> [<https://perma.cc/XT7G-99MX>] [hereinafter *Hashtag Activism*].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Melissa Jeltsen, *The Ray Rice Video Changed the Way We Talk About Domestic Violence*, HUFFINGTON POST (Sept. 8, 2015), [https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence\\_us\\_55ec7228e4b002d5c07646cb](https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence_us_55ec7228e4b002d5c07646cb) [<https://perma.cc/R92T-F4FH>]. The top three reasons cited by survivors *in* the first year of # WhyIStayed posts were: a desire to keep the family intact, love of the abusive partner, and fear of the dangers inherent *in* leaving. *Id.* Early responses to the hashtag included:

@HToneTastic # WhyIStayed - Because his abuse was so gradual and manipulative, I didn't even realize what was happening to me.

@BBZaftig # WhyIStayed - Because he told me that no one would love me after him, and I was insecure enough to believe him.

@MonPetitTX - Because I had watched my mother stay and she had watched hers before that.

*Hashtag Activism*, *supra* note 62.

The numbers are telling here. Within hours, # WhyIStayed had unleashed thousands of tweets, with an avalanche of more than 100,000 *in* the first four months.<sup>66</sup> The sheer scale of the response is a strong indication of a pent-up sense among survivors that their stories are simply not understood by the larger culture.

b. *Physical Versus Psychological Harm*

The pronounced disconnect between survivor and nonsurvivor understandings of the world also strongly shapes common judicial expectations about experiences of harm. Most judges *in* our courts are men<sup>67</sup> and presumably--based on statistical probabilities alone--most are also nonsurvivors.<sup>68</sup> Anyone working *in* the justice system (including the first author) knows that many nonsurvivor judges *in* civil protection order **cases** tend to assume that, if they were to find themselves *in* an abusive relationship, [\*417] the most troubling aspect would be the physical, not the psychological, **violence**.<sup>69</sup> This prioritization of physical over psychological harm is reflected *in* the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of **violence**, rather than emotional abuse or threats of psychological harm.<sup>70</sup> For judges and other justice system actors, the law tends to dictate psychic reality: what the law prohibits *must* be what is harmful. The end result is that most judges assume that the way the world works, and therefore what is externally consistent, is that physical **violence** is far worse than psychological abuse.<sup>71</sup>

How does this assumption translate into courtroom expectations? A common judicial expectation is that a "real" victim will lead with physical **violence in** telling her story on the witness stand.<sup>72</sup> But *in* fact, many survivors tell their stories quite differently. For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical **violence** and threats.<sup>73</sup> The day-to-day, routine abuse often occurs

<sup>66</sup> *Hashtag Activism*, *supra* note 62; Lizzie Crocker, *Harsh Truths about Domestic Violence: Why Voicing Terrible Experiences Can Help Others*, THE DAILY BEAST (Sept. 20, 2014), <https://www.thedailybeast.com/harsh-truths-about-domestic-violence-why-voicing-terrible-experiences-can-helpothers> [<https://perma.cc/5Q5B-AUES>].

<sup>67</sup> Thirty percent of judges *in* U.S. state courts (where **domestic violence cases** typically are heard) are women. NAT'L ASS'N OF WOMEN JUDGES, 2016 U.S. STATE COURT WOMEN JUDGES (2016), <https://www.nawj.org/statistics/2016-us-state-court-women-judges> [<https://perma.cc/LV2M-W9EF>].

<sup>68</sup> National survey data show that nearly one *in* three women and one *in* four men will experience **domestic violence** at some point *in* their lives. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL **VIOLENCE** SURVEY (NISVS): 2010 SUMMARY REPORT 2 (2010).

<sup>69</sup> This prioritization of physical over psychological harm is reflected *in* the written law: both criminal statutes and civil protection order laws focus on heavily on physical assaults and threats of **violence** rather than emotional abuse or threats of psychological harm. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1143-44 (2009).

<sup>70</sup> *Id.* at 1134-38

<sup>71</sup> *Id.* at 1143. This assumption may well vary depending on the particularities of a survivor's identity. The stereotype of women as especially frail and vulnerable, for example, derives primarily from cultural images of white, heterosexual women.

<sup>72</sup> This observation is based on the first author's twenty-seven years of litigating hundreds of civil protection order **cases**. See *supra* note 9.

<sup>73</sup> See NAT'L CTR. FOR VICTIMS OF CRIME, INTIMATE PARTNER **VIOLENCE** (2017) (on file with authors) (demonstrating that emotional and psychological abuse more prevalent than physical **violence**); WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING **VIOLENCE** AGAINST WOMEN: INTIMATE PARTNER **VIOLENCE** (2012), [http://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1) [<https://perma.cc/4M79-8R8M>] (showing lifetime reported prevalence rate of emotional abuse higher than rate of physical abuse).

solely *in* the psychological realm. <sup>74</sup> Psychologists explain that *in* many abusive relationships victims are subjected to their partners' coercive control through a wide variety of psychological tactics, including, for example, "fear and intimidation[,] . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles." <sup>75</sup> An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by refusing to allow her to [\*418] sleep the night before a job interview, hiding or destroying her work clothing, inflicting noticeable injuries to create a disincentive to appear *in* public, hiding car keys or disabling her family car, threatening to kidnap the children if she leaves them with a babysitter or at day care, and harassing her at work. <sup>76</sup>

These pervasive, abusive experiences lead an overwhelming number of survivors to feel that the emotional harm inflicted by their partners is far more damaging than the physical injuries. <sup>77</sup> And this response is consistent with what we know from research; women report that psychological abuse is by far the greatest source of their distress, <sup>78</sup> regardless of the frequency or severity of the physical harm they've experienced.

So when a judge *in* a civil protection order court says to a woman: "tell me what happened," she may well focus on the harm that is most salient to her--the constant derogatory name calling, the way he made her feel that everything was her fault, the way he always checked her phone to see who she was talking to. The physical **violence** and threats may take a back seat; she might not even mention them unless specifically asked. <sup>79</sup> Thus, survivors often frame their courtroom stories *in* a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience. <sup>80</sup> I (the first author) have frequently been *in* courtrooms and [\*419] witnessed judges, presiding over protection order **cases**, get frustrated with women who testify at length about their mental anguish at their partner's hands. These survivors--more than eighty percent of whom proceed without the

<sup>74</sup> *In* one study of 1443 women, 86.2% of those who had experienced physical **violence** also reported emotional abuse without physical/sexual **violence**. Ann L. Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553, 557 (2000).

<sup>75</sup> Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000).

<sup>76</sup> Jody Raphael, *Battering Through the Lens of Class*, 11 J. GENDER, SOC. POL'Y. & L. 367, 369 (2003); see also Postmus, *supra* note 75, at 246. For an excellent discussion of the failure of the legal system to incorporate the full range of survivor harms, see generally Johnson, *supra* note 69.

<sup>77</sup> The authors have observed this prioritization throughout their over fifty years of combined experience talking to women survivors.

<sup>78</sup> See, e.g., Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 **VIOLENCE & VICTIMS** 89, 101-02 (1999) (finding that symptomatic responses to abuse, including PTSD and depression, were largely predicted by psychological abuse, rather than by physical **violence**); Mindy B. Mechanic, Terri L. Weaver & Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse*, 14 **VIOLENCE AGAINST WOMEN** 634, 649-50 (2008). *In* addition, the psychological component of intimate partner **violence** appears to be the strongest predictor of posttraumatic stress disorder. See Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 **NEUROSCIENCE & BIOBEHAV. REVS.** 181, 189 (2005) ("When the role of psychological, physical, and sexual aspects of intimate partner **violence** were considered separately, the psychological component turned out to be the strongest predictor [of PTSD].").

<sup>79</sup> This has been a consistent experience of the first author *in* representing many hundreds of women survivors, and watching thousands more, not represented by counsel, tell their stories *in* civil protection order court.

<sup>80</sup> See, e.g., Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* **ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE** 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter **ROUTLEDGE HANDBOOK**].

benefit of legal representation<sup>81</sup> --have no idea that this part of their stories will not trigger legal relief. It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound--to the judges, at any rate--less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. *In* this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

This profound gap *in* understanding--assuming a woman survivor's story is less plausible when it fails to meet her judicial audience's expectations about how the world works--creates real obstacles for survivors. The survivor has tried her best to faithfully recount her story as she experienced it, and thus with actual fidelity to the truth. But the judge has a fundamentally different understanding of how the world works, and he may well assume his is a universal one. As a result, the woman may well suffer a credibility discount based not on a fair assessment of her case, but rather on a fundamental failure of understanding.

As the above discussion illustrates, even after nearly five decades of antidomestic violence advocacy, many justice system gatekeepers still lack a sophisticated understanding of what constitutes a truly plausible story about women's experiences of intimate partner abuse. Extensive and often high-profile media coverage, radical changes *in* the civil and criminal laws, the creation of specialized domestic violence courts, support for a massive proliferation of shelters and advocacy programs, and millions of dollars' worth of research<sup>82</sup> have not realigned the way many officials go about making sense of plausible survivor behavior.

The dominant culture's persistent failure to absorb the different experiences shared among a marginalized group may well derive from what philosopher Gaile Pohlhaus calls a "willful hermeneutical ignorance."<sup>83</sup> Pohlhaus describes how our culture's asymmetrical authority systems essentially downgrade women into a status of less competent "knowers" than men.<sup>84</sup> Men, *in* contrast, are:

[\*420] [E]ncouraged to develop a kind of epistemic arrogance *in* order to maintain that their experience of the world is generalizable to the entirety of reality, a close-mindedness to the possibility that others may experience the world *in* ways they cannot, and an epistemic laziness with regard to knowing the world well *in* light of those [who are] oppressed . . . .<sup>85</sup>

The result here is that members of the predominantly male, nonsurvivor culture place too much weight on their own--uninformed, inexperienced--perceptions about key features of domestic violence, and too little on the perceptions of survivors with firsthand experience. When male authority figures are made aware of how their perceptions conflict with the stories of women survivors, they resolve the conflict by doubting women's articulated experience.<sup>86</sup> Cognitive scientists refer to this phenomenon as "belief perseverance"--the process by which people tend to hold onto a set of beliefs as true, even when ample discrediting evidence exists.<sup>87</sup>

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<sup>81</sup> See Barasch, *supra* note 11.

<sup>82</sup> See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 3-4 (1999).

<sup>83</sup> Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 17.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 17.

<sup>86</sup> McKinnon, *supra* note 80, at 170-71.

<sup>87</sup> See, e.g., Savion, *supra* note 45, at 81.

Women victimized by ***domestic violence*** often fail to offer narratives that are recognized as internally consistent, due, paradoxically enough, to symptoms of neurological and psychological trauma that *are themselves the effects of abuse*. Such women also fail to tell stories that fit the way nonsurvivors believe the world operates, resulting ***in*** the appearance of external inconsistency and, as an all-too predictable outcome, the reflexive dismissal of their experience within the justice system and the broader culture. Together, these apparent--but not real--inconsistencies ***in*** survivors' stories cast doubt on the stories' plausibility. And the real-world costs are steep indeed: judges, police officers, and other justice system gatekeepers are likely to impose ***credibility*** discounts that interfere with a ***woman's*** ability to obtain justice, safety, and healing.

## B. Storyteller Trustworthiness

***In*** addition to obstacles rooted ***in*** story plausibility, survivors face serious challenges ***in*** convincing justice system gatekeepers to accept them as personally trustworthy storytellers. ***In*** other words, regardless of the *content* of her story, a woman may be considered an unreliable reporter of her own experiences. ***In*** the philosophy literature, this is referred to as "testimonial injustice": a discriminatory disbelief of the storyteller herself, independent of the story she tells.<sup>88</sup>

Three of the most critical factors that contribute to our assessments of storyteller trustworthiness are (1) the storyteller's demeanor;<sup>89</sup> (2) the [\*421] storyteller's motive;<sup>90</sup> and (3) the storyteller's social location.<sup>91</sup> All three of these factors are particularly salient ***in*** the experiences of women ***domestic violence*** survivors trying to establish ***credibility in*** the eyes of justice system gatekeepers.

### 1. Demeanor

As discussed above,<sup>92</sup> when a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse. Three core aspects of PTSD--numbing, hyperarousal, and intrusion<sup>93</sup>--can influence demeanor ***in*** obvious ways. And despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret--and, as a result, discount--the ***credibility*** of women who display each set of symptoms when telling their stories of abuse.

A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.<sup>94</sup> This symptom can profoundly shape the way a woman appears ***in*** court and, ***in*** turn, how a judge or other justice system gatekeeper perceives her. Numbing may cause many survivors to testify about emotionally charged incidents with an entirely flat affect or render them unable to remember dates or details of violent incidents.<sup>95</sup> A woman may tell a story about how her partner sexually assaulted her as if she is talking about the weather outside. The disconnect between expectations about affect and story can be jarring and can result ***in*** the imposition of a ***credibility*** discount.

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<sup>88</sup> FRICKER, *supra* note 49, at 4.

<sup>89</sup> See *infra* text accompanying notes 912-111.

<sup>90</sup> See *infra* text accompanying notes 112-141.

<sup>91</sup> See *infra* text accompanying notes 143-165.

<sup>92</sup> See *supra* text accompanying notes 33-40.

<sup>93</sup> DSM-D, *supra* note 35, at 271-72.

<sup>94</sup> *Id.* at 272.

<sup>95</sup> See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221 (1993); see also HERMAN, *supra* note 39, at 45.

PTSD also alters demeanor via hyperarousal--that is, an anxious posture of alertness and reactivity to an imminent danger. <sup>96</sup> This "[h]yperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage *in* response to relatively minor incidents." <sup>97</sup> *In* the courtroom, for example, an accused abusive partner may give the survivor a particular look or adopt a particular tone of voice. The judge may not notice anything out of the ordinary, but the partner does: She knows that the abuser is communicating a message of intimidation or threat. As a result, she may suddenly break down on the witness stand, gripped by fear, frustration, fury, or all three. But to the judge, who has no window into the triggering event, the survivor is likely to sound [\*422] out of control, even a bit crazy. <sup>98</sup> The survivor now fits the stereotype of a classic hysterical female--an image commonly associated with exaggeration and unreliability. <sup>99</sup> The judge is therefore more likely to apply a *credibility* discount *in* such settings and assume that, regardless of the content of her story, the survivor is not a fully trustworthy witness.

Finally, as discussed *in* the context of story plausibility, PTSD symptoms affect demeanor through *intrusion*--reliving the violent experience as if it were occurring *in* the present, often through flashbacks. <sup>100</sup> Such unbidden reexperiencing of traumatic events may badly impair a witness' ability to testify *in* a narratively seamless--or indeed, even a roughly sequential--fashion. <sup>101</sup>

Once more, *domestic violence* complainants can find themselves *in* a double bind. The symptoms of their trauma--the reliable indicators that abuse has *in* fact occurred--are perversely wielded against their own *credibility in* court. Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to *credibility* discounts that may be imposed by police, prosecutors, and judges. <sup>102</sup>

Even demeanor "evidence" that is not symptomatic of trauma but that is a "normal" response to stressful courtroom circumstances can lead judges to discount a survivor's *credibility. In* a 2017 Boston trial court proceeding, for example, a woman seeking a one-year extension of her existing protection order testified about her abiding fear of her former partner. Following a contested trial, the judge awarded her the extension. Sitting next to her attorney as she listened to the court's ruling, she smiled and slumped *in* her seat, her torso sagging with relief. A few days later, the trial judge, *sua sponte*, set a reconsideration hearing. He told the woman that, *in* his view, she had appeared "too celebratory" when he had ruled *in* her favor at the previous hearing. As a result, he realized that she was not, *in* fact, a credible witness. The judge then vacated his previous decision to extend her protection order. <sup>103</sup>

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<sup>96</sup> DSMD, *supra* note 35, at 272.

<sup>97</sup> Epstein, *supra* note 82, at 41.

<sup>98</sup> See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078 (2011).

<sup>99</sup> See *id.* at 1079 ("Female jurors, according to one study, already believe that women are generally 'less rational, less trustworthy, and more likely to exaggerate than men.'").

<sup>100</sup> DSMD, *supra* note 35, at 275.

<sup>101</sup> Epstein, *supra* note 82, at 41.

<sup>102</sup> See, e.g., *id.*; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim--Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

<sup>103</sup> Interview with Community Advocate, Transition House, *in* Cambridge, Mass. (Dec. 18, 2017). The classic example of the justice system's misuse of affective evidence is Albert Camus's novel, *The Stranger*. The protagonist, Meursault, is sentenced to death for a murder based *in* part on a condemnation of his unrelated, "inappropriate" actions *in* the days following his own mother's death. Witnesses testified that Meursault did not cry but smoked a cigarette and drank coffee as he sat near his mother's coffin, and that the day after her funeral he swam *in* the ocean, saw a comedy film, and then made love with a woman he'd long been romantically interested *in*. This behavior, inconsistent with society's image of a grieving son, led the community to despise him and a jury to condemn him for a murder to which he had no connection. See ALBERT CAMUS, *THE STRANGER*

[\*423] **Credibility** discounts based on presumed inappropriate demeanor are imposed by other justice system gatekeepers as well. One attorney recalls a recent California **case** as follows:

*In* my county, **domestic violence cases** involving children may be referred to court evaluators to meet with the parties and provide the judge with an assessment as to the veracity of the allegations. One client went to her appointment with the evaluator and reported that her ex-boyfriend had been texting her *in* violation of an initial, temporary protection order. She showed her phone to the evaluator, who saw that she had saved her ex-boyfriend's phone number under an expletive, instead of using his actual name. Based on this evidence of the **woman's** anger, the evaluator determined that she was not afraid of the respondent (a fact irrelevant to the applicable legal standard), and for this reason deemed her **domestic violence** claim inconclusive. <sup>104</sup>

At the same time, abusive men often provide a sharp **credibility** contrast; they tend to excel at presenting themselves as self-confident and *in* control, are adept at manipulation, and "are commonly able to lie persuasively, sounding sincere," all of which tends to trigger assumptions that they are *in* fact credible. <sup>105</sup> A 2015 study of survivors conducted by the National **Domestic [\*424] Violence** Hotline is full of examples of this profoundly damaging **credibility** gap, including this one from a female survivor: The police made "things worse and act[ed] like I was the bad guy because I came *in* crying, but my abuser was calm after 2 years of hell--duh[,] I was scared and he was fine." <sup>106</sup>

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8, 20-21, 64 (Matthew Ward trans., Vintage Books 1988) (1942). The tendency, *in* both the public and the justice system, to discount **credibility** and assume guilt persists today, as demonstrated by the **case** of Amanda Knox, a young woman from Seattle who went to Perugia, Italy, and was twice convicted *in* Italian courts--and, years later, fully exonerated--of murdering her housemate. See Martha Grace Duncan, *What Not to Do When Your Roommate Is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, HARV. J.L. & GENDER-CREATIVE CONTENT, Sept. 19, 2017, <http://harvardjlg.com/2017/09/what-not-to-do-when-your-roommate-is-murdered-in-italy-amanda-knox-her-strange-behavior-and-the-italian-legal-system-by-martha-grace-duncan/> [<https://perma.cc/VBS7-P23B>]. Amanda's initial conviction was heavily dependent on her "inappropriate" actions *in* the days following the murder, including kissing her boyfriend not far from the scene, cuddling with him at the police station, turning a cartwheel--at a police officer's request--while waiting to be interviewed, and shopping for underwear not long after the murder (because she had no access to her apartment, which was locked down as a crime scene).*Id.* at 10-23. Similarly, Lindy Chamberlain was convicted of murdering her infant daughter while camping *in* the Australian outback. Clyde Haberman, *Vindication at Last for a Woman Scorned by Australia's News Outlets*, N.Y. TIMES (Nov. 16, 2014), <https://www.nytimes.com/2014/11/17/us/vindication-at-last-for-a-woman-scorned-by-australias-news-media.html>. Public sentiment condemned Chamberlain early on, based largely on her attire and affect *in* the courtroom. Lindy described feeling "trapped *in* a no-win situation. 'If I smiled, I was belittling my daughter's death . . . If I cried, I was acting.'" *Id.* Forensic evidence subsequently exonerated Chamberlain, confirming the accuracy of her report that a wild dog pulled her daughter out of a tent and killed her. *Id.*

<sup>104</sup> Interviews with Jane Stoeber, Clinical Professor of Law, Univ. of Cal., Irvine Sch. of Law (Jan. 6 & 9, 2018).

<sup>105</sup> LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 15-16 (1st ed. 2002); see also Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 *AM. U. J. GENDER SOC. POL'Y & L.* 163, 174 (2009) ("[B]atterers tend to be self-confident and ultra-controlled *in* their outward appearance and thus testify *in* a way that is traditionally perceived as truthful.").

<sup>106</sup> TK LOGAN & ROB VALENTE, NAT'L **DOMESTIC VIOLENCE** HOTLINE, WHO WILL HELP ME? **DOMESTIC VIOLENCE** SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 9-10 (2015), <http://www.thehotline.org/resources/law-enforcement-responses> [<https://perma.cc/CC5Z-Z56H>] [hereinafter National Hotline Survey]. Two national studies, both conducted *in* 2015, help us understand what is happening on the ground *in* terms of police refusal to credit survivor stories. One study, conducted by the ACLU, surveyed more than 900 **domestic violence** service providers about their clients' experiences with police. ACLU, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE AND POLICING* (2015), [www.aclu.org/responsesfromthefield](http://www.aclu.org/responsesfromthefield) [<https://perma.cc/3CKD-6J9E>] [hereinafter Responses from the Field]. The other, conducted by the National **Domestic Violence** Hotline, surveyed survivors themselves. National Hotline Survey, *supra* note 106, at 2. *In* the National **Domestic Violence** Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced **domestic violence**. *Id.* at 2. When asked for the reason, fifty-nine percent of these participants said that their decision was based on either their fear that the police would not believe them or--and this is where we get to consequential **credibility**--that they would do nothing *in* response to their reports of abuse. *Id.* at 4. Much the

The skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of **credibility** discounts. The more a police officer or judge appears to doubt a survivor's **credibility**, the more likely she is to feel upset, destabilized, or even (re)traumatized.<sup>107</sup> This reaction may trigger an increase **in** the intensity of her emotionally "inappropriate" demeanor, making her appear even less credible.<sup>108</sup> **In** other words, the testimonial injustice that women experience as they seek to be recognized as credible witnesses to their own abuse can become a self-fulfilling phenomenon: they internalize the court's image of themselves as unreliable narrators of their own experience.<sup>109</sup>

Social psychologists have coined the term "stereotype threat" to explain such harm. Stereotype threat arises when a person feels that she is at risk of conforming to a cultural stereotype about her particular social group. The existence of negative stereotypes--regardless of whether an individual herself accepts them--can make that individual anxious, and harm her ability to perform.<sup>110</sup> Thus, the existence of **[\*425]** such stereotypes, and **women's** concern about conforming to them, can diminish survivors' ability to effectively communicate their experiences.<sup>111</sup>

## 2. Motive

To assess the trustworthiness of a **woman's** account of **domestic violence**, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly **in** the context of intimate relationships.<sup>112</sup> Although such beliefs vary by the individual, certain fundamental cultural tropes about **women's** motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about **women's** false allegations about male behavior are the grasping, system-gaming woman on the make and the woman seeking advantage **in** a child custody dispute.

A recent review of the first twenty websites to appear **in** a Google search of the term "**domestic violence** false allegations" underlines the power of these stereotypes **in** the legal context. The vast majority of the "hits" **in** response to this search were websites maintained by small firm and sole practitioner defense attorneys; **in** other words, lawyers available to represent those accused of **domestic violence**, typically **in** the face of criminal prosecution. These lawyers post advice for potential clients, and most explain that "false allegations" of **domestic violence** tend to derive from women scheming for some sort of material payday or other advantage, such as a leg up **in** a child custody **case**.<sup>113</sup> Each of these stereotypes, and their implications for **women's credibility**, is explored below.

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same perceived deficit **in** consequential **credibility** hampered the reporting efforts of the remaining 309 women interviewed **in** the National Hotline Survey who **had in** fact interacted with the police: two-thirds of these women reported that they were "somewhat or extremely afraid" to call again **in** the future, based on the same sets of concerns. *Id.* at 8.

<sup>107</sup> See Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, **in** ROUTLEDGE HANDBOOK, *supra* note 80, at 236-38.

<sup>108</sup> See *supra* text accompanying notes 91-107; *infra* notes 109-110.

<sup>109</sup> Saul, *supra* note 107.

<sup>110</sup> See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 389 (2002).

<sup>111</sup> See Saul, *supra* note 107, at 238.

<sup>112</sup> Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 242-43 (2011).

<sup>113</sup> See Memorandum Analyzing First Twenty Hits for "**Domestic Violence** False Allegations" (Nov. 15, 2017) (on file with authors). The twenty websites are: <https://www.breedenfirm.com/domestic-violence/defending-false-accusations-domestic-violence/>; <https://billingsandbarrett.com/new-haven-criminal/domestic-violence-lawyer/false-accusations/>;

[\*426] a. *The Grasping Woman on the Make*

The grasping woman stereotype flourished *in* the Reagan era, when legislators portrayed poor women as "welfare queens," whose family planning decisions were solely dependent on a desire to expand their monthly benefit check by a few dollars. Though factually discredited,<sup>114</sup> the welfare queen image continues to have an impact on the law: to this day, fifteen states prohibit families from receiving higher benefit levels if a baby is born while the household is on assistance, *in* an effort to ensure that cash aid will not serve as a putative incentive for poor women to have more children.<sup>115</sup>

This same stereotype is reflected *in* our contemporary obsession with women as "gold diggers," based on the 1933 movie of that name.<sup>116</sup> This stereotype imbues the lyrics of the eponymous hip hop song about women who target wealthy men, falsely claim that these men are the fathers of their children, and then soak them for child support.<sup>117</sup> It is readily apparent *in* Silicon Valley, [\*27] where tech magnates swap warnings about women they

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<https://www.adamyounqlawfirm.com/Criminal-Defense/Violent-Crimes/False-Allegations-Of-Domestic-Violence.shtml>;  
<https://criminallawdc.com/dc-domestic-violence-lawyer/false-accusations>; <https://www.bajajdefense.com/san-diego-domestic-violence-attorney>;  
<https://www.jonathanmharveyattorney.com/Domestic-Violence/False-Allegations.shtml>;  
<https://www.lafaurielaw.com/Criminal-Defense/Domestic-Violence-Order-of-Protection-in-Family-IDV-Courts/False-Domestic-Violence-Accusations.shtml>;  
<https://chicagocriminaldefenselawyer.com/false-accusations-domestic-violence>;  
<http://www.amcoffey.com/Criminal-Defense-Overview/False-Domestic-Violence-Allegations.shtml>;  
<https://criminallawyermaryland.net/maryland-domestic-violence-lawyer/false-accusations>;  
<http://www.inlegal.com/blog/2017/february/have-you-been-falsely-accused-of-domestic-violence>;  
<http://www.scottriethlaw.com/blog/2017/06/how-false-allegations-of-domestic-violence-can-ruin-your-life.shtml>;  
<https://www.weinbergerlawgroup.com/domestic-violence/false-allegations/defending-faqs>; <https://www.dworinlaw.com/false-domestic-violence-aust-in-texas>;  
<https://stearns-law.com/family-law-services/domestic-violence/false-accusations>;  
<http://www.inlandempiredomesticviolence.com/Domestic-Violence/Falsely-Accused-of-Domestic-Violence.aspx>;  
<https://www.carlahartleylaw.com/Domestic-Violence-And-Criminal-Law/False-Accusations-Of-Domestic-Violence.shtml>;  
<http://www.bosdun.com/Blog/2017/March/What-To-Do-if-You-Have-Been-Wrongly-Accused-of-D.aspx>;  
<http://www.flowermoundcriminaldefense.com/domestic-violence>; <https://www.kefalinolaw.com/miami-domestic-violence-defense-lawyer>.

<sup>114</sup> See Stephen Pimpare, *Laziness Isn't Why People Are Poor. And iPhones Aren't Why They Lack Health Care*, WASH. POST (Mar. 8, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm\\_term=.59f65871be13](https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm_term=.59f65871be13); Eduardo Porter, *The Myth of Welfare's Corrupting Influence on the Poor*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/21/business/the-myth-of-welfares-corrupting-influence-on-the-poor.html>.

<sup>115</sup> Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 249 (2014).

<sup>116</sup> GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands).

<sup>117</sup> Kanye West's song, *Gold Digger*, contains the following lyrics:

*Eighteen* years, eighteen years

She got one of your kids got you for eighteen years

*I* know somebody payin' child support for one of his kids

His baby mama car and crib is bigger than his

You will see him on TV, any given Sunday

Win the Super Bowl and drive off *in* a Hyundai

She was supposed to buy your shorty Tyco with your money

She went to the doctor, got lipo with your money

refer to as "founder hounders."<sup>118</sup> These gender stereotypes are, of course, shaped by race, class, and other identity-based assumptions. The image of the welfare queen, as one example, was purposefully designed to draw its power from racialized narratives;<sup>119</sup> at the same time, it operates more broadly to negatively affect societal perceptions of all women, perhaps especially those who are also poor or low income. As with all stereotypes, those that affect women as women are not monolithic *in* their impact: gender stereotypes are racialized (the unrapeable black woman, for example), and racial discounts are gendered (blackness *in* women is stigmatized *in* ways specific to black women *in* particular). Despite this diversity of impact and complexity of harm, the bottom line is that we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something, either from the government or from their male partners.

This social myth is particularly lethal for women seeking safety from intimate partner *violence*, especially those who are trying to exit their abusive relationships. Most survivors need concrete resources to bring about this fundamental change *in* their living situation. Although a *woman's* informal network of support, made up of family and friends, may be able to help by providing a place to stay, transportation, childcare, or financial assistance,<sup>120</sup> these resources may well not be sufficient and are often stop-gap or finite *in* nature. Eventually, many abuse survivors need to secure additional resources, frequently by turning to the social welfare system or the safety furnished by a civil protection order.<sup>121</sup> This quest for some sort of subsidized autonomy is, once again, a reflection of the underlying dynamics of *domestic* abuse.<sup>122</sup> [\*428] An all-too-common strategy of abusers is to

She walkin' around lookin' like Michael with your money . . .

If you ain't no punk

Holla "We want prenu! We want prenu!" (Yeah!)

It's somethin' that you need to have

'Cause when she leave yo' ass she, gon' leave with half

*Eighteen* years, eighteen years

And on the eighteenth birthday he found out it wasn't his?!

. . . Now I ain't saying she a gold digger . . .

But she ain't messin' with no broke n\* . . .

<sup>118</sup> See Emily Chang, "Oh My God, This Is So F---ed Up": Inside Silicon Valley's Secretive, Orgiastic Dark Side, VANITY FAIR (Feb. 2018), <https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum> ("Whether there really is a significant number of such women is debatable. The story about them is alive and well, however, at least among the wealthy men who fear they might fall victim.").

<sup>119</sup> Premilla Nadasen, *From Widow to "Welfare Queen": Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAMILIES, 52 (2007), 69-70.

<sup>120</sup> Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 339 (2006); Lisa A. Goodman & Katya Fels Smyth, *A Call for a Social Network-Oriented Approach to Services for Survivors of Intimate Partner Violence*, 1 PSYCHOL. OF VIOLENCE 79, 81 (2011); Stephanie Riger, Sheela Raja & Jennifer Camacho, *The Radiating Impact of Intimate Partner Violence in Women's Lives*, 17 J. INTERPERSONAL VIOLENCE 184, 198-200 (2002).

<sup>121</sup> See, e.g., ELEANOR LYON, SHANNON LANE & ANNE MENARD, NAT'L INST. JUSTICE, MEETING SURVIVORS' NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES iv (2008) (noting that "*domestic violence* shelters address compelling needs that survivors cannot meet elsewhere"); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<https://perma.cc/3TSQ-6PKY>] (noting that a substantial percentage of women survivors of intimate partner *violence* seek a civil protection order).

force women into social isolation, thus limiting their access to those family and friends who might have been willing to provide them with help.<sup>123</sup> The law *in* most states authorizes system officials to provide survivors assistance such as priority *in* shelter access, or a protection order provision ordering their abusive partner to vacate a home *in* which they share a legal interest.<sup>124</sup> Again, these resources for survivors are built into our law and policy for good reason--survivors need them to stave off repeat *violence*.<sup>125</sup> But when women actually pursue such concrete, practical assistance, they often suffer an immediate *credibility* discount; their trustworthiness is now colored by the suspicion that they are motivated by a desire to obtain shelter or sole access to a residence, rather than by the urgent need to protect themselves from *violence*.<sup>126</sup>

I (the first author) have participated *in* numerous judicial training sessions with judges *in* the D.C. Superior Court's *Domestic Violence* Unit. Year after year, I have listened as veteran judges warn those who are more junior, cautioning that "so many times I hear these stories and something seems wrong; then I realize the woman is just here to get shelter, or to kick her ex out of the house without having to go through a divorce. Keep an eye out for that." These judges are encouraging their colleagues to discount the personal trustworthiness of women based on their efforts to seek legally authorized resources on their path to safety.<sup>127</sup>

[\*429] And attorneys representing survivors pick up on the power that these unfair stereotypes can exert *in* the courtroom. Until recently, I (the first author) had often joined the ranks of many other victim advocates *in* doing just

<sup>122</sup> See *supra* text accompanying notes 112, 114.

<sup>123</sup> LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 107 (2009); see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 *U.C. DAVIS L. REV.* 1009, 1021-22 (2000) ("[Battered women] frequently become estranged from family and friends who might otherwise provide them with material aid."); Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 *VIOLENCE AGAINST WOMEN* 1354, 1357 (2004) ("Women are not allowed to talk on the telephone, visit their friends, attend church, decide on their own what to wear, or go to school or work.").

<sup>124</sup> SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF *DOMESTIC VIOLENCE*, 12-14 (1997), <https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf> [<https://perma.cc/3SXH-SJ6E>].

<sup>125</sup> See, e.g., MONICA MCLAUGHLIN, NAT'L LOW INCOMEHOUS. COAL., HOUSING NEEDS OF VICTIMS OF *DOMESTIC VIOLENCE*, SEXUAL ASSAULT, DATING *VIOLENCE*, AND STALKING, 1 (2017), [http://nlhc.org/sites/default/files/AG-2017/2017AG\\_Ch06-S01\\_Housing-Needs-of-Victims-of-Domestic-Violence.pdf](http://nlhc.org/sites/default/files/AG-2017/2017AG_Ch06-S01_Housing-Needs-of-Victims-of-Domestic-Violence.pdf) [<https://perma.cc/SJT7-2DBX>] (explaining that "safe housing can give a survivor a pathway to freedom").

<sup>126</sup> As noted above, women of color may be especially likely to experience such *credibility* discounts due to the racialized nature of the stereotypes that drive them.

<sup>127</sup> One more example: *in* a 2012 Baltimore protection order *case*, Judge Bruce S. Lamdin listened to Heather Myrick-Vendetti testify about her husband's abuse, including the following statement: "He pinned me to a shelf, busted my arm open, left a gash *in* my forearm. He then threw me down on the floor and stomped me *in* the ribs so hard that I peed my pants. My oldest, who was 12 years old, got my son and hid *in* a closet with a hammer and called someone to come get us." *Judge Bruce Lamdin Interrogates Woman Seeking Restraining Order*, WASH. POST (Sept. 9, 2012), [https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking-restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653\\_video.html?tid=arein](https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking-restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653_video.html?tid=arein); see also *Baltimore County Judge Bruce Lamdin Faces Complaint* (WBAL TV television broadcast Sept. 4, 2012), <https://www.wbalv.com/article/911-dispatcher-responds-to-call-at-his-own-home-i-just-handled-it-like-any-other-call/25239609> [<https://perma.cc/PP3K-83BB>]. Ms. Myrick-Vendetti then described her husband's attempt to burn down their house a few days later. *Id.* When she told the judge that her husband constituted a threat to her safety and requested that he be ordered to leave the home they shared, Judge Lamdin responded, "Ma'am there are shelters," and "It confounds me that people tell me they are scared for their life and then they stay *in* a situation where they can remove themselves and go to a shelter." *Id.* Although this story is an extreme one, it reflects a deeply held suspicion that woman seeking resources are operating from false motives and cannot be trusted.

that: when representing a client who is privileged enough not to need much assistance from the court (perhaps she doesn't have children with her abusive partner, she doesn't live with him, or their relationship was relatively limited so she was more easily able to cut him out of her life), I have argued that the court should find my client especially credible *for this reason*. *In* other words, because my client is seeking only narrowly limited, safety-based remedies, rather than requesting the full range of relief legally available to her, the court should view her as particularly credible. I've done this for the same reason lawyers use to make every strategic decision: because my audience--the court--is likely to buy the argument. My lawyering instincts tell me that a judge will, *in* fact, understand a more limited request for relief as a real indication of a survivor's ***credibility***.<sup>128</sup>

But I have belatedly come to realize that *in* pursuing this approach I am helping one client but simultaneously lending support to a prejudicial, genderbased ***credibility*** discount. Logically, the flip side of my argument must also be true: judges view survivors who seek more extensive remedies as *less* credible--as women who may be fabricating or exaggerating their allegations *in* order to obtain resources such as shelter and financial support.<sup>129</sup>

It is worth noting here that these judicial suspicions--discounting ***credibility*** when a woman asks for the full scope of available relief--simply do not arise *in* contexts that are not dominated by women litigants. It is laughable to imagine a judge suspecting the ***credibility*** of a business owner if, after presenting a colorable legal claim, that owner sought to recover an [\*430] extensive range of statutorily enumerated remedies. Why are women subjected to male ***violence*** held to a different standard?

***Credibility*** discounts based on the grasping woman stereotype extend beyond the judicial realm to other gatekeepers. *In* Washington, D.C., for example, court-appointed attorney negotiators meet with unrepresented parties *in* civil protection order ***cases*** and attempt to resolve matters without the need for a contested trial. Several of these negotiators have, on many occasions, shared the view that petitioners are not "real" victims of ***domestic violence***, but instead are there to get housing and other resources.<sup>130</sup> These suspicions about survivors' motives color the work of the D.C. Superior Court's Crime Victim's Compensation ("CVC") program as well. The CVC provides a variety of material and housing-related resources to local victims of crime. A survivor is entitled to obtain emergency shelter based on an initial, emergency judicial determination that she is entitled to a short-term temporary protection order. CVC officials then monitor her actions. If the court docket reveals that she ultimately has dropped her request for a permanent order--regardless of whether this decision was made because she was reassaulted and intimidated into doing so, she decided to move to another jurisdiction to better protect herself, or she was unable to accomplish the necessary service of process--the CVC will peremptorily terminate her request for assistance.<sup>131</sup>

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<sup>128</sup> Other lawyers representing survivors report doing the same. See, e.g., Interview with Megan Challender, Supervising Attorney, Md. Ctr. for Legal Assistance (July 12, 2017) (reporting that she has observed lawyers making these arguments *in* court on multiple occasions); Interview with Margo Lindauer, Assoc. Teaching Professor & Dir. of the ***Domestic Violence*** Inst., Ne. Univ. Sch. of Law (Jan. 21, 2018).

<sup>129</sup> One survivor attorney recently shared an experience where the judge *in* a Washington, D.C., civil protection order ***case*** explicitly ruled that the survivor was credible because "she was not asking for anything other than to be left alone." Interview with Megan Challender, *supra* note 128; see also Interview with Courtney K. Cross, Assistant Clinical Professor of Law & Dir., ***Domestic Violence*** Clinic, Univ. of Ala. Sch. of Law (July 12, 2017).

<sup>130</sup> This observation is based on the first author's extensive experience litigating hundreds of civil protection order ***cases***. See *supra* note 9. Other D.C. ***domestic violence*** advocates confirm the routine nature of such comments. See, e.g., Interview with Gillian Chadwick, *supra* note 58; Interview with Courtney K. Cross, *supra* note 129.

<sup>131</sup> See Interview with Janese Bechtol, Chief, ***Domestic Violence*** Section, Office of the Attorney General for the District of Columbia (Aug. 17, 2018). For an overview of the Washington, D.C., crime victim compensation program, see *Crime Victim Compensation & Services in Washington, D.C.*, Interview by Len Sipes with Laura Banks Reed, Dir., Crime Victims' Compensation Program of the D.C. Superior Court (Mar. 3, 2014), <https://media.csosa.gov/podcast/transcripts/category/audiopodcast/page/11/> [<https://perma.cc/LYK5-8H5V>].

This grasping woman stereotype puts survivors *in* a terrible bind. We know that victims of ***domestic violence*** frequently are unable to successfully handle the ***violence in*** their lives without seeking outside help.<sup>132</sup> Many, if not most, need the full set of remedies permitted *in* civil protection order statutes, such as shelter, financial support, and other assistance. By superimposing stereotype-based ***credibility*** assessments onto ***women's*** requests for relief, we are forcing these women to make an untenable choice: they may either seek the full range of assistance they actually need to achieve safety, but risk suffering a court-imposed ***credibility*** discount; or they may make a bid to appear more credible by forgoing essential resources needed for protection. And, of course, the women who are most disadvantaged, and thus need the greatest amount of help, are the ones who are least likely to be believed.

**[\*431]** b. *The Woman Seeking Unfair Advantage in a Child Custody Dispute*

Women seeking to escape violent relationships often must turn to the family courts to resolve custody and other issues with their abusive partners. And virtually every state custody statute requires family court judges to consider intimate partner abuse as a factor weighing against an award of custody to the parent-abuser.<sup>133</sup> Indeed, the U.S. House of Representatives recently passed a concurrent resolution urging state courts to determine family ***violence*** claims and risks to children before turning to the consideration of any other custody factors.<sup>134</sup>

The rationale for such legal provisions is that parent-on-parent ***violence*** harms not only the victim-parent, but also the children, who may witness the ***violence*** or its aftermath.<sup>135</sup> But ***women's*** experience *in* these courts defies the sense of the law as written: *in* fact, mothers' allegations of ***domestic violence*** are discounted or even fully discredited by family court judges.

Recent studies of family court custody decisions reveal that mothers who allege intimate partner ***violence*** are actually *more* likely to lose custody than mothers who do not make such assertions.<sup>136</sup> *In* other words, a claim of parent-on-parent ***violence*** operates to *undermine, rather than strengthen*, custody requests made by survivor-mothers. Judges tend to conclude, typically with no evidence other than the perpetrator-father's uncorroborated assertion, that women are fabricating abuse allegations as part of a strategic effort to alienate the children from their father.<sup>137</sup> The mother's experience of abuse is turned on its head to support the perpetrator's claim that he is the better parent.

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<sup>132</sup> See LYON, LANE & MENARD, *supra* note 121.

<sup>133</sup> AM. BAR ASS'N, *Custody Decisions in Cases with Domestic Violence Allegations*, [https://www.americanbar.org/content/dam/aba/images/probono\\_public\\_service/ts/domestic\\_violence\\_chart1.pdf](https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf) (demonstrating that Connecticut is the sole exception to this rule).

<sup>134</sup> H.R. Con. Res. 72, 115th Cong. (Sept. 25, 2018).

<sup>135</sup> See Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 797 (2008) ("This review finds that children and adolescents living with ***domestic violence*** are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities *in* their lives.").

<sup>136</sup> See Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 328 (2017) ("Overall, fathers who were accused of abuse and who accused the mother of alienation won their ***cases*** 72% of the time; slightly *more* than when they were *not* accused of abuse (67%)."); see also Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005).

<sup>137</sup> Meier & Dickson, *supra* note 136, at 318. This ***credibility*** discount is particularly disconcerting *in* light of studies examining the reliability of ***domestic violence*** allegations *in* the context of family law proceedings. Such studies have found that the allegations of women-mothers are substantiated--*in* other words, corroborated by sources *in* addition to the testimony of the woman who asserted them--*in* a high percentage of ***cases***. See, e.g., Johnston et al., *supra* note 136, at 290 (finding corroboration rate of sixty-seven percent). Although the remainder of these allegations lack independent corroboration, this does

[\*432] Family court studies further reveal that when a father alleges that a mother has engaged *in* "parental alienation,"<sup>138</sup> his chances of being awarded custody increase *even when his allegations are not credited or are left unresolved by the court.*<sup>139</sup> The judicial assumption that women falsely allege or exaggerate ***domestic violence in*** an effort to obtain custody runs so deep that family court judges appear to cling to it even ***in cases*** where they themselves determine that such a claim is untrue.<sup>140</sup>

The ***credibility*** discounting operates *in* the reverse direction as well. At a 2016 "Bench-Bar" social event, two judges involved with the D.C. ***domestic violence*** court commented that they were well aware that women who file for protection orders after having already initiated custody proceedings are trying to "pull the wool over [the judge's] eyes."<sup>141</sup>

The result is that survivor-mothers often leave family court having been wrongly denied custody of their children, and may be unfairly discredited and denied relief *in* their civil protection order hearings as well. A judicial willingness to discount their trustworthiness can have repercussions that will last throughout their own lives and those of their children.

### 3. Social Location

Cognitive psychology teaches us that our wider culture--as translated by the media, authority figures, family members, etc.--transmits stereotypes to individuals that we then adopt on a deep, unconscious level.<sup>142</sup> Our most [\*433] commonly held derogatory stereotypes include those that devalue the words of women, people of color, those living *in* poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.<sup>143</sup> As philosopher Miranda Fricker explains, "If we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with

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not mean that they are false; instead, it simply means that insufficient additional information exists beyond the parent's testimony.

<sup>138</sup> Parental alienation syndrome is a hypothesized disorder first proposed by psychiatrist Richard Gardner *in* 1985. Gardner believes that the disorder arises primarily *in* the context of child custody disputes and involves a child being manipulated by one parent into internalizing the unjustified denigration of the other parent. *In* the more than thirty intervening years, the diagnosis has yet to be accepted *in* the mental health community. See Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 64 (2016). Instead, a great deal of psychological and legal literature has critiqued the construct, and both leading researchers and most professional institutions have renounced the concept as lacking *in* empirical basis or objective merit. See Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 236 (2009) ("The critiques of Gardner's PAS are legion . . ."). Despite all of this, claims of parental alienation syndrome have come to dominate custody litigation *in* family court, especially ***in cases*** involving allegations of abuse. *Id.* at 233.

<sup>139</sup> Meier & Dickson, *supra* note 136, at 331 ("[W]hen courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25-50% of the time.").

<sup>140</sup> This refusal to accept facts that contradict a person's theory of how the world works is explained *in* part by the concept of confirmation bias. See *supra* text accompanying note 41.

<sup>141</sup> Interview with Andrew Budzinski, Graduate Teaching Fellow, Georgetown Univ. Law Ctr. ***Domestic Violence*** Clinic (Jan. 22, 2018).

<sup>142</sup> See, e.g., RACHEL D. GODSIL ET AL., PERCEPTION INST., 2 SCIENCE OF EQUALITY :THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf> [<https://perma.cc/5Q62-R9U7>] ("Popular culture plays an important part *in* reinforcing these gendered associations. Implicit biases are not the result of individual psychology--they are a social phenomenon that affects us all.").

<sup>143</sup> Jeremy Wanderer, *Varieties of Testimonial Injustice*, ***in*** ROUTLEDGEHANDBOOK, *supra* note 80, at 28.

attributes related to poor truth-telling *in* particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc." <sup>144</sup>

Although it is outside our scope to make a full *case* for each of these social categories, we will examine one of them *in* detail here: the practice of discounting *women's credibility* as *women*. *In* Rebecca Solnit's compelling essay, *Cassandra Among the Creeps*, <sup>145</sup> she describes the myth of Cassandra, daughter of the king of Troy. When the god Apollo tried to seduce her, Cassandra rejected him. *In* retribution, Apollo cursed Cassandra so that, although she could accurately foresee the future, her people always disbelieved her and shunned her as a crazy liar. Solnit notes,

*I* have been thinking of Cassandra as we sail through the choppy waters of the gender wars, because *credibility* is such a foundational power *in* those wars and because women are so often accused of being categorically lacking *in* this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so. <sup>146</sup>

This refusal to listen to *women's* stories of male abuses of power runs so deep that it may have played a significant role *in* Sigmund Freud's early decision to upend his entire psychoanalytic theory. <sup>147</sup> Early *in* his career, Freud listened as his female patients told him story after story of their experiences of childhood sexual abuse, often at the hands of their fathers. <sup>148</sup> Freud believed these stories and, *in* the late 1880s developed his "seduction theory," arguing that early childhood [\*434] sexual abuse constituted the root cause of his patients' neuroses. <sup>149</sup> Later, however, Freud abandoned this idea, proclaiming instead that his patients' stories were not based *in* actual experience, but instead on fabricated, wishful fantasies that all women experience. <sup>150</sup> Freud's shift from crediting to discrediting women eventually led him to develop his profoundly influential theory of psychosexual development. <sup>151</sup>

For almost a century, conventional psychoanalytic wisdom held that Freud's shift represented an appropriate course correction--an important move toward greater accuracy *in* analyzing his traumatized patients. *In* the early

<sup>144</sup> See FRICKER, *supra* note 49, at 32; *supra* text accompanying note 41 (discussing confirmation bias).

<sup>145</sup> Rebecca Solnit, *Cassandra Among the Creeps*, HARPER'S MAG., Oct. 2014, at 4.

<sup>146</sup> *Id.* Professor Catharine MacKinnon, the theorist who created the term "sexual harassment" notes: "I kept track of . . . *cases* of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man *in* the same way to even begin to make a dent *in* his denial. That made a woman, for *credibility* purposes, one-fourth of a person." Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

<sup>147</sup> See, e.g., SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 62-65 (James Strachey trans., W. W. Norton & Co. 1963) (1925).

<sup>148</sup> *Id.* at 62.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 63.

<sup>151</sup> *Id.* at 63-64. Freud's theory of psychosexual development rests on the idea that from birth, human beings possess an instinctual sexual energy (libido) that develops *in* five stages. According to Freud, a person who experiences frustration during any one of these developmental stages experiences a resulting anxiety that can persist into adulthood *in* the form of neurosis. During the third stage, called the phallic phase, which occurs between the ages of two and five, a child focuses libidinal energy or sexual wishes on the opposite sex parent and experiences feelings of jealousy and rivalry toward the same sex parent. 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1975).

1980s, however, Jeffrey Masson, a former Sanskrit professor who had subsequently trained as a psychoanalyst and become Projects Director of the Freud Archives, turned this assumption on its head. Based on correspondence between Freud and a contemporary, Wilhelm Fliess, Masson argued that Freud did not abandon his belief *in* his original observation--that girls were being abused *in* huge numbers by male relatives--based on factual evidence.<sup>152</sup> Instead, Freud was unable to accept the disturbing truth he had uncovered; he also may have been unwilling to risk the disapprobation of the conservative medical establishment.<sup>153</sup> Ultimately, Freud decided to abandon his original idea<sup>154</sup> and create a new theory based on the premise that *women's* stories of sexual *violence* were not fact, but fantasy.<sup>155</sup> *In* the words of psychiatrist Judith Herman, "[t]he dominant psychological theory of the next century was founded *in* the denial of *women's* reality."<sup>156</sup>

**[\*435]** Contemporary culture continues to impart strong lessons about *women's* lack of trustworthiness. Our teenagers watch TV shows like *Pretty Little Liars*, *Don't Trust the Bitch in Apartment 23*, and *Devious Maids*; younger children watch animated movies like *Shark Tale*, which features a catchy tune that describes women as scheming.<sup>157</sup> Rap lyrics are full of stories of women deceiving and taking advantage of men.<sup>158</sup>

The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts. *In* one study *in* which a group of "*credibility* raters" assessed the believability of actual witnesses testifying *in* trials *in* a mid-sized Southern city, researchers found that male witnesses were considered more credible than female witnesses.<sup>159</sup> Similarly, the available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men.<sup>160</sup> And recent studies show that the police routinely discredit female survivors

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<sup>152</sup> JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* 107-13 (1984).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 110.

<sup>156</sup> HERMAN, *supra* note 39, at 14. It should be noted that Masson's claim provoked a good deal of controversy *in* the psychiatric community, where Freud is still largely revered. See, e.g., Judith Herman, *The Analyst Analyzed*, *NATION* (Mar. 10, 1984), at 293 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (arguing that Masson is "right and courageous"); Charles Rycroft, *A Case of Hysteria*, 31 *N.Y. REV. BOOKS* 3 (1984) (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984)) (accusing Masson of ignoring evidence contrary to his theory and presenting flimsy evidence to support it); Anthony Storr, *Did Freud Have Clay Feet?*, *N.Y. TIMES*, Feb. 12, 1984, at 3 (reviewing JEFFREY M. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY*) (arguing that "[e]verything we know about [Freud's] character makes Mr. Masson's accusation wildly unlikely").

<sup>157</sup> Soraya Chemaly, *How We Teach our Kids that Women Are Liars*, *ROLE REBOOT* (Nov. 19, 2013), <http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-thatwomen-are-liars> [<https://perma.cc/3N2E-RCEM>].

<sup>158</sup> Terri M. Adams & Douglas B. Fuller, *The Words Have Changed but the Ideology Remains the Same: Misogynistic Lyrics in Rap Music*, 36 *J. BLACK STUD.* 938, 945, 948 (2006).

<sup>159</sup> Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 *BEHAV. SCI. & L.* 195, 195, 203 (2014).

<sup>160</sup> Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 *S. CAL. REV. L. & WOMEN'S STUD.* 1, 61 (1996); see also Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. GENDER RACE & JUST.* 625, 629 (2000) ("[W]omen, more than men, are stereotyped as liars even though men and women are equally adept at telling lies."). It

of intimate partner abuse. *In* the 2015 National ***Domestic Violence*** Hotline Survey, for example, a substantial percentage of women reported that the police did not believe their stories of intimate partner abuse because they were women. <sup>161</sup>

*In* addition, as no end of literary and cultural texts manifest, when women--such as victims of ***domestic violence***--are burdened with the cultural script of acting other-than rationally, or permit themselves to succumb to expressions of emotional intensity, our tendency to discredit them as individuals gains new momentum. <sup>162</sup> *In* a recent study, researchers asked a diverse group of college [\*436] students to take on the role of mock jurors, and review a condensed version of a murder trial transcript. The researchers charged the students with making a preliminary decision as to how they would vote--guilty or not guilty. They were then asked to deliberate electronically with participants whom they believed to be their fellow jurors. The other participants, however, were actually the researchers themselves--an approach designed to ensure that there was always a single "holdout" on the jury, whose messages would sound increasingly angry over the course of deliberations. Participants whose holdout was assigned a clearly male-identified name began doubting their initial opinions; *in* contrast, those for whom the holdout was assigned a clearly female name became significantly more confident *in* their initial opinions, at a statistically significant level. <sup>163</sup> *In* sum, the tendency to discredit women *because they are women* is deeply embedded *in* our broader culture--and clearly influences the way ***credibility*** is assessed *in* the legal system.

People of color, particularly Black people, have the same experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest. <sup>164</sup> Based on all of the above, it stands to reason that black women risk being doubly disbelieved.

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should be noted that existing data on judicial gender bias *in credibility* determinations are somewhat outdated; however, no evidence exists to indicate that the relevant findings have changed *in* recent years.

<sup>161</sup> NATIONAL HOTLINE SURVEY, *supra* note 106, at 7.

<sup>162</sup> "[I]t's also a common view, particularly *in* many Western patriarchal societies, that emotionality is at odds with rationality." McKinnon, *supra* note 80, at 169. For example, consider just one of many Internet memes: A young boy asks, "Dad can you explain ***women's*** logic?" His father replies, "You're grounded!" When the boy asks for the reason, the father replies with the non-sequitur: "Peanut Butter." Image, PINIMG.COM, <https://i.pinimg.com/474x/73/6b/43/736b43231b83b92e7f55b22e0a386ca9.jpg> [<https://perma.cc/KJH7-AHYJ>].

<sup>163</sup> Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

<sup>164</sup> See, e.g., Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000)). *In* one striking study of judicial racial bias, 133 state and local trial judges from multiple jurisdictions were given an Implicit Association Test *in* which they were asked to categorize photos of white and black faces with positive attitude words (like pleasure), or negative attitude words (like awful), as quickly as possible. As hypothesized, the judges responded consistently with the general population, associating black with bad and white with good. Next, the judges engaged *in* a nonconscious "priming" task, *in* which the experimenters flashed coded words on participants' computer screens, too rapidly to be consciously processed. For example, the black prime consisted of flashed words like dreadlocks, hood, and rap; the control group prime consisted of words like summer, trust, and stress. After being primed, the judges were asked to make various determinations regarding a hypothetical ***case*** involving two juvenile defendants. Judges with higher implicit bias scores rendered harsher judgments when primed with the black racial category. See Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198-99 (2009). Similarly, a recent study of 239 federal and state courts found that judges held strong to moderate implicit biases against both Asians and Jews relative to Caucasians and Christians, respectively, and that on a scenario-based task, they gave slightly longer prison sentences to Jewish defendants compared to identical Christian defendants. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

Poor people are also vulnerable to stereotypes about their trustworthiness, as *in* the earlier example of welfare queens, who cheat the system to take what is not theirs. Because so many survivors live at the intersection of all three of [\*437] these identities--they are poor women of color--these stereotypes feed into each other to further undermine assumptions about their trustworthiness. <sup>165</sup>

And as one might expect, a woman who is mentally ill or abusing substances may experience even further **credibility** discounts. When a judge talks to a jury about how to assess **credibility**, the standard instruction emphasizes how important it is for witnesses to articulate strong and clear memories of the events they are relating, as well as their ability under the particular circumstances to have perceived--to have seen and heard--the events *in* question. <sup>166</sup> A survivor who has abused substances to cope with her partner's **violence** is less likely to meet this standard. So is a survivor struggling with a mental illness, regardless of whether that illness contributed to her original vulnerability, or was a consequence of it.

Each of these **credibility** discounts--story plausibility and individual trustworthiness--operate *in* a distinct fashion, but they are not necessarily independent of each other; *in* fact, they are often intertwined. As philosopher Karen Jones explains, "Testifiers who belong to 'suspect' social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know." <sup>167</sup>

Indeed, a wide array of women may be viewed as untrustworthy because of who they are--women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of **credibility**, and women who [\*438] are many or all of the above. This distrust, *in* turn, creates a broader hermeneutics of suspicion, through which the listener interprets the substance of her story. *In* other words, once a listener has discounted a **woman's** trustworthiness, he will be hyperalert for signs of deception, irrationality, or narrative incompetence *in* her story. He will tend to magnify inconsistencies and overlook the ways *in* which any inconsistencies might be explained away. *In* this way, Jones observes, "a low initial trustworthiness rating . . . can give rise to runaway reductions *in* the probability assigned to a witness's story." <sup>168</sup> Because women survivors tend to spark

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<sup>165</sup> Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, *in* SOURCEBOOK ON **VIOLENCE** AGAINST WOMEN 143, 164-65 (Claire M. Renzetti et al. eds., 2001) (noting that African-American women are three times as likely as white women to be killed by an intimate partner). Women receiving public financial assistance are significantly more likely to experience **domestic violence** than are other women. Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 663 (2000). Moreover, intimate partner abuse pushes many women into homelessness. Across the United States, between twenty-two and fifty-seven percent of homeless women identify **domestic violence** as the immediate cause. GOODMAN & EPSTEIN, *supra* note 123, at 107; INST. FOR CHILDREN & POVERTY, THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES (2002), <https://rhyclearinghouse.acf.hhs.gov/library/2002/hidden-migration-why-new-york-city-sheltersare-overflowing-families> [<https://perma.cc/9F6E-XPYE>]; Rebekah Levin, Lisa McKean & Jody Raphael, *Pathways to and From Homelessness: Women and Children in Chicago Shelters*, CTR. FOR IMPACT RESEARCH (Jan. 2004), <http://www.http://advocatesforadolescentmothers.com/wpcontent/uploads/homelessnessreport.pdf> [<https://perma.cc/PG8A-H2LA>]. *In* addition, African American women are thirty-five percent more likely to experience intimate partner **violence** than are white women. Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color*, DEP'T OF JUSTICE (June 2006), [https://www.doj.state.or.us/wp-content/uploads/2017/08/women\\_of\\_color\\_network\\_facts\\_domestic\\_violence\\_2006.pdf](https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf) [<https://perma.cc/6ZU3-6ATL>].

<sup>166</sup> See, e.g., John L. Kane, *Judging Credibility*, 33 LITIG. 31, 32 (2007); *Model Civil Jury Instructions for the District Courts of the Third Circuit*, Rule 1.7 (2010), [http://federalevidence.com/pdf/JuryInst/3d\\_Civ\\_Ch1-3\\_2010.pdf](http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf) [<https://perma.cc/69AN-F2QJ>].

<sup>167</sup> Karen Jones, *The Politics of Credibility*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 158 (Louise M. Antony & Charlotte Witt eds., 2002).

<sup>168</sup> *Id.* at 159.

hermeneutic suspicion, both *in* terms of personal trustworthiness and story plausibility, they are particularly vulnerable to this kind of doubly disadvantaging *credibility* discount.

## II. GATEKEEPER-IMPOSED EXPERIENTIAL DISCOUNTS

The discounts women survivors face are not limited to the *credibility* arena. All too frequently, system gatekeepers also discount the importance of *women's* actual experiences and of the ways *in* which the system itself exposes women to additional harms. Such experiential discounting occurs when, regardless of the plausibility of a survivor's story and regardless of her personal trustworthiness--*in* other words, *even when system actors believe her*--they nonetheless adopt and enforce laws and policies that, *in* practice, revictimize her.<sup>169</sup>

These issues--*credibility* discounting and experiential discounting--cannot be considered *in* isolation. Such an approach would fail to capture the way that each relies on and reinforces the other, both *in* practical reality and through the personal lens of survivor experience. As Catherine MacKinnon explains, *in* the sexual harassment context:

Even when [a woman survivor] was believed, nothing [a male perpetrator] did to her mattered as much as what would be done to him if his actions against her were taken seriously. His value outweighed her . . . worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. *In some ways, it was even worse to be believed and not have [his actions] matter. It meant she didn't matter.*<sup>170</sup>

Experiential discounting does not entail total disregard for harms inflicted on women, just as *credibility* discounting does not entail total disbelief of *women's* stories. Instead, gatekeepers impose experiential discounts when, *in* the pursuit of objectively worthy policy goals, they choose to ignore or trivialize [\*439] the attendant harm to survivors. Women receive the message that systemactors are relatively indifferent to the realities of their lives and the risks that shape their experiences. For an individual woman survivor, this experiential (or ontological)<sup>171</sup> discounting of the law's impact on her life exponentially increases the negative power of the *credibility* discounts she also must face.

The tendency to discount *women's* experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help *in* their efforts to be safe. The following examples illustrate this phenomenon.

### A. Criminal Justice System

Despite enormous improvements *in* the responsiveness of police and prosecutors to *domestic violence* over the past several decades,<sup>172</sup> the criminal justice system continues to discount important aspects of *women's* experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors. As one example, we have known for decades that participation *in* a criminal prosecution can increase a *woman's* risk of retaliatory *violence*: studies show that twenty to thirty percent of perpetrators reassault their targets before the criminal court process is over.<sup>173</sup> Data also show that women are

<sup>169</sup> Lynn Hecht Schafran calls this *women's* "consequential *credibility*." Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, 34 JUDGES' J. 5, 40-41 (1995).

<sup>170</sup> Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (emphasis added).

<sup>171</sup> This type of discounting could be conceptualized *in* philosophical terms as "ontological injustice," operating alongside the above-described categories of hermeneutic and epistemic injustice.

<sup>172</sup> See, e.g., Epstein, *supra* note 82, at 13-16.

<sup>173</sup> See, e.g., Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, *VIOLENCE* & ABUSE 141, 143, 159 (2005).

at greater risk of homicide at the time of separation from their abusive partners (and prosecution, indeed, creates such separation).<sup>174</sup> It is hardly surprising that a major reason survivors cite for withholding cooperation from prosecutors is fear of future harm.<sup>175</sup>

Nonetheless, prosecutors around the country often subpoena, arrest, and even jail survivors *in* an effort to ensure that they will testify against their abusive partners at trial.<sup>176</sup> The intent of these government lawyers is far from malicious; [\*440] they hope to use the power of their office to put an end to intimate partner abuse, and they believe that mandating victim participation is--regardless of an individual survivor's own analysis of her situation--the best way to accomplish this goal. But *in* the process, the secondary harms visited on victims are too often ignored. As Professor Jane Stoever notes, "[j]ail sentences for defendants *in domestic violence cases* are typically only several days long, and most offenders receive only probation, but abuse victims have been jailed for contempt for much lengthier periods for refusing to comply with subpoenas to testify."<sup>177</sup> To obtain testimonial compliance, prosecutors threaten to refer victims to child protection agencies, where they could risk losing custody of their children, and they institute perjury prosecutions against women who have recanted prior statements, often obtaining lengthy jail sentences for survivors.<sup>178</sup> As one example, a 2016 investigation *in* Washington County, Tennessee, showed that women were routinely imprisoned for as long as a week for failing to testify against their abusive partners.<sup>179</sup> *In* the words of defense counsel representing one of the women: "I mean, it's kind of chilling. Here's a woman that called the police, because she needed help and now a couple months later she gets a voicemail that says now you might be the one that's going to jail. Think about that."<sup>180</sup> The local prosecutor refused to apologize for the practice, claiming that "I think we were doing the right thing."<sup>181</sup>

<sup>174</sup> Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 *AGGRESSION & VIOLENT BEHAV.* 514, 519 (2006).

<sup>175</sup> Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 *J. INTERPERSONAL VIOLENCE* 761, 768-69 (1999); Sara C. Hare, *Intimate Partner Violence: Victims' Opinions About Going to Trial*, 25 *J. FAM. VIOLENCE* 765, 771 (2010).

<sup>176</sup> Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 *WM. & MARY J. WOMEN & L.* 383, 387 (2001); Betty Adams, *Battered Wife Jailed After Refusing To Testify Against Husband*, *PRESS HERALD* (June 3, 2014), <https://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/>; *Domestic Violence Victims Could Be Arrested if They Don't Show Up for Court To Face Accuser*, *WSMV.COM* (Apr. 25, 2013), <http://www.wsmv.com/story/22081502/domestic-violence-victims-in-rutherford-county-could-be-arrested-if-they-dont-show-up-for-court> [<https://perma.cc/TWVZ-XZEP>]. Prosecutorial use of coercive tactics increased *in* the aftermath of U.S. Supreme Court decisions that made it far more difficult to engage *in* the practice of "victimless prosecutions." See Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 *BYU L. REV.* 515, 585-86 (2010).

<sup>177</sup> Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 *WASH. L. REV.* 861, 870-71 (2017).

<sup>178</sup> For an extensive compilation of stories of women subjected to such harms, see *id.*

<sup>179</sup> Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, *WJHL.COM* (Sept. 11, 2016), <http://wjhl.com/2016/09/11/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/> [<https://perma.cc/KM36-5EXL>].

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* Prosecutorial dismissal of *women's* risk of harm also can be seen *in* Honolulu Prosecuting Attorney Ken Kaneshiro's 2016 decision to restrict access to the city's Family Justice Center shelter to victims who promised to testify against their abusive partners *in* a criminal trial. Kaneshiro claimed that the victims who declined to testify "did not know what's good for them." Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, *SLATE* (July 12, 2017, 12:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/07/is\\_it\\_ever\\_appropriate\\_to\\_put\\_an\\_abuse\\_victim\\_in\\_jail\\_to\\_compel\\_her\\_to\\_testify.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/is_it_ever_appropriate_to_put_an_abuse_victim_in_jail_to_compel_her_to_testify.html). Honolulu's approach to *domestic violence* prosecution sends a clear message to survivors:

[\*441] A similar theme sounds *in* the actions of police officers responding to **domestic violence** calls across the country. The 2015 ACLU survey reveals a serious lack of police concern regarding the harms experienced by survivors: eighty-three percent of polled service providers reported that their clients called the police only to find that they "sometimes or often" did not take allegations of **domestic violence** seriously.<sup>182</sup>

The 2015 National Hotline Survey echoes this finding. *In* the words of one respondent, "I think [the police] feel that I do not matter, that as an ex-wife, I have to withstand the harassment and stalking." Another woman put it this way: "They sympathized with him and said he [just] needed to stay away from me. Then they pointed me *in* the direction of [name of city withheld] and said to call someone when I got there . . . [They] left me by the side of the road alone *in* my car with my daughter and afraid." Yet another said: "The cops acted as if they did not care . . . They sat *in* the drive while my ex poured gas all over my decks to my home and took what he wanted. Even though I had an [order of protection] and told them he could not enter the home."<sup>183</sup> Another: "[The police] have threatened to arrest me more than once. I am the victim! They blame me for taking him back."<sup>184</sup>

Police officers also use their power to coerce victim testimony at trial. *In* the spring of 2018, a police sergeant *in* Buncombe County, North Carolina, told an advocate, "When I get to a **domestic violence** call, if I get a sense that she's not going to cooperate, I drive away."<sup>185</sup> A minute later he added, "But when I go to my misdemeanor B&E's [breaking and entering **cases**], I stay until I've got all the evidence."<sup>186</sup>

[\*442] By discounting the importance of survivors' experiences and their risks of harm, police officers discourage women from seeking police assistance *in* subsequent emergency situations. As the ACLU Survey concluded, "Clients often do not call the police because they have had experiences *in* the past . . . *in* which they have received a negative response . . . *in* which the incident is minimized, the client is blamed, or the police simply take no

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we discount the realities of your safety concerns and your risks of future harm. Unsurprisingly, during the first eight months the Honolulu shelter was open, sixteen of its twenty beds remained empty.*Id.* This example is, of course, an extreme one: no other Family Justice Center has a similar policy. *Id.* But extreme examples can offer a window into the less dramatic and more routine discounts women suffer *in* terms of their consequential **credibility**. *In* October 2015, a Florida judge jailed a victim of **domestic violence** who indicated that she would not appear to testify *in* the criminal prosecution of her abusive partner. She had endured terrifying **violence** at her husband's hands: he had strangled her, threatened her with a kitchen knife, and smashed her head into a microwave. She told the judge that the abuse had caused her to struggle with depression and anxiety. *In* addition, her husband was the father of her one-year old daughter, and she was concerned about her ability to support her child if he went to jail and lost his job. She cried *in* open court as she explained, "I'm homeless now. I'm living at my parents' house . . . I had to sell everything I own," and added, "I'm just not *in* a good place right now." The judge responded by mocking her, saying, "You think you're going to have anxiety now? You haven't even seen anxiety," and ordered police to handcuff the woman, sending her to jail for three days. Kate Briquet, *Judge Berates Domestic Violence Victim--and Then Sends Her to Jail*, THE DAILY BEAST (Oct. 9, 2015, 1:00 AM), <https://www.thedailybeast.com/judge-berates-domestic-violence-victimand-then-sends-her-to-jail>.

<sup>182</sup> RESPONSES FROM THE FIELD, *supra* note 106, at 12.

<sup>183</sup> NATIONAL HOTLINE SURVEY, *supra* note 106, at 6, 10.

<sup>184</sup> *Id.* at 10. Additional police coercion may be imposed on women *in* jurisdictions utilizing lethality or danger assessment protocols. These protocols are comprised of a series of questions, posed by police on the scene of a **domestic violence** call and designed to determine a survivor's risk of future harm. *In* situations where this (relatively new) tool indicates "highest risk," the protocol directs officers to manipulate women into separating from their abusive partner, by refusing to accept a **woman's** decision to take no action, or by pressuring an unwilling victim to speak to a National **Domestic Violence** Hotline counselor. Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 *CARDOZO L. REV.* 519, 536, 566-67 (2010). Lethality assessment programs are being used *in* counties *in* states including Delaware, Florida, Georgia, **Indiana**, Maryland, Missouri, and Vermont. *Id.* at 539.

<sup>185</sup> Interview with Kit Gruelle, **domestic violence** advocate (June 6, 2018).

<sup>186</sup> *Id.*

action."<sup>187</sup> *In* all of these ways, the criminal justice system tends to dismiss its policies' effects on women's lives as relatively inconsequential, at least as compared to their effects on offender accountability.

*In* addition, the criminal justice system tends to devalue violence that is inflicted by an intimate partner as compared to a stranger. A 2005 Department of Justice report on Family Violence Statistics reveals that seventy-seven percent of those incarcerated for non-family assaults received sentences that were longer than two years.<sup>188</sup> *In* sharp contrast, this was true of only forty-five percent of those incarcerated for family assault.<sup>189</sup> Thus, the criminal justice system discounts the importance of women's experiences and, further, devalues the meaning of the harms they suffer at the hands of their partners.

#### B. Subsidized Housing and Public Shelters

This tendency to discount the impact of laws and policies on the lives of domestic violence survivors extends well beyond the justice system. The public housing system provides an important case in point, *in* part because the availability of affordable housing is essential to many women's ability to both escape abuse and to remain safe after leaving an abusive relationship.<sup>190</sup> Despite this fact, substantive discounting of survivors' experience is readily apparent *in* the already intense and bureaucratically intimidating struggle for public housing.

**[\*443]** At the state and local levels, crime control or nuisance ordinances require public housing landlords to evict tenants for "disorderly behavior" if, within a specified time period, three calls are made to 911 about a particular apartment unit.<sup>191</sup> Fifty-nine counties, cities, and other localities have such ordinances *in* place today.<sup>192</sup> *In* 2013, Illinois alone had adopted more than 100 such ordinances;<sup>193</sup> *in* 2014, Pennsylvania had passed thirty seven.<sup>194</sup> The geographic areas these laws cover include the twenty largest cities *in* the country.<sup>195</sup> A landlord

<sup>187</sup> RESPONSES FROM THE FIELD, *supra* note 106, at 16.

<sup>188</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (June 2005), <https://www.bjs.gov/content/pub/pdf/fvs.pdf> [<https://perma.cc/TD25-2HYZ>].

<sup>189</sup> Similar results were reached *in* a recent study conducted *in* Australia, where domestic violence offenders were compared to those who committed violent crimes outside of a familial/intimate relationship context. Moreover, domestic violence assaults were less likely to result *in* a prison sentence and, if incarcerated, intimate offenders received significantly shorter terms. Christine E. W. Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BRITISH J. CRIMINOLOGY 849, 849 (2014).

<sup>190</sup> Survivors who cannot remain *in* public housing often are forced to choose between homelessness and returning to their abusive partners. "When we ask survivors why they had to stay [*in* their violent relationships], one of the top answers is always lack of access to housing," said Karma Cottman, executive director of the D.C. Coalition Against Domestic Violence. "They stay because they can't afford to go anywhere else." Elise Schmelzer, *Gentrification Eats Away at Shelter Options for Domestic-Abuse Victims*, WASH. POST (July 10, 2016), [https://www.washingtonpost.com/local/dcpolitics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43c0-11e6-8856-f26de2537a9d\\_story.html?utm\\_term=.ad4ce2d6365a](https://www.washingtonpost.com/local/dcpolitics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43c0-11e6-8856-f26de2537a9d_story.html?utm_term=.ad4ce2d6365a).

<sup>191</sup> PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY *IN* AMERICA 135 (2017).

<sup>192</sup> *Id.* at 141.

<sup>193</sup> Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW 1 (2013), <http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf> [<https://perma.cc/K4XE-CFYS>].

<sup>194</sup> News Release, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction*, PA. COAL. AGAINST DOMESTIC VIOLENCE (Oct. 16, 2014), [http://www.pcadv.org/Resources/HB1796\\_PR\\_10162014.pdf](http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf) [<https://perma.cc/TS8P-MRFB>].

who fails to comply can be fined and have his rental license suspended. Accordingly, landlords have no discretion in enforcing this draconian measure--tenants have no realistic opportunity to appeal to their human empathy. To stay in business, a landlord *must* evict after three 911 calls.<sup>196</sup> To be clear, the underlying goal of these laws is the reduction of crime and the resulting safety of all residents; any impact on women survivors of domestic violence is solely incidental.

Despite this fact, these ordinances have a sizable negative impact on survivors of domestic violence. Thirty-nine of them explicitly include calls to 911 from domestic violence victims as a basis for prohibited activities that can result in eviction; only four explicitly exclude such calls.<sup>197</sup> And who ends up getting evicted? It's not just the perpetrators; it's the victims, too. The ordinances make no effort to distinguish between abusers and victims--if a victim chooses to use 911 emergency services to protect herself and her children on three or more occasions, she'll lose her home.<sup>198</sup>

A study conducted by Matthew Desmond and Nicole Valdez in Milwaukee found that close to one-third of the "excessive" 911 call citations over a two-year period were based on emergency reports of domestic violence; fifty-seven percent of these calls resulted in the victim being evicted, and another twenty-six [\*444] percent received formal threats of eviction.<sup>199</sup> Similarly, a 2015 ACLU study of two upstate New York ordinances found that domestic violence comprised the largest category of incidents resulting in nuisance enforcement, with citations frequently resulting in eviction of the victim.<sup>200</sup> Peter Edelman describes the experience of one victim, Rosetta Watson, in St. Louis: "She called the police several times to ask for protection to keep her safe from her former boyfriend. They did not protect her and she was attacked by the man, and then she was literally banished from the city for six months . . . ." <sup>201</sup>

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<sup>195</sup> EDELMAN, *supra* note 191, at 141.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., U.S. DEPT OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 4 (2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF> [<https://perma.cc/YW5F-SNKL>].

<sup>199</sup> Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132-33 (2012). Racial bias influences police decisions regarding enforcement of these laws: tenants living in predominantly black Milwaukee neighborhoods were three times as likely to receive a nuisance citation as women living in predominantly white neighborhoods. *Id.*

<sup>200</sup> ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 22-23 (2015), [https://www.aclu.org/sites/default/files/field\\_document/equ15-report-nuisanceord-rel3.pdf](https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf) [<https://perma.cc/7EML-ETV3>].

<sup>201</sup> EDELMAN, *supra* note 191, at 143. Nancy Markham had a similar experience in Surprise, Arizona. After making multiple calls to 911 because of abuse at the hands of her boyfriend, the local police department pressured her landlord to evict her--even though they had finally arrested her former partner for his violence against her. Sandra S. Park, *With Nuisance Law, Has "Serve and Protect" Turned Into "Silence and Evict"?*, MSNBC (Mar. 25, 2016), <http://www.msnbc.com/msnbc/nuisancelaws-has-serve-and-protect-turned-silence-and-evict> [<https://perma.cc/LF9D-TPV2>]. It took a federal lawsuit, filed by the ACLU Women's Rights Project, for the city to repeal the nuisance ordinance. *Id.*

Similarly, Lakisha Briggs of Norristown, Pennsylvania, was abused by her boyfriend, and her adult daughter called the police.<sup>202</sup> Before leaving, one of the officers warned Briggs that this was her first strike. After that warning, Briggs, who also had a three-year-old daughter, was reluctant to call the police when her boyfriend beat her up.<sup>203</sup> But one night, he stabbed her *in* the neck with a broken ashtray.<sup>204</sup> When she regained consciousness she found herself *in* a pool of blood, but knew she could not dial 911.<sup>205</sup>

"The first thing *in* my mind is let me get out of this house before somebody call," she says. "I'd rather them find me on the street than find me at my house like this, because I'm going to get put out if the cops come here."<sup>206</sup> Just as she feared, a neighbor saw her bleeding outside and called the police.<sup>207</sup> Briggs was airlifted to the hospital, and when she returned home [\*445] several days later, she was evicted from her apartment.<sup>208</sup> The ACLU sued, and the Norristown law was eventually repealed.<sup>209</sup>

But similar measures continue to be enacted as local communities try to get a handle on crime and safety. And despite a series of federal lawsuits challenging the plainly discriminatory impact of these ordinances, hardly any of the affected communities have voluntarily created an exception for *domestic violence* victims. Nor have they sought out ways to accomplish the overall goal of crime control without imposing new and additional harms on survivors, such as barring repeat perpetrators from the building or the housing complex. Such systemic discounting of *women's* needs and experiences is--of course--devastating to survivors of intimate partner abuse. It is difficult to comprehend how a legal system that takes survivors' experiences seriously could permit itself to visit on them the casually brutal choice between emergency police protection and affordable housing.

Such apparent disregard for survivors' risks and needs also exists *in* the closely related access-to-shelter context. *In* 2014, for example, the mayor of Washington, D.C., requested (for the second time *in* two years)<sup>210</sup> emergency authority to limit access to shelter for local families. Specifically, the mayor proposed that applicants be permitted to stay *in* a public shelter only on a provisional, two-week basis; during that time caseworkers would contact applicants' friends and relatives *in* an effort to assess whether they had any alternate housing option.<sup>211</sup> Those who did would be given twenty-four hours to vacate the shelter. *In* the words of the mayor's office: "Our goal is to

<sup>202</sup> Pam Fessler, *For Low-Income Victims, Nuisance Laws Force Ultimatum: Silence or Eviction*, NATIONAL PUBLIC RADIO (June 29, 2016), <https://www.npr.org/2016/06/29/482615176/for-lowincome-victims-nuisance-laws-force-ultimatum-silence-or-eviction> [<https://perma.cc/W2RC-ZWZQ>].

<sup>203</sup> See Complaint at 10, 12, *Briggs v. Borough of Norristown*, No. 13-02191 (E.D. Pa. Apr. 24, 2013).

<sup>204</sup> *Id.* at 15.

<sup>205</sup> See Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, Sept. 11, 2015, <https://www.theguardian.com/commentisfree/2015/sep/11/domesticviolence-victim-town-wanted-me-evicted-calling-911>.

<sup>206</sup> See Fessler, *supra* note 202.

<sup>207</sup> Briggs, *supra* note 205.

<sup>208</sup> *Id.*

<sup>209</sup> See Fessler, *supra* note 202.

<sup>210</sup> *The Homeless Services Reform Amendment Act of 2014: Hearing Before the Washington, D.C., Comm. on Human Servs.* (D.C. 2014) (statement of Marta Beresin, The Washington Legal Clinic for the Homeless), available at <https://www.legalclinic.org/wp-content/uploads/2018/09/Testimony-MB-DHS-oversight-hearing.pdf> [<https://perma.cc/UMY9-2V6X>].

<sup>211</sup> Aaron C. Davis, *D.C. Mayor Asks for Emergency Legislation to Deal with Surge of Homeless into Shelters*, WASH. POST (Feb. 19, 2014), [http://wapo.st/1qiNpOH?tid=ss\\_mail&utm\\_term=.31cabe14e6ed](http://wapo.st/1qiNpOH?tid=ss_mail&utm_term=.31cabe14e6ed).

get people out of shelters . . . or never into shelters *in* the first place, even if that means living with a grandmother, a sister, whatever." <sup>212</sup> But such a policy turns a blind eye to the risks facing ***domestic violence*** survivors, where "whatever" might mean a denial of shelter and being forced to return to the home of an abusive partner. <sup>213</sup> Although the mayor ultimately withdrew his request, <sup>214</sup> a similar rule was again proposed *in* 2017, as an amendment to the [\*446] city's Homeless Services Reform Amendment Act, this time requiring applicants to city shelters to prove, by clear and convincing evidence, that they had no other housing options. <sup>215</sup> Advocates testified, once again, that victims of ***domestic violence*** were "routinely being denied shelter" if their names were on a current lease with, for example, their abusive partner. <sup>216</sup>

After intensive advocacy efforts, a ***domestic violence*** exception was added to the statute. <sup>217</sup> But the reintroduction of shelter laws with such draconian provisions, year after year, demonstrates a deep-seated tendency to discount the importance of survivors' lived experiences and to trivialize the harmful impact these policies will inflict on large numbers of women, *in* service of other policy priorities.

*In* sum, even when a woman survivor, seeking help from the criminal justice, subsidized housing, or public shelter systems, finds that her story of intimate partner abuse *is actually believed*, gatekeepers are likely to communicate some degree of indifference about her experiences, and to accept with apparent unconcern the harms that laws, policies, and practices impose on her. Many women experience this substantive, experiential discounting as directly connected to the ***credibility*** discounting they also face. Together, these discounts create a gauntlet of disbelief and dismissal that women must overcome *in* order to be safe from the first-order abuse they suffer at the hands of their intimate partners.

### III. THE IMPACT OF ***CREDIBILITY*** DISCOUNTS ON WOMEN SURVIVORS

Survivors suffer a wide range of ***credibility*** and experiential discounts when they seek emergency help from the police, *and* when they try to convince judges to award them a civil protection order, *and* when they struggle to obtain a safe place to live, *and* when they try to get custody of their children. They may suffer these discounts because their true stories of abuse don't sound plausible, because they are perceived as personally untrustworthy, or because their stories just don't matter much to system gatekeepers.

All of this may feel like déjà vu for a survivor. Institution-based discounting closely replicates the dynamics of abuse she endures at home. Perpetrators of intimate partner ***violence***, like system actors, often discredit both the plausibility of a survivor's story and her trustworthiness as a truth teller. It is all too common for a survivor to be

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<sup>212</sup> *Id.*

<sup>213</sup> Patty Mullahy Fugere, *There Is a Family Homelessness Crisis and Provisional Placement Is Not the Answer*, HUFFINGTON POST: THE BLOG (Feb. 21, 2014) (updated Apr. 23, 2014), [https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeless\\_b\\_4827364.html](https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeless_b_4827364.html).

<sup>214</sup> Aaron C. Davis, *Gray Steps Back on Unpopular D.C. Homeless Legislation*, WASH. POST (Feb. 25, 2014), [https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homelesslegislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b\\_story.html?utm\\_term=.e28673d02941](https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homelesslegislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b_story.html?utm_term=.e28673d02941).

<sup>215</sup> Wash. Legal Clinic for the Homeless, *Requiring that Families Show "Clear and Convincing Evidence" of Homelessness*, PUBLIC (Aug. 22, 2017), <http://www.publicnow.com/view/F8B804EF4654FB4D115F7E08715D8867B561EF7B?2017-08-22-22:30:10+01:00-xxx9517> [<https://perma.cc/3H8Y-79WT>].

<sup>216</sup> *Id.*

<sup>217</sup> [D.C. CODE § 4-753.02.a-4](#) (2018).

subject to a constant barrage of: "No, that's [\*447] not what happened"; or "I would never have touched you if you didn't keep provoking me"; or "You're the only one who makes me this angry." <sup>218</sup>

Abusive partners often discredit the woman based on her personal trustworthiness. Frequent comments tend to sound like: "You always exaggerate"; or "You're hysterical and over-emotional"; or "You're crazy; I didn't hurt you"; or "No one would believe you. Even I don't believe you." <sup>219</sup> Finally, perpetrators often dismiss the weight or consequences of the abuse: "Why do you always make such a big deal out of everything?" <sup>220</sup>

*In* other words, the **credibility** discounts imposed on a woman by the justice system and other institutions often echo those imposed by her abusive partner. These institutional and personal betrayals operate *in* a vicious cycle, each compounding the effects of the other. That web can cause women to doubt their power to remedy their situations and--*in* more extreme **cases**--the veracity of their own experiences.

System actors are not privy to that broader web of experience. A judge who doubts a survivor's story *in* court is not likely to be aware that he is reinforcing other discrediting messages from her abusive partner and from that partner's defense attorney. An advocate who perceives with indignation that a survivor's **credibility** is being discounted *in* family court may not know that this experience mirrors an earlier one with a police officer, and yet another with her public housing landlord. *In* other words, for system gatekeepers, it is almost impossible to see the whole picture. But from the perspective of a survivor, on the receiving end of one **credibility** discount after another, these experiences coalesce into a single, interwoven fabric. **Credibility** discounts become as pervasive as the air these women breathe.

So what does it mean for a survivor to be caught within a web of **credibility** discounting? The consequences include two major categories of harms: (1) those related to psychological wellbeing; and (2) those related to accessing justice and safety.

#### A. Psychological Harms and Institutional Gaslighting

When a survivor undertakes the considerable risks involved *in* seeking help, she is looking for resources and safety, to be sure. But she is also hoping [\*448] for validation of the harm she has endured--*in* other words, to have her experience credited. As Rebecca Solnit puts it: "To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma." <sup>221</sup>

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, she found that wherever her interview subjects sought justice, their most important goal was to gain validation or "an acknowledgment of the basic facts of the crime and an acknowledgment of harm." <sup>222</sup>

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<sup>218</sup> See, e.g., *Hashtag Activism*, *supra* note 62.

<sup>219</sup> As survivor and activist Beverly Gooden explains: Such statements are "easy to believe when it's just the two of you." *Id.*

<sup>220</sup> The National **Domestic Violence** Hotline website, for example, provides the following examples of gaslighting: "Your abuser might call you 'too sensitive' or raise a skeptical eyebrow when you try to complain about his or her behavior, asking you why you would get upset over 'something so dumb.'" *What Is Gaslighting?*, NAT'L **DOMESTIC VIOLENCE** HOTLINE (May 29, 2014), <http://www.thehotline.org/what-is-gaslighting/> [<https://perma.cc/64K3-PYTA>].

<sup>221</sup> Solnit, *supra* note 145, at 4.

<sup>222</sup> Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 **VIOLENCE AGAINST WOMEN** 571, 585 (2005). Herman goes on to explain:

Whether the informants sought resolution through the legal system or through informal means, their most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgment of harm. Although almost all of the informants expressed a wish for the perpetrator to admit what he had

*In* the **domestic violence** context, a recent qualitative study of women *in* a Massachusetts family court has several women noting the importance of being credited. As one woman said: "Well, validation [from the court] is huge. It really is huge. When you've got someone telling you on a constant basis that you're bad, you're wrong, [you need the courts to say you are right] . . . ." <sup>223</sup>

But when the institutions to which the survivor turns for help (often at great personal risk) <sup>224</sup> refuse to acknowledge this harm, and instead echo a **woman's** abusive partner by discounting her **credibility**, the effort to report and remedy abuse instead works to replicate the denial of a survivor's experience that takes place at home--only, this time, at an institutional level. And the institutions involved are those purportedly charged with hearing victims' stories and meting out justice. It's no wonder that survivors find the experience of systemic discrediting *in* our police districts and courthouses particularly crippling.

[\*449] Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. We conducted a focus group outside of Boston with twelve advocates who shared extensive experience working with survivors *in* a variety of systems. Participants described three distinct outcomes.

*First*, survivors develop a *sense of powerlessness and futility*, expressed *in* statements such as: "I have taken this enormous risk to share my most vulnerable experiences *in* public--and they can't/won't hear/see me. I can't find the right words to make them help me. There is nothing I can do." This is a feeling akin to how numerous survivors eventually come to feel *in* their abusive relationships; there is nothing they can say or do that will make the perpetrator of **violence** hear or really "see" me. <sup>225</sup>

*Second*, survivors develop a *sense of personal worthlessness*. "Maybe they believe my story and still--if no one does anything *in* response to my story, then my experience must not have worth or merit. My pain doesn't matter. I myself must have no value." <sup>226</sup> This too replicates abuse dynamics: He has no empathy for me as a human being. I am worthless *in* his eyes.

done, the perpetrator's confession was neither necessary nor sufficient to validate the victim's claim. The validation of so-called bystanders was of equal or greater importance. Many survivors expressed a wish that the perpetrator would confess, mainly because they believed that this was the only evidence that their families or communities would credit. For survivors who had been ostracized by their immediate families, what generally mattered most was validation from those closest to them. For others, the most meaningful validation came from representatives of the wider community or the formal legal authorities.

*Id.*

<sup>223</sup> Ellen Gutowski & Lisa A. Goodman, *Intimate Partner Violence Survivors' Subjective Experiences of Probate and Family Court: A Qualitative Study* (2018) (unpublished manuscript) (on file with authors) [hereinafter *Massachusetts Family Court Study*].

<sup>224</sup> See, e.g., Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, [11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467-68 \(2003\)](#).

<sup>225</sup> Platt, Barton & Freyd describe the experience of institutional betrayal for **domestic violence** survivors as follows:

[W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world *in* which her agency cannot be taken for granted. She has no personal role with respect to decisionmaking by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of **domestic violence**, the 'secondary trauma' from this experience can amplify the feelings of helplessness and loss of control elicited by abuse . . . . Betrayal *in* these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing *in* the community--the promise to protect, or heal, or provide for children's welfare--are no less devastating than a partner's betrayal.

<sup>226</sup> *In* the Massachusetts Family Court Study, one participant described her experience of betrayal by the family court judge: "You think that somebody's coming, is going to enter the picture that will help you. You're so desperate and when you're let

Finally, survivors develop a *sense of self-doubt*, as the machinery of **credibility** discounting lurches into gear: "They are twisting my story, casting doubt, maybe I didn't remember it right, maybe it didn't happen as I think it did. I must be crazy." <sup>227</sup> This dynamic is well illustrated by the 1944 film [\*450] *Gaslight*, <sup>228</sup> *in* which a man manipulates his wife's routine experiences *in* a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory, and ultimately accepts his story that she is delusional and mentally unsound. <sup>229</sup>

Abusive men gaslight their women partners when they express love and affection on the heels of a violent episode, or deny that certain promises or commitments were ever made, or simply deny that events took place. Over time, these small incidents build until, like the wife *in Gaslight*, survivors may come to doubt their own memory, perception, and experience. <sup>230</sup>

Judy Herman explains:

After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and *in* any **case** it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail. <sup>231</sup>

A quote from the Massachusetts Family Court study illustrates this phenomenon:

It's always that you're overreacting, you're too emotional. He'd do something like the night I woke up with him with his hands around my neck and I was like, "What are you doing?" I start crying, and he started laughing. And he said, "I was dreaming." . . . "I wasn't going to do anything. I was just [\*451] dreaming." He was laughing, and then he says, "Stop overreacting. I wouldn't hurt you. Stop overreacting." And I would believe that I was overreacting: Right?. [Maybe] he didn't really hurt me. I mean really? <sup>232</sup>

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down, it's. And I you know, there's some that are like, 'I don't even want to live anymore. I don't want to live anymore.'" *Massachusetts Family Court Study, supra* note 223.

<sup>227</sup> The National **Domestic Violence** Hotline website warns survivors to pay attention to this sort of dynamic:

"You're crazy--that never happened."

"Are you sure? You tend to have a bad memory."

"It's all *in* your head."

Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call "gaslighting."

Gaslighting typically happens very gradually *in* a relationship; *in* fact, the abusive partner's actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

<sup>228</sup> The film is based on a 1938 Patrick Hamilton play of the same name, *Gaslight*. GASLIGHT (Metro-Goldwin-Mayer 1944).

<sup>229</sup> *Id.*

<sup>230</sup> Darlene Lancer, *How To Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), <https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting>.

<sup>231</sup> HERMAN, *supra* note 39, at 8.

<sup>232</sup> *Massachusetts Family Court Study, supra* note 223.

As one of the first author's clients put it:

He found my most vulnerable point, a tiny kernel of insecurity *in* my soul, and he exploited it to trap me *in* a painfully confusing state of nearly total self-doubt. I spent more than a year working so hard to regain trust *in* my own perceptions and my own humanity. But now I find that the legal system doubts me too, even as I share my more painful and personal story. I get hurt again and again. It is painfully confusing and I find that it has caused a significant regression *in* my overall healing. <sup>233</sup>

These individual experiences are reinforced by the institutional gaslighting women experience *in* the form of system-based **credibility** discounts and experiential trivialization. When our official bodies of justice and law enforcement effectively collaborate *in* the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

#### B. Harms Related to Access to Justice and Safety

The sense of institutional gaslighting that commonly accompanies the progress of abuse claims through the justice system has immediate and baleful consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, justice. Indeed, **credibility** discounts are analogous to other, more tangible obstacles that are already all too familiar to those who work *in* the **domestic violence** field, such as economic dependence, isolation, and fear.

*First*, as we've already seen, **credibility** discounting may discourage women from continuing to pursue justice or other forms of support. Having their claims met with system-wide denial and disbelief gives women ample cause to distrust, and then possibly avoid, the institutions ostensibly there to help them. <sup>234</sup> As the Gender Bias Study of the Court System *in* [\*452] Massachusetts explains: "The tendency to doubt the testimony of **domestic violence** victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on the victims' willingness to seek relief." <sup>235</sup>

A woman *in* the Massachusetts Family Court study captured this fatalistic process *in* heartbreaking detail:

[The court] didn't believe [the abuse] . . . so I felt like it didn't matter . . . . The way my **case** was handled, I am very afraid of [the government *in*] this state now . . . . I'm so afraid of all he needs to do is just file a motion and bang! He'll get, he'll prove me wrong, you know, I'll get discredited again. So I just always keep a watchful eye. <sup>236</sup>

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<sup>233</sup> Communication from client to Deborah Epstein (July 28, 2017).

<sup>234</sup> Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 575 (2014). The secondary victimization of women seeking legal services *in* the aftermath of interpersonal **violence** is described by researcher Rebecca Campbell, who found that when survivors reach out for help, often at a time of great vulnerability and need, "they place a great deal of trust *in* the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help." Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008); see also Platt et al., *supra* note 225, at 202; Heidi Grasswick, *Epistemic Injustice in Science*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 313.

<sup>235</sup> FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS *in* THE JUSTICE SYSTEM 405 (2003).

<sup>236</sup> *Massachusetts Family Court Study*, *supra* note 223. *In* addition, women who do not receive the support they need from law enforcement are less likely to turn to law enforcement *in* the future. See Ruth E. Fleury et al., "Why Don't They Just Call the Cops?": Reasons for Differential Police Contact Among Women with Abusive Partners, 13 **VIOLENCE & VICTIMS** 333, 342 (1998).

Perhaps most perniciously, each individual **woman's** experience can have a large-scale chilling effect. As one advocate described it, "A judge discredits one woman, and it's like a bomb that goes off **in** the community, affecting a hundred women. Within many communities, these stories spread like wildfire." <sup>237</sup>

A woman **in** the Massachusetts Family Court study voiced much the same criticism:

[My advice to other women is:] Just don't say anything about it. The way the system is now . . . you've got to talk to your priest, talk to your family, tell them your story of woe and you know, the fact that you've been abused. Have the support, get therapy if you need therapy, do talk to them. But don't, don't, don't bring it into the courtroom, because . . . [the judge will think] 'oh, that couldn't have happened to you.' <sup>238</sup>

Such advice--editing one's speech so that it includes only what the listener is ready or able to hear--is described **in** the philosophy literature as "testimonial smothering." <sup>239</sup>

**In** the 2015 National **Domestic Violence** Hotline study, <sup>240</sup> both women who had called the police and those who hadn't shared a strong reluctance to turn to law enforcement for help. One **in** four women reported that they would not call the police **in** future, and more than half said doing so would **[\*453]** make things worse. <sup>241</sup> Why? Two-thirds or more said they were afraid the police would not believe them--or would do nothing, if they called. <sup>242</sup>

**Credibility** discounts and experiential trivialization harm women **in** an abundance of ways--up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. Women are devalued and gaslighted from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial portion of the human experience. Together, these harms operate to form a formidable obstacle to **women's** healing, safety, and ability to obtain justice.

#### **IV. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING **CREDIBILITY** DISCOUNTS **IN** THE JUSTICE SYSTEM**

At this point, we have a fairly comprehensive sense of how the justice system and influential actors **in** related social service networks unfairly discredit women and their stories of abuse, and devalue their most difficult experiences. How can we recalibrate these core institutions to tear down the gauntlet of doubt, disbelief, and dismissal women face **in** their efforts to be safe and achieve justice?

Several forms of **credibility** discounting may be amenable to fairly straightforward interventions--specifically, those that derive from listeners' failure to understand a **woman's** experience of intimate partner **violence**. For example, gatekeepers within the justice system often lack information about the effects of **violence**-based neurological and psychological trauma on information processing and memory, about the way that potent courtroom triggers can affect witness demeanor, and about the ways survivors understand their options and prioritize their harms. <sup>243</sup> The best way to cure these knowledge gaps is--of course--improved understanding. Intensive training could, **in** theory, allow individual judges, police officers, prosecutors, clerks, and social service providers to better understand the

<sup>237</sup> Interview with Ronit Barkai, Assistant Dir., Transition House (Dec. 20, 2017).

<sup>238</sup> *Massachusetts Family Court Study*, *supra* note 223.

<sup>239</sup> Dotson, *supra* note 112, at 249.

<sup>240</sup> NATIONAL HOTLINE SURVEY, *supra* note 106, at 9.

<sup>241</sup> *Id.* at 5.

<sup>242</sup> *Id.* at 4.

<sup>243</sup> See *supra* text accompanying notes 19-95.

medical, mental health, and experiential correlates of ***domestic violence***. Such education should help to eradicate those ***credibility*** discounts that are rooted ***in*** incomplete understandings.

A cautionary note, however, is ***in*** order here. For decades, antidomestic ***violence*** activists have engaged ***in*** intensive judicial training efforts throughout the country. Some individuals have absorbed this learning and are far more adept at avoiding knowledge-based pitfalls ***in*** assessing survivor ***credibility***. For others, however, knowledge gaps persist despite exposure to [\*454] high quality training, raising doubts that training alone may be enough. Training must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world.<sup>244</sup>

Other forms of ***credibility*** discounting described above--particularly those rooted ***in*** negative stereotypes and bias--are more resistant to change and may require a more complex set of interventions. The cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain--and the related assumption that women simply lack full capacity as truth-tellers--are longstanding and deeply held.<sup>245</sup>

Regardless of the type of ***credibility*** discount ***in*** question, change will not come easily; it will require a combination of motivation, awareness, and effort. The responsibility here lies with the listening audience--justice and social service system gatekeepers--to intentionally, consciously shift their assumptions. ***In*** Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being [a] nonsense or her being a fool, but rather to some sort of gap ***in*** [the existing interpretive] resources."<sup>246</sup>

The crucial first step is to shift away from an automatic, uninformed disbelief of ***women's*** stories--to begin, ***in*** other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."<sup>247</sup>

[\*455] Let us be clear: We are ***in*** no way arguing that by distrusting one's instincts to distrust a survivor, state actors must go to the other extreme and automatically credit all survivor stories. Instead, system actors need only resist the reflexive presumption ***against*** crediting ***women's*** stories, make an effort to avoid false assumptions,

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<sup>244</sup> These conclusions are based on the first author's extensive experience ***in*** conducting trainings with judges, police officers, and prosecutors, as well as numerous conversations with other trainers ***in*** the field of intimate partner ***violence***.

<sup>245</sup> See *supra* text accompanying notes 112-168. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, ***in*** fact, shaping their perceptions and decisions. As long as these biases remain unconscious, change is unlikely. Psychologists interested ***in*** challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced, are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2007). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habitbreaking intervention." Patricia G. Devine et al., *Long-Term Reduction ***in*** Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective-taking, and counterstereotypic imaging. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes ***in*** key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present ***in*** participants' thoughts, feelings, and behaviors. These changes endured two months following the intervention. *Id.*

<sup>246</sup> FRICKER, *supra* note 49, at 169.

<sup>247</sup> Jones, *supra* note 167, at 164.

overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. We might call this process one of cultivating a capacity for "virtuous listening."<sup>248</sup>

System gatekeepers can build this openness into their traditional approaches to assessing **credibility**. Contributing factors such as the internal and external consistency of story, as well as witness demeanor, can easily expand to accommodate new understandings. For example, a judge who notices temporal gaps **in** a survivor's story can resist the urge to automatically discount her **credibility**. Instead, the judge can ask follow up questions **in** an effort to obtain more concrete factual information and avoid making unjustified assumptions. Such questions might include:

- . What kinds of injuries did you sustain?
- . Did you ever feel unable to breathe for any period of time?

Additional questions might focus on obtaining information about the impact of trauma on the witness. For example:

- . Are you able to remember the full story of what happened, from beginning to end?
- . It's fine if you can't tell me what happened **in** complete detail; just tell me any specific part of this experience that you *do* remember.
- . How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.
- . Is your memory of what happened consistent over time? How does it change?
- . Is this a good or a bad day for your memory of what happened? Do you sometimes remember more or less than what you've been able to recall today?
- . Is your memory of what happened similar to or different from your memory of other events **in** your life? How so?

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- . I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

**[\*456.]** (If not): What do you think explains the difference?

or:

- . I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

When receiving testimony focused on psychological, rather than physical abuse, listeners can use a prompt along these lines:

- . You've talked about the psychological harm you experienced **in** your relationship. Was there ever physical **violence**? Can you help me understand why you have focused primarily on the emotional aspects of your experience?

When suspecting that a woman is improperly motivated by a desire to access housing/shelter, or to gain an advantage **in** a custody **case**:

- . You've spent a lot of time explaining that you need to have a safe place to live. Can you help me understand why you've focused more on this issue than you have on the **violence** you've described?
- . I see that you filed a permanent custody **case** a few weeks ago. Can you help me understand why you have filed your protection order **case** now? I need you to explain to me why you didn't file this **case** first.

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<sup>248</sup> Jose Medina, *Varieties of Hermeneutical Injustice*, **in** ROUTLEDGEHANDBOOK, *supra* note 80, at 48.

To help counter the more general tendency to discredit women as *women*, a judge might take the issue on directly:

. One of the most basic things a judge has to do is to decide whose story to believe. *In* this **case**, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?

The judge may ultimately find a **woman's** story implausible, or find her personally untrustworthy. But by engaging *in* a systematic reorientation of their beliefs, judges can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

*In* addition, *in cases* where a judge or other system gatekeeper concludes that a survivor is, indeed, telling the truth, the gatekeeper should explicitly communicate that to her. *In* light of the frequency with which women face **credibility** discounts and the psychological harm such discounts impose, a counter-message of belief and support (where warranted) can be deeply cathartic. <sup>249</sup>

[\*457] And judges must be held accountable for instituting such changes. Court watch programs should expand to include observations about individual judicial efforts (and failures) to look beyond surface indicators of **credibility** and ask questions targeted at more accurate assessments. Court watch reports, shared with the local judiciary and made available to the public, would create much-needed pressure to follow through with a change *in* existing **credibility** assessment tools.

Still, experience has taught us that judicial training has its limits; accordingly, suggestions for changing gatekeeper behavior are not enough. Reform efforts also must focus on improving survivors' access to powerful forms of corroborative evidence. The story of White House staff secretary Rob Porter serves as a potent reminder that a picture--there, one that showed his ex-wife's black eye--can dramatically reduce the initial **credibility** discounting imposed on **women's** stories of abuse. <sup>250</sup> But survivors often lack such evidence. Many perpetrators routinely look through their targeted victim's phones, deleting any incriminating photos, texts, or voice mails that are stored there. Many women are afraid to maintain such evidence *in* the first instance, due to fear that discovery will lead to further abuse.

Recent technological innovations have created safe spaces for women seeking to maintain corroborative evidence. The SmartSafe+ mobile app, developed by the **Domestic Violence** Resource Centre *in* Victoria, Australia, enables survivors to create an online diary containing written, photographic, video, and audio entries that are stored on a cloud account, rather than on their phones. <sup>251</sup> It also contains guidance about the most important forms of corroborative evidence that can be useful *in* a courtroom. <sup>252</sup> On the phone itself, the app looks like a routine news feed. It can be downloaded, free of charge, at **domestic violence** advocacy organizations, where service providers have been trained to ascertain whether a survivor's phone is being monitored and ensure that the download cannot be detected. <sup>253</sup>

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<sup>249</sup> See *supra* text accompanying notes 218-223. Being believed is critical to a survivors' ability to heal. A judge's explicit statement that a survivor is credible can serve as a stark counter narrative to her abusive experiences, reinforcing the validity of her own perceptions and helping to restore the sense of self-worth she may have lost.

<sup>250</sup> See, e.g., Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/us/politics/robporter-resigns-abuse-white-house-staff-secretary.html>.

<sup>251</sup> *Family Violence App Wins Inaugural Premier's iAward*, CIVIL VOICES (June 30, 2016) <https://probonoaustralia.com.au/news/2016/06/family-violence-app-wins-inaugural-premiers-iaward/> [<https://perma.cc/3PV9-5L4X>].

<sup>252</sup> See, e.g., SmartSafe+ Mobile App, <https://www.youtube.com/watch?v=o9tdxEr1nww> (last visited Oct. 16, 2018).

<sup>253</sup> *Id.*

Efforts also are underway to develop online programs that use plain language to improve survivor access to justice.<sup>254</sup> Such efforts could be expanded to educate [\*458] survivors about the importance of focusing courtroom storytelling around applicable legal standards. Community education focused on storytelling could prompt women to highlight their experiences of physical harm, for example, helping them to focus on what is most important for their legal **case**, rather than what might be most emotionally salient to them on a personal level. **In** addition, online programs and **in**-person advocates could help women think through how to effectively communicate how trauma might be impairing their ability to effectively tell their story **in** court, or to any system gatekeeper.

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution **in** discounting **women's credibility**. But, as noted above, two prerequisite conditions--whether **in** reducing the "willful interpretive gap" **in** understanding **women's** experiences, **in** eradicating cultural stereotypes of women as inherent untrustworthy, or **in** taking **women's** experiences seriously--are the *acknowledgement of gender-based bias, and the will to change*.

Progress is possible. The #MeToo moment represents the beginning of a shift **in** cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women **in** the American workplace. Similarly, the #WhyIStayed campaign brought into sharp relief the ways that women are often trapped **in** abusive relationships. And the January 2018 sentencing hearing **in** the criminal prosecution of Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, raised national awareness about **women's** experiences of sexual assault.<sup>255</sup>

Perhaps most importantly, the Nassar **case** represents an initial effort to break crucial barriers directly related to **credibility** discounting. The women Nassar exploited told the court and the wider world, explicitly and **in** painful detail, their stories of being discredited by the institutions ostensibly designed to help them. Over 150 women from Michigan State University ("MSU") came forward with story after story of how they

told MSU administrators, explicitly and more than once, that Nassar was sexually abusing them during medical appointments. [The administrators] listened to women describe the rubbing back and forth, the digital penetration that sometimes lasted 15 minutes, the ungloved hands. But when [\*459] those women said there was a problem--that this didn't feel right, that they were hurt--*the administrators didn't believe them*.<sup>256</sup>

Instead, school administrators consistently discounted the **credibility** of Nassar's victims, telling them: "He's an Olympic doctor"; or "No way"; or "[You] must be misunderstanding what was going on."<sup>257</sup> When asked about the **women's** reports of abuse, the university's Title IX investigator, Kristine Moore, said "the women likely did not understand the 'nuanced difference' between proper medical procedure and sexual abuse."<sup>258</sup>

The sentencing hearing **in** this **case** was a groundbreaking opportunity for women to share both their experiences of sexual assault and, **in** painful detail, their experiences of **credibility** discounting. The seven days of hearings were cathartic for the survivors; they also shone a light on the institutional gaslighting that women routinely

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<sup>254</sup> Brigitte Lewis, Lisa Harris & Georgina Heydon, *The Conversation We Need to Have: Victoria Has Made Progress on Tackling Domestic Violence, But There Is Still Much to Be Done*, ASIA & PAC. POL'Y SOC'Y (Sept. 6, 2016), <http://www.policyforum.net/the-conversation-we-need-to-have/> [<https://perma.cc/5AQA-697Z>].

<sup>255</sup> Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/>.

<sup>256</sup> *Id.* (emphasis added).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

experience. <sup>259</sup> It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform *in* the justice and social service systems.

## CONCLUSION

Women experience *credibility* discounts *in* their homes and *in* the systems they turn to for help. As the torrent of #MeToo stories have made clear, these same discounts pervade workplaces where women are sexually harassed. The Larry Nassar *case* further shows that these discounts are rampant among campus administrators responsible for handling sexual assaults. The routine experience of *credibility* discounting indeed is an integral part of male abuses of power, making those experiences far more painful and difficult for women to surmount.

But assaults on *women's credibility* also exist independently of those abusive contexts. *In* fact, women routinely face *credibility* discounting *in* multiple spheres of their lives. As we have worked on this essay, we've started to notice *credibility* discounting *in* our own lives everywhere we turn. When we've talked to colleagues and friends about this project, they too reliably respond with a story of their own, typically from the past few days.

For example, one colleague--an extremely well-known legal theorist--exclaimed, "That happens to me, all the time!" <sup>260</sup> She told us the story of a dinner party she had just attended, where the conversation turned to the question of who would succeed to the presidency if Donald Trump, Mike Pence, and Paul Ryan were all somehow removed from office. Our colleague [\*460] (a woman) volunteered that she'd been thinking about this quite a bit, and that the next person *in* line was Orrin Hatch--the President Pro Tempore of the Senate. The other guests responded with deep skepticism: "That can't be right," etc. She insisted that she was certain, but she was ignored. Several guests pulled out their phones and started to Google the question; others brainstormed possibilities among themselves. Eventually, the group concluded that the next *in* line was . . . Orrin Hatch. <sup>261</sup> No one acknowledged that our colleague had ever even suggested this answer. Not only was there no apology for doubting her; it was as though she had never spoken at all.

Other friends and colleagues shared experiences where they reported unusual physical symptoms to male medical professionals. They were concerned, *in* advance, that they might be dismissed as "hysterical" or as exaggerating their experiences, and, *in* fact, they often were told that the problem was likely "all *in* their heads." <sup>262</sup> Gender-based *credibility* discounting is a serious concern *in* the medical field: among emergency room patients complaining of abdominal pain, women are thirteen to twenty-five percent less likely than men to receive high-

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<sup>259</sup> Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/>.

<sup>260</sup> Thanks to Professor Robin West for providing us with this story.

<sup>261</sup> This story has a sharp ironic edge. Orrin Hatch took a leading role *in* the Clarence Thomas confirmation hearings before the Senate Judiciary Committee. See, e.g., *Thomas Hearing Day 1, Part 1*, C-SPAN, at 48:37-57:02 (Oct. 12, 1991), <https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1>. Reflecting on these hearings nearly twenty years later, *in* an interview with CNN, Hatch reasserted his view that Anita Hill fabricated her story about Thomas' harassment, but "talked herself into believing it." Hatch explains:

*I* believe that Anita Hill was an excellent witness. I think she actually believed, and talked herself into believing, what she said. There was a sexual harasser at that time, according to the sources I have, and he was her supervisor. He just wasn't Clarence Thomas. And I think she transposed that to where she believed it . . . .

<sup>262</sup> For a more *in*-depth look at this type of *credibility* discount, see Jennifer Brea, *They Told Me My Illness Was All in My Head. Was It Because I'm a Woman?*, BOS. GLOBE (Dec. 27, 2017), <https://www.bostonglobe.com/magazine/2017/12/27/they-told-illness-was-all-head-was-because-woman/47zuihgBfZqPdNe7S40hSJ/story.html>.

strength "opioid" pain medication; *in* addition, women wait an average of sixteen minutes longer than men to receive treatment. <sup>263</sup>

Indeed, *credibility* discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women. *In* other words, *credibility* discounting and experiential trivializing are distinct injuries women experience, as part of, and *in addition to*, other forms of gender-based, discriminatory harms.

It is time for a *credibility*-discounting #MeToo movement. Women need to come forward *in* massive numbers to tell their stories of discounts based on [\*461] story plausibility and storyteller trustworthiness, as well as ways *in* which their experiences have been minimized and dismissed, *in* an effort to force society to see with clarity this distinct form of gender-based harm. <sup>264</sup> And perhaps once the scale of this injustice is made manifest, we can, at long last, enact a body of genuine institutional remedies, so that women already victimized by abuse, sexual assault, and harassment need not fear that the legal system and the broader culture is set up to perpetuate, rather than alleviate, their harms.



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<sup>263</sup> Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 ACAD. EMERGENCY MED. 414, 414 (2008).

<sup>264</sup> Playwright Timberlake Wertenbaker puts it well:

What the #MeToo moment is besides sexual harassment is the end of women being quiet. And that is almost more important--that is, the ability and the right of women to speak up about what's happened to them or what they think *in* general, without being told to shut up I hope that's what lasts forever."

**User Name:** Amanda Norejko

**Date and Time:** Wednesday, August 24, 2022 12:32:00 AM EDT

**Job Number:** 177959711

## Document (1)

1. [ARTICLE: Evidence's #MeToo Moment, 74 U. Miami L. Rev. 1](#)

**Client/Matter:** -None-

**Search Terms:** women's credibility in domestic violence cases

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Secondary Materials

**Narrowed by**

Jurisdiction:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Dist. of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming

## ARTICLE: Evidence's #MeToo Moment

Fall, 2019

### Reporter

74 U. Miami L. Rev. 1 \*

Length: 84178 words

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### Highlight

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*The #MeToo movement has drawn attention to the prevalence of sexual and gender-based **violence**. But more importantly, it has exposed how society discounts the testimony of women. This Article unfolds how this **credibility** discounting is reinforced *in* our evidentiary system through the use of character for untruthfulness evidence to impeach victims. Specifically, through defense attorneys' practice of impeaching sexual and gender-based **violence** victims' character for truthfulness as a way to introduce functional evidence of **credibility** biases regarding the trustworthiness of sexual and gender-based **violence** victims and the plausibility of their testimonies. The Article further shows a correlation between the poor performance of our legal system *in* redressing the harms associated with sexual and gender-based **violence** and our evidentiary rules. Accordingly, the Article advocates reforming the use of character for untruthfulness evidence and proposes a rule that attempts to temper the prejudicial effects caused by long-held **credibility** biases against sexual and gender-based **violence** victims with a well-established impeachment tradition, constitutional protections, and judicial efficiency. It does so *in* hopes that the #MeToo movement becomes a catalyst *in* the judicial response against sexual and gender-based **violence**.*

## Text

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### [\*4] #FEM2: INTRODUCTION

*Well the icecaps are melting pretty fast and the change here [in workplace sexual harassment] seems to be glacially slow. But I will say, that if we do nothing the change is not gonna come.*<sup>1</sup> [\*5] Historically, *in* sexual and gender-based **violence** ("SGBV") **cases**,<sup>2</sup> women have been doubly victimized.<sup>3</sup> With the rise of

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<sup>1</sup> LastWeekTonight, *Workplace Sexual Harassment: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (July 29, 2018), <https://www.youtube.com/watch?v=dHiAls8loz4> [hereinafter *Last Week Tonight with John Oliver*] (Professor Anita Hill discussing the changes our judicial system has experienced *in* redressing sexual harassment and SGBV at 28:15-28:30).

<sup>2</sup> The term sexual and gender-based **violence cases** will be used *in* this Article as an umbrella term for **cases in** which the majority of victims are women and its **violence** has a gender or sexual component such as sexual harassment, rape, sexual assault, intimate partner **violence**, stealthing, upskirting, and similar aggressions.

[SGBV] refers to harm or threat of harm perpetrated against a person based on her/his gender. It is rooted *in* unequal power relationships between men and women; thus, women are more commonly affected. It is often used interchangeably with "**violence** against women" and can include sexual, physical, economic and psychological abuse. SGBV manifests *in* various forms including physical, emotional and sexual **violence**, sexual exploitation, discrimination and harassment.

ALYS M. WILLMAN & CRYSTAL CORMAN, WORLD BANK, SEXUAL AND GENDERBASED **VIOLENCE**: WHAT IS THE WORLD BANK DOING, AND WHAT HAVE WE LEARNED? A STRATEGIC REVIEW 5 (2013), <https://openknowledge.worldbank.org/handle/10986/16733>. "This does not mean that all acts against a woman are gender-based **violence**, or that all victims of gender-based **violence** are female." *Definitions of Sexual and Gender-Based Violence*, NEW HUMANITARIAN (Sept. 1, 2004), <http://www.thenewhumanitarian.org/feature/2004/09/01/definitions-sexual-and-gender-based-violence>. Men who do not conform to society's views of masculinity could be victims of SGBV. *Id.* Although reliable figures are difficult to compile, it is estimated that between 1993 and 2001 eighty-five percent of intimate partner **violence** victims were women. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER **VIOLENCE**, 1993-2001 (2003), <https://bjs.gov/content/pub/pdf/ipv01.pdf>. Similarly, it is estimated that less than two percent of men *in* the United States--as opposed to twenty percent of women--will be raped. See *Get Statistics*, NAT'L SEXUAL **VIOLENCE** RES. CTR., <https://www.nsvrc.org/node/4737> (last visited Oct. 8, 2019). The proportion of reported **cases** of rape and sexual assault *in* the United States show a similar trend, with a ratio of about 1:10 (men to women). See *Number of Forcible Rape and Sexual Assault Victims in the United States from 1993 to 2017, by Sex*, STATISTA, [https://www.statista.com/statistics/251923/usa--reported-forcible-rape-cases-by-gender/\(last](https://www.statista.com/statistics/251923/usa--reported-forcible-rape-cases-by-gender/(last) updated Apr. 29, 2019); *Number of Rape or Sexual Assault Victims in the United States per Year from 2000 to 2017, by Gender*, STATISTA, [https://www.statista.com/statistics/642458/rape-and-sexual-assault-victims-in-the-us-](https://www.statista.com/statistics/642458/rape-and-sexual-assault-victims-in-the-us-by-gender/(last) by-gender/ (last updated Apr. 29, 2019). The pattern repeats itself *in cases* of sexual harassment. See, e.g., *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2018*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Oct. 10, 2019) [hereinafter *Charges Alleging Sex-Based Harassment*]. The EEOC reports that *in* the last nine years males are on average 16.8% of the complainants. See *id.* Consequently, although males are also targets of SGBV, throughout the Article feminine pronouns will be used to refer to victims, except *in* the proposed rule that will use gender-neutral language to maintain its constitutionality. See *infra* Sections IV.B, V.B. It is also important to stress that, although this Article focuses on how gender intersects with **credibility**, understanding how gender intersects with race, religion, class, and other identities is critical to addressing patterns and forms of sexual and gender-based **violence**. See, e.g., Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 *HOW. L.J.* 459, 474-75 (1997) (discussing allegations of rape when made by and against African Americans); Nesa E. Wasarhaley et al., *The Impact of Gender Stereotypes on Legal Perceptions of Lesbian Intimate Partner Violence*, 32 *J. INTERPERSONAL VIOLENCE* 635, 651-53 (2015) (discussing **credibility** discounting of same-sex couples).

social [\*6] awareness about the embodiment of patriarchal norms *in* our legal system, we reformed our probative and substantive laws to no longer require corroborative testimony, <sup>4</sup>*in* an attempt to put somewhat of a stop to victim-blaming and slut-shaming *in* court. <sup>5</sup>

Today, the #MeToo movement, originated by Tarana Burke, is raising social awareness about rape culture and ***credibility*** biases against SGBV victims. <sup>6</sup>As a result, men have been forced to acknowledge their patriarchal behavior and resign from positions of power. <sup>7</sup>Nevertheless, reporting, prosecution, and conviction rates remain well below acceptable levels and have even fallen. <sup>8</sup>

This Article argues that, while some of the discounting of narratives denounced by the #MeToo movement has been partially eradicated from the judicial process, <sup>9</sup>there is a correlation between the [\*7] poor performance of our legal system *in* addressing SGBV ***cases*** and our evidentiary rules. Specifically, this Article posits that neutral rules regarding the impeachment of a witnesses' character for untruthfulness are used *in* practice by attorneys to discount victims' testimonies through ***credibility*** biases based on trustworthiness and testimony plausibility. <sup>10</sup>

As a possible solution, this Article advocates enacting impeachment rules that would prevent attorneys from using societal narratives about victims' perceived lack of ***credibility*** and working them *in* as part of the defense. The proposed rule, <sup>11</sup>based on the Federal Rules of Evidence ("FRE"), attempts to temper the prejudicial effects caused by ***credibility*** biases with a long-standing tradition of impeaching witnesses with evidence of character for untruthfulness, constitutional protections, and judicial efficiency. The Rule provides for different balancing tests depending on the type of character for untruthfulness evidence and lists concrete factors to aid the court *in* SGBV ***cases*** when weighing the probative value of the character for untruthfulness evidence against its prejudicial effects.

The Article opens with a short story that sheds light on some of the discounting that SGBV victims often experience when they come to court to vindicate their grievances. <sup>12</sup>The Article then explores how these unjust experiences are part of an evidentiary system that, through the impeachment of victims' character for truthfulness, discounts ***women's*** voices by not gatekeeping ***credibility*** biases from SGBV trials. <sup>13</sup>After describing this phenomenon, this Article presents how SGBV continues to be a pressing issue *in* our society and

<sup>3</sup> See *infra* notes 26-30 and accompanying text.

<sup>4</sup> See Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, [53 TULSA L. REV. 1, 13-15 \(2017\)](#).

<sup>5</sup> See *infra* note 26 and accompanying text.

<sup>6</sup> Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

<sup>7</sup> See Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> (last updated Oct. 29, 2018).

<sup>8</sup> See *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 10, 2019).

<sup>9</sup> See, e.g., Buller, *supra* note 4, at 13-15.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Section IV.B.

<sup>12</sup> See *infra* Part I.

<sup>13</sup> See *infra* Part II.

how the low reporting, prosecution, and conviction rates correlate with the undue exploitation of **credibility** biases **in** trials.<sup>14</sup>Next, it explores the current evidentiary landscape **in** the United States regarding the impeachment of SGBV victims with character for untruthfulness evidence and the costs of keeping an evidentiary system that reinforces SGBV through **credibility** biases.<sup>15</sup>After the problem is explained, the Article includes a model impeachment **[\*8]** rule, as well as a commentary explaining the rule and its application.<sup>16</sup>Finally, the Article discusses the benefits and disadvantages of implementing the rule.<sup>17</sup>

## I. #METOO: A NOT CREDIBLE WITNESS

I dreaded that moment. Their silent treatment. Their faces of disappointment. The look **in** their eyes letting me know that I have failed them.

I was so terrified of that moment. I could feel the chills going through my spine. It was worse than the punishment itself. The look on their faces said it all. I lied. I misbehaved. I deserved no mercy.

I went all throughout my childhood trying to avoid that feeling. Yet, as I grew older, I kept running into it.

It was different for sure. It was no longer my parents. It was then my friends', my teachers', and my colleagues' turn. Even though I hadn't done anything wrong, it felt like I had. Like I was a child and had broken an old vase **in** the living room. It still felt like I had lied, like I had misbehaved. But the only thing broken was me.

If a high school teacher made unsolicited sexual advances and I said something about it, I'd have to respond to a myriad of questions. Did I misunderstand the situation? Had I asked for it? Was it my fault for staying alone with him? Was I deflecting? Was I lying because I did not get the highest grade? Was I making a big deal out of nothing?

I quickly learned to keep silent. If I did not want to be made a liar, it was better to shut up. If I wanted a future, it was better to let it go than to taint my reputation.

I thought I had learned all the tricks. Never be alone with your boss. Never walk by yourself late at night. Make sure you know the men you go out with well. Ask other women what they've heard.

Yet, here I am again. Three decades later, feeling those same chills.

I thought this time was going to be different. They told me to break the silence. They told me to tell my story. They told me there were other women like me.

But the look **in** their eyes said it all. The foreman, the jurors, the judge.

**[\*9]** I told the truth. It didn't matter. I cooperated with the police. It didn't matter. I came forward. It didn't matter.

The look was there. Lingering, like his beatings. I had lied. I misbehaved. I deserved no mercy.

Initially, I did not intend to be **in** court for the verdict. But my family and friends convinced me otherwise. They said I should keep my head high. However, I knew from the moment I took the stand that he was going to walk.

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<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Section IV.A.

<sup>16</sup> See *infra* Sections IV.B-IV.D.

<sup>17</sup> See *infra* Part V.

This trial was never about him. It was about me not coming forward promptly, me keeping silence in my own hell, me lying to keep appearances, me putting on makeup, me not stopping going to work. It was about whatever it was that I did that they could not understand.

This case was not about how many times he hit me, how many times he yelled at me, or how he made me feel. It was not about how many times he pushed me against the wall or raped me.

It was about the people who didn't know about it. The people who didn't see it. The people I didn't tell about it.

It was about him saying that he is not the kind of man that would do such things, but I am the kind of woman who would make such things up. It was about me being unreliable, unstable, and perhaps scorned.

*What type of car do you have, Jennifer?*

As soon as his attorney asked that question, I knew it was over for me.

*An Audi. Why?*

*Objection, your Honor!* The prosecutor intervened.

*Your Honor, this question is related to the credibility of the witness.*

*Your Honor, I fail to see how this is related to the credibility of the victim.*

*Your Honor, if I may?*

**[\*10]** *Sidebar please*, the judge commanded.

No one was supposed to hear what they were discussing, but I did. His attorney was arguing how he had evidence that I maliciously lied in a loan application and that it will show my character for untruthfulness. Since all the State had was my testimony against that of my ex, the information was extremely relevant. The prosecutor did not even reply, and the judge just nodded and said: "Get to the point right away."

*Jennifer, you took a loan for that car, no?*

*Yes, I did.*

*Isn't it true that you lied in the loan application?*

*I don't know what you are talking about. That was like six years ago.*

*Do you remember completing a loan application to buy the car?*

*Yes.*

*Do you remember lying about your income?*

*I don't think so.*

The attorney kept looking at his papers, like he was searching for something. I started wondering if he had my loan application with him and was about to show it to the court.

*Are you sure that you didn't write that you made 45k when you applied for the loan?* He kept looking.

*I might have.*

*But that was not your income at the time?*

*I think a friend told me to . . .*

**[\*11]** *I didn't ask you about what your "friend" told you. I asked you about what you wrote in the application. Did you write 45k when you were making less than that?*

Yes.

*So, you lied, correct?*

*I guess you can say I did. I followed my friend's advice.*

*But the application was in your name, no?*

Yes.

*You were not married to my client at the time?*

No.

*But you made everyone think you were.*

*Excuse me?*

*Objection, your Honor! Relevance?* The prosecutor interjected.

*Your Honor, we are trying to get at the credibility of this witness.*

*Overruled.* The judge disinterestedly intervened.

*I will repeat my question. At that time, six years ago, did you go by Mrs. Johnson or Miss Jones?*

*I don't understand.*

*Did your manager at your job call you Mrs. Johnson?*

*Well . . . the manager of the office knew Mark, and he thought that we were married. I did not want to give any explanations about us. It was easier to do that.*

*So, when it is easier for you, you lie?*

*No. I did not say that.*

**[\*12]** *So, when you don't want to give explanations you lie?*

*No. I did not say that.*

*But you lied to your manager, no?*

No.

*Well . . . legally you were Miss Jones, no?*

Yes.

*And you referred to yourself as Mrs. Johnson with your manager, correct?*

*Yes. We were not married at the time, but we were living together, so people referred to me as Mrs. Johnson.*

*But that was not your legal name, right?*

No.

So, you were lying, no?

I wouldn't say that.

Let's go back to the car. You did not tell Mark that you were buying a car, right?

No.

Of course! As you testified, he allegedly wouldn't let you buy even a cell phone, so he wouldn't have let you buy a car, am I correct?

I don't think he would've. No.

But you did apply for a loan, right?

Yes.

**[\*13]** So, you took a loan behind Mark's back, behind the back of the man you called your "husband"?

It wasn't behind his back.

But he didn't know?

No, he did not know.

I could see the face of the lady in the second row of the jury box and I knew exactly what she was thinking. "This woman is a liar. Look at her. She doesn't look like a victim at all." I should've listened to my mom when she told me that no one was going to believe me if I look like nothing had happened. "Victims don't dress like you do, Jen. They look sad. You look too attractive." And then, all a sudden, the attorney went for what I thought was the final blow.

You eventually married my client, right?

Yes.

In fact, you are still married to him?

Yes. I'm in the process . . .

Now. Mrs. Johnson, did you recently take a pregnancy test?

Objection! The State's attorney jumped from her chair.

Again, the attorneys came to the bench. This time the prosecutor was more forceful in her defense. She insisted that the pregnancy test had nothing to do with the case. That it was impermissible to use that type of evidence. His attorney insisted that it was to prove my deceitful character, not to pry into my sexual life. The judge simply said, "I'll allow it."

Please answer my question, Mrs. Johnson. Did you take recently a pregnancy test?

Yes. I went to my doctor's and she ordered one for me.

**[\*14]** It has been more than six months since you have lived with my client, correct?

That's correct.

But you are still married to him, no?

Yes, I am . . . We are in the middle of the divorce process.

***In** that divorce you are asking for alimony, no?*

*Yes. I think my attorney asked for it.*

*And for full custody of your children?*

*Yes.*

*Now, Jennifer, did you try to kill yourself?*

*I expected the question.*

*Yes. It was a difficult time. I was depressed.*

*Did you think about your children?*

*Objection?!*

*Sustained.*

*Apologies, your Honor. Were you depressed or are you still depressed?*

*Well . . . I'm still **in** treatment. As I said, it has been a difficult time.*

*And when you tried to take your life, it was just a few days after your relationship with Mark ended, no?*

*Yes. But that wasn't . . .*

***In** fact, he left you, no?*

*[\*15] That's right.*

*But just two weeks after your suicide attempt, you let Mark into your house.*

*No. He showed up.*

*Thanks. **In** your testimony, you mentioned that around that time you decided not to have anything else to do with Mark, right?*

*Yes.*

*But you let him **in**.*

*I didn't have the strength to . . .*

*You did not have the strength to call the police?*

*No, I did. But I did not mean that.*

*Your kids were not with you, no?*

*No. They were with my parents.*

*So, you did not call the police when Mark showed up?*

*No.*

*Even though you alleged that he had hit you many times before, right?*

*No, I did not call the police at that moment.*

*And no one could verify that he has hit you before, right?*

*No one was at our house when he hit me.*

*And you did not call the police when he showed up even though you allege that he raped you in the past.*

*No.*

**[\*16]** *And you never told anyone about him raping you before until this trial, right?*

*That's correct.*

*Not even your mom?*

*No.*

*Or your friends?*

*No.*

*In fact, you told the police when you made the report that you have never been the victim of domestic violence. No?*

*Yes. I meant that . . .*

*Just a simple yes or no will do. In fact, you told your friends and family how happy you were with Mark?*

*Yes. I didn't want people to know . . .*

*And on Facebook, you were always talking about all the nice things Mark would do for you?*

*Yes. As I told you, I did not want people to know.*

*You never said on Facebook that he raped you, no?*

*That's not something you post on Facebook.*

*So, that was a no?*

*Yes. That was a no.*

*And you had sex with him that night he "showed up" at your house, no?*

*No. He raped me.*

**[\*17]** *But you did not have any bruising on your arms when the police came?*

*No.*

*Or anywhere on your body, isn't that correct?*

*That's correct. I did not have any bruising. That doesn't mean he did not rape me.*

I could see in the foreman's eyes. He was certain that I was lying because I never shared with anyone that he was abusing me. He thought that I was unstable. He was sure that I had sex voluntarily with him and that I was being vindictive and jealous because he left.

*So, you called the police when he was in the bathroom and he was about to leave, right?*

Yes. *That was when I . . .*

*And the police took you to the hospital, right?*

Yes. *I was very anxious.*

*And in the hospital, they administered a rape kit on you, no?*

*No. I did not say, at that moment, that he had raped me.*

*So, this is the first time you have told someone that my client, your husband, who you let in your house, allegedly raped you?*

Yes.

*Now, my client went to check on you after your suicide attempt, no?*

*That's what he said when he showed up at my doorstep.*

*No more questions, your Honor.*

Then it came down to the closing.

**[\*18]** As the attorney went into his argument, I remembered the bedtime stories my mom used to tell me as a child about how the wolf came, and no one believed the shepherd boy. That day, I was the shepherd. But this time I wasn't being believed not for what I said but for what I did not say.

"Heaven has no rage like love to hatred turned, nor hell a fury like a woman scorned."<sup>18</sup> We are here today because of Jennifer's scorn." The defense attorney yelled. "She is a person who would lie when she sees fit. You heard her tell you how she lied about the relationship she had with my client. She pretended to be his wife. And after getting what she wanted, when he decided to call it quits, she lied again, like she did in her loan application. She is just looking to ruin this honest man's life. The man who, before leaving, she was telling everybody how well he treated her.

There is no victim in this case. Or yes, there is one: my client. A man whose life is about to get ruined because of this woman's lies. She is trying to ruin Mark's life by lying. Just like she told you she does when she doesn't want to give explanations, when it's easier for her to get what she wants, when she really wants something that she can't have like a car, my client, or money. Like she lied here in court when she told you that my client wouldn't let her buy a cell phone when she was buying things more expensive and less easily concealable. Things that--if it were true that my client wanted to control her--she would not have been able to have. But we all know that she was lying about the cell phone, as she was lying about the punches, the restrictions, and the insults.

We all know that she was lying about being raped. Who lets an abuser come into her house when the relationship has ended? Who doesn't tell the police she has been raped? No one. It's a lie. A lie from an unstable woman, a woman who hasn't been able to deal with her depression.

And if you have any doubts, look at the other witnesses the State brought. Who does she have to support her story? Her parents. Her friends. People who would do anything for her. People who did not like my client in the first place. People who were not present at any of the alleged instances of abuse. People who, as Mrs. Johnson did, lied to you.

**[\*19]** But you know better than that. You know my client is incapable of the atrocities that he has been accused of. And you know Jennifer. You know she is capable of lying to get her way."

But I did not "get my way." He did.

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<sup>18</sup> WILLIAM CONGREVE, THE MOURNING BRIDE act 3, sc. 2. (original spelling has been modernized).

I just kept my head high.

## II. #BELIEVEHER: DISCOUNTING SGBV VICTIMS WITH CHARACTER FOR UNTRUTHFULNESS EVIDENCE

*All wickedness is but little to the wickedness of a woman.* <sup>19</sup>

Jennifer's story is more common than what we would like to think. *In* fact, her story is based on a fairly publicized intimate partner **violence case in** Puerto Rico between a then-legislator and his spouse. <sup>20</sup>As both fiction and reality demonstrate, discounting [\*20] victims *in* SGBV **cases** by impeaching their **credibility** is part of a larger defense strategy to deny the charges or to boost other defenses. <sup>21</sup>

This is not a new occurrence. Our legal system has a long patriarchal history of discounting **women's credibility** during trials and adversely affecting the fair prosecution of crimes committed against them. <sup>22</sup>For example, *in* rape **cases**, our legal system has historically required corroboration testimony, <sup>23</sup>prompt outcry, <sup>24</sup>and

<sup>19</sup> *Ecclesiasticus*, 25:19 (King James).

<sup>20</sup> Liza Yajaira Rivera Colón pressed charges against her husband, attorney and legislator Luis Farinacci, for **domestic violence**. See *Esposa del legislador Luis Farinacci Morales relata patrón violencia doméstica [Wife of Legislator Luis Farinacci Morales Recounts Pattern of Domestic Violence]*, PRIMERA HORA (Aug. 8, 2010, 12:00 AM), <https://www.primerahora.com/noticias/puerto-rico/nota/esposadellegisladorluisfarinaccimoralesrelatapatronvioleciadomestica-409310/>. The defense attorney *in* the **case**, Pablo Colón, impeached Liza Yajaira's **credibility** to argue that the accusations were aimed at destroying his client. *Cuestionan credibilidad de esposa de Farinacci [Credibility of Farinacci's Wife Called into Question]*, EL NUEVO DÉA, <https://www.elnuevodia.com/noticias/politica/nota/cuestionancredibilidaddeesposadefarinacci-811028/> (last updated Nov. 3, 2010, 6:04 PM); *Liza Yajaira niega que quisiera destruir a Farinacci [Liza Yajaira Denies Attempting to Destroy Farinacci]*, EL NUEVO DÉA, <https://www.elnuevodia.com/noticias/politica/nota/lizayajairaniegaquequisiera-destruirafarinacci-997334/> (last updated June 21, 2011, 7:12 PM); *No culpable el exrepresentante Farinacci de violencia doméstica [Former Representative Farinacci Acquitted of Domestic Violence]*, EL NUEVO DÉA, <https://www.elnuevodia.com/noticias/politica/nota/noculpablelexrepresentantefarinaccideviolen-ciadomestica-1008503/> (last updated June 5, 2011, 10:40 PM). Liza Yajaira's **case** inspired this Article and my first reflection on this topic *in* 2011. See Aníbal Rosario Lebrón, *Atando los cabos sueltos del machismo en el sistema judicial de Puerto Rico [Tying up the Loose Ends of Machismo in the Judicial System of Puerto Rico]*, DERECHOALDERECHO (Aug. 17, 2011), <http://derechoal-derecho.org/2011/08/17/atando-los-cabos-sueltos-del-machismo-en-el-sistema-judicial-de-puerto-rico/>. After proposing a reform to the Puerto Rican Rules of Evidence to address the impeachment of **domestic violence** victims, I decided to research deeper the use of character for untruthfulness evidence *in* the context of SGBV victims. See Aníbal Rosario Lebrón, *Scorned Law: Rethinking Evidentiary Rules in Cases of Gender-Based Violence*, CONCURRING OPINIONS (Feb. 16, 2014), <https://concurringopinions.com/archives/2014/02/scorned-law-rethinking-evidentiary-rules-in-cases-of-gender-based-violence.html>. The ideas from those early reflections culminated *in* this Article.

<sup>21</sup> See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 19-21 (1999) (discussing how *The Little Mermaid* is an example of a tale built upon intergender sexual behaviors that illustrates a cultural rape narrative of women lying about rape); Carolyn Copps Hartley, "He Said, She Said": *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 **VIOLENCE AGAINST WOMEN** 510, 522-34 (2001) (describing study of strategies used by the defense attorneys *in* **domestic violence** felony **cases**); Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 5, 5-6, 40-41 (explaining **credibility** biases against women); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 **U. PA. L. REV.** 1, 11-13 (2017) (illustrating how rape allegations have been always intertwined with questions about victims' **credibility**); see also Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus?*, 7 **YALE J.L. & FEMINISM** 243, 271-72 (1995) (discussing the effects of using prior victim's alleged false allegations of wrongdoing); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of the Truth*, 37 **N.Y. L. SCH. L. REV.** 123, 150-51 (1992) (explaining how SGBV victims are not believed for their customary inconsistent behavior).

<sup>22</sup> See Buller, *supra* note 4, at 9-13.

cautionary [\*21] jury instructions. <sup>25</sup>It has also allowed the use of victims' prior sexual history <sup>26</sup>and social companion defenses. <sup>27</sup>However, the impeachment of SGBV victims' character for truthfulness is a subtler and perhaps more pernicious patriarchal vestige as it shields itself behind the *neutral* façade of character for untruthfulness evidence. <sup>28</sup>

The mechanism by which our evidentiary system operates is quite simple. <sup>29</sup>It allows not only the impeachment of witnesses' **credibility** with their character for untruthfulness through reputation or opinion testimony, <sup>30</sup>but also through evidence of prior specific [\*22] acts. <sup>31</sup>As to specific acts, the FRE

<sup>23</sup> See *id.* at 9-15 (describing the historical context of the corroboration requirement and the rape-reform movement); see also Crooms, *supra* note 2, at 469-70, 477-78 (discussing how rape corroboration rules rested *in* assumptions about **credibility** based on sex and race).

<sup>24</sup> See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, [84 B.U. L. REV. 945, 964-68 \(2004\)](#) [hereinafter Anderson, *Legacy*]; Tuerkheimer, *supra* note 21, at 22-25.

<sup>25</sup> Anderson, *Legacy*, *supra* note 24, at 973-77.

<sup>26</sup> See Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, CRIM. JUST., Summer 2014, at 14, 15 [hereinafter Anderson, *Time to Reform Rape Shield Laws*] (detailing how *in* the '70s and early '80s jurisdictions *in* the United States adopted rape shield statutes to prevent jurors from giving less credence to victims based on their sexual histories and avoid jurors deciding **cases** based on stereotypes about complainants' sexual histories).

<sup>27</sup> Tuerkheimer, *supra* note 21, at 26-27.

<sup>28</sup> See Julia Simon-Kerr, **Credibility by Proxy**, [85 GEO. WASH. L. REV. 152, 190-92, 200-01 \(2017\)](#) [hereinafter Simon-Kerr, **Credibility by Proxy**] (discussing how impeachment rules related to character for (un)truthfulness enforce a cultural conception of who is worthy of belief, not an actual view of truth, *in* the context of race and gender).

<sup>29</sup> The analysis *in* this Part is based on the FRE, which are followed *in* the majority of jurisdictions *in* the United States. See *id.* at 186 ("Most states have gradually adopted the Federal Rules' approach to impeachment, and dual focus on crimes and character evidence is nearly universal."); Bennett Capers, *Evidence Without Rules*, [94 NOTRE DAME L. REV. 867, 872 \(2018\)](#) [hereinafter Capers, *Evidence Without Rules*] ("*In* a very real sense, the Federal Rules of Evidence *are* the Rules of Evidence."). For a discussion on the distinctions of the relevant rules between the FRE and other jurisdictions and the implications of such differences, see *infra* Section IV.A.

<sup>30</sup> For example, [FRE 608](#), titled "A Witness's Character for Truthfulness or Untruthfulness," *in* pertinent part, provides the following:

(a) REPUTATION OR OPINION EVIDENCE. A witness's **credibility** may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony *in* the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

[FED. R. EVID. 608\(a\)](#).

<sup>31</sup> For example, [FRE 608](#) and [609](#), respectively, allow the use of prior acts and criminal convictions for the impeachment of a witness. See [FED. R. EVID. 608\(b\)](#), 609.

Rule 608 provides, *in* pertinent part:

Rule 608 provides, *in* pertinent part:

distinguish between criminal acts<sup>32</sup> and other bad acts related to untruthfulness.<sup>33</sup> Although these [\*23] exceptions to the prohibition against character evidence<sup>34</sup> are predicated on truth seeking,<sup>35</sup> the notion that people who lie *in* one context would lie *in* others has been disproven.<sup>36</sup> Yet, because our system emphasizes the adversarial discovery of the truth through the presentation of conflicting versions, the honesty of

(b) SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct *in* order to prove specific instances of a witness's conduct *in* order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

[FED. R. EVID. 608\(b\)](#). As to prior criminal convictions, Rule 609, "Impeachment by Evidence of a Criminal Conviction," states:

Rule 609 provides, *in* pertinent part:

(a) **IN GENERAL**. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, *in* the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, *in* a civil **case** or *in* a criminal **case in** which the witness is not a defendant; and

(B) must be admitted *in* a criminal **case in** which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving - or the witness's admitting - a dishonest act or false statement.

[FED. R. EVID. 609](#).

<sup>32</sup> See [FED. R. EVID. 609\(a\)](#).

<sup>33</sup> See [FED. R. EVID. 608\(b\)](#).

<sup>34</sup> [FRE 404](#) precludes the admission of character evidence; however, the Rules provide for exceptions under Rules 607, 608, and 609. [FED. R. EVID. 404](#).

<sup>35</sup> See Robert D. Okun, *Character and **Credibility**: A Proposal to Realign [Federal Rules of Evidence 608](#) and [609](#)*, 37 VILL. L. REV. 533, 565-68 (1992).

<sup>36</sup> See *id.* at 546-49, 565-66; Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 763-64 (2008); Jonathan D. Kurland, *Character as a Process *in* Judgment and Decision-Making and Its Implications for the Character Evidence Prohibition *in* Anglo-American Law*, 38 LAW & PSYCHOL. REV. 135, 143-48 (2014); Miguel A. Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1051-53 (1984) [hereinafter Méndez, *California's New Law on Character Evidence*]; Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964-68 (2006); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1996 (2016); Simon-Kerr, ***Credibility** by Proxy*, *supra* note 28, at 208-09.

each witness is crucial *in* deciding which of the conflicting accounts is the truth. <sup>37</sup>Thus, any evidence somewhat probative of how honest the witness is could be admissible *in* spite of the risks of confusion or skewing the perception of truth. <sup>38</sup>

The importance of a witness's *credibility* implicates how attorneys litigate, <sup>39</sup>which *in* turn affects the structure of the rules of impeachment based on character for untruthfulness. <sup>40</sup>As Professor Méndez explains,

[\*24] [t]rial lawyers know that the outcome of a trial will be determined *in* almost all *cases* by the witnesses the jurors choose to believe and the ones they decide to ignore. Telling jurors which witnesses to believe or disbelieve is thus a crucial part of a closing argument. But such an appeal will not be persuasive unless the lawyer can give the jurors reasons rooted *in* the evidence about why a witness should be believed or disbelieved. This inescapable dynamic of jury trials encourages lawyers to produce the most favorable evidence about the *credibility* of their witnesses and the most unfavorable about their opponents. Rules of evidence generally counter this inclination by placing strict limits on the use of evidence to support or attack the *credibility* of witnesses. Despite the *unquestioned* relevance of such evidence, the rules proceed on the assumption that the unrestrained use of evidence on witness *credibility* may distract and confuse jurors about the substantive issues to be decided. <sup>41</sup>

For that reason, except for convictions for prior felonies <sup>42</sup>and *crimen falsi*, <sup>43</sup>the impeachment based on character for untruthfulness is subject to the balancing of prejudice required by [FRE 403](#). <sup>44</sup>  
[\*25] Under [FRE 403](#), the court has the discretion to exclude evidence of character for untruthfulness or prevent questioning *in* such matters if the evidence is ineffective towards aiding *in* the determination of truth, is unfairly

<sup>37</sup> See, e.g., [Gordon v. United States](#), 383 F.2d 936, 940 (1967) ("[W]e must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses.").

<sup>38</sup> See Miguel A. Méndez, *V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. REV. 455, 465-66 (2005) [hereinafter Méndez, *V. Witnesses*]; Jenn Montan, Comment, *N.J.R.E. 608 and Specific Instances of Conduct: The Time Has Come for New Jersey to Join the Majority*, 49 SETON HALL L. REV. 441, 459-62 (2019).

<sup>39</sup> See Méndez, *V. Witnesses*, *supra* note 38, at 465.

<sup>40</sup> See *infra* Sections II.A-II.B.

<sup>41</sup> Méndez, *V. Witnesses*, *supra* note 38, at 465 (emphasis added).

<sup>42</sup> [FED. R. EVID. 609](#). For example, [FRE 609\(a\)\(1\)\(B\)](#) provides for the admission of a prior felony conviction if the probative value outweighs the prejudicial effect, a higher standard than [FRE 403](#). [FED. R. EVID. 609\(a\)\(1\)\(B\)](#). Further limits are placed on prior felony convictions that are more than ten years old, have been the subject of a pardon, or were the subject of juvenile adjudication. See [FED. R. EVID. 609\(b\)-\(d\)](#).

<sup>43</sup> [FED. R. EVID. 609\(a\)\(2\)](#). A *crimen falsi* is an "offense that involves some element of dishonesty or false statement." *Crimen falsi*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Roberts, *supra* note 24, at 1983.

<sup>44</sup> [FRE 403](#), entitled "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons," reads as follows:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[FED. R. EVID. 403](#). See also Roberts, *supra* note 36, at 1983 (explaining how convictions under [FRE 609\(a\)\(1\)\(B\)](#) must be admitted irrespective of its probative value or prejudicial effect).

prejudicial, leads to confusion of the issues, or misleads the jury. <sup>45</sup>Likewise, [FRE 611](#) limits the use of character for untruthfulness evidence on cross-examination when use of that evidence constitutes harassment. <sup>46</sup>

The final protection put *in* place when attorneys impeach a witness with evidence of character for untruthfulness comes when the evidence used is *in* the form of specific acts. *In* that *case*, the use of extrinsic evidence to support the previous act of untruthfulness is precluded unless it is evidence of a conviction allowed under [FRE 609](#). <sup>47</sup>*In* other words, *in* order to undermine the *credibility* of the witness through specific acts, the attorney must do so without presenting any documentary evidence to support the inquiry. <sup>48</sup>As a result, the answers given by the witness are as far as an attorney can go. <sup>49</sup>Purportedly, the reasons for excluding extrinsic evidence include [**\*26**] avoiding distracting the jury from the matter being adjudicated, limiting undue delay, preventing confusion of the issues, and precluding the unfair treatment of witnesses. <sup>50</sup>Yet, *in* SGBV *cases*, as this Article will explain, the use of prior acts of untruthfulness exacerbates jury confusion, treats victim witnesses unfairly, and distracts adjudicators from the matter to be judged. <sup>51</sup>

Previous acts of untruthfulness are the most powerful type of character evidence *in* an attorney's repertoire. <sup>52</sup>This is remarkably true *in cases* of SGBV, which are often described as "he said/she said" contests,

<sup>45</sup> [FED. R. EVID. 403](#).

<sup>46</sup> [FRE 611](#), *in* pertinent part, establishes the following:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

[FED. R. EVID. 611\(a\)](#).

<sup>47</sup> [FED. R. EVID. 608](#) (precluding impeachment by introduction of extrinsic evidence of specific acts, except where permitted under Rule 609); [FED. R. EVID. 609](#) (permitting introduction of extrinsic evidence of certain prior convictions to impeach for untruthfulness). There are other limits regarding prior convictions (remoteness, pardon, annulment, rehabilitation, or juvenile adjudications). See [FED. R. EVID. 609\(b\)-\(d\)](#).

<sup>48</sup> See [FED. R. EVID. 608](#), 609.

<sup>49</sup> See [FED. R. EVID. 608](#), 609. This does not mean that extrinsic evidence or its shadow does not find its way into the jurors' attention. Capers, *Evidence Without Rules*, *supra* note 29, at 871, 895. As Professor Bennett Capers points out, there is functional evidence that escapes the gatekeeping directives of the FRE. *Id.* at 871 (2018) (explaining the term functional evidence as evidence that is not regulated by the FRE but is used by jurors *in* their fact-finding role). *In* Jennifer's *case*, for example, the shadow of the extrinsic evidence of the loan application comes into evidence by the simple flickering of documents by defense counsel when inquiring into whether Jennifer recalls the details of her false statement.

<sup>50</sup> Montan, *supra* note 38, at 459-62; see Okun, *supra* note 35, at 544; see also Kassandra Altantulkhuur, Note, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, [2018 U. ILL. L. REV. 1091, 1095 \(2018\)](#).

<sup>51</sup> See *infra* Section II.B.2.; Montan, *supra* note 38, at 459-62.

<sup>52</sup> Michael D. Schwartz & Phillip R. Maltin, *Strength of Character: The Admissibility of Character Evidence in Civil Trials is Subject to Exacting Standards*, L.A. LAW., June 2010, at 26, 26-28 (2010).

<sup>53</sup>where perceptions of **credibility** are already skewed against the victims. <sup>54</sup>*In* SGBV **cases**, like Jennifer's **case**, <sup>55</sup>attorneys impeach the victim's **credibility** with specific acts of untruthfulness [**\*27**] *in* order to further a sexist narrative that women are not credible and SGBV victims' accounts are implausible. <sup>56</sup>These attorneys take advantage of the cultural discounting of victims and the often-misunderstood or unknown processes through which victims relate their accounts of abuse. <sup>57</sup>By discrediting victims, defense lawyers benefit from adjudicators' integrative processing. <sup>58</sup>When jurors are unable to reconcile a victim's actual behavior with imaginary or cultural narratives about SGBV crimes <sup>59</sup>and how a victim "should" act or look, <sup>60</sup>jurors may be more likely to conclude that the SGBV accounts are false. <sup>61</sup>

As it was shown *in* Jennifer's account, <sup>62</sup>this sexist defense strategy resonates well with adjudicators by hindering convictions and deterring victims from coming forward. <sup>63</sup>For this reason, defense attorneys impeach the **credibility** of SGBV victims with evidence of character for untruthfulness. <sup>64</sup>Plaintiff's attorneys

<sup>53</sup> Hartley, *supra* note 21, at 514. Most of these **cases** happen *in* private with no witnesses but the people implicated, giving the sense to others that it is a swearing contest between the victim and the alleged perpetrator. *Id.* at 527, 535-36.

<sup>54</sup> See TASLITZ, *supra* note 21, at 6 (pointing out how "[d]espite several decades of a renewed **women's** movement and increasing attention to the problem of rape, judges and juries continue to be skeptical of rape, demanding greater proof than for many other types of crimes and demonstrating deep suspicion of victims."); Hartley, *supra* note 21, at 514. *In* reality, "[f]ormulations such as 'no-body really knows what happened' *in* the **cases** of sexual assault and rape, for example, work to discredit victims before they speak." LEIGH GILMORE, TAINTED WITNESS: WHY WE DOUBT WHAT WOMEN SAY ABOUT THEIR LIVES 140 (2017); see also Sherry F. Colb, *The Difference Between Presuming Innocence and Presuming Victim Perjury in Acquaintance Rape Trials*, DORF ON LAW (July 16, 2018), <http://www.dorfonlaw.org/2018/07/the-difference-between-presuming>.html [hereinafter Colb, *The Difference Between*] (explaining how "[c]enturies of misogyny have . . . presume[d] that a woman who claims to have been raped is an insane perjurer").

<sup>55</sup> See *supra* Part I.

<sup>56</sup> See TASLITZ, *supra* note 21, at 6; Hartley, *supra* note 21, at 514.

<sup>57</sup> See Altantulkhuur, *supra* note 50, at 1111 (explaining the process of recanting and how it does not mean that the victim is lying); Scheppele, *supra* note 21, at 138-40 (explaining customary behavior from SGBV victims such as delay *in* reporting, revised stories, and taking the blame).

<sup>58</sup> Integrative processing refers to the phenomenon that "people make connections between various pieces of information and base decisions on overall impressions rather than on specific pieces of information." Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decision Making*, *in* PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 254, 257 (Neil Brewer & Kipling D. Williams eds., 2005); see also Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1050 (1997) (showing that jurors adjust the exclusion of evidence to their preexisting beliefs lessening the effects of a limiting instruction).

<sup>59</sup> See, e.g., TASLITZ, *supra* note 21, at 19-21.

<sup>60</sup> Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 436-46 (2016) (discussing Nils Christie's theory of the ideal victim as applied to SGBV victims).

<sup>61</sup> See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44 (2000).

<sup>62</sup> See *supra* Part I.

<sup>63</sup> See *infra* Part III. For an analysis on how and why these strategies work, see TASLITZ, *supra* note 21, at 44-57 (discussing the rape **cases** of Mike Tyson and Glen Ridge).

*in* high profile [\*28] accusations, such as Britney Taylor's, <sup>65</sup>are also aware of this strategy, and try to counteract it by preemptively rehabilitating their client's credibility. <sup>66</sup>

Although research *in* this area is scarce, <sup>67</sup>analyses exist of well-publicized SGBV cases in and outside the courtroom, including Professor Anita Hill's, <sup>68</sup>Nafisatou Diallo's, <sup>69</sup>Katelyn Faber's, <sup>70</sup>and Doctor Christine Blasey Ford's. <sup>71</sup>There are also news reports on less-publicized trials, such as Liza Yajaira's, <sup>72</sup>and court opinions that recount the defense strategies used by attorneys *in* these types of cases. <sup>73</sup>Additionally, some scholars have conducted targeted [\*29] studies of the defenses used by attorneys *in* certain types of SGBV cases. <sup>74</sup>

While sources suggest that defense themes *in* SGBV cases are not necessarily different from other cases, <sup>75</sup>they show an interesting way *in* which defenses are assembled and how often they are employed. <sup>76</sup>For

<sup>64</sup> See Méndez, *V. Witness*, *supra* note 38, at 465.

<sup>65</sup> *In* September 2019, Britney Taylor accused NFL player Antonio Brown of sexually assaulting her. Patrik Walker et al., *Antonio Brown Cut by Patriots: Timeline of How He Wore Out His Welcome in Pittsburgh, Oakland, New England and What's Next*, CBS SPORTS, <https://www.cbssports.com/nfl/news/anto-nio-brown-cut-by-patriots-timeline-of-how-he-wore-out-his-welcome-in-pitts-burgh-oakland-new-england-and-whats-next/> (last updated Sept. 19, 2019). Not long after Taylor went public with her allegations, another accuser, who remains anonymous came forward accusing Antonio Brown of sexually assaulting her. Mike Reiss, *Brown Out: Pats Cut WR Amid Off-Field Allegations*, ESPN (Sept. 19, 2019, 4:15 PM), [https://www.espn.com/nfl/story/\\_/id/27662788/brown-pats-cut-wr-amid-field-allegations](https://www.espn.com/nfl/story/_/id/27662788/brown-pats-cut-wr-amid-field-allegations).

<sup>66</sup> *Antonio Brown Rape Accuser Claims She Passed Lie Detector*, TMZ SPORTS (Sept. 11, 2019 6:20 AM), <https://www.tMZ.com/2019/09/11/antonio-brown-rape-accuser-claims-she-passed-lie-detector/>.

<sup>67</sup> See Hartley, *supra* note 21, at 510-11.

<sup>68</sup> See Scheppele, *supra* note 21, at 128-45; GILMORE, *supra* note 54, at 27-58.

<sup>69</sup> See GILMORE, *supra* note 54, at 135-45.

<sup>70</sup> See JOHN F. WUKOVITS, *KOBE BRYANT 58-62* (2011); Renae Franiuk et al., *Prevalence of Rape Myths in Headlines and Their Effects on Attitudes Toward Rape*, 58 *SEX ROLES* 790, 790-800 (2008); Anderson, *Time to Reform Rape Shield Laws*, *supra* note 26, at 14-19.

<sup>71</sup> See Kate Shaw, *How Strong Does the Evidence Against Kavanaugh Need to Be?*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/opinion/kavanaugh-blasey-allegation-disqualify.html>; Mimi Rocah et al., *Brett Kavanaugh Allegations: Why They Are Not Simply A 'He Said, She Said' Situation*, NBC NEWS (Sept. 18, 2018, 3:41 PM), <https://www.nbcnews.com/think/opinion/allegations-against-brett-kavanaugh-are-not-simply-he-said-shencna910771>.

<sup>72</sup> See *supra* note 20 and accompanying text.

<sup>73</sup> See, e.g., *Halstead v. Texas*, 891 S.W.2d 11, 13 (Tex. Crim. App. 1994) (cross-examination of victim raised issue of whether she had a history of making false accusations of sexual misconduct against men she did not like); *New Jersey v. Frost*, 577 A.2d 1282, 1288 (N.J. Super. Ct. App. Div. 1990) (victim's conduct of staying with her abuser makes it appear that she is lying about the attack); *Wisconsin v. Jensen*, 432 N.W.2d 913, 915 (Wis. 1988) (defense cross-examined several witnesses to establish that the victim's delay *in* reporting the assault and denying the incident to family members supports the theory of fabrication); *Washington v. Ciskie*, 751 P.2d 1165, 1173 (Wash. 1988) (defense implied to jury that behavior of battered woman indicated that she lied about attack).

<sup>74</sup> See, e.g., Hartley, *supra* note 21, at 537.

<sup>75</sup> See *id.* at 513.

<sup>76</sup> See *id.* at 522-34.

instance, one study found that *in domestic violence cases*, the most common defenses are self-defense or provocation, a lesser charge, diminished capacity, and innocence.<sup>77</sup> The defense of innocence was reported to be used 37.5% of the time, while self-defense, diminished capacity, or a lesser charge were used 15%, 25%, and 22.5%, respectively.<sup>78</sup>

Remarkably, attorneys apparently feel quite confident about their chances of prevailing by denying their clients committed the actions charged, despite the State's evidence to the contrary.<sup>79</sup> *In* contrast, defenses that would admit some lesser type of wrongdoing and which do not require negating all of the allegations are less frequently used.<sup>80</sup> One possible explanation is that denying all allegations is somewhat easier *in* SGBV *cases* because these *cases* are ultimately *credibility* contests.<sup>81</sup>

If two people are equally believable, completely contradicting one party's account of the facts, arguably, does not seem to be the best strategy because it automatically implies that someone is lying. However, that does not seem to worry defense attorneys *in* SGBV [\*30] *cases*.<sup>82</sup> Perhaps the reason why attorneys prefer the innocence path is that they know that SGBV victims' testimony could be easily discounted.<sup>83</sup> Defense attorneys can easily impeach the victims' versions of the events because triers of fact tend to believe victims less than defendants.<sup>84</sup> *In* other words, they know that the victim's perceived lack of *credibility* provides their best defense.

Recently, we witnessed a great display of this strategy *in* the nomination hearings of Justice Brett Kavanaugh.<sup>85</sup> The White House gave a spin to negating Dr. Blasey Ford's accusations by stating that they had no doubt that something terrible happened to her but that she was confused about who her aggressor was.<sup>86</sup> *In* other words, she remembered the assault but not who the aggressor was and therefore she was lying about Kavanaugh sexually assaulting her.

*In* fact, Hartley's study shows that some of the strategies or impeachment techniques used to mount these defenses depend on the theory that the victim is lying.<sup>87</sup> Depending on the defense, the most frequent

<sup>77</sup> *Id.* at 518. Having an alibi does not seem to be a defense used *in* these types of *cases* even though it would negate the charges. *Cf. id.* However, because the aggression *in* these types of *cases* happen *in* private spaces between people with close relationships, presumptively, the easiest defense to negate the charges is to argue that the victim is lying. *See id.* at 535-36.

<sup>78</sup> *Id.* This does not seem to be different from defenses *in* rape *cases*. *See, e.g.,* TASLITZ, *supra* note 21, at 47, 55.

<sup>79</sup> *See* Hartley, *supra* note 21, at 518.

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* at 534.

<sup>82</sup> *See id.* at 518.

<sup>83</sup> *See id.* at 530-34.

<sup>84</sup> *See* Aiken & Murphy, *supra* note 61, at 44.

<sup>85</sup> *See* Kellyanne Conway: Christine Blasey Ford "Absolutely Was Wronged by Somebody," CBS NEWS (Sept. 28, 2018), <https://www.cbsnews.com/video/kellyanne-conway-christine-blasey-ford-absolutely-was-wronged-by-somebody/> (Kellyanne Conway discussing Dr. Christine Blasey Ford's testimony at 4:10-5:30).

<sup>86</sup> *Id.*

<sup>87</sup> *See* Hartley, *supra* note 21, at 534 ("These tactics range from outright denying the abuse (it didn't happen, she's lying) to minimizing the abuse (I never punched her, I just slapped her) . . .").

strategies used include no witnesses, general victim's character assassination, highlighting that the accused never threatened the victim, and turning victim's behavior against her.<sup>88</sup> Another theory frequently employed is that the relationship was fine and the accused was remorseful after the offense.<sup>89</sup> These defense narratives are used to establish the victim's propensity to lie, a lack of evidence of defendant's prior abusive behavior, or a lack of corroborative testimony.<sup>90</sup> Professor Andrew Taslitz made a similar observation when he highlighted that, *in cases* of rape, the cultural story of *the [\*31] lying woman* helps to craft a portrait "of the vengeful, spurned woman, lying on the stand to reap her retribution."<sup>91</sup> When these defensive narratives are combined with the reality that the offenses often take place without witnesses,<sup>92</sup> the prevalence of revised accounts,<sup>93</sup> and the phenomenon of testimonial injustice,<sup>94</sup> defense attorneys have a reliable foundation from which to argue that the offense never occurred.

Testimonial injustice ensues when "the prejudice results *in* the speaker's receiving more *credibility* than she otherwise would have--a *credibility* excess--or it results *in* her receiving less *credibility* than she otherwise would have--a *credibility* deficit."<sup>95</sup> *In* the context of SGBV victims, the *credibility* deficit is caused by the narrative of women as tainted witnesses<sup>96</sup> and the narrative of implausibility associated with the "he said/she said" *credibility* bias.<sup>97</sup> As Professor Tuerkheimer observes, *credibility* has two components: (1) the trustworthiness of the witness; and (2) the plausibility of the testimony.<sup>98</sup> *In* the *case* of SGBV victims both components are affected. [\*32] Firstly, women are perceived as less trustworthy, and therefore less credible than men.<sup>99</sup> Secondly, SGBV accounts are perceived as implausible because of biases against victims and frequent misunderstandings of victims' conduct.<sup>100</sup>

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<sup>88</sup> *Id.* at 533.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 534-37.

<sup>91</sup> See TASLITZ, *supra* note 21, at 18.

<sup>92</sup> See Hartley, *supra* note 21, at 535-36.

<sup>93</sup> See Scheppele, *supra* note 21, at 138-40. The term *revised accounts* refers to stories that are altered over time, often because victims repress what happened to them, hope the abuse will go away, and cover up for their abusers. *Id.* Revised accounts can also be attributed to the physical and psychological harms caused by the abuse. Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PA. L. REV. 399, 449-51 (2019).

<sup>94</sup> MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17 (2007).

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 21.

<sup>97</sup> See Hartley, *supra* note 21, at 514. As a corollary to this *credibility* deficit, SGBV defendants experience a net *credibility* excess--they benefit from a surplus caused by the victims' *credibility* deficit. See Schafran, *supra* note 21, at 42 ("As a group [women] are perceived as less competent than men; the context of the harms we seek redress *in* courts is often completely foreign to the trier of fact; and even when the harm is acknowledged, it is often minimized by a *de minimis* punishment for those who injure us.").

<sup>98</sup> Tuerkheimer, *supra* note 21, at 13 (citing Karen Jones, *The Politics of Credibility, in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 155 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) (adopting Lockean terminology of *credibility*)).

<sup>99</sup> See GILMORE, *supra* note 54, at 18.

<sup>100</sup> See *supra* note 54 and accompanying text.

A. Women's Lack of Trustworthiness

The ways in which women are frequently turned into tainted or less credible witnesses have been well documented.<sup>101</sup> Schafran, for instance, suggested in her analysis of intimate partner violence that this perception is triggered by three credibility biases: (1) collective credibility; (2) consequential credibility; and (3) contextual credibility.<sup>102</sup> The first two biases are related to the first component of credibility--the trustworthiness of the witness.<sup>103</sup>

1. COLLECTIVE CREDIBILITY BIAS

The lack of collective credibility points to a history in which our culture has deemed women less credible as a group.<sup>104</sup> Simply being female brands a victim as untruthful or untrustworthy.<sup>105</sup> This is true not only for victims, but for women involved in the judicial process in any capacity.<sup>106</sup> Jurors (1) find female witnesses to be slightly less **[\*33]** credible and persuasive than men;<sup>107</sup> (2) are less likely to credit witnesses who use voice patterns regularly associated with women;<sup>108</sup> and (3) perceive female attorneys as "shrill, irrational, and unpleasant" for expressing the same emotions that, when expressed by male attorneys, are interpreted as appropriate.<sup>109</sup>

This lack of credibility is based solely on the identity of women as women.<sup>110</sup> However, its roots are shared with the credibility discounts other groups experience.<sup>111</sup> As Miranda Fricker has pointed out, "[m]any of the

<sup>101</sup> See, e.g., GILMORE, *supra* note 54, at 138-39; Franiuk et al., *supra* note 70, at 795.

<sup>102</sup> Schafran, *supra* note 21, at 5. Other authors have pointed to these phenomena, albeit having labeled the three differently. See, e.g., GILMORE, *supra* note 54, at 18. For example, Gilmore wrote that "[w]omen are often seen as unpersuasive witnesses for three related reasons: because they are women, because through testimony they seek to bear witness to inconvenient truths, and because they possess less symbolic and material capital than men as witnesses in courts of law." *Id.*

<sup>103</sup> See GILMORE, *supra* note 54, at 18.

<sup>104</sup> *Id.*; see Schafran, *supra* note 21, at 5 ("Yet for women, achieving credibility in and out of the courtroom is no easy task.").

<sup>105</sup> Schafran, *supra* note 21, at 5 ("[S]ocial science and legal research reveal that women are still perceived as less credible than men.").

<sup>106</sup> See, e.g., Nicole D. Galli & Marta L. Villarraga, *Does Your Expert's Gender Matter? Explicit and Implicit Bias in the Courtroom*, A.B.A. (Aug. 17, 2017), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2017/does-your-experts-gender-matter-explicit-implicit-bias-in-courtroom/>.

<sup>107</sup> *Id.*

<sup>108</sup> See Ken Broda-Bahm, *Avoid Rising Intonation?*, PERSUASIVE LITIGATOR (May 26, 2014), <https://www.persuasivelitigator.com/2014/05/avoid-rising-intonation.html> (summarizing studies finding that rising intonation or upspeak negatively impact perceptions of credibility).

<sup>109</sup> Lara Bazelon, *What It Takes to be a Trial Lawyer if You're Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/>.

<sup>110</sup> Schafran, *supra* note 21, at 5.

<sup>111</sup> See Tuerkheimer, *supra* note 21, at 42-44.

stereotypes of historically powerless groups such as women, black people, or working-class people variously involve an association with some attribute inversely related to competence or sincerity or both." <sup>112</sup>

However, **credibility** is not only discounted **in cases in** which parties are of the opposite sex. <sup>113</sup>This phenomenon is a function of how witnesses are gendered. <sup>114</sup>

For example, **in** a study about lesbian intimate partner **violence**, researchers found that when participants read a defendant and a victim as masculine, they viewed the victim as more credible than victims read as feminine. <sup>115</sup>Similarly, when participants believed that a defendant and a victim both had traditionally-masculine traits, the participants also assessed higher levels of defendant's responsibility. <sup>116</sup>Conversely, "when the victim was [perceived as] feminine, the defendant's appearance did not impact ratings of defendant responsibility." <sup>117</sup>Also, participants had more sympathy for victims **[\*34]** seen as masculine. <sup>118</sup>**In** sum, the study found that exhibiting masculine traits leads to higher believability and **in** turn a higher likelihood of attributing guilt to a charged abuser. <sup>119</sup>These results came as a surprise to the researchers that expected more pro-victim ratings when the defendant exhibited masculine traits. <sup>120</sup>However, when we account for the lack of collective **credibility** of women or victims with feminine traits, the results are expected and coherent.

Overcoming this type of trustworthiness-bias based on a witness's gender is very difficult. "Negative identity prejudice, as Fricker calls it, is especially concerning because it tends to be 'resistant to counter-evidence.'" <sup>121</sup>**In** addition, as Professor Capers has observed, this bias is a type of evidence that is put before the jury without any check, as it is part of the functional evidence that the FRE do not regulate. <sup>122</sup>However, we cannot pinpoint the particular conduct from an attorney or witness that would make such evidence apparent. <sup>123</sup>

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<sup>112</sup> FRICKER, *supra* note 94, at 32.

<sup>113</sup> See, e.g., Wasarhaley et al., *supra* note 2, at 651-53.

<sup>114</sup> See *id.* This bias, like any of the biases that are discussed throughout, is not held only by men. See *id.* at 647-48.

<sup>115</sup> *Id.* at 648.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 648, 651.

<sup>120</sup> *Id.* at 647-48.

<sup>121</sup> Tuerkheimer, *supra* note 21, at 43 (quoting FRICKER, *supra* note 94, at 35).

<sup>122</sup> Capers, *Evidence Without Rules*, *supra* note 29, at 871, 895.

<sup>123</sup> Perhaps the best way to counter this bias is through implicit bias training. However, the effectiveness of implicit bias training has been questioned. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 152 (2013); Frank Kineavy, *Implicit Bias Training for Police Gaining Attention*, DIVERSITYINC (Oct. 10, 2016), <http://www.diversityinc.com/news/implicit-bias-training-police-gaining-attention> (stating that "it is undetermined whether implicit bias training is effective"); Destiny Peery, Opinion, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST (Mar. 14, 2016, 9:29 PM), [http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo\\_b\\_9464564.html](http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html) (stating that there is little evidence that implicit bias trainings alone will have a positive effect on racial bias **in** policing and may, **in** fact, lead to negative backlash). See Jason A. Cantone, *Federal and State Court Cooperation: Effectiveness of Implicit Bias Trainings*, FED. JUD. CTR., <https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings> (last visited Oct. 3, 2019) (explaining discussions held with judges **in** an effort to combat implicit bias). If implicit bias training is a solution, it would be more easily implemented for judges and attorneys who the state can require to be continuously trained well

[\*35] Victims are well aware that this bias exists. <sup>124</sup>For example, *in* *Time's* article titled *Time 2017 Person of the Year: The Silence Breakers*, one of the victims interviewed stated that "[she] stayed anonymous because [she] live[s] *in* a very small community. And they just think usually that [the women are] lying and complainers." <sup>125</sup>As seen *in* Jennifer's *case*, victims are deterred from coming forward even under the guise of anonymity. <sup>126</sup>Furthermore, as discussed *infra* Part III, pervasive biases hinder convictions and favorable adjudications for victims *in* SGBV *cases*.

## 2. CONSEQUENTIAL CREDIBILITY BIAS

Consequential credibility bias, another bias Schafran proposes that is rooted *in* *women's* identities, also affects convictions and favorable adjudications. <sup>127</sup>Schafran argues that women are afforded less consequential credibility, meaning they are part of a group whose injuries and harms are not taken seriously. <sup>128</sup>Thus, their claims are trivialized and minimized. <sup>129</sup>

One way *in* which the consequential credibility bias manifests is *in* the reluctance to arrest or prosecute abusers. <sup>130</sup>Jurors and judges treat SGBV *cases* with the same disdain as police officers and prosecutors, <sup>131</sup>suggesting that they think SGBV injuries, *cases*, and [\*36] abuses are inconsequential. A recent example of this bias was seen *in* the defense of Justice Brett Kavanaugh by two women featured during a CNN panel of Republican women from Florida. <sup>132</sup>For instance, Gina Sosa stated, "What boy hasn't done this *in* high school?" <sup>133</sup>Similarly, Irina Villarino argued that there was no harm because there was no intercourse.

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*in* advanced of a trial. See Anita Chabria, *California May Soon Push Doctors and Lawyers to Confront Their Biases*, L.A. TIMES (September 12, 2019), <https://www.latimes.com/california/story/2019-09-12/california-implicit-bias-legislation-doctors-lawyers>. Training jurors would unduly extend the trial or be ineffective as it would be done shortly before the trial. However, for jurors, implicit bias can be address through jury instructions. See e.g., Capers, *Evidence Without Rules*, *supra* note 29, at 898-900.

<sup>124</sup> See, e.g., *Zacharek et al.*, *supra* note 6.

<sup>125</sup> *Id.*

<sup>126</sup> See *supra* Part I.

<sup>127</sup> Schafran, *supra* note 21, at 40-41.

<sup>128</sup> *Id.*; see also Tuerkheimer, *supra* note 21, at 28 ("Although false reports of rape are uncommon, law enforcement officers often default to incredulity when women allege sexual assault, resulting *in* curtailed investigations and infrequent arrests.").

<sup>129</sup> See Schafran, *supra* note 21, at 40-41.

<sup>130</sup> Hartley, *supra* note 21, at 512. Part of the reason why police officers do not arrest for this type of offense is their skepticism regarding the occurrence of SGBV, as they tend to overestimate the incidence of false reporting. See Tuerkheimer, *supra* note 21, at 16.

<sup>131</sup> See Schafran, *supra* note 21, at 9, 40; Gender Fairness Implementation Comm., *Gender Fairness in North Dakota's Courts: A Ten-Year Assessment*, 83 N.D. L. REV. 309, 337-40 (2007); Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 265-66 (1997); Aiken & Murphy, *supra* note 61, 45-46.

<sup>132</sup> See CNN, *GOP Voter on Kavanaugh: What Boy Hasn't Done This in High School?* YOUTUBE (Sept. 20, 2018), <https://www.youtube.com/watch?v=fllM3AUyQ3A>.

<sup>133</sup> *Id.* at 1:11-1:14. All the women dismissed her claims as either misremembering, based *in* jealousy, or overblown. *Id.* at 2:29-2:42. They also questioned her silence and recanting of the story, *in* addition to victim-blaming Dr. Blasey Ford. *Id.* at 1:26-1:44, 2:29-2:42. All of their comments show how consequential, contextual, and collective credibility operate at the same time *in* SGBV *cases*.

<sup>134</sup>*In* short, by exposing their consequential **credibility** bias, both women underplayed and trivialized the harms suffered by victims *in* situations similar to Dr. Blasey Ford. <sup>135</sup>

As with the lack of collective **credibility**, consequential **credibility** bias is hard to combat because it is rooted *in* the identity of the victims. <sup>136</sup>Like collective **credibility** bias, SGBV victims are aware that consequential **credibility** bias exists. <sup>137</sup>As *in* Jennifer's **case**, victims frequently opt not to go to the police or even talk to friends and family about the SGBV they suffer. <sup>138</sup>For instance, nearly twenty percent of non-student female victims of rape or sexual assault of college age, decided not to report because "police would not or could not do anything to help." <sup>139</sup>

The preferred strategy to counteract this problem has been training all actors *in* the judicial system about the prevalence and importance of prosecuting SGBV **cases** and about implicit bias. <sup>140</sup>However, the effectiveness of educating members of the judiciary **[\*37]** about the prevalence of SGBV has not really been measured. <sup>141</sup>Moreover, its effectiveness might be diminished when triers of fact are faced with impeachments that reinforce collective and contextual biases against a backdrop of a lack of physical evidence. <sup>142</sup>

#### B. Perceived Implausibility of SGBV Victims' Testimony

As anticipated, not only are SGBV victims disbelieved because their trustworthiness is discounted, <sup>143</sup>but their trustworthiness is discounted based on a perceived implausibility. <sup>144</sup>This perceived implausibility stems

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<sup>134</sup> *Id.* at 0:49-1:01.

<sup>135</sup> *See id.* at 0:49-1:16.

<sup>136</sup> *See* Schafran, *supra* note 21, at 41.

<sup>137</sup> *See, e.g.,* SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, at 1, 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>138</sup> *See id.*; Hartley, *supra* note 21, at 536.

<sup>139</sup> SINOZICH & LANGTON, *supra* note 137, at 9.

<sup>140</sup> *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 44 (1999).

<sup>141</sup> *See* Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 *N.C. L. REV.* 1157, 1216 n.220 (2009) ("There is consensus among advocates that training is the most effective for judges who are receptive to learning about **domestic violence**; however, the true effectiveness of judicial training programs has not been measured.").

<sup>142</sup> *See* BANAJI & GREENWALD, *supra* note 123, at 152. Some researchers, however, have pointed out that training jurors about implicit bias at the beginning of the trial or jury instructions regarding implicit bias could be effective at preventing jurors from engaging *in* this type of thinking when adjudicating **cases**. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 *STAN. L. REV.* 407, 439, 452-53 (2013); Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 *YALE L.J.* 1690, 1729-30 (2015). This may be true as the time between the training and the instruction is not so far removed from the decision. However, the literature also seems to indicate that over time bias training loses its effectiveness. *See supra* note 123 and accompanying text.

<sup>143</sup> *See* Schafran, *supra* note 21, at 5.

<sup>144</sup> *See* Tuerkheimer, *supra* note 21, at 46 (citing FRICKER, *supra* note 94, at 1) (explaining how hermeneutical injustice overlaps with testimonial injustice).

from a failure of understanding victims' reality.<sup>145</sup> Like the lack of collective and consequential **credibility**, this failure of understanding is the result of centuries of diminished social power as women have not been able to participate **in** the construction of the social experience.<sup>146</sup> As a result, **women's** experiences not shared by the hegemonic group of men "find no meaningful outlet **in** collective notions of reality."<sup>147</sup> This translates into two **[\*38]** phenomena regarding SGBV: (1) society misunderstands the processes of SGBV because of an inability to empathize,<sup>148</sup> and (2) the collective framing of the SGBV and its harms are structurally prejudiced with biased labels and stereotypes.<sup>149</sup>

## 1. CONTEXTUAL **CREDIBILITY** BIAS

Schafran denominates the first phenomenon as contextual **credibility** bias.<sup>150</sup> This bias refers to the inability to put oneself **in** the victim's shoes.<sup>151</sup> **In** other words, triers of fact are unable to understand victims' experiences because of stereotypes, social narratives or scripts, misconceptions about how victims process their trauma, and underestimation of the effects of abuse on victims.<sup>152</sup>

Some of the representative narratives of this bias identified **in** the literature, and present **in** Jennifer's **case**,<sup>153</sup> include the idea that the victim is lying when recanting or revising her story; nothing happened, because if it had the victim would have come forward sooner; the abuser is not the type of person who would commit such an act; and questioning why would the victim put herself **in** the situation of **violence**.<sup>154</sup> President Trump embodied a perfect example of this type of **credibility** bias **in** a tweet about Dr. Blasey Ford not coming forward when the alleged attack first happened:

I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities [sic] by either her or her loving parents. I ask that she **[\*39]** bring those filings forward so that we can learn date, time, and place!<sup>155</sup>

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<sup>145</sup> *Id.* at 46-48.

<sup>146</sup> *Id.* at 46 (citing FRICKER, *supra* note 94, at 148).

<sup>147</sup> *Id.* at 47-48.

<sup>148</sup> See, e.g., St. Joan, *supra* note 131, at 290-92 (discussing how cultivating a sense of empathy with judges for victims will help to lessen cultural myths about SGBV victims).

<sup>149</sup> See Tuerkheimer, *supra* note 21, at 47 (citing FRICKER, *supra* note 94, at 155) (explaining the hermeneutical marginalization of **women's** experiences).

<sup>150</sup> Schafran, *supra* note 21, at 6.

<sup>151</sup> See *id.*

<sup>152</sup> See *id.* at 6; see also Hartley, *supra* note 21, at 512, 539; Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 **VIOLENCE & VICTIMS** 271, 281 (1991). This helps to explain why it has been reported that expert testimony **in** SGBV **cases** is very effective **in** rehabilitating the victims and securing pro-victim judgments. Scheppele, *supra* note 21, at 157-60.

<sup>153</sup> See *supra* Part I.

<sup>154</sup> See Franiuk et al., *supra* note 70, at 790-91.

<sup>155</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 6:14 AM), <https://twitter.com/realdonaldtrump/status/1043126336473055235?lang=es>.

Scholars argue that these narratives are *in* place to protect us from uncomfortable truths and to let us think that we might have control over these events and might even be able to prevent them. <sup>156</sup>*In* other words, we believe these narratives because it allows us to assume that such an aggression will not happen to us. However, the endorsement of these narratives has the effect of diminishing sympathy towards victims. <sup>157</sup>

This self-preservation strategy causes us to disparage and question the victim more if her *case* does not fit into some of the stereotypical narratives. <sup>158</sup>For instance, one of the most prevalent stereotypical scripts *in cases* of rape or sexual *violence* is that the perpetrator is a stranger. <sup>159</sup>If the victim was abused by someone close to her, one tends to question more whether she is actually telling the truth. <sup>160</sup>

Another negative effect of this aspect of contextual *credibility* is that stereotypes and narratives are reinforced by popular culture. <sup>161</sup>For example, *in* studies performed about the Kobe Bryant rape *case*, researchers found that

65% of newspapers articles perpetuated at least one myth about sexual assault, with "she's lying" being the myth most commonly perpetuated. Further, participants *in* this study who were exposed to a rape myth-supporting article were less likely to think Bryant was guilty (before the *case* went to trial) and more [\*40] likely to think the victim was lying than those exposed to a rape myth-attenuating article. <sup>162</sup>

This type of reinforcement is also present *in* television and cinema. <sup>163</sup>

The danger of these myths *in* the media is that they mislead and encourage people to distrust the victim, even when examining the evidence might counter misconceptions. <sup>164</sup>*In* addition, these myths provide a fertile substratum for future triers of fact and attorneys to explain the SGBV with which they come across *in* court. <sup>165</sup>For instance, Pennington and Hastie found that jurors will consider external information as part of their thought processes to determine the guilt or innocence of a defendant. <sup>166</sup>Basically, triers of fact will "fill *in* the blanks"

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<sup>156</sup> Franiuk et al., *supra* note 70, at 791.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; see also Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, [78 OHIO ST. L.J. 733, 754 \(2017\)](#) (discussing how asylum seekers are often disbelieved for not comporting to stereotypical victim behavior).

<sup>159</sup> Franiuk et al., *supra* note 70, at 791.

<sup>160</sup> See *id.*

<sup>161</sup> *Id.* at 792.

<sup>162</sup> *Id.* Another study looking exclusively at headlines from the same *case* found that myths were present *in* almost ten percent. *Id.* at 797.

<sup>163</sup> See *id.* at 792; see also TASLITZ, *supra* note 21, at 19-25 (discussing the embodiment of rape narratives *in* *The Little Mermaid*, *Where the Boys Are*, and *Thelma and Louise*).

<sup>164</sup> Franiuk et al., *supra* note 70, at 792.

<sup>165</sup> See Hartley, *supra* note 21, at 539 (citing Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 PSYCHOL. BULLETIN 246, 248-49 (1981)).

<sup>166</sup> Pennington & Hastie, *supra* note 165, at 246, 248-49.

*in* the **cases** with their preconceived notions or previous knowledge about the dynamics of SGBV. <sup>167</sup>Thus, these studies explain why the impeachment of victims' **credibility** is so commonplace and successful.

Attorneys, as part of society, are susceptible to believing these stereotypes about victims *in* SGBV **cases**. <sup>168</sup>That is why attorneys use them as a bridge to communicate with triers of fact. Driven by these stereotypes, attorneys and triers of fact instinctively question victims and find material to support their distrust. <sup>169</sup>

As Hartley points out,

[\*41] if jurors accept the commonly held myths about **domestic violence** [or any other type of SGBV] and the defense further reinforces these misconceptions at trial, they may "fill *in* the blanks" with an unrealistic view of the violent relationship, and their evaluation of the evidence may be based on misconceptions and prejudices unsupported by scientific research. <sup>170</sup>

For example, *in* Jennifer's **case**, <sup>171</sup>jurors will fill *in* the blanks as to why she did not speak of the rape before, why Mark was able to come into her house even when they were separated, why she took a pregnancy test, or why she said to the police that she has not been a victim of **domestic violence**. <sup>172</sup>They would likely assume that she was heartbroken and lying, trying to get back at Mark for leaving by having sex with other men clandestinely. The defense attorney just needs to ask the questions that will open the door to stereotypes that undermine the victim's **credibility**. <sup>173</sup>

Consequently, the balance *in* these **credibility** contests is resolved *in* favor of the defendants, especially when defense counsel highlights a lack of corroborative testimony or evidence. <sup>174</sup>Recall the common impeachment strategies used to undermine the victim's **credibility**, <sup>175</sup>such as pointing out that there are no witnesses besides the parties and eliciting that the defendant never threatened the victim. <sup>176</sup>As Scheppele has pointed out,

[c]ases of sexualized **violence** [or SGBV] often evolve into a "he said, she said" battle of competing narratives *in* which the "he," who is the defendant, wins by default simply because the evidence is contested. Default rules about the burden of proof and the benefit of the doubt resolve all divergent accounts [\*42] *in* favor of the accused when there are merely contested stories with no "hard" evidence to compel choice between them.

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<sup>167</sup> Hartley, *supra* note 21, at 539; see Scheppele, *supra* note 21, at 137-38 (analyzing the filling of silences and revised stories *in* Professor Anita Hill's **case**); TASLITZ, *supra* note 21, at 7-8 (explaining how jurors think *in* terms of stories and how they fill the gaps *in* the stories).

<sup>168</sup> See Tuerkheimer, *supra* note 21, at 38 (discussing how prosecutors consider their own skepticisms and **credibility** discounting when deciding whether to pursue sexual assault **cases**).

<sup>169</sup> See, e.g., Hartley, *supra* note 21, at 539.

<sup>170</sup> *Id.*

<sup>171</sup> See *supra* Part I.

<sup>172</sup> See Hartley, *supra* note 21, at 539 (explaining how jurors fill *in* the blanks with own life experiences).

<sup>173</sup> See Méndez, *V. Witnesses*, *supra* note 38, at 465.

<sup>174</sup> See, e.g., Crooms, *supra* note 2, at 471.

<sup>175</sup> See Hartley, *supra* note 21, at 522-34.

<sup>176</sup> *Id.* at 535-36.

Though laws on the books look more woman-friendly on issues of sexualized violence than they used to, women do not always find that helpful laws produce victories for women. <sup>177</sup>

Moreover, common stereotypes connected to victims are reinforced by the lack of understanding triers of fact hold about the dynamics of SGBV. <sup>178</sup>Specifically, one of the most damaging of those stereotypes is that victims who change their stories are liars. <sup>179</sup>However, the most misunderstood characteristic of domestic violence victims is that such victims have a tendency to tell revised stories of their abuse. <sup>180</sup>It has been reported that women tend to move from less stereotyped, general, emotionless accounts of their abuse to more detailed, compelling, and specific narratives. <sup>181</sup>In fact, one sign of recovery is that women's stories of abuse change in this way as they recover their sense of safety and make coherent their memories of abuse. <sup>182</sup>However, this sign of recovery from the abuse is turned against victims, as in Jennifer's case, to become the very thing that discredits the victims as liars. <sup>183</sup>

Similarly, victims' previous silence about the abuse, victims' history of no reporting, and the fact that victims depict their relationships as happy and normal are all processes that are used against the victims to undermine their credibility, <sup>184</sup>as the defense attorney did in Jennifer's case. <sup>185</sup>However, these actions are normal processes of SGBV victims while they come to terms with the fact that they have been victims of SGBV and recover from the traumatic [\*43] events. <sup>186</sup>Yet, these actions are viewed in conjunction with a discredited character to show that the abuse never happened. <sup>187</sup>As Scheppele so poignantly summarizes,

[w]omen who delay in telling their stories of abuse at the hands of men or who appear to change their stories over time about such abuse are particularly likely to be discredited as liars. The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true. But abused women frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver, and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be "good girls"; and they take the blame for the abuse upon themselves. Such actions produce delayed or altered stories over time, which are then disbelieved for the very reason that they have been revised. <sup>188</sup>

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<sup>177</sup> Scheppele, *supra* note 21, at 123-24. See *infra* Section II.B.2, for a discussion on how this script is the all-encompassing narrative for SGBV, how it came to be, and how it drives this lack of empathy and contextual credibility bias.

<sup>178</sup> See Hartley, *supra* note 21, at 539.

<sup>179</sup> See Scheppele, *supra* note 21, at 144-45.

<sup>180</sup> *Id.* at 140-41.

<sup>181</sup> *Id.* at 139-40.

<sup>182</sup> *Id.* at 140.

<sup>183</sup> See TASLITZ, *supra* note 21, at 18; see also Scheppele, *supra* note 21, at 133.

<sup>184</sup> See Scheppele, *supra* note 21, at 169-70.

<sup>185</sup> See *supra* Part I.

<sup>186</sup> See Scheppele, *supra* note 21, at 138-39.

<sup>187</sup> *Id.* at 145.

<sup>188</sup> Scheppele, *supra* note 21, at 126-27.

Consequently, women not only face the disbelief of those closest to them, who generally hold the contextual **credibility** bias and are unable to understand why victims stay with their abusive partners,<sup>189</sup> but they also bear the cross of being depicted as less credible **in** court when they seek to redress the wrongs committed against them. The law facilitates discrediting these women by allowing the introduction of character for untruthfulness evidence that reinforces **credibility** biases.<sup>190</sup>

The resulting **credibility** discount, contrary to the purposes of evidentiary rules,<sup>191</sup> leads to unfair prejudice, confusing the issues, and misleading jurors and judges **in** their fact-finding function.<sup>192</sup> [\*44] Even though some confusion and prejudice could be countered through expert testimony, corroborating evidence, similar accounts from other victims, jury instructions, and rehabilitative testimony, it is more difficult **in** practice to fight against the **credibility** discount.

Although expert testimony helps explain the inconsistent victim behavior,<sup>193</sup> it is expensive and time consuming,<sup>194</sup> and thus not always accessible to the parties.<sup>195</sup> Also, attorneys may strategically choose not to use expert testimony at trial to keep it shorter for both the victims' and jurors' sake.<sup>196</sup>

Similarly, jury instructions directing jurors to properly weigh the **credibility** impeachment by explaining that not believing part of a witness's testimony does not mean that they cannot believe the rest of a testimony might not be effective.<sup>197</sup>

Furthermore, because of the cycle of **violence** or the past silence from the victim, as **in** Jennifer's **case**, physical corroborative evidence might not be available.<sup>198</sup> But even when it is available, **credibility** biases might diminish its value. Once a victim is impeached as not credible, the impeachment spreads to the evidence associated with her.<sup>199</sup> The same holds true to other witnesses, who are usually related to the victim, that become tainted by association.<sup>200</sup>

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<sup>189</sup> See Franiuk et al., *supra* note 70, at 791.

<sup>190</sup> See *supra* note 51-61 and accompanying text.

<sup>191</sup> See, e.g., **FED. R. EVID. 102** (stating that "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination").

<sup>192</sup> See Montan, *supra* note 38, at 459-62; see also **FED. R. EVID. 403**.

<sup>193</sup> Montan, *supra* note 38, at 459-62

<sup>194</sup> Jill Starbuck, *Expert Witnesses: Worth the Time and Money?*, **IND. CONTINUING LEGAL EDUC. F.** (Sept. 20, 2012), <https://iclef.org/2012/09/expertwitnesses-worth-the-time-and-money/> (explaining how "time and money are significant factors for hiring an expert witness").

<sup>195</sup> See, e.g., **Commonwealth v. Serge, 896 A.2d 1170, 1184-85 (Pa. 2006)** (discussing how states do not have an obligation to pay for an expert witness for an indigent defendant).

<sup>196</sup> See Starbuck, *supra* note 194 (discussing the time considerations made when deciding to use an expert).

<sup>197</sup> See Kassin & Sommers, *supra* note 58, at 1053 (discussing literature about the ineffectiveness of jury instructions).

<sup>198</sup> See Hartley, *supra* note 21, at 535-36; see Scheppele, *supra* note 21, at 155-56.

<sup>199</sup> See GILMORE, *supra* note 54, at 142 ("[Doubt] may be initially withheld as one hears an account of sexual harassment, for example, but creep[s] **in** as evidence is presented.").

[\*45] *In* terms of other victims coming forward, that strategy also requires considerable efforts, as plaintiffs will need to devote resources to finding victims and convincing them to participate *in* the action even when they might have decided not to bring actions *in* their own names. <sup>201</sup>*In* addition, the U.S. Supreme Court's decision *in Epic Systems Corp. v. Lewis* <sup>202</sup>might have eliminated this option for some victims as arbitration agreements requiring individualized proceedings are legal and might become the norm. <sup>203</sup>

Finally, rehabilitative testimony might not be effective because the victim's testimony might be compromised by the biases associated with trustworthiness. The factfinders' integrative process might have led them to already come up with explanations as to why the victim is allegedly lying and reaffirm that the victim should not be believed. Thus, countering the consequential bias with the victim herself could be even more damaging.

## 2. "HE SAID/SHE SAID" CREDIBILITY BIAS

The effectiveness and pervasiveness of consequential credibility bias and the resulting credibility discounting is due to the history of the prejudiced collective framing of SGBV. <sup>204</sup>As Professor Julia Simon-Kerr has pointed out, the script of a truthful woman was fraught with ideas about her sexual purity--equating unchastity with untruthfulness. <sup>205</sup>The idea of a woman's veracity entered early impeachment practice and jurisprudence involving women. <sup>206</sup>However, states ultimately barred this type of impeachment *in cases* [\*46] other than rape. <sup>207</sup>The decision to remove it from cases other than SGBV cases signals how SGBV cases were, and still are, socially perceived as different from others.

This differential treatment of unchastity, as applied to women, helped create the social script that we as a society must be careful *in* SGBV cases of convicting male defendants because they can be the victims of women's proclivity to lie. <sup>208</sup>Such a script, *in* turn, was embodied *in* the law with requirements of corroboration testimony, prompt outcry, and cautionary jury instructions, as well as the availability of victims' prior sexual history as impeachment and social companion defenses. <sup>209</sup>However, these stereotypes and prejudices against

<sup>200</sup> Those close to victims who are called as a witness are likely to be impeached for bias because their closeness to the victim is likely to be interpreted as cause for their testimony to be slanted toward the victim. See Phillip W. Broadhead, *Why Bias is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases*, 27 AM. J. TRIAL ADVOC. 235, 263 (2003).

<sup>201</sup> Scheppelle, *supra* note 21, at 155.

<sup>202</sup> [138 S. Ct. 1612, 1619 \(2018\)](#) (holding that arbitration agreements requiring individual arbitration are enforceable under the Federal Arbitration Act, irrespective of provisions *in* the National Labor Relations Act).

<sup>203</sup> Najah Farley, *How the US Supreme Court Could Silence #MeToo*, GUARDIAN (Apr. 18, 2018, 6:00 PM) <https://www.theguardian.com/commentisfree/2018/apr/18/supreme-court-metoo-arbitration-clauses-decision-sexual-harassment> (discussing how corporations use forced arbitration clauses to take harassment claims into private arbitration proceedings, which prevents other women from coming forward as they are usually kept confidential).

<sup>204</sup> See Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1879 (2008) [hereinafter Simon-Kerr, *Unchaste and Incredible*].

<sup>205</sup> See *id.*

<sup>206</sup> *Id.* at 1169-70.

<sup>207</sup> See *id.* at 1870.

<sup>208</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 181; Simon-Kerr, *Unchaste and Incredible*, *supra* note 204, at 1875.

<sup>209</sup> See *supra* notes 26-30 and accompanying text.

female victims are not issues of the past and still linger *in* our impeachment practices. For example, jurisdictions that have abolished the use of specific acts of untruthfulness to impeach a witness's credible character have carved out exceptions for rape cases to use this type of evidence because of the particular nature of SGBV cases.<sup>210</sup>

The persistence of carving out SGBV cases as ones *in* which we must exercise caution with victims because they tend to lie is a direct result of the cultural endurance of the description of SGBV cases as "swearing contests," "nobody really knows what happened," or "he said/she said" cases.<sup>211</sup> Professor Taslitz, who labels these phenomena as themes, pointed out that the four most common *in* rape cases were silenced voices, bullying, black beasts, and a little more than persuading.<sup>212</sup> This Article adopts the term "he said/she said" credibility bias to denominate the collective framing discounting of SGBV victims and all its prejudiced and biased societal narratives.

Behind these *neutral* descriptions of SGBV cases lies the presumption that victims are lying about what happened to them.<sup>213</sup> This perceived implausibility about SGBV victims' testimony is built into the fabric of how we talk about these cases.<sup>214</sup>

[\*47] Two of the stickiest judgments that circulate *in* response to claims by women of sexual violence are "he said/she said" and "nobody really knows what happened." . . . They render as unknowable and undecidable both physical evidence and verbal testimony. They deflect a more rigorous engagement with narratives, persons, evidence, and scenes of abuse that are complicated. Physical evidence is discounted when, for example, "she said" the sexual contact that the evidence confirms was rape, but "he says" it was consensual. . . . It represents the introduction of reasonable doubt, the legal standard by which rape is judged *in* criminal court. But we should remember also that "he said/she said" simply identifies how witnesses *in* an adversarial legal structure are positioned. How "he said/she said" has come to be seen as something other than the prompt from which due process begins suggests that women lie outside the frame of justice from the beginning.<sup>215</sup>

*In* other words, these formulations that are depicted as neutral portrayals of a situation *in* which we only have as witnesses the parties themselves serve to discredit the victims before they even speak.<sup>216</sup> They represent a free-floating form of collective judgment that attaches to testimony *in* the form of doubt."<sup>217</sup> These formulations, coupled with contextual credibility bias, are why biases that discount the trustworthiness of women are exacerbated *in cases* of SGBV.<sup>218</sup> They are also the reason why the use of character for

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<sup>210</sup> See *infra* Section IV.A.3.

<sup>211</sup> See GILMORE, *supra* note 54, at 6-7.

<sup>212</sup> TASLITZ, *supra* note 21, at 19.

<sup>213</sup> See Colb, *The Difference Between*, *supra* note 54.

<sup>214</sup> See, e.g., GILMORE, *supra* note 54, at 6-7.

<sup>215</sup> GILMORE, *supra* note 54, at 6-7.

<sup>216</sup> See *id.* at 140. Even though these narratives of "he said/she said" are presented as neutral, it is interesting to note how the speech privileges the man's voice by mentioning him first, notwithstanding that the accuser is usually the woman and the person who will tell first the story. This construction signals that the voice to which everything must be compared is the man's. This results *in* a subtler way of stating that women's accounts of abuse we will be measured *in* function of whatever the principal voice (the man's) will say about the case.

<sup>217</sup> *Id.*

<sup>218</sup> See, e.g., Hartley, *supra* note 21, at 539.

[\*48] untruthfulness evidence in the impeachment of SGBV victims has undue prejudicial effects as opposed to in other contexts. <sup>219</sup>

As Professor Colb points out, these prejudiced scripts have consequences on the treatment of witnesses in SGBV cases, their credibility, and the perception of jurors regarding the issues being tried. <sup>220</sup>Colb, reflecting on acquaintance rape *vis- -vis* robbery, states the following:

Some folks, however, make the mistake of thinking that in order to presume innocence, we must conclude that the complaining witness in a rape case, the alleged rape victim, is perjuring herself when she provides incriminating testimony against the accused rapist. They compound this mistake by imagining that we must give as much credence to the defendant as we do to the alleged victim and that we cannot convict a rapist on the basis of the victim's testimony alone.

None of that is true. Think about a non-rape case, an armed robbery. Juries must presume that the defendant is innocent there as well, and the prosecution there must prove guilt beyond a reasonable doubt to avoid an acquittal too. Yet no one presumes that the robbery victim, as he testifies, is lying on the stand. I know, because I was a robbery victim, and the defense attorney bent over backwards to treat me with respect and to make clear that he thought I might have been mistaken but not that I might have been lying. He is not an outlier. Juries would hate a defense attorney who approached a crime victim witness as one would approach a liar, unless, that is, the victim accuses the defendant of acquaintance rape. <sup>221</sup>

[\*49] As noted, the interaction between the *neutral* rules of allowing character for untruthfulness evidence magnifies the credibility biases discussed. The underlying bias tends to confuse the issues for triers of fact whose views are already skewed against SGBV victims because of their gender identity. <sup>222</sup>In turn, the inherent biases in the rules aid attorneys in achieving not guilty verdicts by creating narratives about the defendant's innocence, victim's tendency to lie, and victim's revengeful prosecutions. In Jennifer's case, for example, these narratives imbedded in the functional evidence were the bedrock from which the defense attorney's cross and closing drew support. <sup>223</sup>

Moreover, this credibility discounting through perceived implausibility also deters victims from coming forward. <sup>224</sup>In fact, conviction rates seem to suggest that when attorneys employ these strategies, they are quite effective. <sup>225</sup>

### III. #TIMESUP: THE COSTS OF CHARACTER FOR UNTRUTHFULNESS EVIDENCE IN SGBV CASES

*When I testified, I had already had to watch this man's attorney bully, badger and harass my team, including my mother . . . I was angry.* <sup>226</sup>

<sup>219</sup> See GILMORE, *supra* note 54, at 6-7 (explaining that victim testimony is often times the only evidence in these cases).

<sup>220</sup> See Colb, *The Difference Between*, *supra* note 54.

<sup>221</sup> *Id.*; see also House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments, 61 A.B.A. J. 463, 464 (1975) (quoting Connie K. Borkenhagen while urging the House of Delegates to redefine rape).

<sup>222</sup> See Montan, *supra* note 38, at 459-62.

<sup>223</sup> See *supra* Part I.

<sup>224</sup> Tuerkheimer, *supra* note 21, at 28.

<sup>225</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

SGBV remains an alarming problem. Most of these crimes are not prosecuted, mainly because they go unreported.<sup>227</sup> Organizations working *in* the field estimate that less than twenty-five percent of all sexual assaults,<sup>228</sup> a third of all rapes,<sup>229</sup> and around forty percent of all stalking crimes are *in* fact reported.<sup>230</sup> Moreover, meta-analysis [\*50] of police and judicial statistics reveals that only one out of six ***domestic violence cases*** reported to the police *in* the United States results *in* conviction.<sup>231</sup> Furthermore, only one third of the people arrested end up convicted.<sup>232</sup> About 0.7% of rapes and attempted rapes end with a felony conviction for the perpetrator, according to an estimate based on the best of the imperfect measures available."<sup>233</sup> It is also estimated that a robbery accusation is four times more likely to end *in* a conviction.<sup>234</sup>

These numbers illustrate a twofold problem. First, a large percentage of the victims are not seeking judicial redress.<sup>235</sup> Second, the ones that do go through the legal process are not receiving the justice they deserve.<sup>236</sup>

There are multiple reasons attributed to the low reporting rates *in* these types of crimes.<sup>237</sup> It has been widely documented that victims do not feel comfortable going to the authorities because police officers do not validate their accusations, and instead they are received with a new iteration of the SGBV that they have been trying to escape.<sup>238</sup> As discussed, victims are received this way due to ***credibility*** discounting.<sup>239</sup> *In* addition, *in* many instances, women are trying [\*51] to avoid the negative effects that prosecuting these abuses

<sup>226</sup> [Zacharek et al.](#), *supra* note 6 (quoting Taylor Swift).

<sup>227</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

<sup>228</sup> *Id.*

<sup>229</sup> Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences.*, WASH. POST (Oct. 6, 2018, 7:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-faceemotional-physical-consequences/>.

<sup>230</sup> KATRINA BAUM ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *STALKING VICTIMIZATION IN THE UNITED STATES* (2009), <https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalkingrpt.pdf>.

<sup>231</sup> Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 CRIM. JUST. REV. 44, 53 (2009).

<sup>232</sup> *Id.*

<sup>233</sup> Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018), [https://www.washingtonpost.com/business/2018/10/06/less-thanpercent-rapes-lead-felony-convictions-least-percent-victims-face-emotionalphysical-consequences/?noredirect=on&utm\\_term=.3fc0f7b254d2](https://www.washingtonpost.com/business/2018/10/06/less-thanpercent-rapes-lead-felony-convictions-least-percent-victims-face-emotionalphysical-consequences/?noredirect=on&utm_term=.3fc0f7b254d2).

<sup>234</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

<sup>235</sup> See *id.*

<sup>236</sup> See *id.* This conclusion presumes that most victims do not lie about their harms. See Tuerkheimer, *supra* note 21, at 20 (discussing how false report rates fall between 4.5%, 5.9%, and 6.8%).

<sup>237</sup> See, e.g., Altantulkhuur, *supra* note 50, at 1109; SINOZICH & LANGTON, *supra* note 137, at 9; Epstein & Goodman, *supra* note 93, at 431.

<sup>238</sup> See Altantulkhuur, *supra* note 50, at 1109; SINOZICH & LANGTON, *supra* note 137, at 9; Tuerkheimer, *supra* note 21, at 29.

<sup>239</sup> See *supra* Part II.

present *in* their lives, such as adverse child custody determinations or becoming the object of criminal investigations themselves.<sup>240</sup>

Another important reason for the low reporting rate is how the *credibility* discounting operates by activating trustworthiness and plausibility biases through the impeachment of victims with character for untruthfulness evidence.<sup>241</sup> Victims are cognizant of that possibility and, as a result, are deterred from coming forward.

<sup>242</sup>As we saw *in* Jennifer's *case*, victims know that they could be doubly victimized during cross-examination.

<sup>243</sup>They are aware that they would have to relive their abusive experiences and subject themselves to re-enactments of the abuse and disparagement during the trial.

<sup>244</sup>Moreover, our adversarial system values aggressiveness during the trial, particularly during cross-examination.<sup>245</sup>

These problems with the adversarial system grow even deeper when factors such as race, socio-economic position, and immigration status are thrown into the mix.<sup>246</sup> Not only are they accentuated [**\*52**] by

extrajudicial factors or functional evidence,<sup>247</sup> but the legal system is increasing the harshness of cross-

<sup>248</sup>The holdings *in* *Crawford v. Washington*,<sup>249</sup> *Blakely v. Washington*,<sup>250</sup> and *United States v. Booker*,

<sup>251</sup>the erosion of evidentiary privileges for accusers;<sup>252</sup> increasing sentences;

<sup>253</sup>mandatory prosecutions (no-drop policies);<sup>254</sup> and the legality of arbitration agreements providing for

<sup>240</sup> Melissa A. Trepicione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution when Her Child Witnesses Domestic Violence?*, [69 FORDHAM L. REV. 1487, 1490-91 \(2001\)](#); Epstein & Goodman, *supra* note 93, at 431; Aiken & Murphy, *supra* note 61, at 51.

<sup>241</sup> Tom Lininger, *Bearing the Cross*, [74 FORDHAM L. REV. 1353, 1359-60 \(2005\)](#).

<sup>242</sup> See *id.* at 1376; Tuerkheimer, *supra* note 21, at 28; see also Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 BERKELEY J. CRIM. L. 1, 27 (2009).

<sup>243</sup> See *supra* Part II; see also *supra* notes 22-28 and accompanying text.

<sup>244</sup> See Lininger, *supra* note 241, at 1359-60; TASLITZ, *supra* note 21, at 99.

<sup>245</sup> TASLITZ, *supra* note 21, at 81-83.

<sup>246</sup> See Capers, *Evidence Without Rules*, *supra* note 29, at 895 (discussing how factors such as race and gender matter as "evidence" when considering plea negotiations).

<sup>247</sup> See *id.*

<sup>248</sup> See Lininger, *supra* note 241, at 1363.

<sup>249</sup> [541 U.S. 36, 68-69 \(2004\)](#) (holding that the Sixth Amendment requires a defendant to be afforded the opportunity to cross-examine a witness making testimonial statements); see also Lininger, *supra* note 241, at 1363-66 (explaining how *Crawford* has required victims to testify, resulting *in* unpleasant cross examinations of the victim).

<sup>250</sup> [542 U.S. 296, 304-05 \(2004\)](#) (holding that *in* order for a judge to sentence a defendant beyond the statutory maximum, the facts being relied on to support the increase *in* punishment, must be submitted to the jury); see also Lininger, *supra* note 241, at 1367-71 (stating how *Blakely* has expanded proceedings that victims would be subjected to).

<sup>251</sup> [543 U.S. 220, 244-45 \(2005\)](#) (holding "that the Sixth Amendment as construed *in* *Blakely* does apply to the [Federal] Sentencing Guidelines"); see also Lininger, *supra* note 241, at 1367-69 (explaining how *Booker*, *in* conjunction with *Blakely*, has increased the likelihood of trials and therefore the likelihood of victims being subject to cross-examinations).

<sup>252</sup> Lininger, *supra* note 241, at 1371-74 (explaining how the erosion of spousal privilege, self-incrimination, privilege for psychiatric and counseling records make victims less likely to wish to testify).

individualized proceedings <sup>255</sup>have made indispensable the testimony of the victims during the trial, expanded the scope of issues victims must testify about, and strained the relationships between prosecutors and victims. <sup>256</sup>This, *in* turn, has made cross harsher and the experience of victims worse. <sup>257</sup>

Because of the aforementioned changes, defendants are more likely to go to trial and contest their convictions because sentences **[\*53]** could be longer, meaning the defendant has more at stake. <sup>258</sup>This translates to more aggressive cross examinations of victims. <sup>259</sup>Furthermore, the relationship between victims and prosecutors has been shaken, as the latter are now required to force witnesses to testify with low expectations of prevailing or transforming the nature of their personal and family relationships with the defendants. <sup>260</sup>As a result, the tortuous process for the victim is lengthened.

As discussed, the *credibility* discounting women face impacts conviction rates because *credibility* biases constrain victims into not reporting and drive police officers away from going forward with investigations. <sup>261</sup>Similarly, based on the convictability standard, <sup>262</sup>prosecutors choose not to pursue *cases* as they know they will not prevail *in* court because jurors will discount victims' *credibility*. <sup>263</sup>

These underreporting and low conviction rates are not exclusive to criminal proceedings--the same story repeats itself *in* civil *cases* for sexual harassment. <sup>264</sup>For example, it is estimated that seventy-five percent of people who experience sexual harassment, eighty-three percent of which are women, do not report it. <sup>265</sup>Moreover, *in* the past decade, over half of the sexual harassment claims have resulted *in* no charge. <sup>266</sup>

<sup>253</sup> *Id.* at 1379-80 (explaining how increased sentences makes trials and cross-examinations more likely and more aggressive).

<sup>254</sup> *Id.* at 1362 (explaining how "'no drop' policies *in* many prosecutors' offices have added to victims' sense of frustration during cross-examination").

<sup>255</sup> [Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 \(2018\)](#) (holding that the Arbitration Act requires the enforcement of agreements that provide for individualized arbitration).

<sup>256</sup> See, e.g., Lininger, *supra* note 241, at 1373, 1380, 1392, 1394.

<sup>257</sup> See [id. at 1363, 1373](#).

<sup>258</sup> See [id. at 1380](#).

<sup>259</sup> *Id.*

<sup>260</sup> [Id. at 1362](#); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, [90 N.Y.U. L. REV. 397, 453 \(2015\)](#).

<sup>261</sup> See Tuerkheimer, *supra* note 21, at 28-32.

<sup>262</sup> See [id. at 37-38](#).

<sup>263</sup> [Id. at 36-41](#); see also Capers, *Evidence Without Rules*, *supra* note 29, at 895 (discussing how prosecutors and defense attorneys, when deciding whether to enter plea negotiations or proceed with a *case*, take into account functional evidence, such as gender and the effect of *credibility* biases, *in* assessing the strength of the evidence).

<sup>264</sup> See, e.g., Mona Chalabi, *Sexual Harassment at Work: More Than Half of Claims in US Result in No Charge*, *GUARDIAN* (July 22, 2016, 12:30 PM), <https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-ailles-fox-news>.

<sup>265</sup> *Id.*

**[\*54] Credibility** discounting helps to explain some of the reasons for low conviction rates *in* SGBV **cases**, and also gives us an explanation as to why rape shield laws have been unsuccessful *in* bringing reporting and conviction rates up. <sup>267</sup>Notwithstanding this reality, character for untruthfulness evidence continues to be allowed by the FRE *in* SGBV **cases**, *in* spite of data showing that such evidence is not a good predictor of whether a witness is lying <sup>268</sup>and that false accusations *in* these **cases** are estimated to be less than ten percent. <sup>269</sup>

The #MeToo movement has not only drawn attention to the prevalence of SGBV, but also to the discounting of **women's credibility in** SGBV **cases** and its consequences. <sup>270</sup>The movement has made clear the consequences women endure by coming forward about their experiences and how that has caused them to remain silent and not press charges or file lawsuits. <sup>271</sup>It has shown us how class, race, and nationality affect the outcome *in* SGBV **cases**. <sup>272</sup> **[\*55]** More importantly, it has made evident that it is one thing to publicly and temporarily ostracize aggressors and another to secure convictions or judgments against them. <sup>273</sup>

<sup>266</sup> *Charges Alleging Sex-Based Harassment, supra* note 2; see also Chalabi, *supra* note 264. This does not include the approximately twenty-two percent of **cases** that were closed for "administrative reasons" over the last nine years. *Charges Alleging Sex-Based Harassment, supra* note 2.

<sup>267</sup> See Cassia C. Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 *J. CRIM. L. & CRIMINOLOGY* 861, 880-82 (1996); Julie Horney & Cassia C. Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 *L. & SOC'Y REV.* 117, 880-82 (1991); Bennett Capers, *Rape, Truth, and Hearsay*, 40 *HARV. J. L. & GENDER* 183, 205 (2017) ("[R]ape shield rules have not protected rape victims as hoped. . . . Rape shields certainly have not leveled the playing field for victims of rape. Rapes remain under-reported, conviction rates remain low, and victims who come forward continue to face demeaning and victim-blaming cross-examination *in* the courtroom amounting to a 'second victimization.'").

<sup>268</sup> See Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 *SW. U. L. REV.* 769, 771-72 (2008) (stating that "a person's behavior *in* a given situation cannot accurately be predicted on the basis of personality test scores or even past behavior *in* a similar situation").

<sup>269</sup> *Get Statistics, supra* note 2 (stating how the prevalence of false reporting is between two and ten percent); Tuerkheimer, *supra* note 21, at 20 (discussing how false report rates fall between 4.5%, 5.9%, and 6.8%).

<sup>270</sup> See *Zacharek et al., supra* note 6.

<sup>271</sup> See *id.*

<sup>272</sup> For example, if we consider Taylor Swift's successful claim, we notice that she is white, rich, and filed a lawsuit for the symbolic amount of one dollar. See Hillary Weaver, *Taylor Swift Has Finally Been Sent the Symbolic Dollar She Won in Court*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/style/2017/12/former-dj-david-mueller-says-he-sent-taylor-swift-dollar-payment>. We can infer how all these factors played out *in* her favor by highlighting to jurors that she could not have any ulterior motive to bring charges against her assailant. *In* fact, most of the women we have seen *in* the media associated with the #MeToo movement have been largely white, non-immigrant, and wealthy. See generally *Zacharek et al., supra* note 6. Meanwhile, we ignore how unsuccessful the movement has been for women of color, undocumented, *in* jobs with minimum wage. See Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY, <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/> (last updated Jan. 30, 2019, 5:13 PM).

<sup>273</sup> Since April 2017, of the 263 celebrities, politicians, CEOs, and others who have been accused of sexual misconduct only a few have faced legal consequences for their actions. Anna North et al., *A List of People Accused of Sexual Harassment, Misconduct, or Assault*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> (last updated Jan. 9, 2019). This suggests that it is easier to publicly condemn these men than to pursue legal action.

Unfortunately, the #MeToo movement has also created a backlash *in* terms of victims' **credibility**.<sup>274</sup> It has been reported that from 2017 to 2018 people distrust victims more and think of SGBV as an inconvenience rather than a real problem *in* need of solution:

The share of American adults responding that men who sexually harassed women at work 20 years ago should keep their jobs has risen from 28% to 36%. The proportion who think that women who complain about sexual harassment cause more problems than they solve has grown from 29% to 31%. And 18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with [a previous] 13% . . . .<sup>275</sup>

Parallel, we have seen an increase of "no cause" determinations *in* sexual harassment **cases** and the decrease *in* settlements.<sup>276</sup>

**[\*56]** This backlash should serve, however, as an incentive to take advantage of the rise *in* awareness brought by the #MeToo movement.<sup>277</sup> Otherwise, the #MeToo movement could just become another chapter *in* the cycle of increased awareness followed by no change, just like the movement *in* the '90s.<sup>278</sup>

#### IV. #NEVERMORE: REFORMING IMPEACHMENT OF SGBV VICTIMS' CHARACTER FOR TRUTHFULNESS

*I have lied, but I am not a liar.*<sup>279</sup>

Some commentators have suggested that a way to deal with the problems discussed could be to have no juries *in* SGBV **cases**.<sup>280</sup> That proposal goes against the core values of our criminal justice system,<sup>281</sup> and it does not consider that these **cases** also play out *in* the civil arena<sup>282</sup> or that judges might be as ill-equipped to deal with the **cases** as jurors.<sup>283</sup>

A more sensible way to address the problems so far discussed would be to reform our evidentiary rules to shield victims from attacks about their character for truthfulness that play on patriarchal prejudices and discount **women's credibility**. *In* that way, our legal system would guarantee a fair redress of the harms inflicted on SGBV victims *in*

<sup>274</sup> See, e.g., *After a Year of #MeToo, American Opinion has Shifted Against Victims*, ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims> [hereinafter *After a Year of #MeToo*].

<sup>275</sup> *Id.*

<sup>276</sup> *Charges Alleging Sex-Based Harassment*, *supra* note 2.

<sup>277</sup> See, e.g., Theodore L. Caputi et al., *Research Letter: Internet Searches for Sexual Harassment and Assault, Reporting, and Training Since the #MeToo Movement*, 179 J. INTERNAL MED. 258, 258-59 (2019).

<sup>278</sup> See TASLITZ, *supra* note 21, at 6 (discussing how "[d]espite several decades of a renewed **women's** movement and increasing attention to the problem of rape, judges and juries, continue to be skeptical . . . ."); see also *Last Week Tonight with John Oliver*, *supra* note 1 (discussing how this is not the first wave of awareness regarding SGBV).

<sup>279</sup> *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H.R. Comm. on Oversight and Reform*, 116th Cong. 15 (2019) [hereinafter *Hearing with Michael Cohen*].

<sup>280</sup> See, e.g., Julie Bindel, Opinion, *Juries Have No Place *in* Rape Trials. They Simply Can't be Trusted*, GUARDIAN (Nov. 21, 2018, 8:29 PM), <https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trialsmyths-justice>.

<sup>281</sup> See *U.S. CONST. amend. VI*.

<sup>282</sup> See Chalabi, *supra* note 264.

<sup>283</sup> See, e.g., Montan, *supra* note 38, at 459-62.

an environment that would promote awareness and [\*57] transform our rape and **credibility** discounting culture, while improving the low victim favorable outcomes *in* SGBV **cases**. Adopting evidentiary rules that would prevent attorneys from impeaching victims with evidence of character for untruthfulness could ameliorate the revictimization of SGBV victims and foster fairer trials. It could also incentivize victims to come forward and change the culture around SGBV. <sup>284</sup>

A. *United States Landscape on the Use of Sexual and Gender-Based **Violence** Victims' Character for Untruthfulness Evidence*

Regulating fairly and effectively the impeachment of the character for truthfulness of a witness has historically proven to be a challenge because, as Michael Cohen so eloquently explained, lying does not make one a liar. <sup>285</sup>Legal commentators have pointed out how the common law rule allowing evidence of the character for untruthfulness of a witness should not be allowed as its prejudicial effects outweigh any probative value this type of evidence could have *in* any of its forms. <sup>286</sup>Research has questioned the commonsense notion that there is a unified trait for honesty (i.e., a character for truthfulness) and has shown the prejudicial effects of this type of impeachment *in* spite of limiting instructions. <sup>287</sup>*In* fact, jurors and judges alike tend to overestimate or be over-persuaded by this type of evidence, leading them to misinterpret its import. <sup>288</sup>

Yet [FRE 608](#) and [FRE 609](#) allow for the admission of this type of evidence. <sup>289</sup>This disconnect between the strong evidence that [\*58] there is no such thing as a character for truthfulness that can be used to predict or determine whether a person is lying on a specific occasion <sup>290</sup>and our insistence of using past events to ascertain the **credibility** of a witness <sup>291</sup>helps explain why we have so many issues with the impeachment of character for truthfulness *in* evidentiary law. <sup>292</sup>Historically, no type of evidence of character for truthfulness (i.e., opinion, reputation, conviction, and bad acts) has been exempted from this controversy or admitted consistently *in* one way. <sup>293</sup>

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<sup>284</sup> The proposal *in* this Article is not intended to solve the problem of SGBV, nor does it claim that the judicial system is best equipped to do so. Its scope is more modest. It aims at removing barriers that hinder victims from redressing the harms they have suffered. The essential premise is that, as long as we address the problem through legal mechanisms, the redress available to victims should not be only achievable on paper but should be achievable *in* actuality.

<sup>285</sup> *Hearing with Michael Cohen, supra* note 279, at 15; see also Gold, *supra* note 268, at 771-72.

<sup>286</sup> See, e.g., H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, [42 DUKE L.J. 776, 827 \(1993\)](#) (arguing that all forms of character evidence are highly prejudicial *in* all of the contexts, affecting both the judgments of judges and juries alike).

<sup>287</sup> See Studebaker & Penrod, *supra* note 58, at 265-66.

<sup>288</sup> Méndez, *California's New Law on Character Evidence, supra* note 36, at 1054.

<sup>289</sup> See [FED. R. EVD. 608](#), 609.

<sup>290</sup> See Gold, *supra* note 268, at 771-72.

<sup>291</sup> See, e.g., [FED. R. EVD. 608](#), 609.

<sup>292</sup> See, e.g., Lininger, *supra* note 241, at 1376; Tuerkheimer, *supra* note 21, at 28. Although evidence suggests that character for truthfulness/untruthfulness should not be admissible, *in* light of the resistance of the majority of jurisdictions to do so, this Article does not take such position. Instead, this Article puts forward a proposal that preserves jurisdictional reliance on this type of evidence but limits its prejudicial effects *in* the context of SGBV **cases**.

<sup>293</sup> See, e.g., Charles H. Kanter & Richard Page, *Impeaching and Rehabilitating a Witness with Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions*, 9 U.C.D. L. REV. 319, 324 (1976); Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003, UTAH L. REV. 635, 646-47 (2003).

## 1. OPINION &amp; REPUTATION EVIDENCE

Prior to the enactment of the FRE, evidence about the character for untruthfulness of a witness *in* the form of reputation was once considered to be unreliable hearsay.<sup>294</sup> This type of evidence, *in* the form of opinion, was excluded under the belief that it "preempt[ed] the jury's function as the final arbiter of fact."<sup>295</sup>

However, today, opinion and reputation evidence are considered the most reliable types of evidence regarding a victim's character for truthfulness, and their use is widely accepted because the safeguards *in* place are believed to guarantee the reliability of the generalizations based on this evidence.<sup>296</sup> For instance, evidence *in* the [\*59] form of reputation is based on a pool of people that know and believe a witness possesses a trait of untruthfulness, so it should be more reliable than evidence based on *one* witness' opinion.<sup>297</sup> Similarly, evidence *in* the form of opinion is based on a larger data cluster as it requires the witness to base it on more than one act of untruthfulness.<sup>298</sup> Moreover, the basis for a witness's testimony regarding reputation or opinion must be disclosed for the testimony to be admissible.<sup>299</sup> This ensures the reliability of the evidence.

*In* sum, because of these safeguards, the likelihood of this evidence leading to a confusion of the issues is more limited, even *in* SGBV *cases* (*in* spite of the *credibility* biases rooted *in* patriarchy).<sup>300</sup> *In* addition, this type of evidence is not as widely available as evidence of specific acts.<sup>301</sup> Moreover, it continues to be accepted by the majority of jurisdictions *in* the United States because of its apparent reliability<sup>302</sup> and the required disclosure of the bases for the opinion or reputation.<sup>303</sup> Therefore, a proposal to limit its prejudicial effects *in* the context of SGBV *cases* should be narrow.

<sup>294</sup> Kanter & Page, *supra* note 293, at 324.

<sup>295</sup> *Id.* at 327.

<sup>296</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179-86 (discussing how the use of character evidence for truthfulness evolved from notions of honor and reputation to today's system; arguing that the current system is still premised on notions of status as to who is culturally considered credible and not *in* the seeking of mendacity).

<sup>297</sup> *Id.* at 178-79.

<sup>298</sup> [Wilson v. City of Chicago, 6 F.3d 1233, 1239 \(7th Cir. 1993\)](#), *as modified on denial of reh'g* (Dec. 8, 1993) ("The telling of a lie not only cannot be equated to the possession of a reputation for untruthfulness, but does not by itself establish a character for untruthfulness, as the rule explicitly requires whether the form of the impeaching evidence is evidence of reputation or opinion evidence.").

<sup>299</sup> See, e.g., [Oregon v. Paniagua, 341 P.3d 906, 910 \(Or. Ct. App. 2014\)](#) (affirming the exclusion of witness testimony who used statements of others to form her opinion about the defendant and who did not testify to the frequency she interacted with the defendant that allowed her to form her opinion of him).

<sup>300</sup> See Méndez, *V. Witnesses*, *supra* note 38, at 465 ("[U]nrestrained use of evidence on witness *credibility* may distract and confuse jurors about the substantive issues to be decided."); Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 207 ("This focus on 'worthiness of belief' is intertwined with social hierarchies and related moral judgments that have shaped evidence jurisprudence. It has clear repercussions for witnesses whose race or gender or both trigger distrust or disapprobation.").

<sup>301</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 156 ("[I]n today's atomistic society, people do not have discernable reputations for truthfulness or untruthfulness that can be accurately commented on *in* court.").

<sup>302</sup> *Id.* at 186 ("Most states have gradually adopted the Federal Rules' approach to impeachment.").

<sup>303</sup> See, e.g., [Oregon v. Paniagua, 341 P.3d 906, 910 \(Or. Ct. App. 2014\)](#) (holding that trial court did not abuse its discretion *in* excluding witness's personal opinion about victim's character for truthfulness to impeach victim's testimony during assault trial when witness met victim four years prior to trial but had only seen her five or six times within the last year and indicated she had formed her opinion *in* part on having heard from others that victim had lied to them).

## [\*60] 2. PRIOR CONVICTION EVIDENCE

The same could be said regarding prior convictions. Yet, impeachment by prior convictions requires more careful attention. Even though prior convictions are a subset of specific acts, they have historically been treated differently than prior acts of untruthfulness.<sup>304</sup> The difference *in* treatment is due, *in* part, to the fact that impeachment by prior convictions developed as an impeachment tool later *in* time.<sup>305</sup> Because being convicted of a crime historically made most people incompetent to testify, prior convictions had no use as an impeachment tool.<sup>306</sup> Once that bar was removed, prior convictions became a previous bad act to be used to impeach the *credibility* of a witness.<sup>307</sup> However, jurisdictions disagreed as to the scope of impeachment based on prior convictions.<sup>308</sup>

This disagreement persists today.<sup>309</sup> Jurisdictions differ on whether only convictions of *crimen falsi* should be used to impeach, whether felonies should be used, how remote a conviction must be to be valid for impeachment, whether the impeachment should be subject to a prejudicial analysis under [FRE 403](#), and whether the conviction must be automatically admitted or the court should have discretion on its admissibility.<sup>310</sup>

The FRE provide that a prior felony conviction for a witness, other than the defendant, must be admitted if its probative value is *substantially* outweighed by its prejudicial effect.<sup>311</sup> However, *in* a criminal *case*, a defendant's prior conviction must be admitted "if the probative value of the evidence outweighs its prejudicial effect."<sup>312</sup> Yet, for *crimen falsi*, the evidence must be admitted with [\*61] no further analysis.<sup>313</sup> Furthermore, there is a ten-year limitation on prior convictions evidence; for any older conviction the proponent of the evidence must provide written notice to the adverse party and prove that the evidence substantially outweighs the prejudicial effect.<sup>314</sup> The ease of admission of these types of character for untruthfulness evidence rests on the assumption that the act must be sufficiently extreme to be a crime and that it be an act that was proven beyond a reasonable doubt or admitted by the witness.<sup>315</sup> Therefore, the act should provide a reliable basis to judge the character of a person.<sup>316</sup>

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<sup>304</sup> See Zeigler, *supra* note 293, at 646-47.

<sup>305</sup> [Id. at 639.](#)

<sup>306</sup> *Id.*

<sup>307</sup> [Id. at 639-40.](#)

<sup>308</sup> [Id. at 640-41.](#)

<sup>309</sup> See Zeigler, *supra* note 293, at 662-66.

<sup>310</sup> See *id.*

<sup>311</sup> [FED. R. EVID. 609\(a\)\(1\)\(A\)](#) (subjecting a felony conviction to the balancing test of [FRE 403](#)). [FRE 403](#), *in* pertinent part states: "The court may exclude relevant evidence if its probative value is *substantially* outweighed by . . . unfair prejudice." [FED. R. EVID. 403](#) (emphasis added).

<sup>312</sup> [FED. R. EVID. 609\(a\)\(1\)\(B\).](#)

<sup>313</sup> See [FED. R. EVID. 609\(a\)\(2\).](#)

<sup>314</sup> [FED. R. EVID. 609\(b\).](#)

<sup>315</sup> See Gold, *supra* note 268, at 775.

<sup>316</sup> *Id.*

Nonetheless, this type of reliance does not help explain the divergent treatment between bad acts and prior convictions, such as the time limitation, the ability of bringing acts not related to honesty, the differences on being subject to a balancing test, the balancing test used, or the scope of the cross about the evidence.<sup>317</sup> *In* fact, scholars have been pushing for the realignment of the rules regarding impeachment with prior convictions and bad acts.<sup>318</sup> Some of that harmonizing has occurred.<sup>319</sup> However, there still exist some discrepancies that do not make much sense.<sup>320</sup> For instance, attorneys are allowed to cross under [FRE 608](#) on events that will not be permitted under [FRE 609](#) and get into more detailed information about the events that should have less reliance than prior convictions.<sup>321</sup> Attorneys can also bring *in* convictions that have nothing to do with truthfulness, but cannot use bad acts that do not involve dishonesty.<sup>322</sup>

**[\*62]** Because of the wide acceptance of prior convictions as character for untruthfulness evidence and its limited scope on cross-examination,<sup>323</sup> a proposal for reform on the use of prior convictions evidence *in* the context of SGBV cases that is narrowly tailored to limit the prejudicial effects of such evidence is probably more likely to be adopted than a total overhaul of this evidentiary method. However, the jurisdictional divergence *in* terms of what type of prior convictions can be used and the standards used for admissibility highlights the need for a proposal that considers carefully the crimes covered, the balancing test to which prior convictions should be subjected, and its scope.

*In* addition, because of the lower reliability of this type of evidence *vis- -vis* evidence *in* the form of opinion or reputation,<sup>324</sup> this type of evidence could lead to confusing issues more easily and could be used to play into the biased narratives previously explained.<sup>325</sup> Likewise, this type of evidence deserves more attention because evidence *in* this form could include issues that are not related to credibility (crimes other than *crimen falsi*)<sup>326</sup> or be about crimes not actually committed because of pleading strategies.<sup>327</sup> This evidence

<sup>317</sup> Compare [FED. R. EVID. 608](#), with [FED. R. EVID. 609](#).

<sup>318</sup> Zeigler, *supra* note 293, at 678; Okun, *supra* note 35, at 548-59.

<sup>319</sup> See, e.g., Zeigler, *supra* note 293, at 670-71 (discussing the 1990 Amendments to [FRE 609](#) and how the inconsistencies between 609(a) and 608(b) were slightly remedied).

<sup>320</sup> See, e.g., [id. at 671](#) (discussing the inconsistencies that remain after the 1990 Amendments to [FRE 609](#)).

<sup>321</sup> See [FED R. EVID. 608](#), 609.

<sup>322</sup> For example, under [FRE 609](#), "courts permit [attorneys to ask about] the name of the crime, the date of the crime, and the sentence imposed," but not to go into the conduct itself as *in* [FRE 608](#). Compare [FED. R. EVID. 609](#), with [FED. R. EVID. 608](#); see also Roberts, *supra* note 36, at 1985. Furthermore, the Supreme Court has held that attorneys cannot use convictions garnered *in* violation of the right to counsel as impeachment evidence. [Loper v. Beto, 405 U.S. 473, 483 \(1972\)](#); see also Roberts, *supra* note 36, at 1985-86.

<sup>323</sup> See Gold, *supra* note 268, at 775; [FED. R. EVID. 609](#).

<sup>324</sup> See Gold, *supra* note 268, at 774.

<sup>325</sup> See Montan, *supra* note 38, at 459-62. *In* fact, multiple scholars have advocated for the abolition of this rule. See, e.g., Brian J. Foley, [Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling, 43 TULSA L. REV. 397, 413 \(2007\)](#); Roberts, *supra* note 36, at 2036; Ted Sampsell-Jones, [Implicit Stereotyping As Unfair Prejudice in Evidence Law, 83 U. CHI. L. REV. ONLINE 174, 189-89 \(2017\)](#).

<sup>326</sup> See [FED. R. EVID. 609\(a\)](#).

<sup>327</sup> See Brandon L. Garrett, [Why Plea Bargains Are Not Confessions, 57 WM. & MARY L. REV. 1415, 1425-27 \(2016\)](#) (discussing plea bargaining and how a guilty plea is not necessarily a complete admission to having committed a crime); Roberts, *supra* note 36, at 1993-94.

could also arise *in* more **cases** as it might be more readily available than opinion or reputation evidence. <sup>328</sup>Thus, its [\*63] use as a tool to impeach character for truthfulness *in* SGBV **cases** could have a greater effect. Consequently, the proposal to limit the prejudicial effects of character for untruthfulness evidence *in* the form of prior convictions, *in* the context of SGBV **cases**, should be more comprehensive than the reform of this evidence *in* the form of opinion or reputation.

### 3. PRIOR ACTS OF UNTRUTHFULNESS EVIDENCE

*In* the **case** of prior acts of untruthfulness, the reform should be even more extensive. As scholars have pointed out, "[o]f the four types of witness character evidence, misconduct evidence provides the weakest basis for making a generalization about truthfulness." <sup>329</sup>As discussed, a single act or multiple separate acts do not serve by themselves to predict whether a person would lie *in* a particular context. <sup>330</sup>Moreover, specific acts are a type of evidence to which the witness might not be prepared to respond and explain because it could refer to events that are not memorable. <sup>331</sup>However, jurors tend to give great weight to evidence of prior bad acts. <sup>332</sup>It is for this reason that the admissibility of evidence of bad acts has been restricted since the Eighteenth Century. <sup>333</sup>The main methods employed to restrict impeachment with bad acts have been (1) a total ban on questioning using this type of evidence, and (2) permitting questions on the matter during cross-examination, "but without recourse to rebuttal by extrinsic evidence if the witness denies the acts." <sup>334</sup>

As explained, the FRE follow the second method. While [FRE 608\(b\)](#) allows the impeachment of witnesses with previous acts of untruthfulness, [FRE 403](#) provides, *in* theory, a wall against using this evidence to impeach SGBV victims by excluding evidence [\*64] whose probative value is substantially outweighed by unfair prejudice, confusing the issues, or misleading the jury. <sup>335</sup>*In* practice, however, even if the effects of impeachment with collateral acts of untruthfulness could be unfairly prejudicial, confusing, or misleading to the jury because of the phenomenon of a **woman's** lack of **credibility**, <sup>336</sup>the evidence is usually admitted because it is seen as

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<sup>328</sup> Evidence of a prior conviction is more readily available because a prior conviction is public record, whereas evidence of reputation or opinion requires a person to come to court and testify. See Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUSTICE (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis2019> opinion/just-facts-many-americans-have-criminal-records-college-diplomas; Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 178-79.

<sup>329</sup> Gold, *supra* note 268, at 774.

<sup>330</sup> See Montan, *supra* note 38, at 459-62; Méndez, *V. Witnesses*, *supra* note 38, at 465-66.

<sup>331</sup> Gold, *supra* note 268, at 775.

<sup>332</sup> *Id.* at 775-76 (citing RICHARD E. NESBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENTS 45-46 (1980)).

<sup>333</sup> Kanter, *supra* note 293, at 328-29.

<sup>334</sup> *Id.* at 328.

<sup>335</sup> Rule 403 provides the following:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[FED. R. EVID. 403.](#)

<sup>336</sup> See, e.g., Schafran, *supra* note 21, at 5.

relevant, and its probative value is not outweighed by the prejudicial effects. <sup>337</sup>Thus, [FRE 403](#) does not seem to serve as much of a safeguard to victims of SGBV.

Nor does [FRE 611](#). As commentators have argued, even though [FRE 611](#) grants the court the faculty to limit the interrogation of a witness to protect the witness from harassment or undue embarrassment, <sup>338</sup>"the rule does not include any concrete language indicating what constitutes 'harassment or undue embarrassment,'" nor is there a solid body of **case** law expanding on the meaning of those terms. <sup>339</sup>With no definition that would include the interplay of **credibility** biases for SGBV victims as embarrassment or harassment beyond what a witness would normally endure during cross-examination, the rule serves no protection from defense strategies predicated on the trustworthiness and plausibility biases. <sup>340</sup>Moreover, when an attorney uses a recognized impeachment method, courts usually presume that [FRE 611](#) is not applicable. <sup>341</sup>

**[\*65]** *In* sum, these protections are insufficient for victims of SGBV *in* court and do not facilitate a fair trial *in* these types of **cases**. An easy solution would be to institute a total ban on impeachment using prior acts of untruthfulness. That would not only help *in* the impeachment of SGBV victims but would also address the problems *in* general with this type of evidence. <sup>342</sup>However, most states follow the federal scheme as pertaining to impeachment of a witness's **credibility** with specific acts. <sup>343</sup>Therefore, such a solution does not seem like it would have many adherents.

More importantly, even the states that limit the use of bad acts for impeachment purposes do not have a complete ban on this type of evidence. <sup>344</sup>Out of the nine states that limit evidence of specific acts of untruthfulness, eight states have chiseled a judicial exception for the introduction of such evidence to impeach victims *in cases* of sex crimes with a prior reporting of sexual misconduct not ending *in* conviction or a false accusation. <sup>345</sup>This is irrespective of how the states treat other forms of evidence of untruthfulness. For example, **[\*66]** Florida, <sup>346</sup>Louisiana, <sup>347</sup>and Massachusetts, <sup>348</sup>which only admit evidence of character for truthfulness *in* the

<sup>337</sup> A reason for that result is that judges participate also *in* the trustworthiness and plausibility biases that discount victims' **credibility**. See Schafran, *supra* note 21, at 9, 40; Gender Fairness Implementation Comm., *supra* note 131, at 337-40; St. Joan, *supra* note 131, at 265-66.

<sup>338</sup> See [FED. R. EVID. 611](#).

<sup>339</sup> Lininger, *supra* note 241, at 1387.

<sup>340</sup> See *supra* Part II.

<sup>341</sup> See Lininger, *supra* note 241, at 1387 (citing, *inter alia*, [State v. Perolis, 398 S.E.2d 512, 517 \(W. Va. 1990\)](#) ("no witness should be protected from the embarrassment of proper impeachment")).

<sup>342</sup> See, e.g., Simon-Kerr, **Credibility by Proxy**, *supra* note 28, at 221 (proposing an abolition on the use of reputation, opinion, and prior bad act evidence for impeachment purposes).

<sup>343</sup> *Id.* at 186.

<sup>344</sup> See, e.g., [LA. CODE EVID. art. 608\(B\)](#) ("Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided *in* Articles 609 and 609.1 or as constitutionally required.").

<sup>345</sup> See *infra* notes 346-53 and accompanying text.

<sup>346</sup> [FLA. STAT. §§ 90.609](#), 90.610 (2019). Florida courts have carved out exceptions to the admission of such evidence. See, e.g., [Roebuck v. State, 953 So. 2d 40, 42 \(Fla. Dist. Ct. App. 2007\)](#) (reversing trial court because it did not allow the impeachment of the victim with an alleged false reporting incident based on [section 90.405\(2\) of the Florida Statutes](#), which allows proof of specific incidents of conduct when offered to prove a particular trait of character; *in* this **case**, the "trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without

form of reputation and <sup>[\*67]</sup> prior convictions, have recognized an exception *in* the **case** of sexual crimes. Likewise, Alaska, <sup>349</sup>Illinois, <sup>350</sup>New Jersey, <sup>351</sup>Oregon, <sup>352</sup>and Texas, <sup>353</sup>which have a broader recognition of reputation and prior conviction evidence, have also recognized such an exception.

justification."); *Blue v. State*, 8 So. 3d 454, 455 (Fla. Dist. Ct. App. 2009) (holding that refusing to allow defendant to question victim about previous statements she had made and that would have provided proof that she had made false allegations against the defendant *in* the past, violated defendant's right to a full cross-examination).

<sup>347</sup> [LA. CODE EVID. art. 608](#). Like Florida, Louisiana has also carved out exceptions to the admission of prior allegations. See, e.g., *State v. Smith*, 743 So. 2d 199, 203-04 (La. Ct. App. 1999) (holding that a defendant may present evidence that a victim made prior false allegations regarding sexual activity for impeachment purposes); *State v. Freeman*, 970 So. 2d 621, 624-26 (La. Ct. App. 2007) (conducting a 403 analysis on the introduction of prior accusations and determining that the probative value of evidence that the victim had made prior accusations of kidnapping and rape against a person ultimately acquitted of such charges, was substantially outweighed by danger of unfair prejudice *in* subsequent aggravated rape prosecution as the prior acquittal did not establish that victim made a false accusation, there was no evidence that the victim ever retracted the prior allegation of abuse, and there was no independent witness to testify that the prior allegation was false).

<sup>348</sup> The Massachusetts Guide to Evidence provides insight into the application of the state's rule on character evidence and provides:

The Supreme Judicial Court has "chiseled" a narrow exception to the rule that the testimony of a witness may not be impeached with specific acts of prior misconduct, recognizing that *in* special circumstances (to date, only rape and sexual assault **cases**) the interest of justice would forbid its strict application. [Commonwealth v. LaVelle](#), 414 Mass. at 151-152. *In* [Commonwealth v. Bohannon](#), 376 Mass. 90, 94-96 (1978), the special circumstances warranting evidence of the prior accusations were that (1) the witness was the victim *in* the **case** on trial; (2) the victim/witness's consent was the central issue at trial; (3) the victim/witness was the only Commonwealth witness on the issue of consent; (4) the victim/witness's testimony was inconsistent and confused; and (5) there was a basis *in* independent third-party records for concluding that the victim/witness's prior accusation of the same type of crime had been made and was false. Not all of the Bohannon circumstances must be present for the exception to apply. [Commonwealth v. Nichols](#), 37 Mass. App. Ct. 332, 337 (1994).

MASS. GUIDE EVID. 608 note to subsection (b).

<sup>349</sup> ALASKA R. EVID. 608. Alaska courts have also carved out exceptions for prior false accusations. See, e.g., *Morgan v. State*, 54 P.3d 332, 336 (Alaska Ct. App. 2002) (holding that "if the defendant proves that a complaining witness has made prior false accusations of sexual assault (under the rules explained *in* the next section of this opinion), the defendant is not limited to cross-examining the complaining witness concerning these prior accusations. Rather, the defendant can both cross-examine the complaining witness and present extrinsic evidence on this point.").

<sup>350</sup> ILL. R. EVID. 608. Likewise, Illinois has carved an exception. See, e.g., *State v. Visgar*, 457 N.E.2d 1343, 1350 (Ill. App. Ct. 1983) (deciding that daughter's prior allegation of sexual misconduct by defendant did not warrant a psychiatric examination where defendant had opportunity to attempt to impeach her during cross-examination with regard to such allegation); *State v. Alexander*, 452 N.E.2d 591, 595 (Ill. App. Ct. 1983) (holding that "[t]he trial court did not err *in* ruling that evidence of prior rape complaints by the victim are inadmissible where defendant was unable to *show that the prior complaints were unfounded*") (emphasis added).

<sup>351</sup> N.J. R. EVID. 608. *In* addition to Alaska and Illinois, New Jersey has carved out exceptions *in cases* of sexual **violence**. See, e.g., *State v. Guenther*, 854 A.2d 308, 324-25 (N.J. 2004) (recognizing *in* criminal **cases** an exception to the rule of evidence barring the admission of specific instances of conduct to attack a witness's character for truthfulness that allow a defendant to introduce evidence that the victim has made a prior false criminal accusation when the **credibility** of the victims is the central issue *in* the **case**, and where the proof of the false accusation is not a diversion so that it would overshadow the trial of the charges itself). New Jersey has even included its exception *in* the text of the rule. See N.J. R. EVID. 608(b).

<sup>352</sup> OR. EVID. CODE § 608. Similarly, Oregon has an exception to its rule on the use of prior accusations. See, e.g., *State v. LeClair*, 730 P.2d 609, 615 (Or. Ct. App. 1986) (concluding that the confrontation clause "requires that the court permit a defendant to cross-examine the complaining witness with other accusations she has made if 1) she has recanted them, 2) the accusations were false, or 3) there is some evidence that the victim has made prior false accusations that were false.").

[\*68] The justifications for allowing evidence of prior reporting without a conviction and false accusations to be admitted at trial vary from the right to confrontation,<sup>354</sup> to the history of exceptions to the bar on character evidence,<sup>355</sup> to courts' expansive interpretations of the evidentiary rules.<sup>356</sup> There is an even greater variance amongst jurisdictions *in* terms of (1) whether to allow the use of extrinsic evidence to prove the existence of a prior bad act; (2) whether evidence of a prior non-conviction reported by third parties is admissible; (3) what the standard of admissibility should be regarding extrinsic evidence of prior non-conviction acts; (4) whether a hearing should be conducted to determine admissibility of extrinsic evidence; (5) whether it can be proven that the allegation of a prior bad act is false; (6) how remote the reported prior non-conviction can be from the crime charged; and (7) what the proper scope of extrinsic evidence used to prove the existence of a prior non-conviction bad act should be.<sup>357</sup>

The point of convergence, however, is the admission of a prior no-conviction reporting *in cases* of SGBV and no other types of *cases*,<sup>358</sup> illustrating how the persistence of *credibility* discounting still drives and informs the decision-making process *in* admitting [\*69] this type of evidence.<sup>359</sup> Admitting this type of evidence does not incorporate an analysis of the inherent process of victims *in* recanting accusations and revising accounts.<sup>360</sup> This failure ignores what we know about victims' processing of the aggression and uses the evidence of a prior no-conviction reporting to the detriment of the victim to show that she must be lying *in* the current instance. Such an admission disregards that there are many reasons that a victim's prior report resulted *in* a no-conviction, and that a prior report with a no-conviction does not automatically mean that the victim is lying.<sup>361</sup>

Yet, the creation of exceptions to the admission of prior no-conviction reporting signals what might be truly relevant *in* specific acts of untruthfulness: whether the witness has lied *in* the past and has misused the judicial system *in* a similar context or *in* an analogous manner to the one *in* which she is currently a witness. This would not be to show the victim's propensity to lie, but to show some kind of *modus operandi* or pattern by the victim, or

<sup>353</sup> TEX. R. EVID. 608. *In* addition, Texas has carved an exception for prior false accusations. See, e.g., [Lopez v. State, 18 S.W.3d 220, 225-26 \(Tex. Crim. App. 2000\)](#) (acknowledging that the confrontation clause may require allowing impeachment with prior false accusations).

<sup>354</sup> See, e.g., [Lopez, 18 S.W.3d at 225-26](#) (acknowledging that the confrontation clause may require allowing impeachment with prior false accusations, but declining to admit such evidence); [State v. Barber, 766 P.2d 1288, 1290 \(Kan. Ct. App. 1989\)](#) (explaining how evidence of prior false accusations are relevant to the defendant's confrontation rights, but declining to admit the alleged evidence because there was no indication of prior false accusations on behalf of the victim).

<sup>355</sup> See e.g., [Morgan v. State, 54 P.3d 332, 335 \(Alaska Ct. App. 2002\)](#) (explaining that courts have allowed this type of evidence "consistent with the common-law doctrine that a party could present evidence of a witness's 'corruption'--a term that encompassed evidence of (1) the witness's general willingness to lie under oath, (2) the witness's offer to give false testimony for money or other reward, (3) the witness's acknowledgement of having lied under oath on prior occasions, (4) the witness's attempt to bribe another witness, or (5) the witness's pattern of presenting false legal claims.").

<sup>356</sup> See, e.g., [Guenther, 854 A.2d at 326](#).

<sup>357</sup> See Zeigler, *supra* note 293, at 666-73.

<sup>358</sup> A Westlaw search using the Boolean terms and connectors "prior false allegations' /s *credibility*" shows that the exceptions are made *in* SGBV *cases*.

<sup>359</sup> See, e.g., [State v. Long, 140 S.W.3d 27, 31 \(Mo. 2004\)](#) (en banc) ("The current Missouri rule prohibiting extrinsic evidence of prior false allegations does not strike the appropriate balance. Therefore, a criminal defendant *in* Missouri may, *in* some *cases*, introduce extrinsic evidence of prior false allegations. This rule is not limited to sexual assault or rape *cases*.").

<sup>360</sup> See Scheppele, *supra* note 21, at 138-40.

<sup>361</sup> See, e.g., Tuerkheimer, *supra* note 21, at 30-33 (discussing how reported SGBV *cases* have been mishandled by police leading to no arrest and rape kits sitting on shelves never to be tested).

to prove the victim's bias or fabrication. <sup>362</sup>However, because of the way *in* which some of these prior victim reporting exceptions are formulated, *in* practice the exceptions do not necessarily address these arguably valid goals. <sup>363</sup>Admitting a victim's prior no-conviction reporting without [\*70] further analysis, even *in cases* of false accusations, can be problematic. First, it goes against studies regarding a victim's process of coming forward. <sup>364</sup>Blind admission of prior reports assumes that such a specific act, *in* and of itself, proves that the victim might be currently lying when we know that that might not be the *case*, <sup>365</sup>especially *in* SGBV *cases* where recanting is a natural occurrence not always associated with untruthfulness. <sup>366</sup>Second, not requiring a showing that the victim is currently misusing the judicial system, even *in cases* of prior false allegations, makes the relevancy of this evidence weak, <sup>367</sup>especially *in cases* trying to prove pattern, bias, or fabrication. Moreover, it unduly prejudices the testimony of the victims as triers of fact can be over-persuaded by this type of evidence. <sup>368</sup>

One commentator, Kassandra Altantulkhuur, has focused on the admittance of these specific acts (i.e., prior no-conviction reporting). <sup>369</sup>Altantulkhuur proposes requiring, *in* a separate hearing, "a defendant [who] seeks to use such information . . . to prove [that] [\*71] the prior accusation is demonstrably false." <sup>370</sup>Her proposal "would require defendants to show by clear, convincing, and substantial proof that the victim actually made a false accusation." <sup>371</sup>Once that determination is made, the court should consider the prejudicial effect of allowing

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<sup>362</sup> See, e.g., [State v. Botelho](#), 753 A.2d 343, 346 (R.I. 2000).

<sup>363</sup> See *id.* (stating "that evidence of similar accusations by a complaining witness may be admissible to challenge the witness's *credibility*. . . . The evidence may be admissible even when the allegations were never proven false or were never withdrawn. . . . [R]egardless of whether the accusations were made before or after those made *in* respect to a defendant.") (internal citations omitted); [People v. Diaz](#), 85 A.D.3d 1047, 1050 (N.Y. App. Div. 2013) (explaining that "[e]vidence of a complainant's prior false allegations of rape or sexual abuse is admissible to impeach the complainant's *credibility* [if the] defendant establishe[s] that the [prior] allegation may have been false[, and] . . . that the particulars of the complaints, the circumstances or manner of the alleged assaults, or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the complainant, it is error for the trial court to preclude evidence regarding the prior allegation.") (internal quotation marks and citations omitted); [Rayner v. Georgia](#), 706 S.E.2d 205, 210 (Ga. Ct. App. 2011) (holding that "[e]vidence of prior false allegations of sexual misconduct is admissible to attack the witness's *credibility* and as substantive evidence *in* support of the argument that the charged offense did not occur. However, to protect the complaining witness from unfounded allegations that the witness has made similar false allegations *in* the past, before such evidence can be admitted, the trial court is required to make a threshold determination outside the jury's presence that a reasonable probability of falsity exists.") (internal quotation marks and citations omitted); [Blair v. State](#), 877 N.E.2d 1225, 1233-34 (Ind. Ct. App. 2007) (noting that "[e]vidence of prior false accusations may be admitted only if 1) the complaining witness admits that she had made a prior false accusation of rape; or 2) the accusation is demonstrably false."); [Tibbs v. Allen](#), 486 F. Supp. 2d 188, 196 (D. Mass. 2007) (observing that under Massachusetts law, evidence of an alleged rape victim's prior false allegations of rape is "admissible [ ] only when there is a pattern of prior false accusations; one false accusation does not a pattern make.").

<sup>364</sup> See Scheppele, *supra* note 21, at 138-40.

<sup>365</sup> See Okun, *supra* note 35, at 546-49, 565-66; Roberts, *supra* note 36, at 1996; Méndez, *California's New Law on Character Evidence*, *supra* note 36, at 1051-53; Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 208-209.

<sup>366</sup> See Tuerkheimer, *supra* note 21, at 17-18.

<sup>367</sup> See Johnson, *supra* note 21, at 372.

<sup>368</sup> See, e.g., Gold, *supra* note 268, at 775-76.

<sup>369</sup> Altantulkhuur, *supra* note 50, at 1097-99.

<sup>370</sup> *Id.* at 1120-21.

<sup>371</sup> *Id.* at 1121.

the evidence, barring admission of the no-conviction report if the court determines that the defendant is only trying to prove propensity. <sup>372</sup>

Although such a proposal would deal with the problems of allowing impeachment through a prior no-conviction reporting, it would distract the court from the real issue, which is the current accusation. <sup>373</sup>It would also mean having a new trial within a trial, which would mean more resources, time, and money spent litigating this issue. <sup>374</sup>While Altantukhuur's proposal deals with some of the issues of specific acts of untruthfulness, <sup>375</sup>it does not deal with all of them and ignores the type of specific acts of untruthfulness that can be introduced *in* more than eighty percent of jurisdictions; further demonstrating the need for a rule that is more comprehensive to protect victims of SGBV and facilitate the fair trial of these types of **cases**.

The need for a more comprehensive rule becomes more apparent when we consider the only jurisdiction *in* the United States that previously implemented a total bar on the use of prior acts of untruthfulness as impeachment evidence: California. Prior to 1982, California had a complete bar on the use of specific acts evidence *in* both criminal and civil **cases**. <sup>376</sup>However *in* 1982, voters approved the *Right to Truth in Evidence Proposition* amendment to the California [\*72] evidence rules to prevent the exclusion (with few exceptions) of relevant evidence *in* criminal proceedings. <sup>377</sup>With the enactment of the amendment, the bar against the use of prior acts existed only *in* the civil context, while *in* the criminal setting the rules are even more liberal than their federal counterpart. <sup>378</sup>As a result, California had fewer victims reporting crimes *in* categories such as sexual abuse and **domestic violence**. <sup>379</sup>Rape crisis counselors stated under oath that they knew of victims who decided not to come forward because of the reform *in* the law. <sup>380</sup>This information from California suggests a correlation between the use of character for untruthfulness impeachment strategies and under-reporting, under-prosecution, and under-conviction. <sup>381</sup>Moreover, the change *in* victim reporting after California's change *in* its

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<sup>372</sup> *Id.* at 1121-22.

<sup>373</sup> See Montan, *supra* note 38, at 460 ("One of the general dangers presented by specific-instance character evidence is the potential to confuse or distract the jury from the substantive issues being tried. Evidence of specific acts is usually not relevant to the issues being tried, which can create a danger of confusion for the jury.").

<sup>374</sup> See *id.* at 463.

<sup>375</sup> See generally, Altantukhuur, *supra* note 50.

<sup>376</sup> Miguel A. Méndez, *Comparing the Federal Rules of Evidence with the California Evidence Code-Proposition 8 and the Wisdom of Using Initiatives As A Rule-Making Device*, 36 SW. U. L. REV. 571, 577 (2008); Miguel A. Méndez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1008 (1992).

<sup>377</sup> Friedland, *supra* note 242, at 5.

<sup>378</sup> *Id.* at 7-8.

<sup>379</sup> See *id.* at 27.

<sup>380</sup> *Id.*

<sup>381</sup> Establishing a causal link between the under-adjudication *in* favor of victims and the use of prior acts of untruthfulness to impeach victims' character for untruthfulness is extremely difficult as there are many variables that cannot be controlled *in* a study. For example, it is difficult to compare jurisdictions that have more limited rules than the FRE, such as Alaska, Florida, Illinois, Louisiana, Massachusetts, New Jersey, Oregon, Tennessee, and Texas, with jurisdictions that have adopted [FRE 608\(b\)](#) because the existence of other rules and procedures that are different *in* those jurisdictions can affect the outcome, and therefore, impede the establishment of a causal link. Moreover, there is little to no point *in* only looking at statistics within jurisdictions that completely bar the use of prior acts because such a ban on prior bad acts evidence would apply, for the most part, across the board to all adjudications, not just *in* SGBV **cases**.

evidentiary laws suggests that victims are less likely to come forward when the defendant can inquire into character for untruthfulness evidence. <sup>382</sup>

Like California, Tennessee has also distanced itself from the FRE *in* terms of the use of prior acts of untruthfulness as impeachment evidence. Although Tennessee does allow specific acts of untruthfulness to be used during impeachment, it allows this only after a hearing outside the presence of the jury to determine the factual basis and probative value of the prior act if the act was done within 10 years of the commencement of the current action. <sup>383</sup>If the specific act is older than 10 years, the court is required to consider the [\*74] prejudicial effect of the evidence, as compared to the probative value. <sup>384</sup>Although this safeguard is a great addition, it might not protect victims of SGBV effectively. The standard to allow the specific acts is whether it

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<sup>382</sup> Friedland, *supra* note 242, at 27, 29.

<sup>383</sup> Rule 608 of the Tennessee Rules of Evidence, titled "Evidence of Character and Conduct of Witness," provides:

(a) **Opinion and Reputation Evidence of Character** -- The *credibility* of a witness may be attacked or supported by evidence *in* the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

(b) **Specific Instances of Conduct** -- Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided *in* Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines *in* the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(3) If the witness to be impeached is the accused *in* a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on *credibility* outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but *in* any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(c) **Juvenile Conduct** -- Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused *in* a criminal *case* if the conduct would be admissible to attack the *credibility* of an adult and the court is satisfied that admission *in* evidence is necessary for a fair determination *in* a civil action or criminal proceeding.

TENN. R. EVID. 608.

<sup>384</sup> TENN. R. EVID. 608(b)(2).

has probative value and a reasonable factual basis for the inquiry.<sup>385</sup> While this standard is better than the current good faith basis usually employed to determine whether an attorney can question about a prior bad act,<sup>386</sup> it is still a pretty low standard to meet, considering that socially, we overvalue prior acts of untruthfulness as predictors of character for truthfulness.<sup>387</sup> Moreover, as discussed *supra* Part II, if judges do not have more particularized guidance on allowing that type of evidence *in cases* of SGBV, they will fail to see the need to exclude it, as they operate as the rest of society under the *credibility* biases associated with women and victims.<sup>388</sup>

*In fact, case* law applying Tennessee's Rule of Evidence 608 suggests that when more specific guidance is given to judges, issues [\*75] related to the prejudicial effects of character evidence for truthfulness can be reduced.<sup>389</sup> For example, *in* a rape *case*, the trial and the appellate court following Tennessee's Rule of Evidence 608 excluded evidence of the victim's bad checks and fraudulent conduct during marriage because the lower court found no reasonable basis for the questions and because of the remoteness of the conduct.<sup>390</sup> Accordingly, a rule to better regulate the use of prior acts *in cases* of SGBV should include more specific standards rather than a good faith basis and *FRE 403* and *611* protections.

*In sum*, the current landscape on the impeachment of character for truthfulness illustrates the need for a rule that protects SGBV victims during cross-examination. No state has such a protection. Moreover, as discussed, the limited protections against the prejudicial effects of evidence for untruthful character do not require evidence of a victim's untruthfulness to be related to current specific acts of misusing the judicial system, nor do the protections consider how attorneys use this evidence to argue *cases* predicated on the societal *credibility* discounting of SGBV victims.<sup>391</sup>

#### B. Proposed Rule for the Impeachment of SGBV Victims' Character for Truthfulness

The proposal presented here attempts to fill the gaps *in* the *FRE in* a way that could help transform society's perception of *women's credibility* and SGBV victims. Considering that the majority of jurisdictions, *in* one way or another, follow the *FRE*,<sup>392</sup> the language used *in* the proposal is based on the language employed by the *FRE*. New language is italicized, while existing *FRE* language remains *in* plain typeface.

The Rule envisions three different balancing tests depending on the type of character for truthfulness evidence and lists concrete factors to aid courts *in* weighing the probative value of the character for untruthfulness evidence against its prejudicial effects, specifically *in* SGBV *cases*. It also provides for a hearing presided over by a [\*76] separate judge when the evidence at issue is character for untruthfulness evidence *in* the form of specific instances. The proposed rule attempts to temper the prejudicial effects caused by *credibility* biases while balancing other considerations, such as a long-standing tradition of impeaching witnesses with evidence for untruthfulness, the constitutional protections *in* criminal *cases*, and judicial efficiency. This procedure would ensure

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<sup>385</sup> *Id.*

<sup>386</sup> See [United States v. Nixon, 777 F.2d 958, 970 \(5th Cir. 1985\)](#); [United States v. Ruiz-Castro, 92 F.3d 1519, 1528-29 \(10th Cir. 1996\)](#).

<sup>387</sup> See, e.g., Gold, *supra* note 268, at 775-76.

<sup>388</sup> See, e.g., St. Joan, *supra* note 131, at 265-66.

<sup>389</sup> See, e.g., [State v. Manning, No. 03C01-9501-CR-00012, 1998 WL 103317, at \\*14 \(Tenn. Crim. App. Feb. 27, 1998\)](#).

<sup>390</sup> *Id.*

<sup>391</sup> See *supra* Part II.

<sup>392</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 186.

that SGBV victims enjoy a more impartial trial, while preserving the core values of our criminal and probative systems.

Rule 101X. SCOPE; DEFINITIONS

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**(b) Definitions.**

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(7) "*sexual and gender-based **violence cases***" refers to criminal or civil **cases** regarding intimate partner **violence**, sexual assault, rape, sexual harassment, and stealthing.

Rule 403X. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 608X. WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

**(a) Reputation or Opinion Evidence.**

A witness's **credibility** may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony **in** the form of an opinion about said character.

**In cases** involving sexual and gender-based **violence**, if the only testimony to support the character for untruthfulness of the victim is **in** the form of an opinion or reputation provided by the defendant, **[\*77]** the court may admit the evidence if it determines, following the factors enumerated **in** Rule 416X(b)(4), that the probative value of the evidence substantially outweighs its prejudicial effects.

Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

**(b) Prior Convictions.**

(1) **In General**! The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(a) for a crime that, **in** the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(i) must be admitted, subject to Rule 403X, **in** a civil **case** or **in** a criminal **case in** which the witness is not a defendant, *except as provided in (ii)*;

(ii) **in** a civil or criminal sexual and gender-based **violence case**, the prior conviction of the victim must be admitted only after the court determines, following the factors enumerated **in** Rule 416X(b)(4) and any evidence of an incentive to plead, that the probative value of the evidence about the victim's character for untruthfulness is not outweighed or closely balanced by its prejudicial effect; and

(iii) must be admitted **in** a criminal **case in** which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant;

(b) for any crime regardless of the punishment that, **in** the convicting jurisdiction, required proving--or the witness's admitting--a dishonest act or false statement, *the evidence*:

(i) must be admitted, subject to Rule 403X, in a civil case or in a criminal case except as provided in (ii); and

(ii) in a civil or criminal sexual and gender-based violence case, the prior conviction of the victim must be admitted only after the court determines, following the factors enumerated in Rule 416X(b)(4) and any evidence of an incentive to plead, that the probative value of the evidence about the victim's character for untruthfulness substantially outweighs its prejudicial effects.

(2) Limit on Using the Evidence After 5 Years. This subdivision (2) applies if more than 5 years have passed since the witness's conviction [\*78] or release from confinement for it, whichever is later. Evidence of the conviction is admissible after the proponent gives the adverse party reasonable written notice of the intent to use it, so that the party has a fair opportunity to contest its use, only if:

(a) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect;

(b) in a case of a victim's prior conviction in a sexual and gender-based violence case, after the court determines following the factors enumerated in Rule 416X(b)(4) that the probative value of the evidence is not outweighed or closely balanced by its prejudicial effect; and

(c) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(3) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(a) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(b) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(4) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(5) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

**(c) Prior Acts of Untruthfulness. (Specific Instances of Conduct)**

Except for a criminal conviction under the special rules provided in section (b) of this rule, extrinsic evidence is not admissible [\*79] to prove specific instances of a witness's conduct to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow the opposing party to inquire into such specific acts of untruthfulness if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

*If the character for truthfulness being called into question is that of a victim in a sexual and gender-based violence case, the court must follow the procedure established in Rule 416X before allowing the impeachment with a prior act of untruthfulness.*

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness or untruthfulness.

*Rule 416X. IMPEACHMENT OF SEXUAL AND GENDER-BASED **VIOLENCE** VICTIMS WITH PRIOR ACTS OF UNTRUTHFULNESS*

**(a) Requirement of a Hearing Presided Over by a Different Judge .**

***In** any civil or criminal sexual and gender-based **violence case**, the defense may inquire into specific acts of untruthfulness of the victim, provided that the court **in** a hearing presided over by a separate judge or magistrate, determines, following the procedures set out **in** this rule, that the evidence about the victim's character for untruthfulness is not outweighed or is closely balanced by its prejudicial effect, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury.*

**(b) Procedure to Determine Admissibility .**

*(1) **Motion**. A defendant that intends to offer evidence about the character for untruthfulness of a sexual and gender-based **violence** victim, **in** the form of specific acts must:*

- 1. file a motion that specifically states the intention to use evidence **in** the form of specific acts to impeach the character for truthfulness of the victim, and lists and describes the specific acts of untruthfulness;*
- 2. do so at least 14 days prior to the commencement of the trial, unless the court, for good cause, sets a different time before trial;*

*[\*80] i. **in** all civil **cases**, if the defendant does not file the motion within the period established, the defendant will waive the right to present such evidence;*

*ii. **in** all criminal **cases**, if the defendant does not file the motion before the commencement of the trial, the defendant must at least do so before the victim testifies; if not the defendant will waive his right to present such evidence, unless the Court determines that said evidence is of exculpatory nature;*

*3. serve the motion on all parties; and*

*4. notify the victim or, when appropriate, the victim's guardian or representative.*

*(2) **Evidence to be Presented by the Defendant**. The defendant can present evidence of the following:*

- 1. the specific acts of untruthfulness;*
- 2. how those specific acts are related to a claim that the victim is currently misusing the judicial system or has done so **in** the past;*
- 3. the victim maliciously or falsely filed civil or criminal sexual and gender-based **violence** actions **in** the past;*
- 4. the victim intends to cause harm to the defendant beyond the negative effects commonly associated with a judicial action by filing the current cause of action;*
- 5. proof of the victim's character for untruthfulness; and*
- 6. any other evidence that would make the use of specific acts of untruthfulness more reliable.*

*The use of extrinsic evidence is allowed. Such use of extrinsic evidence is exclusively for the purposes of the hearing under this Rule.*

*(3) **Evidence to be Presented by the Victim or on the Victim's behalf**. The prosecution, the plaintiff, or the Appointed Attorney can present evidence of the following:*

1. *the character for truthfulness of the victim;*
2. *the lack of evidence about the victim currently misusing the judicial system or having done so **in** the past;*
3. *the remoteness of the specific acts;*
4. *any evidence to rebut the veracity of the specific act of untruthfulness;*
5. *testimony explaining the recanting of charges; or*
6. *any other evidence that would make the use of specific acts of untruthfulness less reliable.*

**[\*81]** *The use of extrinsic evidence is allowed. Such use of extrinsic evidence is exclusively for the purposes of the hearing under this Rule. The victim is not required to present any evidence **in** order for the court to make its determination.*

(4) *Factors to Consider. **in** making its determinations **in** (5) and (6), the court should consider the following factors:*

1. *amount and scope of the evidence of character for untruthfulness;*
2. *how the evidence proves character for untruthfulness;*
3. *how the evidence of character for untruthfulness is related to a claim that the victim is currently misusing the judicial system or has done so **in** the past;*
4. *remoteness of the specific acts;*
5. *evidence of the veracity or falsity of the acts, the opinion, or reputation;*
6. *evidence of the victim maliciously or falsely filing civil or criminal sexual and gender-based **violence** actions **in** the past;*
7. *evidence of the character for truthfulness of the victim;*
8. *evidence explaining the recanting or presentation of previous allegations of sexual and gender-based **violence**; and*
9. *any other evidence that would speak to the reliability of using the evidence to determine character for untruthfulness or truthfulness.*

(5) *Probative Value Outweighed. After the hearing, if the court determines that the probative value of the evidence of the victim's untruthful character is closely balanced or outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge, the court will issue a written order stating that any line of inquiry into those issues will not be allowed during the trial and the defense will be sanctioned if it disregards said order. **in** making such determination the court must balance the probative value of the evidence and its prejudicial effect considering the factors listed **in** Rule 416X(b)(4).*

(6) *Concerns Outweighed. After the hearing, if the Court determines that the probative value of the evidence of the victim's untruthful character is not closely balanced nor outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or **[\*82]** the judge, the court will issue an order stating which specific acts may be inquired into during cross-examination **in** the trial with the purpose of impeaching the victim's character for truthfulness. The scope of such cross-examination will be limited to the occurrence of the specific act **in** question. **in** making such determination the court must balance the probative value of the evidence and its prejudicial effect considering the factors listed **in** Rule 416X(b)(4).*

(7) Appointment of Attorney Under Special Circumstances. *In criminal cases*, if the court understands that the interests of the victim are not being adequately represented by the State, or the victim's safety is *in peril*, the court may appoint an attorney to represent the victim during the hearing or the victim's testimony *in trial*. *In all civil cases*, if the court determines that self-representation could result *in undue psychological burden* to the victim or the victim's safety is *in peril*, the court may appoint an attorney to represent the victim during the hearing or the victim's testimony *in trial*.

(8) Sealed Hearing and Materials. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

### C. Advisory Comments on the Rule

As can be inferred, the purpose of the Rule is to prevent attorneys from accessing credibility biases based on trustworthiness and plausibility and using them as part of their defense to discount the victim's testimony, while respecting the reliance jurisdictions grant to character evidence for untruthfulness. To do so, the Rule attempts to temper our knowledge of the phenomenon that evidence of character for untruthfulness is not a good predictor of a witness lying during a trial with the well-established practice of admitting this type of evidence *in* judicial proceedings, especially *in* SGBV cases. To balance all of the interests at stake, including the right of confrontation, the Rule envisions the use of three different standards which depend on the form of the evidence for character for untruthfulness and its perceived reliability as a predictor of a witness lying.

#### [\*83] 1. BALANCING TESTS

For evidence that is perceived to be most reliable--evidence *in* the form of reputation or opinion--for determining a witness's character for untruthfulness, <sup>393</sup>the standard would remain the one set forth *in* FRE 403. On the other hand, for categorically less reliable evidence, such as prior convictions and specific acts of untruthfulness, <sup>394</sup>the proposed Rule establishes two different standards and instructs the court to take into account specific factors associated with SGBV cases, such as the inherent biases involved *in* these types of cases. These factors will aid the court *in* making a more accurate determination of the prejudicial effects of character for untruthfulness evidence *in* SGBV cases. The two different standards available for such an analysis also recognize that there is a diverse degree of perceived reliability of the various forms of character for untruthfulness evidence. <sup>395</sup>

For prior convictions other than *crimen falsi* and specific acts of untruthfulness, which have been categorized as the least reliable form of character evidence, <sup>396</sup>the Rule provides a more stringent standard: impeachment with character for untruthfulness evidence is prohibited if the probative value of the evidence of the victim's untruthful character is closely balanced or outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge. However, for prior convictions for *crimen falsi*, evidence *in* the form of opinion or reputation supported solely by the defendant, or prior convictions older than five years, the standard would be an intermediate balancing test as to whether the probative value substantially outweighs the prejudicial effects.

#### 2. SEPARATE HEARING FOR DETERMINING IMPEACHMENT WITH PRIOR ACTS OF UNTRUTHFULNESS

[\*84] *In* the case of specific acts, the Rule also requires a hearing presided over by a separate judge or magistrate. As discussed, prior acts of untruthfulness are the least reliable type of character for untruthfulness

<sup>393</sup> See Simon-Kerr, Credibility by Proxy, *supra* note 28, at 179-86 (discussing the use of reputation and opinion evidence over time and the reliance on such evidence).

<sup>394</sup> See Gold, *supra* note 268, at 774.

<sup>395</sup> Compare Simon-Kerr, Credibility by Proxy, *supra* note 28, at 179-86, with Gold, *supra* note 268, at 774.

<sup>396</sup> See Gold, *supra* note 268, at 774.

evidence but the most persuasive *in* leading a fact finder to think that a witness is lying. <sup>397</sup>Thus, *in* order to balance the right of confrontation *in* criminal **cases** and the extended practice of relying on evidence of character for untruthfulness with specific act evidence's inherently prejudicial effects, <sup>398</sup>the Rule contemplates both a hearing and a more stringent standard to determine whether this type of evidence should be admitted.

Contrary to the proceeding laid out *in* Tennessee's Rule of Evidence 608 or a *Daubert* hearing, <sup>399</sup>the proposed Rule requires a hearing to be presided over by a judge other than the one that will be presiding over the underlying SGBV matter. This serves to better protect the impartiality of the court proceedings by shielding the parties from potential future biased adjudications and avoiding parties strategizing *in* response to their perception of the judge's rulings. As enumerated *in* proposed Rule 416X(b)(3)-(4), the hearing calls for the disclosure of evidence that the parties could present during the trial. Even if during the hearing the parties do not present evidence that could come up again, the totality of the separate proceeding could influence future rulings.

Triers of fact do not forget about evidence presented just because it has not been admitted into evidence. <sup>400</sup>*In* fact, jurors tend to rationalize their judgments based on evidence excluded using the evidence admitted. <sup>401</sup>This integrative process is not exclusive to jurors, as judges are susceptible to it as well. <sup>402</sup>Considering the adverse effects this integrative process could have on both the defendant's **case** and the victim's testimony, the proposed Rule 416X breaks **[\*85]** away from the fiction that judges, contrary to jurors, would be able to compartmentalize the information and ignore the evidence that has not been admitted.

By having a different judge decide the admissibility of the evidence of specific acts of untruthfulness, the Rule seeks to preserve the impartiality and fairness needed for the decision-making process. Under the proposed Rule, the court, during the separate hearing, would hear any relevant extrinsic evidence. *In* order to avoid the trier of fact's rulings being unfairly influenced by the information presented at this previous admissibility hearing--while also protecting the privacy of the victim--the Rule requires that the hearing is conducted by a separate judge or magistrate and that the record, motions, and related materials be sealed.

This has the added benefit of preventing the parties from adapting their trial strategies to fit the parties' perception of the judge's disposition simply based on what the judge ruled at the preliminary admissibility hearing. For example, the parties will not have to decide whether to ask the judge to recuse himself because it appears that the evidence discussed during the hearing could influence his rulings during the trial. *In* that way, parties will not have to enter into a cost-benefit analysis about losing political capital with the judge by moving to recuse him. *In* addition, the parties will not have to consider how certain evidence that was not discussed during the hearing will play out *in* light of what transpired during the previous proceeding. The sealed nature of the preliminary admissibility hearing, as well as the use of a second, independent judge, allows the parties to maintain a clean slate with the actual trial judge.

These safeguards make the procedures *in* Rule 416X different from those under Tennessee's Rule of Evidence 608. Tennessee's Rule of Evidence 608 calls for a determination that "the alleged conduct has probative value and

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<sup>397</sup> See *id.*

<sup>398</sup> See *supra* Part II.

<sup>399</sup> See [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-94 \(1993\)](#) (explaining the factors a court must consider to determine if an expert is qualified before allowing him to testify).

<sup>400</sup> See Kassin & Sommers, *supra* note 58, at 1053.

<sup>401</sup> *Id.*; see also Studebaker & Penrod, *supra* note 58, at 257.

<sup>402</sup> See St. Joan, *supra* note 131, at 282 ("Ample evidence indicates that many judges adopt the dominant cultural myths about **domestic violence** and fail to understand the common experiences of abused women. Some judges deeply resist evidence that could challenge their cultural beliefs about **domestic violence**.").

that a reasonable factual basis exists for the inquiry." Contrary to Rule 416X, this procedure does not entail presenting evidence that could not be introduced during the trial. Thus, the proposed Rule 416X protects the impartiality of the upcoming proceedings.

A similar reasoning explains the safeguards Rule 416X provides that are not available at a *Daubert* hearing,<sup>403</sup> namely that a Rule [\*86] 416X hearing must be presided over by a different judge. The purpose of a *Daubert* hearing is to determine whether the expert meets the requisite level of qualifications and that the testimony is based on reliable methodologies.<sup>404</sup> *In* essence, a *Daubert* hearing can be compared to a more stringent *voir dire* of the witness that is removed from the presence of the jury to prevent misleading them. However, even if the court, contrary to Rule 416X, is never asked to hear evidence that is excluded from trial, parties could theoretically delve into matters that may later come up *in* trial during an expert's *voir dire*. Yet, what is being ascertained *in* the *Daubert* hearing is how to interpret facts that are already part of the record.<sup>405</sup> On the other hand, the procedure of proposed Rule 416X seeks to determine if the evidence regarding the **credibility** of the witness who is providing relevant testimony should be admitted. As a result, the extent of what the court is doing *in* a *Daubert* hearing is vastly different from a Rule 416X hearing.

The *Daubert* hearing decides the admissibility of an expert's interpretation by looking at her qualifications and methodology.<sup>406</sup> Once the court determines that an expert's interpretation of the facts should not be heard, that interpretation of the facts will have no bearing on the **case**.<sup>407</sup> And if the expert testimony is admitted, the court essentially makes a determination that the testimony should be considered by the jury.<sup>408</sup> This implies that there is no real issue of the judge's future rulings being unfairly colored by the hearing.

Rule 416X, *in* contrast, is looking at evidence that affects the **credibility** of a witness. The risk of contaminating the judge with evidence that could later be determined to have no bearing on the **credibility** of the witness is therefore always present and could affect either of the parties *in* unpredictable ways.<sup>409</sup> This critical difference between the *Daubert* hearing and the hearing under Rule 416X warrants that the latter needs to be presided over by a different judge as opposed to the former, which does not necessarily need a separate judge.

### [\*87] 3. REALIGNMENT OF ADMISSIBILITY OF PRIOR ACTS WITH ADMISSIBILITY OF PRIOR CONVICTIONS

The Rule also tries to harmonize impeachment by character for untruthfulness evidence using specific non-criminal untruthful acts with impeachment by prior convictions. As discussed, these are both technically specific acts, which only differ as to the criminality of the act and the prior judicial determination that the act has occurred.<sup>410</sup> For that reason, the proposed Rule employs a different balancing test for prior convictions because that type of specific acts evidence is generally perceived as more reliable than specific acts of non-criminal untruthfulness evidence.<sup>411</sup> However, there is no reason to have two different standards regarding the time span required

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<sup>403</sup> [Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592-93 \(1993\)](#).

<sup>404</sup> [Id. at 592-94](#).

<sup>405</sup> [Id. at 591-92](#).

<sup>406</sup> [Id. at 592-94](#).

<sup>407</sup> See [id. at 597](#).

<sup>408</sup> See [id. at 595](#).

<sup>409</sup> See Epstein & Goodman, *supra* note 93, at 405 (noting how judges tend to disbelieve victims of SGBV).

<sup>410</sup> Compare [FED. R. EVID. 608\(b\)](#), with [FED. R. EVID. 609](#).

for admission or whether the evidence is subject to [FRE 403](#) analysis. Accordingly, the proposed Rule departs from the FRE by subjecting all prior convictions for *crimen falsi* (*in non-SGBV cases*) to a [FRE 403](#) analysis and by limiting the use of both prior acts of untruthfulness and prior convictions to a time limit of five years.

The Rule rejects the FRE's idea that prior acts of untruthfulness could be admissible irrespective of when they occurred, while prior convictions could be admissible only if they are not older than ten years.<sup>412</sup> It is counterintuitive to limit impeachment with a prior conviction and not limit it as to a prior bad act whose criminality is less and to which the witness has no incentive of remembering.<sup>413</sup> Because of the lack of incentive to remember a non-serious, prior bad act,<sup>414</sup> the Rule limits its use to acts within the last five years, so that the witness could have a better memory when responding to the impeachment.

#### [\*88] 4. COUNSEL FOR VICTIM

*In* addition, the proposed Rule provides for the appointment of a victim's counsel *in cases in* which the interests of the victim are not adequately represented. This addition of a possible trilateral process is based on the recognition that the objectives of prosecutors and victims diverge greatly *in* terms of the protection of victims' privacy, impeachment of victims, and standards for measuring the success of the *case*.<sup>415</sup> Professor Lininger poignantly describes these tensions by stating

prosecutors do not share victims' sense of urgency *in* protecting against disclosure of sensitive personal information. Prosecutors are generally very cautious about making evidentiary objections. They fear objections will signal to jurors that the government has something to hide. Another reason why prosecutors may forego valid objections is that by giving defense counsel wide leeway, prosecutors eliminate possible appellate grounds. Prosecutors have an ethical and constitutional obligation to disclose material that undermines the *credibility* of the prosecution's witnesses. Cynical prosecutors may believe that defense harassment of accusers is helpful because it may outrage the jury and increase the likelihood of conviction. Victims, on the other hand, have no ethical obligation to be forthright about their foibles, and they have a much stronger interest *in* privacy.

There is a second reason why the bilateral adversarial model inaccurately describes the relationship between prosecutors and victims: The government frequently impeaches accusers. . . . The convergence of "no drop" policies and stricter confrontation requirements make such impeachment far more likely than *in* the past.<sup>416</sup>

<sup>411</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179-86 (discussing the use of reputation and opinion evidence over time and the reliance on such evidence); Gold, *supra* note 268, at 774 ("Of the four types of witness evidence, [noncriminal] misconduct evidence provides the weakest basis for making a generalization about truthfulness.").

<sup>412</sup> Compare [FED. R. EVID. 608](#), with [FED. R. EVID. 609](#).

<sup>413</sup> Gold, *supra* note 268, at 775.

<sup>414</sup> *Id.*

<sup>415</sup> Lininger, *supra* note 241, at 1394.

<sup>416</sup> [Id. at 1394-95](#). *In* addition to those reasons, Professor Lininger also adds that:

One final reason for the discordant relationship between the prosecutor and the accuser is the different standard by which the two groups measure the success of a prosecution. Prosecutors have a short-term perspective. They focus on the jury verdict and the length of the sentence. A guilty verdict and a long sentence mean that the prosecution has prevailed; an acquittal or a short sentence brings disappointment. Prosecutors have other ancillary concerns such as managing huge caseloads and maintaining good relationships with repeat players *in* criminal court, but their primary concern is the "scorecard" of convictions and jail time. The accuser, for her part, has a far different gauge for measuring the success of a prosecution. A prosecution is successful for the accuser if it facilitates her long-term emotional recovery, strengthens her

**[\*89]** Considering these tensions, it is important that the victims have a mechanism to make sure that events that might have no bearing to the cause of action do not come up and that someone protects the victim from such inquiries. <sup>417</sup>We currently lack such a mechanism *in* SGBV **cases**, and the Rule seeks to correct that by providing counsel for the victim at the hearing and during the trial. Even if the hearing does serve as an incentive for the prosecution to defend the interests and privacy of the victim, the prosecutor might have a strategy that does not guarantee that victims would be protected from impeachment to her character for untruthfulness. <sup>418</sup>For that reason, the possibility of a trilateral process is of utmost importance if the system seeks to correct the problems of under-prosecution. <sup>419</sup>This representation should also extend to civil **cases** when the victims are **[\*90]** proceeding pro se, as a way to level the playing field and avoid undue revictimization.

The Rule, however, does not protect against the revictimization that can happen due to the prosecution's impeachment of the victim because of no-drop prosecutions or declaration of the victim as a hostile witness. <sup>420</sup>Rule 416X only operates when an opposing party impeaches an SGBV victim's character for truthfulness and *in* no other context. This would allow jurisdictions that believe no-drop prosecution rules are necessary to continue that practice. <sup>421</sup>

## 5. NOTIFICATION REQUIREMENT

Further, the Rule attempts to make the proceedings as fair as possible by requiring the defendant to notify the prosecution or the victim of his intention to use evidence of specific acts of untruthfulness and list the acts intended to be used. Part of the problem with using specific acts of untruthfulness is that contrary to other forms of character for untruthfulness evidence, "to the extent that misconduct evidence is weak or even misleading, the witness [the victim] may be ill prepared to explain the defects of that evidence." <sup>422</sup>Giving the victim the opportunity to rebut the evidence puts the court *in* a better position to weigh the probative value of the evidence of character for untruthfulness against its prejudicial effects. *In* criminal **cases**, the Rule seeks to balance the right to confrontation with the notification requirement, by providing that the defendant has until the commencement of the trial to file the motion and notify the prosecution and the victim before waiving his right to use this evidence. Finally, as a corollary of the trilateral process, the Rule provides for the motion to be sent directly to the victim, this way the victim can decide whether to initiate the trilateral process.

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sense of self-determination, and leaves open the possibility of rebuilding interpersonal relationships (perhaps even with the defendant). *In* addition, the victim hopes that the prosecution will improve - or at least not limit - the odds of success *in* parallel civil litigation; prosecutors are subject to ethical rules that prohibit them from taking actions to assist civil proceedings, and prosecutors typically regard parallel civil litigation as a nuisance that hinders the attainment of prosecutorial goals.

[Id. at 1395-96.](#)

<sup>417</sup> For example, a trilateral process could have helped Jennifer when she felt that the prosecutor was not interested *in* defending her interest. See *supra* Part I.

<sup>418</sup> See Lininger, *supra* note 241, at 1394-95.

<sup>419</sup> As Professor Lininger suggests, the trilateral process should be a possibility *in* every SGBV **case** and even more extensive than the processes proposed here. Lininger, *supra* note 241, at 1396.

<sup>420</sup> [Id. at 1362.](#)

<sup>421</sup> However, as Professor Lininger advocates, these jurisdictions should incorporate the trilateral process at least for proceedings *in* which the interests of the victims collide with those of the prosecution. [Id. at 1395-96.](#)

<sup>422</sup> Gold *supra*, note 268, at 775.

*In* sum, the Rule respects the reliance our evidentiary system grants to character evidence for untruthfulness and the right of confrontation while making trials of SGBV *cases* fairer by preventing attorneys from accessing biased narratives about victims' lack of *credibility* and using them as part of their defense.

[\*91] D. *Proposed Rule for Impeachment in Action*

Applying the Rule to Jennifer's *case*<sup>423</sup> shows how the Rule could affect outcomes and shield the process from biases. *In* Jennifer's *case*, the evidence regarding the lies on Facebook, the loan application, the use of a married name, and the extra-marital pregnancy constitute prior acts of untruthfulness. Thus, the admissibility of such evidence would be a matter to be adjudicated during the separate hearing established *in* Rule 416X. However, the evidence of bias (divorce and future litigation), contradiction (Facebook posts not showing bad moments and car buying), perception (mental health and drug use), and lack of verification (no previous police reports and no reporting to friends or family) would not be subject to the hearing procedure established *in* Rule 416X as they are not specific acts of untruthfulness. That means that the defendant would be able to introduce that evidence subject to [FRE 403X](#) and [FRE 608X](#).

When the court considers the evidence of Jennifer's prior acts under Rule 416X, it should conclude that all of the specific acts *in* Jennifer's *case* should be excluded. The defense has four acts to show that Jennifer has a character for untruthfulness. However, the court should not only consider the quantity of specific acts but how probative these acts are of the victim lying. *In* Jennifer's *case*, two of the four acts are inconsequential acts of untruthfulness related to social expectations that do not tell the court whether a person would lie *in* a judicial proceeding. For the most part, people do not air their problems on social media; rather, they portray the good aspects of their lives.<sup>424</sup> It can be said that because people only portray the good aspects of their lives, it follows that they know others are doing the same.<sup>425</sup>

The same can be said about Jennifer using a married name when she was not legally married. This conduct may just reflect a desire [\*92] to keep matters about one's love life private.<sup>426</sup> Again, this is conduct that people would likely not attach much meaning to *in* terms of a person's character for untruthfulness, especially because unmarried people can struggle to find words to properly describe the specific contours of their relationships.<sup>427</sup>

*In* contrast, people would likely attach more meaning to someone's infidelity when assessing that person's character for untruthfulness.<sup>428</sup> Common sense dictates that the average juror would probably think it is more deceitful to be unfaithful to a spouse than it is to lie on Facebook or lie about one's civil marital status. Yet, *in*

<sup>423</sup> See *supra* Part I.

<sup>424</sup> Helmut Appel et al., *The Interplay Between Facebook Use, Social Comparison, Envy, and Depression*, 9 CURRENT OPINION PSYCHOL. 44, 44 (2016) (stating that "[i]n [ ] Facebook profiles, users communicate abundant social comparison information conveying mainly positive self-portrayals.").

<sup>425</sup> See *id.*

<sup>426</sup> See Elizabeth Weil, *Unmarried Spouses Have a Way with Words*, N.Y. TIMES, (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/fashion/unmarried-spouses-have-a-way-with-words.html>.

<sup>427</sup> *Id.*

<sup>428</sup> Because infidelity inherently encompasses lying, common sense would dictate that a juror would attach more meaning to infidelity when assessing a witness's truthfulness. However, courts have routinely prohibited the introduction of this evidence as being more prejudicial than probative. See, e.g., [United States v. Thiongo, 344 F.3d 55, 60 \(1st Cir. 2003\)](#) ("Evidence Defendant bore the man's child while married to another does not appear to be relevant or probative of Defendant's truthfulness or untruthfulness."); [United States v. Stone, 472 F.2d 909, 916 \(5th Cir. 1973\)](#) ("Attempted impeachment of [witness] by proof of [marital] infidelity would have been impermissible.").

Jennifer's **case** the conduct is not even that meaningful **in** terms of deceit because the alleged "infidelity" took place when the couple had already parted ways--conduct that people would find more acceptable because a relationship has effectively ended. <sup>429</sup>Thus, this evidence should not be admissible to impeach Jennifer's character for truthfulness.

Consequently, the court **in** Jennifer's **case** has only one specific act of untruthfulness to consider: the loan application. This is an act that could speak to a person's character for untruthfulness and can lead a juror to think that a witness might lie **in** court. However, **in** order to admit the evidence for impeachment purposes, the court should examine the available extrinsic evidence and verify that there is some proof that such a specific act occurred. If it turns out that the [\*93] defense has extrinsic evidence that gives it a reasonable basis to ask about the loan application, the court should also inquire as to the remoteness of the act. **In** this **case**, the loan application seems to be from six years prior to the current proceedings **in** Jennifer's **case**. The proposed Rule looks at evidence of acts older than five years with distrust. The weight of the evidence of distrust should be diminished by the lack of evidence regarding previous allegations of SGBV. Thus, the evidence of the loan application should be excluded as its probative value is at most, closely balanced by the unfair prejudice to the victim's testimony, and the Rule would require exclusion **in** such a close **case**.

It could have been different if there were prior criminal or administrative accusations of SGBV that were recanted or not proven; if those recanted or prior accusations could not be explained by Jennifer; if the prior act of untruthfulness was more recent; and if the defense had witnesses of reputation speaking of Jennifer's character for untruthfulness, then the court's conclusion about the admissibility of the loan application may have been different. The court probably would allow the impeachment of Jennifer with the loan application had those other factors been present. Nevertheless, the impeachment would be limited to show that Jennifer lied **in** the loan application. According to Rule 416X, the examination about that act should be limited to whether the witness engaged **in** the prior act of untruthfulness.

Therefore, **in** Jennifer's **case** none of the specific acts should be used to impeach her character for truthfulness. As a result, the defense would only be able to impeach her using the evidence of bias, contradiction, perception, and lack of verification. During the trial, some of that admissible evidence that exposes customary victim behavior would have been explained by Jennifer **in** her testimony or by expert witnesses. However, with the lack of evidence regarding specific acts of untruthfulness, the defense would have been precluded from accessing the biases discussed **in** Part II. This would prevent the defense from unfairly discounting Jennifer's **credibility** and **in** turn, would make the adjudication of Jennifer's **case** fairer and more accurate.

#### [\*94] V. # EVERYDAYSEXISM: OBJECTIONS TO SPECIFIC IMPEACHMENT RULES FOR SGBV VICTIMS

*Well, it's a tough thing going on. If you can be an exemplary person for 35 years, and then somebody comes and they say you did this or that, and they give three witnesses, and the three witnesses--at this point--do not corroborate what she was saying. It's a very scary situation where you're guilty until proven innocent. My whole life, my whole life I've heard you're innocent until proven guilty, but now you're guilty until proven innocent. That is a very, very difficult standard. . . . Well I say that it's a very scary time for young men **in** America when you can be guilty of something that you may not be guilty of.* <sup>430</sup>

<sup>429</sup> See generally Jessica Blankenship, *What Does and Does Not Count as Cheating*, THOUGHT CATALOG (Jan. 3, 2014), [https://thoughtcatalog.com/jessica-blankenship/2014/01/what-does-and-does-not-count-as-cheating/\(discussing](https://thoughtcatalog.com/jessica-blankenship/2014/01/what-does-and-does-not-count-as-cheating/(discussing) how it is not considered cheating to move on when partners decide to go "on a break").

<sup>430</sup> CNN, *President Trump: Scary Time for Young Men **in** America*, YOUTUBE (Oct. 2, 2018), <https://www.youtube.com/watch?v=qUEBZmuzYQM> (President Trump talking to reporters outside of the White House at 6:39-7:29); see also Monique Judge, Opinion, *When Donald Trump Says 'It's a Scary Time for Young Men **in** America,' He Means Young White Men*, ROOT (Oct. 2, 2018, 8:01 PM), <https://www.theroot.com/when-donald-trump-says-its-a-scary-time-for-young-men-i-1829479262>.

Even if the proposal of this Article is a more sensible way to tackle some of the issues that victims of SGBV confront, potential detractors of the proposal would argue that it is not needed. They might argue that even if it is needed, it could create other problems such as curtailing the rights of defendants, it could lead to over-conviction of false accusations, and it could overburden the judicial system. Furthermore, detractors might criticize the proposal as not gender specific when it tries to attend to issues of SGBV, that it responds to an unfounded SGBV exceptionalism, or that it could be resolved by abolishing the use of character for untruthfulness evidence. However, these objections are meritless.

First, there is a serious problem with the adjudication of SGBV cases and victim's and women's credibility biases.<sup>431</sup> Some detractors might argue that if there is a problem it could be attended with [\*95] instructions to the jurors.<sup>432</sup> Those instructions exist today.<sup>433</sup> Most instructions tell jurors that just because a juror does not believe part of the testimony of a witness does not mean that the juror should not give credence to the rest of the witness's testimony.<sup>434</sup> However, as discussed *supra* Part II, jurors are not able to compartmentalize evidence *in* that way.<sup>435</sup> Even Professor Bennett Capers, a proponent of jury instructions, recognizes that rethinking the Rules of Evidence to cover functional evidence is consistent with the overall goals of the Rules.<sup>436</sup>

Regarding the other objections the Rule's detractors might have, they are not actual problems. But rather, except for the SGBV exceptionalism critique, they might be an extension of the biases discussed associated with these types of cases.

#### A. Defendants' Rights

Detractors might argue that the Rule erodes the right of confrontation of defendants *in* criminal cases and that it shifts the burden of proof, by automatically believing the victims' allegations.<sup>437</sup> Yet, [\*96] what the Rule intends to do is to make sure that the evidence used to impeach the victims is relevant. The Rule does not exclude evidence that has been shown to be relevant, even where the reliability of such evidence has been doubted. Because the Rule only excludes evidence that is not relevant, the right of confrontation of the defendant is not violated.

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<sup>431</sup> See *supra* Part II.

<sup>432</sup> See Capers, *Evidence Without Rules*, *supra* note 29, at 898-900 (arguing for jury instructions that instruct jurors to disregard functional evidence considered by jurors, such as race and clothes); but see J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 95 ("The empirical research clearly demonstrates that instructions to disregard are ineffective *in* reducing the harm caused by inadmissible evidence and improper arguments.").

<sup>433</sup> See, e.g., PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.15 (3rd ed. 2016).

<sup>434</sup> An example of this type of instruction is the following:

If you decide that a witness deliberately testified falsely about a material point, [that is, about a matter that could affect the outcome of this trial,] you may for that reason alone choose to disbelieve the rest of his or her testimony. But you are not required to do so. You should consider not only the deliberate falsehood but also all other factors bearing on the witness's credibility in deciding whether to believe other parts of [his] [her] testimony.

*Id.*

<sup>435</sup> See Kassin & Sommers, *supra* note 58, at 1053.

<sup>436</sup> Capers, *Evidence Without Rules*, *supra* note 29, at 900-01.

<sup>437</sup> See Colb, *The Difference Between*, *supra* note 54 (arguing that prosecutors can oftentimes secure a conviction solely with eye-witness testimony and that "jurors [need] to presume innocence until they hear credible evidence proving guilt beyond a reasonable doubt."); see also Sherry Colb, *What Does # Believe Women Mean?*, YONKERS TRIB., (Nov. 7, 2018, 1:45 PM), <https://www.yonkertribune.com/2018/11/what-does-believewomen-mean-by-sherry-f-colb>.

The defendant does not have a right to introduce evidence that is not relevant. <sup>438</sup>Moreover, the Rule protects the right of confrontation by providing a hearing to elucidate the relevancy of evidence whose probative value has been called into question. Similarly, the defendant, as *in* Jennifer's *case*, <sup>439</sup>still has at his disposal impeachment with evidence of bias, contradiction, perception, and lack of verification; focusing on the actual lies rather than on a witness's status as a liar.

Moreover, the argument that the Rule subverts the burden of proof by giving full credence to the victim and assuming the defendant is guilty unless proven otherwise is a fallacy. <sup>440</sup>The Rule does no such a thing. Such an objection is based on some of the narratives associated with the "he said/she said" *credibility* bias. <sup>441</sup>The Rule merely requires the defendant to assert the relevancy of the evidence to be used to impeach the victim. The factors used for that determination do not assume that the victim is telling the truth about the events or that the defendant is guilty of the charges. What the Rule does is balance factors to ascertain whether the evidence could be [\*97] used to show character for untruthfulness without confusing the jurors about the matter at trial. Therefore, the Rule does not violate any constitutional rights of the defendant.

#### B. *Over-Conviction of False Accusations*

Criticisms that the proposed Rule will result *in* over-convictions are also unwarranted. While the Rule is intended to correct the problem of under-conviction and under-adjudication *in* favor of victims, <sup>442</sup>that does not mean that the Rule will shift the balance to the opposite side to over-conviction. Even though the Rule does make it easier to obtain convictions, it does so *in* light of the current scheme that makes it extremely hard. Moreover, the Rule does not change any burden of proof or substantive elements of SGBV causes of actions. Consequently, there should be no shift to over-convictions.

This objection seems to be based more on biases about victims *in* SGBV *cases* lying or trying to advance future litigation *in* divorce or child custody and support *cases*. <sup>443</sup>However, statistics contradict [\*98] these

<sup>438</sup> See, e.g., [Roundtree v. United States, 581 A.2d 315, 321 \(D.C. 1990\)](#) ("Because the Constitution does not require confrontation of witnesses with irrelevant evidence, the very applicability of the confrontation clause *in* this *case* depends on [the victim's] prior allegations being false. Under these circumstances, the confrontation clause does not prevent the trial court from weighing the [defendant's] offer of proof to determine its probative value to the trier of fact.") (internal quotation marks omitted); [State v. Brum, 923 A.2d 1068, 1074-76 \(N.H. 2007\)](#) (holding that defendant was not entitled to introduce extrinsic evidence of victim's prior allegations of sexual assault and that the limitation on cross-examination did not violate defendant's state constitutional right to confrontation).

<sup>439</sup> See *supra* Part I.

<sup>440</sup> See Colb, *The Difference Between*, *supra* note 54.

<sup>441</sup> See *id.*

<sup>442</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

<sup>443</sup> See Scheppele, *supra* note 21, at 170 (explaining that women are perceived as liars when they revise their stories, despite revisionism being a part of the coping process); Trepiccione, *supra* note 240, at 1490-91 (discussing how battered mothers are oftentimes charged with neglect and lose custody of their children). Another reason that serves to explain the perception that victims *in* SGBV *cases* are lying is that victims do not usually conform their stories to the legal standards, which *in* turn leads to intensive fact-finding from law enforcement, attorneys, or judges leading them to think that victims are lying or fabricating facts. See Epstein & Goodman, *supra* note 93, at 418-19. As Professors Epstein and Goodman explain:

survivors often frame their courtroom stories *in* a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience . . . .

impressions. The prevalence of false reporting is low; <sup>444</sup>it is estimated that false reporting lies between two and ten percent. <sup>445</sup>

For example, a study of eight communities *in* the United States found the rate of false reporting as seven percent. <sup>446</sup>*In* another study of sexual assault *cases*, the reported rate of false reports was 5.9%. <sup>447</sup>These statistics, combined with the low rates of adjudication, <sup>448</sup>suggest that it is very unlikely that a rule that focuses only on the determination of relevancy of evidence for character for untruthfulness would have the effect of over-convicting defendants.

The Rule proposed *in* this Article attempts to better determine whether a victim truly has a character for untruthfulness. *In* other words, the Rule should serve to better identify the victims that are actually lying. Consequently, the problem of over-conviction should not be an issue because the Rule would actually try to help weed out the *cases* involving false allegations.

The potential argument that the proposed Rule would promote victims misusing allegations of SGBV to better their chances *in* separate future litigations is likewise unwarranted. The proposed Rule does not facilitate the conviction or adjudication of false allegations. Thus, there is no incentive to bring false charges because they would likely be barred by the proposed Rule.

[\*99] Furthermore, the outcome of an SGBV *case* has no bearing on the outcome of most divorce proceedings. <sup>449</sup>Similarly, SGBV allegations have little effect *in* most alimony determinations. <sup>450</sup>*In* terms of child custody

It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound--to the judges, at any rate--less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. *In* this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that *women's* too-little, too-late testimony about physical *violence* is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

*Id.*

<sup>444</sup> See, e.g., *id.*

<sup>445</sup> *Id.*

<sup>446</sup> KIMBERLY LONSWAY ET AL., FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT, NAT'L SEXUAL *VIOLENCE* RES. CTR. 2 (2009), <https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf>.

<sup>447</sup> David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 *VIOLENCE AGAINST WOMEN* 1318, 1329 (2010).

<sup>448</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

<sup>449</sup> First, with the advent of no-fault divorce, a great percentage of jurisdictions no longer consider fault *in* property division distribution unless the abuse was egregious. See *id.* Other states that still consider fault do so only if spousal abuse constitutes economic fault (i.e., the economic impact that the abuse may have had on medical bills or decreased ability to work), while other jurisdictions demand a connection between the abuse and some other factor. *Id.* Finally, some states consider spousal abuse as a relevant factor *in* and of itself. *Id.* Therefore, the argument that victims use SGBV *cases* to enhance their chances *in* divorce litigation ignores the multiarray of how fault plays into property division determinations. It also disregards that marriage rates continue to decrease. See *Marriage Rate in the United States from 1990 to 2017 (per 1,000 of population)*, STATISTA, <https://www.statista.com/statistics/195951/marriage-rate-in-the-united-states-since-1990/> (last visited Sept. 17, 2019). Likewise, the argument overlooks that there would only be an incentive to institute an SGBV *case* to affect the outcome of a divorce settlement *in cases* where the parties actually have substantial assets to divide, which might not be majority of *cases*. See Stacy Francis, *Money Stress Traps Many Women into Staying in Unhappy Marriages*, CNBC (Aug. 13, 2019), <https://www.cnbc.com/2019/08/13/money-stress-traps-many-women-into-staying-in-unhappy-marriages.html>.

and support **cases**, statistics show that victims of SGBV are actually more likely to lose custody after making assertions of **violence** against another. <sup>451</sup>*In fact, in some states, bringing a **case** of SGBV against a spouse or a cohabitant could be used against the victim in custody determination based on the idea that the victim endangered the child by staying in the relationship and not reporting the **violence**.* <sup>452</sup>However, some states have presumptions for joint custody that are enforced even **in cases** of intimate [\*100] partner **violence**. <sup>453</sup>Thus, married or partnered women are actually disincentivized to allege SGBV allegations if the women are also planning on litigating any of these family law matters **in** the future.

### C. Burden to the Judicial System

Regarding the potential objection to the proposed Rule that it burdens an already burdened system, <sup>454</sup>the detractors would be justified **in** pointing out that requiring a separate hearing would increase the costs for the judicial system, the costs for the parties, and the time that it would take to resolve a matter. However, a cost-benefit analysis shows that the benefits of adopting the proposed Rule outweigh its costs. For instance, making sure that the system accounts for the patriarchal biases and attempts to correct those biases by delivering more accurate outcomes **in cases** of SGBV is an extremely valuable benefit. The under-prosecution of SGBV is a significant problem. <sup>455</sup>Adopting the proposed Rule could help fix some of the problems associated with such under-prosecution and promote the notion that women and victims of this type of **violence** matter. Refusal to reform or start to fix some of these problems only reifies the issues of looking at victims of this type of **violence** as people who do not count.

[\*101] Refusing to adopt the proposed Rule when the evidentiary system has adopted analogous rules **in** other contexts, such as with expert testimony, <sup>456</sup>would confirm that this is a matter of gender oppression. The only

<sup>450</sup> See Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 68 (2008) ("With the advent of no-fault divorce, alimony [has] also lost its punitive rationale."); see also THE HOUSE OF RUTH MD. **DOMESTIC VIOLENCE** LEGAL CLINIC ET AL., **DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY IN MARYLAND DISTRICT AND CIRCUIT COURTS** 144-45 (2019) (discussing how alimony awards **in** Maryland consider **domestic violence**, under the estrangement factor, because alimony is based on financial need and not punitive).

<sup>451</sup> Epstein & Goodman, *supra* note 93, at 431. Shockingly, abusive parents are more likely to seek sole custody and succeed at a rate of seventy percent. *10 Myths About Custody and Domestic Violence and How to Counter Them*, A.B.A. COMM'N ON **DOMESTIC VIOLENCE**, (2006), [http://leadershipcouncil.org/docs/ABA\\_custody\\_myths.pdf](http://leadershipcouncil.org/docs/ABA_custody_myths.pdf).

<sup>452</sup> Aiken & Murphy, *supra* note 61, at 51.

<sup>453</sup> Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, *25 N. ILL. U. L. REV.* 403, 428 (2005).

<sup>454</sup> See, e.g., Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> ("Civil suits . . . are piling up **in** some of the nation's federal courts, leading to long delays **in cases** involving Social Security benefits, personal injury and civil rights, among others.").

<sup>455</sup> See *The Criminal Justice System: Statistics*, *supra* note 8. For example, under-prosecution of intimate partner **violence** can negatively impact the economy because women are not able to fully participate **in** the job market. See NAT'L COAL. AGAINST **DOMESTIC VIOLENCE**, **DOMESTIC VIOLENCE**, [https://www.speakcdn.com/assets/2497/domestic\\_violence2.pdf](https://www.speakcdn.com/assets/2497/domestic_violence2.pdf) (last visited Oct. 3, 2019). "Victims of intimate partner **violence** lose a total of 8,000,000 million days of paid work each year. . . . **In** addition, intimate partner **violence** is estimated to cost the US economy between \$ 5.8 billion and \$ 12.6 billion annually, up to 0.125% of the national gross **domestic** product." *Id.*

<sup>456</sup> See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-94 (1993) (establishing a procedure for determining whether an expert is qualified under **FRE 702** to protect parties from the admission of expert testimony based on shoddy science).

reason that could explain the adoption of a rule *in* one context and not the other is the difference *in* whom is being protected. This discrepancy reveals the gender biases that pervade the legal system. Adopting this proposal would demonstrate a recognition that there is a need for reform *in* this area of our evidentiary law, just as the creation of *Daubert* hearings served to prove that there was a need for reform *in* the context of expert testimony.

On the other hand, the proposed Rule does not need to be adopted as a whole. Jurisdictions could adopt versions that are less burdensome. For example, a state could theoretically adopt a version of the proposed Rule that dispenses with the trilateral process. Or a state could adopt a version of the Rule that holds the preliminary admissibility hearing outside the presence of the jury but that does not require a separate judge to preside over the hearing. Another alternative could be to use the proposed Rule's standard for specific acts for untruthfulness of the victim but to forego the preliminary hearing. A fourth option could be to use the most stringent standard *in* the proposed Rule when assessing all forms of character for untruthfulness evidence, regardless of level of reliability.

However, as it stands today, the pervasiveness of the gender biases is so widespread<sup>457</sup> that some level of precautions or safeguards is needed. Perhaps, as time passes, the biases *in* adjudicating these types of *cases* would naturally subside and the proposed safeguards would no longer be needed. *In* that *case*, the cost of implementing the Rule would be high initially but it could be reduced significantly as time passes and the biases fade. The Rule should achieve this *in* two ways. First, the proposed Rule itself serves as an educational tool to inform society of the existence of the biases discussed. Second, the safeguards put *in* place by the Rule should hopefully serve as a deterrent to defendants that would otherwise try to impeach victims with evidence that would not meet the established minimum [\*102] standards of the Rule. As the application of the Rule becomes settled law, parties would likely start to understand when they can use specific acts of untruthfulness to impeach and when they cannot. This would lead to a decrease *in* costs of implementing the Rule over time and ultimately increase the efficiency of the judicial system.

Another way to reduce the monetary and procedural burdens of the Rule would be to have trained judges preside over the preliminary admissibility hearings for a regular, set period of time. Optimizing the processes of the Rule, as well as developing and improving them could be a way to reduce the overall costs of the Rule. Because the proposed Rule is so adaptable, the argument that such a Rule merely imposes burdens on the system is just another excuse to continue ignoring a problem that needs urgent attention.

#### D. No Gender Specific Rule

Detractors might also argue that the proposed Rule should not be drafted *in* gender-neutral language because the Rule is supposed to deal with a problem that disproportionately affects women.<sup>458</sup> First, this seems to be a contradiction. Second, there is no reason to believe that the gender-neutral language could benefit men at the expense of women. Such objections overestimate the scope of the proposed Rule.

The Equal Protection Clause requires that the Rule be drafted *in* gender neutral terms, unless it is substantially related to a government interest.<sup>459</sup> Because of the Equal Protection Clause, if the problem of impeachment using evidence of character for untruthfulness is to be addressed, it must be done *in* gender-neutral terms. That does not necessarily open the door to men to misuse the Rule *in* their favor. The gender-neutral language of the Rule does not mean that [\*103] men could file false accusations to prevent accusations against them or that they

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<sup>457</sup> See *supra* Part II.

<sup>458</sup> See *Number of Rape or Sexual Assault Victims in the United States per Year from 2000 to 2017, by Gender, supra* note 2 (showing that women are more likely to be a victim of rape or sexual assault as compared to men).

<sup>459</sup> See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475-76 (1981). A law that makes a distinction based on sex will not be upheld as constitutional unless it is shown that the law furthers an important government interest by means that are substantially related to that interest. See *id.* (upholding a gender-based distinction *in* California statutory rape law that made men criminally liable for intercourse with a woman under eighteen but did not make women liable for intercourse under any circumstance because it helped to further the important state goal of preventing teenage pregnancies).

could use the Rule to avoid being impeached for their own character for untruthfulness. The Rule, as discussed, does not change any of the protections for defendants or any of the other substantive rules regarding SGBV cases. Thus, there is no need to be preoccupied with the gender-neutral language of the rule.

In terms of the Rule being distorted by its applicability to both male and female victims, that argument ignores that male victims could be subjected to the same biases in the context of SGBV because of the phenomenon of feminization of victims.<sup>460</sup> Similar to what happens to aggressors that are associated with male characteristics and perceived as more credible,<sup>461</sup> the feminization of victims leads to the association of male victims with the biases and stereotypes typically attributed to women.<sup>462</sup> A perfect example of this phenomenon is what happened to Nimrod Reitman, when he accused by his former graduate advisor, Professor Avital Ronell, of sexually harassing him.<sup>463</sup> Reitman confronted the same types of attacks on his credibility that female victims are usually subjected to in the public forum and during trial.<sup>464</sup>

Consequently, male victims might also need to be protected under Rule 416X because of the feminization of victims that occurs in these types of cases even when the victim is a male.<sup>465</sup> Thus, the [\*104] critique of the gender-neutral language as a distortion or contradiction is not justified.

#### E. SGBV Exceptionalism

Finally, some detractors, based on Professor Erin R. Collins' idea of evidentiary domestic violence exceptionalism,<sup>466</sup> might argue that this proposed Rule encourages a similar exceptionalism and perpetuates some of the associated harms. Specifically, Collins argues that many jurisdictions have enacted specialized evidence rules (i.e., character evidence exceptions, relaxed forfeiture by wrongdoing rule, and hearsay exceptions) predicated on the front-end prosecutorial differential approach,<sup>467</sup> which disregards the lack of justifications to extend this exceptionalism to trials. She further illustrates that this evidentiary intervention is premised on a mistaken application of the already shaky battered woman syndrome defense and on the dominance feminism theory, which is not responsive to the particular needs of the parties involved.<sup>468</sup> This practice compromises

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<sup>460</sup> See Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 *N.Y.U. L. REV.* 293, 308 (1998) ("[T]he feminization of men who have been forced into sexual 'passivity' could make male same-sex rape victims the object of prejudice normally reserved in our culture for women.").

<sup>461</sup> See *supra* Section II.A.1.

<sup>462</sup> See María Victoria Carrera-Fernández et al., "Blanditos, débiles y sumisos": La feminización de las víctimas de bullying [ "Softie, Weak, and Submissive": The Feminization of Bullying Victims], Extr. (8) *REVISTA DE ESTUDIOS E INVESTIGACIÓN EN PSICOLOGÍA Y EDUCACIÓN* 40, 43 (2017) (Spain) (discussing the feminization of bullying victims); Kramer, *supra* note 460, at 308 (discussing how male same-sex rape victims are the object of prejudice reserved in our culture for women).

<sup>463</sup> Zoe Greenberg, *What Happens to # MeToo When a Feminist is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>.

<sup>464</sup> See *id.*

<sup>465</sup> See Kramer, *supra* note 460, at 308.

<sup>466</sup> Collins, *supra* note 260, at 414.

<sup>467</sup> *Id.* at 412-14.

<sup>468</sup> See *id.* at 408-10, 414.

the integrity of the criminal justice system and reduces the efficacy of the interventions by inadvertently harming and discrediting the victims who do not support prosecution.<sup>469</sup>

However, the proposed Rule is not built on a shaky defense that is wrongly applied *in cases* beyond its original scope. Instead, the Rule is influenced by observations and analyses from various scholars as to how society discounts victims. Additionally, even if the analysis departs from the premise that the current rule serves to reinforce the subordination of women, the Rule does not remove choice from state actors.<sup>470</sup> Rather the Rule directs state choice and tries to educate states as to the biases that have created problems.

Further, the proposed Rule does not perpetuate the harms of exceptionalism. As discussed, the use of character for untruthfulness evidence *in* and of itself compromises our adjudication system by searching for liars instead of lies.<sup>471</sup> The proposed Rule attempts to [\*105] correct this failure *in* SGBV *cases* where the negative effects of the current evidentiary rules seem to be most severe.<sup>472</sup> The proposed Rule is also not intended to be used against victims that do not wish to prosecute the offender. For that reason, the Rule is not intended to be used *in cases* of hostile witnesses, which is also why the Rule opens up the possibility of a trilateral process. The goal of the Rule is not to ease the prosecution of particular crimes, but rather to correct the imbalance of how we currently discount victims *in* SGBV *cases*. Although the natural result of the proposed reform is a better prosecution of the crime, better prosecution is not cause for a relaxation of the rules or special concessions during the trial.

Some might argue evidence of character for untruthfulness should be barred altogether.<sup>473</sup> Yet, banning all character evidence does not remove that evidence from coming *in* through judicial action.<sup>474</sup> *In* addition, reliance on this type of evidence is still very prevalent across the country.<sup>475</sup> Because character evidence does not seem to be going anywhere anytime soon *in* our current systems, we have to focus instead on removing the *credibility* biases against SGBV victims.

#### # WOMENSREALITY: CONCLUSION

*The # MeToo movement is accomplishing what sexual harassment law to date has not.*

*This mass mobilization against sexual abuse, through an unprecedented wave of speaking out *in* conventional and social media, is eroding the two biggest barriers to ending sexual harassment *in* law and *in* life: the disbelief and trivializing dehumanization of its victims.*<sup>476</sup>

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<sup>469</sup> See *id.* at 446-47, 452-55.

<sup>470</sup> See [id. at 408-10](#) (explaining how dominance feminism removes choice from reluctant state actors).

<sup>471</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 221.

<sup>472</sup> See *supra* Part III.

<sup>473</sup> See, e.g., Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 225.

<sup>474</sup> See *supra* Section IV.A.3; see also Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, [121 YALE L.J. 1912, 1922 \(2012\)](#) (explaining how courts oftentimes skip threshold inquiries about character evidence, allowing evidence that would otherwise be excluded *in*).

<sup>475</sup> See, e.g., Hartley, *supra* note 21, at 540 (stating that common defense tactics include attacking the character of a victim).

<sup>476</sup> Catharine A. MacKinnon, Opinion, *# MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

**[\*106]** As Catharine MacKinnon points out, the # MeToo movement is eroding the "disbelief and trivializing dehumanization" of SGBV victims.<sup>477</sup> However, as this Article explains, our evidentiary system has systemic barriers that impede that erosion from flowing into our judicial proceedings.

Current evidentiary rules galvanize **credibility** biases against SGBV victims **in** trials via the introduction of evidence regarding the victims' character for untruthfulness.<sup>478</sup> Attorneys use this evidence, which **in** most **cases** is of low probative value,<sup>479</sup> to discount SGBV victims. Even **in** jurisdictions where there are more stringent limitations on the use of character for untruthfulness evidence, courts carve out specific SGBV exceptions to their impeachment rules and allow this evidence to come **in** and be used to attack victims' characters.<sup>480</sup>

This defense strategy correlates with the underreporting, under-conviction, and under-favorable adjudication of SGBV **cases**.<sup>481</sup> Our current rules, that should serve to guarantee the fairness of the judicial proceedings by discouraging the use of reprehensible tactics and protecting witnesses from undue harassment,<sup>482</sup> have proven to be insufficient to guarantee the redress of SGBV. "If we operate with norms of **credibility** that do not take into account the influence of background beliefs *and* of prejudice on our **credibility** judgments, there is a very real risk of committing epistemic injustice."<sup>483</sup> For that reason, this Article proposes amending the current evidentiary rules to prevent attorneys from using **credibility** biases associated with trustworthiness and plausibility against SGBV victims during trials.

The proposed Rule attempts to implement reform while still respecting the long-standing tradition of impeaching witnesses with evidence of character for untruthfulness. The Rule is drafted so that **[\*107]** it follows constitutional mandates, avoids over-correction, and promotes judicial efficiency. As a result, the Rule provides for three different balancing tests depending on the type of character for untruthfulness evidence involved. The Rule lists concrete factors to aid the courts **in** weighing the probative value of the character for untruthfulness evidence against its prejudicial effects **in** the context of SGBV **cases**.

For evidence **in** the form of opinion or reputation by a witness other than the defendant, which is perceived by society to be the most reliable form of character for untruthfulness evidence,<sup>484</sup> the balance remains the one set **in** *FRE 403* (i.e., that the probative value is substantially outweighed by the prejudicial effects). However, for the less reliable types of evidence (i.e., prior convictions for crimes other than *crimen falsi* and specific acts of non-criminal untruthfulness),<sup>485</sup> the Rule provides that impeachment with character for untruthfulness evidence would be prohibited if the probative value of the evidence of the victim's untruthful character is closely balanced or outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge. Finally, for evidence **in** the form of prior convictions for *crimen falsi*, prior convictions older than five years, or opinion or reputation supported solely by the defendant, the Rule

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<sup>477</sup> *Id.*

<sup>478</sup> See *supra* Part II.

<sup>479</sup> See Gold, *supra* note 268, at 774.

<sup>480</sup> See, e.g., *supra* notes 346-53 and accompanying text.

<sup>481</sup> See *The Criminal Justice System: Statistics*, *supra* note 8.

<sup>482</sup> Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 228 (1976).

<sup>483</sup> Karen Jones, *The Politics of Credibility, in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 158 (Louise Antony & Charlotte Witt eds., 2002) (emphasis added).

<sup>484</sup> See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179-86.

<sup>485</sup> See Gold, *supra* note 268, at 774.

establishes that the balancing test would be whether the probative value substantially outweighs the prejudicial effects.

Additionally, where the evidence of character for untruthfulness is *in* the form of specific acts, the Rule requires a preliminary admissibility hearing presided over by a separate judge or magistrate. During that hearing or when the victim testifies at trial, if the interests of the victim are not being adequately represented, the Rule provides for the appointment of an independent counsel for the victim.

With these amendments to the current impeachment rules, attorneys should be prevented from accessing ***credibility*** biases during trial and discounting the testimony of witnesses. That, as a result, would ameliorate the revictimization of SGBV victims, foster fairer adjudications, and incentivize victims to come forward. This would slowly start correcting the problems of underreporting, under-conviction, and under-favorable adjudication of SGBV ***cases***.

**[\*108]** "[T]he efficacy of the judicial decision-making process rests on the popular belief of judicial fairness."<sup>486</sup> Historically, our system has denied that fairness to women, especially when redressing ***violence*** targeted towards them.<sup>487</sup> As Professor Anita Hill has pointed out, the changes our judicial system has experienced *in* the redressing of SGBV claims have come glacially slow.<sup>488</sup> The proposal presented *in* this Article is hopefully one catalyst that would accelerate that glacially slow change.

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<sup>486</sup> Dolan, *supra* note 482, at 228.

<sup>487</sup> *See supra* Part II.

<sup>488</sup> *Last Week Tonight with John Oliver, supra* note 1.