

## ACADEMIC STUDIES SHOW THAT BIAS AGAINST WOMEN EXISTS IN THE COURTS ESPECIALLY RELATED TO CHILD CUSTODY DETERMINATIONS

311. Since the 1990's, a series of gender bias studies were done around the country. The findings of the thirty-one state and five federal task forces that have reported over the last fifteen years are similar and disturbing. They report that gender bias in the courts does sometimes affect men, but that its victims are overwhelmingly women; that male judges and lawyers of all ages are largely unaware of the experiences and perceptions of their female colleagues; and that the disrespect and devaluation experienced by white women is even more pronounced for women of color. In the words of the New York Task Force on Women in the Courts, "Gender bias against women litigants, lawyers and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity." The task forces also found that custody awards often punish women who breach the stereotype of the ideal mother, because, for example, they work outside the home or have a sexual relationship outside of marriage. There is a growing tendency to award custody to the wealthier parent rather than to award child support. Given women's and men's unequal earning power, this constitutes a paternal preference. There is also significant indifference to spouse abuse in custody cases. Many judges do not understand why a man who beats his wife but not his child should not be awarded custody, and erroneously assume that husbands' violence against their wives ends with divorce, so requests for supervised visitation can be denied. Judges sometimes assume that women are making false allegations of child sexual abuse to gain an advantage in custody disputes.
312. The task forces repeatedly found that men who rape, batter and even murder women often face little or no punishment. These findings are illustrated by two cases. A Kentucky man raped his former girlfriend and injured her so severely that she required surgery. The jury recommended a sentence of thirteen years in prison. The judge sentenced him to six months in jail and probation on work release. The judge was swayed by letters from such luminaries as a basketball coach attesting to the rapist's good character. [Thomas Tulliver, 13-year Sentence for Rape Cut to 6 Months, Probation, LEXINGTON HERALD-LEADER, June 8, 1994 at A1] A Maryland man shot his wife to death several hours after finding her in bed with someone else. The judge sentenced him to eighteen months in prison to be served on work release, plus fifty hours of community service in a domestic violence program, the last place someone like this should be permitted. The judge said he wished he did not have to impose any sentence, because it was understandable that a man in such a situation would feel compelled to impose some "corporal punishment." [ Reporter's Official Transcript of Proceedings (sentencing) at 3 and 12, *State v. Peacock (Md. Cir. Ct. Oct. 17, 1994) (No. 94-CR-0943)*].
313. Domestic violence continues to be an area in which women experience significant bias, despite major statutory reforms to provide them with civil and criminal

protections. Courts show little understanding of the circumstances under which battered women survive and the ways in which the cycle of violence, economic dependence, lack of support from family and community, and fear of the batterer combine to keep women in these situations.

314. Instead of focusing on why men batter and what can be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence, subject them to demeaning and sexist comments, shuttle them from court to court, and issue mutual orders of protection when the respondent has not filed a cross-petition and there is no evidence that the petitioner was violent. These women are then castigated for failing to go forward with their cases. Although initial orders of protection are granted with greater frequency than they were in the past, violators are rarely punished in any meaningful way.
315. The gender bias task forces' documentation of state courts' failure to treat gender-based violence seriously was the basis for a 1991 Senate report recommending adoption of the Violence Against Women Act, which treats these crimes as a civil rights violation. Pointing to the "sad fact" that "law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes," the Senate acknowledged the need for a federal remedy for women victims. [S. Rep. No. 102-197, at 47-48 (1991)].<sup>1</sup> Unfortunately, the civil rights remedy for battered women was declared unconstitutional by the Supreme Court.<sup>2</sup>
316. Domestic violence is a factor in 50-80% of divorce cases in the U.S., depending on the jurisdiction.<sup>3</sup> The victims of domestic violence are overwhelmingly women and children, approximately 95%.<sup>4</sup> Therefore, practices in the divorce courts disproportionately impact women, especially battered women. In addition, a high correlation has been shown between spouse abuse, child abuse and incest<sup>5</sup> putting at risk the children of these battered women. Nor is child sexual abuse rare in the U.S. "The Honorable David Paterson, a state senator from New York, testified that one of every three young girls and one of every five boys become victims of child sexual abuse and that a high percentage of those most afflicted repeat the cycle."<sup>6</sup>
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317. As early as the 1960s, when fathers asked for custody of the children, they won 70% of the time. Fifty-nine percent of the judicially successful fathers and 50% of the privately successful fathers had physically abused their wives or initiated a violent

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<sup>1</sup> National Judicial Education Project, *Gender Bias Task Forces: Findings & Recommendations*, 2006

<sup>2</sup> *U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>3</sup> *Divorce Mediation and Domestic Violence*, Domestic Violence Report (Civic Research, Inc. Kingston, N.J., Oct/Nov. 1998), at 1.

<sup>4</sup> Jaffe, P.G., Wolfe, D., & Wilson, S., *Children of Battered Women*. Newbury Park, CA: Sage, 1990

<sup>5</sup> American Bar Association, Young Lawyer's Division, Center for Child Advocacy and Protection, *Legal Response: Child Advocacy and Protection*, No. 2, P. 1 (June-July 1979); Roy, A Current Study of 150 Cases, *Battered Women: A Psychological Study of Domestic Violence* (1979).

<sup>6</sup> EXPOSE p. 201, Exhibit 6

divorce. Sixty-four percent of the judicially and 50% of the privately successful fathers saw their wives as “uppity” i.e. not fitting their stereotypical view of what mothers and women should be. According to these men, “uppity” women returned to school or work, held independent political or religious opinions, had non-marital sexual activity during marriage or even after divorce, or started a divorce against the husband’s wishes. Fathers who kidnapped their children were not punished while 80% of women who did were imprisoned, fined or custodially punished. Having more money was one of the factors that allowed fathers to win but 62% of the fathers used violence to win custody. Courts then rubber stamped this behavior. These fathers had not been any more involved in child care or housework than any other father. The standard for evaluating mothers and fathers was very different. 7

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318. Pursuant to the National Institute of Justice Grant number 2000-WT-VT-0016 entitled “History of Intimate Partner Violence and the Determination of Custody and Visitation among Couples Petitioning for Dissolution of Marriage” many academic studies were done and the results published in Violence Against Women, No. 11, Volume 8, Sage, 2005, p. 991 entitled Children in the Crossfire.

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319. In one study, the researchers looked at spouse abuse issues in all divorces in Seattle, Washington from 1998-1999. They did not look at child abuse issues. They found that mothers who suffered interpersonal violence (IPV) were no more likely to be awarded custody than other mothers without IPV. Fathers with known histories of IPV were more likely to be denied visitation, but that still only represented 17% who were denied visitation. 61% had restricted decision making and 71% had restrictions on visitation. Of those fathers with IPV, 51% were ordered to participate in some program. 25% of them had supervised visitation, however they were no more likely to have it than any other group. In half of the cases with court or police documented domestic violence (DV), that history was not in the divorce file.

320. The study concluded that interpersonal violence (IPV) was ignored even with a documented, substantiated history and strong protections for the children were not put into place. 8 As many as 20% of the victims reported returning to the abuser because of threats made about taking the children. Clearly returning to the abuser is not ending violence against the children.

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7 Chesler, Phyllis, Mothers on Trial The Battle for Children and Custody, McGraw-Hill Book Company, NY. 1986.

Exhibit 7

8 Child Custody Determinations among Couples with a History of Intimate Partner Violence, p. 991, Kenic, Monrany-Ernsdorff, Koepsell, Holt in Children in the Crossfire.

321. A second study looked at outcomes when the fathers had protection orders against them. <sup>9</sup> There was no statistical difference in outcomes for fathers and mothers when filing custody or visitation petitions.
322. They found that contrary to popular thought, fathers restrained by orders of protection (OPs) were more likely to obtain visitation orders than not (64%). More than 50% threatened to kidnap the child, 40% threatened to kill the mother and in 44% of cases, the children were physically involved in the violence. The researchers found that the State of New York could and did charge mothers with failure to protect if children witnessed violence. But if the mothers separated from the fathers to avoid the child witnessing violence, fathers asked for and got custody or visitation and the children and mothers were abused yet again during the exchanges and visits.
323. In the first look at the data, they found that 81% of custody petitions filed by fathers with OPs were rejected. In this second look at the data, they found that, “If OP fathers get custody less often than other fathers, it is not because of decisions made by the courts to deny them custody.” A denial must have a full fledged hearing which rarely happened. Rather the reason was in the rate of dismissals and withdrawals. The researchers were unable to find out the rate of dismissals but available evidence showed that most were for failure to appear at hearings. No fathers restrained by OPs who asked for custody and appeared at trial were denied custody or visitation in family court. Thus safety considerations were obviously not being considered in custody determinations.
324. Paradoxically, the data showed that fathers were more likely to get visitation when an OP was granted (64%) than when it was dismissed (49%). So mothers who wanted to protect their children were better off not filing for a protection order. Also in 58% of those cases, father’s custody petition was also dismissed indicating that fathers filed custody to coerce mothers into dropping OP petitions. If mothers want to protect their children, they have to not protect themselves. Even when there were two orders – OP and visitation order – the OP was limited by the visitation order rather than the visitation order being limited by the OP. Thus the “right” of the father for visitation was a higher ranking right than the right of the mother or child to be protected from physical violence. The researchers concluded that the courts are failing to protect women from victimization and children from exposure to violence.

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<sup>9</sup> Outcomes of Visitation and Custody Petitions when Fathers are Restrained by Protection Orders: The case of the New York City Family Courts, Rosen and Sullivan, National Institute of Justice Grant no. 1998-IJ-CS-0021, secondary analysis of data, p. 1054.

The court itself may become the instrument by which abusive fathers continue to have contact with and abuse partners.

325. One study directly studied the effectiveness of statutes mandating that the court have a presumption against custody to the perpetrator and that judges have education about the issue of domestic violence.<sup>10</sup> When there was a presumption against custody to a perpetrator, more custody decisions gave custody to the mother unless there was also a friendly parent provision and a presumption for joint custody in the law. Under those conditions, courts granted joint custody twice as often in states with a presumption against the perpetrator but also competing presumptions of friendly parent and joint custody as those with no presumption against DV at all. So in those states, it appears that reporting DV punishes the victim of abuse rather than protects her.
326. The presumption against custody to abusers had no effect regarding physical custody; mothers won 66% of the time. But when a state had the competing presumptions, the courts vastly favored fathers. Only 4% of mothers then won sole physical custody. The presumption against custody to abusers did not affect granting visitation, but with it, more visitation orders were structured. Without the competing statutes, 66% of the orders had conditions on perpetrators. With competing presumptions, only 19% had conditions on perpetrators. In states with the presumption against perpetrators, only 6% of the orders protected the mothers address and 10% ordered her to counseling. If there was no presumption, no orders protected the address and only 1% were ordered to counseling. Thus even with a presumption against abuse, courts did not protect the safety of the victim and in fact more seemed to blame her by ordering her to counseling.
327. When sole legal custody was given to father, he also received sole physical custody 100% of the time, for mothers it was 90%. In states with competing provisions, sole physical was given more often to fathers than mothers. When joint legal custody was awarded, mother was given physical custody 50% of the time. Even with the presumption against custody to perpetrators, 40% of batterers were given joint custody. The conclusion was that even if there is a statute saying that the court shall operate with a presumption against custody to perpetrators, the competing presumptions of friendly parent or joint custody undermine the intended protections. The friendly parent provision effectively penalizes the abused parent who asks that the visitation be denied or curtailed. This violates her freedom of thought and expression. In spite of statutory presumptions against custody to abusers, they were

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<sup>10</sup> Child Custody and Visitation Decisions when the Father has Perpetrated Violence against the Mother, Morrell, Dai, Dunn, Sung, Smith, National Institute of Justice Grant 1999-WT-VX-0013, Children in the Crossfire, Sage, p. 1076.

granted joint or sole custody or unrestricted visitation the majority of the time. Statutory reform or litigation has been shown to be ineffective to protect children.

328. Some judges actually believed there was no situation that could justify restricting the fathers visitation. Thus the right to life and security of the mother and child were violated as the fathers parental rights were elevated into a higher position.

329. Whether a state mandated it or not, 87% of the judges said they had had Domestic Violence (DV) education in the past three years. Judges who had education in DV scored no better than judges without it in knowledge and attitudes. More judges who had DV education gave mother sole physical custody but few structured or limited fathers visitation. If judges had DV education, they were twice as likely to give sole physical custody, half as likely to give primary or shared physical, less likely to structure fathers visitation or impose conditions, more often protected her address and less often referred her to counseling. Thus it seems they understood the parties could not co-parent but they did not understand the need for protection for mother or child during visitation. If judges had DV education and if sole legal custody was given, conditions were more likely to be imposed. But even if judges had DV education and she got sole physical custody, conditions were less likely to be imposed than if she got joint physical. On average female judges had more knowledge and more enlightened attitudes than male judges but this did not affect their orders. The researchers concluded that the quality of DV education is more important than a statutory mandate to have DV education. "Indeed, it is almost impossible for them to obtain court custody orders that adequately protect them and their children." Gender bias against women is common because of an effective father's rights movement relying on a history and culture of discrimination. 11

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330. The situation was no better with mediators who work in family court. Mediators failed to recognize and report DV in 57% of the cases, even when DV was on the court screening form. The screening form itself failed in 15% of the cases. Even when there was a protection order, mediators recognized DV in only 49% of the cases. Even when there was both DV in the court screening form and a protection

order, mediators recognized DV in only 49% of the cases. 12 This level of failure cannot be put down to ignorance or negligence but must be willful disregard.

331. Joint legal custody was recommended by mediators 91% of the time for DV cases and 90% for non DV cases, turning conventional wisdom on its head. Sole custody was recommended 5% of the time when DV was present and 7% when there was no DV. Primary physical custody was awarded to the mother 49% of the time when there was DV and 48% when there was not according to mediators. But according to researchers, it was 35% and 40% respectively. According to the mediators, primary physical custody for fathers was recommended significantly more often in DV than non DV cases – 11% v. 7%. But according to researchers, it was 10% and 9% respectively i.e. no more likely. It was clear that the mediators were unaware of their own determinations or their own prejudices. Even worse, mediators who reported DV were more likely to recommend supervised visitation but the findings were significant ONLY if there was police involvement and child abuse in addition to abuse of the mother. In other words, violence against mothers was not a reason to supervise visits showing a failure to grasp the risk to mothers or to children presented by violent fathers. Mediators recommended a higher percentage of protected child exchanges when there were no DV indicators than when there were DV indicators, again the opposite of what would be expected. Without DV indicators, threats resulted in protected child exchanges 75% of the time but with DV indicators, the number dropped to 32%. This appears to be deliberate punishment of the victim who reports DV. The authors concluded, “Present findings offer evidence that the children may be placed in greater jeopardy when DV is alleged at all.”

332. While joint physical custody was recommended 40-60% of the time, actual time sharing was 14%. In reality, fathers kept control but did not assume responsibility. Joint physical custody was recommended by the mediator 12% in DV cases and 15% in non-DV cases. Fathers were granted visitation in 89% of DV cases and 86% in non-DV. When violence was documented, supervised visitation was recommended in 25% versus 16% in non-DV cases. That means that 75% of the fathers in documented DV cases had unsupervised visitation. When there were threats, supervision was granted in 38% of cases versus 16% if no threats; if there were police reports supervision was granted in 32% to 15%; if there were child safety concerns it was 41% to 14%; if there were documented child abuse and neglect supervised visitation was ordered in 29% versus 16% in non DV cases. Again, that means that in 71% of cases of documented child abuse and neglect, unsupervised visitation was granted to the father. Documented drug use resulted in restrictions 29% of the time versus 17% without drug use and with alcohol abuse the figures were 26% to 16%.

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12 Violence Against Women, No. 11, Volume 8, Sage, 2005, Child Custody Mediation in Cases of Domestic Violence, Johnson, Saccuzzo, Koen, p. 1022, National Institute of Justice Grant No. 1999-WT-VX-0015.

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Even with documented difficulties in child exchange, supervised visitation was granted in only 13% of the cases compared to 20% of other cases. This pattern appears over and over – if the mother wishes to protect the child, she has to stay silent about the DV. In the situations where the father was a clear perpetrator, he received some physical custody in 97% of the cases. In the situations where there was documented child abuse or neglect, the father was twice as likely to have restrictions but still 71% had absolutely no restrictions on visitation. Clearly the child's health and welfare is not protected.

333. The researchers looked at what factors determined the few recommendations for supervised visitation. One factor was child safety concerns, which meant supervised visitation was 3.6 times more likely if the mediator felt there was a child safety issue. Another factor was parental drug use, making supervised visitation 2.9 times more likely. The third factor was difficulty in child exchanges but that only had an impact of .213 times. Concerns for mothers safety had no impact whatsoever on the decisions. Thus again, the right to life and security of the mother is being ignored while the parental rights of the father are placed on a higher level.

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334. Contrary to common belief, violence against a woman and her children does not stop when she leaves the abuser. In fact separation often leads to an escalation of the violence and greater danger. In spite of that, the father-child relationship is privileged as more important than the danger to the child.<sup>13</sup> Often the request for custody of the children has more to do with attempting to force the mother to reconciliation or to punish her for refusing than over care about or concern for the child's best interest. In fact, research has found that 75% of men who abuse their female partner also abuse their children. Girls run a higher risk – they are 6.5 times more likely to be sexually abused than girls from non-violent homes. They are particularly susceptible to sexual abuse when the marriage is ending. The belief that mothers and children make false allegations of child sexual abuse during custody proceedings has been shown to be simply not true. Mothers were no more likely than fathers to make false allegations. In fact, 21% of father's allegations were shown to be false compared to only 1.3% of mothers.

335. Another prominent myth is that mothers always get custody of children. Several studies have shown that in contested custody cases, fathers win custody approximately 70% of the time. Other studies show that abusive fathers are the ones most likely to fight for custody. (Exhibit 8) After making allegations of abuse by father, 58% of mothers had no or supervised visitation with their children by the end of the court battle.

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<sup>13</sup> Arizona Battered Mothers Testimony Project, Exhibit 8, pages 14-18. See also Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, Exhibit 9.

336. A national survey found that 65% of non-abusive parents were advised by attorneys, mediators, court personal, advocates, police, psychologists, family court advisers, other protective parents and even judges not to report the abuse. (Exhibit 8, p. 18) This is a clear denial of due process, access to court and the right to petition the courts for the protection of fundamental rights.
337. While one would hope that experts appointed by the court would be aware of the issues involved in the best interest of the child, this is simply not so. Forty percent of those working in mental health fields in the U.S. have received no training about partner violence and fewer received training about child sexual abuse. A study by Bancroft and Silverman showed chronic problems with custody evaluations done by unqualified evaluators. (Exhibit 9, Exhibit 8, p. 19, see also *Placing Children at Risk: Questionable Psychologists and Therapists in the Sacramento Family Court and Surrounding Counties*, investigative reporter Karen Winner, May 15, 2000) Evaluators often blame the victim for not leaving the abusive situation and label her as unfit or unstable. They then turn right around and recommend custody to the violent parent. One study gave therapists a case study of an actual domestic violence situation that resulted in the murder of the woman. The study found that 91% of therapists failed to even identify the abuse. Of the 9% who recognized it, 40% of them did not think it was important. Thus by the court's abdicating its power of decision making to these unqualified therapists, they are eviscerating the law that requires domestic violence to be taken into account in custody decisions and denying women access to the protection of the existing law. (See paragraphs 272, 276-7).
338. Studies have also shown that even when confronted with the child's disclosure of abuse, less than 50% of mothers took action. For those mothers who did, the most frequent action was a divorce. However, that is precisely when the court and child protective agencies do not believe the mother or child. Rather than understanding that abuse motivated the divorce, they believe the divorce motivated the abuse allegation. Those children who were believed about the abuse suffered much less emotional and behavior problems. But when the mother believes the child and takes action, she is at most risk of losing custody or visitation all together. (Exhibit 8, p. 27) This is clearly in violation of the right to establish a family, and to receive protection therefore, Article VI of the Declaration and the duty of every person to aid, support, educate and protect his minor children, Article XXX of the Declaration.
339. According to Patricia Bellasalma, "(t)he judicial system reality is that outcomes are determined by the personal philosophy of the jurist ...this system has only served to reinforce a profoundly patriarchal philosophy." Even the experts chosen to educate judges tend to promote the patriarchal philosophy of those judges. Nor are judges objective and disinterested parties. Instead they under value the contribution of the mother and over value any contribution by the father, mirroring the bias in society. James Ptacek found in his study that judicial harassment of women was a common problem. The Wellesley BMTP found gender bias and that mothers are held to a higher standard than fathers. The 2002 California Family Court Report found that in almost every case involving abuse allegations, the mother was labeled as overprotecting or alienating and custody was recommended to the father. The

mothers in AZ felt they were held to different standards and were themselves held responsible for the abuse. See Exhibit 8, pages 27-31 and 49.

340. Mothers are in a no win situation - if they do not protect the child, they are accused of failing to protect but once a divorce is filed, suddenly the viewpoint is reversed and if she tries to protect, she is instead accused and likely to lose her children. (Exhibit 8, p. 32) As Jill Zuccardy, the attorney in the Nicholson case stated, "The battered mother has to worry that if she leaves, the abuser will take her children and, if she doesn't, that the government will." That is precisely what happened to Petitioner A and B.
  341. Different standards are also applied to working outside of the home. A stay-at-home mother loses credibility for not having worked in the marketplace and the working mother is at fault for not being home. The father who works outside the home however is praised even if he works long hours. (See Exhibit 8, p. 32)
  342. The mothers explained how the abusers used the court system to continue their abuse of her and the children. Ordering joint custody actually increased the risk of post separation violence. (See Exhibit 8, pages 39-40)
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