Domestic Violence and Custody Litigation: The Need for Statutory Reform

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INTRODUCTION

Domestic violence and custody litigation are interrelated problems that impose substantial burdens on society and on the courts. Recently, a panel of legal and mental health professionals convened in California to discuss the problem of domestic violence in the context of custody disputes. While expressing varying opinions on specific issues, the panelists generally agreed that evidence of domestic violence must be considered in custody decisions.

An informed discussion of domestic violence and its relevance in custody litigation requires an understanding of the scope of the problem. Wife beating is a pervasive national problem, yet violence against women is tolerated by the very authorities that have the ability to deal with the problem. While the frequency and severity of

2. Id. at 624-32. The panelists expressed differing views on joint custody and on mediation.
3. See id. at 636-38.
4. In the overwhelming number of domestic violence cases, women are the victims. U.S. Comm’n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice, at V (1982) [hereinafter cited as ADMINISTRATION OF JUSTICE]. See M. Pagelew, The "Cycle of Violence" in Families: Fact or Fiction? 9, 18 (1982) (indicating that the most severe and common type of spousal violence is wife beating and that this is the violence most likely to be witnessed by children) (reprinted by the National Center on Women and Family Law (NCOWFL)).

These victims often are uniquely isolated. Friends who might otherwise be a source of support hesitate to intrude on the privacy of “family matters” . . . . Reporting
wife beating is shocking, the failure of police, prosecutors and the judiciary to exercise punitive and preventive measures is equally astounding. Many experts agree that the legal system fails to protect battered wives. Current policies and practices of police departments, social service agencies and courts signal to both victims and batterers that society is willing to tolerate acts within marriage that would otherwise be prosecuted as assault, battery, aggravated assault, attempted murder and rape.

Physical abuse of women by their spouses and lovers has recently received some attention in the media. This attention is partly in shocked response to cases where desperate victims have retaliated against their abusers. Drawing attention to the problem, however,

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violence to authorities carries its own risks. All too often police, prosecutors or judges minimize or ignore the problem and the victim is left alone to face an attacker who may respond with anger at being reported. ATTORNEY GENERAL'S TASK FORCE REPORT, supra note 5, at iii-iv. See Brozan, Task Force Urges Action Against Family Violence, N.Y. Times, Sept. 20, 1984, at A25, col. 1.


8. ADMINISTRATION OF JUSTICE, supra note 4, at 12-60. The U.S. Commission on Civil Rights concluded that the police, prosecutors, and the courts fail to protect battered women. The Commission found that police practices, reflecting social and legal policy, include failure to respond to domestic disturbance calls, non-arrest policies in inappropriate cases, channeling criminal spousal assault cases into the civil courts and reporting practices that mask the nature and frequency of the crime. Id. at 21-22. The Commission found that prosecutors often give low priority to domestic violence cases, fail to prosecute or obtain convictions, often treat victims rather than defendants as the culpable party, hesitate to file charges, frequently attribute low prosecution rates to uncooperative victims while discouraging the required cooperation, rarely utilize subpoenas to acquire victim cooperation, and frequently charge abusers with lesser crimes. Id. at 33-34. Regarding the courts, the Commission found misuse of available civil and criminal remedies, imposition of lenient sanctions, failure to make civil orders of protection available to battered women and failure to impose appropriate sanctions when such orders are violated. Id. at 59-60. Additionally, the Commission found that mediation was generally an inappropriate remedy in domestic violence situations, id. at 70-76, that more funding is needed for shelters, id. at 77-90, and that state legislation making protection orders available to battered wives is needed. Id. at 95.

9. Id. at ii, iv.

10. D. MARTIN, supra note 6, at 87-88.

11. See ISSUES OF PUBLIC POLICY, supra note 5, at 5. A recent television docudrama, NBC's The Burning Bed, based on the book by Faith McNulty, portrayed the story of Francine Hughes, a battered wife who set fire to her husband as he lay sleeping. The story was also the subject of a cover story in a popular magazine. Diliberto, A Violent Death, A
is only the first step towards dealing with it. A massive and cooperative effort by law enforcement agencies, legislatures and the courts will be required to deal with domestic violence in this country.

The need for reform is particularly urgent in the custody litigation context. Courts often fail to consider or give weight to evidence of violence against the mother when evaluating the relative fitness of the parents for custody. Wives often cite physical violence in complaints for divorce, but such complaints are frequently disregarded. Implicit in the courts' refusal to consider wife beating is a

Haunted Life, PEOPLE, Oct. 8, 1984, at 100.

12. Arbeitman, Wife Battering Seen As a Negative Indicator for Custody in Five States, in THE WOMEN'S ADVOCATE 3, 6 (May 1983) (a newsletter of the NCOWFL); NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., NCOWFL INSTITUTES A BATTERED WOMEN AND CUSTODY PROJECT (1982) (news release) [hereinafter cited as NCOWFL Battered Women and Custody Project]. The National Center on Women and Family Law gathers and distributes information on women and family law and publishes a bi-monthly newsletter, THE WOMEN'S ADVOCATE. In recent years, the Center has concentrated its resources on legal advocacy for battered women. The position of the Center on battering and custody is that battering is criminal conduct and per se evidence of the batterer's unfitness for custody. See also Bruner, For Alice, Divorce Didn't Stop Beatings, Jacksonville Journal, May 23, 1983, at 1, col. 1 (judge awards joint custody to a father who had severely beaten the mother for years both before and after the divorce); Letter from Dennis L. Arfmann, Nebraska attorney, to Laurie Woods, Director of NCOWFL, in New York City (Feb. 17, 1981) (on file at NCOWFL). This private attorney represented a battered woman in custody litigation but was unable to convince the judge to consider evidence of the father's sexual assault on the mother as relevant in determining custody. Id.

Client confidentiality prohibits attorneys from revealing the names of clients who have been unsuccessful in having evidence of their abuse admitted or given weight in custody litigation. Attorneys who litigate extensively on behalf of battered women, however, attest to the difficulty of convincing judges to consider this evidence. Joanne Schulman, staff attorney at the National Center on Women and Family Law (NCOWFL), litigates nationally on behalf of battered women and has published extensively in the area of women and family law. Ms. Schulman states that battered women often lose custody because courts refuse to consider a father's battering of the mother as evidence of his unfitness for custody. Telephone interview with Joanne Schulman, staff attorney at NCOWFL (Feb. 19, 1985) (record on file at Hofstra Law Review). See Blake v. Blake, 106 A.D.2d 916, 483 N.Y.S.2d 879 (1984) (reversing family court award of joint legal custody, with physical custody to the batterer).

Meg O'Regan, managing attorney at the Center for Women's Rights in Mineola, New York, states that in her experience, judges in New York generally admit evidence of spouse abuse, but fail to give weight to the evidence. Ms. O'Regan reports that while her clients are often awarded custody, they are unable to convince the court that the children's visitation with their father should be restricted and strictly supervised. Ms. O'Regan attributes this to judicial failure to recognize that the low impulse control of batterers is highly relevant to their fitness as parents. Finally, Ms. O'Regan emphasizes that the women she represents, like most battered women, generally do not have the resources to finance an appeal. Telephone interview with Meg O'Regan, managing attorney for the Center for Women's Rights (Feb. 19, 1985) (record on file at Hofstra Law Review).

failure to recognize that detriment to the children is inherent in the beating of their mother, and that the problem does not end with separation or divorce.

Several states have begun to take notice of the problem. The Florida legislature, recognizing the relevance of battering in custody litigation, has amended that state’s joint custody statute to require courts to “consider evidence of spouse abuse as evidence of detriment to the child.” In addition, five other states have statutes that address the issue of spousal violence in a custody context. This Note analyzes existing statutory schemes and suggests specific revisions designed to facilitate resolution of custody disputes where domestic violence is a factor.

Evidence of wife beating should create a statutory presumption of detriment to the child and of the abuser’s unfitness for custody. This Note will discuss the negative effects suffered by the children of battered women, the correlation between spouse and child abuse, and the intergenerational aspects of family violence. Finally, the special problems faced by battered women in custody litigation, including the use of custody as a battering weapon and the dangers to battered women created by modern family law trends, will be addressed.

I. HISTORICAL OVERVIEW OF BATTERING AND CUSTODY

While attention to the problem of wife beating is a recent phenomenon, wife beating itself is not. For literally thousands of years

15. See infra notes 73-111 and accompanying text.
16. See infra notes 112-16 and accompanying text.
19. See NCOWFt Battered Women and Custody Project, supra note 12.
20. See infra notes 73-86, 95-100 and accompanying text.
21. See infra notes 101-11 and accompanying text.
22. See infra notes 117-43 and accompanying text.
23. See infra notes 183-250 and accompanying text.
women as well as children were considered the property of men. Men had absolute authority within the family unit; children, women and servants were subject to "domestic chastisement." A husband's legal right to physically chastise his wife was not repudiated in this country until the end of the nineteenth century. While most states now have specific laws against wife beating, violence against wives continues at alarming rates. In the United States today, between two and four thousand women are beaten to death by their husbands each year.

The history of custody law in the United States reflects a traditional deference to paternal authority. Until the twentieth century, a virtually irrebuttable presumption of the paternal right to custody existed in this country. A father could lose custody upon strong proof of cruelty or unfitness but this rarely occurred. Women were economic non-entities, unable to support themselves or their children after divorce and therefore could not afford to seek custody. In addition, fathers had no legal duty to support children who were not in their custody. This rule was based on the rationale that a father deprived of the services of his children should not be required to maintain them. While the tender years doctrine, which created a preference for the mother in a dispute over custody of a very young child, emerged by the end of the nineteenth century, a correspond-

25. ISSUES OF PUBLIC POLICY, supra note 5, at 5-6 (address by D. Martin).
27. Eisenberg & Micklow, supra note 7, at 139; Davidson, supra note 24, at 19-20. See SISTERHOOD IS GLOBAL 703 (R. Morgan ed. 1984). In 1871 Alabama and Massachusetts became the first states to outlaw wife battery. Id.
29. See SISTERHOOD IS GLOBAL, supra note 27, at 703-04. Additionally, approximately two to six million women are beaten each year by their partners, and in 1979, 40% of all women who were murdered were killed by their partners. Id.
32. Uviller, supra note 30, at 113.
34. Uviller, supra note 30, at 112-13. Fathers were entitled to the services of their children and in return owed their children the duty of maintenance and support. Id. at 112.
35. Id. at 113. The premise of the tender years doctrine was that a very young child needs the care of a mother. Id.
ing duty of non-custodial fathers to support their children was not widely accepted until some time between the 1920's and the 1940's. Thus, the presumption of maternal custody did not become widespread until the second quarter of this century and has been in decline since the 1970's.

Although women and children are no longer the legal property of men, female economic disadvantage and widespread domestic violence perpetuate an unequal power relationship between men and women. In this context, application of a so-called "gender neutral" custody standard has a discriminatory impact on women. Women who seek custody of their children still find themselves at a tremendous economic disadvantage, especially with child support orders unrealistically low and rarely enforced. Furthermore, violence is the ultimate tool for keeping women "subservient, dependent, concili-

36. Id.
37. Polikoff, supra note 31, at 236 n.9 (citation omitted).
38. See infra notes 144-57 and accompanying text. Uviller, supra note 30, at 114-17; Polikoff, supra note 31, at 236.
40. See Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 YALE L. & POLICY REV. 168 (1984). Neely discusses the unequal economic and psychological bargaining power of women in divorce proceedings. He states that "the unpredictability of divorce proceedings can be used to terrorize women," id. at 177, and that "under our purportedly sex-neutral system, women . . . come out of divorce settlements with the worst of all possible results: They get the children, but insufficient money . . . to support them." Id. at 178.
42. SISTERHOOD IS GLOBAL, supra note 27, at 699. Morgan states that:

In 1981, of the over 8 million women raising children alone, only 59% had been awarded any child support (of these, 72% actually received payment and only 47% received the full amount). Average payments totaled $2106 per yr. but 60% received less than $1500 (often to be used for more than 1 child). After 1 yr. of divorce, an average woman's income drops 73% and a man's rises 42% (1982).
iatory and obedient." Violence, or the threat of it, can deter a woman from attempting to leave a relationship or can force her to make economic concessions in exchange for custody. Finally, state reluctance to "intrude" upon the privacy of the marital relationship deprives women of protection from abuse and preserves male authority. Custody standards that fail to reflect the disadvantaged status of women perpetuate patterns of discrimination.

II. COURTS FAIL TO RECOGNIZE BATTERERS' UNFITNESS FOR CUSTODY

Judicial opinions both reflect and advance social policies. The reluctance to give sufficient weight to evidence of wife beating is symptomatic of society's tolerance of violence by husbands against wives. The conspicuous absence of discussion of wife beating in divorce and custody cases reflects social policy implemented by judicial rulings that disallow evidence of fathers' violence towards mothers on the issue of fitness for custody.

While judges may exercise discretion to exclude evidence of spouse abuse in custody litigation, there are cases where courts are compelled to deal with the issue of battering in a custody context. Thus, the most extensive discussions of wife battering as bearing on the batterer's fitness for custody appear in cases where the state has sought to terminate the parental rights of fathers who have murdered the mothers of their children. These cases provide insight into judicial policy and reasoning in this area.

In one such case, In re James M., the California Court of Ap-
peals affirmed a lower court's dismissal of the state's petition to free four children from the custody of their natural father. The father had pled guilty to second degree murder after killing his former wife, the children's mother, by stabbing her twenty-two times. The issues on appeal included whether the killing of the mother constituted cruel treatment of the children; whether the conviction for the murder of the mother was of such a nature as to prove unfitness; and whether an award of custody to the father would be detrimental to the children as a matter of law. The lower court found that the nature of the murder did not prove the father's unfitness for the future custody of his children and that the children had not been cruelly treated or neglected. Finally, the court concluded that the welfare and best interests of the children required dismissal of the state's petition.

The language and reasoning of the affirming court suggests that the court viewed the defendant, rather than the deceased, as the victim. The court chose to emphasize the decedent wife's extramarital affair and supposed manipulation of the defendant's love for her. While the court conceded that the commission of some types of felonies could be sufficient to show unfitness for custody as a matter of law, the court indicated that such a crime would require either evi-

50. *Id.* at 259, 135 Cal. Rptr. at 225.

51. The relevant California statute provides that a child who has been cruelly treated or neglected by a parent may be declared free of the custody and control of that parent under certain circumstances. *Id.* at 263, 135 Cal. Rptr. at 227. See *Cal. Civ. Code* § 232(a)(2) (West Supp. 1985).

52. 65 Cal. App. 3d at 263, 135 Cal. Rptr. at 227. The California statute set forth additional grounds for termination of parental rights, where:

> [the] parent . . . [is] convicted of a felony . . . of such nature as to prove the unfitness of such parent . . . to have the future custody and control of the child, or if any term of sentence of such parent . . . is of such length that the child will be deprived of a normal home for a period of years.

*Id.* at 263-64, 135 Cal. Rptr. at 227 (quoting *Cal. Civ. Code* § 232(a)(4) (current version at West Supp. 1985)).

53. *Id.* at 262, 135 Cal. Rptr. at 226.

54. *Id.* at 262, 135 Cal. Rptr. at 227.

55. *Id.* at 257-58, 135 Cal. Rptr. at 224. According to the court, the victim had "played upon Sergio's love for her and led him to believe that they were reconciling." *Id.* at 258, 135 Cal. Rptr. at 224. This occurred after a final divorce decree. On the day the defendant stabbed the victim, he was "[s]till gullible as to [her] intentions." *Id.* at 259, 135 Cal. Rptr. at 225. They argued after she refused to agree to return to him with the children. The court further emphasized the defendant's testimony that the victim "directed the knife to her breast" and may have "dared him to use it" and cited expert psychiatric testimony given at trial to the effect that the victim may have had a death wish. *Id.*
idence of depravity or involve “direct” abuse of the child. The court suggested that “the murder of the mother of minor children could be committed by their father in such circumstances as to prove . . . unfitness . . . if the killing were accomplished in the presence of a child.”

The court’s reasoning indicates a failure to recognize the effect that such an event has on children, and a reluctance to conclude that a murderer may not be the proper parent for his own children. The court actually analogized the deprivation suffered by these children to that experienced by children whose parents get divorced.

If In re James M. was an isolated case, it could be dismissed as an aberration. Judicial tolerance towards wife abuse, however, is more widespread than rare. Significantly, the case has been cited with approval in subsequent cases. The California Court of Appeals, in In re Sarah H., found unfitness in a father who murdered the mother, but nevertheless cited James M. with approval. In spite of the defendant’s prior criminal record, his brutal beating to

56. Id. at 265-66, 135 Cal. Rptr. at 228-29.
57. Id. at 266, 135 Cal. Rptr. at 229.
58. The court failed to recognize that an act committed against the mother, but not physically against the children, could nevertheless constitute direct cruelty to the children. The court’s reasoning that “[t]he concept of neglect in the statute connotes a failure on the part of the neglecting parent in his . . . direct relationship with the child,” id. at 266, 135 Cal. Rptr. at 229, misses the mark. The court noted that cruel treatment could be mental, but averred that it “must be intended action or conduct directed to have an effect upon or reaction from a child.” Id. The court’s articulation of the scienter requirement here would appear to excuse even the father who murders the wife in view of the children, but without the intent or knowledge that they were witnessing the act. See infra notes 73-111 and accompanying text.
59. Id. at 266, 135 Cal. Rptr. at 229.
60. See supra notes 8-10 and accompanying text.
61. See In re Sarah H., 106 Cal. App. 3d 326, 329, 165 Cal. Rptr. 61, 62 (1980); See also In re Geoffrey G., 98 Cal. App. 3d 412, 424, 159 Cal. Rptr. 460, 467 (1979) (Hopper, J., dissenting). The Geoffrey court affirmed a trial court’s finding of a father’s unfitness for custody where the defendant had pleaded nolo contendere to voluntary manslaughter after strangling the children’s mother to death during an argument. The court considered the defendant’s criminal record of numerous arrests and convictions for intoxication, his prior failure to support his child, the fact that the defendant and decedent had never married, that the mother received welfare for the child while the defendant had lived with the mother and child, and that the three-year-old child was happy and well-adjusted, living with maternal grandparents. 98 Cal. App. 3d at 415-18, 159 Cal. Rptr. at 461-63. The dissent, however, cited In re James M. for the proposition that killing the mother was not enough for a finding of unfitness and suggested that a showing of a propensity to violent crime together with a showing that defendant did not hesitate to involve family members of a tender age in violent crime, and an inability to make a living, might be required for such a finding. Id. at 424, 159 Cal. Rptr. at 467.
63. Id. at 329, 165 Cal. Rptr. at 62.
death of the mother in view of the children, and testimony showing that the children suffered psychological effects from witnessing the murder, the concurring justice in *Sarah H.* felt that the case was a "close one" and that the record was "replete with evidence that the father had been a good father." At least one intermediate appellate court in another jurisdiction has utilized the reasoning of *In re James M.* In *Bartasavick v. Mitchell,* a Pennsylvania trial court removed a child from her grandparents' custody and returned her to the custody of the father who had murdered her mother. The court reasoned that "the permanence of the loss of [the] mother does not necessarily render the father permanently incapable of parenting."

Children who have experienced the loss of their mother in this manner are further victimized when they become the objects of protracted litigation. In 1975, a five-year-old boy who witnessed the baseball bat slaying of his mother by his father went to live with his aunt and uncle after his father was convicted of murder. Three years later, the father was paroled and sued to regain custody of the child. Despite the child's fear of his father and desire to remain with his foster parents, litigation continued for three years before custody was awarded to the foster parents. During this time the

64. *Id.* at 331-32, 165 Cal. Rptr. at 64.
65. *In re Abdullah,* 85 Ill. 2d 300, 423 N.E.2d 915 (1981). The Illinois intermediate appellate court, reversing a circuit court, had held that the mere conviction of the father of the stabbing murder of the mother, for which he received a sixty year sentence, was insufficient as a matter of law for a finding of unfitness for custody. *Id.* at 302-03, 423 N.E.2d at 916-17. The defendant had argued that the best interests of the child mandated a case by case determination and forbid a per se finding of depravity under the circumstances. The Supreme Court of Illinois reversed, holding that the murder of the mother and the extended sentence established a prima facie case of depravity which the defendant could, but had failed to, rebut. *Id.* at 305, 423 N.E.2d at 918. Regarding the fact that the victim was the child's mother, the court emphasized that the "[d]efendant . . . deprived his son of his mother and further heightened the psychological scarring caused by a family already broken by divorce." *Id.*
67. *Id.* The court overturned a trial court termination of the parental rights of the father and held that the killing of a mother by a father is not sufficient by itself to warrant a finding of abandonment of the child by the father. *Id.*
68. *Id.*
71. Newlund, *Boy Has Become Legal Tug of War,* Minneapolis Tribune, June 3, 1979, at 1A, col. 1. See Doctor Says Boy Should Remain in State, Minneapolis Tribune, Nov. 5, 1980, at 14B, col. 1. *See In re Mullins,* 298 N.W.2d 56 (Minn. 1980). In this opinion, the court addressed only the issue of which state, California or Minnesota, had jurisdiction to decide the custody issue.
child and his foster parents suffered economically and emotionally from the effects of extensive interstate custody litigation.\textsuperscript{72}

These cases demonstrate the critical need for statutory reform. Clearly, judicial discretion is not sufficient to protect the interests of battered women and children. The cases are disturbing in several respects. They indicate a judicial willingness to strain to protect the parental rights of batterers and convey the message that society is willing to excuse violence within the family more readily than violence in other contexts. Just as important, the best interests of the children are jeopardized by allowing violent men to have custody.

III. RELEVANCE OF SPOUSE ABUSE IN A CUSTODY CONTEXT

Abuse of mothers is detrimental to children regardless of whether the children are physically abused themselves or actually witness the violence.\textsuperscript{73} The batterer’s violence his wife should not be viewed as distinct from his relationship with his children, since spouse abuse injures children both directly and indirectly.\textsuperscript{74} The effects of spouse abuse on children include actual and potential emotional\textsuperscript{75} and physical harm,\textsuperscript{76} the negative effects of exposure to an inappropriate role model,\textsuperscript{77} and the potential for future harm where contact with the batterer continues.\textsuperscript{78}

A. Spouse Abuse is Child Abuse

Lenore Walker, recognized by both academicians and the judi-
ciary as an expert in the area of wife abuse,\textsuperscript{79} describes violence in the home as a form of nonphysical child abuse.\textsuperscript{80} In addition to suffering physical and emotional effects themselves,\textsuperscript{81} children are deprived of attention and care when their mothers are battered. At best, a battered woman's ability to care for her children is impaired.\textsuperscript{82} Battered women suffer from an array of symptoms that may include depression, low self-esteem, low energy and feelings of helplessness.\textsuperscript{83} Additionally, many women are bed-ridden or hospitalized regularly as a result of physical injuries.\textsuperscript{84} Decreased interaction between the mother and children can be expected in these circumstances.\textsuperscript{85} Since battering is the direct cause of this deprivation, wife abuse should also be considered a form of child abuse.\textsuperscript{86}

B. Emotional Harm Suffered by Children

Even children who are not physically abused themselves are traumatized by wife beating.\textsuperscript{87} Assaults against women in the home,

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\item \textsuperscript{80} L. Walker, The Battered Woman Syndrome 59 (1979). In Walker's study, 87% of the women reported that children were aware of violence in the home; 53% of men who abused their partners abused their children as well, while an additional one-third threatened such abuse. \textit{Id.}
\item \textsuperscript{81} See \textit{infra} notes 87-100 and accompanying text.
\item \textsuperscript{83} See R.E. Dobash & R. Dobash, supra note 82, at 111; Hilberman, supra note 82, at 1341-42; Prescott & Letko, supra note 82, at 84; Westra & Martin, supra note 82, at 49.
\item \textsuperscript{84} R.E. Dobash & R. Dobash, supra note 82, at 110-11. See Hilberman, supra note 82, at 1340-41; \textit{See also} Bruner, supra note 12, at 1 (a battered wife describes repeated beatings that resulted in severe injuries requiring hospitalization).
\item \textsuperscript{85} Westra & Martin, supra note 82, at 49.
\item \textsuperscript{86} L. Walker, supra note 80, at 59. See Westra & Martin, supra note 82, at 50. Westra and Martin note that the child in a family where there is abuse against the woman is exposed to the same environment as the battered child and is just as likely to live in fear. \textit{Id.} \textit{See also} Hilberman & Munson, Sixty Battered Women, 2 VICTIMOLOGY: AN INT'L J. 460, 462 (1977) (children are likely to see or hear violence directed against their mother); Pagelow, \textit{Children in Violent Families: Direct and Indirect Victims}, in \textit{Young Children and Their Families} at 47-48 (S. Hill and B.J. Barnes eds. 1982) (exposure to physical force against a loved one is "indirect abuse").
\item \textsuperscript{87} D. Martin, supra note 6, at 22. See Thomas, supra note 74, at 143A-145;
\end{itemize}
including beating and rape, occur most often at night and on weekends.\textsuperscript{88} As a result, children are likely to witness these attacks. Even where children do not directly witness the attacks, they are deeply affected by the climate of violence in their home.\textsuperscript{89} This trauma can result in immediate reactions of shock, fear, and guilt,\textsuperscript{90} longer lasting impairment of self-esteem,\textsuperscript{91} and impairment of developmental and socialization abilities.\textsuperscript{92} While there is a need for more research documenting the effects of wife abuse on children, problems ranging from below normal cognitive, verbal, motor and quantitative abilities,\textsuperscript{93} to anxiety, depression and social deviancy\textsuperscript{94} have been observed in the children of battered women.

C. \textit{Increased Risk of Physical Harm to Children}

In addition to suffering personality and developmental detriment, children who are exposed to family violence suffer an increased risk of physical injury.\textsuperscript{95} Children whose mothers are beaten are not only more likely to be the objects of physical attack themselves, they may be injured by their proximity to the attacks.\textsuperscript{96} In

Hilberman, supra note 82, at 1340-41 (children traumatized by the climate of violence); Hirsch, supra note 17, at 1 (abusers often force children to watch the violence).

88. Hilberman, supra note 82, at 1340; Hilberman & Munson, supra note 86, at 462.
89. Pagelow, supra note 86, at 53-55.
90. D. Martin, supra note 6, at 22.
91. Thomas, supra note 74, at 143A.
92. Westra & Martin, supra note 82, at 42-50.
93. \textit{Id.} at 52; See L. Walker, supra note 80, at 62-63.
95. Hilberman, supra note 82, at 1337; Hilberman & Munson, supra note 86, at 463; Westra & Martin, supra note 82, at 50; \textit{See Roy, A Current Survey of 150 Cases, in Battered Women: A Psychosociological Study of Domestic Violence, supra note 24, at 25, 33.} In Roy's study, 45% of the assaults on women included assaults on children. \textit{Id. See also} Pagelow, supra note 86, at 55-57; Prescott & Letko, supra note 82, at 81; Thomas supra note 74, at 145; Varma, \textit{Battered Women: Battered Children, in Battered Women: A Psychosociological Study of Domestic Violence, supra note 24, at 263, 264. But see} R.E. Dobash \& R. Dobash, supra note 82, at 150. The authors concluded that most wife batters do not beat their children. They noted that while 20% of the men in the study did punch at least one of their children very hard, most of the violence suffered by the children was either the result of the child's attempt to intervene on behalf of the mother or resulted from the child's proximity to blows directed at the mother. \textit{Id.} Dobash and Dobash also emphasized that concern for the children of battered wives should not obscure the fact that the woman is the primary victim. \textit{Id.} at 155.
96. R.E. Dobash \& R. Dobash, supra note 82, at 150; Pagelow, supra note 86, at 55-56. See P. Hoff, J. Schulman, A. Volenik \& J. O'Daniel, supra note 7, at 3-15; \textit{Legal Advocacy for Battered Women, supra note 73, at 83 (citation omitted); NCOWFL Battered Women and Custody Project, supra note 12, at 2.}
addition, older children can be injured when they attempt to intervene on behalf of their mother.\textsuperscript{98} Battering also tends to increase during pregnancy\textsuperscript{99} and can result in injury or death to the fetus.\textsuperscript{99} This type of abuse is not solely spouse abuse: It is child abuse as well.\textsuperscript{100} Wife battering is strong evidence of the batterer's reckless disregard for the safety and welfare of his children; batterers should be charged with knowledge of the risk their behavior entails.

D. \textit{Intergenerational Aspect of Family Violence}

While the emotional or physical manifestations of harm suffered by children of batterers are alarming, the cyclical nature of family violence may be the phenomenon with the most far-reaching implications for society. Simply stated, violent tendencies may be passed on from one generation to the next.\textsuperscript{101} From battering fathers, children receive direct messages condoning violent behavior and abuse of women.\textsuperscript{102} A child's propensity for future violence is likely to increase as a result of witnessing violence between parents and from exposure to an aggressive male parent as a role model.\textsuperscript{103} Children in violent families learn to use physical violence as an outlet for anger and are more likely to resort to violence as a means for resolving conflicts or displaying power.\textsuperscript{104} The abuser himself is likely to have come from a violent home.\textsuperscript{105}

The transmission of violent tendencies may be a sex-specific

\begin{thebibliography}{99}
97. Hilberman, supra note 82, at 1340; Hilberman & Munson, supra note 86, at 462.
99. Hilberman, supra note 82, at 1340; Hilberman & Munson, supra note 86, at 462.
100. See Hilberman & Munson, supra note 86, at 462.
101. Hilberman, supra note 82, at 1337, 1340-41. See Pfouts, Schopler, & Henley, Jr., supra note 94, at 95; Thomas, supra note 74, at 144-45; Westra & Martin, supra note 82, at 50. See also Varma, supra note 95, at 263 (on family violence as a self-perpetuating phenomenon).
102. \textit{Legal Advocacy for Battered Women}, supra note 73, at 83. Batterers exhibit personality traits and engage in behaviors that, if committed against strangers outside of the home, would raise serious questions about the suitability of these men as role models for their children. \textit{Id}.
103. Pagelow, supra note 86, at 64-66; infra notes 106-11 and accompanying text. See \textit{also State Education Department, the University of the State of New York, Addressing Domestic Violence: A Guide for School Personnel} (1982) (booklet issued to New York State school personnel) [hereinafter cited as \textit{State Education Department}].
104. \textit{State Education Department}, supra note 103.
\end{thebibliography}
phenomenon. Thus, boys may be more likely to imitate the violent behavior of their fathers while girls tend to become passive and withdrawn and may learn to use sexuality as a way to win their father's approval.

Children who observe violence in the home may be more likely to imitate that behavior than children who suffer direct physical abuse. While the extent to which a child raised in a violent home will be likely to abuse his own spouse will vary according to the reinforcement he receives for imitating the aggressive parent, at least one expert has concluded that boys who observed paternal violence were more likely to become violent than boys who were themselves victims of either maternal or paternal violence.

Messages implicit in the batterer's behavior encourage children to develop characteristics that perpetuate the very roles and relationships that fuel family violence. The batterer as a negative role model for children should be considered in conjunction with the array of other negative effects suffered by children from exposure to domestic violence.

E. Violence Does Not End With Divorce or Separation

The negative effects of spouse abuse on children do not vanish when parents divorce. Judges may consider spouse abuse irrelevant in a divorce context because they assume that the violence will end

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106. Pagelow, Violence in Families: Is There An Intergenerational Transmission? 15-17 (1982) (paper prepared for presentation at the 1982 annual meeting of the Society for the Study of Social Problems in San Francisco, California) (reprinted by NCOWFL). Dr. Pagelow, who has written extensively on the intergenerational aspect of family violence, asserts that the intergenerational model should be focused and controlled for greater scientific accuracy, to account for differences based on the sex of the batterers and victims and whether the affected person was a witness to, or victim of, the violence. Id.

107. Pagelow, supra note 86, at 64.

108. Id. at 64-65.

109. Id. at 57, 65. Pagelow notes that the adult male has the highest status in the family and his behavior is thus more likely to be imitated by both girls and boys. Since girls are less likely to be rewarded for aggressive behavior, they are unlikely to deviate from their sex roles without special inducements. Id. at 64-65. Like boys, however, girls may choose to identify with the father and turn against the mother. Girls may become susceptible to "seductive" fathers in order to win favor with the power figure in the family. Id. Some experts have noted that a higher than average rate of incest victims exists among the children of battered women. L. WALKER, supra note 80, at 65.

110. See Pagelow, supra note 86, at 64-66.

111. Pagelow, supra note 106, at 15-16; Pagelow, supra note 4, at 11. According to social learning theory, the home is the optimal environment for children to learn behavior patterns. Pagelow, supra note 86, at 65.
with the divorce or separation. Abuse may actually increase, however, when the woman asserts her independence. Several experts have noted that when a woman attempts to assert her autonomy or defend herself, either within the relationship or by leaving, physical assaults against her escalate. Batterers are also more likely to attempt to kidnap the children at this time. As a batterer’s violence towards an estranged or ex-wife escalates, both the woman and children are at risk during unsupervised visitation periods, during transfers of the children for visitation, and through shared custody arrangements. If the courts fail to recognize the continued risk of harm to the woman or children from the batterer, they will not make provisions for supervision during visitation or for the protection of the woman exposed to contact with the batterer while transferring the children.

IV. THE USE OF CUSTODY LITIGATION AS A WEAPON

Custody litigation, or the threat of it, has become an additional weapon for batterers to use against their victims. Since economic dependency is a key factor preventing battered women from escaping the battering situation, the batterer’s ability to use the threat of a

112. Issues of Public Policy, supra note 5, at 229, 259 (presentation by M. Fields); See id. at 215 (presentation by D. Martin, Overview — Scope of the Problem). Martin states that:
If a woman does manage to get away and obtains a divorce, she still has no guarantee of safety. Some ex-husbands continue to stalk and hunt down “their” women for years after a divorce, forcing their victims to move and change jobs continually. Despite the danger, judges continue to grant violent fathers visitation rights, and thus the opportunity to further intimidate their ex-wives.

Id. See also Bruner, supra note 12, at 1 (discussing court grant of joint custody to a particularly vicious batterer and his wife).

113. Hirsch, supra note 17, at 1. See Bruner, supra note 12, at 1; Lee, Violence in the Home, KPFA Folio, Berkeley, Cal. (Aug.-Sept. 1983) at 7; Shainess, Psychological Aspects of Wifebattering, in Battered Women: A Psychosociological Study of Domestic Violence, supra note 24, at 111, 116. See also In re James M., 65 Cal. App. 3d 254, 135 Cal. Rptr. 222. In James M., the husband threatened his wife with a knife when she filed for divorce and stabbed her to death after the divorce was final. Id. at 258-59, 135 Cal. Rptr. at 224-25.

114. See, e.g., D. Martin, supra note 6, at 76-79. The “threat of both physical and psychic withdrawal of love” may trigger violence in batterers. Id. at 46. See also R.E. Dobash & R. Dobash, supra note 82, at 109. Fear of reprisal may deter victims from calling the police. Roy, supra note 95, at 35.


117. D. Martin, supra note 6, at 83-85. Martin emphasizes that lack of money entraps affluent wives as well as the wives of poorer men, since they may have just as little control of
custody fight as a weapon is particularly effective. First, victims of abuse are unlikely to be able to afford legal fees. This enables the batterer to use the threat of custody litigation to keep the woman from leaving the home. When a battered woman is forced to remain in a relationship due to the combined threat of poverty and the loss of her children, both the woman and children are victimized by continued exposure to violence.

Secondly, a battered woman may make economic concessions in order to retain custody, only to find herself defending against a motion for modification later when her poverty is considered by the court as grounds for a change of custody to the more affluent parent. In In re Marriage of Day, for example, a mother accepted a reduced property settlement in exchange for the father's offer to give her custody of the children. Such willingness to bargain away or access to the family's money. Id. See Gelles, No Place to Go: The Social Dynamics of Marital Violence, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE, supra note 24, at 46; Roy, supra note 95, at 43. See also International Association of Chiefs of Police Training Key No. 245, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE, supra note 24, at 144, 146 [hereinafter cited as Police Training Key No. 245].

118. See Police Training Key No. 245, supra note 117, at 146. This manual states that: Economic dependence is perhaps the single most common reason why many abused wives choose to stay within a violent marriage. This is especially true of violent homes where the husband tries to maintain the wife's dependency through economic control. . . .

Most abused wives do not possess marketable skills that could be used to establish financial independence. But even those wives who are principal providers or who earn supplemental incomes can . . . be financially trapped within a violent marriage when their husbands control the family's finances.

Id.

119. Cf. Hart, supra note 39, at 3 (batterers force property and support concessions from their wives in exchange for promises to remove themselves from the home).

120. 314 N.W.2d 416 (Iowa 1982). In this case the husband offered custody to the mother contingent on her acceptance of his offer for a property settlement. A year and a half later he filed for modification of the custody decree and was awarded custody after alleging that the mother spent too much time away from the children. Id. at 417. The father also argued that the mother had wrongfully removed the children from the state without first informing him of the move. Id. at 420. The mother had been previously battered by the father, who carried a gun and had declared, "I will not stop bothering you until you or I are dead." Id. at 419. The mother had left the state with the children when her new husband's job required that they move to Kentucky. The fear of her ex-husband's violent reaction and potential emotional harm to the children led to her decision not to discuss the move with him first. In this case, the court, while not condoning the mother's secretive move with the children, concluded that her fears were reasonable, and affirmed the intermediate appellate court's reversal of the district court's award of custody to the father. Id. at 421.

121. Id. at 417.
spousal or child support and equitable distribution of marital property in exchange for safety and custody of the children is not atypical. Where battered women do litigate for custody, they may be penalized for lifestyles that originate from their status as battered women. Batterers frequently support their claims for custody by alleging that their victims are too unstable to care for the children. Battered women may appear unstable when they move frequently to avoid the attacks or for economic reasons. A mother may be deemed “uncooperative” about visitation when she attempts to avoid exposure to continued threats or beatings from the father. Ironically, if the woman has remained in the violent situation or attempted to leave and returned, this may be cited as further evidence of emotional instability. Finally, the woman is likely to be suffering from genuine emotional problems caused by the beatings. When courts fail to consider evidence of spouse abuse as relevant to fitness for custody, the battered woman may lose custody as a result of problems caused by the abuse itself.

Even where the victim’s charges of abuse are admissible, she may be prejudiced in certain situations by the fact that she made the allegations. For example, California includes a “friendly parent”

123. NCOWFL Battered Women and Custody Project, supra note 12, at 1; Thomas, supra note 74, at 157-59.
124. NCOWFL Battered Women and Custody Project, supra note 12, at 1; Thomas, supra note 74, at 157-59. See also In re Cline, 433 N.E.2d 51 (Ind. Ct. App. 1982) (battered woman leaves state with child).
125. NCOWFL Battered Women and Custody Project, supra note 12, at 1.
126. Id.; Thomas, supra note 74, at 159.
127. Thomas, supra note 74, at 158. See generally, ISSUES OF PUBLIC POLICY, supra note 5, at 258-59 (judge more critical of victim’s failure to take action earlier than of batterer’s violence).
128. Thomas, supra note 74, at 158-59.
129. See supra note 12.
130. The family court, Jefferson County, New York, awarded joint custody of two children, with physical custody to the father because the court concluded that the shelter for battered women, to which the mother had fled, was not an adequate facility for children. Blake v. Blake, 106 A.D.2d 916, 483 N.Y.S.2d 879 (1984). The appellate division reversed, holding that the trial court abused its discretion by failing to conduct “a full and complete hearing.” Id. at 880. See Arbelman, supra note 12, at 3; NCOWFL Battered Women and Custody Project, supra note 12, at 2.
131. See Thomas, supra note 74, at 157, 160 (batterers often argue that the victim’s allegations of violence are exaggerated or unfounded).
provision in its joint custody statute, giving preference in a sole custody award to the parent most likely to encourage contact between the children and the other parent. Because of the "friendly parent" provision, the California statute places the burden of proof on the party opposing joint custody. Michigan's custody statute creates a presumption favoring joint custody that can only be overcome by "clear and convincing evidence." A battered woman risks losing custody altogether if she fails to meet this stringent burden of proof. If the woman was previously reluctant to seek help or if the police failed to respond, this burden can be insurmountable. When the evidence consists largely of the woman's testimony against that of her husband, the myth that women fabricate allegations of abuse can operate against the woman in a custody dispute.

Battered women are especially disadvantaged in custody litigation when the courts consider the relative economic positions of the parents. Recently, this factor has been given significant weight by

136. Schulman & Pitt, supra note 133, at 554-56, 558-60. The battered woman who attempts to raise her mate's violence as grounds to rebut the presumption of joint custody is the "unfriendly parent" to the extent that she voices concern about unsupervised contact of the children with the batterer. Letter from Joanne Schulman, NCOFL staff attorney, to Ada Shen-Jaffe, Evergreen Legal Services, Everett Washington (Sept. 4, 1980) (discussing joint custody legislation).
137. The victim may actually have difficulty corroborating her allegations due to her prior reluctance to seek help, Thomas, supra note 74, at 160, or the failure of authorities to respond. See supra notes 5-9 and accompanying text.
138. See generally Lindsey, Mute Girl's Story: Child Abuse and the System, N.Y. Times, May 12, 1984, at 45, col. 1 (mother's allegations of father's sexual abuse of daughter not believed because, "You're going through a divorce, all women say that."). Id. Women's allegations of child abuse are disbelieved as readily as their claims of being battered. Letter from Brenda K. Jursik, Women Against Rape, Milwaukee, Wis., to Joanne Schulman, NCOFL staff attorney, (Oct. 18, 1982) (discussing custody in cases of alleged child sexual abuse).
139. Thomas, supra note 74, at 157, 159-60. Women in general are discriminated against when their financial condition is compared to the father's without consideration of the male/female earnings gap. See SISTERHOOD Is GLOBAL, supra note 27, at 697-98. According to Morgan, women employed full-time earn 64.7% of the median weekly income for men and as of 1983, the female median income was $12,000, compared to $20,060 for men. Id. at 697. See Woods, Been & Schulman, supra note 41, at 1131-32.
In addition to suffering the economic discrimination shared by women in general, battered women may experience additional economic hardship. First, the batterer may harass the woman at her work place and thereby jeopardize her job. In addition, absenteeism or poor performance due to emotional or physical problems arising from beatings may be cause for dismissal. Finally, battered women who attempt to secure safety for themselves and their children may lose time from work due to litigation and related matters.

The threat of a custody suit can be used to keep a woman in a violent relationship or to extract economic concessions from her. Protracted litigation can be used as a means to continue abusing the woman emotionally and financially. As the following discussion will demonstrate, the batterer has the ability to acquire continued access to his victim through shared custody arrangements.

V. STATUTORY STANDARDS FOR CUSTODY DETERMINATIONS

The modern trend in statutory standards for custody determinations is clearly towards joint custody. Where a court awards joint physical custody, the parties share both legal responsibility for the child and physical custody. In an award of joint legal custody, on the other hand, the parents share equally the rights and responsibilities of making decisions regarding the health, education and welfare of the child, but one of the parents is granted physical custody. While some states merely provide for joint custody as an option when the parties agree, other states allow awards of joint custody over the objection of one parent, or create a presumption of joint custody. Under these statutory schemes, joint custody can be imposed on unwilling parties.

140. See Polikoff, supra note 31, at 237-39; Thomas, supra note 74, at 159; Woods, Been & Schulman, supra note 41, at 1130-34.
141. NCOWFL Battered Women and Custody Project, supra note 12, at 1; Thomas, supra note 74, at 160; Woods, Been & Schulman, supra note 41, at 1134.
142. NCOWFL Battered Women and Custody Project, supra note 12, at 1; Thomas, supra note 74, at 160; Woods, Been & Schulman, supra note 41, at 1134.
143. See infra notes 183-236 and accompanying text.
144. See Schulman & Pitt, supra note 133, at 539, 543-46, 572-77.
145. Id. at 542-45. See e.g., CAL. CIV. CODE § 4600.5(d)(3) (West Supp. 1985).
148. Id. at 546-48, 550-51.
149. Id. at 551-53.
States that do not require joint custody by statute generally adhere to the "best interests of the child" standard in making custody determinations. This formula for determining custody gives broad discretion to the court in choosing the factors to be considered and how a particular factor will be weighed. In applying the standard, courts appear increasingly reluctant to scrutinize a parent's character. In addition, only four states have statutes that allow a court to consider the causes for marital breakdown in determining custody, and several states have adopted language from the Uniform Marriage and Divorce Act that precludes judicial consideration of parental conduct that "does not affect his relationship to the child." This language can be construed to exclude evidence of spouse abuse where courts fail to recognize its effect on children.

The trend towards automatic awards of joint custody, along with greater reluctance to evaluate the relative fitness or fault of the parties, bodes ill for battered women. While no-fault divorce and custody standards are ostensibly motivated by the desire to minimize acrimony in family dispute settlement, these statutory trends are unrealistic to the extent that they fail to take into account the high incidence of domestic violence involved in marital breakdown.

At least five states, however, have recognized the interrelated nature of custody and battering. While most state statutes do not expressly recognize the relevance of wife abuse in custody dis-
these states have enacted statutes that allow or require courts to consider evidence of spouse abuse in custody cases. In Florida, for example, legislation which became effective October 1, 1984, amended that state's joint custody statute. This law requires the court in a divorce proceeding to consider evidence of spouse abuse as evidence of detriment to a child. As a result, battered women may be able to obtain sole custody without having to prove, in each case, the correlation between wife beating and detriment to the child.

The Florida amendment further provides that in cases involving spouse abuse a court may, in addition to awarding sole custody to the victim, "make such arrangements for visitation as will best protect the child and abused spouse from further harm." Implicit in this language is recognition that both the child and the battered spouse may require protection from the batterer and that all arrangements for visitation in such a case should be explicitly defined. Since abducting a child during visitation is not uncommon behavior for batterers, supervised visitation may be especially important where the potential for child snatching exists.

Although the Florida law is the first requiring a court to consider spouse abuse as evidence of detriment to a child, other states address the problem of custody and battering less directly. Alaska's custody statute, for example, requires the court to consider marital violence in determining whether to award joint custody. The Alaska statute could be construed to limit consideration of marital

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159. Arbeitman, supra note 12, at 3. See supra notes 144-54 and accompanying text.
161. Fla. Stat. Ann. § 61-13(2)(b)(2) (West Supp. 1985). This is significant because under Florida's joint custody statute, joint custody is awarded unless the court makes a finding that "shared parental responsibility would be detrimental to the child." Id.
162. Hirsch, supra note 17, at 1.
165. Thomas, supra note 74, at 168-72. Child snatching is a vehicle for further abuse of the mother and the children. As one author notes:

Once the battered woman leaves, the batterer's hostility and violence often becomes directed at the children, or at her through the children by a snatching. Custody and visitation issues and incidents provide the batterer with opportunities for continued violence and carrying out his threats of child snatching.

166. Thomas, supra note 74, at 168-69, 72.
violence to cases where joint custody is an issue.\textsuperscript{168} As a result, the statute is arguably less effective in protecting children, since the court is not required to consider evidence of violence in a sole custody situation.\textsuperscript{169} The question remains open as to whether the Alaska courts will construe the statute to allow or require consideration of evidence of battering in all custody cases, whether or not joint custody is an issue. Furthermore, the statute does not require consideration of domestic violence in structuring visitation.

The Illinois Appellate Court, in an insightful decision, refused to be constrained by a literal interpretation of that state's custody statute. The court broadly construed the requirement that it consider "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,"\textsuperscript{170} in determining the best interests of the child. Thus, in \textit{Williams v. Williams},\textsuperscript{171} the court upheld a trial court ruling that permitted the mother to introduce evidence of a brutal beating inflicted upon her by the child's father, despite the fact that the child had not witnessed the attack.\textsuperscript{172}

In \textit{Williams}, the parties were divorced during the mother's pregnancy but cohabited after the birth.\textsuperscript{173} Subsequently, the father filed for custody and the court permitted the mother to introduce evidence of the beating.\textsuperscript{174} The father appealed the trial court's award of custody to the mother, arguing that the court erred in considering evidence of conduct that did not directly affect the father's relationship with the child.\textsuperscript{175} The issue on appeal was whether or not the state's custody statute requires that a child witness the violence before such conduct may be considered relevant to custody.\textsuperscript{176} In holding evidence of the beating relevant and admissible, the court reasoned that although the child may have actually witnessed the assault, that fact was not determinative since the child was so young that comprehension might be limited.\textsuperscript{177} Significantly, the court ac-

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170. \textit{ILL. ANN. STAT.} ch. 40, § 602(a)(5) (Smith-Hurd 1980). The statute requires the court to "determine custody in accordance with the best interest of the child" while "consider[ing] all relevant factors . . . ." \textit{Id.}
172. \textit{Id.} at 17, 432 N.E.2d at 376.
173. \textit{Id.} at 17, 432 N.E.2d at 375-76.
174. \textit{Id.} at 17, 432 N.E.2d at 376.
175. \textit{Id.} at 17-18, 432 N.E.2d at 376.
176. \textit{Id.} at 18-19, 432 N.E.2d at 376-77.
177. \textit{Id.} at 19, 432 N.E.2d at 377.
\end{flushright}
knowledged that the best interests of the child might require removal from a potentially harmful environment, regardless of the child’s awareness. The court noted that evidence of actual harm to the child was not a prerequisite to a finding that the child should be removed from a harmful environment. The admissibility of evidence of a parent’s brutality, however, should not depend on judicial willingness to engage in activist statutory interpretation. Custody statutes should be drafted to ensure the admissibility of evidence of domestic violence in all cases.

Finally, two states, Kentucky and Colorado, attempt to protect battered women by precluding the introduction of evidence of the woman’s absence from the home as tending to show instability, abandonment, or fault. While these statutes do not address the issue of battering as evidence probative of parental fitness, they do prohibit consideration of a battered woman’s absence from the family home where the victim has left to escape the abuse. While this type of statute can alleviate some of the prejudice battered women experience in custody litigation, additional legislation is needed to ensure that evidence of battering will be admissible and given weight in every custody case.

178. Id.
179. Id. The court stated that while the child may actually have witnessed the assault, that fact was “of no import, for the child was of such tender age as to preclude full comprehension of the event.” Id. Furthermore, the court emphasized that “the best interests of the child may necessitate removing the child from [a] potentially harmful environment irrespective of the child’s state of knowledge.” Id. (citing In re Padiak, 101 Ill. App. 3d 306, 427 N.E.2d 1372 (1981)).

The attack on the wife in Williams was especially brutal. The husband beat, raped, and confined the victim for several days after inflicting injuries that required surgery and hospitalization. Id. at 18, 432 N.E.2d at 376. The court may have felt compelled under the circumstances to construe the statute broadly. Restrictive statutory language might not be so easily overcome in a case involving less shocking facts.

180. COLO. REV. STAT. § 14-10-124(4) (1984) provides:
If a parent is absent or leaves home because of spouse abuse by the other parent, such absence or leaving shall not be a factor in determining the best interests of the child. For the purpose of this subsection (4), “spouse abuse” means the proven threat of or infliction of physical pain or injury by a spouse on the other parent.

Id. KY. REV. STAT. § 403.270(2) (1984) provides:
The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. The abandonment of the family residence by a custodial party shall not be considered where said party was physically harmed or was seriously threatened with physical harm by his or her spouse, when such harm or threat of harm was causally related to the abandonment.

182. See supra notes 116-30 and accompanying text.
VI. DANGERS TO BATTERED WOMEN IN MODERN CUSTODY TRENDS

Modern trends in family law are fostering a treacherous situation for battered women. The major areas of concern for battered women include statutory presumptions of joint custody, certain provisions of the Uniform Child Custody Jurisdiction Act, moving restrictions in custody decrees, and mandatory mediation of family disputes. The pitfalls for battered women inherent in each of the statutory schemes are magnified when battering is not considered as evidence of unfitness for custody.

A. Joint Custody is Inappropriate Where Parents Are Hostile

The premise underlying joint custody — that children benefit from a relationship with both parents — does not lead inevitably to the conclusion that maximizing father-child contact in the post divorce situation is an absolute goal. While the maintenance of an ongoing relationship with both parents is recognized as a factor contributing to the successful post divorce adjustment of children, the converse is true for children who have been exposed to a parent who abused the children or their mother, either physically or psychologically. Furthermore, joint custody requires close contact, cooperation and decision making, and is therefore inappropriate in cases involving hostile parents. Shared custody arrangements provide

183. Thomas, supra note 74, at 143; Woods, Been & Schulman, supra note 41, at 1133-44.
185. See infra notes 200-21 and accompanying text.
186. See infra notes 222-36 and accompanying text.
187. See infra notes 237-50 and accompanying text.
189. See Wallerstein, supra note 188, at 2. Wallerstein concludes that "children who were able to maintain geographical distance from a psychiatrically disturbed parent greatly improved and in fact experienced a developmental spurt during the first year following the marital breakdown." Id. Wallerstein also noted that "the departure of a parent who has been physically or psychologically brutal or demeaning to the child or [other] parent provides great relief." Wallerstein, Children of Divorce: The Psychological Tasks of the Child, 53 AMER. ORTHOPSYCHIATRY 230, 237 (April 1983).
191. In Blake v. Blake, the court noted that "[t]he parties . . . have demonstrated great antagonism toward each other. For that reason alone, joint custody . . . is inappropriate." 106 A.D.2d 916, 483 N.Y.S.2d 879, 880 (1984). See Schulman & Pitt, supra note 133, at 570; Bodenheimer, Equal Rights, Visitation, and the Right to Move, 1 FAM. ADVOC. 18, 19 (1978). See also Neely, supra note 40, at 183-84 (distinguishing voluntary from court-ordered joint
the batterer with ongoing access to his victim and expose the children to continued harm from violence and hostility between the parents.\textsuperscript{192} For these reasons, courts should not award joint custody in situations involving domestic violence. Unfortunately, as more states adopt joint custody, this type of arrangement is decreed more frequently in inappropriate situations.\textsuperscript{193}

In \textit{In re Marriage of Weidner},\textsuperscript{194} the Supreme Court of Iowa recently emphasized that joint custody should not be imposed on unwilling parties, even though Iowa law allows the court to award joint custody over one party's objection.\textsuperscript{195} The \textit{Weidner} Court sustained a trial court's award of sole custody to a mother,\textsuperscript{196} reasoning that joint custody was inappropriate where the parents were mutually hostile and the father, in particular, was aggressively hostile towards the mother and engaged in behavior that disrupted the children's daily lives.\textsuperscript{197} Unfortunately, most states do not have a domestic violence exception in their joint custody statutes,\textsuperscript{198} and many judges still refuse to give evidence of spouse abuse significant weight when making custody determinations.\textsuperscript{199} Under these circumstances, women and children are jeopardized by the joint custody trend.

\textbf{B. The UCCJA: Mixed Blessing for Battered Women}

The Uniform Child Custody Jurisdiction Act (UCCJA) has been adopted in every state\textsuperscript{200} as part of a nationwide effort to deter child snatching and to resolve competing jurisdictional problems in interstate custody litigation.\textsuperscript{201} While these goals are important, several of the provisions of the UCCJA can be problematic for battered women who leave a state with their children in order to escape the batterer.\textsuperscript{202}

\begin{footnotes}
\item 192. \textcite{Schulman & Pitt, supra note 133, at 555-56.}
\item 193. \textcite{P. Hoff, J. Schuman, A. Volenik & J. O'Daniel, supra note 7, at 2-7.}
\item 194. \textcite{338 N.W.2d 351 (Iowa 1983).}
\item 195. \textcite{Id. at 358-59. See Iowa Code Ann. § 598.41(2) (West Supp. 1985).}
\item 196. \textcite{338 N.W.2d at 359.}
\item 197. \textcite{Id. at 357.}
\item 198. \textcite{Arbeitman, supra note 12, at 3.}
\item 199. \textcite{See supra note 12.}
\item 201. \textcite{See S. Katz, Child Snatching: The Legal Response to the Abduction of Children 11-15 (1981).}
\item 202. \textcite{P. Hoff, J. Schuman, A. Volenik & J. O'Daniel, supra note 7, at 3-15 - 3-16.}
\end{footnotes}
The jurisdictional requirements of the UCCJA may jeopardize the safety of a battered woman by requiring her to litigate in the forum where the batterer lives and files suit. Section 3 of the UCCJA grants jurisdiction to render a custody decree to the state where a child has last lived for six months or more. Thus, a battered woman who flees her home for safety reasons may be required to return to her home state for a hearing on custody. When this occurs, the victim is once again exposed to the batterer and incurs additional expenses if she wants to avoid the possibility of a home state decree awarding custody to the batterer upon her failure to appear. Since each state under the UCCJA is required to give full faith and credit to the decree of another state exercising jurisdiction pursuant to its provisions, the home state decree, issued by default, would be enforceable in the state to which the victim has fled.

This situation can be prevented when the home state voluntarily waives its right to exercise jurisdiction. The Indiana Court of Appeals, in In re Cline, ruled that an Indiana trial court was correct in doing just that. In that case, the court held that the trial court had properly deferred jurisdiction to a California court where a battered woman had fled with her child from Indiana to California. The Indiana trial court had declined to exercise jurisdiction because it found that California was the more convenient forum, and be-

204. This could happen, for example, where a battered woman leaves California, her home state, and California subsequently exercises jurisdiction for custody purposes under U.C.C.J.A. § 3(a)(1) (1968). This section confers jurisdiction on a court in the state which had been the child's home state within six months before commencement of the proceedings when one parent removes the child from that state and the other parent remains. Id. Since California requires participation in mandatory mediation in a custody dispute, Cal. Civ. Code § 4607(a) (West Supp. 1985), the battered woman would have to return to California for this purpose. A California attorney who has handled several cases where this has happened believes that this situation is not uncommon. Telephone interview with Michelle Welsh, private attorney in Pacific Grove, California (Mar. 1, 1985) (record on file at Hofstra Law Review). See U.C.C.J.A. § 11 (1968) (appearance of parties and child).
207. Id.
208. See infra notes 209-14 and accompanying text.
210. Id. at 53-54.
211. Id. The court considered the mother's allegations of battering and the fact that she fled to her parents' home, California's desire to extradite the father on criminal charges involving his attempt to take the child away from his mother in California, and the presence of
cause the California court was willing to hear the matter. The appellate court, apparently sensitive to the plight of the battered spouse, agreed that there were sufficient reasons for the trial court to determine that California was the more appropriate forum. Waiver of jurisdiction, however, is within the court's discretion, and less progressive courts may more often force the fleeing victim to return to the home state for litigation.

The UCCJA's emergency jurisdiction provision, which provides an alternative basis for a state to exercise jurisdiction, similarly fails to address the needs of battered women. This section of the Act allows a court that would not otherwise have jurisdiction to exercise jurisdiction when it is necessary to protect the child. This provision has been narrowly drafted and construed and the courts have generally been reluctant to invoke emergency jurisdiction. To be more effective, the UCCJA emergency jurisdiction provision should provide explicitly that a battered woman who flees a state in a good faith attempt to escape her batterer will be entitled to relief in the state where she settles with her children. Such a provision would require the state that the battered woman leaves to defer jurisdiction to her new home state. The batterer, rather than the victim, would then absorb the costs of litigating in a distant forum, and the woman would not have to again risk exposure to the batterer.

Finally, the pleading requirements of the UCCJA create an additional area of concern for battered women, since this section requires all the parties to disclose their addresses. The safety of a hospital records in California that were relevant to the mother's fitness. See U.C.C.J.A. § 7 (1968) (defining inconvenient forum under the Act).

212. 433 N.E.2d at 53.
213. Id. at 54.
214. See supra note 204. See also P. HOFF, J. SCHULMAN, A. VOLENIK & J. O'DANIEL, supra note 7, at 3-15 - 3-17 (discussing the problematic nature of jurisdiction under the U.C.C.J.A. in cases involving battered women fleeing home states).
215. U.C.C.J.A. § 3(a)(3) (1968) provides that an otherwise competent court has jurisdiction to make a custody determination if the child is physically present in the state and has been abandoned or if "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]." Id.
217. Such a provision would be consistent with the purposes of the Act. First, there would be less likelihood of a jurisdictional conflict. Second, the exercise of jurisdiction by a state that the victim moves to would not encourage child snatching or forum shopping, since battered women flee in order to secure safety for themselves and their children.
218. U.C.C.J.A. § 9(a) (1968) (requiring information under oath to be submitted to the
battered woman is jeopardized when the batterer can locate her through this public record.\textsuperscript{219} New York has resolved this problem in its version of the UCCJA\textsuperscript{220} by providing for the confidentiality of the addresses of battered women and of shelters.\textsuperscript{221} The potential difficulties for battered women in specific provisions of the UCCJA illustrate that even remedial statutes can fail to realistically consider the needs of domestic violence victims in the custody context.

C. Moving Restrictions in Custody Decrees

The incorporation of moving restrictions into custody decrees, requiring custodial parents to remain in a certain geographical area, is another area of concern for battered women.\textsuperscript{222} Consistent with the trend emphasizing joint parenting responsibilities and privileges,\textsuperscript{223} some courts have imposed moving restrictions on custodial parents.\textsuperscript{224} In addition, some states have anti-removal statutes\textsuperscript{225} that have the same effect.

Even in the absence of a statutory or explicit requirement in the decree, courts may find that the non-custodial parent’s visitation rights require the custodial parent to remain in a specific geographic area. Thus, one court has ruled that the non-custodial parent’s right to free access and liberal visitation created an implicit restriction on the custodial parent’s right to move.\textsuperscript{226}

At least one court, however, has refused to impose such a restriction on the custodial parent.\textsuperscript{227} In a well-reasoned decision, the
court in *Hale v. Hale*\(^{228}\) recognized that the desirability of frequent and continuing contact between the non-custodial parent and the children was not dispositive of the custodial parent’s request to move with the children to a distant state.\(^{229}\) The court emphasized that the well-being of the custodial parent should be considered in a determination of whether removal was appropriate,\(^{230}\) and that the best interests of the child are interwoven with the best interests of the custodial parent.\(^{231}\) Removal was allowed in this case where the mother made a good faith request to move to another state to pursue a career opportunity.\(^{232}\)

In situations involving battered women, moving restrictions are particularly inappropriate. As the Supreme Court of Iowa noted in *In re Weidner*,\(^{233}\) proximity may increase hostility, and therefore distance between the parties may be desirable.\(^{234}\) Implicit in both the *Hale* and *Weidner* opinions is the view that the non-custodial parent’s strong interest in visitation may be overridden by a number of other concerns, including factors that relate directly to the welfare of the custodial parent.\(^{235}\) In a case involving domestic violence, the emotional and physical well-being of the battered woman should take priority over the batterer’s interest in access to his children.

Moving restrictions are dangerous to battered women who retain custody to the extent that they assure proximity and access to the batterer.\(^{236}\) Where a court excludes evidence of battering, the potential for the imposition of moving restrictions on battered women is clear. Even where evidence of battering is admitted, if the court considers the desirability of continuing contact between the non-custodial parent and the children as dispositive of the removal rights of the custodial parent, a battered woman may be required to remain in the same geographical area as her abuser. In such a case, the non-custodial batterer is assured access to his children and to the victim while retaining the right to move himself, if he wishes. The battered woman, however, may not move even to escape beating, if

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228. *Id.* See Gersten, *supra* note 226, at 871.
230. *Id.* at 815, 429 N.E.2d at 342.
231. *Id.* at 817-20, 429 N.E.2d at 343-45.
232. *Id.* at 813-14, 429 N.E.2d at 341-42.
233. 338 N.W.2d 351 (Iowa 1983).
234. *Id.* at 357.
235. These factors would logically include the economic, emotional and physical well-being of the custodial parent.
she wishes to retain custody.

D. Mediation is Inappropriate in Cases Involving Spouse Abuse

Mediation, particularly participation in mandatory mediation as a precondition to opportunity to be heard on a motion for custody or divorce, is another developing trend in family law that is potentially hazardous for battered women. Despite findings that arrest is the best deterrent to domestic violence, the trend towards diverting domestic violence complaints from the courts into mediation programs appears to be gaining popularity. California, for example, requires mediation in all cases involving child custody, including those involving child or spouse abuse.

The impetus for mediation arises as much from the inability and unwillingness of the judicial system to handle the volume of conflicts that arise, as it does from a misguided popular belief that domestic disputes are especially appropriate for resolution through mediation. The primary goals in any domestic violence situation

237. See, e.g., CAL. CIV. CODE § 4607(a) (West Supp. 1985).
242. Lefcourt, The Use of Mediation to Resolve Family Disputes, N.Y.L.J., March 29, 1983, at 1, col. 2. Lefcourt quotes Chief Justice Burger, recommending that divorce and custody matters be settled by mediation in order to relieve the caseload of the courts. Id.
243. Mediation is seen as a remedy to court overcrowding and as a "civilized way to settle family problems." Berg & Pearlman, supra note 6, at 3 (emphasis in original); Boffey, supra note 238.
are providing safety and economic survival for the victims. Media-
tion subverts these goals to the goals of the mediation process which
emphasizes "communication, reasonable discourse, and joint resolu-
tion of adverse interests" outside the courtroom.

Imposing mediation on battered women indicates a failure to
appreciate the unequal power relationship between a batterer and his
victim. In a custody dispute, a battered woman, already suscepti-
ble to pressure to make economic concessions in exchange for
favorable custody arrangements, comes to the negotiations with
unequal bargaining power, and no legal representation, and is
expected to negotiate with her batterer "at arm's length" while the
criminal nature of the batterer's conduct is overlooked. In a soci-
ety where a battered woman must overcome multiple obstacles to
arrive at the point of terminating the ties that bind her to the bat-
terer, mandatory mediation imposes yet another burden on the vic-
tim of domestic violence.

VII. THE NEED FOR STATUTORY REFORM

In view of the high percentage of all family disputes that involve

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244. Lefcourt, supra note 122, at 268.
245. Id. Hart, supra note 39, at 11-12, compares the disparate goals of mediators and
battered women's advocates. See generally, Lerman, supra note 26.
246. ATTORNEY GENERAL'S TASK FORCE REPORT, supra note 5, at 23. See supra notes
117-42 and accompanying text.
247. Richard Neely, Chief Justice of the West Virginia Supreme Court of Appeals and
Professor of Economics at the University of Charleston, describes how he, as a young, small
town lawyer, helped a client who had no desire to actually obtain custody, use the threat of a
custody fight to obtain economic concessions from the client's wife. Neely, supra note 40, at
177-78. Neely concludes that
[a] parent concerned with paying as little as possible can use the threat of a custody
fight . . . as a lever during settlement negotiations. The result is that one parent —
typically the father — winds up paying less in child support than the needs of the
. . . children warrant, while the other parent — typically the mother — is forced to
scrape by on inadequate support, a problem exacerbated by the generally lower
earning power of women.
Id. at 168. See Hart, supra note 39, at 10-11 (batterers force property and support concessions
from their wives in exchange for promises of safety for the victims).
248. See supra notes 119-22 and accompanying text.
249. See Cohen, supra note 238 (discussing the need for "vigorous enlightened advoca-
cy" to protect women's rights in family disputes); Schulman & Woods, Legal Advocacy vs.
Mediation in Family Law, in THE WOMEN'S ADVOCATE, at 3, 4 (July 1983) (a newsletter of
the NCOWFL).
250. Lerman, supra note 26, at 84, 91-92. For a discussion of why mediation is an "in-
appropriate law enforcement response in family violence incidents," see ATTORNEY GENERAL'S
TASK FORCE REPORT, supra note 5, at 22-25.
DOMESTIC VIOLENCE AND CUSTODY

DOMESTIC VIOLENCE

251 legislation in the family law area should be implemented only after careful consideration of its potential impact on battered women. Legislators should question whether mandating arrangements such as joint custody, mediation, and restrictions on the right to move is realistic or desirable.

In the custody litigation context, a presumption in favor of the admissibility of evidence of spouse abuse is appropriate. The Florida statute, requiring evidence of spouse abuse to be considered as evidence of detriment to a child, is a good beginning, but reform is still needed. A more effective statute would provide that evidence of spouse abuse creates a presumption of detriment to a child. Extensive documentation of the negative effects of wife beating on children provides a sufficient basis for such a presumption.

A statutory presumption of detriment to a child arising from spouse abuse can help to limit the use of custody litigation as a battering weapon. In initial custody litigation, there are generally no clear guidelines for allocating the burden of proof. The presumption that battering is detrimental to children may actually lower the number of custody suits started for harassment purposes, since the batterer will be on notice that evidence of his violence will be both admissible and given substantial weight.

Finally, presumptions that are reality based impart order and some measure of fairness to domestic dispute resolution. Since ju-

251 See supra note 7; Schulman & Pitt, supra note 133, at 555.
253 See supra notes 73-116 and accompanying text.
255 One commentator notes that "[l]itigation is less frequent when there is a clear preference for one parent, and, in most cases, the avoidance of litigation itself is in the best interests of the child." Katz, supra note 30, at 348. Katz discusses the importance of the allocation of the burden of proof in custody litigation:

Litigation is a contest between adversaries, and custody is no exception. As in all contests, there should be rules that tell each contestant what he or she must do in order to "win" and who "wins" in case of a tie. The allocation of the burden of proof is such a rule and so are rebuttable presumptions. Such rules impart order and predictability into the judicial decision making process. Litigants as a result start with some notion of their chances of success; they can make choices accordingly.
Id. at 343. See also Uviller, supra note 30, at 126 (elimination of the maternal presumption removed an effective deterrent to litigation).
256 See Birzon, Evidentiary Problems for the Matrimonial Lawyer, 16 Fam. L. Rev. 5
Judicial decision-making is particularly difficult in the custody area, the operation of a rational presumption can facilitate the process, thus preserving the resources of the court and the parties. A presumption of detriment to children from battering will relieve the victims of the evidentiary burden of proving the negative effects of violence on children in each case. When the court’s choice is between custody to a batterer or to the victim, the battered woman is the preferred custodian.

CONCLUSION

Custody statutes are appropriate vehicles for stemming the tide of domestic violence in this country. At least one court has explicitly recognized that child custody and spouse abuse are interrelated areas and may properly be the subjects of one statute. In holding that a state domestic violence statute designed to protect victims of abuse could properly provide for ex-parte orders of protection including temporary custody and support provisions, the Supreme Court of Missouri in Williams v. Williams acknowledged that orders relating to custody and support may be necessary as part of the effort to aid domestic violence victims. The trial court had invalidated the statute as unconstitutional because of its impact on the father’s important personal rights, including his property interest in his home and his liberty interest in the custody of his children. The higher court reversed, holding the statute a reasonable exercise of the state’s police power and necessary to secure the protection of victims of abuse and to prevent future abuse. Regarding the parents’ ad-

(1984). Birzon notes that “[t]he ability to reasonably forecast evidentiary rulings which may determine the direction or ultimate result of a case remains of foremost importance...” Id. See also Uviller, supra note 30, at 114-23 (discussing the unfairness of sex neutral standards that fail to consider the disadvantages mothers suffer in competing for custody with fathers on an "equal" basis).

257. Birzon, supra note 256.
258. Hirsch, supra note 17, at 1.
259. Thomas, supra note 74, at 146-47, discusses the characteristics of battered women that make them preferred parents over batterers. See infra notes 263-68 and accompanying text.

260. Williams v. Williams, 626 S.W.2d 223, 229 (Mo. 1982).
262. Williams, 626 S.W.2d at 228-29.
263. 626 S.W.2d 223 (Mo. 1982).
264. Id. at 229, 230-32.
265. Id. at 229.
266. Id. at 230.
267. Id. at 229-32.
mittedly equal interest in the custody of the children, the court con-
cluded that when domestic violence is involved, the rights of the
abuser may be subverted to the rights of the victim.\footnote{268}

Although the Missouri case upheld the inclusion of custody pro-
visions in a domestic violence statute, the court's reasoning is equally
relevant to the issue of domestic violence provisions in custody stat-
utes. Recognition of the interrelated nature of custody and battering
is the first step towards structuring a rationally based family law
system. Custody statutes and determinations should be structured to
protect women and children from further harm, even where restric-
tion of a parent's contact with the children is necessary to accommo-
date this goal. Furthermore, custody statutes that properly consider
evidence of violence can serve a remedial purpose. Family violence is
a national tragedy with devastating consequences for society. Legis-
lators and the judiciary have the ability to structure custody provi-
sions that will deter this crime.

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