

Gender Bias in the Courts: Implications for Battered Mothers and Their Children

by Molly Dragiewicz, Ph.D.*

***Editor's Note:** In the courtroom, female litigants face not only a battle with an ex-partner who is trying to gain custody of their children but also face a far more sinister opponent: the deeply entrenched gender bias permeating the United States legal system. Gender bias impairs not only a woman's chances of winning relief from her abuser but also limits the ability of her attorney, if female, to prove her case. In this article, Molly Dragiewicz provides compelling evidence for these assertions, demonstrating, through data coming from diverse sources, that the decks are indeed stacked against the average female litigant's likelihood of obtaining justice and relief from a court system that professes equality under the law but in many cases delivers anything but. The oft-used moniker of the "good old boys' club" is quite horrifyingly accurate when describing how women rank vis-à-vis men in what goes on behind the courtroom doors. Dr. Dragiewicz's summary of the evidence ought to raise critical self-examination by our courts and their agents of the practices they use in adjudicating women's custody cases in jurisdictions across the country.*

Although the work on substantive areas of law is preliminary in nature, much of it is remarkably consistent. Our data came from many sources and in many forms. Across subject matters and districts, we heard overlapping and corroborating reports. We heard that gender counts, that in adjudication, whether you are a woman or a man affects the courtroom,

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the chambers conference, the perception of your credibility, the amount of damages you may receive, or the view of the importance of your claim.¹

INTRODUCTION

Battered women face a number of challenges when trying to leave an abuser. These problems are multiplied, complicated, and exacerbated for battered mothers. Contradictory laws, policies, and cultural beliefs put battered mothers in an especially untenable situation as they attempt to implement separation. The economic costs for primary or exclusive caregiving of children adds to these challenges, making it difficult for mothers to start over financially after leaving a relationship with an abuser. Recent changes in custody practice and policy have also begun to make it even more difficult for battered women to make a break from their abusers. Although every state is required to consider domestic violence (DV) as a factor at custody determinations, and many states have a presumption against granting custody to abusers, men's violence against women is often marginalized when considered alongside other factors. In combination with efforts to promote father involvement after divorce, mandates intended to increase safety and financial survival for battered women following divorce are increasingly being compromised.

Domestic Violence Defined

DV refers to a pattern of abusive, coercive, and controlling behavior by one partner against the other that includes violence. DV is comprised of multiple forms of psychological, economic, sexual, and physical abuse, and is often referred to as battering. These terms will be used interchangeably in this article in order to make clear that the author is talking about ongoing, dangerous forms of abuse and not minor disagreements or "conflict tactics." Conflating mere conflict with DV is misleading and irresponsible given the well-documented imbalances in power and outcomes in battering relationships as well as the inadequate resources currently available to deal with battering. Physical abuse varies in frequency from relationship to relationship, but the use and credible threat of physical harm including homicide intensifies the other forms of abuse. Battering in heterosexual relationships is overwhelmingly male against female, and women face a disproportionate risk of harm including homicide from intimate partners relative to men.² Cultural factors that condone men's use of violence against women in response to gendered transgressions, despite putative

¹ Judith Resnik, "Gender Bias: From Classes to Courts," 45 *Stan. L. Rev.* 2195, 2206 (1993).

² James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States: 2002 Update* (U.S. Department of Justice: Bureau of Justice Statistics, 2004); Bureau of Justice Statistics, *Homicide Trends in the U.S.: Intimate Homicide* (U.S. Department of Justice, 2007); James A. Mercy & Linda E. Saltzman, "Fatal Violence among Spouses in the United States, 1976-85," 79(5) *Am. J. Pub. Health* 595 (1989); Margo Wilson & Martin Daly, "Spousal Homicide Risk and Estrangement," 8(1) *Violence & Victims* 8 3 (1993).

exhortations not to “hit a girl,” contribute to the sex differences in battering and domestic homicide.³

One of the most insidious factors aggravating battered women’s problems upon separation is persistent and pervasive gender bias in the courts. This article reviews the research on gender bias in the courts, with special attention to the impact of bias on battered mothers. First, it reviews the history of efforts to address gender bias in the courts. Next, the findings of the gender bias task forces that are most relevant to battered mothers are discussed. The article concludes with a discussion of the ways that social demands for equality interact with persistent and pervasive forms of bias to penalize battered mothers in custody disputes.

Gender Bias Defined

Gender bias is defined by the National Judicial Education Program (NJEP) to Promote Equality for Women and Men in the Courts, as “(1) stereotyped thinking about the nature and roles of women; (2) how society values women and what is perceived as women’s work; and (3) myths and misconceptions about the social and economic realities of women and men’s lives.”⁴ Although the terms “sex” and “gender” are often used interchangeably, it is important to recognize the distinction between the two. Sex generally refers to the category female or male and is ostensibly linked to biological differences. Gender, on the other hand, refers to femininity and masculinity, the normative socially and historically specific characteristics ascribed to the sexes.

Gender Versus Sex

Gender implies not only different stereotypical characteristics for women and men, but also hierarchy. Masculine characteristics are generally seen as more valuable than feminine ones. At the same time, masculinity is also considered neutral, the ungendered standard to which feminine behavior and characteristics are compared.⁵ For example, legal understandings of

³ Walter S. DeKeseredy, Martin D. Schwartz, Danielle Fagan, & Mandy Hall, “Separation/Divorce Sexual Assault: The Contribution of Male Peer Support,” 1(3) *Feminist Criminology* 228 (2006) [hereinafter DeKeseredy et al., “Separation/Divorce Sexual Assault”]; Kate Cavanagh et al., “‘Remedial Work’: Men’s Strategic Responses to Their Violence Against Intimate Female Partners,” 35(3) *Sociology* 695 (2001); Russell P. Dobash et al., “Separate and Intersecting Realities: A Comparison of Men’s and Women’s Accounts of Violence Against Women,” 4(4) *Violence Against Women* 382 (1998); Walter DeKeseredy, Alberto Godenzi, & Martin Schwartz, “Toward an Integrated Gendered Social Bond/Male Peer Support Theory of University Woman Abuse,” *Critical Criminology* 10 1 (2001); Jay G. Silverman & G.M. Williamson, “Social Ecology and Entitlements Involved in Battering by Heterosexual College Males: Contributions of Family and Peers,” 12(2) *Violence and Victims* 147 (1997); Neil Websdale, *Understanding Domestic Homicide* (1999).

⁴ Lynn Hecht Schafran, “Overwhelming Evidence: Gender and Race Bias in the Courts,” in *The Criminal Justice System and Women: Offenders, Prisoners, Victims and Workers* 457, 459. (Barbara Raffel Price & Natalie J. Sokoloff, eds., 2004).

⁵ Allan G. Johnson, *The Gender Knot: Unraveling our Patriarchal Legacy* (2005).

self-defense have historically been based on what a “reasonable man” would do in a particular situation.⁶

The invisibility, centrality, and taken-for-grantedness of men’s gendered experiences are revealed in the relative ease with which courts understand and identify with men’s perspectives and actions. Judges often explicitly identify even with violent men (see “Minimization of Violence Against Women”).⁷ The other side of this coin is the incomprehensibility of battered mothers’ experiences in court. Battered women experience denial of the validity of their experiences and needs, even in the face of copious evidence that they are both common and reasonable.

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It is easy to think of multiple ways that each of the three types of gender bias might apply

to battered mothers in court. Stereotyped thinking about the nature and roles of women have been documented in women’s lack of credibility relative to men in the courts, especially around rape and other forms of men’s violence against women.⁸ The devaluation of women’s work is relevant to mothers at divorce because women continue to bear primary responsibility for child care and housework, damaging their earning power and limiting the financial assets to which women have access at divorce. Myths and misconceptions about the social and economic realities of women and men’s lives serve to inhibit the mostly male judiciary’s ability to understand women’s entrapment in violent relationships, as well as their economic difficulties following divorce. They also create a rosier picture than is justified of the level of social and economic equality that women have attained and the proportion of child care that fathers currently provide.

The three forms of gender bias described by NJEP are manifested in conflicting policies, practices, and attitudes that too easily combine to coerce battered mothers and their children into contact with abusers even after separation. This is true despite the well-documented risks to mothers and children;

⁶ Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (2000).

⁷ Peter G. Jaffe, Nancy K. Lemon, & Samantha E. Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (2003); James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (1999); Schneider, *supra*, note 6.

⁸ Leigh Goodmark, “Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform,” 37(3) *Ariz. St. L.J.* 709 (2005); Hecht Schafran, *supra*, note 4; Schneider, *supra*, note 6.

despite social expectations that battered women “just leave” abusers; and despite child protective policies that continue to punish women for “failure to protect” when they do not leave an abuser. In other words, battered women are blamed for the violence and abuse they and their children experience if they do not leave, and they may even lose custody of their children for exposing the children to DV if they stay with an abuser. But when battered mothers do leave, family law and the courts may well force them and their children into frequent and ongoing contact with their abusers even when there is a high risk of continued physical and emotional abuse, including risk of homicide.⁹

The practice of forcing battered mothers into visitation and joint custody arrangements with their abusers, or even awarding the abusers with sole custody, is on the increase following the expansion of “fatherhood promotion” funding, programs and ideology.¹⁰ For example, states with “friendly parent” provisions do not take violence against women as seriously as states without such provisions, weighing each parent’s willingness to promote contact with the other parent more heavily than safety and therapeutic considerations related to violence and abuse.¹¹ Although the harm to battered women may not be intentional, such “friendly parent” provisions have obvious negative implications for battered women who seek to protect themselves and their children from an abuser. It is imperative that lawyers, judges, and others be aware of the impact of gender bias on battered women negotiating custody arrangements, regardless of the intention of the court actors involved. Gender bias studies help to shed light on why and how courts disadvantage battered mothers at divorce despite the juridical injunction for objectivity and justice.

EFFORTS TO ADDRESS GENDER BIAS IN THE COURTS

Background

NJEP was formed by the National Organization for Women Legal Defense and Education Fund (NOW LDEF) in 1980. NOW LDEF had been formed by feminist lawyers and activists to “further women’s legal rights and to end the gender bias women faced in the courts. The impetus for the focus on the courts was the way judges were applying, or failing to apply, new laws intended to end gender bias in situations that ranged from hiring decisions to rape trials.”¹² NOW LDEF reasoned that “there is no point in passing remedial legislation if the judges who interpret, apply, and enforce these laws are themselves biased.”¹³

⁹ Schneider, *supra*, note 6.

¹⁰ Allison C. Morrill et al., “Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother,” 11(8) *Violence Against Women* 1076 (2006); Peter G. Jaffe & Claire V. Crooks, “Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues,” 10(8) *Violence Against Women* 1 917 (2004).

¹¹ Morrill, et al., *supra*, note 10.

¹² Hecht Schafran, *supra*, note 4, at 458-59.

¹³ *Id.*

NOW LDEF invited the newly formed National Association of Women Judges (NAWJ) to partner in an effort to address gender bias in the courts. NOW LDEF chose to partner with NAWJ because its members knew that judges would be most likely to listen to other judges and that it was important to establish the project as about improving the administration of justice according to judicial standards rather than as a feminist political cause.¹⁴ NAWJ was formed just a year earlier, in 1979, by Justice Joan Dempsey Klein, Justice Vaino Spencer, and 100 other women judges. The judges established the organization to work toward equal justice in the courts on a variety of fronts including advocacy for “women, youth, the elderly, minorities, the underprivileged, and people with disabilities.”¹⁵

Documentation

Before it undertook to address the impact of gender bias in the courts, NJEP set out to document the existence of bias state by state. Since the most explicit forms of discriminatory legal practice, such as the exclusion of women

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from juries, the bench, and law schools, had already been eliminated, NJEP knew that it would have to unequivocally demonstrate the continued existence of gender bias before it could demand training for judges.¹⁶ Members of NJEP

correctly anticipated that courts would resist acknowledging the existence of bias in their own jurisdictions, necessitating the state-by-state approach. More than 40 states have conducted gender bias self-studies to date. After many of the states had completed their assessments, circuit courts undertook self-studies as well, beginning with the Ninth Circuit Court. The majority of the circuit courts have now also completed self-assessments for bias.

The gender bias task forces utilized a number of qualitative and quantitative methods to assess bias-related factors, from the representation of women in the courts to the perceptions of those appearing in court. Many courts administered surveys to judges, lawyers, court personnel, plaintiffs, and defendants. Others took data from court watch projects, employment records, focus groups, and interviews.¹⁷ Levels of enthusiasm about the gender bias studies were mixed. Some gender bias task forces presented their findings tentatively, pointing out

¹⁴ Dorothy W. Nelson, “Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force,” 67 *S. Cal. L. Rev.* 731 (1994).

¹⁵ National Association of Women Judges, *History*, <http://www.nawj.org/history.asp>.

¹⁶ Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998); Hecht Schafran, *supra*, note 4.

¹⁷ Richard C. Kearney & Holly Sellers, “Sex on the Docket: Reports of the State Task Forces,” 56(6) *Pub. Admin. Rev.* 587 (1996).

the many weaknesses of their approach.¹⁸ Others seemed more convinced of the importance and validity of their studies' findings, asserting "the task force concluded 'gender counts' and can have an effect on litigants, witnesses, lawyers, employees, and judges."¹⁹

Participation of the Courts

The biggest accomplishment of the gender bias task forces may have been that so many of the courts participated, creating an atmosphere where the existence of perceptions of bias was at least acknowledged.²⁰ States varied widely in the amount of resources and energy that they offered to assist the task forces at the research and implementation phases. For example, New York's report concluded that "more was found in this examination of gender bias in the courts than bruised feelings resulting from rude or callous behavior. Real hardships are borne by women. An exacting price is ultimately paid by our entire society."²¹ In response to this finding, New York established a standing Judicial Committee on Women in the Courts, which continues efforts to study and address gender bias.

The Fourth Circuit showed considerably less enthusiasm and reported, "In the summer of 1994, two students from the College of William and Mary, serving as interns in the office of the Circuit Executive, were assigned the task of preparing a report on the issue of gender bias in the courts."²² Following the students' report, the Fourth Circuit declined to spend time or resources on a study of their circuit, citing the derogatory comments of Senators Grassley and Hatch about gender bias studies and their refusal to provide funding for the studies as justification.²³

Overall, the state and circuit court gender bias task forces unearthed similar problems. The repetition of the findings across the various courts indicates that regardless of specific methodological shortcomings, the results are valid, having been effectively triangulated across the courts and with similar findings unearthed by multiple methods. Despite more than 25 years of work on the gender bias uncovered, issues persist.

FINDINGS OF GENDER BIAS TASK FORCES

The state gender bias task forces were led by New Jersey, which produced the first report at the request of Chief Justice of the New Jersey Supreme Court

¹⁸ Bruce M. Selya, "First Circuit: A Study of Gender Bias in and Around Courts," 32 *Univ. Richmond L. Rev.* 647 (1998).

¹⁹ Procter Hug, Jr., Marilyn L. Huff, & John C. Coughenour, "Ninth Circuit: The Gender Bias Task Force," 32 *Univ. Richmond L. Rev.*, 735 (1998).

²⁰ Lynn Hecht Schafran, *Gender Bias Task Forces: Findings and Recommendations*, available at <http://www.nowldef.org/html/njep/findings.shtml>.

²¹ New York State Judicial Committee on Women in the Courts, *Women in the Courts: A Work in Progress: 15 Years after the Report of the New York Task Force* (2002), available at <http://nysl.nysed.gov/Archimages/80218.PDF>.

²² Samuel W. Phillips, "Fourth Circuit: The Judicial Council's Review of the Need for a Gender Bias Study," 32 *Univ. Richmond L. Rev.* 721, 722 (1998).

²³ Judith Resnik, "Asking About Gender in the Courts," 21 *Signs* 952 (1996).

Robert N. Wilentz in 1982.²⁴ State task forces continued to collect data through the 1990s and were met with remarkably divergent responses.²⁵ Accordingly, the reports take a variety of tones, from denying the seriousness of gender bias because of claims that the “nature of federal law” made such inquiry unnecessary, to boasting that “we were not asked simply to determine if gender bias exists in Florida, because this question already had been resolved.”²⁶

Despite the varying levels of enthusiasm for the study process or implementation, the courts’ findings were remarkably similar. The results show that gender bias is pervasive and has serious consequences, and it “permeates the decision making, operations, and environment of state court systems.”²⁷ The reports found both “gender bias in the courtroom and under the law” and “gender bias in court administration and the legal profession.”²⁸ The studies indicated that while gender bias sometimes affects men, its impact is over-

whelmingly and disproportionately against women. They also consistently found that men are much less likely to see gender bias as a problem or to acknowledge its existence.

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Others assume that judges are insulated from gender bias because they are supposed to be objective. Neither is the case. Judith Resnik notes that “neither age nor professional role explains differences in perceptions of the existence and frequency of gender bias. Whether older or younger members of the bar or bench, men saw the world one way, women another.”²⁹

Those involved in the studies have remarked about the frequency with which participants in the studies objected to their existence and asserted that they were unnecessary since bias was not an issue, with many respondents writing comments in the margins to this effect.³⁰ The Delaware report noted that “the finding of virtually every task force has been that the

²⁴ *Id.*

²⁵ Lynn Hecht Schafran, “Will Inquiry Produce Action? Studying the Effects of Gender Bias in the Federal Courts,” 32 *Univ. Richmond L. Rev.* 615 (1998).

²⁶ *Id.*; Florida Supreme Court, *Report of the Florida Supreme Court Gender Bias Study Commission* (1990).

²⁷ Kearney & Sellers, *supra*, note 17, at 587.

²⁸ *Id.* at 588.

²⁹ Resnik, *supra*, note 1, at 2206.

³⁰ Deborah R. Hensler, “Studying Gender Bias in the Courts: Stories and Statistics,” 45 *Stan. L. Rev.* 2187 (1993).

refusal of some lawyers and judges to acknowledge this fact is one of the primary mechanisms by which gender bias is perpetuated.”³¹ Delaware’s report recounted the negative reaction their study received from many male respondents.

Some members of the legal community emphatically told the Task Force that the project was a “waste of time and money.” For example, one attorney wrote that the survey portion was “(1) nonsense, (2) ideologically biased, (3) a waste of taxpayers’ funds, and (4) certain to come to a ‘politically correct’ conclusion that there is gender bias in Delaware’s courts—though there isn’t.” Another attorney questioned the survey saying, “Where did the money come from for this and why did anyone think the money needed to be spent?,” while a judge told the Task Force that the study was “totally unnecessary.” One court employee referred to the survey as a “witch hunt” and another dismissed gender bias as frequently being merely an excuse for those who do not succeed. Reflecting the view of some respondents who told the Task Force that, though gender bias may have once existed, it is no longer a factor, one attorney stated: “I have completed your survey and herewith returned it despite the fact that I have concluded it is no longer relevant. Ten years ago maybe, twenty years ago certainly, five years ago possibly, but today gender discrimination, if it exists, cannot possibly be measured by an instrument as crude as the one I just completed.”³²

But it did measure gender discrimination. Another respondent to the same study remarked, “It absolutely confounds me that any male could have the arrogance to declare that there is no problem, based simply on his limited experience.”³³ For example, a significant number of female respondents noted that they were subject to address by diminutive terms of “endearment,” not being recognized as attorneys, and “rude and otherwise unprofessional behavior, including sexual comments and advances” in court.³⁴ The reports also frequently noted that racism magnifies the bias against women of color.³⁵ Some of the reports sought to examine both forms of bias, and many states later developed bodies to address race and gender bias, but most of the first reports tried to isolate gender bias from that based on race. Respondents talked about how forms of bias intersect, anyway.

Gender Bias Issues Affecting Battered Mothers in the Courts

DV, child custody, and child support featured prominently in the gender bias reports produced throughout the 1980s and 1990s. The issues raised

³¹ Delaware Gender Bias Task Force, *The Delaware Gender Bias Task Force: Executive Summary*, at 2-3 (1995).

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.* at 11.

³⁵ Hecht Schafran, *supra*, note 20; Kearney & Sellers, *supra*, note 17.

were remarkably consistent, and almost all of the gender bias reports devoted substantial sections to these areas of law. Key among the issues raised were: women's credibility in court, double standards around parenting, inequitable distribution of resources, and the courts' lack of appreciation of the seriousness of violence and abuse against women by male intimates. Divorce cases involving battered mothers are a location where prejudices against women and mothers coalesce. Since "gender bias was not born in the court system[,] . . . it reflects the prevailing attitudes and conditions of our society," and policies that may not be biased on their face are often applied in ways that systematically disadvantage women.³⁶

Questioning of Women's Credibility. The issue of women's credibility in the court, especially around cases of men's violence against women they know, has been repeatedly documented.³⁷ The gender bias reports found that "women litigants are assumed to be less credible or their problems less important than those of men," and that "women's testimony may simply be thought to be complaints about life rather than as legally cognizable harms, and that even when believed, women's injuries may be trivialized or viewed as not 'worth much' in monetary terms."³⁸ In other words, state and circuit court studies found that "women are often disbelieved because they are women."³⁹ Courts that set out to aggressively address this issue, for example by advocating "reasonable woman" standards to ameliorate this form of gender bias, were among the most highly criticized, indicating the persistence of sexism.⁴⁰ Recent follow-up gender bias reports indicate that women's credibility is still a concern. North Dakota's 10-year follow-up study found "continuing concerns related to victim blaming, lack of respect for victim concerns, and skepticism about the credibility of women in domestic violence proceedings."⁴¹

Elizabeth Schneider has written extensively about the contradictory legal position of battered women and the challenges this poses to their credibility.⁴² In order to be "credible" as battered women, women have often been called upon to present themselves as incapacitated rather than as acting reasonably and justifiably in self-defense. Because violence committed against women by men known to them is so trivialized, and because the courts have been so slow to recognize the seriousness of violence against women as a crime,

³⁶ Massachusetts Supreme Judicial Court, "Gender Bias Study of the Court System in Massachusetts," 24 *New Eng. L. Rev.* 745, 746 (Spring 1990).

³⁷ Schneider, *supra*, note 6.

³⁸ Resnik, *supra*, note 1, at 2205.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ North Dakota Commission on Gender Fairness in the Courts, *Gender Fairness in North Dakota's Courts: A Ten Year Assessment*, available at <http://www.ndcourts.gov/court/committees/gender/gficreport.htm#p1>.

⁴² Schneider, *supra*, note 6.

women's self-defense pleas were not comprehensible in the same way that men's have always been.

Credibility problems are also manifested in the higher standards for evidence required from abused women, whether they are seeking orders for protection, reporting violence by a spouse, or demonstrating that they are a good enough mother. According to the Massachusetts gender bias report, attorneys believe that juries require more corroborating evidence from women in sexual assault cases than for other serious felonies. And, "although half of those surveyed agreed that judges accord sexual assault victims

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the same credibility as victims of other serious felonies, the responses of the rest of the attorneys differed depending on the sex of the respondent."⁴³ The New York report found similar perceptions of rape victims' lack of credibility in court.⁴⁴ The gender bias reports hypothesized that this lower credibility was based on negative stereotypes about women's integrity as well as an unwillingness to hold men accountable for violence against women they know.

Although the above comments were not necessarily about marital rape and other forms of sexual assault in marriage, it is not uncommon to hear claims that women fabricate reports of sexual violence against them and their children in order to "get a leg up" in the divorce property settlement or custody determination.⁴⁵ The few studies available on this issue do not support this assumption.⁴⁶ In fact, studies have found that many women are willing to agree to unfair and inadequate property division and support arrangements in order to retain primary custody of their children.⁴⁷ Nonetheless, the idea that women fabricate reports of sexual assault and other forms of violence for personal gain is present in battered mothers' court cases just as in other contexts.⁴⁸

Disregard of Evidence in Custody Determinations. Women's lack of credibility in court is also visible when courts simply ignore evidence of abuse in the context of custody determinations. Despite laws in every state mandating

⁴³ Massachusetts Supreme Judicial Court, *supra*, note 36, at 751.

⁴⁴ New York Task Force on Women in the Courts, "Report of the New York Task Force on Women in the Courts," 11 *Ford. Urb. L.J.*, 15, 52-54 (1987).

⁴⁵ Janet R. Johnston et al., "Allegations and Substantiations of Abuse in Custody-Disputing Families," 43(2) *Fam. Ct. Rev.* 283 (2005); Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

⁴⁶ Carrie Cuthbert et al., *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Courts* (Wellesley Center for Women, 2002); Johnston et al., *supra*, note 45.

⁴⁷ Johnston et al., *supra*, note 45; Maccoby & Mnookin, *supra*, note 45.

⁴⁸ Massachusetts Supreme Judicial Court, *supra*, note 36.

the consideration of DV, in practice, custody determinations often bracket evidence of violence and abuse in favor of formally equal arrangements that fail to account for family history, safety, and justice.⁴⁹ In sharp contrast to the well-documented harm to children from exposure to men's violence against women, and child protective services' use of this documentation to justify punishing women for failure to protect when they live with a batterer, family courts often ignore violence against women and focus only on men's direct abuse of children when it is time to allocate custody.⁵⁰

Impact on Children. The impact on children of exposure to men's violence against women includes but is not limited to: increased risk of physical, sexual, and psychological abuse; physical harm incidental to assaults against the mother; aggressive and noncompliant behavior; emotional and internalizing problems; effects on social and academic development; posttraumatic stress disorder; and traumatic bonding to the abuser. Effects also include the internalization of negative attitudes about women; feelings of guilt about causing the abuse; victim blaming; learning the appropriateness of using violence to get what you want; and the appropriateness of violence against women and intimates.⁵¹ The negative impacts on children of witnessing men's violence against women are mediated by a variety of factors, including the severity and duration of the abuse, the nature of children's exposure, whether the children are also directly abused, personality and other protective factors, the children's sex, whether the children maintain a close relationship with their mothers or peers; whether the children are believed at disclosure, and whether they are protected from further exposure to abuse after separation.⁵² Custody arrangements therefore have a significant impact on both potential harm to children and the availability of factors that can promote healing following the mother's separation from an abuser.

⁴⁹ Cuthbert et al., *supra*, note 46.

⁵⁰ Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) [hereinafter Bancroft & Silverman, *Batterer as Parent*]; Lundy Bancroft & Jay G. Silverman, *Assessing the Risk to Children from Batterers*, available at http://www.lundybancroft.com/pages/articles_sub/JAFFE.htm; Cuthbert et al., *supra* note 46; Jaffe & Crooks, *supra*, note 10; Peter G. Jaffe, Claire V. Crooks, & Samantha E. Poisson, "Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes," 54 *Juv. & Fam. Ct. J.* 57 (2003); Jaffe, Lemon, & Poisson, *supra*, note 7; Peter G. Jaffe, Michelle Zerwer, & Samantha E. Poisson, *Access Denied: The Barriers of Violence and Poverty for Abused Women and Their Children's Search For Justice and Community Services After Separation* (2002), http://www.lfcc.on.ca/access_denied_full.pdf; Jay G. Silverman et al., "Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis," 94 (6) *Am. J. Pub. Health* 951 (2004).

⁵¹ Bancroft & Silverman, *Batterer as Parent*, *supra*, note 50; Jaffe, Lemon, & Poisson, *supra*, note 7.

⁵² Bancroft & Silverman, *Batterer as Parent*, *supra*, note 50; Margareta Hyden & Imelda Colgan McCarthy, "Woman Battering and Father-Daughter Incest Disclosure: Discourses of Denial and Acknowledgement," 5(4) *Discourse & Soc'y* 543 (1994); Jaffe, Lemon, & Poisson, *supra*, note 7; Audrey Mullender, Liz Kelly, Gill Hague, Ellen Malos, & Umme Imam, *Children's Perspectives on Domestic Violence* (2002); Sally E. Palmer et al., "Responding to Children's Disclosure of Familial Abuse: What Survivors Tell Us," 78(2) *Child Welfare League of Am.* 259 (1999).

Significantly, the effects of exposure to adult DV on children include many of the behaviors and characteristics often described as negative “divorce outcomes.” Family studies scholars are only just beginning to consider that the quality of family relationships prior to divorce may have an impact on outcomes for children after divorce.⁵³ That is to say, what the research terms “divorce outcomes” may be contributing factors in addition to experiencing divorce or “father absence.” Unfortunately, almost all of the extant family studies literature still fails to investigate or even explicitly address violence and abuse of either mothers or children.

The available literature on “high conflict” divorce cases often minimizes the importance of men’s violence against women, emphasizing instead the notion of conflict as mutual, or the result of a communication problem.⁵⁴ This construction of “mutuality” ob-

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scures the marked and pervasive sex and gender differences in violence and abuse and their contributing factors, characterizing “conflict” as rooted in interpersonal dynamics. This framing of conflict does not accurately reflect the nature of DV and distorts the motives, meaning, and outcomes of abusive, protective, and defensive behavior. Significantly, in a court setting that is prone to underestimate the seriousness of men’s violence against known women and children, this framing can be used to punish mothers who seek to protect themselves or their children from further harm and to blame victims for the violence used against them.

Even when men’s violence against children has been reported, children’s disclosures may be dismissed as “coached” by the mother, or children’s objections to being around an abusive parent may be dismissed as the results of mothers’ “alienation” rather than the child’s justified and rational response to abuse. Alternatively, mothers’ reports of abuse are simply ignored as irrelevant now that separation is underway.⁵⁵ This results in the exclusion of evidence of violence and abuse from evaluators’ reports, and judges’ refusal to hear evidence of abuse.⁵⁶

Notably, research has found that those responsible for considering violence and abuse at custody determinations often articulate very different priorities than they enact.⁵⁷ Perhaps this is due to courts and their proxies such

⁵³ Jaffe, Lemon & Poisson, *supra*, note 7.

⁵⁴ Bancroft & Silverman, *Batterer as Parent*, *supra*, note 50.

⁵⁵ *Id.*; Cuthbert et al., *supra*, note 46; Joan Zorza, “The ‘Friendly Parent’ Concept: Another Gender Biased Legacy From Richard Gardner,” 12(5) *Domestic Violence Rep.* 65 (2007).

⁵⁶ Cuthbert et al., *supra*, note 46.

⁵⁷ *Id.*

as guardians ad litem (GALs) relying on the unfounded assumption that violence ends at separation or misguided efforts at allocating the children's time equitably as if they were property to which each parent was entitled a fair share. The problem with such formally equal arrangements is that they profoundly distort the realities of life and risk due to violence and abuse before and after separation.

Minimization of Violence Against Women. DV is consistently remarked upon as a location of gender bias in studies of courts.⁵⁸ Lynn Hecht Schafran has noted that DV is located “at the intersection of two of the most pernicious tendencies in the law: the devaluation of violence against women and the devaluation of family law.”⁵⁹ The gender bias reports affirm this observation.⁶⁰ Many of the reports comment on judges' dislike for hearing family law and DV cases, as do other studies.⁶¹ Comments trivializing violence and abuse, and communicating judges' feeling that family matters were beneath them and a waste of the court's time were common.

Hecht Schafran recounts comments from a judge who expressed his identification with a man who killed his wife because of her infidelity. The judge levied a minimal sentence, likening the man's killing of his wife to a drunk driving accident, and letting loose a string of comments about his doubts “that many married men . . . would have the strength to walk away, but without inflicting some corporal punishment . . . I shudder to think what I would do.”⁶² The judge further reflected that he was free to impose a lenient sentence because only the defendant's allies were in court, and women killed by their husbands did not have court watchers there to see what he was doing. The judge also required the perpetrator to work at a DV agency as part of his punishment. Hecht Schafran documents many cases like this where judges' identification with the perpetrator appears to drive their failure to protect victims. More than one of these cases has ended in homicide.⁶³

Hecht Schafran relates additional examples of judges trivializing violence against women. The Missouri gender bias report notes that a member of the state's antiviolence coalition stated that “inappropriate comments and belittling behaviors” are often directed at women from the bench. One Missouri judge reportedly asked women if they enjoyed being beaten.⁶⁴ A Florida judge sang “you light up my wife” in court when he heard about a woman

⁵⁸ Lynn Hecht Schafran & Norma J. Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, (2007), available at <http://womenlaw.stanford.edu/genderfairness-strategiesproject.pdf>.

⁵⁹ Lynn Hecht Schafran, “There's No Accounting for Judges,” 58(4) *Alb. L. Rev.* 1063, 1077 (1995).

⁶⁰ Delaware Gender Bias Task Force, *supra*, note 31, at 195.

⁶¹ Kearney & Sellers, *supra*, note 17; Schneider, *supra*, note 6.

⁶² Hecht Schafran, *supra*, note 59, at 1064.

⁶³ *Id.* at 1066.

⁶⁴ *Id.* at 1065.

whose abuser had covered her with lighter fluid and set her on fire.⁶⁵ Many of the state reports recounted similar complaints that DV was not taken seriously by the courts and that court personnel were inadequately trained or sensitive to this area. In addition to minimizing the seriousness of violence against women, these disrespectful comments are also abusive and dangerous because they affirm abusers' perceptions that their violence is not a big deal and that even if they are penalized, it is just a formality.

The assumption that reports of abuse are often false is also an example of minimization.⁶⁶ The minimization of violence against women is also evident in the failure to take restraining orders or violations of them seriously. Despite the fact that only about half of all temporary orders are converted to more permanent ones, guardians ad litem often dismiss "permanent" protective orders (in reality normally valid for a year or two) and their violation altogether since they are based on women's testimony. Judges often characterize restraining order violations as "inadvertent," in contrast to their own insistence that they take violence against women seriously.⁶⁷ This characterization of restraining order violation contradicts the research on batterers and battered women that describes postseparation stalking, harassment, terrorism, and violence including homicide, homicide/suicide, and familicide.⁶⁸

A related problem exists where "many family court judges routinely enter mutual orders of protection in family-offense proceedings upon the mere oral request of respondents" or when the respondent has not even made such a request.⁶⁹ This characterizes battered women seeking protection as responsible for the violence done to them, effectively undermining the purpose of restraining order to protect victims from further harm.

Double Standards for Parenting. At custody determinations, women face the combination of continued expectation of maternal responsibility for child and home care with the idealization of father involvement. This combination means that in family court women are held to a very high standard of parenting while men's expression of intent to parent is sufficient. Mothers' records of past care provide many opportunities to point out places where their mothering has fallen short of perfection: "I had the feeling that . . . every part of my parenting was criticized. Whereas he was a father who . . . moved from place to place and left the town . . . but not only did he not lose custody, I couldn't

⁶⁵ *Id.*

⁶⁶ Cuthbert et al., *supra*, note 46.

⁶⁷ Lori A. Zoellner et al., "Factors Associated With Completion of the Restraining Order Process in Female Victims of Partner Violence," 15(10) *J. Interpersonal Violence* 1081 (2007); Cuthbert et al., *supra*, note 46.

⁶⁸ David Adams, *Why Do They Kill? Men Who Murder Their Intimate Partners* (2007); Walter S. DeKeseredy, McKenzie Rogness & Martin Schwartz, "Separation and Divorce Assault: The Current State of Social Scientific Knowledge," 9 *Aggression & Violent Behav.* 675 (2004) [hereinafter DeKeseredy et al., "Separation and Divorce Assault"]; Websdale, *supra*, note 3; Wilson & Daly, *supra*, note 2.

⁶⁹ New York Task Force on Women in the Courts, *supra*, note 44, at 38.

get sole custody. I felt the judges were blaming me for the kids' bad behavior or academic problems."⁷⁰ Men, on the other hand, have much less experience on average of day-to-day child care, and are often judged to be *potentially* great fathers, regardless of their past conduct.⁷¹ Men benefit from the idealization of "involved fathering," while entrenched and highly gendered stereotypes set a low threshold for the achievement of this goal. One battered mother commented, "I had to prove myself over all those years. He was just, you know, the perfect dad. The judge had no concerns over him. And it's like they wanted me to do so many things, they wanted me to go to school, they wanted me to do this and that, but they weren't asking him to do anything."⁷² Another battered mother remarked, "[My ex-partner] doesn't pay child support . . .

The financial and moral worth of women's contributions continue to be minimized in divorce settlements. In fact, mothers' greater provision of care during the marriage may be used against them at divorce, when the courts have sometimes decided that fathers' greater income qualifies them as better able to provide for the best interests of the children.

he hasn't seen my son in three years. . . . But now he wants to be a father. Everybody's like . . . now he's decided he wants to be a father, God forbid we don't give him the chance."⁷³ Women may also be punished by judges who determine that working outside the home makes them bad mothers.⁷⁴ Alternatively, the judge may treat women as if they are out to gain resources that they are not entitled to at

divorce if they have stayed away from work to raise the children.⁷⁵ Despite some improvements, the financial and moral worth of women's contributions continue to be minimized in divorce settlements. In fact, mothers' greater provision of care during the marriage may be used against them at divorce, when the courts have sometimes decided that fathers' greater income qualifies them as better able to provide for the best interests of the children.

Related to the double standard for women's parenting compared to men's is the assumption, common to many of the family studies scholars who have produced studies that largely ignore violence, abuse, and parenting patterns prior to divorce, that "everything changes at divorce." This assumption is unfortunate for three primary reasons. First, the research on battering and child abuse

⁷⁰ Cuthbert et al., *supra*, note 46, at 35.

⁷¹ Lynne M. Casper, *My Daddy Takes Care of Me! Fathers as Care Providers* (1997). U.S. Department of Commerce, Economics, and Statistics Administration, *Current Population Reports* (U.S. Census Bureau, Jan. 23, 2007).

⁷² Cuthbert et al., *supra*, note 46, at 35.

⁷³ *Id.* at 36.

⁷⁴ R. Abrams & J. Greaney, *Report of the Gender Bias Study of the Supreme Judicial Court of the Commonwealth of Massachusetts* (1998).

⁷⁵ Cuthbert et al., *supra*, note 46; Schneider, *supra*, note 6.

strongly contradicts this assumption. Many batterers and, significantly, many of those who kill women or children when they are attempting to leave, continue violent and abusive behavior at separation or escalate their efforts to regain control of or punish the women for leaving.⁷⁶ Yet some courts ignore this risk:

Unless the battering has been directed at the children themselves, the courts will generally not deny custody or limit visitation solely on the basis of the father's violence against the mother. . . . [Frequently] courts will believe that wife beating will end with divorce and that supervised visitation . . . [is] unnecessary.⁷⁷

Given the tenacity of the most dangerous batterers, the minimal "protection" offered by supervised visitation looks like a cruel joke. Regardless of whether or not the woman and man are separated in the building where supervised visitation takes place, regular contact offers an opportunity for motivated batterers to stalk, follow, threaten, or harm battered mothers and their children. One advocate noted that "even where pickup and dropoff [for visitation] is at the police station, women get harassed, followed, and threatened by ex-partners."⁷⁸ The serious risk to battered women at even supervised visitations receives little notice in the literature on custody and visitation. Supervised visitations are not risk-free ways to reconcile parents' demands for access to their children and battering.

Punishment of Women Who Report Abuse at Divorce. Not only is violence against women sometimes minimized and denied at divorce and custody determinations, but battered mothers appear to be increasingly likely to be punished for raising the issue of violence and abuse at divorce. This may take the form of punishing women who mention violence and abuse under "friendly parent" assumptions, punishing women who insist on the relevance of a history of violence and abuse when they are pushed into participating in mediation, or being pressured to drop restraining orders to move things along more quickly in court. One battered mother described the pressure to act as if the history of abuse was not relevant to the custody and divorce arrangements this way:

We had to sit in a room, without our attorneys, with her [the probate probation officer] in the room, and I was made to look like the bad guy. Because

⁷⁶ Michael A. Anderson, Paulette Marie Gillig, Marilyn Sitaker, Marilyn McCloskey, Kathleen Malloy & Nancy Grigsby, "Why Doesn't She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety," 18(3) *J. Fam. Violence* 151 (2003); DeKeseredy et al., "Separation/Divorce Sexual Assault," *supra*, note 3; DeKeseredy et al., "Separation and Divorce Assault," *supra*, note 68; Jennifer L. Hardesty, "Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature," 8(5) *Violence Against Women* 597 (2005); Jaffe, Zerwer & Poisson, *supra*, note 49.

⁷⁷ Abrams & Greaney, *supra*, note 74, at 42.

⁷⁸ Cuthbert et al., *supra*, note 46, at 17.

I kept saying that's not acceptable. What about the domestic [assault and battery]? What about the history? It was totally disregarded. . . . I felt [the partner abuse] was not taken seriously, and I felt it was held against me.⁷⁹

Another battered mother was pressured into visitation with a batterer who had just gotten out of prison after threatening to kill his new wife and her child. The probation officer assigned to the case argued that this was irrelevant since the visitation would be supervised and admonished the battered mother that "you need to help build the bridge here."⁸⁰

The Massachusetts report noted that judges both minimize the risk related to battering around custody and punish mothers for bringing it up, quoting an attorney who said,

Battered women are losing custody because courts refuse to consider a batterer's violence as evidence of his parental unfitness. . . . Many battered women are threatened with loss of custody or contempt if they take precautions to protect themselves from access by the batterer.⁸¹

In this context, women's reports of violence are unfairly presumed to be false and frivolous, and they are prevented for protecting themselves from further violence.

Unfair Financial Settlements. The gender bias studies found that discrimination against women at divorce was manifested in unfairness in financial settlements. Women often receive unfair financial settlements when their unpaid labor in the home, in family-owned businesses, and in child care are ignored in the division of marital assets. The original New York gender bias report found that

male perspectives on family life has [sic] skewed decisions in equitable distribution cases. The perception of most men—and the judiciary is mostly male—is that care of the house and children can be done with one hand tied behind the back. Send the kids out to school, put them to bed, and the rest of the time free to play tennis and bridge. They think any woman—no matter her age or lack of training—can find a nice little job and a nice little apartment and conduct her later years as she might have done at age [twenty-five].⁸²

Judges apparently failed to consider the impact of women's contribution to the family on their earning potential following divorce, the cost of child care, and the loss of earnings by women who have paid jobs but who have

⁷⁹ Id. at 51.

⁸⁰ Id. at 52.

⁸¹ Abrams & Greaney, *supra*, note 74, at 42.

⁸² Hecht Schafran, *supra*, note 20.

nonetheless subordinated their careers to the needs of their husbands and children. Judges did not account for ongoing pay inequity between women and men. Other judges apparently assumed that since women would remarry, they would not need support from their ex-husbands. Courts usually did not award alimony, and, when they did, it was temporary.⁸³

Judges apparently failed to consider the impact of women's contribution to the family on their earning potential following divorce, the cost of child care, and the loss of earnings by women who have paid jobs but who have nonetheless subordinated their careers to the needs of their husbands and children.

Adding to the inequity of asset distribution, the gender bias reports noted that child support payment was often not enforced.⁸⁴

These are all examples of the ways that the devaluation of women's work and the persistence of myths and misconceptions about the social and economic realities of women's lives disadvantage women at divorce. The financial implications of divorce become even clearer when what is known about the dynamics of DV is considered. Women often remain with abusers or reconcile with abusers because they lack the financial resources that would enable them to leave. Women with children are even more financially dependent.⁸⁵ Batterers often forbid women's employment or deliberately interfere with their work in ways that cause them to lose jobs.⁸⁶ In addition to the implications of poverty for women and children's survival following divorce, women's lack of assets often contributes to them not having legal representation at divorce.⁸⁷

Is Gender Bias Gender Neutral?

In addition to the evidence of bias affecting battered mothers in court, some gender bias reports also remarked on perceptions of gender bias against men. Often this took the form of perceptions of favoritism to women. For example, according to some respondents, women's advancement on the bench or bar was attributed to affirmative action, and female defendants were seen as being treated more leniently than male defendants.⁸⁸ One of the places that gender bias task forces reported perceptions of bias against men was in family law cases around child custody and child support. These findings sometimes

⁸³ Delaware Gender Bias Task Force, *supra*, note 31.

⁸⁴ Hecht Schafran, *supra*, note 20; Kearney & Sellers, *supra*, note 17.

⁸⁵ Jaffe, Zerwer, & Poisson, *supra*, note 50.

⁸⁶ Susan Lloyd, "The Effects of Domestic Violence on Women's Employment," 19(2) *Law & Pol'y* 139 (1997).

⁸⁷ Kearney & Sellers, *supra*, note 17.

⁸⁸ Indiana Supreme Court Commission on Race and Gender Fairness, *Honored to Serve: Indiana Supreme Court Commission on Race and Gender Fairness Executive Report and Recommendations* (2007).

received pride of place in the final report by committees that chose to present gender bias as an equal opportunity problem, so it is important to consider these representations of bias.⁸⁹

Other gender bias reports obscured differences by gender and race. For example, a report from the Second Circuit indicated that

while an attorney survey reported occasional conduct by judges and more by lawyers that to the observer seemed to reflect bias, virtually no incidents of deliberate bias were reported or found. . . . [O]n the whole, attorneys think that the judges and the courts of the Second Circuit are fair, and that they enjoy practicing in the federal system. . . . In short, most lawyers, most of the time, think that the federal courts are fair and good institutions.”⁹⁰

This kind of writing uses “neutral” language to obscure gender differences. However, the fact that some members of all groups noted instances of bias does not mean that the problem is simply one of neuter incivility. The task forces that reported perceptions of bias against men also found perceptions of bias against women in the same areas. Rather than indicating that bias is not really a systemic problem, close examination of these complaints indicates that that sexism and patriarchal gender stereotypes are harmful to women *and* men.

As is often the case, looking at numbers out of context can lead to misleading conclusions Resnik has pointed out that complaints of favoritism to women in sentencing and custody decisions must be considered in the context of the realities of the courts’ trivialization and marginalization of women and actual differences in women’s and men’s behavior. Women really do most of the child care. Men really do most of the violence.⁹¹ In looking at the areas where women were sometimes perceived to have an advantage in the courts (custody, divorce, and sentencing), the context clearly is important to the disparities. The studies that included consideration of the factors affecting the award of custody rather than just counting who got custody the most, in fact, found that “the interests of fathers are given more weight than the interests of mothers and children.”⁹²

Sex differences in the history of care and parental preferences in particular are relevant to the disposition of custody cases. Certainly these factors are affected by ongoing sex and gender disparities in areas like assumptions about who is responsible for child care and women’s lower wages than men, but this does not mean that gender bias against men caused the outcome of more women than men having primary custody. Instead, most divorcing couples

⁸⁹ Id. at 28.

⁹⁰ George Lange III, “Second Circuit: Study of Gender, Race, and Ethnicity,” 32 *Univ. Richmond L. Rev.* 703, 704 (1998).

⁹¹ Resnik, *supra*, note 1.

⁹² Abrams & Greaney, *supra*, note 74, at 826.

agree to continue some form of the child care arrangements that existed prior to divorce (mothers doing most of the care and almost always being primarily responsible for it).⁹³

Perceptions of bias against men must also be considered in the context in which the gender bias studies took place. The reports that framed gender bias as an equal opportunity problem were among the last ones to be completed, in some cases 20 years behind the others, and were conducted well into the backlash against feminist work to secure women's rights.⁹⁴ North Dakota's report remarked on the "risk of misperceptions when gender neutral legal doctrine [sic] are perceived as biased because of disparate impact in case results,"⁹⁵ apparently dismissing gender disparity as accidental. Perceptions about bias against men are not surprising given what is known about privilege, challenges to it, and how they are perceived. Assertion of "equality with a vengeance" is a hallmark of resistance to feminism and other movements for social justice. This is one way to resist challenges to current power relations that are perceived accurately by those in power as potential threats to their privilege, power, and prerogative.

As with any other facet of human behavior, it is essential to consider the context and effects of bias in addition to perceptions of it. Significantly, the areas in which men report being disadvantaged exist because of rigid patriarchal gender roles: men have to pay more support because they make more money. They are less likely to be seen as the best parent because women continue to do the vast majority of child care and household labor. In the interest of justice, courts need to work to eliminate the unconscious and intentional influence of stereotypes that are not just gendered but patriarchal; not just affected by race but white supremacy.

One of the most troublesome realities for battered mothers is the combination of persistent and pervasive impacts of sexism or gender bias alongside inaccurate assumptions that sexism is no longer a factor in women's lives. The gender bias studies made very clear that sex and race shaped very different perspectives on and experiences in the court. Across the board, women reported more gender bias than men and evaluated what they did see more seriously. Men, on the other hand, reported much less bias or none at all.

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⁹³ Maccoby & Mnookin, *supra*, note 45.

⁹⁴ Susan Faludi, *Backlash: The Undeclared War Against American Women* (1991).

⁹⁵ North Dakota Commission on Gender Fairness in the Courts, *Gender Fairness in North Dakota's Courts: A Ten Year Assessment*, available at <http://www.ndcourts.gov/court/committees/gender/gficreport.htm#p1>.

UNEVEN PROGRESS: EFFECTS OF THE GENDER BIAS STUDIES

Several positive outcomes resulted from the gender bias studies and the national conversation on gender bias in the courts. First, the very participation of the majority of the states and circuits in self-study represents a major achievement. At the very least, the hegemonic position shifted from denial that gender bias could exist to the recognition that at least perceptions of bias are pervasive and significant. Second, the fact that gender bias can be grounds for appeal is a major advancement. The recognition that gender bias can compromise the court's ability to do its job is perhaps the most powerful example of how the gender bias study results have been institutionalized. Third, the continued work of antibias task forces is a major accomplishment. While some states and circuits abandoned their investigation of bias as soon as federal funding was eliminated, many localities have established permanent bodies to study and work to ameliorate ongoing bias. Fourth, the availability of training on bias issues, from sexual harassment prevention for court personnel to education on DV, is a significant indication of progress. Finally, increased awareness of the realities of battered women's experiences in the courts is a major achievement. The stories collected by the battered mothers' testimony projects show that these are substantive problems for a significant number of women. Recognition is the first step toward action.

CONCLUSION: DIRECTIONS FOR FUTURE RESEARCH AND ADVOCACY

There is more to do. As the research on battered mothers' experiences in the courts demonstrates, resistance to, and reaction against, the implementation of efforts to eliminate bias may be increasing as the most blatant forms of gender bias decrease. Battered mothers are seeing a backlash against efforts to address DV as well as a backlash against child support enforcement from both mainstream "fatherhood initiatives" and more radical fathers' rights groups as they push to reduce the penalties against abusers and enforce ongoing contact between abusers, mothers, and their children.

As many of the gender bias task forces and battered mothers' testimony projects have made clear, there is a paucity of data on issues related to the courts in general and the disposition of custody cases involving battered mothers in particular. The continued efforts of state and federal courts to track and address bias by gender and race are contributing to a growing body of data on the issue, but there is no large scale uniform data collection effort underway at this time.

In addition, the social science research that is used to justify custody disposition in contested custody cases is inadequate and inappropriate for that use since it overwhelmingly ignores violence and abuse. Even worse, what we do know about violence against mothers and children is largely ignored

at custody determination. The ongoing risk of violence, including homicide, is downplayed, and minimal efforts like supervised visitation and batterer intervention programs are assumed to take care of the problem. What we know about the therapeutic value of separation from the abuser and acknowledgement that the abuse was wrong are also largely ignored by current practices.⁹⁶ Clearly, there is a need for more research in this area. Research on the outcomes of custody arrangements and other divorce outcomes must take battering into account.

Violence against women is well documented and prevalent. Courts need to reconcile the prevalence of violence and abuse with the practice of the courts in divorce and child custody disputes so that the safety of battered women and the best interests of their children are protected. Given that battering requires such a large percentage of state and private resources, the serious consideration of abuse should be seen as a form of prevention for the public good. The gender bias reports have helped to lay the foundation for progress on this issue.⁹⁶

⁹⁶ Palmer et al., *supra*, note 52; Zorza, *supra*, note 55.