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Nancy VerSteegh

William Mitchell College of Law, nancy.versteegh@wmitchell.edu

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Differentiating Types of Domestic Violence: Implications for Child Custody

Abstract

This article examines child custody determinations through the lens of a domestic violence typology. The resulting analysis (1) reconciles competing viewpoints and contradictory evidence about domestic violence; (2) matches families with appropriate child custody court procedures and services such as parent education, mediation, supervised visitation and parent coordination; and (3) exposes serious deficiencies in current domestic violence childcustody statutes.

Keywords

domestic violence, domestic abuse, family violence, types of domestic violence, child custody

Disciplines

Family Law

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*Nancy Ver Steegh**

I. INTRODUCTION

Family Courts have traditionally turned a blind eye to domestic violence or have minimized its significance. Custody disputes involving domestic violence have been forced into a one-size-fits-all paradigm, an erroneous and potentially life-threatening approach. What is required is a differentiated approach based on careful screening of cases for the presence of domestic violence and thoughtful consideration of the clinical and legal implications.¹

Child custody determinations are based on the fiction that families with a history of domestic violence are all alike. However, researchers, scholars, and practitioners increasingly agree that families experience and children are exposed to different types of domestic violence. These types of violence involve distinctly different phenomena—they are not simply separate points along a single continuum of abuse.

This article examines child custody determinations through the lens of a domestic violence typology. The resulting analysis (1) reconciles competing viewpoints and contradictory evidence about domestic violence; (2) matches families with appropriate child custody court procedures and services such as parent education, mediation, supervised visitation and parent coordination; and (3) exposes serious deficiencies in current domestic violence child custody statutes.

Application of the typology leads to the conclusion that child custody courts could more effectively protect children through identification and consideration of the type of domestic violence a family has experienced. To this end, three significant procedural and substantive law reforms are recommended. First, courts should adopt Differentiated Case Management in order to identify cases involving domestic violence, and to the extent possible, distinguish the type of violence experienced. Second, child custody court procedures and

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* Nancy Ver Steegh, J.D., M.S.W. is an Associate Professor of Law at William Mitchell College of Law in St. Paul, Minnesota.

1. Peter G. Jaffe et al., *Child Custody & Domestic Violence* 16 (2003).

services should vary depending on the needs of the individual family and type of violence experienced. Under the current one-size-fits-all approach, some families are referred to procedures and services that are unsafe for them while other families, who could benefit from those very procedures and services, are discouraged from using them. Third, current domestic violence-related child custody statutes should be amended to include language that targets perpetrator patterns of coercive control. Current statutes are not drafted with sufficient precision to adequately protect children.

Domestic violence typologies should, of course, be approached with caution because typologies can be inappropriately manipulated to justify discounting the needs of some victims and children. All cases of domestic violence are serious and important; saying that they are not all the same does not diminish this fact. Families experiencing domestic violence are different from one another, but every case requires concentrated attention. By analogy, a heart attack is different and requires different treatment from cancer, but both are serious conditions requiring medical attention.

Domestic violence situations can be life-threatening, and the typology discussed in this article is theoretical in nature. It should be considered from a “what if” perspective, rather than viewed as ready for immediate implementation. Experienced professionals often have difficulty detecting the existence of domestic violence—let alone accurately discerning the type of violence involved. Nevertheless, viewing child custody law and procedure through the lens of a domestic violence typology provides the opportunity to reexamine commonly-held assumptions, open cross-disciplinary communication, and spark creative thinking about fresh approaches to a complicated and intractable problem.

This article is divided into five sections with the introduction constituting Part I. Part II presents a domestic violence typology and related social science research. Part III focuses on how and when families should be linked to child custody procedures (such as parent education and mediation) and services (such as supervised visitation and parent coordination) through Differential Case Management. Part IV surveys current child custody statutes (including the legal definitions of domestic violence, domestic violence as a best interests factor, joint custody and “friendly parent” provisions, presumptions against custody awards to violent parents, and termination of parental rights) and suggests specific statutory amendments aimed at protecting children more comprehensively. Part V recommends how custody cases involving specific types of domestic violence should be handled.

II. DIFFERENTIATING TYPES OF VIOLENCE

A. *Contradictory Research Suggests the Existence of Different Types of Domestic Violence*

Despite intense study, researchers, scholars, and practitioners fail to agree upon the most basic facts about domestic violence. This state of affairs stems in part from the multi-disciplinary nature of domestic violence. Each professional group approaches the problem from a different viewpoint using different sets of analytical tools. Researchers focusing on one aspect of the problem may not grasp the significance of other research and professionals adhering to a particular world view may have difficulty assimilating contrary information from other schools of thought.² This has resulted in the creation of individual “silos” of information with no mechanism for constructing a comprehensive view.³ Unfortunately, our knowledge about domestic violence reflects this fractured approach to the problem.⁴

2. Claire M Renzetti et al., Sourcebook on Violence Against Women 1–2 (2001); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 Fam. & Conciliation Cts. Rev. 273 (1999).

3. Professionals from different disciplines have historically proffered competing theoretical explanations of domestic violence. See Joanna Miles, *Domestic Violence*, in Family Law 81 (Jonathan Herring ed., 2001). Advocates of opposing theories disagree about issues such as whether domestic violence is transmitted between generations and whether it escalates over time. For discussion of intra-individual and social psychological theories see Renzetti et al., *supra* note 2, at 6 (discussing intra-individual and social psychological theories such as social learning theory, psychopathology, psychological and physiological explanations, resource theory, and exchange theory); Richard J. Gelles, *Intimate Violence in Families* 126–29 (1997) (discussing psychiatric/personality theory, social-situational/stress and coping theory, social learning theory, and resource theory). For discussion of sociocultural explanations see Renzetti et al., *supra* note 2, at 12–15 (discussing feminist theory, family violence theory, subculture of violence, cultural acceptance of violence, and stress).

4. However, recently researchers have begun to develop comprehensive multidimensional explanations of domestic violence that integrate different schools of thought. Rather than rehashing prior disputes, researchers are reframing issues in an effort to accommodate (rather than disprove) a range of views. See Renzetti et al., *supra* note 2, at 15–17; Kristin L. Anderson, *Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches*, 59 Journal of Marriage and the Family 655 (1997) (combining family violence and feminist perspectives in research examining how structural inequality differentially influences male and female violence); Sonia Miner Salari & Bret M Baldwin, *Verbal, Physical, and Iljurious Aggression Among Intimate Couples Over Time*, 23 J. of Fam. Issues 523 (2002) (support for sociological, feminist, and psychological theories in their study of abuse over time). See also Lynn Magdol

Disquieting inconsistencies, as well as major contradictions, are either ignored or become the subject of rancorous cross-professional debate. For example, for the past twenty-five years, researchers have engaged in an intense debate concerning how often assaults occur and whether men and women are equally violent. The controversy stems from the contradictory findings of various studies. Epidemiological “family conflict” studies show higher overall assault rates⁵ with nearly equal rates of assault by men and women.⁶ In contrast, so-called “crime” studies and police call data show lower overall annual assault rates⁷ and much higher rates of assault by men than by women.⁸

The “family conflict” studies have been criticized by service providers and some feminist scholars who challenge the methodology of the studies, particularly the use of reliance on the Conflict Tactics

et al., *Gender Differences in Partner Violence in a Birth Cohort of 21-Year-Olds: Bridging the Gap Between Clinical and Epidemiological Approaches*, 65 *Journal of Consulting and Clinical Psychology* 68, 76 (1997). Magdol’s study of young adults found that while more women were violent than men (supporting the family conflict studies), the violent men had more deviant characteristics and their female victims suffered more symptoms (consistent with the crime and clinical studies). The authors suggest that these findings provide confirmation of both schools of thought. *Id.*

While much remains to be done, the integration of contrasting theories has sparked creativity and brought new imagination to the study of domestic violence. Susan L. Miller & Charles F. Wellford, *Patterns and Correlates of Interpersonal Violence*, in *Violence Between Intimate Partners* 16 (Albert P. Cardarelli ed., 1997). Cross-disciplinary and multi-perspective collaborations hold promise for advancing the struggle against domestic violence and ultimately benefitting children growing up in violent homes. *Id.*

5. Murray A. Straus, *The Controversy Over Domestic Violence By Women*, in *Intimate Relationships* 17, 23 (Ximena B. Arrias et al. eds., 1999) (family conflict studies show annual assault rates of from 10 to 35%) [hereinafter Straus, *The Controversy*].

6. Kathleen J. Ferraro, *Woman Battering: More than a Family Problem*, in *Women, Crime, and Criminal Justice* 135, 137 (Claire Renzetti et al. eds. 2001) (reports of use of violence against a partner was 12.1% for men and 11.6% for women in the 1975 *NFVS* and 11.3% for men and 12.1% for women in the 1985 *NFVS*); Murray A. Straus, *Physical Assaults by Wives*, in *Current Controversies on Family Violence* 67 (Richard J. Gelles et al. eds., 1993) [hereinafter Straus, *Physical Assaults*]. See also Martin S. Fiebert & Denise M. Gonzalez, *College Women Who Initiate Assaults on Their Male Partners and the Reasons Offered for Such Behavior*, 80 *Psychological Reports* 583 (1997) (twenty-nine percent of studied female college students admitted to physical aggression against male partners).

7. Straus, *The Controversy*, *supra* note 5, at 23 (National Crime Survey 0.2%, National Crime Victim Survey 0.9%, police call data 0.2%).

8. *Id.* (Male to female ratios as follows: National Crime Survey, 13:1; National Crime Victim Survey, 7:1; and police call data, 9:1).

Scale.⁹ These critics believe that the studies focus too heavily on specific acts of aggression and too little on resulting injury and the context of the behavior.¹⁰ “However, both groups of researchers agree that women are ten times as likely as men to be injured as a result of domestic violence.”¹¹ Differences also stem from definitional issues. The family conflict researchers define domestic violence narrowly in terms of physical assault, while service providers and clinical researchers define it broadly to include all types of maltreatment.¹²

In the final analysis, despite the high level of acrimony, these studies may not actually contradict each other. As Murray Straus¹³ explains, researchers may in fact be observing and measuring different phenomena. He asserts that both groups of researchers are correct. They are merely studying different populations experiencing different types of violence. He speculates that, “these two types of violence probably have different etiologies and probably require different types of intervention.”¹⁴

Researcher Michael P. Johnson¹⁵ has taken the process of integrating competing studies to its conclusion by developing a comprehensive typology that accounts for contradictory research and

9. See Murray A. Straus & Sherry L. Hamby, *The Revised Conflict Tactics Scales*, 17 *Journal of Family Issues* 283, 287 (1996). Family conflict researchers counter that the Revised Conflict Tactics Scale measures psychological aggression, sexual coercion and takes account of resulting injury. *Id.* See also Sujata Desai & Linda E. Saltzman, *Measurement Issues for Violence Against Women*, in *Sourcebook on Violence Against Women* 35, 43–49 (Claire M. Renzetti et al. eds., 2001) (discussing measurement tools including the Abusive Behavior Inventory, the Conflict Tactics Scales, the Conflict Tactics Scale 2, the Index of Spouse Abuse, the Measure of Wife Abuse, Partner Abuse Scales, the Severity of Violence Against Women Scales, the Sexual Experiences Survey, and the Women’s Experience with Battering Scale).

10. Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 *Social Problems* 71, 77 (1992); Demie Kurz, *Social Science Perspectives on Wife Abuse: Current Debates and Future Directions*, 3 *Gender & Society* 489, 491 (1989). See also Lisa D. Brush, *Violent Acts and Injurious Outcomes In Married Couples: Methodological Issues in the National Survey of Families and Households*, 4 *Gender & Society* 56 (1990) (finding wives more likely to be injured than husbands).

11. Gelles, *supra* note 3, at 93. See also Brush, *supra* note 10, at 59. National Survey of Families and Households analysis shows that men and women both commit violence acts but that women are more likely to be injured. *Id.*

12. Straus, *The Controversy*, *supra* note 5, at 38.

13. Murray A. Straus is a Professor of Sociology and Co-Director of the Family Research Laboratory at the University of New Hampshire.

14. Straus, *Physical Assaults*, *supra* note 6, at 77

15. Michael P. Johnson, Ph.D., is an Associate Professor of Sociology, Women’s Studies, and African and African American Studies at Pennsylvania State University.

connects contrasting perspectives. Based on his analysis of the “family conflict” and the “feminist” studies discussed above, he concludes that women’s advocates and service providers are primarily observing one type of domestic violence, Intimate Terrorism, while family conflict researchers are predominantly measuring another type of violence, Situational Couple Violence.¹⁶

Johnson identifies four types of domestic violence based on the motivation of the aggressor and the overall pattern of the violence.¹⁷ The two most common forms are Intimate Terrorism, which involves an escalating pattern of coercive control, and Situational Couple Violence, which involves isolated conflict-based incidents. These two forms are the subject of this article. A third form, Violent Resistance, which involves self-defense, will be discussed only as it relates to Intimate Terrorism and Situational Couple Violence.¹⁸

The possibility that families experience different types of violence has far reaching implications for policy and practice. Johnson asserts that failure to recognize these differences makes “much of the empirical domestic violence literature . . . virtually meaningless.”¹⁹ He argues that “*all* of our important questions about domestic violence may be different for the different forms of violence.”²⁰

The modeling of the causes and consequences of partner violence will never be powerful as long as we aggregate behaviors as disparate as a “feminine” slap in the face, a terrorizing pattern of beatings accompanied by humiliating psychological abuse, an argument that escalates into a mutual

16. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 *Journal of Marriage and Family* 948 (2000).

17. *Id.* at 3. Johnson suggests a category of violence called Mutual Violent Control which occurs when both the husband and the wife violently attempt to control each other. He theorizes that this type of violence is very rare; therefore, this article does not discuss it. *Id.* But see Marilyn J. Kwong & Kim Bartholomew, *Gender Differences in Patterns of Relationship Violence in Alberta*, 31 *Canadian Journal of Behavioural Science* 150, 157 (1999) (describing patterns of violence other than patriarchal terrorism or common couple violence).

18. Although other domestic violence typologies exist, the Johnson typology was selected for use in this article because (1) it is empirically based, (2) it is consistent with other related research, and (3) it comports with the author’s observation of cases as a legal aid lawyer and a family mediator.

19. Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, available at <http://www.personal.psu.edu/faculty/m/p/mpj/JF103.html>.

20. Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 11 available at <http://www.personal.psu.edu/faculty/m/p/mpj/02VAW.html> [hereinafter Johnson, *Symmetry*].

shoving match, or a homicide committed by a person who feels there is no other way to save her own life.²¹

B. Policy Implications: Children May Be Exposed to Different Types of Domestic Violence

Researchers agree that children who witness domestic violence are harmed emotionally and their behavior is affected.²² Not surprisingly these children may be more aggressive and antisocial or they may be more fearful and inhibited than other children. They also show higher anxiety levels, more depression, and symptoms of trauma.²³ Additionally, there is some indication that they suffer social, cognitive, and physical effects as well.²⁴ They are also more likely to be physically abused.²⁵

These children may have special needs that should be considered in connection with custody and parenting-time decisions. Bancroft and Silverman²⁶ suggest six circumstances that promote healing. First, children need an environment that provides physical and emotional safety. Second, they require structure, appropriate limits, and a sense of predictability. Third, they benefit from a strong bond with the nonperpetrating parent. Fourth, they need to be relieved of the burden of caring for adults. Fifth, they may prefer to have some limited contact with the perpetrator if such contact is safe. Sixth, they benefit from the opportunity to reestablish relationships with siblings.²⁷

However, as Jeffery Edleson²⁸ explains, “the available research reveals a great deal of variability in children’s experiences and the

21. Johnson & Ferraro, *supra* note 16, at 19.

22. Jerome R. Kolbo et al., *Children Who Witness Domestic Violence: A Review of the Empirical Literature*, 11 *Journal of Interpersonal Violence* 281, 283 (1996).

23. Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment Under the Law?*, in *Protecting Children from Domestic Violence* 8, 10 (Peter G. Jaffe et al. eds., 2004).

24. *Id.* at 11; Kolbo, *supra* note 22, at 288; Edleson, *supra* note 23, at 11.

25. Lundy Bancroft & Jay G. Silverman, *The Batterer As Parent* 42 (2002) (finding 40-70% percent report concurrent child abuse); Evan Stark & Anne Flitcraft, *Women at Risk* 76 (1996) (discussing relationship between domestic violence and child abuse).

26. Lundy Bancroft is an author, trainer, counselor, and activist on issues of abuse and recovery. Jay G. Silverman, Ph.D., is an Assistant Professor of Society, Human Development, and Health at the Harvard School of Public Health.

27. Bancroft & Silverman, *supra* note 25, at 103-05.

28. Jeffrey L. Edleson, Ph.D., is a Professor at the University of Minnesota, School of Social Work and Director of the Minnesota Center Against Violence and Abuse.

impact of those experiences on a child.”²⁹ Consequently, researchers have identified various factors that influence the impact that witnessing abuse has upon children. Some factors relate to the marital conflict, such as marital violence (as opposed to distress), the intensity of the conflict, the frequency of the conflict, whether the conflict is resolved, and the child’s awareness of the conflict.³⁰ Other factors, such as the child’s gender and age, influence the ultimate impact of witnessing domestic violence.³¹ The existence of other stressors such as concurrent child abuse or maternal depression can increase the child’s level of distress, while “buffers” such as outside support can act as protective factors.³²

Although the literature in this area does not generally distinguish among types of violence, it is likely that the impact on children varies based on the type of violence the family experiences.³³ This idea is consistent with evidence that violent conflict is more harmful to children than high levels of nonviolent conflict³⁴ and the work of Emery and Laumann-Billings which makes distinctions among child abuse cases for the purpose of intervention.³⁵ Some have speculated that the extent to which domestic violence and child abuse occur concurrently may be explained by the underlying dynamic of

29. Edleson, *supra* note 23, at 11; Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence*, in *Partner Violence* 73, 80 (Jana L. Jasinski et al. eds., 1998).

30. Amy Holtzworth-Munroe et al., *A Brief Review of the Research on Husband Violence*, 2 *Aggression and Violent Behavior* 179, 199–201 (1997). *See also* Edleson, *supra* note 23, at 11 (factors include the level of violence, child’s degree of exposure, other stressors, harm for each child, and child’s resilience); Kolbo, *supra* note 22, 290 (mediating factors include frequency and duration of abuse, whether the abuse was physical and verbal, whether the child was abused, age, gender, maternal stress, and family disadvantage).

31. Peter G. Jaffe et al., *Protecting Children from Domestic Violence* 31–37 (2004) (finding effects on children of various ages). *See also* Robert E. Emery & Lisa Laumann-Billings, *An Overview of the Nature, Causes, and Consequences of Abusive Family Relationships*, 53 *American Psychologist* 121, 128 (1998) (discussing five classes of variables related to the consequences of victimization).

32. Holtzworth-Munroe et al., *supra* note 30, at 201–205. *See also* Joan B. Kelly & Robert E. Emery, *Children’s Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 *Family Relations* 352 (2003) (children’s adjustment to divorce generally); Joan B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 *J. Am. Acad. Child Adolesc. Psychiatry* 963 (2000) (research on children’s adjustment to divorce generally).

33. *But see* Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 *Women’s Rts. L. Rep.* 107, 116 (2002) (finding children who witness violence at no greater risk than children in distressed relationships with no violence).

34. Bancroft & Silverman, *supra* note 25, at 39.

35. Emery & Laumann-Billings, *supra* note 31, at 121 (arguing for differentiation between family maltreatment and family violence).

coercive control³⁶ found in cases of Intimate Terrorism. Consequently, with respect to children, Johnson queries whether “exposure to Intimate Terrorism might in fact have powerful effects that are muted by their aggregation with the effects of Situational Couple Violence.”³⁷

C. Viewing Domestic Violence Through the Lens of the Johnson Typology

Johnson identifies types of domestic violence based on the motivation of the aggressor and the overall pattern of the violence.³⁸ The types considered in this article are Intimate Terrorism, Situational Couple Violence, and, to a lesser extent, Violent Resistance.

1. Intimate Terrorism

a. The Johnson Typology: Intimate Terrorism

Intimate Terrorism (IT) is the type of violence observed in battered women’s shelters and measured by crime and clinical studies. In Intimate Terrorism, violence is one tactic in a larger pattern of power and control.³⁹ Control is exerted by making threats, wielding economic control, applying privilege and punishment, manipulating and threatening children, isolating the victim, and inflicting emotional and sexual abuse.⁴⁰ As compared with other types of violence, Intimate Terrorism involves more frequent per

36. Stark & Flitcraft, *supra* note 25, at 78.

37. Johnson & Ferraro, *supra* note 16, at 17 (Situational Couple Violence (SCV) was previously called Common Couple Violence (CCV) in Johnson’s typology).

38. *Id.* at 3. *But see* Kwong & Bartholomew, *supra* note 17, at 157 (descriptions of patterns of violence other than patriarchal terrorism or common couple violence).

39. Johnson & Ferraro, *supra* note 16, at 4.

40. Janel M. Leone et al., *Consequences of Male Partner Violence for Low-Income Minority Women*, 66 *Journal of Marriage and Family* 472, 473 (2004); Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 *Albany L. Rev.* 973, 1017 (1995) (discussing “tangential spouse abuse” as an extension of coercive control); Angela Browne, *Violence in Marriage: Until Death Do Us Part?*, in *Violence Between Intimate Partners* 48, 56–60 (Albert P. Cardarelli ed., 1997) (early warning signs include intrusion, isolation, possession, jealousy, prone to anger, history of violence).

couple incidents,⁴¹ more severe violence,⁴² and results in more serious injury.⁴³ This type of violence is quite likely to escalate over time.⁴⁴

Intimate Terrorism is nearly always perpetrated by men upon women,⁴⁵ and female victims are more likely to suffer from Post Traumatic Stress Syndrome (PTSD), depression, and poor health.⁴⁶ These women actively seek formal help and are likely to leave the abuser.⁴⁷ Intimate Terrorism accounts for somewhere between eleven percent and thirty-five percent of domestic violence situations.⁴⁸

b. Research and Theory Consistent with Intimate Terrorism

Other researchers have also identified this pattern of abusive control. Lenore Walker first described it as the “cycle of violence” in the late 1970s.⁴⁹ Ellis and Stuckless refer to it as “control instigated abuse”⁵⁰ and Johnston and Campbell describe it as “ongoing and episodic male battering.”⁵¹

i. Victims of Intimate Terrorism

41. Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 7 *Journal of Marriage and the Family* 283, 286 (1995) [hereinafter Johnson, *Patriarchal Terrorism*].

42. *Id.* at 287.

43. Leone et al., *supra* note 40, at 48; Michael P. Johnson, *Two Types of Violence Against Women in the American Family: Identifying Patriarchal Terrorism and Common Couple Violence*, available at <http://www.personal.psu.edu/faculty/m/p/mpj/ncfr99paper.html> [hereinafter Johnson, *Two Types*].

44. Johnson, *Two Types*, *supra* note 43, at 29 (75% escalated).

45. Johnson, *Patriarchal Terrorism*, *supra* note 41, at 285 (97% percent assaults on wives); Glenda Kaufman Kantor & Jana L. Jasinski, *Dynamics and Risk Factors in Partner Violence*, in *Partner Violence* 1, 10 (Jana L. Jasinski et al. eds., 1998) (no evidence in the literature describes systematic victimization by women on men).

46. Leone et al., *supra* note 40, at 475; Johnson, *Symmetry*, *supra* note 20, at 23.

47. Johnson & Ferraro, *supra* note 16, at 15 (two-thirds leave); Johnson, *Symmetry*, *supra* note 20, at 13.

48. Leone et al., *supra* note 40, at 486.

49. Lenore E. Walker, *The Battered Women* 56 (1979).

50. Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* 2 (1996).

51. Janet R. Johnston & Linda Campbell, *Parent-child Relationships in Domestic Violence Families Disputing Custody*, 31 *Fam. & Conciliation Cts. Rev.* 282, 286–87 (1993); Janet R. Johnston & Linda E. G. Campbell, *A Clinical Typology of Interpersonal Violence in Disputed-Custody Divorces*, 6 *Amer. J. Orthopsychiat.* 190 (1993).

While most research regarding victims of domestic violence does not explicitly distinguish between Intimate Terrorism and Situational Couple Violence, much of the research seems focused on female victims of Intimate Terrorism.⁵² The most commonly held view of “battered women”⁵³ is based on “the traumatization model” which includes themes such as “learned helplessness” and “battered women’s syndrome.”⁵⁴ Some women who are victims of Intimate Terrorism suffer from Post Traumatic Stress Disorder as a result of the abuse.⁵⁵ Victims experience painful and serious physical injuries,⁵⁶ as well as depression, PTSD, suicide attempts, and substance abuse.⁵⁷ Victimization is also related to difficulty maintaining employment⁵⁸ and a permanent residence.⁵⁹

However, contrary to popular belief, many victims of domestic violence leave the violent relationship.⁶⁰ In fact, Richard Gelles reports that women who experience the most frequent and severe violence (arguably victims of Intimate Terrorism) are more likely to leave.⁶¹ This is consistent with research demonstrating victims’ use of a “vast array of personal strategies and help resources.”⁶² For

52. Johnson & Ferraro, *supra* note 16, at 15.

53. Note that some survivors of domestic abuse reject use of the term “battered women” because it defines them in terms of the abuse. See Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 St. Louis U. Pub. L. Rev. 107, 145 (2004).

54. Lenore E. A. Walker, *The Battered Women Syndrome Is a Psychological Consequence of Abuse*, in *Current Controversies on Family Violence* 133–37 (Richard J. Gelles et al. eds., 1993). Note that contrary to popular perception, Walker does not use the term “learned helplessness” to mean that victims behave in a helpless way. Rather she uses it to mean that victims learn that they “cannot predict whether what they do will result in a particular outcome.” *Id.*; Stark, *Re-representing*, *supra* note 40, at 974–75.

55. Stark, *Re-representing*, *supra* note 40, at 974–75.

56. Phyllis W. Sharps & Jacquelyn Campbell, *Health Consequences for Victims of Violence in Intimate Relationships*, in *Intimate Relationships* 163, 166 (Ximena B. Arriaga et al. eds., 1999).

57. Stark, *supra* note 33, at 111.

58. Angela Browne et al., *The Impact of Recent Partner Violence on Poor Women’s Capacity to Maintain Work*, 5 *Violence Against Women* 393 (1999).

59. Angela Browne & Shari S. Bassuk, *Intimate Violence in the Lives of Homeless and Poor Housed Women*, 67 *American Journal of Orthopsychiatry* 261 (1997).

60. Tracy Bennett Herbert et al., *Coping With an Abusive Relationship: How and Why Do Women Stay?*, 53 *Journal of Marriage and the Family* 311 (1991) (65.6% no longer in relationship). *But see* Jean Gile-Sims, *The Aftermath of Partner Violence*, in *Partner Violence* 65 (Jana L. Jasinski et al. eds., 1998) (half of battered women from shelters return to relationship).

61. Gelles, *supra* note 3, at 87, 88.

62. Lee H. Bowker, *A Battered Woman’s Problems Are Social, Not Psychological*, in *Current Controversies on Family Violence* 154, 155 (Richard J. Gelles et al. eds., 1993).

example, in one study, researcher Lee Bowker found that women used seven personal strategies (such as talking to or avoiding their partner, hiding or running away, threatening to call police or file divorce, or fighting back physically)⁶³ to end the abuse, after which they accessed informal and formal resources (including police, clergy, physicians, and lawyers).⁶⁴ Victims, therefore, are not necessarily passive but may be active survivors of abuse.⁶⁵ As Bowker explains:

Their vast diversity as unique individuals implies that they will experience a very wide range of reactions to abuse. All battered women will react to the abuse they suffer, but not all will develop symptoms that fit the pattern of the battered woman syndrome. Furthermore, some of the women who do develop *BWS* symptoms experience the symptoms for only a short time. It is important to realize that most battered women begin to recover from these symptoms as soon as they (and their children, if there are any) are safe.⁶⁶

Nevertheless, victims of Intimate Terrorism are more likely to be traumatized than are victims of Situational Couple Violence. Early identification of Intimate Terrorism would assist professionals in connecting these victims to services such as emergency shelter, medical care, legal protection, and emotional support. Victims of Intimate Terrorism need comprehensive safety planning, especially around the time of separation when the perpetrator's need to control may escalate.

ii. Perpetrators of Intimate Terrorism

Like the research on victims, the research regarding perpetrators of domestic violence does not distinguish between types of violence. However, researchers have previously developed typologies of male batterers that are consistent with Johnson's framework.⁶⁷

63. Such personal strategies include talking to or avoiding their partner, hiding or running away, threatening to call police or file for divorce, or fighting back physically. *Id.* at 155–56.

64. Bowker, *supra* note 62, at 155–56. Informal and formal resources include police, clergy, physicians, and lawyers. *Id.*

65. Gelles, *supra* note 3, at 87, 89.

66. Bowker, *supra* note 62, at 160.

67. Donald G. Dutton, *The Abusive Personality* (1998) (suggesting three types of batterers: overcontrolled, generally violent (psychopathic); and borderline or cyclical); Donald G. Dutton & Susan K. Golant, *The Batterer* (1995); Donald G. Dutton & Andrew J. Starzomski, *Borderline Personality in Perpetrators of Psychological and Physical Abuse*, 8 *Violence and Victims* 327 (1993). For a comparison of batterer typologies, see Amy Holtzworth-Munroe & Gregory L.

Holtzworth-Munroe⁶⁸ and Stuart⁶⁹ differentiate male perpetrators based on the severity of the abuse, whether the perpetrator is violent outside of the family, and the perpetrator's psycho pathology or personality disorders. They suggest three types of batterers, two of which are consistent with Intimate Terrorism and one consistent with Situational Couple Violence.

Dysphoric/borderline perpetrators inflict moderate to severe abuse with psychological and sexual aspects. These batterers have borderline personalities, are likely to have substance abuse problems, and difficulty controlling their "explosive anger."⁷⁰ They are primarily violent at home but may engage in some other criminal behavior.⁷¹ These men are impulsive, fear abandonment, and have hostile attitudes toward women.⁷² Holtzman-Munroe and Stuart believe that dysphoric/borderline perpetrators make up twenty-five percent of batterers.⁷³ Johnson asserts that this type of perpetrator is involved in Intimate Terrorism.⁷⁴

Generally violent/antisocial batterers inflict moderate to severe abuse that includes psychological and sexual abuse. They are likely to exhibit antisocial personality disorder and psychopathy. These perpetrators usually have a history of involvement with the law.⁷⁵ They exhibit negative attitudes toward women.⁷⁶ Holtzman-Munroe and Stuart suggest that generally violent/antisocial batterers constitute twenty-five percent of batterers. Johnson concludes that they are involved in Intimate Terrorism.⁷⁷

Most of the literature and research on perpetrators is focused on the traits of perpetrators who engage in Intimate Terrorism. For example, Bancroft and Silverman limit their discussion of batterers to those with a pattern of exercising coercive control over a female

Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 *Psychological Bulletin* 476, 492 (1994).

68. Amy Holtzworth-Munroe, Ph.D., is a Professor of Psychology at Indiana University.

69. Gregory Stuart, Ph.D., is an Assistant Professor of Psychiatry and Human Behavior at Brown University.

70. Amy Holtzworth-Munroe et al., *A Typology of Male Batterers, in Violence in Intimate Relationships* 45, 46 (Ximena B. Arriga et al. eds., 1999).

71. *Id.* at 46.

72. Holtzworth-Munroe & Stuart, *supra* note 67, at 492.

73. *Id.* at 482.

74. Johnson & Ferraro, *supra* note 16, at 5.

75. Holtzworth-Munroe et al., *supra* note 71, at 46-47.

76. Holtzworth-Munroe & Stuart, *supra* note 67, at 476.

77. Johnson & Ferraro, *supra* note 16, at 5.

victim.⁷⁸ They define characteristics of batterers as including the following:

1. imposition of a pattern of control;
2. attitude of entitlement;
3. selfishness and self-centeredness;
4. feeling of superiority;
5. possessiveness;
6. confusion of love and abuse;
7. manipulateness;
8. contradictory behavior;
9. externalization of responsibility; and
10. denial, minimization, and victim blaming.⁷⁹

Not surprisingly, these traits have serious implications for parenting.

iii. Intimate Terrorists as Parents

Bancroft and Silverman delineate typical parental characteristics of batterers. As noted above, they focus their discussion on batterers who engage in coercive control or under Johnson's typology, Intimate Terrorism. First, these fathers are likely to be rigidly authoritarian. They expect to be obeyed without question, are highly irritable, show little empathy for children, and spank children more than twice as often.⁸⁰ Second, battering fathers tend to be under-involved parents who view children as an annoying hindrance and are unwilling to accommodate their needs.⁸¹ This pattern of neglect may be punctuated with brief periods of fatherly interest in the children during which he will attempt to win their favor.⁸² Third, batterers continually undermine the parenting efforts of the mother by ridiculing her, overruling her decisions, and physically attacking her.⁸³ Finally, battering fathers tend to be self-centered, viewing the children as extensions of themselves and believing that the children should meet their needs.⁸⁴

78. Bancroft & Silverman, *supra* note 25, at 3 (defining the term batterer and noting that "by contrast, violence that is primarily annoying (as opposed to intimidating) and that is not accompanied by a pattern of coercion will not be considered here").

79. *Id.* at 5-19. See also James Ptacek, *The Tactics and Strategies of Men Who Batter*, in *Violence Between Intimate Partners* 104 (Albert P. Cardarelli ed., 1997) (discussing report of tactics by men and strategies of women).

80. Bancroft & Silverman, *supra* note 25, at 30-31.

81. *Id.* at 31.

82. *Id.* at 32-33.

83. *Id.* at 33-34.

84. *Id.* at 34-35.

Cycles of terror and kindness can lead to traumatic bonding with the battering parent. The child may crave positive contact with the batterer and be unable to separate love and abuse. Children may conclude that their safety depends upon sustaining close ties with the batterer.⁸⁵

Evan Stark⁸⁶ describes the batterer's extension of coercive tactics to the children as "tangential spouse abuse."⁸⁷ Batterers are able to control the mother by manipulating or threatening the children, even after divorce.⁸⁸ Unfortunately, fathers with a history of Intimate Terrorism are also likely to continue their previous inappropriate parenting practices after divorce.⁸⁹

Bancroft and Silverman discuss typical post-divorce relationships between perpetrators and children. In some cases, the perpetrator has little or no contact with the children. However, in other cases, the perpetrator seeks involvement with the children in a continued effort to manipulate and control.⁹⁰ Various studies and articles chronicle the extent to which perpetrators of domestic violence (presumably Intimate Terrorism) use the court system to coerce and control the victim. For example, they are more likely than other fathers to seek custody of the children⁹¹ and there is indication that more often than not, they are awarded custody.⁹² They also file harassing motions, make false allegations, and manipulate the process by engaging in parallel actions.⁹³ In court, the batterer is likely to project a

85. *Id.* at 39–41.

86. Evan Stark, Ph.D., is an Associate Professor of Public Administration, Director of the Masters in Public Health Program at Rutgers-Newark and Director of Urban Health Administration at the UMDNJ School of Public Health.

87. Stark, *Re-Presenting*, *supra* note 40, at 1017–18.

88. *Id.*

89. Bancroft & Silverman, *supra* note 25, at 105.

90. *Id.* at 106.

91. Linda Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 *Fam. Ct. Rev.* 411, 414 (2004); Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 *B. C. Third World L.J.* 283, 303 (2004); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am. U. J. Gender Soc. Pol'y & L.* 657, 685 (2003); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 *Wm. Mitchell L. Rev.* 495, 513 (2001).

92. Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 *Wm. Mitchell L. Rev.* 601, 608 (2001); Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 *St. Louis U. Pub. L. Rev.* 7, 28 (2004); Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 *Fam. L. Q.* 719, 735 (1999).

93. Goodmark, *supra* note 92, at 34; Bancroft & Silverman, *supra* note 25, at 125.

nonabusive image and present himself as the parent most willing to cooperate and communicate.⁹⁴ Thus, in cases of Intimate Terrorism, the primary needs of children are safety and protection from the perpetrator.

2. *Situational Couple Violence*

a. *The Johnson Typology: Situational Couple Violence*

Situational Couple Violence (SCV) occurs in the context of a specific disagreement that spirals into a violent incident; it is an isolated reaction to conflict and does not involve a larger pattern of power and control. Situational Couple Violence generally involves fewer per couple incidents than Intimate Terrorism, and the violence is generally less severe and less likely to result in injury.⁹⁵ It is important to note, however, that Situational Couple Violence is not simply a milder form of Intimate Terrorism. Situational Couple Violence can involve severe violence; however, the violence is not part of a larger pattern of control.⁹⁶

Situational Couple Violence is the type of domestic violence measured in the epidemiological “family conflict” studies, and it is initiated nearly equally by men and women.⁹⁷ However, there is evidence that men and women are differently motivated⁹⁸ and that women suffer more injury and negative consequences resulting from the violence. These consequences include higher levels of depression, low self-esteem, and substance abuse.⁹⁹ This type of violence usually does not escalate and may in fact de-escalate or stop altogether.¹⁰⁰ Situational Couple Violence is the most common form

94. Goodmark, *supra* note 92, at 34; Bancroft & Silverman, *supra* note 25, at 122–26.

95. Johnson & Ferraro, *supra* note 16, at 4.

96. *Id.* at 15.

97. Johnson, *Patriarchal Terrorism*, *supra* note 41, at 285. *But see* Robert M. Milardo, *Gender Asymmetry in Common Couple Violence*, 5 *Personal Relationships* 423 (1998) (higher rates of female aggression).

98. Milardo, *supra* note 97, at 434; Sally A. Lloyd & Beth C. Emery, *The Dark Side of Courtship* 61 (2000); Renzetti et al., *supra* note 2, at 440 (highlighting need to consider motivation and meaning).

99. Kristin L. Anderson, *Perpetrator or Victim? Relationships Between Intimate Partner Violence and Well-Being*, 64 *Journal of Marriage and Family* 851, 861 (2002) (“Although men and women report similar rates of intimate partner violence perpetration and victimization, the negative consequences of intimate partner violence are more likely to be experienced by women.”); Dina Vivian & Jennifer Langhinrichsen-Rohling, *Are Bi-Directionally Violent Couples Mutually Victimized? A Gender-Sensitive Comparison*, 9 *Violence and Victims* 107, 118 (1994) (even if aggression is bi-directional, wives are affected more negatively).

100. Johnson, *Patriarchal Terrorism*, *supra* note 41, at 286; Johnson & Ferraro,

of domestic violence accounting for an estimated fifty-one percent of cases.¹⁰¹

b. Research and Theory Consistent with Situational Couple Violence

Other researchers have also identified this pattern of domestic violence. Ellis¹⁰² and Stuckless¹⁰³ identify Situational Couple Violence as “conflict instigated violence,”¹⁰⁴ while Johnston and Campbell label it “male-controlling interactive violence.”¹⁰⁵

i. Victims of Situational Couple Violence

There is a common assumption that all victims of domestic violence should want to leave their relationships. Obviously, many should and do leave, including some victims of Situational Couple Violence. However, others want to live safely in their current relationships, seeking only an end to the violence.¹⁰⁶ As compared to victims of Intimate Terrorism, victims of Situational Couple Violence are more likely to voluntarily choose to work on the relationship rather than leave it.¹⁰⁷ Campbell,¹⁰⁸ Rose,¹⁰⁹ Kub,¹¹⁰ and Nedd¹¹¹ suggest that victims engage in “a process of achieving nonviolence,” which includes negotiating with the partner and implementing strategies to end the violence;¹¹² this research is likely to apply to

supra note 16, at 13.

101. Leone et al., *supra* note 40, at 486.

102. Desmond Ellis, Ph.D., is a Professor of Sociology at York University.

103. Noreen Stuckless is the Undergraduate Director for the Department of Psychology at York University.

104. Ellis & Stuckless, *supra* note 50, at 34.

105. Johnston & Campbell, *supra* note 51, at 292.

106. Goodmark, *supra* note 92, at 7.

107. See Stark & Flitcraft, *supra* note 25, at 170 (contrasting “the vast majority of domestic violence episodes” involving “relatively minor acts... rather than severe violence.”).

108. Jacquelyn C. Campbell, Ph.D., is the Associate Dean for Faculty Affairs and Professor at Johns Hopkins School of Nursing.

109. Linda Rose, Ph.D., is an Associate Professor at the Johns Hopkins School of Nursing.

110. Joan Kub, Ph.D., is an Associate Professor at the Johns Hopkins School of Nursing.

111. Daphne Nedd, Ph.D., is an Assistant Clinical Professor in the College of Nursing at Wayne State University.

112. Jacquelyn Campbell et al., *Voices of Strength and Resistance*, 13 *Journal of Interpersonal Violence* 743, 751, 759 (1998); See also Kathleen J. Ferraro, *Battered Women: Strategies for Survival*, in *Violence Between Intimate Partners* 124 (Albert P. Cardarelli ed., 1997) (describes stages of leaving a violent

victims of Situational Couple Violence. Similarly, Campbell, Miller, Cardwell, and Belknap¹¹³ found that after two and one-half years, only twenty-five percent of battered women were still being abused.¹¹⁴ Forty-seven percent were in a relationship with no violence (half were in new relationships and half in the same relationship, but violence free for one year),¹¹⁵ and twenty percent had left the abuser but not entered into another relationship.¹¹⁶ One might speculate that victims in relationships that became free of violence for at least one year were more likely to have been victims of Situational Couple Violence.

Relatively fewer services are available to victims who choose to stay in their relationships. However, these couples could benefit from monitoring and enhancement of their conflict resolution skills. Such support would also be beneficial to Situational Couple Violence victims who decide to leave the relationship. Thought should also be given to the reality that some of the victims of Situational Couple Violence are men. Even though female victims of Situational Couple Violence are more likely to experience injury and other detrimental effects than are male victims,¹¹⁷ some male victims might seek supportive services.

ii. Perpetrators of Situational Couple Violence

Johnson believes that one of the Holtzworth-Munroe and Stuart batterer types, family-only perpetrators, are involved in Situational Couple Violence.¹¹⁸ These family-only perpetrators inflict less severe violence with less psychological and sexual abuse. They evidence little or no psycho pathology and are usually not violent outside the home.¹¹⁹ Their violence results from stress, anger, and lack of relationship skills such that a marital conflict becomes violent. Their violence is not likely to escalate over time,¹²⁰ and they generally have positive attitudes toward women.¹²¹ Holtzworth-Munroe and Stuart

relationship).

113. At the time of the study, Paul Miller, Mary M. Caldwell, and Ruth Ann Belknap were associated with the College of Nursing at Wayne State University.

114. Jacquelyn C. Campbell et al., *Relationship Status of Battered Women Over Time*, 9 *Journal of Family Violence* 99 (1994).

115. Of these, half were in new relationships and half in the same relationship but violence-free for one year.

116. Campbell et al., *supra* note 114, at 105.

117. See discussion about the dynamics of Situational Couple Violence *supra*.

118. Johnson & Ferraro, *supra* note 16, at 5.

119. Holtzworth-Munroe et al., *supra* note 70, at 46.

120. *Id.* at 47.

121. Holtzworth-Munroe & Stuart, *supra* note 67, at 492.

hypothesize that family-only perpetrators make up fifty percent of violent men.¹²²

iii. Situational Couple Violence and Parenting

Bancroft and Silverman report that some perpetrators parent quite responsibly after divorce, leading one to speculate that these are cases of Situational Couple Violence rather than Intimate Terrorism. According to them, these fathers did not undermine the mother or use the children against her during the marriage. They were less psychologically abusive, they accepted the termination of the relationship, and they showed the ability to elevate the children's needs over their own. After five years, their former partners reported few problems.¹²³ If indeed these were cases of Situational Couple Violence, this is an indication that carefully structured parenting plans may work in such situations and that ongoing contact with both parents would be in the children's best interest. As Andrew Shepard explains:

Conflict instigated violence is certainly not admirable and has serious negative consequences for children and parents. It may not, however, be as dangerous for both parents to have a continuing relationship with the children requiring parental contact as when control instigated violence is the problem. Perpetrators of conflict instigated violence may be able to learn to resolve conflict more peacefully than those who use violence as part of a pattern of control. Control instigated violence seems far more based in deeply rooted character and personality traits that are far less amenable to positive intervention.¹²⁴

In cases involving Situational Couple Violence, children remain at risk but are likely to benefit from parental education regarding the impact of high conflict on children and enhanced conflict resolution skills. Evan Stark concurs in this assessment:

Common Couple Violence [Situational Couple Violence] In many relationships, one or both adults use force in ways that they view as legitimate to address perceived differences in power or to resolve conflicts. If children are hurt by so-called "common couple violence," this is almost always

122. *Id.* at 482.

123. Bancroft & Silverman, *supra* note 25, at 106.

124. Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. Little Rock L. Rev. 395, 419–20 (2000).

inadvertent, and the risk of their experiencing psychological trauma is small, though modeling is a concern. Typically, both partners involved in this dynamic benefit from culturally sensitive counseling focused on anger management, conflict resolution, and information on potential risks to children.¹²⁵

Thus, the type of violence has a direct bearing on a perpetrator's ability to parent, the extent of harm to children, and potentially, the prognosis for perpetrator change.

iv. Violent Resistance

Violent Resistance involves situations where a female victim defends herself against her aggressive male partner.¹²⁶ In one study, researchers found that victims who resist violence, either physically or verbally, were twice as likely to be injured.¹²⁷

While some perpetrators of Situational Couple Violence are female, they must be carefully distinguished from women who are violent resisters of Intimate Terrorism. Confusing a woman defending herself from Intimate Terrorism with a woman perpetrator of Situational Couple Violence could be a deadly mistake for her and her children. A woman resisting Intimate Terrorism (and her children) needs immediate protection, not anger management techniques. The possibility of such a mistake illustrates a danger inherent in the creation and use of typologies. At the same time, "a monolithic etiological model of marital aggression is inadequate to capture the diversity of relationship and individual dynamics in physically aggressive marriages."¹²⁸

D. The Need for Additional Research

The two most common forms of domestic violence, Intimate Terrorism and Situational Couple Violence, are dissimilar in a number of respects. Yet, in literature and in practice, distinctions are rarely made between them. As Johnson concludes:

Yes, all family violence is abhorrent, but not all family violence is the same. If there are different patterns that arise

125. Stark, *supra* note 33, at 123.

126. Johnson & Ferraro, *supra* note 16, at 4; Johnson, *Two Types*, *supra* note 43, at 28 (Violent Resistance is 96.1% female).

127. Ronet Bachman & Dianne Carmody, *Fighting Fire with Fire The Effects of Victim Resistance in Intimate Versus Stranger Perpetrated Assaults Against Females*, 9 J. of Fam. Violence 317 (1994); Gile-Sims, *supra* note 60, at 54.

128. Vivian & Langhinrichsen-Rohling, *supra* note 99, at 120.

from different societal roots and interpersonal dynamics, we must make distinctions in order to maximize our effectiveness in moving toward the goal of peace in our society.¹²⁹

Additional research is needed in order to verify the existence of different types of domestic violence, to better understand the underlying dynamics, and to create tools for distinguishing types of violence. Until this occurs, typologies can lend insight into some violent relationships but substantial caution must be exercised in applying them in practice.

III. USING DIFFERENTIATED CASE MANAGEMENT TO MATCH FAMILIES WITH APPROPRIATE COURT PROCEDURES AND SERVICES

For too long, courts and legislatures have taken a one-size-fits-all approach to domestic violence and very real differences among families have been overlooked. As a result of this lack of scrutiny, the most acute cases (arguably those involving Intimate Terrorism) are not taken seriously enough, resulting in batterers being given unrestricted access to children and sometimes even custody. At the same time, in other cases (potentially those involving Situational Couple Violence) families are discouraged from accessing services, such as parent education and mediation which would be helpful to them. Families experiencing domestic violence are in need of special care and handling, and it is time for professionals from all disciplines to work together to provide it, rather than shaking their heads over the complexity and intransigence of the problem.

A. Current Failure to Differentiate Cases Involving Different Types of Domestic Violence

1. Misidentifying Cases: All Domestic Violence Viewed as Situational Couple Violence

The extent to which cases of Intimate Terrorism are mistakenly viewed as Situational Couple Violence is illustrated in a 1997 study of how prosecuting and defending attorneys handle domestic violence cases.¹³⁰ Even though a number of the cases involved Intimate Terrorism, they were mischaracterized as involving Situational Couple Violence:

129. Johnson, *Patriarchal Terrorism*, *supra* note 41, at 293.

130. Edna Erez & Tammy A. King, *Patriarchal Terrorism or Common Couple Violence: Attorneys' Views of Prosecuting and Defending Woman Batterers*, 7 *International Review of Victimology* 207 (1997).

The study suggests that attorneys' discourse of women battering reflects batterers' accounts of battering, and portrays intimate violence that reaches the court, by and large, as common couple violence [previous name for Situational Couple Violence]. Victims' battering experiences, which are likely to reflect patriarchal terrorism [previous name for Intimate Terrorism], are denied, minimized, or at best referred to as a few "true" or "real" cases of domestic violence.¹³¹

Defense attorneys reported that their most effective strategy was to depict cases as involving "mutual combat" and to attack the credibility and sincerity of the victim. Women were often portrayed as using the system to "get even." When women were reluctant to cooperate in prosecution, attorneys attributed this to a desire to preserve her family while the victims listed fear of the batterer as the most important reason.¹³² The authors of the study conclude that "to accomplish a meaningful change in court practices and outcomes, the cultural belief system underlying them must change."¹³³

The tendency to view all cases of domestic violence as Situational Couple Violence takes place in family court as well as in criminal cases.¹³⁴ As will be discussed in later sections, this propensity is encouraged by statutory definitions that target Situational Couple Violence rather than Intimate Terrorism. The failure to understand the dynamic of coercive control present in Intimate Terrorism places victims and children in extreme danger and discourages them from seeking help. At the same time, hesitancy to acknowledge the existence of Situational Couple Violence allows the mischaracterization of cases to continue and is used by some to justify it. All cases of domestic violence are "real," but they should not all be handled the same way.

2. *Lack of Formalized Screening*

131. *Id.* at 224.

132. *Id.* at 222-23.

133. *Id.* at 224.

134. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 Albany L. Rev. 1345, 1359 (1997) (judges trivialize domestic abuse); Meier, *supra* note 91, at 672 (victims treated as "hysterical and unreasonable" and award joint custody); Karen Czapanskiy, *Domestic Violence, The Family, and The Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 Fam. L. Q. 247, 257 (1993) (victims viewed as unstable and less fit to have custody); Jeannette F. Swent, *Gender Bias At the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. Cal. Rev. L. & Women's Stud. 1, 58 (1996) (judges presume that victim provoked violence).

Professionals from all disciplines agree that screening for the presence of domestic violence is a vital first step in protecting victims and children. Fortunately, a number of excellent screening tools have been developed for the purpose of risk assessment and to aid in safety planning.¹³⁵ However, because victims are hesitant to disclose domestic violence, it is dangerous to rely on a single method of screening.¹³⁶ Consequently, professionals must continually monitor for indications of domestic violence. In this regard, screening is more of an art than a science. In addition to identifying violent behavior, professionals must watch and listen carefully for evidence of domination and control.¹³⁷ Screening devices could and should be revised to assist in distinguishing between Intimate Terrorism and Situational Couple Violence.¹³⁸

Unfortunately, in many court systems no particular person or agency is specifically charged with screening for domestic violence. Pleadings were never designed to act as a screening device, but courts lack other ways to identify cases of domestic violence unless a protective order is sought. Many parties are pro se,¹³⁹ and even if represented, there is no guarantee that the attorney is aware of the violence. Furthermore, research indicates that twenty percent of mediators do not formally screen for abuse and that separate screening interviews are used even less frequently.¹⁴⁰

The lack of awareness of the existence of domestic violence may not be remedied later in the divorce process. Ann Freedman has drawn attention to the “troubling inadequacy of fact-finding resources in civil domestic violence proceedings, particularly in cases involving

135. Carla B. Garrity & Mitchell A. Baris, *Caught in the Middle* 42 (1994) (Conflict Assessment Scale); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2156 (1993) (Conflict Assessment Protocol); Linda Girdner, *ABA Center on Children and the Law, Domestic Abuse and Custody Mediation Training for Judges and Administrators: Instructor's Guide* 5, 17–26 (1999) (Tolman Screening Model and others); Kantor & Jasinski, *supra* note 45, at 40 (Abusive Behavior Inventory, The Aggression Scale, The Danger Assessment Instrument, Spouse Specific Aggression Scale).

136. Girdner, *supra* note 135, at 15.

137. Neilson, *supra* note 91, at 427.

138. Leone et al., *supra* note 40, at 489.

139. Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 Rutgers L.J. 105, 109 (2001) (neither party represented in 52% of cases and at least one party unrepresented in 88% of cases).

140. Jessica Pearson, *Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 Mediation Q. 319, 325 (1997).

children.”¹⁴¹ She attributes this to high case volumes; increasing numbers of pro se litigants; the complex nature of the issues; legal maneuvering by the perpetrator; unclear social priorities; and judicial preconceptions and beliefs.¹⁴² Others have similarly commented on the disheartening tendency of courts to “throw up their hands in despair” and characterize cases as “he said, she said.”¹⁴³

Thus, in many states, courts do not have a reliable mechanism for identifying cases of domestic violence and matching families with appropriate court processes and services. This increases the likelihood that these critical cases will fall between the cracks of an overloaded system. For this reason, the American Law Institute recommends that the existence of domestic violence be disclosed in parenting plans.¹⁴⁴ Additionally, it recommends that courts develop a process for screening and referral to appropriate services,¹⁴⁵ and hold hearings to review parenting plans and order “protective measures.”¹⁴⁶

3. *The Need for Differential Case Management and Unified Family Courts*

Recognizing that families have different needs, some court systems “customize” handling of family cases.¹⁴⁷ This may occur through Differential Case Management or the creation of unified family courts, both of which are especially valuable to families experiencing domestic violence.

Differential Case Management involves early screening of cases, assessment of the family’s needs, and referral to appropriate services

141. Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 Am. U. J. Gender Soc. Pol’y & L. 567, 568–69 (2003).

142. *Id.* at 577–83.

143. Jaffe et al., *supra* note 1, at 47.

144. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.05(2)(f) (2002).

145. *Id.* § 2.05(3).

146. *Id.* § 2.06(2).

147. Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Fam. L. Q. 617, 631 (1999); Shepard, *supra* note 124, at 413, 422–23; American Bar Association, *High-Conflict Custody Cases: Reforming the System for Children – Conference Report and Action Plan*, 34 Fam. L. Q. 589, 597 (2001). See also Barbara A. Babb, *Fashioning An Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. Cal. L. Rev. 469 (1998) (discussion of various state approaches); Carolyn D. Schwarz, *Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems*, 42 Fam. Ct. Rev. 304, 315–16 (2004) (Oregon, Hawaii, D.C.).

and court processes.¹⁴⁸ Early intervention allows case managers to perform “triage” and expedite the handling of cases involving issues such as domestic violence.¹⁴⁹ Courts using Differential Case Management are ideally situated to identify and consider the type of violence experienced by families.

The American Bar Association recommends that all jurisdictions establish unified family courts.¹⁵⁰ In addition to providing screening and linking families with needed services, these courts assure that actions pertaining to a given family are heard in the same court, by the same judge, and that the family works with a single case manager and treatment team to develop a service plan.¹⁵¹ This interdisciplinary approach enhances safety, accountability, and efficiency, and provides comprehensive services to the families who need them the most.¹⁵² Families are educated about the divorce processes available to them and they may be counseled by specially trained personnel.¹⁵³ In addition to providing thorough screening, unified court systems avoid multiple actions, conflicting orders, and unnecessary delays.¹⁵⁴

B. Matching Families with Services and Processes

Determining the type of violence experienced would help professionals make safer and more appropriate referrals and could assist families in choosing a divorce process.¹⁵⁵ For example, as Johnson suggests, some programs could be dangerous for victims of Intimate Terrorism:

. . . it is common for couples involved in violence to be referred to couples counseling or mediation, a strategy that can be extremely dangerous for women entrapped in intimate

148. Elrod, *supra* note 91, at 522; Shepard, *supra* note 124, at 397.

149. Shepard, *supra* note 124, at 397.

150. Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems And The Mandate to Establish Unified Family Courts*, 32 Fam. L. Q. 31, 32 (1998).

151. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 Fam.L. Q. 3, 15 (1998).

152. Andrew I. Shepard, *Children, Courts, and Custody* 114–15 (2004).

153. Babb, *Fashioning*, *supra* note 147, at 523 (1998). *See also* Carol R. Flango, *Family-Focused Courts*, 2 J. Center for Families, Child. & Cts. 99, 103 (2000) (discussing models of unified family courts).

154. Schwarz, *supra* note 147, at 309–10 (also discusses contrary points of view). *See also* Randal B. Fritzler & Leonore M. J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 U.M.K.C. L. Rev. 139 (2000) (discussion of specialized domestic violence courts).

155. Elrod, *supra* note 91, at 522.

terrorism, who risk retaliation if they disclose information about the abuse in front of the abuser. In this situation, couples counseling would be not only inappropriate, but dangerous. For couples involved in situational couple violence, however, such counseling might provide useful skills in problem-solving, anger management, and conflict resolution.¹⁵⁶

Thus, identifying the type of violence experienced has immediate and practical implications.

1. Participation in Parent Education Programs

In less than thirty years, parent education programs have proliferated in every state.¹⁵⁷ Parent education programs generally provide information on such topics as the emotional and legal aspects of divorce, the impact of divorce on children, co-parenting arrangements, communication skills, and community resources.¹⁵⁸ For example, the American Law Institute suggests that parents be informed about parenting plan preparation, the needs of children, the impact of conflict and domestic violence on children and appropriate referrals, and mediation.¹⁵⁹ Parent education programs may be mandatory or discretionary, and they may be implemented statewide or through local judicial rules.¹⁶⁰

Parent response to the programs has been quite positive. Studies show parental satisfaction levels over ninety percent.¹⁶¹ Some, but not all, studies show that participating parents are better able to cooperate after completing parent education programs.¹⁶² The programs help to reduce conflict and make parents aware of the needs

156. Johnson & Leone, *supra* note 19, at 19.

157. Jack Arbuthnot, *Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 *Fam. Ct. Rev.* 371 (2002); Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 *Fam. & Conciliation Courts Rev.* 195 (1999).

158. Nancy Ver Steegh, *Mandatory Divorce Education Classes: What Do the Parents Say?*, 28 *Wm. Mitchell L. Rev.* 889, 895 (2001); Elrod, *supra* note 91, at 531–32 (2001).

159. *Family Dissolution*, *supra* note 144, § 2.07(1) (2002).

160. Ver Steegh, *Mandatory*, *supra* note 158, at 895–99; Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 *Fam. & Conciliation Courts Rev.* 219, 220–21 (1998).

161. Thoennes & Pearson, *supra* note 157, at 196 (93% said participation should be mandatory).

162. *Id.* at 195.

of the children,¹⁶³ and both highly conflicted and less conflicted parents appear to benefit.¹⁶⁴

Not surprisingly, some parents profit more than others from parent education.¹⁶⁵ Those who attend early in the divorce process,¹⁶⁶ attend more sessions overall, and attend programs focusing on communications skills and co-parenting appear to benefit the most.¹⁶⁷

The question of whether victims of domestic violence should attend parent education programs has been controversial. In general, parent educators favor their attendance, while domestic violence advocates believe that attendance should be waived. Fuhrmann, McGill, and O'Connell¹⁶⁸ speculate that these two professional groups focus on victims of different types of violence, noting that "understanding that there are several types of violence could, possibly, unlock the domestic violence/parent education impasse."¹⁶⁹

Clearly, victims of Intimate Terrorism need specialized parent education groups. Messages about cooperative parenting and enhancing communication traditionally given in parent education classes are dangerous and inappropriate for victims of Intimate Terrorism.¹⁷⁰ Rather than emphasizing co-parenting and communication skills, specialized groups should stress separate parallel parenting and detailed safety planning. In addition, these victims need information on the dynamics of abuse, ways that their partner may try to manipulate the divorce process, and community referrals.¹⁷¹

163. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 Va. J. Soc. Pol'y & L. 129, 163 (2002).

164. Brenda L. Bacon & Brad McKenzie, *Parent Education After Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes*, 42 Fam. Ct. Rev. 85, 95 (2004).

165. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and their Children: Who Needs What Kind of Help?*, 22 U. Ark. Little Rock L. Rev. 453, 468 (2000).

166. Thoennes & Pearson, *supra* note 157, at 197.

167. *Id.* at 197-98.

168. Geri S. W. Fuhrmann, Psy.D., is Director of the Child and Family Forensic Center at UMass Memorial Health Care, Inc., and Associate Professor of psychiatry and pediatrics at the University of Massachusetts Medical School. Joseph McGill, LICSW, is a child and forensic social worker at the Child and Family Forensic Center at UMass Memorial Health, Inc., and an instructor in psychiatry at the University of Massachusetts Medical Center. Mary E. O'Connell, J.D., is a Professor of law at the Northwestern University School of Law.

169. Geri S. W. Fuhmann et al., *Parent Education's Second Generation: Integrating Violence Sensitivity*, 37 Fam. & Conciliation Cts. Rev. 24, 27 (1999).

170. Bancroft & Silverman, *supra* note 25, at 207-08.

171. Johnston, *supra* note 165, at 453, 468-69.

Special safety precautions are also necessary in order to keep victims of Intimate Terrorism safe. Parents should never be allowed to attend the same session, and the perpetrator should not be informed of the victim's planned date of attendance. The location of parent education classes should be kept confidential, and heightened security precautions, including visible security guards, weapon screening, and escort services should be provided.¹⁷²

Parents who have experienced Situational Couple Violence may benefit from specialized parent education groups as well. However, they are more likely to profit from standard parent education classes that include content on anger management and enhancing communications skills than are couples with a history of Intimate Terrorism.¹⁷³ In addition, messages about reducing conflict levels and focusing on the needs of children would be very appropriate for parents who have experienced Situational Couple Violence.

2. *Participation in Mediation*

Mediation is a process where a third-party neutral assists the parties in reaching a voluntary resolution. The mediator facilitates discussion of the party's underlying interests and helps them to explore options and ultimately reach agreement.¹⁷⁴ Whether couples with a history of domestic violence should enter into mediation is a subject of great controversy.

Women's advocates often express strong reservations about allowing victims of domestic violence to enter mediation. Concerns stem from the theory that the power imbalance between the victim and the perpetrator will result in an unfair coerced settlement.¹⁷⁵ For example, victims of abuse may fear retaliation if they do not acquiesce to the batterer's wishes.¹⁷⁶ At least one study found that victims perceive themselves as more powerless than other women and more likely to believe that the perpetrator could "out-talk" them

172. Victoria L. Lutz & Cara E. Gady, *Necessary Measures and Logistics to Maximize the Safety of Victims of Domestic Violence Attending Parent Education Programs*, 42 *Fam. Ct. Rev.* 363, 364–67 (2004); Furhmann et al., *supra* note 172, at 28–30.

173. See Lutz & Gady, *supra* note 172, at 370 (distinguishing between control and conflict based domestic violence).

174. Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 *Fam. L. Q.* 1, 3 (2001).

175. Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 *Fam. L. Q.* 177, 203–05 (1994).

176. Barbara Hart, *Battered Women and the Criminal Justice System*, in *Do Arrests and Restraining Orders Work?* 98–99 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

and would retaliate if they disagreed with him.¹⁷⁷ Women's advocates believe that mediators do not screen adequately for domestic violence and are inadequately trained to deal with abuse. Indeed, only seventy percent of surveyed mediation programs report regular mediator training on domestic violence.¹⁷⁸

Mediators generally believe that power imbalances can usually be managed by a specially trained mediator using special procedures. Such procedures include making detailed security arrangements, encouraging representation, requiring and enforcing strict ground rules, using separate caucuses, and monitoring for lopsided agreements.¹⁷⁹ Research shows that violent couples are as satisfied with the mediation process and the resulting agreements reached as are nonviolent couples. The rate of compliance with agreements is also similar.¹⁸⁰

As in the controversy over parent education, the existence of different types of domestic violence may provide a way to bridge the gap in thinking between women's advocates and mediators on this issue. As researcher Joan Kelly concludes:

These varied types of partner violence suggest a need to revisit blanket policies regarding mediation and domestic violence, because not all violence in marriages leads to an inability to meet together in mediation settings, nor is fear of the partner a major component in common couple violence.¹⁸¹

The American Law Institute recommends that mediators be required to screen for domestic violence and to ensure that participants give "meaningful consent" to participation.¹⁸² In

177. Girdner, *supra* note 135, at 13; Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 Fam. & Conciliation Cts. Rev. 30, 57 (1995).

178. Pearson, *Mediating*, *supra* note 140, at 332; Nancy Thoennes et al., *Mediation and Domestic Violence Current Policies and Practices*, 33 Fam. & Conciliation Cts. Rev. 6, 10 (1995).

179. Model Standards of Practice for Family and Divorce Mediation, available at <http://www.afccnet.org/pdfs/modelstandards.pdf>; Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women & L. 145, 198-202 (2003); See Elrod, *supra* note 91, at 528-29 (discussing impasse directed mediation and super mediation).

180. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2152 (1993). See also Robert Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. Consulting & Clinical Psychology 323 (2001) (long-term random study of effects of mediation).

181. Kelly, *Psychological and Legal Interventions*, *supra* note 163, at 142 (situational couple violence was previously called common couple violence).

182. *Family Dissolution*, *supra* note 144, § 2.07(2)(a).

addition, courts are not allowed to compel any service requiring “face-to-face” meetings.¹⁸³

Mediation may be inappropriate in cases of Intimate Terrorism, the type of violence women’s advocates are most likely to see. However, mediation may be quite helpful to couples with a history of Situational Couple Violence who need to learn to resolve conflict more peacefully.¹⁸⁴ Indeed, sending Situational Couple Violence couples into the adversary system may only serve to heighten their conflict level.¹⁸⁵

C. Regulating Perpetrator Contact with Children

The type of violence experienced also has implications for structuring post-decision relationships with children.

1. Supervised Visitation

Because parental rights are not terminated in divorce proceedings, the perpetrator of domestic violence will have continued access to the children in the form of visitation.¹⁸⁶ As discussed above, this may be appropriate in cases of Situational Couple Violence, assuming the parties have improved their conflict resolution skills and have been informed about the harm to children resulting from ongoing conflict.

However, in cases of Intimate Terrorism visitation can be dangerous. The batterer may harm the children through acts of violence or psychological abuse. In addition, the abuser is likely to use visitation to assault or manipulate the mother in an attempt to reassert the pattern of domination and control.¹⁸⁷ Unfortunately, some intimate terrorists are granted unrestricted visitation of their children.¹⁸⁸

Experts suggest consideration of the following factors when assessing risk to children:

183. *Id.* § 2.07(3).

184. See Ver Steegh, *Yes, No, and Maybe*, *supra* note 179, at 205 (suggesting that victims be counseled to consider the following factors in choosing a divorce process: type of violence, frequency and severity, victim status, likely abuser response, quality of the process available, legal representation, presence of children, state law, financial resources, and preferred decision making approach).

185. Kelly, *Psychological and Legal Interventions*, *supra* note 163, at 131.

186. Debra A. Clement, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 *Fam. & Conciliation Cts. Rev.* 294, 296 (1998); Margaret Tortorella, *When Supervised Visitation is in the Best Interests of the Child*, 30 *Fam. L. Q.* 199, 211 (1996).

187. Bancroft & Silverman, *supra* note 25, at 110.

188. *Id.* at 110.

1. history of physical abuse toward the children;
2. history of neglectful or underinvolved parenting;
3. history of sexual abuse or boundary violations;
4. level of physical danger toward adult partner; level of psychological cruelty toward partner and children;
5. history of using children to manipulate;
6. willingness to harm children incidental to abuse of mother;
7. level of coercive control exercised during relationship;
8. level of entitlement and self-centeredness;
9. history of substance abuse;
10. refusal to accept end of relationship;
11. level of risk of child abduction;
12. refusal to accept responsibility for past actions; and
13. mental health history.¹⁸⁹

The above factors are more indicative of Intimate Terrorism than Situational Couple Violence, so identifying the type of violence experienced would provide another avenue for protecting children.

Certainly an argument can be made that in some cases, Intimate Terrorists should not be allowed visitation, especially if the child strongly objects.¹⁹⁰ However, many experts believe that children benefit from ongoing but limited contact with the abusive parent.¹⁹¹ This is because the visits provide a “reality check” for the child and help the child come to terms with the abuser.¹⁹²

Supervised visitation centers provide a safe location for visits under the oversight of trained personnel who can intervene if problems arise.¹⁹³ Parents arrive and depart at different times so that there is no opportunity for contact. Staff members observe the visits and interact with parents to provide informal advice and education.¹⁹⁴

189. *Id.* at 157–70; Jaffe et al., *supra* note 27, at 106–11 (listing thirteen factors for assessing risk to children).

190. Martha Bailey, *Supervised Access: A Long-Term Solution?*, 37 *Fam. & Conciliation Cts. Rev.* 478, 481 (1999); Neilson, *supra* note 91, at 412.

191. Baily, *supra* note 190, at 480–81; Bancroft & Silverman, *supra* note 25, at 173; Clement, *supra* note 186, at 297.

192. *Id.* at 481–82; Bancroft & Silverman, *supra* note 25, at 173; Clement, *supra* note 186, at 297; Schepard, *supra* note 152, at 105.

193. Elrod, *supra* note 91; *See Standards and guidelines for Supervised Visitation Network Practice*, 36 *Fam. & Conciliation Cts. Rev.* 108 (1998); Robert B. Straus, *Supervised Visitation and Family Violence*, 29 *Fam. L. Q.* 229, 244–51 (1995).

194. Barbara E. Flory et al., *An Exploratory Study of Supervised Access and Custody*, 39 *Fam. Ct. Rev.* 469, 473 (2001); Jerry H. Dunn et al., *An Exploratory Study of Supervised Access and Custody Exchange Services: The Children's*

Visiting parents are prohibited from whispering to children, forcing physical contact, or making negative comments about family members.¹⁹⁵ Most families view the program favorably,¹⁹⁶ and there is some indication that parental attitudes are positively affected.¹⁹⁷

In cases of Intimate Terrorism, the existence of supervised visitation assists courts in balancing ongoing contact and safety.¹⁹⁸ Consequently, the National Council of Juvenile and Family Court Judges encourages ordering supervised visitation in cases of domestic violence,¹⁹⁹ and states such as Louisiana provide for supervised visitation conditioned on completion of treatment.²⁰⁰

When supervised visitation has been ordered, a perpetrator may later seek unsupervised visitation based upon completion of a treatment program. Such a request raises the issue of the effectiveness of treatment programs. Unfortunately, research findings concerning the effectiveness of perpetrator treatment programs are unclear.²⁰¹ Many programs have high drop-out rates,²⁰² and researchers disagree about how to measure outcomes.²⁰³ Daniel G. Saunders suggests that researchers consider the interaction of perpetrator traits and treatment models:

The major finding of this study is that personality styles and disorders interacted with the type of treatment being received. Men with antisocial traits were less likely to be violent after treatment if they attended the feminist-cognitive-behavioral treatment. Men with dependent traits, on the other hand, had

Experience, 42 Fam. Ct. Rev. 60, 62 (2004).

195. Clement, *supra* note 186, at 298. See Bancroft & Silverman, *supra* note 25, at 112 (supervised visitation must be tightly structured to avoid manipulation by the batterer).

196. Jessica Pearson & Nancy Thoennes, *The Families and Their Experiences*, 38 Fam. & Conciliation Cts. Rev. 123, 125, 139 (2000). See Flory et al., *supra* note 194, at 472 (parents and children feel safer); Dunn et al., *supra* note 194 at 62 (no incidents of physical violence during study).

197. Dunn et al., *supra* note 194, at 68.

198. Clement, *supra* note 186, at 296; Nat Stern & Karen Oehme, *The Troubling Admission of Supervised Visitation Records in Custody Proceedings*, 75 Temple L. Rev. 271, 276 (2002).

199. National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence § 405 [hereinafter *Model Code on Domestic and Family Violence*].

200. La. R.S. 9:364 (2004); Buel, *supra* note 92, at 736.

201. Gelles, *supra* note 3, at 164; Jana L. Jasinski & Linda M. Williams, *Partner Violence* 232 (1998); Kathleen J. Ferraro, *Women Battering: More Than a Family Problem*, in *Women, Crime, and Criminal Justice* 147 (Claire Renzetti et al. eds., 2001).

202. Jasinski & Williams, *supra* note 201, at 226.

203. Renzetti et al., *supra* note 2, at 268.

better outcomes with the process-psycho dynamic treatment.²⁰⁴

Thus, differentiating types of perpetrators and types of violence holds promise for designing and implementing effective treatment programs for batterers. For example, interventions focusing on power and control are likely to be more helpful in cases of Intimate Terrorism,²⁰⁵ while anger management treatment may be more useful in cases of Situational Couple Violence.²⁰⁶

Bancroft and Silverman recommend a “tiered approach” to visitation for batterers who complete treatment and behave appropriately. Visitation would initially start at a visitation center, followed by supervised visitation in the community. The next level would involve supervision by friends or relatives and eventually visitation might include short periods of unsupervised time.²⁰⁷ Visitation should not occur over the objection of the child and should not include overnight visits.²⁰⁸

The American Law Institute recommends that in cases involving domestic violence, the court “should impose limits that are reasonably calculated to protect the child, child’s parent, or other member of the household from harm.”²⁰⁹ This includes reduced and supervised visitation.²¹⁰

2. Parent Coordinators

Because cases involving violence or high conflict require extra oversight and monitoring, some courts have created the role of parent coordinator.²¹¹ Parent coordinators are analogous to special masters used in federal civil cases where judges appoint professionals with particular subject matter expertise and delegate limited decision making power to them.²¹² In 2000, the American Bar Association Family Law Section held an interdisciplinary conference on high

204. Daniel G. Saunders, *Feminist-Cognitive-Behavioral and Process-Psycho dynamic Treatments for Men Who Batter: Interaction of Abuser Traits and Treatment Models*, 11 *Violence and Victims* 393, 410 (1996).

205. Jasinski & Williams, *supra* note 201, at 222.

206. *Id.* at 224.

207. Bancroft & Silverman, *supra* note 25, at 173.

208. *Id.* at 174, 202.

209. *Family Dissolution*, *supra* note 144, § 2.11(2).

210. *Id.* § 2.11(2) (a), (b).

211. Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, *Parenting Coordination: Implementation Issues*, 41 *Fam. Ct. Rev.* 533, 534 (2003) [hereinafter AFCC Task Force 2003].

212. Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved, in Acting As a Psychologist Parent Coordinator in Child Custody Cases*, 42 *Fam Ct. Rev.* 576, 576 (2004).

conflict cases and the conferees recommended appointing parenting coordinators or masters to manage recurring child custody and access disputes.²¹³ By 2003, at least fourteen states had implemented this new professional role.²¹⁴

Parent coordinators assist parents in creating, implementing, and monitoring parenting plans.²¹⁵ Some states limit appointment of parent coordinators to post-decree matters while other states involve them in the divorce process.²¹⁶ During the divorce process, parent coordinators may function as the leader of an interdisciplinary team assisting the family.²¹⁷ More typically parent coordinators make decisions or recommendations²¹⁸ about day-to-day matters such as scheduling, activities, transportation, child care, discipline, education, and health care.²¹⁹ They generally cannot modify custody, allow relocation, or make any other major changes to court orders.²²⁰ Rather, they settle more routine parenting disputes outside of the court setting.²²¹ Thus, depending on the needs of the family, parent coordinators may perform assessments, provide education, serve as

213. Conference Report and Action Plan, High Conflict Custody Cases: Reforming the System for Children, Wingspread Conference at Racine, Wisconsin, September 8–10, 2000, sponsored by the American Bar Association and the Johnson Foundation.

214. AFCC Task Force 2003, *supra* note 211, at 534.

215. Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 Fam. Ct. Rev. 246, 247 (2004). See also AFCC Task Force on Parenting Coordination, Model Standards of Practice for Parenting Coordinators (Draft for Comment March 2005), available at http://www.afccnet.org/about/parent_coord_tf.asp [hereinafter AFCC Task Force 2005] (“The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to ensure compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy, and meaningful parent-child relationships.”).

216. AFCC Task Force 2003, *supra* note 211, 533.

217. Coates et al., *supra* note 215, at 257.

218. Parent coordinators may make decisions or make recommendations to the court depending on how they are authorized and what the parties have stipulated. See Elrod, *supra* note 91, at 533 (2001); AFCC Task Force 2003, *supra* note 211, at 556 (2003).

219. Sullivan, *supra* note 212, at 576; AFCC Task Force 2003, *supra* note 211, at 544. See also AFCC Task Force 2005, *supra* note 215, at Stnd XI (listing seventeen issues that parenting coordinators may resolve).

220. AFCC Task Force 2003, *supra* note 211, at 543. See also AFCC Task Force 2005, *supra* note 215, at Stnd XI (“A PC should refrain from making decisions that would change legal and physical custody from one parent to the other or that would change the parenting plan in such a way that precipitates a change in child support.”).

221. Kelly, *Psychological and Legal Interventions*, *supra* note 163, at 143.

case coordinator, assist with conflict management, and potentially make binding decisions or recommendations to the court.²²²

Parent coordinators are usually appointed by stipulation of the parties in order to avoid concerns about delegation of judicial authority and continuing jurisdiction. However, appointment may be authorized by state statute, court rule, or court order.²²³ A well-drafted stipulation should include the terms of appointment, scope of decision making, discussion of confidentiality, and procedures for challenging decisions and removal.²²⁴ At least one state parenting coordinator statute has withstood challenge. The Oklahoma parenting coordinator statute was held not to violate equal protection and due process.²²⁵

The qualifications of parent coordinators vary by state, but many have backgrounds in mental health or conflict resolution.²²⁶ Preliminary research shows that parents report reduced levels of conflict and that relitigation rates are substantially reduced when parent coordinators are used.²²⁷

Parent coordinators are likely to be especially useful in cases involving domestic violence.²²⁸ However, depending on the type of violence involved, the role of the parent coordinator may change. In cases of Intimate Terrorism, the parent coordinator should act as an arbitrator and be able to call upon the judge for immediate sanctions if the perpetrator is threatening or fails to comply with agreements or court orders. As the Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination explains:

In those cases of domestic violence where one parent seeks to obtain and maintain power and control over the other, the role of the PC [parent coordinator] changes to an almost purely enforcement function. Here the PC is likely to be dealing

222. AFCC Task Force 2005, *supra* note 215, at Stnd VI.

223. Elrod, *supra* note 91, at 533; AFCC Task Force 2003, *supra* note 211, at 536–7; Coates et al., *supra* note 215, at 249–50 (2004); AFCC Task Force 2005, *supra* note 215, at Stnd VII.

224. Johnston, *supra* note 165, at 475; AFCC Task Force 2003, *supra* note 211, at 542.

225. *Barnes v. Barnes*, 107 P.3d 560 (Okla. 2005). The Supreme Court of Oklahoma determined that there were sufficient limits on the parenting coordinator so that the parenting coordinator did not “micro-manage the family” and intrude upon the custodial parent’s right to make decisions. *Id.*

226. AFCC Task Force 2003, *supra* note 211, at 552; Sullivan, *supra* note 212, at 576. *See also* AFCC Task Force 2005, *supra* note 215, at App. A (recommendations for training of parent coordinators).

227. Sullivan, *supra* note 212, at 579–80; Coates et al., *supra* note 215, at 247 (166 cases had 993 court appearances but after using parent coordinators the same cases had 37 court appearances); Johnston, *supra* note 165, 475 (2000).

228. AFCC Task Force 2003, *supra* note 211, at 549–50.

with a court order, the more detailed the better, rather than a mutually agreed upon parenting plan; and the role is to ensure compliance with the details of the order and to test each request for variance from its terms with an eye to protecting the custodial parent's autonomy to make decisions based on the children's best interests and guarding against manipulation by the abusing parent.²²⁹

However, in cases of Situational Couple Violence, the parent coordinator should take an educational approach, function as a mediator, and model conflict resolution skills.²³⁰

IV. IMPLICATIONS FOR SUBSTANTIVE LAW REFORM

Courts can more effectively meet the needs of children by differentiating between cases of Situational Couple Violence and Intimate Terrorism. With support, education, and careful planning, children may be parallel parented²³¹ by parents with a history of Situational Couple Violence. However, children who are exposed to Intimate Terrorism need additional protection. They require physical and emotional safety, structure and predictability, and a strong bond with the nonviolent parent. Without intensive intervention, perpetrators of Intimate Terrorism are incapable of meeting these needs and awarding them custody or unsupervised visitation endangers the children.

Substantive custody law should focus on meeting the needs of children exposed to domestic violence. Unfortunately, statutes often fall short of the mark. Even when domestic violence is identified, courts are not given adequate guidance in evaluating the violence and meeting the needs of children. Although typologies are not refined sufficiently for exact application, viewing child custody statutes through the lens of different types of violence helps explain the superficial and imprecise analyses that some courts undertake.

A. Most Legal Definitions of Domestic Violence Are Inadequate

229. AFCC Task Force 2005, *supra* note 215, at n. 2.

230. Coates et al., *supra* note 215, at 253–54 (matching parent coordinators to parents).

231. *Children*, *supra* note 213, at 35 (“Under parallel parenting models, each parent does not include the other when interacting with the child. In essence, each parent raises the child as if he or she were a single parent during the period that the child is in residence. Interactions between parents is limited to the minimum extent feasible.”). Shepard, *supra* note 152, at 35.

Most legal definitions of domestic violence are drawn to include violent acts and fear of violent acts.²³² However, because these defining statutes do not address patterns of domination, coercion, and control, they target Situational Couple Violence while seeming to ignore the dynamics of Intimate Terrorism.

Three typical definitions of domestic violence illustrate the problem. The American Law Institute defines domestic violence as “the infliction of physical injury or the creation of a reasonable fear thereof. . . .”²³³ Similarly the Louisiana definition provides that “‘Family violence’ includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code. . . .”²³⁴ Finally, the North Dakota definition of domestic violence “includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault. . . .”²³⁵

These definitions do not go to the heart of Intimate Terrorism, the pattern of coercive control exerted through a variety of tactics and behaviors. Mary Ann Dutton describes the pattern as follows:

. . . a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is a pattern of behavior exhibited by the batterer that includes words, actions, and gestures, which,

232. *Family Dissolution*, *supra* note 144, at § 2.03 Comment h (state definitions encompass “physical harm or threat thereof”).

233. *Id.* § 2.03(7) (defining domestic violence as “the infliction of physical injury, or the creation of a reasonable fear thereof, by a parent or a present or former member of the child’s household, against the child or another member of the household. Reasonable action taken by an individual for self-protection, or the protection of another individual, is not domestic violence.”) *See also National Council of Juvenile & Family Court Judges*, *Family Violence: A Model State Code 1* (1994):

Sec. 102 Definitions.

Unless the context otherwise requires, as used in *the Model Code*:1. “Domestic or family violence” means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

(a) Attempting to cause or causing physical harm to another family or household member;

(b) Placing a family or household member in fear of physical harm;

(c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

234. La. R.S. 9:362(3) (2004).

235. N.D.C.C. 14-07.1-01(2).

taken together, establish power and control over an intimate partner.²³⁶

By analogy, Evan Stark illustrates the lack of focus on coercive control in the context of criminal definitions by explaining that “this categorization of domestic violence has created a new (second) class of misdemeanor assaults rather than criminalizing the far more severe pattern of coercive behaviors that are distinctive to partner relationships, that is battering.”²³⁷

The failure to include definitional statutory language describing the pattern of control characteristic of Intimate Terrorism has several consequences. First, in many states a single overarching definition of domestic violence applies to both protective orders and child custody determinations. Thus, in custody determinations courts correctly focus on specific acts of violence but are less likely to assign importance to patterns of coercion and control that are significant with respect to parenting. This may result in paying needed attention to Situational Couple Violence while discounting the dynamics and consequences of Intimate Terrorism. Second, by failing to include language regarding patterns of control, these definitions reinforce the misguided notion (discussed previously) that all domestic violence is really Situational Couple Violence. As a result, the danger to victims and children experiencing Intimate Terrorism is underestimated and Intimate Terrorists may be allowed to use the legal system as an instrument of harassment and control. Third, proof of a pattern of coercive control could lend support to a victim’s claim of self-defense and assist courts in more accurately differentiating cases of Violent Resistance to Intimate Terrorism from cases of female-initiated Situational Couple Violence. Fourth, as will be discussed below, imprecise definitions can lead to the inappropriate triggering of custody presumptions (triggering them in cases of Situational Couple Violence but not Intimate Terrorism) and confusion about when such presumptions have been rebutted.

Maine, Nevada, Minnesota, and Missouri have adopted statutory definitions of domestic violence that come closer to encompassing patterns of coercive control. The Maine definition includes, “attempting to place or placing another in fear of bodily injury through any course of conduct, including, but not limited to, threatening, harassing or tormenting behavior.”²³⁸ It also discusses

236. Mary Ann Dutton, *Expert Witness Testimony, in The Impact of Domestic Violence on Your Legal Practice*, ABA Commission on Domestic Violence § 8-81, §8-8 (Deborah M. Goelman et al. eds., 1996).

237. Stark, *Re-Presenting*, *supra* note 40, at 980–81 (1995).

238. 19-A M.R.S.A. § 4002(1)B (2004).

using intimidation to compel conduct,²³⁹ restricting movement,²⁴⁰ and being in the victim's vicinity without reasonable cause.²⁴¹ The Nevada statute similarly discusses the compelling of acts²⁴² and a "knowing, purposeful or reckless course of conduct intended to harass the other."²⁴³ The Minnesota definition of domestic abuse²⁴⁴ includes terroristic threats which are defined as threatening "directly or indirectly, to commit any crime of violence with purpose to terrorize another... or in reckless disregard of the risk of causing such terror"²⁴⁵ Missouri defines abuse as follows:

"Abuse" includes but is not limited to the occurrence of any of the following acts, attempts or threats against a person who may be protected pursuant to sections 455.010 to 455.085:

- (a) "Assault," purposely or knowingly placing or attempting to place another in fear of physical harm;
- (b) "Battery," purposely or knowingly causing physical harm to another with or without a deadly weapon;
- (c) "Coercion," compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage;
- (d) "Harassment," engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another adult and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable adult to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner. Such conduct might include, but is not limited to:
 - a. Following another about in a public place or places;
 - b. Peering in the window or lingering outside the residence of another; but does not include constitutionally protected activity;
- (e) "Sexual assault," causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress;

239. *Id.* § 4002(1)C (2004).

240. *Id.* § 4002(1)D (2004).

241. *Id.* § 4002(1)F (2004).

242. N.R.S. § 33.018(1)(c) (2004).

243. *Id.* § 33.018(1)(e).

244. Minn. Stat. § 518B.01 subd. 2 (2004).

245. *Id.* § 609.713 subd. 1 (2004).

(f) “Unlawful imprisonment,” holding, confining, detaining or abducting another person against that person’s will²⁴⁶

While these definitions encompass more behaviors than typical statutes, none of these statutes directly address patterns of coercive domination including tactics such as psychological abuse, economic control, use of privilege and punishment, isolation, and manipulation of children.

Because Intimate Terrorism is so dangerous and insidious, statutory definitions should be amended to add language specifically describing it. Language could be added to existing definitions of domestic violence such as that contained in the American Law Institute recommendations. The following is an example of possible language:

Domestic violence involves the infliction of physical injury or the creation of a reasonable fear thereof and may include a pattern of coercive control involving tactics such as threats, intimidation, psychological and emotional abuse, sexual abuse, isolation of the victim, manipulation of children, and exercise of economic control.

Adding such language to state statutory definitions will draw attention to the range of intimidation typical of Intimate Terrorism and ensure that evidence of a variety of coercive tactics will be seen as relevant to establishing the pattern of abuse. Victims of Intimate Terrorism and children exposed to it will ultimately be better protected.

B. Domestic Violence and “Best Interests”

1. Domestic Violence as a Single Factor

Because courts historically failed to recognize the nexus between domestic violence and parenting, during the 1980s, women’s advocates lobbied for the inclusion of domestic violence as a factor in determining the best interests of the child.²⁴⁷ This effort was bolstered by mounting empirical evidence concerning the harm to children from witnessing abuse and the prevalence of concurrent child abuse.²⁴⁸ Currently nearly every state includes domestic violence as an explicit factor to be considered in determining custody.²⁴⁹

246. V.A.M.S. § 455.010(1) (2004).

247. Goodmark, *supra* note 92, at 12.

248. Lemon, *supra* note 92, at 604.

249. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law*,

In cases of Situational Couple Violence, case-by-case evaluation of the children's needs is likely to be appropriate, and a best interests analysis can be useful in creating a highly structured parenting plan that requires little contact between the parents. Of course, this assumes that the court will give sufficient weight to the domestic violence factor.

However, in cases involving Intimate Terrorism, inclusion of domestic violence as one factor among many may not provide adequate protection for children. Judges who are unfamiliar with the dynamics of Intimate Terrorism may discount the seriousness of the abuse and give the factor too little weight.²⁵⁰ For example, Minnesota's statute is a typical "best interests" statute providing that the court consider "the effect on the child of the actions of an abuser, if related to domestic abuse...that has occurred between the parents or between a parent and another individual. . . ."²⁵¹ This factor is to be considered along with twelve other factors in determining the best interests of the child.

Even if the court weighs the domestic violence factor heavily, as discussed above, the statutory definition of domestic violence is unlikely to address patterns of coercive control. Consequently, courts are implicitly encouraged to underestimate the serious consequences of Intimate Terrorism in making child custody determinations. Thus, in addition to amending statutory definitions of domestic violence, states that use a domestic violence as a best interests factor should include language (as suggested above) describing the pattern of coercive control evident in Intimate Terrorism cases. Additionally with respect to custody determinations, states could require courts to make findings concerning a listing of parenting behaviors common to Intimate Terrorists.²⁵² However, this determination may best be left to experts advising the court.

2. Use of Experts

37 Fam. L. Q. 578 (2004) (Domestic violence as a custody criteria in all states except Connecticut, Mississippi, and Utah).

250. Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 Wm. Mitchell L. Rev. 775, 790-1 (2000). See *Family Dissolution*, *supra* note 144, at § 2.11 Comment (c) (2002) (discussing cases where domestic violence is weighed as a factor in deciding custody); Lemon, *supra* note 92, at 608-11 (discussing cases where batterers were awarded custody).

251. Minn. Stat. § 518.17 subd. 1(a)(12).

252. Mary Grams, *Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn*, 22 Law & Ineq. 105, 137 (2004). See Bancroft & Silverman, *supra* note 25, at 29-37. Typical characteristics include: authoritarianism; underinvolvement, neglect, and irresponsibility; undermining the mother; self-centeredness; manipulateness; and ability to perform under observation. *Id.*

In addition to amending relevant statutory sections, custody evaluators and guardians ad litem can effectively assist the court by taking into account the dynamics of Situational Couple Violence and Intimate Terrorism when making risk assessments and custody and access recommendations.²⁵³ Unfortunately, both groups have been criticized for failing to identify domestic violence²⁵⁴ and for viewing all domestic violence as conflict-based (Situational Couple Violence), and consequently overlooking control-based violence (Intimate Terrorism).²⁵⁵

The custody evaluator should make an in-depth investigation, which includes obtaining relevant police and court records, interviewing all parties with information, making home visits, and completing any psychological testing.²⁵⁶ He or she should inform the court concerning the frequency and severity of the violence, the type of violence, and the impact of the violence on the children.²⁵⁷

Multi-disciplinary teams including guardians ad litem and custody evaluators are ideally situated to assist families with a history of Situational Couple Violence in reducing conflict levels and developing parenting plans. In contrast, these professionals can provide important protection to children exposed to Intimate Terrorism by alerting courts to the pattern of coercive control and by

253. See William G. Austin, *Partner Violence and Risk Assessment in Child Custody Evaluations*, 39 Fam. Ct. Rev. 483 (2001) (urging a risk assessment approach to child custody evaluation); Johnston, *supra* note 165, at 463–64 (2000).

254. Lynn Hecht Schafran, *Evaluating the Evaluator*, 42 No. 1 Judges' J. 10 (2003) (domestic violence not mentioned in reports by *Gals*).

255. Dalton, *supra* note 2, at 273, 287; Meier, *supra* note 91, at 708. For discussion of protocol for child custody evaluation see American Bar Association, *supra* note 126, at 589. See also AFCC Model Standards of Practice for Child Custody Evaluation; Schafran, *supra* note 254, at 738 (listing factors evaluators erringly thought were more important than a history of abuse); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 No. 4 Judges' J. 38, 41 (1997) (evaluators not trained about domestic violence may ignore or minimize violence); June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 Santa Clara L. Rev. 1091, n. 131 (1999) (90.6% of psychologists would not consider allegation of physical child abuse as grounds for denying custody).

256. Bancroft & Silverman, *supra* note 25, at 197; Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. Center for Child. & Cts. 139 (1999). See *Family Dissolution*, *supra* note 144, § 2.11(3) (2002) (providing that the court “should” order an investigation or appoint a *Gal* or attorney unless satisfied that adequate information will be secured).

257. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 Fam. & Conciliation Courts Rev. 462, 463–64 (2000).

strongly recommending the use of supervised visitation and parenting coordinators.

C. *“Friendly Parent” Provisions and Joint Custody*

1. *“Friendly Parent” Provisions*

During the 1980s, public policy shifted to encourage continued involvement by both parents after divorce. This led to the passage of best interest factors favoring the parent most willing to encourage contact with the other parent, commonly referred to as “friendly parent” provisions.²⁵⁸ Twenty-eight states have enacted such provisions.²⁵⁹

“Friendly parent” provisions should not be used in cases involving domestic violence. Exercise of such provisions is especially dangerous in cases of Intimate Terrorism for several reasons: (1) the batterer may appear to be the more cooperative parent and thus gain custody or unrestricted access to the children; (2) the victim may be coerced into agreeing to unrestricted visitation in order to keep custody; (3) the victim may be forced to have additional ongoing contact with the batterer; and (4) the batterer is likely to use the provision as a means to control and manipulate the process.

“Friendly parent” provisions are counterproductive in cases of Situational Couple Violence as well because they encourage cooperative parenting in cases where increased contact may exacerbate conflict levels. While parents with a history of Situational Couple Violence may be able to parallel parent under a carefully drafted parenting plan, they should not be encouraged to coparent or share joint physical custody. States with “friendly parent” provisions should explicitly provide that they do not apply in cases of domestic violence.²⁶⁰

2. *Joint Custody*

The movement supporting continued involvement by both parents after divorce led to increased use of various forms of joint custody

258. Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 Fam. L. Q. 197, 201–02 (1995).

259. Elrod & Spector, *supra* note 249, at 578.

260. Minn. Stat. § 518.17 subd. 2(a)(13) provides, “except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.”

and, consequently, nearly every state has adopted joint custody in some form.²⁶¹ Like “friendly parent” provisions, joint legal or physical custody is dangerous for victims of Intimate Terrorism because continued contact provides the opportunity for manipulation, control, and additional violence by the batterer.²⁶² Joint physical custody is ill-advised for parents with a history of Situational Couple Violence, although in some cases, it is possible that parents may be able to share joint legal custody pursuant to a carefully drafted parenting plan. States should explicitly provide that joint legal and physical custody is inappropriate in cases of domestic violence.²⁶³ For example, Minnesota has adopted a rebuttable presumption against ordering joint legal or physical custody in cases of domestic abuse.²⁶⁴

D. Presumptions Against Custody Awards to Batterers

Concern about the application of “friendly parent” provisions and joint custody in domestic violence cases led several influential bodies to encourage states to adopt rebuttable presumptions against custody awards to batterers. In 1990, Congress urged creation of such presumptions²⁶⁵ and in 1994 the National Council of Juvenile and Family Court Judges drafted a Model Code on Domestic Violence that contains a rebuttable presumption. The presumption states, “it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.”²⁶⁶ Similarly the American Bar Association recommends that “[w]here there is proof of [domestic violence], batterers should be presumed by law to be unfit custodians for their children.”²⁶⁷

261. Elrod & Spector, *supra* note 249, at 578 (joint custody not a criteria in Arkansas, California, Massachusetts and Vermont).

262. Elrod, *supra* note 91, at 508–9; Meier, *supra* note 91, at 679.

263. See *Family Dissolution*, *supra* note 144, § 2.11 Comment (c) (discussing states with presumptions against joint physical custody in cases involving domestic violence).

264. Minn. Stat. § 518.17 subd. 2.

265. H.R.J. Res. 172, 101st Cong. (1990).

266. *Model Code on Domestic and Family Violence*, *supra* note 199, §§ 401–403 (1994). *But see Family Dissolution*, *supra* note 144, § 2.11(3) (2002) (providing that courts not allocate custodial responsibility or decision-making responsibility to perpetrators of domestic violence without making special written findings and that the perpetrator has the burden of proving that the child or parent would not be endangered).

267. Howard Davidson, *The Impact of Domestic Violence on Children*, a Report to the President of the American Bar Association 13 (1994).

As of 2001, sixteen states plus the District of Columbia had adopted rebuttable presumptions regarding custody awards to batterers. Some of the states apply the presumption to all types of custody while others apply it only to joint custody requests. States differ as to what showing is required to trigger the presumption and to rebut it.²⁶⁸

1. Triggering the Presumption

When viewed through the lens of a domestic violence typology, rebuttable presumption statutes are both over and under inclusive. Specifically, they are likely to include cases of Situational Couple Violence (which arguably they should not) and at the same time, they fail to reliably capture cases of Intimate Terrorism (which should fall under their umbrella of coverage).

In cases of Intimate Terrorism, rebuttable presumptions against custody awards to batterers are quite appropriate and they were likely written with that scenario in mind. As previous sections have discussed, Intimate Terrorists are dangerous and unsuitable parents who manipulate the court system to continue a pattern of abuse and control.

However, in contrast, invoking a rebuttable presumption regarding custody is inappropriate in cases of Situational Couple Violence where enhanced conflict resolution skills and counseling might enable both parents to remain more substantially involved in the child's life. Cases of Situational Couple Violence require careful but discretionary handling. Not only is the nature of the violence very different, but it is possible that both parents may initiate Situational Couple Violence. Automatic operation of a presumption could be quite harmful to a child in such a case.

Unfortunately, presumption statutes are not carefully drafted to target Intimate Terrorists. Just as definitions of domestic abuse fail to include identification of a pattern of domination and control, behaviors triggering presumption statutes may not distinguish between Intimate Terrorism and Situational Couple Violence.²⁶⁹

For example, Louisiana has one of the most comprehensive rebuttable presumption statutes. It is presumed that "no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children." The court may find "a history of

268. Lemon, *supra* note 92, at 612–13.

269. Lemon, *supra* note 92, at 615–16 (discussing definitions and standards of proof triggering state statutes); Jack M. Dagleish, *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R. 5th 241 (2004).

perpetrating family violence,” triggering the presumption, if there is one incident involving “serious bodily injury” or a finding of more than one incident of violence. This trigger could include cases of Situational Couple Violence where there had been two occurrences of relatively “mild” violence spaced over a long period of time. However, the statute could (at least theoretically) exclude cases of Intimate Terrorism where the pattern of domination and control was maintained primarily through means other than repeated physical violence. Even if most cases of Intimate Terrorism are found to fall within the purview of the statute, the court is not clearly directed toward identifying them.

Rebuttable presumption statutes should be amended so that they are triggered by patterns of coercive control. This will maximize their application in cases of Intimate Terrorism and make it less likely that cases of Situational Couple Violence will fall within them.

2. Operation of the Presumption When Violence Is Alleged Against Both Parents

States are divided about the application of presumptions against custody awards to perpetrators in cases where both parents are alleged to have a history of violence. The Louisiana statute addresses situations where both parents have a history of violence by awarding custody “solely to the parent who is less likely to continue to perpetuate family violence.”²⁷⁰ Viewed through the typology lens, this is troubling for two reasons. First, as discussed previously, in cases of Intimate Terrorism the male is nearly always the perpetrator. Consequently, in cases of Intimate Terrorism, this provision could be construed against women who are violent resisters engaging in self defense. Second, it is more likely that both parents may initiate violence in cases of Situational Couple Violence. However, as previously discussed, in Situational Couple Violence cases neither parent should be automatically presumed to be unfit.

The Nevada statute is even more troubling. It provides that “if it is not possible for the court to determine which party is the primary aggressor, the presumption ... applies to both parties.”²⁷¹ As noted above, this section could defeat custody awards to victims of Intimate Terrorism who defend themselves. However, it is most likely to be invoked in cases involving Situational Couple Violence. In such a

270. La. R.S. 9:362B (2004). Note that it is possible that this section could be used in rare cases of Mutual Violent Control.

271. N.R.S. § 125.480(6) (2004).

case, the statute could work to deprive a child of two potentially fit parents.

In direct contrast to Nevada, the courts in North Dakota have held that when both parents have an equivalent history of violence, the presumption does not apply.²⁷² In cases of Situational Couple Violence, this is the most sensible solution. However, in a case involving Intimate Terrorism, the victim could be penalized for defending herself.

When both parents have a history of domestic violence, the first step should be to determine the type of violence involved. The presumption should apply to perpetrators who evidence a pattern of coercive control. As discussed previously, in cases of Intimate Terrorism it is very likely that any violence perpetrated by the female victim is in the nature of self defense (Violent Resistance). Equally initiated violence is only likely to occur in cases involving Situational Couple Violence and, for the foregoing reasons, rebuttable presumptions against custody awards to perpetrators should not apply in those cases.

3. *Overcoming the Presumption*

Questions also arise concerning when presumptions against custody have been rebutted. For example, the North Dakota statute provides that the “presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent’s participation as a custodial parent.”²⁷³ Such language gives the court little guidance and makes it more likely that cases of Intimate Terrorism will be erroneously viewed as Situational Couple Violence. Not surprisingly, this statutory section has resulted in numerous appellate cases.²⁷⁴

On its face, the Louisiana rebuttable presumption statute appears to be more informative. The presumption can be overcome by showing the following by a preponderance of the evidence: completion of a treatment program; lack of alcohol and drug use; and proof that the parent’s participation is in the best interest of the child or children.²⁷⁵ While all of these factors are useful, they are not specifically directed at cessation of a pattern of domination and control. Although the statute requires a treatment program “designed specifically for perpetrators of family violence,”²⁷⁶ it does not

272. Krank v. Krank, 529 N. W.2d 844 (N.D. 1995). See Lemon, *supra* note 92, at 624 (discussing North Dakota cases).

273. NDCC 14-09-06.2(1)(j) (2004).

274. See Lemon, *supra* note 92, 624.

275. La. R.S. 9:364A (2004).

276. La. R.S. 9:362(7) (2004).

differentiate between treatment programs for Intimate Terrorists and those for perpetrators of Situational Couple Violence.²⁷⁷ Consequently, a perpetrator of Intimate Terrorism could meet the requirements of the statute while continuing to engage in coercive control and dangerous parenting practices. For example, in *D.O.H. v. T.L.H.*,²⁷⁸ completion of anger management therapy was deemed sufficient to rebut the statute even though no determination concerning the type of violence was made. As discussed above, anger management classes are not appropriate for perpetrators of Intimate Terrorism, although they are likely to be quite helpful to perpetrators of Situational Couple Violence.

Rebuttable presumption statutes should be amended to require greater court scrutiny in situations where the perpetrator seeks to overcome the presumption. Ideally a treatment plan based on an assessment by an interdisciplinary team should be developed for each batterer and compliance should be monitored for a year or more. In addition to taking concrete steps to end the violence and improve parenting skills, attitudinal change should be evaluated by experts before a court finding that the presumption is overcome.

E. Termination of Parental Rights

In extreme cases of Intimate Terrorism where services such as supervised visitation, parent coordination, and even incarceration are not sufficient to keep the former partner and children safe, the state should proceed with termination of the batterer's parental rights. As Joan Meier explains, “TPR actions—send a clear message that batterers have lost their ‘rights’ to their children—might actually impact many abusers more powerfully than the more common civil or criminal justice restraining orders or criminal adjudications.”²⁷⁹

277. See Bancroft & Silverman, *supra* note 25, at 185 (listing indicators of fundamental change in batterers: years of consistently improved parenting behavior; change not motivated by desire to punish partner; concrete steps taken to improve parenting skills; and acceptance of responsibility for past parenting, identification of inappropriate attitudes, and empathy regarding effects on children); Jaffe et al., *supra* note 27, at 113–14 (factors for assessing change in abusers).

278. *D.O.H. v. T.L.H.*, 01-0174 (La. App. 3d Cir. 10/31/01), 799 So.2d 714, 718 (“Although Dr. Adams admitted he did not know the specific details of the spousal abuse for which the father was receiving treatment, Dr. Adam’s psychotherapy assessment indicates that he knew that the father had been physically abusive to his ex-wife, with no indication that he had abused the children. He testified that six anger management training sessions were sufficient to expose the father to the basic principles of anger management.”).

279. Meier, *supra* note 91, at 723; Clement, *supra* note 186, at 297 (“[H]aving provided the parent with every opportunity, [the court] is able to terminate visitation with a clear conscience.”).

V. CONCLUSIONS AND RECOMMENDATIONS

Differentiating among types of domestic violence has practical implications for court procedure and for substantive child custody law. The one-size-fits-all approach endangers children and victims because the failure to differentiate among families means that cases of Intimate Terrorism are often mischaracterized as cases of Situational Couple Violence. As a result, neither group is adequately protected or referred to appropriate court procedures and services. Unfortunately, the language contained in most family law statutes supports the mistaken view that domestic violence is a single phenomenon.

Courts should adopt a Differentiated Case Management system as a part of a unified family court. Each family should be screened for domestic violence and consideration should be given to the type of violence experienced. An interdisciplinary team should make appropriate referrals and develop a safety and treatment plan. To the extent that the type of violence can be determined, families experiencing Intimate Terrorism should be treated differently from those experiencing Situational Couple Violence.²⁸⁰ The Summary Comparison Chart, below, compares the dynamics of Intimate Terrorism and Situational Couple Violence and suggests implications for parent education, mediation, supervised visitation, parent coordination and substantive child custody law.

Cases Involving Intimate Terrorism. When children have been exposed to Intimate Terrorism, their safety and protection should be the primary focus of the legal system. Parents should be required to attend separate parent education programs where special safety precautions are taken. The program's content should be modified to stress information about domestic violence, available services, safety planning, the need for separate parallel parenting, and options for restricted contact. Mediation may not be appropriate for some of these families; however, if the victim chooses to mediate, mediation should only be undertaken by a specially trained mediator who uses special precautions and safeguards. Because Intimate Terrorists are unsuitable parents, access to the children should be restricted through use of supervised visitation and a parent coordinator should be appointed to monitor safety, prevent the batterer from manipulating the process, and arbitrate disputes.

280. See Summary Comparison, below, comparing the dynamics of Intimate Terrorism and Situational Couple Violence and suggesting implications for parent education, mediation, supervised visitation, parent coordination and substantive child custody law.

In states where domestic violence is a best interests factor, statutory language should be amended to include patterns of coercive control and give extra weight to this factor. In addition typical perpetrator parenting behaviors could be specifically listed and experts could make special domestic violence parenting evaluations. Joint legal or physical custody should be presumed to be inappropriate.

States should adopt rebuttable presumptions against legal or physical custody awards to Intimate Terrorists. The statutory language should be carefully drafted so that the presumption is triggered by behaviors indicating a pattern of coercive control. If mutual violence is alleged, the presumption should be applied to the perpetrator engaged in a pattern of coercive control. Requirements for overcoming the presumption should take the dynamic of coercive control into account by requiring an interdisciplinary team to create and monitor a treatment plan. Such a plan should involve completion of an appropriate treatment program and require the perpetrator to demonstrate behavioral and attitudinal change. In cases where there is additional violence or where the batterer continues to manipulate and threaten, termination of parental rights should be pursued.

Cases Involving Situational Couple Violence. Cases of Situational Couple Violence must also be taken more seriously, but intervention should focus on parent education and enhancement of conflict resolution skills. Parents should be required to attend separate specialized parent education programs stressing information about domestic violence, community referrals, safety planning, the detrimental impact of ongoing conflict on children, conflict resolution skills, anger management, and parallel parenting. With appropriate safeguards, mediation is likely to be appropriate and helpful to these parents. Emphasis should be placed on creating a detailed parenting plan aimed at reducing conflict levels, avoiding situations that could escalate into a violent encounter, establishing parenting ground rules, and resolving access issues based on the needs of the children. A parenting coordinator should be appointed to continue the educational process, monitor conflict levels, and assist in mediating day-to-day decision making.

States should not use rebuttable presumptions against legal or physical custody awards in cases of Situational Couple Violence, and statutes should be amended to minimize the possibility that presumptions will be triggered in these cases. Instead of invoking a presumption, an individualized best interests analysis should be made by the court if the parties reach impasse in mediation.

The Need for Caution and Additional Research. The failure to distinguish between types of violence has contributed to the development of one-size-fits-all stereotypes about violent families. Less attention has been paid to families and family members who do

not fit expected patterns. Some of these “unexpected patterns” may involve different types of abuse. The impact of the violence, as well as the victim’s response to it are likely to be very different depending on whether Intimate Terrorism or Situational Couple Violence is involved.

Because Johnson’s work is theoretical and families experiencing domestic violence are in life-threatening situations, caution must be exercised in applying his or other typologies in practice. Because all families are different, they are unlikely to fit neatly into categories and some may exhibit more than one type of violence. More research is needed to develop ways to screen for different types of violence and verify their existence.

However, the recognition of different types of domestic violence has opened cross-disciplinary communications and has the potential to explain and settle long standing controversies and disputes. Viewing child custody law and process through the lens of Johnson’s domestic violence typology also creates the opportunity to reexamine assumptions, identify shortcomings, and conceptualize more effective ways of helping children exposed to domestic violence.

Summary Comparison of Intimate Terrorism and Situational Couple Violence with Implications for Child Custody

	Intimate Terrorism	Situational Couple Violence
Motivation	Power and control	Isolated reaction to conflict
Pattern	Violence as one tactic in larger pattern of control	(No pattern of coercive control)
Frequency/severity/injury	More frequent, more severe, serious injury more likely	Generally fewer incidents, may be less severe, serious injury less likely
Perpetrator	Male	Male or female or both
Escalation of violence	Yes	No
Prognosis for parenting by perpetrator	Poor	Parallel parenting possible under highly structured

		parenting plan (assuming enhanced conflict resolution and anger management skills)
Participation in parent education?	Only in classes with specialized curriculum and stringent safety precautions	Preferably in specialized class
Participation in mediation?	May not be appropriate—if mediate, need specially trained mediator using special procedures and precautions	Yes—likely to be helpful in developing conflict resolution skills
Supervised visitation necessary?	Yes	Not needed in many cases if parents improve conflict resolution and anger management skills and have a highly structured parenting plan
Use of parent coordinator?	Yes—monitors compliance and acts as arbitrator	Yes—acts as mediator and educator
Differential Case Management	Yes	Yes
Best interests factors	Amend factors to include patterns of coercive control (list parenting behaviors and use expert)—friendly parent provisions inapplicable	Careful discretionary case-by-case evaluation—friendly parent provisions should not apply
Joint custody	Presumed inappropriate	Inappropriate (need detailed parenting plan designed to meet needs of family)

Presumptions against custody awards to perpetrators—trigger	Amend presumptions against custody awards to perpetrators to target patterns of coercive control	Presumptions against custody awards to perpetrators should not apply
Presumptions against custody awards to perpetrators—violence alleged against both parents	Presumption should apply to perpetrator with pattern of coercive control—female is likely to be Violent Resister	Presumption should not apply
Presumptions against custody awards to perpetrators—rebutting	Monitoring treatment plan and change over time by interdisciplinary team	Presumptions should not apply
Termination of parental rights	Appropriate in some cases	Inappropriate