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## COMMENTARIES

# PROTECTING CHILDREN EXPOSED TO DOMESTIC VIOLENCE IN CONTESTED CUSTODY AND VISITATION LITIGATION<sup>1</sup>

PAULINE QUIRION

### INTRODUCTION

Domestic violence is detrimental to children. Thus, courts should consider it as evidence of parental unfitness or misconduct, both of which courts weigh heavily in determining what custody and visitation arrangements are in the children's "best interests." Likewise, given the staggering number of murders resulting from family violence,<sup>2</sup> the courts should fashion orders to ensure that no additional violence or harm is inflicted on an abused parent or the parties' children.

Massachusetts law governing custody decisions and studies documenting the profound impact of domestic violence on children arguably provide a basis for a rebuttable presumption against awarding child custody to an abusive parent. Under Massachusetts law, the rights of both parents to have custody of their children are equal only "in the absence of misconduct."<sup>3</sup> Moreover, Massachusetts law requires that the court consider "whether the child's present or past living conditions adversely affect his physical, mental, moral, or emotional health."<sup>4</sup> Furthermore, Massachusetts law offers judges making temporary orders for shared legal custody guidance as to what might constitute "misconduct" or

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<sup>1</sup> This article is part of the continuing efforts of the Cambridge and Somerville Legal Services (CASLS) Battered Women's Legal Assistance Project to educate the bar, the judiciary and the public about the impact of domestic violence on children and the need for a rebuttable presumption against orders for care and custody of children to abusers. Attorneys Pauline Quirion, Judith Lennett, Kristin Lund and Chanda Tuck contributed to this overview of literature and arguments in favor of such a presumption. CASLS also acknowledges and thanks Amy Offenbergh for her editorial and research assistance.

<sup>2</sup> Typically, probate and family courts enter orders for child custody or visitation after parents separate. This is a particularly dangerous time because abusers often escalate the violence to coerce victims into reconciliation. In addition, battered women are most likely to be murdered by abusers after they leave the relationship or report the abuse. See Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary, and Recommendations*, 43 JUV. & FAM. CT. J. 29, 34 (1992), and studies cited therein.

<sup>3</sup> MASS. GEN. LAWS ch. 208, § 31 (1987 & Supp. 1996).

<sup>4</sup> *Id.*

adverse living conditions by mandating that the court shall consider "whether any member of the family has been a perpetrator of domestic violence."<sup>5</sup>

Not all judges consistently view domestic abuse as a major factor when deciding custody and visitation issues, nor do they necessarily see abuse of one's partner as related to parental fitness.<sup>6</sup> Precisely why courts do not view domestic violence as a major consideration is unclear, but one national surveyor of court decisions surmised that:

A lack of information about family violence and the danger it poses to adult and child victims has led the courts to consider the abuse of wives or mothers by male partners as largely irrelevant to custody deliberations and awards, concluding either that men who are violent toward their partners may, nonetheless, be very good fathers or that domestic violence has little effect on the children or that even if the father was violent during cohabitation, he will cease beating and terrorizing the mother upon separation. All of these conclusions are erroneous.<sup>7</sup>

The American Medical Association (hereinafter the "AMA") reports harmful and pervasive societal misconceptions about abuse undermines the appropriate responses to domestic violence. These include the misconceptions that: "(1) domestic violence is rare; (2) violence does not occur in relationships that appear 'normal'; (3) domestic violence is a private matter that should be resolved without outside intervention, and (4) battered women are responsible for their abuse."<sup>8</sup> These myths are not surprising given that domestic violence within the home was once a legally sanctioned feature of the family. In earlier times, courts upheld a husband's authority to administer punishment, which could be defined as anything short of death or permanent injury.<sup>9</sup>

To overcome common misconceptions about domestic abuse, the AMA and various health professionals, including the Surgeon General, view domestic violence as a crime and a public harm,<sup>10</sup> reasoning that abuse as a private matter

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<sup>5</sup> *Id.* Other than domestic violence, Massachusetts General Laws ch. 208, §31 gives a non-exhaustive list with only three other specific factors courts must consider in deciding if temporary shared legal custody would not be in the child's best interest. The three specific considerations are whether the parent "abuses alcohol or other drugs or has deserted the child and whether the parties have a history of being able to cooperate in matters concerning the child." *Id.*

<sup>6</sup> For two excellent articles surveying the state of the nation with respect to custody decision-making in cases where domestic violence is present, see Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991) and Hart, *supra* note 2.

<sup>7</sup> Hart, *supra* note 2, at 34.

<sup>8</sup> Council on Ethics and Judicial Affairs, *Physicians and Domestic Violence: Ethical Considerations*, 267 JAMA 3190, 3191 (1992). See also Nancy S. Jecker, *Privacy Beliefs and the Violent Family: Extending the Ethical Argument for Physician Intervention*, 269 JAMA 776, 777-79 (1993).

<sup>9</sup> See Jecker, *supra* note 8, at 778. See also U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB, BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982).

<sup>10</sup> Former United States Surgeon General Antonia Novella describes the public ramifi-

contributes to the tendency to minimize its importance.<sup>11</sup> Likewise, violence in the home is not taken seriously because traditional values and sentimental qualities associated with the family unit impede intervention on behalf of individual family members:

[T]he sharp distinction drawn between public and domestic realms and the putative protection of the family from outside interferences has meant that ethical principles, such as justice, were generally deemed inapplicable to family relationships. Reflecting this tradition, justice theories typically do not address the family, treating it as a private association, along with churches, universities, and clubs. In modern times this has meant that the family is simultaneously revered as a sentimental and inherently moral haven, while at the same time it is granted immunity from the rules of justice.<sup>12</sup>

Fortunately, social advances have made abuse prevention laws directed at family violence more common. In addition, recent studies have provided a better understanding of domestic violence by demonstrating that domestic violence not only damages the life of the abused parent,<sup>13</sup> but produces profound adverse effects on children.<sup>14</sup> When domestic violence is examined in this context, it becomes more evident that abuse is, in fact, a type of "misconduct" which creates hazardous living conditions for children. Consequently, a showing of such abuse should impact a parent's right to care for and enjoy the companionship of his or her children.

Whatever the cause, a court's failure to appreciate and respond properly to domestic violence endangers the lives of many young children already traumatized by exposure to domestic violence. Courts may place children in the care and custody<sup>15</sup> of perpetrators of such violence only to be further, and even perma-

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cations of domestic violence as follows: "This is not just a 'minor dispute' between spouses or loved ones. It is a violation of our criminal laws and a callous disregard for human life. If we do not help to break the cycle of abuse, it will reflect itself in the next generation." Antonia C. Novello, et al., *From the Surgeon General, U.S. Public Health Service: A Medical Response to Domestic Violence*, 267 JAMA 3132 (1992). Part II, Section D, *infra*, discusses how a child learns violent ways of interacting from an abusive parent.

<sup>11</sup> See Jecker, *supra* note 8, at 776-79.

<sup>12</sup> See *id.* at 778.

<sup>13</sup> Injuries related to domestic violence are as serious as, or more serious than, injuries received in ninety percent of all violent felonies. Study reported in Barbara Hart, *The Legal Road to Freedom*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 18 (Marsali Hansen & Michelle Harway eds., 1993).

<sup>14</sup> See studies cited by Hart, *supra* note 2, at 33-34. Section II, *infra*, discusses various studies of the effects of domestic violence on children.

<sup>15</sup> The term "care and custody" or "custody" is used to refer to physical custody as well as the possession that occurs during visitation with a non-custodial parent. This article primarily addresses custody and visitation issues that arise between male and female parents with a focus on victims who are mothers. The focus is not meant to imply that domestic violence does not occur in lesbian or gay relationships or that the impact on

nently, harmed.

Recent signs of change with respect to this historic and dangerous oversight have emerged, however, as increasing numbers of states give consideration to domestic violence in custody and visitation determinations.<sup>16</sup> These positive signs are likely a reflection of greater awareness of the impact of battering on children.<sup>17</sup> While this trend is encouraging, much more needs to be done to ensure that children are consistently protected from the harm that will likely result from inappropriate care and custody orders.

This article contends that the best interests of children exposed to domestic abuse are served by legislating a rebuttable presumption against an award of custody in favor of the perpetrator and by allowing a visitation order only if adequate safety provisions for the children and abused parent can be made.<sup>18</sup> This article provides an overview of the literature which can educate courts about the extent and effect of domestic violence. To this end, Sections I and II survey the literature on partner battering generally and on the effects of family violence on children in particular. Section III surveys applicable federal initiatives, decisions of courts in states other than Massachusetts, and Massachusetts' own statutory framework as sources of support for creating this rebuttable presumption.

## I. DOMESTIC VIOLENCE: SCOPE OF THE PROBLEM

Policy and decision makers are beginning to recognize the seriousness of domestic violence. According to Susan Schechter, a well-known researcher and author on the subject of violence against women, a national study undertaken over ten years ago found that at least 1.8 million women were severely assaulted by their spouses or partners and over 230,000 children were severely abused each year.<sup>19</sup> In 1992, the Council on Ethical and Judicial Affairs of the AMA summarized the national state of domestic violence for its members as follows:

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children of same gender partners is different. Likewise, the focus is not meant to negate the traumatic effect of violence perpetrated by a mother.

<sup>16</sup> See Hart, *supra* note 2, at 29.

<sup>17</sup> It may also indicate a better understanding of battering generally. See, e.g., Barry Zuckerman, et al., *Silent Victims Revisited: The Special Case of Domestic Violence*, 96 PEDIATRICS 511 (1995).

<sup>18</sup> The National Council of Juvenile & Family Court Judges adopts this position in its report on model legislation regarding family violence. See FAMILY VIOLENCE: A MODEL STATE CODE (National Council of Juvenile & Family Court Judges, 1994) [hereinafter "National Council of Juvenile & Family Court Judges"]. See also Andrea Goodman, *When Spouse Abuse is Child Abuse, Integrating Domestic Violence in Child Custody Decisions* in CONFERENCE ON DOMESTIC VIOLENCE, CHILDREN IN VIOLENT FAMILIES (South Middlesex Legal Services ed., 1993).

<sup>19</sup> See SUSAN SCHECHTER & LISA KLEE MIHALY, ENDING VIOLENCE AGAINST WOMEN AND CHILDREN IN MASSACHUSETTS FAMILIES: CRITICAL STEPS IN THE NEXT FIVE YEARS 11 (1992) (citing MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTIONS TO VIOLENCE IN 8,145 FAMILIES (1990)).

Women in the United States are more likely to be victimized, through assault, battery, rape, or homicide, by a current or former male partner than by all other assailants combined. The rate of injury to women from battering surpasses that of car accidents and muggings combined. Just over one half of all women murdered in the United States are killed by their partners

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Another group of writers offered the following analogy: between 1967 and 1973, 39,000 American soldiers were killed in fighting in Vietnam; during that very same period, 17,500 women and children were killed in America by members of their families.<sup>21</sup> Furthermore, incredible as these figures may seem, figures based on nationally representative samples are generally understood to be marked underestimates.<sup>22</sup> Surveys of battered women, for example, typically under-represent those who do not speak English fluently, the very poor, those whose lives are especially chaotic, and individuals who are homeless, institutionalized, or incarcerated at the time the survey is conducted.<sup>23</sup> Thus, at the very least, this data affirms former Surgeon General Koop's declaration of violence as the number one health problem of women.<sup>24</sup>

The violence experienced by battered women is often life-threatening. Domestic violence leaves permanent emotional and physical scars. It may take the form of physical, sexual, and/or psychological abuse; is generally repeated; and often escalates within relationships.<sup>25</sup> Domestic violence is mainly perpetrated by men against women; ninety-five percent of the victims of domestic violence are women.<sup>26</sup> Furthermore, men perpetrate more aggressive actions against their female partners than do women against their male partners.<sup>27</sup> Men are also more likely to perpetrate multiple aggressive actions against their partner during a single incident than are women against male partners.<sup>28</sup> Similarly, national homicide statistics also demonstrate the differential risk for women and the severity of physical outcomes of partner assault. "From 1976 through 1987, approximately 38,648 people over the age of 15 years died as a result of one partner killing another (including married, common law, divorced or dating partners). Of these

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<sup>20</sup> Council on Ethics and Judicial Affairs, *supra* note 8, at 3190.

<sup>21</sup> See PETER JAFFE ET AL., CHILDREN OF BATTERED WOMEN 19 (1990).

<sup>22</sup> See Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3189 (1992).

<sup>23</sup> See *id.* at 3184.

<sup>24</sup> See Press Conference with Dr. C. Everett Koop, Surgeon General and Dr. Luella Klein, Former President of the American College of Obstetricians and Gynecologists, in FED. NEWS SERVICES, Jan. 3, 1989.

<sup>25</sup> See Council on Scientific Affairs, *supra* note 22, at 3186.

<sup>26</sup> See UNITED STATES DEPARTMENT OF JUSTICE, REPORTS TO THE NATION ON CRIME AND JUSTICE 21 (1983).

<sup>27</sup> See Susan Schechter & Lisa T. Gary, *A Framework for Understanding and Empowering Battered Women*, in ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN, 240-53 (Martha Straus ed., 1988).

<sup>28</sup> See *Id.*

deaths, 61 percent were women and 39 percent were men."<sup>29</sup>

In 1991, an estimated 43,000 women were severely battered in Massachusetts.<sup>30</sup> In that same year, the commonwealth's twenty-eight battered women's service organizations received 69,000 calls for help.<sup>31</sup> Based on data collected by the Massachusetts Coalition of Battered Women Service Groups through July, 1994, a death occurs every eleven days in Massachusetts as a consequence of domestic violence.<sup>32</sup> In 1993, over 55,000 petitions were filed in Massachusetts courts by women seeking protection from abuse under Massachusetts General Laws chapter 209A.<sup>33</sup> Such statistical reports led Governor William Weld's administration to declare domestic violence a "public emergency" in the Commonwealth of Massachusetts.<sup>34</sup> Furthermore, the connection between domestic violence and child abuse is increasingly apparent. In 1989, the Massachusetts Department of Social Services ("DSS") reported that there was documented violence against mothers in thirty percent of substantiated child abuse cases.<sup>35</sup>

However the data is collected, analyzed, and reported, the results are staggering. Scholars and advocates alike recognize that the widespread nature of violence against women is long-standing and has deep historical roots. One author noted that:

[w]ife beating is a pervasive national problem yet violence against women is tolerated by the very authorities that have the ability to deal with the problem . . . . [F]or literally thousands of years, women as well as children were considered the property of men. Men had absolute authority within the family unit; children, women and servants were subject to 'domestic chastisement.' A husband's legal right to physically chastise his wife was not repudiated in the United States until the end of the 19th century.<sup>36</sup>

Looking at more recent history, Professor Naomi Cahn has stated that

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<sup>29</sup> Council on Scientific Affairs, *supra* note 22, at 3186.

<sup>30</sup> See SCHECHTER & MIHALY, *supra* note 19.

<sup>31</sup> See *id.*

<sup>32</sup> See Massachusetts Coalition of Battered Women Service Groups, 1994 VICTIM LIST, UPDATED: July 15, 1994.

<sup>33</sup> See ADMINISTRATIVE OFFICE OF THE TRIAL COURT, ANNUAL STATISTICAL REPORT OF THE TRIAL COURT 19, 62 (1993).

<sup>34</sup> Toni Locy, *An Alarm Sounds Over Battering, Cellucci Declares Emergency, Backs Program Funding*, BOSTON GLOBE, April 8, 1992, at 21.

<sup>35</sup> See SCHECHTER & MIHALY, *supra* note 19, at 12. As the authors note, this figure understates the true extent of the overlap between child abuse and domestic violence because the study upon which it is based was conducted before DSS case workers were required to inquire about domestic violence in the course of their investigations. See *id.*

<sup>36</sup> Linda Keenan, *Domestic Violence and Custody Litigation: The Need For Statutory Reform*, 13 HOFSTRA L. REV. 407, 410-11 (1985). Thanks to Keenan and others like her, the history of violence against women has been well documented. See also, e.g., DEL MARTIN, BATTERED WIVES 25-43 (1981); UNITED STATES COMMISSION ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY (1978); LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); and Sue Eisenberg & Patricia Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138 (1977).

[r]esearchers have only recently begun to explore the sociological and psychological dimensions of the domestic violence problem. Until twenty years ago, woman abuse was neither publicly studied nor acknowledged. It occurred, but with little state interference or regulation. Battered women received no support from social services providers, and they usually did not leave their homes because there were no shelters. Prior to 1975 psychologists did not study the problem of the battered woman as a victim . . . . The few laws that existed to protect battered women were rarely enforced.<sup>37</sup>

The physical abuse of women may be understood by documenting the extraordinary extent of battering in this country. Statistics, however, cannot address the psychological devastation experienced by women whose intimate partners threaten their lives on a daily basis. In *Trauma and Recovery*,<sup>38</sup> Dr. Judith L. Herman traced the historic and clinical studies of "shell shocked" combat veterans from the First World War, and compared the results to her own work with victims of domestic violence and sexual abuse, to demonstrate that the psychological dynamics experienced by these groups are identical. Dr. Herman initially notes that:

People who have endured horrible events suffer predictable psychological harm. There is a spectrum of traumatic disorders ranging from the effects of a single overwhelming event to the more complicated effects of prolonged and repeated abuse. Established diagnostic concepts, especially the severe personality disorders commonly diagnosed in women, have generally failed to recognize the impact of victimization.<sup>39</sup>

Dr. Herman explains that when the impact of victimization is recognized with a desire to fully understand the dynamics of the woman's experience, one finds that:

the psychological syndrome seen in survivors of rape, domestic battery and incest [is] essentially the same as the syndrome seen in survivors of war. The subordinate condition of women is maintained and enforced by the hidden violence of men. There is war between the sexes. Rape victims, battered women, and sexually abused children are its casualties . . . . The hysteria of women and the combat neurosis of men are one.<sup>40</sup>

Children suffer deeply from exposure to violence against their mothers. When violence occurs in the home, children experience severe trauma both directly and indirectly,<sup>41</sup> even when they "merely" witness physical violence between their

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<sup>37</sup> Cahn, *supra* note 6, at 1047-48.

<sup>38</sup> JUDITH L. HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992). Dr. Herman is nationally respected for her work in the treatment and study of victims of trauma and is co-founder of the Victims of Violence Program at Cambridge Hospital in Cambridge, Massachusetts.

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.* at 32.

<sup>41</sup> See STRAUS & GELLES, *supra* note 19, at 32.



parents.<sup>42</sup>

In 1991, Congress passed a joint resolution addressing the problem of domestic violence and encouraging states to adopt laws that protect children from the effects of battering.<sup>43</sup> In 1994, the National Council of Juvenile & Family Court Judges issued a report recommending that states adopt a rebuttable presumption that placing a child in the custody of a perpetrator of family violence is detrimental to the child.<sup>44</sup> Moreover, the report recommended that judges order visitation only after adequate safety provisions are made for the victim and the child.<sup>45</sup>

## II. EFFECTS ON CHILDREN OF EXPOSURE TO DOMESTIC VIOLENCE

Dr. Judith Herman's work with abuse victims demonstrates that:

Repeated trauma in adult life erodes the structure of the personality already formed, but repeated trauma in childhood forms and deforms the personality. The child trapped in an abusive environment is faced with formidable tasks of adaptation. She must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a situation of helplessness.<sup>46</sup>

Research shows that virtually all children know about the abuse their mothers suffer. Reports given by battered mothers indicate that children witness the abuse eighty-seven percent of the time.<sup>47</sup> Many children see their fathers, stepfathers, or mothers' "boyfriends" not only beat their mothers, but rape them as well.<sup>48</sup> Whether children are physically abused themselves, or "only" witness the violence, their mothers' abuse severely impacts them.<sup>49</sup> Studies of the children of battered women, many of which are summarized by Jaffe and his colleagues, all conclude that partner abuse injures children both directly and indirectly.<sup>50</sup>

### A. *Batterers Are More Likely To Abuse Their Children*

Children are harmed most directly by partner or spouse abuse when they, like their mothers, are beaten or otherwise abused by their fathers. The statistical correlation between woman abuse and child abuse is very high.<sup>51</sup> More than half of

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<sup>42</sup> See *id.*

<sup>43</sup> See H.R. Con. Res. 172, 101st Cong. (1990).

<sup>44</sup> See National Council of Juvenile & Family Court Judges, *supra* note 18.

<sup>45</sup> See *id.*

<sup>46</sup> HERMAN, *supra* note 38, at 96.

<sup>47</sup> See WALKER, *supra* note 36, at 59.

<sup>48</sup> See Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY, 460-70 (1978).

<sup>49</sup> See Keenan, *supra* note 36, at 74.

<sup>50</sup> See JAFFE, *supra* note 21, at 18-21.

<sup>51</sup> In a study conducted by the Department of Pediatrics at Boston City Hospital, such a strong correlation was found between abuse of children and their mothers that the au-

all men who abuse their partners abuse their children and an additional eighty percent of batterers threaten to abuse their children.<sup>52</sup> Children in homes where domestic violence occurs are abused at a rate 1,500% higher than the national average.<sup>53</sup>

Studies indicate that battering is prevalent during pregnancy.<sup>54</sup> According to the Second National Family Violence Survey, the overall rate of domestic violence during pregnancy was fifteen percent in the first four months and seventeen percent during the remaining five months.<sup>55</sup> Studies at prenatal clinics also indicate a high percentage of battering of pregnant women,<sup>56</sup> resulting in injury to children in violent homes even prior to birth.<sup>57</sup> Thus, in light of this data, concerns for the safety of the children of battered women are quite realistic.

Children whose mothers are beaten are not only more likely to be attacked by the abuser, but also are more likely to be injured in the course of the abusers' attacks on their mothers.<sup>58</sup> Many fathers indirectly injure their children while throwing objects at their victims. Young children sustain serious injuries, such as concussions, broken shoulders, and broken ribs.<sup>59</sup> Some children, held by their mothers attempting to protect them, are hurt when their fathers continue to as-

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thors of the study concluded with a call for a redefinition of the problems of woman abuse and child abuse with a focus on "family" violence. See Linda McKibben et al., *Victimization of Mothers of Abused Children: A Controlled Study*, 84 PEDIATRICS 3 (1989).

<sup>52</sup> See WALKER, *supra* note 36, at 59. One study found that the more severe the wife abuse, the more deliberate the child abuse, with the strongest indicators being severity and frequency of marital rape. See Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 164 (Kersti Yllo & Michelle Bograd eds., 1988).

<sup>53</sup> See *The Violence Against Women Act of 1990: Hearings on S. 272 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 37 (1990).

<sup>54</sup> See Richard J. Gelles, *Violence and Pregnancy: Are Women At Greater Risk of Abuse?*, J. MARRIAGE & FAM., 841-47 (1988); see also Hortensa Amaro et al., *Violence During Pregnancy and Substance Abuse*, 80 AM. J. PUB. HEALTH, 575-79 (1990); and Judith McFarlane et al., *Assessing Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 JAMA 3176-78 (1992).

<sup>55</sup> See Gelles, *supra* note 54.

<sup>56</sup> See Amaro et al., *supra* note 54, at 575; see also Paula Hillard, *Physical Abuse in Pregnancy*, 66 OBSTETRICS & GYNECOLOGY 185-90 (1985).

<sup>57</sup> A recent Massachusetts study examining the relationship between abuse during pregnancy and adverse birth outcomes listed abdominal trauma, exacerbation of chronic illness, elevated stress, isolation, and inadequate access to prenatal care as likely causes for negative birth outcomes among battered women. See Eli Newberger et al. *Abuse of Pregnant Women and Adverse Birth Outcomes: Current Knowledge and Implications for Practice*, 267 JAMA 2370, 2372 (1992).

<sup>58</sup> See R. EMERSON DOBASH & RUSSELL DOBASH, *Violence Against Wives: A Case Against the Patriarchy* 150 (1979); see also Mildred Pagelow, *Children in Violent Families: Direct and Indirect Victims*, in YOUNG CHILDREN IN THEIR FAMILIES 55-56 (Hill & Barnes eds., 1982).

<sup>59</sup> See MARIA ROY, *Children in the Crossfire* 89-90 (1988).

sault their mothers without any concern for their children's safety.<sup>60</sup> In a thirty-six month study of 146 children ages eleven to seventeen who came from homes where domestic violence was a major problem, all the sons over fourteen attempted to intervene and protect their mothers from attacks; sixty-two percent of the sons were injured in the process.<sup>61</sup>

Given the prevalence of physical harm to children whose mothers are abused, the decision to leave a batterer has an immediate impact. Removing children from a battering environment is probably the best way to stop child abuse.<sup>62</sup> However, once the battered woman leaves or obtains a restraining order against the abuser, the abuser is likely to file a court case for visitation or custody.<sup>63</sup> Moreover, because abusers use violence to control their partners and children, a battered woman and her children are most at risk when she challenges the abuser's control by leaving.<sup>64</sup> Violence often escalates at the time of separation or divorce.<sup>65</sup>

The implication for the courts is that visitation and custody orders which do not address safety concerns undermine the victim's restraining and "no contact" orders by providing the abuser with access to family members for further harassment and abuse. Children, as well as mothers, are not only at their highest risk for being physically abused by their fathers after their mothers have left the battering relationship, but also are more likely to be kidnapped by the batterers at this time than in any other period.<sup>66</sup>

Recognition by the courts of the risks posed by abusers to children and their mothers, after as well as before separation, is the first step in fashioning appropriate protective orders. "If access to the child is allowed, judges should be directed to make arrangements to protect any family member from further abuse."<sup>67</sup>

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<sup>60</sup> See JAFFE, *supra* note 21, at 26.

<sup>61</sup> See ROY, *supra* note 59, at 92.

<sup>62</sup> See J.I. Layzer et al., *Children in Shelters*, 9 RESPONSE, No. 2, 6-11 (1986); see also Bowker et al., *supra* note 52, at 164.

<sup>63</sup> The 1989 Report of the Massachusetts Gender Bias Study of the Supreme Judicial Court points out that abusers use the issues of child custody and visitation to obtain access and contact with the victim as well as to pressure the victim into returning to or remaining in a violent relationship. See GENDER BIAS STUDY COMMITTEE, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 88 (1989).

<sup>64</sup> See Hart, *supra* note 2, at 15-17.

<sup>65</sup> A 1991 United States Justice Department study found that the ten percent of American women who are divorced or separated composed seventy-five percent of the victims of spousal violence. These women were fourteen times as likely as married women to be victims of spousal violence. See BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENT CRIME (1991).

<sup>66</sup> See Keenan, *supra* note 36, at 422; see also Hart, *supra* note 2, at 34.

<sup>67</sup> GENDER BIAS STUDY COMMITTEE, *supra* note 63, at 73.

B. *Children Exposed to Violence Against Their Mothers Experience Both Behavioral and Developmental Harm*

A 1985 Massachusetts Department of Youth Services study (the "Study") found that children from violent homes are seventy-four percent more likely to commit crimes against the person.<sup>68</sup> The Study also noted that children from violent families are five times more likely to be delinquent as those from the general population.<sup>69</sup>

Children who are exposed to domestic violence experience fear, terror, and guilt.<sup>70</sup> These emotions have a long lasting effect, especially during formative stages, often resulting in the development of certain character traits now associated with children from abusive families.<sup>71</sup> These traits include low self-esteem, sadness, depression, stress disorders, poor impulse control, and feelings of powerlessness. Children exposed to battering of their mothers are at a high risk for alcohol and drug use, sexual acting out, running away, isolation, loneliness, fear, and suicide.<sup>72</sup>

In addition, children exposed to battering exhibit behavioral problems such as insecurity through clinging, crying, nervousness, and a constant need to know where their mothers are.<sup>73</sup> At all ages, children in a battering environment display somatic symptoms such as colds, sore throats, bedwetting, insomnia, and fitful sleep.<sup>74</sup>

As a consequence of witnessing the beatings of their mothers, some boys become aggressive; specifically, they "act out, become disobedient and behave defiantly and destructively" and even assault their mothers and siblings, whereas girls tend to become "withdrawn, clingy, dependent."<sup>75</sup> Older children, especially girls, take on the burden of protecting their younger siblings while their fathers beat their mothers and, therefore, often feel constrained from leaving

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<sup>68</sup> See Deborah Guarino, *Delinquent Youth and Family Violence: A Study of Abuse and Neglect in Homes of Serious Juvenile Offenders*, Commonwealth of Massachusetts Department of Youth Services, Publication No. 16, 981-76-100-11-91-2.06-C.R. (1985). Juvenile delinquents subjected to abuse were twenty-four times more likely to have committed rape. See *id.* (citing Joseph Alfaro, *Report on the Relationship Between Child Abuse and Neglect and Later Socially Deviant Behavior*, New York State Assembly Committee on Child Abuse (1978)).

<sup>69</sup> See *id.*

<sup>70</sup> See Pagelow, *supra* note 58, at 60.

<sup>71</sup> See Keenan, *supra* note 36, at 419-20.

<sup>72</sup> See JAFFE, *supra* note 21, at 26-29. See also, Nechama Masliansky, *Child Custody and Visitation Determinations When Domestic Violence Has Occurred*, 30 CLEARINGHOUSE REV. 275 (1996).

<sup>73</sup> See Pagelow, *supra* note 58, at 60.

<sup>74</sup> See Hilberman & Munson, *supra* note 48, at 463; see also J.J. Alessi & K. Hearn, *Group Treatment of Children in Shelters for Battered Women*, in BATTERED WOMEN AND THEIR FAMILIES 51 (Albert Roberts ed., 1984); and Pagelow, *supra* note 58, at 59.

<sup>75</sup> JAFFE, *supra* note 21, at 35.

home.<sup>76</sup>

Lenore Walker, a leading expert on domestic violence who has studied the children of battered women, found that children who witness domestic violence carry deep psychological scars from watching their fathers beat their mothers. Such children learn to become part of a dishonest conspiracy of silence, lying in order to prevent inappropriate behavior, and suspending fulfillment of their needs rather than risking another confrontation.<sup>77</sup> These children expend a significant amount of energy avoiding problems and living in a world of make believe.<sup>78</sup>

Increasingly, experts in this field who have both studied the data and worked directly in clinical settings with the children of battered women, have used the diagnosis of Post Traumatic Stress Disorder (PTSD) to describe the complex of behavioral problems observed in this group of youngsters. Jaffe and his colleagues, for example, write that:

the applicability of PTSD . . . to children's exposure to family violence is straightforward. Evidence presented throughout this volume suggests that many of the reactions of children can be classified as 'trauma responses,' most notably their proclivity to explosive bursts of anger and aggression, their fixation on the trauma and reduction of normal, routine activities, and somatic and emotional complaints.<sup>79</sup>

Most impressive about the literature describing the behavioral and developmental effects of exposure to domestic violence is the demonstration that children whose mothers suffer abuse are harmed in much the same way as abused children. To protect a child exposed to violence in the home, courts must recognize that abuse of the mother inflicts injury upon the child. A court should treat a battered woman's child as if the abuser had directly battered the child.<sup>80</sup> Thus, as stated in the Report of the Massachusetts Gender Bias Study, "[s]uch abuse should be considered misconduct toward the child warranting restriction on visitation."<sup>81</sup>

### C. *Children Are Harmed by the Loss of Effective Parenting*

Experts in child development agree that "the early parent-child relationship sets the stage for the child's future development of relationships. If this early relationship is characterized by trust, reciprocity, consistency, and child-centered

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<sup>76</sup> See *id.* at 30-31.

<sup>77</sup> See Walker, *supra* note 36, at 46.

<sup>78</sup> See *id.*

<sup>79</sup> JAFFE, *supra* note 21, at 72.

<sup>80</sup> "Similar to the reactions of children who have been physically abused . . . the reactions of children who chronically witness family violence may include disruptions of normal developmental patterns that result in disturbed patterns of cognitive, emotional, and/or behavioral adjustment." *Id.* at 39 (citation omitted). See also Westra & Martin, *Children of Battered Women*, MATERNAL NURSING J. 41, 52 (1984) (citation omitted).

<sup>81</sup> GENDER BIAS STUDY COMMISSION, *supra* note 63, at 73.

nurturing activities, the child's propensity to develop positive, desirable relations is considered to be greatly enhanced."<sup>82</sup> Mothers have historically assumed the primary caretaker role, even while employed.<sup>83</sup> Thus, when domestic violence disrupts their mothers' ability and availability to parent, such violence deprives children of an essential component of healthy development.<sup>84</sup>

In this context, the injury to children may take the form of a loss of care that results when a battered woman is so seriously injured that she cannot attend properly to her children. As the abuse increases in intensity, children may be deprived of necessary interaction, especially if their mothers are bedridden, hospitalized, or disabled as a result of physical injuries. The most extreme cases involve a permanent loss of this critical relationship, as when the abuser murders the mother. In summary, the abuser's violence disrupts the victim's daily living and adversely affects the mother-child relationship in profound and possibly permanent ways.

#### D. *Violence Begets Violence and Becomes a Learned Way of Interacting*

In calling for changes in the way courts respond to children exposed to their mothers' battering, one writer has aptly observed that "[w]hile emotional and physical manifestations of harm suffered by children of batterers are alarming, the cyclical nature of family violence may be the phenomenon with the most far reaching implications for society."<sup>85</sup> There is, among those who study family violence, a growing consensus that violent tendencies are passed from one generation to the next.<sup>86</sup>

Growing up in a violent family creates problems in a child's later life because of the values, attitudes, and coping mechanisms that such an environment teaches. Children subjected to domestic violence learn that violence is the basis of power and control.<sup>87</sup> When raised in a violent family without outside intervention, children believe that all the power lies with the wrongdoer. Children who witness their own parents engage in violence are more likely to abuse their mates<sup>88</sup> and are more likely to abuse their elderly parents in later years.<sup>89</sup> The more violence children see, the more they will tolerate it as adults.<sup>90</sup> These children may not only learn unhealthy attitudes towards sexuality and love, but they

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<sup>82</sup> JAFFE, *supra* note 21, at 38.

<sup>83</sup> See Goodman, *supra* note 18, at 10.

<sup>84</sup> See *id.*

<sup>85</sup> Keenan, *supra* note 36, at 420.

<sup>86</sup> This literature is summarized in detail by JAFFE, *supra* note 21, at 56.

<sup>87</sup> See Pearl Berman, *Impact of Abusive Marital Relationships on Children*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE, *supra* note 13, at 139.

<sup>88</sup> See TERRY DAVIDSON, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFE BEATING PATTERN 118 (1978).

<sup>89</sup> See MARTIN, *supra* note 36, at 23; see also DOBASH & DOBASH, *supra* note 58, at 152-55; RICHARD GELLES, THE VIOLENT HOME 172 (1972); and ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR 12 (1974).

<sup>90</sup> See WALKER, *supra* note 36, at 146-47.

may also equate relating sexually to another person with rape, an expression of power or anger.<sup>91</sup>

The most promising way to end this generational cycle is to end violent interactions in the home. It is crucial to support victims and their children by enabling them to live separately from the perpetrators of the violence. A judge minimizes an abuser's violence and fails to consider the child's emotional and physical well-being when he or she places a child with an abuser without appropriate safety or supervisory conditions. Thus, the court, as part of "[t]he greater community[,] teaches children it supports violence by doing little or nothing about it when family violence is reported."<sup>92</sup>

*E. Children Are Harmed When Care and Custody Is Used To Retaliate Against Victims Of Domestic Violence*

Batterers also use custody litigation or the threat of it as an additional weapon against their victims. The threat is significantly dangerous to children. As one group of experts has observed:

[c]hildren of battered women are often victimized by prolonged legal disputes about which parent should have custody after separation or what kind of visitation schedule is reasonable . . . . Even before the separation, many battered women are threatened with the fact that their husbands will want custody of the children if the women decide to leave. Often this threat will be a central issue in keeping a woman prisoner in her own home for fear of this and other consequences . . . . Women who feel most vulnerable . . . are ones who believe that because their husbands have never *directly* abused the children, the husbands would have a good opportunity to be awarded custody.<sup>93</sup>

The abuser's need for power and control over the victim is a predominant component of domestic violence. In fact, "divorce may actually exacerbate his need to control, as evidenced in very bitter and never ending custody disputes."<sup>94</sup>

Economic dependence is a major factor which prevents battered women from fleeing violent homes and compels them to return to abusive relationships.<sup>95</sup> Studies of divorced couples indicate that the standard of living for women and children plunges after divorce.<sup>96</sup> In addition, the majority of families living in poverty are female headed households, including battered women.<sup>97</sup> Batterers use

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<sup>91</sup> See *id.* at 121.

<sup>92</sup> Berman, *supra* note 87, at 137. "The consequences of being exposed to an unresponsive legal or social system . . . may serve to send the child a community message that violence and unequal power between males and females is acceptable, thus increasing the potential for a negative long term impact on the child's development." *Id.* at 142.

<sup>93</sup> JAFFE, *supra* note 21, at 107.

<sup>94</sup> Marsha Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE*, *supra* note 13, at 175.

<sup>95</sup> See Keenan, *supra* note 36, at 424.

<sup>96</sup> See Hart, *supra* note 2, at 17.

<sup>97</sup> See *id.* Sarah Buel notes that there is a correlation between the feminization of pov-

custody claims to exert influence and control over the victim, disrupting her efforts to build a new life. The financial and emotional strain of contested litigation creates tremendous hardship for battered women. These women are also generally less able to afford lawyers.<sup>98</sup> Thus, batterers use children as an effective bargaining chip to pressure victims into returning to abusive relationships or to gain an economic advantage in negotiation of support and property settlements.<sup>99</sup>

Frequently, battered women make great financial concessions in order to retain custody of their children.<sup>100</sup> The pressure battered women feel to bargain away spousal or child support and equitable distribution of marital property in exchange for safety and custody of children is an increasingly common and alarming phenomenon.<sup>101</sup> The court's traditional reluctance to view abuse of a partner as having anything to do with the children inadvertently fuels the batterer's threat to take custody in retaliation against women who try to escape a violent relationship.

When a battered woman is forced to remain in a relationship due to the combined threat of poverty and the loss of her children, both the woman and her children are further victimized by continued exposure to violence. Courts must respond promptly and effectively in order to protect battered women's children. In order to do so, courts must understand the potential for misuse of custody litigation by abusers, and must also appreciate that a mother's abuse has harmful effects on her children.

### III. A REBUTTABLE PRESUMPTION AGAINST CUSTODY TO AN ABUSER CAN PREVENT FURTHER HARM TO CHILDREN

In order to satisfy the mandate that a child's best interest determines custody and visitation arrangements, courts must give serious consideration to the profound effects of family violence on minor children. As studies have shown, courts must understand and acknowledge that children of violent parents suffer from exposure to their mother's battering, and that the harm does not cease once

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erty and battered women's options. She states that public assistance grants not only can carry a taint of shame but are financially inadequate, providing about \$668.00 per month for a family of four. This is less than the cost of rent in most parts of Massachusetts. Likewise, even if the victim gets a full time job, minimum wage will not bring the family up to the poverty line as daycare costs average ninety dollars per week. See Sarah Buel, *Abuse Within the Non-Traditional Family: Civil and Criminal Remedies*, in *THE NON-TRADITIONAL FAMILY* 275 (Massachusetts Continuing Legal Education ed., 1991).

<sup>98</sup> See Keenan, *supra* note 36, at 424.

<sup>99</sup> See GENDER BIAS STUDY COMMITTEE, *supra* note 63, at 87-88.

<sup>100</sup> See WALKER, *supra* note 36, at 59.

<sup>101</sup> See Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266 (1984). In addition, according to a survey conducted as part of the Massachusetts Gender Bias Study, "when fathers actively sought physical custody, mothers obtained primary physical custody in only 7% of cases." GENDER BIAS STUDY COMMISSION, *supra* note 63, at 62.



their parents are no longer living together.<sup>102</sup> Because the source of the harm is the violent parent, a court acting in a child's best interests can best protect that child by applying a rebuttable presumption against the batterer in all cases where custody orders are requested.

The presumption suggested here, and recommended by the National Council of Juvenile & Family Court Judges, is that it is against a child's best interest to be placed in the custody of a parent who has perpetrated violence against the child's mother.<sup>103</sup> As discussed below, support for the imposition of a presumption exists in federal initiatives, the action of other states, and finally, in Massachusetts statutory and case law. The most powerful support for a rebuttable presumption comes from social science data, showing that failure to provide the strong protection mandated by this presumption will result in the exposure of countless children to a continuing cycle of violence.

#### A. Federal Anti-Violence Initiatives Support A Rebuttable Presumption

Over the last decade, the federal government has begun to recognize and stress the importance of focusing on the impact of domestic violence on children. In 1982, the United States Civil Rights Commission reported that "children in spouse abuse situations suffer at least as much as other family members."<sup>104</sup> Moreover, in 1984, the United States Attorney General's Task Force on Family Violence found that:

Violence in the home strikes at the heart of our society. Children who are abused, or who live in homes where parents are battered, carry the terrible lessons of violence with them into adulthood . . . . To tolerate family violence is to allow the seeds of violence to be sown into the next generation.<sup>105</sup>

In 1990, Congress expressed a desire to protect children in custody litigation from further exposure to violence. As a result, Congress unanimously passed Concurrent Resolution 172, which provided in part that "[for] purposes of determining child custody, credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent."<sup>106</sup> Congress demonstrated concern with the actual and potential harm to children, the negative effect on children of inappro-

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<sup>102</sup> Children may be harmed by the "aftereffects" of abuse by one parent on the other parent. See Julie Kuncie Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, 30 CLEARINGHOUSE REV. 295, 297 (1996). "Even after the partner abuse has stopped, there is a question whether the continuation of contact with the abusive parent even in a secure setting may still damage the child." *Id.* (quoting Robert Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 238 (1995)).

<sup>103</sup> National Council of Juvenile & Family Court Judges, *supra* note 18.

<sup>104</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 11 (1982).

<sup>105</sup> U.S. ATTY. GEN., TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (Sept. 1984).

<sup>106</sup> H.R. Con. Res. 172, 101st Cong., 2d Sess. (1990).

priate role modeling, and the potential for intergenerational consequences of witnessing domestic violence. Congress concluded that "children are emotionally traumatized by witnessing physical abuse of a parent . . . even children who do not directly witness spousal abuse are affected by the climate of violence in their home."<sup>107</sup>

Federal lawmakers have demonstrated deep concern over the direct and indirect effects of domestic abuse on the children in the household by advocating a presumption against custody to abusive parents. Thus, Congress has provided states like Massachusetts with a strong foundation for more enlightened custody and visitation schemes.

**B. *The National Council of Juvenile and Family Court Judges, American Bar Association Committees, and Several State Court Decisions Support a Presumption Against Awarding Care and Custody of Children to Batterers***

**1. The National Council of Juvenile and Family Court Judges**

In 1990, The National Council of Juvenile and Family Court Judges (the "Council") issued a report recommending that "violent conduct be weighed and considered in making custody and visitation orders."<sup>108</sup> Roughly forty-one states and the District of Columbia directly address the harmful effects of domestic violence on children by requiring the consideration of violence in custody cases.<sup>109</sup>

The Council continues its efforts to provide guidance to courts and legislative bodies about family violence. Recently, the Council drafted model legislation which includes a presumption against custody to a batterer and requires the courts to ensure the safety of victims and children when awarding visitation.<sup>110</sup> The proposed model legislation contains the following language:

Sec. 401. Presumptions concerning custody.

In every proceeding where there is at issue a dispute as to custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal

<sup>107</sup> *Id.*

<sup>108</sup> NATIONAL COUNCIL ON JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, SECTION II: RECOMMENDATIONS FOR THE COURTS 25 (1990).

<sup>109</sup> The forty-one states include: Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington, Vermont, Wisconsin, and Wyoming. See Hart, *supra* note 2, at 29. See also, ALA. CODE § 30-3-131 (1995); DEL. CODE ANN. tit. 13, § 705A (1995); GA. CODE ANN. § 19-9-1 and 19-9-3 (1996); IND. CODE ANN. § 31-1-11.5-21 (Michie 1996); NEB. REV. STAT. § 42-364(2)(d) (1994); N.Y. DOM. REL. LAW § 240 (Consol. 1996); TENN. CODE ANN. § 36-6-106 (1996); VA. CODE ANN. § 20-124.3 (1994).

<sup>110</sup> See National Council of Juvenile & Family Court Judges, *supra* note 18.

custody, or joint physical custody with the perpetrator of family violence.<sup>111</sup>

In addition, the model legislation is explicit about safety concerns:

Sec. 402. Factors in determining custody and visitation.

1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence:

(a) The court shall consider as primary the safety and well being of the child and of the parent who is the victim of domestic or family violence.

(b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, or assault, to another person.<sup>112</sup>

Similarly, the model section on "conditions of visitation" further requires that the court award visitation only "if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made."<sup>113</sup> The accompanying commentary posits that where protective interventions are not accessible in a community, a court should not endanger the child or adult victim in order to accommodate a perpetrator's visitation. The Council concludes that supervised visitation centers are an essential component of an integrated community intervention which can reduce retributive violence, prevent abduction, safeguard family members, and offer a batterer safe contact with the children.<sup>114</sup>

2. The American Bar Association

In 1994, the American Bar Association commissioned a report (the "ABA Report") on the impact of domestic violence on children which contains recommendations consistent with the findings of the Council.<sup>115</sup> The ABA Report states that batterers who have committed severe or repeated abuse to an intimate partner "should be presumed, by law, to be unfit custodians of their children."<sup>116</sup> In addition, the ABA Report advocates a rebuttable presumption that any visitation by the abusive parent be supervised.<sup>117</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See* THE AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (1994), [hereinafter "ABA Report"].

<sup>116</sup> *Id.* at 13.

<sup>117</sup> *See id.* at 14. The ABA Report notes that abusers are likely to use children in their care or attempt to gain custody as a means of controlling their former partners. This type of behavior is regarded as evidence of their unfitness as custodians of children. *See id.* at 13.

### 3. State Court Decisions

Since 1990, at least fourteen states and the District of Columbia have statutorily created legal or physical custody presumptions of the sort advocated here.<sup>118</sup> At the same time, a number of state courts have shown a willingness to give the impact of domestic violence on children adequate attention in determining custody and visitation. Recently, for example, a Connecticut court held that testimony concerning battered woman's syndrome was relevant to the best interests of the child in determining custody. The court found that the presence of battering in the household has, at a minimum, some effect on the parenting skills of both spouses and the child's response to the parents even after separation.<sup>119</sup> Similarly, an Illinois court held that spousal abuse is a "relevant and possibly decisive" factor in determining custody and visitation even when the children have not been directly abused.<sup>120</sup> In taking this position, the Illinois court acknowledged that the victim's infant was too young to comprehend the brutal beatings his mother endured even if he did see them. Nonetheless, the court determined that incidents of violence not witnessed by the child are key factors in a custody decision.<sup>121</sup> Moreover, a best interest analysis mandated keeping the child away from his violent father regardless of his actual knowledge or understanding of the abuse.<sup>122</sup>

Similarly, the California Court of Appeals declared, upon hearing evidence of attacks a father made on a mother in front of a child, that the violence "must

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<sup>118</sup> See ALA. CODE § 30-3-131 (1996); DEL. CODE ANN. tit. 13, § 705A (1994); D.C. CODE ANN. § 16-914 (1996); HAW. REV. STAT. § 571-46 (1996); IDAHO CODE § 32-717B(5) (1996); IOWA CODE § 598.41 (1995); LA. REV. STAT. ANN. § 9:36 (West, 1992); MINN. STAT. § 518.17(2)(d) (1995); MO. REV. STAT. § 455.050.5 (1995); NEV. REV. STAT. § 125.480(5) (1995); N.J. REV. STAT. § 2C:25-29 (1995); N.D. CENT. CODE § 14-05-22(3) (1995); OKLA. STAT. tit. 10, § 21.1D (1995) and OKLA. STAT. tit. 43, § 112.2 (1995); and WIS. STAT. ANN. § 767.24(2)(b)(c) (West 1994). See also Hart, *supra*, note 2, at 31-32. See also, ALA. CODE tit. 30-3-131 (1996); DEL. CODE ANN. tit. 13, § 705A (1994); IDAHO CODE § 32-717B(5) (1996); IOWA CODE § 598.42 (1994); and NEV. REV. STAT. § 125.480-5 (1994). The Louisiana statute may well be one of the most comprehensive and most protective. In addition to imposing a rebuttable presumption against unsupervised custody or visitation to a perpetrator of domestic violence, it requires the following: (1) perpetrators must enter into and complete specialized batterer's treatment; (2) the court must issue an injunction against violence in all divorce, custody, separation and visitation orders or judgments with identified family violence; and (3) the courts must address, in a progressive fashion, the problem presented by cross-allegations of abuse. See Hart, *supra* note 2, at 29-31 for an in-depth analysis of this statute. Colorado's statute provides that it "shall not" be in the best interest of a child to award joint custody if a party has a history of spouse abuse. See COLO. REV. STAT. § 14-10-124(1.5)(m) (1995). Washington's law provides that a parent's "residential time" with a child "shall be limited" if he or she engaged in domestic violence. WASH. REV. CODE § 26.09.191(1)-(2) (1995).

<sup>119</sup> See *Knock v. Knock*, 621 A.2d 267 (Conn. 1993).

<sup>120</sup> In *Re Wiley*, 556 N.E.2d 809 (Ill. 1990).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* (citing In *Re Custody of Williams*, 432 N.E.2d 375 (Ill. 1982)).

inevitably have affected the child even though he has not *yet* been physically injured."<sup>123</sup> Given the need to protect the mother and her child from further harm, the court found no abuse of discretion in the trial court's decision to place the child with the mother and keep the location of the mother's residence confidential.<sup>124</sup>

Statutory and case law of this kind reflects a greater understanding of the deep impact of domestic violence on children and evidences a growing commitment to take action to protect children from the additional harm they would suffer in the care and custody of abusive parents. Perhaps they are reflective of the hope expressed by Jaffe and his colleagues that:

[c]ourts may become more responsive to the needs of battered women and their children as more information and specialized resources are offered to them. When courts feel that they have enough input from informed professionals working with these children and when resources are made available to deal with very practical dilemmas new attitudes may be fostered.<sup>125</sup>

Massachusetts can and should join states like California, Connecticut, and Illinois in articulating a strong position against the continued harm to children of batterers in its custody and visitation decisions.

### C. *Massachusetts' Statutory Scheme Invites A Presumption*

One could ask a Massachusetts court deciding the issue of custody where domestic violence is present to apply a rebuttable presumption against the perpetrator of the violence. Although a presumption is not mandated, it is arguably implied by the "best interests" analysis required by existing law.<sup>126</sup>

The Massachusetts custody statute directs a court to conduct a best interests analysis in determining custody. The relevant language is as follows:

In making an order or judgment relative to the custody of the children, the rights of the parents shall, *in the absence of misconduct*, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or *past living conditions adversely affect his physical, mental, moral, or emotional health*.<sup>127</sup>

Battering another person not only constitutes "misconduct," but rises to a level of unlawful criminal activity.<sup>128</sup> The statute intends that the rights of the parents

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<sup>123</sup> In Re Jon, 224 Cal. Rptr. 319, 322 (1986) (emphasis added).

<sup>124</sup> See *id.* at 321.

<sup>125</sup> See JAFFE, *supra* note 21, at 110.

<sup>126</sup> See MASS. GEN. LAWS ch. 208, § 31 (1996) which applies to children of parents who have been married. The "best interests of the child" standard also applies to children of unmarried parents. See MASS. GEN. LAWS ch. 209C, § 10. Likewise, the "best interests" analysis applies when the court orders visitation. See DiRusso v. DiRusso, 422 N.E.2d 463 (Mass. 1981).

<sup>127</sup> MASS. GEN. LAWS ch. 208, § 31 (1996) (emphasis added).

<sup>128</sup> See, e.g., MASS. GEN. LAWS ch. 265, § 13A (1996).

are not equal when abuse has occurred.<sup>129</sup> Likewise, there is overwhelming sociological and psychological evidence that violence creates hazardous living conditions which adversely affect the physical, mental, and emotional health of children with abused mothers.<sup>130</sup>

Thus, the language of the Massachusetts custody statute pertaining to "misconduct" and "living conditions" which "adversely affect" the child's "physical, mental . . . or emotional health" can be read to invite the presumption. This is true especially when viewed alongside related language in chapter 208 of Massachusetts General Laws and other laws which manifest deep concern over domestic violence.<sup>131</sup> Consequently, taking these provisions as a whole, a rebuttable presumption against awarding custody to an abusive parent is in keeping with the legislatively articulated concern about domestic violence and the overriding mandate to protect children from harm. Only an inconsistent reading of these statutes would block the establishment of a presumption against a batterer in custody situations.

There is extensive and reliable support for mandating the rebuttable presumption that awarding custody to a perpetrator is against the child's best interest, and that violence is detrimental to children.<sup>132</sup> As in other areas where relevant social or scientific principles and data are helpful to the court, the court should rely upon well documented and extensively reported effects of violence on children. Likewise, the Supreme Judicial Court has stated that "[W]hen supported by substantial authority . . . this court has not hesitated to accept the benefits of science."<sup>133</sup> In addition, the Massachusetts Supreme Judicial Court recognizes

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<sup>129</sup> The Report of the Massachusetts Gender Bias Commission takes the position that "abuse should be considered misconduct toward the child warranting restrictions on visitation." GENDER BIAS STUDY COMMISSION, *supra* note 63, at 73.

<sup>130</sup> Visitation can recreate the same adverse conditions, even after the parents separate. "As children become older and strive for independence, the batterer may respond with attempts to control them as he controlled his wife." Berman, *supra* note 87, at 139, (quoting LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984)).

<sup>131</sup> See, e.g., MASS. GEN. LAWS ch. 208, § 18 (authorizing the court to make orders necessary to protect either party or the children), § 31 (allowing restriction of abuser's access to school or medical records), § 34B (allowing orders to vacate the marital home on a temporary emergency basis without notice), § 34C (regarding service of orders to vacate or refrain from abuse, and violations of such orders), and § 34D (requiring a search within the criminal registry record keeping system upon the filing of a request for a restraining order); MASS. GEN. LAWS ch. 209, § 32 (requiring a court to conduct a domestic violence records search when considering a complaint to prohibit a spouse from having a restraining order); MASS. GEN. LAWS ch. 209A (Abuse Prevention Act); and MASS. GEN. LAWS ch. 209C, § 15 (allowing vacate and restraining orders where necessary to protect a party or child in cases involving unmarried parents).

<sup>132</sup> See National Council of Juvenile & Family Court Judges, *supra* note 18, at 33. See also, ABA report, *supra* note 115.

<sup>133</sup> Commonwealth v. Beausoleil, 490 N.E.2d 788, 794 (Mass. 1986) (quoting Commonwealth v. Fataldo, 191 N.E.2d 479 (Mass. 1963) (holding that properly performed "HLA" parentage testing results over ninety-five per cent could be relied upon as admis-

that presumptions promote public interests and reflect advances in knowledge. "The common law is 'designed to meet and be susceptible of being adapted' to new institutions and conditions of society . . . new usages and practices, as the progress of society in the advancement of civilization may require."<sup>134</sup>

In 1994, a six month study of men who batter based on the database used to track all restraining orders in Massachusetts concluded that:

The high frequency with which RO's [sic] are issued might lead some skeptics to assume that these orders are granted too easily for minor offenses and almost any man is at risk of being a defendant. The data from the new RO database in Massachusetts reflect otherwise. Men against whom ROs have been used are clearly not a random draw of the male population. They are likely to have a criminal history, often reflective of violent behavior toward others.<sup>135</sup>

Almost seventy-five percent of men against who had restraining orders entered against them had prior criminal records and over forty eight percent had histories of violent crime.<sup>136</sup> The study also indicated that the risk of arraignment for some type of violent offense against any victim of crime during this period while the orders were in effect was almost thirty percent.<sup>137</sup> The study concluded that past or present restraining orders should alert practitioners to a continued

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sible evidence of paternity if coupled with evidence of intercourse, although no statute on the admissibility of "HLA" testing was in effect in 1986)). *See also*, *Commonwealth v. Mamay*, 553 N.E.2d 945 (Mass. 1990) (expert testimony regarding rape trauma properly admitted by the court).

<sup>134</sup> *C.C. v. A.B.*, 550 N.E.2d 365, 372 (Mass. 1990) (quoting *Commonwealth v. Gallo*, 175 N.E. 718 (Mass. 1931) and *Commonwealth v. Temple*, 14 Gray 69, 74 (Mass. 1859)). Courts can revise or create presumptions to meet legitimate public interests and to reflect changing attitudes. For example, the Massachusetts Supreme Judicial Court expanded the presumption of legitimacy to include children born after marriage (in addition to children born during marriage) if conception occurs during the marriage. *See P.B.C. v D.H.*, 483 N.E.2d 1094, 1096 (Mass. 1985). Later, the Supreme Judicial Court addressed the issue of the burden of proof required to overcome the presumption of legitimacy of children conceived during marriage. The Supreme Judicial Court afforded putative fathers who have a relationship with the children they fathered outside of marriage, the right to establish paternity even if the children are conceived during a marriage and the mother claims the presumption of legitimacy should bar such an action. *See C.C.*, 550 N.E.2d at 365. In affording these new rights and protections to this class of fathers, the court cited "changes in societal attitudes" and the "gradual betterment" of the legal position of children born outside of marriage as a basis to alter application of the presumption. *See id.* A court could use a presumption against granting care and custody to batterers to address the recognized problem of domestic violence.

<sup>135</sup> Nancy Isaac, et al., *Men Who Batter: Profile from the Restraining Order Database*, 3 ARCH. FAM. MED. 50 (1994).

<sup>136</sup> *See id.* 74.8% of these defendants had prior criminal records and 48.1% had histories of violent crime. *See id.*

<sup>137</sup> *See id.* The risk of arraignment for defendants in the study was 29.7%. *See id.*

high risk of violence to the female partner.<sup>138</sup>

The Massachusetts Supreme Judicial Court and the Appeals Court recently held that it was reversible error for a judge to fail to consider and issue findings about the effects of domestic violence on the children as well as upon the abusive father's parenting ability.<sup>139</sup> Thus, the court's use of a presumption against custody to batterers is appropriate in light of the well documented and acknowledged epidemic of domestic violence.

*D. A Rebuttable Presumption Promotes the Public's Interest in the Safety of and Well-being of Children*

It is certainly appropriate in the 1990s to create a presumption against custody of children to batterers as a way to protect children from the profoundly debilitating effects of domestic violence. The times demand such action.

Since 1990, when Massachusetts Governor William Weld declared a state of emergency as one part of the government's response to increasing and increasingly lethal incidents of domestic violence, the statistics have been staggering. Presently, according to data collected by the Massachusetts Coalition of Battered Women Service Groups, there is, on average, one murder caused by domestic violence every eleven days.<sup>140</sup> Currently, the Massachusetts Department of Social Services (DSS) estimates that a majority of all substantiated child abuse or neglect cases involves domestic violence.<sup>141</sup> DSS has created a special Domestic Violence Unit in an attempt to respond to this extraordinary demand, recognizing at last, that the best way to meet the needs of battered women's children is to serve them and their mothers together and comprehensively. The Domestic Violence Unit's purpose is to assist social workers in the field as they struggle to respond to reports of abuse and neglect across the commonwealth. Although the creation of this unit represents an important advance in DSS thinking on the subject of family violence, the level of funding for this unit permits only eleven domestic violence unit specialists for the entire commonwealth. As a result, the ability of DSS' field staff to intervene effectively on behalf of children exposed to domestic violence will continue to be quite limited. Thus, the emergency declared four years ago will continue unabated.

A rebuttable presumption can facilitate thorough fact finding which will help the court enormously in making visitation and custody orders. To rebut the presumption, a batterer would have to present evidence that, despite the exposure to violence, the children have not been sufficiently harmed, and are not at risk of sufficient additional harm, warranting orders limiting his or her rights to custody or visitation. The primary source of such evidence would likely be social service and mental health providers with special expertise in child abuse and family vio-

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<sup>138</sup> See *id.*

<sup>139</sup> See *Custody of Vaughn*, 664 N.E.2d 434 (Mass. 1996); see also *RH v. BF*, 653 N.E.2d 195 (Mass. App. Ct. 1995).

<sup>140</sup> See Massachusetts Coalition of Battered Women Service Groups, *supra* note 32.

<sup>141</sup> See SCHECHTER, *supra* note 19, at 30.



lence. Such experts would share the same interests as the court, and therefore courts can rely upon these experts' investigation in fashioning orders that protect children from the pain and psychological devastation of family violence. As Jaffe and his colleagues have indicated, it is surely in the interests of the children of battered women to have courts and clinicians working together to make informed and sensitive decisions on their behalf.<sup>142</sup>

Courts, along with state government, private social service, and mental health agencies, play a critical role in the struggle to come to grips with the impact of domestic violence on women and their children. As Dr. Herman explains:

[a]t the basic level of acknowledgment, women commonly find themselves isolated and invisible before the law. The contradictions between women's reality and the legal definitions of that same reality are often so extreme that they effectively bar women from participation in the formal structures of justice . . . . Efforts to seek justice . . . often involve further traumatization for the legal system is often frankly hostile to . . . [battered women]. Indeed, an adversarial legal system is of necessity a hostile environment; it is organized as a battlefield in which strategies of aggressive argument and psychological attack replace those of physical force. Women are generally little better prepared for this form of fighting than for physical combat.<sup>143</sup>

In addition to affording the children of battered women desperately needed protection, a rebuttable presumption can go a long way toward transforming the experience of battered women and their children caught in the court system because of a contested custody or visitation case. Courts can then begin to change the battered woman's perception of the judiciary as an essentially hostile arena.

#### CONCLUSION

The laws regarding domestic violence, though far from perfect, from the perspective of advocates for battered women and their children, are unambivalent in their intent to deter woman and child abuse. Equally clear, under our statutes, is the obligation of courts to protect women and children from abuse to the maximum extent possible. Although this obligation is shared with the battered women's and child welfare service systems, the law enforcement community, the medical community, and the mental health service network, the failure of any one component to safeguard women and children from battering leaves those who have been failed in an extremely vulnerable place.

At the same time, complete dedication and efficiency of collaboration amongst these players cannot guarantee that a mother and her children will be safe from a violent abuser. As Dr. Herman has observed, from a therapeutic point of view:

[t]he guarantee of safety in a battering relationship can never be based upon a promise from the perpetrator, no matter how heartfelt. Rather, it must be

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<sup>142</sup> See JAFFE, *supra* note 21, at 28.

<sup>143</sup> See HERMAN, *supra* note 38, at 72. This passage refers to rape victims, but it is argued that the abused woman's experience is different only in the matter of degree.

based upon the self-protective capability of the victim. Until the victim has developed a detailed and realistic contingency plan and demonstrated the ability to carry it out, she remains in danger of repeated abuse.<sup>144</sup>

Courts must extend themselves to the victims of violence in creative and powerful ways in order to understand and appreciate the great complexity of issues they need to address in order to enable a battered woman to reach the place where she can, indeed, carry out a realistic contingency plan.<sup>145</sup> A rebuttable presumption against awarding custody to a batterer is one such way to promote children's best interests, and to increase the safety of victims who suffer abuse.

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<sup>144</sup> *Id.* at 168-69.

<sup>145</sup> For example, the courts actively participated in safety planning with victims of abuse, might result in visitation orders which include specific provisions aimed at eliminating the custodial parent's and the child's exposure to intimidating behavior when the child is dropped off and picked up for visits. Increased sensitivity to the trauma experienced by children in abusive families could result in increased use of professional visitation centers, preferably with staff who specialize in and who have been trained and certified as having expertise with domestic violence cases. This would eliminate potential negative contact between the parents and provide monitoring during visits so as to reduce the possibility of emotional or physical harm to the child. In addition, some centers may provide parenting education to the abusive parent. Likewise, the court could order the abuser to pay costs of supervised visits, condition visits on participation in batterers' counseling, and require a bond to ensure the child's safe return. The court could order confidentiality of the child's and mother's address since research shows that this is the most effective method to stop stalking and assault. See Council of Juvenile and Family Court Judges, *supra* note 18, at 34-35. To ensure the safety of the child and the victim, court orders should specify that friends or family members of the abuser are NOT to be used as visitation supervisors and should avoid any ambiguity. See ABA Report, *supra* note 115, at 14.

