

TAKING DOMESTIC VIOLENCE SERIOUSLY: THE
ROLE OF LAWYERS, JUDGES AND PROBATION OFFICERS

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I. INTRODUCTION

There exists dramatic variation in the practices of lawyers, judges and probation officers' handling of domestic violence cases. The responses to litigants and their children are often most impacted by race, class, jurisdictional precedent, and lack of current knowledge regarding effective domestic violence interventions. As much social science research and legal jurisprudence now exist on the topic, this article attempts to provide guidance for lawyers, judges and probation officers who wield great influence in stopping family violence. For example, batterer compliance with court orders appears largely predicated on the *system* in place: that is, a swift and sure response to the violence, continuing court review of the perpetrator's behavior or dedicated probation monitoring, and periodic risk assessments.² It is intentional that the roles of judges, lawyers, and probation officers are discussed in one article; for each knowing the others' functions can enhance cooperation and allow us to better compliment the other's practice.

That children are adversely impacted by domestic violence³ is now well documented⁴ and intellectually understood. Yet, intervenor⁵ and court practices in some jurisdictions continue to reflect the out-dated notion that if the children have not been *physically* battered, evidence of domestic violence will be of little import in fashioning orders and agreements. Tragically, such denial places both the abused parent and children at greater risk for further harm, and all but ensures that the abuser will have further involvement with the criminal justice system.⁶ It is bad enough that children exposed to violence in their homes suffer a myriad harmful effects, but it is worse that once professional intervenors

² Edward W. Gondolf, BATTERER INTERVENTION SYSTEMS; ISSUES, OUTCOMES AND RECOMMENDATIONS 199 (2002); and *See, generally*, Lundy Bancroft, *Chapter 14 The Process of Change*, in WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2002).

³ "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. Roberta Valente, *Domestic Violence and the Law*, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE (1996).

⁴ *See* David Shichor and Stephen G. Tibbetts, *Chapter 5, Children as Victims and Witnesses* in Victims and Victimization, Essential Readings 82 (2002); M.H. Rhea, K.H. Chafey, V.A. Dohner, and R. Terragno, *The Silent Victims of Domestic Violence – Who Will Speak?* 9 J. of CHILD AND ADOLESCENT PSYCHIATRIC NURSING. (1996); Mildred Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION QUARTERLY (1990); Peter Jaffe, D. Wolfe and S. Wilson, CHILDREN OF BATTERED WOMEN: ISSUES IN CHILD DEVELOPMENT AND INTERVENTION PLANNING (1990); Bowker, Arbitell, and McFerron, *On the Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVES ON WIFE ABUSE (1988); Peter Jaffe, et. al, CHILDREN OF BATTERED WOMEN, (1990); B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 AL. L. Rev. 1109, 1113 (Spring 1995).

⁵ Intervenor will herein mean those professionals providing services to adult or child victims, including, but not limited to judges, lawyers, probation officers, advocates, batterer's intervention program staff, child protective services' staff, child care providers, educators, faith community leaders, juvenile justice staff, law enforcement officers, and medical and mental health providers.

⁶ *See* James Ptacek, BATTERED WOMEN IN THE COURTROOM, THE POWER OF JUDICIAL RESPONSES (1999); and David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON BAR JOURNAL 25 (July/August 1989).

become aware of such danger, often too little is done to protect the victims. The best way to protect children is usually to protect their mothers, who are seeking the resources needed to achieve safety.⁷

Of particular importance is an understanding of family violence in the context of mental health and substance abuse issues.⁸ All practices must be viewed through the structural framework of cultural competence within our most powerful institutions.⁹ While domestic violence impacts all legal system professionals,¹⁰ judges, lawyers and probation officers are uniquely positioned to dramatically improve victim safety and offender accountability *if* they have learned how to respond effectively.¹¹ Sadly, the most frequently asked question is, “But, *why* do those battered women stay?” This uninformed antipathy toward abuse victims appears based on the notion of volition; that a victim chooses to stay with the abuser in the spite of available options. There exist many valid reasons for victims’ remaining with or returning to the batterers, not the least of which include a lack of financial resources, no job skills, fear, low self-esteem and believing that it is in the children’s best interest to have their father or a father-figure in the home. Many victims also lack knowledge of their legal and other options, thus a their response could be greatly impacted by access to well-informed, competent counsel and courts.¹² Often, this victim-blaming focus diverts the court’s attention from the perpetrator, thus sabotaging the victim’s safety and the legislative intent of abuse prevention statutes.

⁷ There is no dispute that some mothers, battered or otherwise, will not or cannot protect their children from harm. However, the vast majority of battered mothers make many courageous attempts to shield their children from harm. See, e.g. Pagelow, and Jaffee, *supra* note 3; and Chris Lombardi, *Justice For Battered Women: Victims of Domestic Violence Defend Their Right to Keep Their Children*, 2002 WL 2210679 (July 15, 2002) (describing Judge Jack Weinstein’s *In Re Nicholson*’s decision in which he applauds programs focusing on battered women’s safety as a means of protecting children.)

⁸ See Bancroft, *supra* note 2 at 191; Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse and Child Welfare: The Legal System’s Response*, 3 J. HEALTH CARE L. & POL’Y 89 (1999); ; Kathleen A Oriel, *Screening Men for Partner Violence in a Primary Care Setting, A new Strategy for Detecting Domestic Violence*, 46 J. FAMILY PRAC. 493 (1998); Beth Gorney, *Domestic Violence and Chemical Dependency: Dual Problems, Dual Interventions*, 21 J. PSYCHOACTIVE DRUGS 229 (1989); and Albert R. Roberts, *Substance Abuse Among Men Who Batter Their Mates*, 5 J. SUBSTANCE ABUSE TREATMENT 83 (1988).

⁹ See Reneta J. Lawson, *Critical Race Theory as Praxis: A View From Outside the Outside*, 38 HOWARD L. J. 353, 359 (1995); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV.767 (1988) (contending that, historically, white superiority has forced the sacrifice of black interests); and Richard Delgado, *Critical Legal Studies and the Realities of Race – Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. L. REV. 407 (1988) (showing how the “race-charged” condition of the world impacts the way people of color strike various balances).

¹⁰ See THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE (1996), with chapters covering the relevance for most fields of law, including Children’s; Civil Rights; Contracts; Corporate; Criminal; Elder; Employment Evidence; General Practice; Health Care; Government and Public Sector; Housing and Homelessness; Insurance; Judiciary; Law Firm Management; Legal Services; Mediation; Military; Poverty; Probate, Estate and Trust; Professional Responsibility and Ethics; Real Property; Safety Planning; Screening; Sexual Harassment; Solo Practitioners; Sports and Entertainment; State and Local Government; Tax; Trial Practice and Torts. Available for \$35. from the ABA Resource Center 800/285-2221.

¹¹ See Roberta Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAMILY LAW QUARTERLY 187 (Summer 1995).

¹² See Sarah M. Buel, *50 Obstacles to Leaving a.k.a. Why Victims Stay*, 28 COLORADO LAWYER 1 (October 1999); Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEXAS BAR JOURNAL 936 (October 1999).

II. JUST AS UNIVERSAL SCREENING FOR DOMESTIC VIOLENCE HAS BECOME PART OF THE STANDARD OF CARE FOR MEDICAL AND MENTAL HEALTH PRACTITIONERS, LAWYER'S CLIENT INTERVIEWS MUST INCLUDE INQUIRY ABOUT ABUSE.

Lawyers and probation officers should *initiate* questions about abuse in the household (or relationship) during the first meeting, in order to assess the immediate safety issues, regardless of whether the client is the victim or perpetrator, adult or child.¹³ With any client reporting prior or current abuse, a civil protection order should be fully discussed in the context of completing a SAFETY PLAN.¹⁴ Initially, probation officers may be reluctant to broach the topic of protective orders and safety plans, perhaps believing that it is not their job. *Every* professional intervenor with knowledge of harm to a child or adult, has a moral, and sometimes legal,¹⁵ obligation to advise the victim of available resources. In Boston, area law students staff Boston City Hospital's Emergency Department on the week-ends to advise victim-patients of their rights and explain the process of obtaining a protective order, as well as accessing other helpful services. Medical and nursing students then accompany the law students to court in order to learn the realities of accessing the legal system; the better to advise their future patients.¹⁶

In addition to screening for physical harm, lawyers should routinely ask about any psychological abuse,¹⁷ a common tactic of batterers to destroy the victim's self-esteem. The batterer may have told the victim that no one will believe her,¹⁸ that she will be found wherever she goes, that no one will want

¹³ Judge Cindy Lederman of the Dade County (FL.) Juvenile Court has launched a study of their innovative protocol for screening *all* child and adults for abuse who present at their court, then providing counseling and other needed services. The Travis County (TX.) Juvenile Drug Court will include screening for family violence as part of its intake procedures.

¹⁴ A SAFETY PLAN is, essentially, an action plan for staying alive; walking the victim through practical steps for protecting herself during an explosive incident, when preparing to leave, at work, in public, and with the children; a sample Safety Plan is available from the American Bar Association's Torts and Insurance Practice Section "Domestic Violence, Safety Tips For You and Your Family" at www.abanet.org/tips/publicservice/dvsafety.html. The Youth Safety Plan is available from the American Bar Association's Commission on Domestic Violence web site at: www.abanet.org/domviol. These Safety Plans are NOT copyrighted in the hope that each reader will take them home for their police, sheriff, shelter, bar association or other entity to reproduce and distribute.

¹⁵ Every state had mandatory child abuse reporting laws for many professionals, including but not limited to teachers, medical and mental health providers, and law enforcement officers. *See e.g.* Many states also require reporting of elder and handicapped persons' abuse.

¹⁶ The author is the co-founder of the Harvard Law School Battered Women's Advocacy Project which took part in this effort, and participated as a trainer at Boston City Hospital to expand the program in 1992.

¹⁷ Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993); *See also* Patricia Evans, *THE VERBALLY ABUSIVE RELATIONSHIP, How to Recognize It and How To Respond* ("All Domestic Violence Begins With Verbal Abuse") (1992).

¹⁸ While not discounting the reality of male victims (both gay and heterosexual), the vast majority of domestic violence victims are female and the perpetrators are male. Russel Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992); Caroline W. Harlow, U.S. DEP'T OF JUST., *FEMALE VICTIMS OF VIOLENT CRIME 1* (1991); Peter Finn and Sarah Colson, U.S. DEP'T. OF JUST., *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4* (1990); Patsy A. Klaus & Michael R. Rand,

to help her and that the abuse is all her fault.¹⁹ Intervenors must tell their battered child and adult clients, “You are not to blame for the abuse,” “What your abuser has done is wrong,” and “Help is available.”²⁰

A lawyer’s silence constitutes collusion with the batterer and likely malpractice.²¹ The Model Rules of Professional Conduct specify that: “(c)ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”²² Given the growing body of legal, psychological and popular literature²³ about domestic violence, there can be little doubt but that screening is a minimal first step. Regardless of the legal problem a client presents, the attorney must routinely screen all clients for domestic violence. Lawyers and other intervenors would be wise to follow the American Medical Association (hereinafter AMA) physician guidelines, starting with, “Because abuse and violence are so common in women’s lives, I’ve begun to ask about it routinely.”²⁴ The intervenor can then follow with, “Have you been hit or threatened in the this relationship? Are you afraid now? Do you want information about a protective order? What can I do to help?”

It is not only lawyers who are required to routinely inquire about abuse and provide follow-up information to the victims. It is malpractice for attorneys, medical and mental health providers, social workers, child protection and child care staff, and educators to *not* conduct universal screening.²⁵ Thus, the responsibility for effective interventions has not been lain just on the door step of legal professionals, rather the obligation is to borne by the entire community.

Intervenors must learn to ask for the assistance of child abuse and domestic violence victim advocates, as case complexity means that they are often not amenable to simple solutions. For example, the battered mother may also be abusing her children, but is more likely to stop when her batterer is removed from the home.²⁶ When the victims are immigrants,²⁷ elders,²⁸ lesbian²⁹ or gay,³⁰

FAMILY VIOLENCE: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1984), as cited in Roberta Valente, *supra* note 6.

¹⁹ Barbara Hart, *Why She Stays, When She Leaves*, STOPPING THE VIOLENCE (1990).

²⁰ Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1042-43 (1995).

²¹ The Model Rules of Professional Conduct mandate that attorneys “provide competent representation to a client” which “requires the legal knowledge, skills, thoroughness and preparation necessary for the representation.” Rule 1.1.

²² Model Rules of Professional Conduct, Rule 1.1 cmt. 5.

²³ See e.g. *supra* note 3; Ann Jones, NEXT TIME SHE’LL BE DEAD (1992); George Lardner, THE STALKING OF KRISTEN (1993).

²⁴ American Medical Association, *Diagnostic and Treatment Guidelines on Domestic Violence* (1992). See also Michael A. Rodriguez, MD, MPH, Heidi M. Bauer, MD, MPH, Elizabeth McLoughlin, ScD, and Kevin Grumbach, MD, *Screening and Intervention for Intimate Partner Abuse, Practices and Attitudes of Primary Care Physicians*, 282 JAMA 468 (August 4, 1999).

²⁵ Attorney Allen Horsley, Boston Bar Association Seminar on “Tort Litigation Against Domestic Violence Perpetrators,” March, 1992, Boston, MA.

²⁶ Barbara Hart, *Children of Domestic Violence: Risks and Remedies* 1 (1992) in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual (1993).

handicapped,³¹ teens,³² substance abusers, mentally ill or otherwise traditionally underserved, advocates can provide invaluable guidance. Whether offering specific resource and program referral information, or suggesting strategies with difficult clients, advocates are often able to decrease the stress of handling such cases. All intervenors must remember that when a victim recants or seeks to withdraw orders, *she is often trying to stay alive*. If we become frustrated because the victim wants to dismiss the divorce or protective order, has relapsed into substance abusing or illegal behavior, has reunited with the abuser or is not leaving a dangerous relationship, it is helpful to say the following:

- (1.) I AM AFRAID FOR YOUR SAFETY.
- (2.) I AM AFRAID FOR THE SAFETY OF YOUR CHILDREN.
- (3.) IT WILL ONLY GET WORSE.
- (4.) I AM/ ADVOCATES ARE HERE FOR YOU WHEN YOU WANT TO TALK OR LEAVE.
- (5.) YOU DO NOT DESERVE TO BE ABUSED.³³

Finally, attorneys must address domestic violence issues with their clients in order to avert claim preclusion in future tort litigation against the abuser. Many states require that all related issues be handled in the divorce action, and certainly within the statutes of limitation, effectively precluding subsequent legal action as redress for the abuse. Thus, while victims are encouraged to detail the domestic abuse in the divorce or other case pleadings to allow the court to make the proper safety and remedial orders, such information is exactly what impedes future litigation. Especially if child and adult victims will need on-going therapy or will incur other expenses as a direct result of the abuse, it is critical to either ensure restitution and a settlement that includes future expenses, or that the final orders allow for further tort action to cover such expenses. Furthermore, most divorce decrees include language stating specifically that the parties have resolved all matters between them, with some even delineating tort claim prohibitions. If the child and/or adult victims have been emotionally traumatized, seeking compensatory as well as the punitive damages should be considered. Attorneys will also want to consider tort litigation against other professionals whose improper interventions have harmed the child or adult victim, such as physicians, law enforcement officers or therapists.³⁴

²⁷ See Leslye E. Orloff, Deeana Jang, and Catherine F. Klein, *With No Place To Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. LAW Q. 313 (Summer 1995).

²⁸ See Martha Minow, *Elder Abuse*, FAMILY MATTERS, 246-249 (1993).

²⁹ See Ruthann Robson, *Lavender Bruiser: Intra-Lesbian Violence*, *Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1994).

³⁰ See Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence*, 9 VICTIMS AND VIOLENCE 95 (1994).

³¹ As disabled persons are at greater risk for abuse, increased attention is now being focused on improving interventions. Both Texas Rural Legal Aid (Austin, Texas office) and the Austin Safeplace Shelter have received funding to specifically address the needs of disabled battered women. For more information on those programs serving disabled abuse victims, contact the National Domestic Violence Hotline, 1-800-799-SAFE.

³² See Stacy L. Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. LAW Q. 331 (Summer 1995).

³³ Based on the author's twenty-three years experience working with thousands of abuse victims in six states.

³⁴ See David T. Austern, *Strategies For Recovery In Domestic Violence Tort Cases*, 33 TRIAL 26 (August 1997); Fredrica L. Lehrmam, *Torts in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE*, 6-9 (1996); and Edwin J. Terry, Jr. and Kristin K. Proctor, *Infliction of Emotional Distress: No Justice in the 'Middle Ground.'* 27 TEXAS TRIAL LAWYERS FORUM 5 (1993).

III. SAFETY PLANNING MUST BECOME AN INTEGRAL PART OF DOMESTIC VIOLENCE, CHILD ABUSE AND JUVENILE JUSTICE INTERVENTION PRACTICES.

A. *Contrary to popular belief, leaving the batterer does not ensure safety.* In fact, separation violence is likely for domestic violence victims.³⁵ Attempting to leave the batterer can cause the abuse to escalate, resulting in an increased likelihood that the victim, and too often her children, will be murdered.³⁶ Similarly, children and adolescents disclosing abuse will need immediate and long-term safety planning as their perpetrators often seek to retaliate, particularly if they fail to see adults protecting the victims.

B. *Safety planning must become an integral part of every intervenor's work with domestic violence victims and their children, whether or not the victim remains with the perpetrator.* An abused child or adult may be forced to remain with the perpetrator, yet is obviously in great need of assistance in negotiating safety. Intervenors must formulate resolutions that prioritize victim safety, while fairly handling divorce, custody, visitation, support and other assorted civil and criminal matters. The Adult and Youth Safety Plan brochures provide action steps to help victims stay alive, but have a more universal application. Courts can help by implementing a policy in which a protection order, family, criminal and juvenile cases will not be dismissed prior to an advocate completing a Safety Plan with the victim and children. Responsible intervenors are advising their clients about the safety ramifications of their decisions, be they victim, offender or child.

IV. CULTURAL COMPETENCE MUST BE ACHIEVED, WITH ON-GOING TRAINING AND GUIDANCE FOR ALL INTERVENORS.

A. *All intervenors must ensure that their staffs reflect the diversity of the communities they serve.* Victims, offenders and their children have increased confidence in systems by which they are served when the providers look like them and share their backgrounds. It is also important that staff and clients have access to publications coming out of communities of color to provide a more balanced view. In addition to the usual *Newsweek* or *Better Homes and Gardens* magazines, offices should add those focusing on people of color, such as *Essence*, *Jet*, *Latina*, *Hispanic*, *Asian American*, *Ebony*, *Emerge*, etc. The presence of magazines from communities of color can help send the message that your office embraces diversity and is committed to being educated about how to improve its practices.

B. *Supervisors should ensure on-going training on cultural competence.* Without additional training, many intervenors (especially whites) base their opinions on stereotypes and

³⁵ Barbara Hart, *supra* note 16.

³⁶ Ronet Bachman & Linda E. Saltzman, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1,4 (1995), as cited in Deborah M. Goelman, "Safety Planning," THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 2-11 (1996)..

misinformation prevalent in our culture. The William Monroe Trotter Institute has documented that *eighty-five percent* of the information about people of color, disseminated by major media outlets, is negative.³⁷ Such biased misinformation cannot help but impact the professional decisions being made regarding hiring, firing, promotions, etc. As legal scholar Richard Delgado articulates, “white people rarely see acts of blatant or subtle racism, while minority people experience them all the time.”³⁸ Thus, intervenors must ensure that publications from communities of color are available to staff and placed in court and service agencies’ waiting areas.

Changes in U.S. immigration laws and patterns of re-settlement have substantially impacted the numbers of those foreign born interacting with the legal system. For instance, upwards of 60% of Asian Americans were not born in America; a rate ten times that of the U.S. population.³⁹ Thus, in some communities, many of the victims and offenders may not be familiar with the American justice system and are understandably suspicious of any governmental involvement in family matters.⁴⁰ Compounded by the backlash against immigrants and general attitude of intolerance toward “difference,” efforts to improve interventions with families of color may be sabotaged by local bigotry.⁴¹

C. We must remedy the disproportionate arrest, prosecution and incarceration of youth and adults of color. As is typical in many jurisdictions, Milwaukee County reports that although African-Americans constitute just 24 percent of the population, they represent 66% of the domestic violence arrests that find their way to the district attorney’s office. Whites are 62 percent of the populace, but surface in just 32 percent of the domestic violence cases reviewed by prosecutors.⁴² To its credit, Milwaukee County has established a Judicial Oversight Initiative Committee (JOIC) to address the disparity, in part by studying the city vs. suburban police responses. In the more white suburbs, the Committee found batterers were often issued municipal citations and paid fines, while those of color in the City of Milwaukee tended to be arrested, charged with state crimes and prosecuted. The JOIC Report states that, “The problem lies in the fact that it appears that some people in our community, depending on where they live, their race, ethnicity, income or occupation, are not being held to the same standard of accountability.”⁴³

Nationwide, juveniles of color comprise just 32 percent of the youth population yet constitute 68 percent of the juveniles in secure detention facilities.⁴⁴ Federal and state studies indicate that youth of

³⁷ See Kirk A. Johnson, MEDIA IMAGES OF BOSTON’S BLACK COMMUNITY, A RESEARCH REPORT, William Monroe Trotter Institute at the University of Massachusetts, Boston (1987).

³⁸ Delgado *supra* note 7 at 407.

³⁹ K. Wang, *Battered Asian American Women: Community Responses From the Battered Women's Movement and the Asian American Community*, ASIAN LAW JOURNAL 3 (1996), as cited in *Id.* at p. 198.

⁴⁰ For more information see, *Programs, Battered Immigrant Women: Role of Advocates* (Nov. 14, 2002) <<http://endabuse.org/programs>>.

⁴¹ See e.g. Charlotte Pierce-Baker, SURVIVING THE SILENCE, BLACK WOMEN'S STORIES OF RAPE (1998).

⁴² David Doege, *Police practices are behind racial disparities, panel suspects*, Milwaukee J. & Sentinel 05B (August 20, 2001) 2001 WL 9374110.

⁴³ *Id.* Officials from the District Attorney’s office, the Suburban Police Chief’s association and key judges have been meeting to review domestic violence intervention practices and plan improved responses.

⁴⁴ Disproportionate Minority Confinement, JUVENILE JUSTICE BULLETIN 2, OJJDP (Sept. 1998).

color experience a “cumulative disadvantage” as a result of being unfairly treated at every juncture in the system. In comparing white vs. minority youth before the court for the same offenses, African American juveniles with no prior admission had a six (6) times greater likelihood of being incarcerated than did the white youth. Hispanic juveniles had a three (3) times greater chance of being incarcerated than the white youth.⁴⁵

Similarly, adults of color face dramatically disproportionate rates of arrest, prosecution and incarceration.⁴⁶ While African-Americans constitute just 13 percent of all drug users, they represent 35 percent of defendants arrested for possessing drugs, 55 percent of those receiving convictions, and 74 percent of those being incarcerated.⁴⁷ Some states’ records of disparate racial dispositions are even more pronounced, as evidenced by seven states in which African-Americans comprise 75-90 percent of all incarcerated drug defendants.⁴⁸ The racial disparity in arrest rates, coupled with media attention, perpetuates the misconception that whites do not use drugs as often as African-Americans, when the opposite is true. Former drug czar William Bennett clarified that, “The typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb.”⁴⁹

Annually, close to half of the 700,000 marijuana arrests are of Latinos. Such imbalanced practices permeate every phase of the criminal justice system with little redress by powerful legal and legislative stakeholders,⁵⁰ and often, disastrous consequences for the convicted men of color. Criminal drug and felony convictions can preclude receipt of financial aid for college or technical schools, and result in denial of public housing, emergency financial assistance, the right to vote and apply for civil service jobs

⁴⁵ *And Justice For Some*, Report by the National Council on Crime and Delinquency, as reported in THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ UPDATE ON “MINORITY YOUTH IN JUVENILE JUSTICE,” p. 6, (Jan. 9, 2001). For example, in Texas, juvenile referrals to probation for misdemeanor and felony offenses also reflect a disheartening disparity based on race. Although African American youth are just 13 percent of the juvenile population, they reflect 23 percent of the juvenile referrals. 51 percent of Texas youth are white, yet only 38 percent of them have been adjudicated in the juvenile court system. Hispanic youth account for 39 percent of the referrals, and are 36 percent of the juvenile population. Fabelo, T., (2001) *Profiles of Referrals to Selected Juvenile Probation Departments in Texas*, Criminal Justice Policy Council Report prepared for the 77th Texas Legislature, p. 8.

⁴⁶ Deborah Small, *The war on drugs is a war on racial justice*, 68 SOC. RESEARCH (Oct. 1, 2001) 2001 WL 24181757.

⁴⁷ *Drugs and Human Rights. Who Goes to Prison for Drug Offenses: A Rebuttal to the New York State District Attorneys Association*. Human Rights Watch World Report, 1999. <http://www.hrw.org/campaigns/drugs/ny-drugs.htm>, site accessed December 29, 2002.

⁴⁸ Id. Note that California and New York annually incarcerate more Latino and African-American men than are graduated from universities and colleges. More than 94 percent of New York inmates serving time for drug offenses are Latino or African-American. At least 15 states incarcerate African-American drug offenders 20 to 57 times more often than white drug offenders. Small, *supra* note 45.

⁴⁹ Holly Sklar, *Reinforcing Racism with the War on Drugs*, CHAOS OR COMMUNITY? SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS (1995).

⁵⁰ Small, *supra* note 45.

and the military.⁵¹ Currently, 13 percent of African-American adult males (1.4 million) are disenfranchised by virtue of criminal convictions.⁵²

From 1986 to 1991, the nation saw an 828 percent increase in the number of African-American women arrested on drug charges. Pregnant women of color are also about ten times more likely to be reported for substance abuse, though studies indicate that pregnant white women abuse drugs and alcohol at higher rates. Research has shown that drug and alcohol abuse rates are higher for pregnant White women than pregnant Black women, but Black women are about 10 times more likely to be reported to authorities under mandatory reporting laws.⁵³

The criminal justice system's racial bias contributes to many battered women of color feeling reluctant to call the police for help; family and community must take precedent as the legal system has proven it is not one upon which she can rely for access to legal remedies, including those likely to garner safety.⁵⁴ It is hoped that more jurisdictions will follow the lead of Milwaukee County to remedy racial inequities. The challenge for courts and legal professionals is to balance the cultural influences with legal doctrine designed to protect victims, while holding the perpetrators responsible.

D. All community education materials must positively reflect the rich diversity of our communities. All posters, brochures, PSA's, instructional videos, etc. should portray the valued diversity of the people whom we want to serve and are on our staff. As a model, the domestic violence posters from the Family Violence Prevention Fund and the National Domestic Violence Hotline not only depict people of diverse races and cultures, but are printed in several languages as well.⁵⁵ We must educate ourselves about the resources within our communities that are available to serve people of color and determine what are the unmet needs. For example, you will want to know if there exists a battered women's support group conducted in Spanish, or if the area needs African-American batterer's intervention counselors. Similarly, when addressing the needs of mentally ill or substance abusing litigants,⁵⁶ every effort should be made to ensure that interventions reflect the nexus between race, culture and discrimination against such parties. When services are race and culture-specific, they are utilized in greater numbers and with higher success rates.

⁵¹ Id.

⁵² *US Elections 2000-Losing the Vote: The Impact of Felony Disenfranchisement Laws*, Human Rights Watch World Report (November 8, 2000) at <http://www.hrw.org/campaigns/elections/results.htm> Site visited Dec. 29, 2002.

⁵³ Small, *supra* note 45.

⁵⁴ Linda A. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, WIS. L.REV. 1003, 1020 (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1243, 1257 (July 1991); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1243, 1257 (July 1991).

⁵⁵ You may obtain these domestic violence community education materials easily adaptable for your area from the Family Violence Prevention Fund by calling #1-800-END ABUSE or the National Domestic Violence Hotline at #1-800-799-SAFE.

⁵⁶ See *infra* Section V.

V. THE CORRELATION BETWEEN FAMILY VIOLENCE AND JUVENILE DELINQUENCY INDICATES THAT EARLY INTERVENTION IS ESSENTIAL.

A. Children who grow up in a violent family are more likely to abuse others or to be victims of abuse, as adolescents and adults.⁵⁷ Those children who do not replicate the abuse generally have had at least one adult protecting them or clearly speaking out against the violence. Children need not be directly beaten in order to take on violent and delinquent behavior: it is enough for them to witness their mother's abuse. The Massachusetts' Department of Youth Services found that children growing up in violent homes had a six times higher likelihood of attempting suicide, a twenty-four percent greater chance of committing sexual assault crimes, a *seventy-four percent* increased incidence of committing crimes against the person, and a fifty percent higher chance of abusing drugs and/or alcohol.⁵⁸ Another study comparing youth who were delinquent vs. those who were non-offending found that a history of family abuse was the primary distinction between the two groups.⁵⁹ Such children are in pain and they are self-medicating in response to an adult community seemingly content to disregard the violence in our families.

B. Teen dating violence can be an early predictor of victim and offender patterns which may continue without effective, early intervention programs. Although one in three teenagers will suffer physical abuse in a dating relationship,⁶⁰ most schools and courts do not address the issue at all. Barrie Levy, a psychotherapist who has written three books on teen dating violence, cautions that the signs of abuse may not be easy to detect. Some warning signs include controlling behavior, extreme jealousy, withdrawal from friends and hypervigilance toward obeying the partner's rules. Ms. Levy suggests that each partner should be approached separately if abuse is suspected, though neither partner may be willing to acknowledge the problem. Rather than trying to stop all contact, Levy cautions adults to focus on safety. For example, a teacher, probation officer, judge or advocate might say, "I understand that you love him, but I can see you're being hurt." A critical next step is to provide information and referrals for where the teen can get help.⁶¹

C. School based dating violence intervention programs should be implemented in collaboration with domestic violence advocates. Austin's Safeplace shelter began a Teen Dating Violence Project (TDVP) in 1988, offering 24-week therapeutic peer support groups in their public schools, first just for victims, but expanding to perpetrators in 1991. Barri Rosenbluth, who directs the Safeplace School Based Intervention Programs, has used the *Expect Respect* curriculum, which teaches the warning signs of batterers, including excessive use of power and control.⁶² Ms. Rosenbluth

⁵⁷ Frederica L. Lehrman, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE, 1-24 (1996).

⁵⁸ Susan Guarino, *Delinquent Youth and Family Violence: A Study of Abuse and Neglect in the Homes of Serious Juvenile Offenders*, Massachusetts Dept. of Youth Services Publication #14,020-200-74-2-86-CR, pp. 5, 36 (1985). Note, the Texas Youth Commission has also conducted an unpublished study documenting the high correlation between domestic violence and juvenile delinquency.

⁵⁹ G. Miller, *Violence By and Against America's Children*, 17 J. OF JUV. JUSTICE DIG. 6 (1989).

⁶⁰ Mary M. Harrison, *Equal Partners*, TEACHING TOLERANCE 42 (Fall 1997).

⁶¹ Id. at 43.

⁶² Id.

explains that early on she surveyed some teen victims who reported on-going, increasingly violent behavior by their partners, but an unwillingness to break off the relationships. When asked to raise their hands if they thought all men were violent, every girl responded affirmatively. It was then that the focus shifted from simply warning the victims about abusive behaviors, to teaching them how to set limits, protect themselves and expect respect and equality in their relationships.⁶³ Cisco Garcia, who now heads the *Expect Respect Project*, includes gender, race, culture and other relevant topics as part of the revised curriculum.⁶⁴

VI. BATTERERS SHOULD NOT BE AWARDED JOINT OR SOLE CUSTODY OF THE CHILDREN.⁶⁵

A. *Men who batter their partners are likely to also abuse their children.*⁶⁶ One study estimated a *seventy percent* co-incidence of partner and child abuse in violent families.⁶⁷ In New York, it was reported that half of the children whose mothers are abused are likely to be victims of physical abuse.⁶⁸ In most cases, the abuse of the children ends when the children are removed from the batterer's environment and placed exclusively with their mother.⁶⁹ Additionally, the more serious the battery of the mother, the more severe the child maltreatment.⁷⁰

B. *After parental separation, there is increased risk that the batterer will physically, sexually and/or emotionally abuse the children.*⁷¹ Post-separation, batterers will often use the children as leverage to coerce the victim to return; whether promising gifts for them or invoking guilt for

⁶³ Id. at 44.

⁶⁴ In 1998 Safeplace received a Centers for Disease Control grant for more than \$500,000. to expand the program to elementary, middle and high schools in the Austin area. For further information on their program, including a copy of the *Expect Respect* curriculum (\$35.), contact Safeplace at #512-385-5181.

⁶⁵ See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VANDERBILT L. REV. 1041 (1991) and discussion *infra* at 6e.

⁶⁶ Susan Schechter, Jon Conte and Loretta Fredrick, *Domestic Violence and Children: What Should the Courts Consider?* in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual, ed. National Council of Juvenile and Family Court Judges Family Violence Project (March 1993); Evan Stark and Anne Flitcraft, *Women and Children At Risk: A Feminist Perspective on Child Abuse*, 18 INT'L. J. HEALTH SVCS 97 (1988), as cited in Barbara J. Hart, *Children of Domestic Violence: Risks and Remedies* (1992) in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual (1993).

⁶⁷ Suzanne H. Jackson, *Child Abuse*, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 5-17 (1996); Evan Stark & Anne Flitcraft, *Woman-Battering, Child Abuse, and Social Heredity: What is the Relationship?*, MARITAL VIOLENCE (1985).

⁶⁸ R. Messinger & R. Eldridge, New York Task Force on Family Violence, BEHIND CLOSED DOORS: THE CITY'S RESPONSE TO FAMILY VIOLENCE (1993); see also Mildred Pagelow (1990) *supra* note 3, reporting that more than half of those who batter their wives also abuse their children.

⁶⁹ Bowker, Arbitell, and McFerron, *On the Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVES ON WIFE ABUSE (1988).

⁷⁰ L.H. Bowker, M. Arbitell, & J.R. McFerron, *On the Relationship Between Wife Beating and Child Abuse*, in K. Yllo and M. Bogard (Eds.) PERSPECTIVES ON WIFE ABUSE (1988), as cited in Barbara Hart (1992) *supra* note 16.

⁷¹ *Developments in the Law—Legal Responses to Domestic Violence: Battered Women and Child Custody Determinations*, 106 HARV.L. REV. 1597, 1612 (1993); and U.S. Dept. of Justice, *Report on the Nation of Crime and Justice: The Data* (1993).

depriving them of a father figure.⁷² Children report being routinely grilled by the batterer regarding their mother's actions, dress, social life and spending habits, in flagrant disregard for the emotional toll exacted.⁷³

C. Children are traumatized by witnessing the abuse, whether their pain and rage are turned inward or vented on others. Frequently, the children have witnessed the domestic abuse, either by being present in the same room or hearing it.⁷⁴ They are traumatized by seeing their parent harmed, and often express anger at themselves for not being able to protect the abused parent. Some children are furious with the abuser, while others are upset with the victim for not figuring out how to leave and protect herself and the children. After age five or six, some children may disrespect the victim for her perceived weakness, and identify with the batterer.⁷⁵ Still other children risk injury when intervening to try to protect their mother or siblings from the batterer.⁷⁶ Children who witness domestic violence demonstrate the same symptoms as physically or sexually abused children, including psychosomatic, psychological and behavior dysfunction.⁷⁷

D. Courts should presume that a batterer is not fit to be the sole or joint custodian of the children.⁷⁸ Just such a presumption was *unanimously* passed by Congress in 1990, in response to the realization that too many batterers were able to present well in court and obtain custody of the children.⁷⁹ Most states now require, as does Texas,⁸⁰ that courts must consider evidence of domestic violence in making custody determinations.⁸¹ In fact, Texas case law has created a *preference* that the non-violent parent be appointed managing conservator (sole physical custodian).⁸² However, too often the courts have minimized or rationalized the abuse, as well as its impact on the children.⁸³ Thus, family

⁷² Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 232 (1995).

⁷³ David Adams *supra* note 5 at 25.

⁷⁴ Daniella Levine, *Children in Violent Homes: Effects and Responses*, 68 FLA. B. J. 38, 62 (Oct. 1994).

⁷⁵ Laura Crites and Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, THE JUDGES JOURNAL (Spring, 1988).

⁷⁶ Davidson, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFE ABUSE PATTERN 119 (1978).

⁷⁷ See Phillip C. Crosby, note, *Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U.L. REV. 483, 500 (1997); Lynne R. Kurtz, note, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB.L.REV. 1345, 1350 (1999); Peter Jaffe, et. al, CHILDREN OF BATTERED WOMEN, (1990); ; B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 AL. L. Rev. 1109, 1113 (Spring 1995); and D. Kalmus, *The Intergenerational Transmission of Marital Aggression*, 46 J. MARRIAGE & FAM. 11-19 (1984).

⁷⁸ See Kurtz, *Id.*; and See generally, Violence Against Women Office, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, sec. 3 (December 2, 1999) <<http://www.vae.umn.edu/Vawnet/custody.html>>.

⁷⁹ H. Con. Res. 172, 101st Cong. (passed 9-27-90, passed unanimously 10-25-90).

⁸⁰ See e.g., Texas Family Code sec. 153.004(a) mandating that the court consider evidence of domestic violence in deciding which parent should receive custody.

⁸¹ Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, JUV. & FAM. COURT JOURNAL 43 (1992).

⁸² *Lewelling v. Lewelling*, 796 S.W.2d 164, 168 (Tex. 1990).

⁸³ See e.g. *Pena v. Pena*, 986 S.W.2d 696 (Tex. Appeals – Corpus Christi 1998) While the Court found that there was “uncontroverted testimony” concerning three incidents of physical violence against the mother by the father, these did not constitute a pattern of abuse as they are not connected. Thus, the Court allowed the batterer to obtain sole

advocates applaud Louisiana's 1992 amendment to its custody code, which includes the above-referenced presumption against custody to the batterer, but also specifies that the abusing parent can only obtain supervised visitation *and* must successfully complete a batterer's intervention program.⁸⁴ The "best interest of the child" standard requires that abusers *not* receive joint or sole custody of their children.

E. Contrary to popular belief, most fathers who attempt to gain custody of their children do so successfully.⁸⁵ Certainly, in some of those cases the father was the more fit parent. However, in other instances the battered mother lost custody of her children because she had no access to legal counsel and did not know how to defend herself against the well-financed attorney of the batterer.⁸⁶ One reason this fact should scare us is that the majority of batterers grew up witnessing their fathers beating their mothers,⁸⁷ confirming that domestic violence is a learned behavior. Even with legal representation, it can take years for the victims to prove that the batterers used death threats, alienated the children, hid assets, and otherwise continued their pattern of total control throughout the divorce process.⁸⁸ In the mean time, the children are learning that violence works; it is an acceptable means to obtain what you want. Thus, the generational cycle will continue unless our children are taught, *with our actions*, that: (1.) *Most men are not violent to their partners and children;* (2.) *there is no excuse for domestic violence;* and (3.) *the abusive behavior will not be tolerated.*

F. Psychologists' Child Custody Recommendations Frequently Ignore Domestic Violence. Surveying psychologists from 39 states, researchers found that of the criteria used to make custody decisions, a history of domestic violence was seen as relevant by just 27.7% of respondents.⁸⁹ This study's findings are shocking given that over forty states' statutes *require* judges to consider domestic violence in custody decisions. Particularly disturbing were the factors that custody evaluators did believe were more important than a history of abuse. 75% of the psychologists believed that sole or joint custody should not be granted to a parent who "alienate[s] the child from the other parent by

legal custody of their children. Id. at 696. But *see also*, *Huesers v. Huesers*, - N.W.2d - (N.D., 1997) in which the state Supreme Court set aside the trial court's custody award to the abusive father after finding that the trial court had excused three prior incidents of domestic violence by explaining that the wife had provoked the violence; as reported in 29 JUVENILE AND FAMILY LAW DIGEST 1646 (May 1997); and based on the author's 20 years of experience working with tens of thousand of abuse victims in the courts.

⁸⁴ La. Rev. Stat. Ann. sec. 9.364.

⁸⁵ Finding that *seventy percent* of fathers were granted custody who requested it. *Summary of Findings in Domestic Violence*, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, SUPREME JUDICIAL COURT 79 (1989).

⁸⁶ Based on the author's twenty-three years of working with abuse victims in the courts.

⁸⁷ N. Lemon & P. Jaffe, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, 2 (1995).

⁸⁸ *See e.g. Woman Gets \$18 Million In Divorce Fraud Case*, New York Times, June 15, 1997, p. 14, col. 5, describing a jury verdict awarding Joyce Lozoya \$6 million in compensatory damages and \$12 million in punitive damages against her ex-husband, Raymond Cohea Gracia. In 1989, Mr. Gracia was awarded custody of the couple's four children, though he had threatened to kill his wife if she persisted in trying to obtain custody and visitation rights, and had hidden assets.

⁸⁹ *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 (3) FAM. L. Q. 565 (1996), as cited in Joan Zorza, *Domestic Violence Seldom Considered in Psychologists' Child Custody Recommendations*, 2 DOMESTIC VIOLENCE REPORT 65 (June/July, 1997).

negatively interpreting the other parent's behavior."⁹⁰ For psychologists without training in the dynamics of domestic violence, the abused parent's efforts to protect herself and her children could easily be misinterpreted as intentionally alienating the batterer-parent. This in spite of the American Psychological Association's determination that there exists no scientific basis for the theory of parental alienation syndrome.⁹¹ Surprisingly, just 54.7% stated they would recommend sole custody being given to the primary caretaker, while 25% weighed economic stability as a key factor.⁹² Clearly, it is the lawyer's responsibility to identify and engage psychologists who have received training regarding domestic violence and its adverse impact on children.

G. *Battered Mothers Frequently Make Many Courageous Efforts to Protect Their Children From the Abuse.* A 1998 shelter outreach project found that one of the issues of most concern to battered women was addressing the adverse impact of the abuse on the children,⁹³ yet often the victims are blamed for being unable to stop the batterer's violence. The Massachusetts' Department of Social Services (DSS) Domestic Violence Unit is to be commended for their extensive efforts to identify battered mothers and provide more appropriate interventions, in the context of child protection cases. By providing on-going training to all staff, as well as regional domestic violence advocates within DSS offices, they have been able to assist many abuse victims in accessing legal assistance and other resources. Such steps can obviate the need to remove the non-abused children, while better protecting the battered mothers.⁹⁴

H. *Based solely on their status as abuse victims, battered mothers should not be denied child custody.*⁹⁵ In *Lewelling*, the Texas Supreme Court was clear: "We hold that evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child. Any other result is contrary to the public policy of our state. . . The legislature has also determined that removing a child from a parent simply because she has suffered physical abuse at the hands of her spouse is not in the best interests of our state."⁹⁶

⁹⁰ Zorza, *Id.* at 72.

⁹¹ See 1 (6) DOMESTIC VIOLENCE REPORTS 11, 12 (1996), as cited in *Id.*

⁹² *Id.*

⁹³ Edward W. Gondolf, *Service Contact and Delivery of a Shelter Outreach Project*, 13 JOURNAL OF FAMILY VIOLENCE 131, 143 (June 1998).

⁹⁴ For additional information, the Mass. Dept. of Social Services Domestic Violence Unit may be contacted at #617-617-727-3171.

⁹⁵ *Lewelling v. Lewelling*, *supra* note 47 at 168.

⁹⁶ *Id.* at 167-168.

VII. ENSURE SAFE VISITATION: CHILDREN SHOULD BE EXCHANGED AND/OR SUPERVISED AT A CERTIFIED VISITATION CENTER.

A. *Abuse victims and children often face renewed violence in the course of visitation, necessitating lawyers and judges prioritizing safety concerns.*⁹⁷ In recognition of the highly volatile atmosphere in visitation settings, Louisiana is to be commended for their emphasis on victim (adult and child) safety. As previously noted, Louisiana presumes that neither joint or sole custody can be awarded to a perpetrator of adult or child abuse, but requires supervised visitation until the perpetrator has successfully completed a batterer's intervention program.⁹⁸ The National Council of Juvenile and Family Court Judges also proposes that abusers should be limited to supervised visitation until they have completed a certified program *and* had a batterer's expert evaluate them.⁹⁹

B. *Visitation Center staff must be fully trained in the dynamics of domestic violence in order to keep the child and adult victims safe.* Well-intentioned, but ill-informed, providers can greatly endanger all parties involved. Several domestic violence victims have reported that the Kids Exchange Visitation Center allows their staff person to accompany the batterer and child *to the batterer's home* during supervised visits.¹⁰⁰ Not only is this practice contrary to the purpose of supervised visits (child safety), but also places the staff person at risk and unnecessarily creates liability for the Center. At the Center there should be guards or security personnel, as well as other employees, to ensure that the batterer stays within the limits of non-violent behavior. The more child-focused Visitation Centers, such as those in Houston¹⁰¹, and in Brockton, Massachusetts,¹⁰² require that all staff (including the security personnel) receive training on family violence dynamics, as well as the clear policies designed with victim safety in mind.

C. *Where there is evidence of serious domestic violence, courts should assume that any visitation with the battering parent will be supervised.*¹⁰³ Supervised visitation must *not* be conducted by any relative or friend of the batterer, and any associated costs should be paid by the battering parent.¹⁰⁴ Further, the ABA House of Delegates on Unified Family Courts' resolution suggests that courts should: (1) ensure that children only be exchanged for visitation in protected places; (2) allow only supervised visitation (with the batterer paying costs); (3) prohibit visitation

⁹⁷ See Mary McKernan Kay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 CHILD WELFARE 29 (1994) (citing W. Stacey & A. Shupe, *THE FAMILY SECRET* (1983)).

⁹⁸ La. Rev. Stat. Ann. sec. 9.364.

⁹⁹ FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1990), reprinted in 41 JUV. & FAM. CT. J. at 17-18 (1990).

¹⁰⁰ Based on the author's own experience of victim's reporting.

¹⁰¹ For further information on their "Safe Program", run by Marinelle Timmons at the Victim Assistance Centre, and their strategy of using primarily volunteers to staff the Center and structuring visits to run concurrently, call #713-755-5625.

¹⁰² For further information and information on starting a Visitation Center, contact Pat Keller, Director, Brockton Visitation Center, 180 Belmont St., Brockton, MA 02401, #508-583-5200.

¹⁰³ Howard Davidson, *Custody and Visitation*, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN*, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, p. 14 (August 1994).

¹⁰⁴ *Id.*

(supervised or otherwise) unless the batterer has completed a specific batterer's intervention program; and (4) allow visitations only when the batterer has abstained from possessing or consuming alcohol or drugs for a designated time prior to and during visitations.¹⁰⁵ Additionally, when appropriate, the courts can deny overnight visitations, mandate that abusers who have threatened kidnapping must post bond to ensure the children's return, maintain confidentiality of the victim and children's address, and be open to other creative conditions which will promote victim safety.¹⁰⁶

VIII. DO ALL THAT IS POSSIBLE TO ENSURE ADEQUATE CHILD SUPPORT.

A. *A primary cause of child poverty in the United States is the nonpayment of child support.* More than 80% of all non-custodial parents either pay nothing or less than 15 percent of their income for child support.¹⁰⁷ Currently, approximately \$35 billion in child support is owed to our children.¹⁰⁸

B. *The number one reason that abuse victims return to the abuser is a lack of financial resources.* Obtaining the child support not only increases the likelihood that the children will be taken out of poverty, but also that they will not be again forced to return to the violent home with their mother. For too many domestic violence victims, the child support check is all that keeps them off welfare/TANF, for their minimum wage employment cannot sustain even a family of two. Tennessee provides just \$185. for a parent with two children and Texas allows \$201., while more than half of all states pay less than \$400. per month for a family of three.¹⁰⁹ Given that the federal poverty guidelines are being revised from \$16,000. per year for a family of four up to \$19,000., it is understandable that welfare is an appealing option for domestic violence survivors.

C. *Batterers often use nonpayment of child support as a means of harassing the victim and forcing her to return.* Pennsylvania found that the most common factor among those men who did not pay child support was their shared propensity for committing domestic violence crimes.¹¹⁰ Thus, the "get tough" approach to child support enforcement is particularly necessary with batterers

¹⁰⁵ Id.

¹⁰⁶ Conrad N. Hilton Foundation, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, MODEL CODE PROJECT OF THE FAMILY VIOLENCE PROJECT, National Council of Juvenile and Family Court judges, sec. 405 (1994), as cited in Id. (For further information on the Model Code and other issues related to Visitation, Custody and Child Protection in the context of domestic violence, contact the National Resource Center on Domestic Violence and Child Protection #1-800-52-PEACE.); See Judith Lennett, et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB.INT.L.J. 501 (Winter, 1997).

¹⁰⁷ Jessica Pearson & Esther Ann Griswold, *A Preliminary Look at Client Experiences with the Good Cause Exemption to Child Support Cooperation Requirements*, 2 DOMESTIC VIOLENCE REPORT 1 (June/July 1997).

¹⁰⁸ Richard Wolf, *Welfare's Problem Child, The Difficulty of Tracking Down Deadbeat Parents and Enforcing Child Support Is Threatening Efforts to Get Welfare Families Back On Their Feet*, USA TODAY, June 16, 1997, p. 3A, col. 2.

¹⁰⁹ Peter T. Kilborn, "Welfare All Over the Map," *The New York Times*, December 8, 1996, p. E3, col. 1. Note that most of the states providing higher benefits are in the north, where heating and winter-related costs negate the small differential.

¹¹⁰ Interview with Barbara Hart, Legal Counsel for the Pennsylvania Coalition Against Domestic Violence, October 4, 1996.

because they are the most willing to use the withholding of payments to further harass, threaten and frighten their victims.¹¹¹

D. *Regular child support payments can obviate the need for public assistance.* As is logical, the battered mother who is a custodial parent has an easier time maintaining employment and is less likely to need welfare assistance if the children's father is regularly paying child support.¹¹² When attempting to leave welfare, consistent child support payments can also expedite the transition if they become a reliable income stream.¹¹³

E. *Swift, sure sanctions for nonpayment of child support have proven quite successful.* Tulsa's Judge Linda Morrissey reports an amazing 93% collection rate, within thirty days, for employed batterers. She says that if they do not comply with the court's child support order within one month, they are sent to jail. For those unemployed, Judge Morrissey requires that they produce written documentation of their good faith efforts to obtain a job.¹¹⁴ She argues that if court orders are not fully enforced in a timely manner, the non-paying parent rightly assumes there is no need to comply. If, on the other hand, the county jail awaits those unwilling to support their children, it is far more likely that the payments will be forthcoming.

F. *Child support enforcement agencies can do much to increase victim safety and facilitate timely collection.* *First, the forms package for requesting assistance in the collection of child support must be greatly simplified and standardized across the country.* The problem is exacerbated by the fact that virtually every form of public assistance also requires prolific forms, from public housing, unemployment, free/reduced lunch, W.I.C., and welfare, to day care, social security disability, Medicaid, and food stamps. One form could be used to apply for all public assistance, with *limited* additional forms added for programs needing other specific information. The forms must also be available in Spanish, and, to the degree possible, in other languages represented in the client community.

Second, when applicants for assistance call the child support enforcement agency, the recorded message could offer to send an Adult or Youth Safety Plan to anyone in need.

Third, the state agency must expedite the payment process, ensuring that they collect the money and monitor enforcement. For example, New Hampshire law allows that any party in a domestic violence case may request that the child support payments be made to the New Hampshire Division of Human Services (DHHS). Neal Carter, Supervisor of the Office of Program Support for the Claremont Office of D.H.H.S., makes it part of standard operating procedure to have payments made through their office. Mr. Carter believes this takes from the victim the possibly dangerous task of

¹¹¹ Id., based on the study conducted by PCADV.

¹¹² Carl Formoso, *The Net Impact of Child Support Payments on Work and Welfare Outcomes in Washington State*, 12 CHILD SUPPORT REPORT 6 (December 2000).

¹¹³ Id. at 7.

¹¹⁴ Presentation by Judge Linda Morrissey, Oklahoma Domestic Violence Conference, May 2, 1997, Tulsa, Oklahoma.

trying to collect support payments, and relieves the batterer of the temptation to further harass the victim by making late payments or none at all.¹¹⁵

Fourth, client intake must include a screening mechanism to identify abuse victims and ensure they are not penalized if they are unable to disclose their batterer's whereabouts. The intake staff must *initiate* questions about abuse of adults and children in the household (or relationship) during the first meeting, in order to assess the immediate safety issues. With any client reporting prior or current abuse, a civil protection order should be discussed in the context of completing a SAFETY PLAN, then referring the victim to local domestic violence programs.

Fifth, on-going client services must include safety planning. Contrary to popular belief, leaving the batterer does not ensure safety. In fact, separation violence is likely.¹¹⁶ Attempting to leave the batterer can cause the abuse to escalate, resulting in an increase in the likelihood of the victim being murdered.¹¹⁷ Since the child support staff may be the only person with whom the victim has outside communication, it is necessary to integrate safety planning into every contact. ***Safety planning must become an integral part of every child support staff member's work with domestic violence victims and their children, whether or not the victim later returns to the perpetrator.*** Staff must have policies which prioritize victim safety, while fairly handling the enforcement efforts. The attached Safety Plan brochures, for adults and youth,¹¹⁸ provide action steps to help victims and children stay alive, but have a more universal application. Child support offices could routinely include a Safety Plan with mailings to applicants. Staff can encourage the Courts to implement a policy in which a child support order, protection order, family or criminal case will not be dismissed prior to an advocate completing a Safety Plan with the victim.

Sixth, child support staff should collaborate with the courts and advocates to ensure that protective orders include adequate child support. The Claremont, N.H. Office of Child Support Enforcement has worked closely with local domestic violence programs and assisted with inter-agency trainings to ensure that the protection orders not only included provisions for child support, but specified the amount.¹¹⁹

Seventh, child support staff can collaborate with the courts and domestic violence advocates to ensure that the child support provisions of the protective order are made into permanent orders. The Claremont, N.H. Office of Child Support Enforcement has adopted a policy of taking each protective order and immediately opening the case to facilitate enforcement. One critical

¹¹⁵ Neal J. Carter, CREATING A WORKING RELATIONSHIP BETWEEN CHILD SUPPORT & DOMESTIC VIOLENCE SUPPORTIVE SERVICES, Office of Child Support Enforcement, New Hampshire Dept. of Health & Human Services, Claremont, N.H., p. 2, Sept. 4, 1997.

¹¹⁶ Barbara Hart, *supra* note 16.

¹¹⁷ Ronet Bachman & Linda E. Saltzman, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1,4 (1995), as cited in Deborah M. Goelman, "Safety Planning," THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 2-11 (1996)..

¹¹⁸ See *infra* note 15 for information on obtaining Safety Plans.

¹¹⁹ Neal Carter, *supra* note 110 at 1.

step the Office takes is to make the protective order into a permanent order. Usually this involves filing a motion in Superior Court, incorporating the protective order with any arrearages which exist, then entering a new Superior Court order for ongoing support. The Superior Court's child support order can be added to the divorce decree.¹²⁰

Similarly, Judge Bill Jones, one of four Domestic Violence Court judges in Charlotte, North Carolina, reports that two days per week they have a child support enforcement staff member present in their courtroom. All protection order and other cases which will involve child support are set for those days, thus, best utilizing all staff time. Judicial economy is achieved by freeing the judges to handle the safety and other legal matters. Paternity acknowledgment can be accomplished on the spot, with support amount determined and wage withholding forms filed. Their child support enforcement office then files that child support action as its own *permanent* case, enabling the child support order to remain in effect past the one year expiration date of the protective order. Victims appreciate the "one stop shopping" approach, allowing them to obtain child support along with the protective order and/or other civil remedies.¹²¹

IX. FAILURE TO PROTECT CHILDREN

As in many jurisdictions, New York City's Administration for Children and Families (ACS) routinely removed the children of battered women, charging the mothers with the offense of "engaging in domestic violence".¹²² In *In Re Sharwline Nicholson, et al.*,¹²³ U.S. District Court Judge Jack Weinstein found that ACS (1.) often charges battered mothers with neglect solely on the basis of their being battered; (2.) neither helped the mothers flee the abuse nor held the batterers responsible; (3.) often place children in foster care without just cause; (4.) did not properly train its staff about domestic violence; and (5.) its written policies encouraged this improper conduct. Citing violations of the Fourth, Ninth, Thirteenth and Fourteenth Amendments, he chided ACS for its blatant disregard for plaintiff's due process rights.¹²⁴

Judge Weinstein's landmark decision stated that poor women threatened with losing their children were at the mercy of a "sham" system of court-appointed counsel, stressing that the many years of "pitiless double abuse of these mothers" violated their constitutional rights.¹²⁵ Judge Weinstein's scathing decision said these practices were rooted in "benign indifference, bureaucratic

¹²⁰Id. at 3.

¹²¹ Judge Bill Jones presentation at "Effective Responses to Family Violence: National & Local Perspectives" Conference at Florida Coastal Law School, Jacksonville, FL., April 15, 1998.

¹²² William Glaberson, *Removal of Children From Homes of Battered Women is Rebuked*, THE NEW YORK TIMES, March 5, 2002 at 1. (describing *In Re Nicholson*, in which Sanctuary for Families filed a class action suit on behalf of all similarly situated battered mothers.)

¹²³ Memorandum and Preliminary Injunction, CV 00-2229, CV 00-5155, CV 00-6885 (March 11, 2002).

¹²⁴ *Child Abuse, Neglect & the Foster Care System 2002: Effective Social Work and the Legal System; The Attorney's Role and Responsibilities*, Practising Law Institute, Order No. C0-001M, p. 238 (March, 2002) Judge Weinstein stated that the plaintiff's Thirteenth Amendment rights were violated when they were denied control of their children and stigmatized. Id.

¹²⁵ Id.

inefficiency and outmoded institutional biases.”¹²⁶ *In Re Nicholson* notes the disparities of class, race and gender, as the majority of the *Nicholson* plaintiffs and eighty-five percent of New York City’s foster children are Hispanics, African-Americans or immigrants.¹²⁷ This, in spite of the fact that domestic violence occurs across all socio-economic strata, yet child protective agencies rarely intervene with affluent families.¹²⁸

Not only did Judge Weinstein’s 188-page decision award Ms. Nicholson \$150,000, with similar amounts for the other plaintiffs Judge Weinstein ordered ACS to dramatically change its practices, beginning with cessation of taking children from battered mothers whose only “offense” was being a crime victim,¹²⁹ as well as to coordinate with domestic violence advocates to craft improvements in its handling of such cases.¹³⁰ Judge Weinstein specified that ACS should make reasonable efforts to increase the safety of battered mothers and their children by removing the abusers, providing shelter, assisting the victims in obtaining protective orders and/or prosecution of the batterer.¹³¹ He mandated that removal of children be the option of last resort, only taken after ACS has made good faith efforts to safeguard the mother, and that ACS staff must receive training in domestic violence. To facilitate adequate representation for the battered mothers, he also ordered New York State to raise its hourly rate for court appointed Family Court lawyers, doubling the compensation to \$90 per hour.¹³²

It is hoped that the historic implications of Judge Weinstein’s *In Re Nicholson* decision will engender systemic reforms nationally, as no court has previously addressed these issues with such clear condemnation of dangerous practices and dictated specific reforms to be undertaken by the defendant agency. Remarkably, he also identified model programs to which ACS could turn for guidance, such as the Dade County Dependency Court Intervention Project,¹³³ while emphasizing the

¹²⁶ *Id.*

¹²⁷ Lombardi, *supra* note 12 (describing *In Re Nicholson*’s two-month trial that included forty-four witnesses, including Nicholson, nine other mothers in similar situations and numerous experts.)

¹²⁸ *Id.*

¹²⁹ “When Administration for Children’s Services (ACS) notifies the New York State Central Register of Child Abuse and Maltreatment of the results of an investigation pursuant to [New York Social Services Law section 422](#), ACS shall declare the report unfounded as to the mother where the sole basis of the report against the mother is (i) that the mother has been a victim of domestic violence, or (ii) that the mother has “engaged” in domestic violence where the sole basis for the allegation is that the mother has been the victim of domestic violence, or (iii) that the mother has failed to cooperate with “services,” where the sole reason for offering services is that the mother has been a victim of domestic violence unless ACS has alleged with specificity how the child has been harmed or is at risk of harm as a result of the mother’s failure to cooperate.” *Id.* at 239.

¹³⁰ Weinstein cited ACS’s 1993 pilot “Zone C Project,” in which child abuse cases were screened for domestic violence, then created domestic violence advocate and ACS caseworker teams to intervene with the family. As a result, removals of children dropped significantly. Similarly, in 1999, a “Zone A Project” was implemented, adding the collaboration of the police and increasing the batterer’s arrests to 50 percent. At the same time, 42 percent of the victims were able to obtain orders of protection. Not surprising, these improvements produced large decreases in child removals, down to just three percent of the cases. In spite of such success, the Project was discontinued. *Id.*

¹³¹ Additionally, Judge Weinstein ordered that ACS create a simply written pamphlet, in English and Spanish, explaining the rights of battered women and their children in such circumstances. *Id.*

¹³² *Id.*

¹³³ Judge Cindy Lederman has established this model program in spite of Miami’s challenges of extraordinarily high caseloads, rich diversity among litigants, overtaxed social services, undocumented and immigrant families, and extremely low income of its litigants. *Id.*

principle that protecting the battered mother is the most often the best way to protect the children.¹³⁴ Battered women's advocates are particularly optimistic as Weinstein's orders have the force of law – they are not merely suggestions. This may be why ACS has appealed the case to the Second Circuit Court of Appeals, although Judge Weinstein already granted them one extension to begin implementation of his reform orders.¹³⁵

Perhaps most difficult are the cases where ethical and moral conflicts may arise because a battered mother will not separate from the person harming her and/or her children. Clearly, counsel cannot represent both parties in the case, whether it is a termination of parental rights or criminal matter.¹³⁶ In some cases, even after the court and a child protective agency advise the battered mother that her rights will be permanently terminated if she does not separate from the abuser, she is still unable or unwilling to do so.¹³⁷ Sometimes a domestic violence shelter advocate can provide free, on-going counseling and safety planning, with the goal that eventually this abuse victim will leave her abuser. The dilemma is that if, in the mean time, the children are placed in danger, counsel may be placed in the position of reporting the former client to a child protective agency.¹³⁸

X. THE CORRELATION BETWEEN PHYSICAL AND SEXUAL VIOLENCE AND SUBSTANCE ABUSE IS WELL DOCUMENTED.¹³⁹

A. A chemically dependent batterer needs treatment for both his decision to batter and his decision to abuse substances. Abusers, their families and intervenors too often use the substance abuse as an excuse for the violence, focusing only on the addiction instead of the combined problems. It has been proven that batterer's intervention programs are more effective if the substance abuse is also treated.¹⁴⁰ In this way the intervenor can confront the batterer's "denial, rationalizations and faulty logic" regarding both the violence and substance abuse.¹⁴¹ Judges can order random urinalysis or hair tests to determine whether the batterer is abusing drugs or alcohol and if so, whether he is in compliance with the court's order to abstain.¹⁴²

¹³⁴ This principle includes the premise that a battered mother will be afforded a myriad needed services, ranging from childcare to job training, and law enforcement to education. *Id.*

¹³⁵ In denying a second extension, Judge Weinstein found "no indication. . . that anything has been done except with respect to talk about" reforms. *Id.*

¹³⁶ *See, e.g., State v. Tammy S. and Jerald ., supra* note 332.

¹³⁷ *See, e.g., Id.*

¹³⁸ This option is not offered without reserve and great trepidation. However, in many states counsel is a mandatory reporter of suspected child abuse and may, in addition, feel a moral compulsion to do all that is possible to protect the children. The argument follows the theme of allowing the battered mother to make whatever decisions for herself that she deems appropriate, but that, at some point, the state may need to intervene if the children's safety is jeopardized.

¹³⁹ V. Gil Rivas, R. Fiorentine, & M.D. Anglin, *Sexual abuse, physical abuse, and posttraumatic stress disorder among women participating in outpatient drug abuse treatment*, 28 J. of PSYCHOACTIVE DRUGS 95 (1996).

¹⁴⁰ Oriel, *supra* note 6, at 495 ; and Gorney, *supra* note 6, at 229.

¹⁴¹ *See* Gorney, *supra* note 6 at 235.

¹⁴² In Travis County, Texas courts many judges will order immediate urinalysis tests to determine if a litigant has used substances, and if such tests indicate continuing use, random tests are then ordered for the future.

B. Intervenors must utilize a screening tool to determine which batterers are substance abusers. Specific assessments should be in place to determine the “the nature and extent of the individual’s battering pattern and substance abuse problem.”¹⁴³ The screening must accurately identify the severity and pattern of substance of abuse, to assist the intervenor in assessing the level of possible danger to the victim.¹⁴⁴ Such screening should occur as early as possible, whether in a juvenile or family drug court, probation or parole intake units, or batterer’s intervention program.

C. Since the victim is at greater risk for serious injury if the batterer is chemically dependent, all safety planning must include screening for such behavior. One study found that, at the time of committing their crimes, 60% of the batterers were under the influence of alcohol,¹⁴⁵ while another found that fully 92% of victims report that their batterers used drugs or alcohol on the day of the offense.¹⁴⁶ Furthermore, men who drink heavily are more likely to commit violence crimes than those who do not.¹⁴⁷

D. Pre-release and sentencing conditions should include provisions addressing any substance abuse matters given that drunkenness dramatically increases recidivism. The judge can order that the batterer is prohibited from using drugs or alcohol,¹⁴⁸ whether the offender is an adult or juvenile. Recent studies indicate that even one episode of inebriation during the first three months after sentencing makes the batterer *three and a half times more likely to reassault* his partner.¹⁴⁹ When compared with abusers who seldom drank, those who drank on a daily basis were *sixteen times more likely to batter* their victims again.¹⁵⁰ Interestingly, researchers found that employment status of the offenders did not have an impact on their likelihood of recidivism.¹⁵¹ The judge will also want to seriously consider ordering the substance abusing batterer into treatment, as participation of such services decreases the risk of renewed violence by *thirty to forty percent*.¹⁵²

E. Depression or mental illness in combination with chemical dependency significantly increased the likelihood of the user battering his partner. When the abuser was alcoholic and had either antisocial personality disorder or recurrent depression, researchers found an 80 to 93% rate

¹⁴³ Albert R. Roberts, *Substance Abuse Among Men Who Batter Their Mates*, 5 J. SUBSTANCE ABUSE TREATMENT 87 (1988).

¹⁴⁴ See Gorney, *supra* note 6, at 232.

¹⁴⁵ Roberts, *supra* note 47, at 85.

¹⁴⁶ Daniel Brookoff, et al., *Characteristics of Participants in Domestic Violence Assessment at the Scene of Domestic Assault*, 277 JAMA 1369, 1371 (1997).

¹⁴⁷ Oriel, *supra* note 6, at 495.

¹⁴⁸ Most states’ statutes include general language similar to Texas, where a judge may order the abuser to “perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence.” TEXAS FAMILY CODE 85.022(a)(3).

¹⁴⁹ Alison Snow Jones and Edward W. Gondolf, *Time-Varying Risk Factors for Reassault Among Batterer Program Participants*, 16 J. of FAMILY VIOLENCE 345 (December 2001).

¹⁵⁰ *Id.* at 353.

¹⁵¹ *Id.*

¹⁵² *Id.* at 355.

of violence.¹⁵³ Another study reported that severe psychopathology increases the probability of reassault two fold.¹⁵⁴ For the batterer who grew up in violent home, alcohol abuse raised the chances of repeating the violence.¹⁵⁵

F. Chemically dependent victims are usually at greater risk for further harm, whether they are abusing prescription, over-the-counter or street drugs.¹⁵⁶ Substance abusing victims are often forced to return to the batterer, since many shelters will not accept alcoholics or addicts.¹⁵⁷ One study found a higher rate of substance abuse among battered women,¹⁵⁸ but that the vast majority of victims did not abuse drugs or alcohol.¹⁵⁹ Most of the users started drinking in response to the domestic violence.¹⁶⁰ When the intervenors are unresponsive, hostile, blaming or otherwise unwilling to assist the victim, the victim's hopelessness can precipitate self-medication. White and Native American women showed higher rates of alcoholism than African American or Hispanic women.¹⁶¹ However, even battered women who were not addicted, but had been drinking when the abuse occurred, were less likely to find sympathy in the courts.¹⁶²

XI. FAMILY MEMBERS' MENTAL HEALTH ISSUES MUST BE CONSIDERED IN CRAFTING DOMESTIC VIOLENCE INTERVENTIONS.

A. Batterers with thought disorders have an elevated probability of committing renewed violence against their victims.¹⁶³ As mentioned previously, when depression or other mental illnesses are combined with substance abuse, the rate of violence ranged from 80 to 93 percent,¹⁶⁴ thus indicating the need for early identification of both problems.

¹⁵³ Donald G. Dutton, *THE DOMESTIC ASSAULT OF WOMEN, PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 13 (1988).

¹⁵⁴ Jones and Gondolf, *supra* note 99 at 355.

¹⁵⁵ Oriel, *supra* note 6, at 496.

¹⁵⁶ See Jeanne McCauley, et al., *The "Battering Syndrome": Prevalence and Clinical Characteristics of Domestic Violence in Primary Care Internal Medicine Practices*, 123 *ANNALS OF EMERGENCY MED.* 737, 741 (1995); and See Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must be Aware to be Effective*, 264 *JAMA* 940, 943 (1990).

¹⁵⁷ Margaret Parrish, *Substance Abuse, Families and the Courts*, 3 *J. HEALTH CARE L. AND POL'Y* 191, 205 (1999). However, Tulsa's Domestic Violence Intervention Services is a model shelter in its provision of services to chemically dependent abuse victims. For more information, they can be reached at 918-585-3170.

¹⁵⁸ *Id.* at 742; and see Glenda Kaufman Kantor & Murray A. Straus, *Substance Abuse as a Precipitant of Wife Abuse Victimizations*, 15 *AM. J. DRUG & ALCOHOL ABUSE* 173, 179 (1989).

¹⁵⁹ Kaufman & Strauss, *Id.* at 179.

¹⁶⁰ See Randall *supra* note 52, at 943.

¹⁶¹ Margaret E. Goldberg, *Substance Abusing Women: False Stereotypes and Real Needs*, 40 *SOCIAL WORK* 789, 791 (1996).

¹⁶² See Murphy & Potthast, *supra* note 6, at 94 (1999); and Deborah Capasso Richardson and Jennifer L. Campbell, *Alcohol and Wife Abuse: The Effect of Alcohol on Attributions of Blame for Wife Abuse*, 6 *PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN* 51, 53 (1980).

¹⁶³ Jones and Gondolf, *supra* note 99 at 349. See also, D. Saunders, *Prediction of Wife Assault* in J. Campbell, *ASSESSING THE RISK OF DANGEROUSNESS: POTENTIAL FOR FURTHER VIOLENCE OF SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS*, pp. 68-95 (1995); and R.M. Tolman and L.W. Bennett, *A review of quantitative research on men who batter*, 5 *J. of INTERPERSONAL VIOLENCE* pp. 87-118 (1990).

¹⁶⁴ Dutton, *supra* note 103 at 13.

B. Victims with mental health disorders have a more difficult time staying safe. Much research has documented that prolonged stress can permanently harm neurons in the hippocampus, a part of the brain involved with memory. However, studies have also shown that antidepressants can reverse the stress-induced harm to the cells by stimulating growth of hippocampal nerve cells.¹⁶⁵ This is important information not only for lawyers to be able to relate to judges and probation officers, but also to share with the battered offenders who may be helped by taking antidepressants and/or seeing a therapist. Battered women are over-represented among those suffering from depression, and, not surprisingly, those incarcerated report even higher levels of mental illnesses.¹⁶⁶

Many intervenors complain that some battered women seem to enter into successive abusive relationships, as though victims choose batterers. Rather, several decades of research indicate that victims in multiple violent relationships show elevated rates mental illness, such as of self-defeating personality disorders, depression, and Post Traumatic Stress Disorder (PTSD).¹⁶⁷ Since childhood physical and sexual abuse increase the risk of PTSD,¹⁶⁸ counseling interventions should address the lifespan of abuse. As might be expected, the length and severity of the abuse appear to directly correlate to the degree of depression and mental illness. Those battered women with chronic and severe personality disorders are more likely to have been raised in violent families, and tend to stay with a batterer longer.¹⁶⁹

XII. BATTERED WOMEN AS DEFENDANTS

A. Female inmates are likely to be victims of severe abuse and mistreatment.¹⁷⁰

Researchers report that victimized inmates often underreported their abuse, either because they did not consider the behavior abusive or they excused the violence perpetrated against them.¹⁷¹

B. Victims of extreme violence suffered addictions at substantially higher rates.¹⁷² As experts believe that that the chemical dependency is a coping mechanism to dull the pain of the physical

¹⁶⁵ Erica Goode, *Antidepressants Lift Clouds, But Lose ‘Miracle Drug’ Label*, THE NEW YORK TIMES, June 30, 2002, p. 18, col. 3.

¹⁶⁶ Angela Browne, *Violence Against Women By Male Partners: Prevalence, Outcomes, and Policy Implications*, 48 AM. PSYCHOL. 1077 (1993); *see also*, M.C. Astin, K.J. Lawrence, and D.W. Foy, *Posttraumatic Stress Disorder Among Battered Women: Risk and Resiliency Factors*, 8 VIOL. VICTIMS 17 (1993).

¹⁶⁷ Frederick L. Coolidge and Laura W. Anderson, *Personality Profiles of Women in Multiple Abusive Relationships*, 17 J. of FAMILY VIOLENCE 117 (June 2002); The authors explain that behavior may rise to the level of a personality disorder by virtue of the “symptoms’ pervasive, enduring, and disrupting consequences.” *Id.* at 129.

¹⁶⁸ *Id.* at 120.

¹⁶⁹ *Id.* at 119.

¹⁷⁰ Beth Richie & C. Johnsen, *Abuse histories among newly incarcerated women in a New York City jail*, 51 J. of AM. MED. WOM. ASSOC. 111 (1996).

¹⁷¹ *Id.*

¹⁷² *Id.* Battered inmates who abused drugs reported being mutilated, thrown from windows, burned, stabbed, shot, and constantly threatened.

and mental abuse, female offenders must have access to counseling and support groups administered by experienced domestic violence providers.¹⁷³

C. *Battered, addicted female offenders, particularly those who are pregnant, may need intensive therapy to achieve a successful recovery.*¹⁷⁴ Thus, while many correctional institutions and communities offer Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) groups, more comprehensive programs should be sought for this group. The comprehensive program must address the female offenders' history of sexual and physical maltreatment that often prompts substance abuse and criminal behavior, as well as the sequelae of depression, low self-esteem, and self-destructive behavior.¹⁷⁵ Such intensive programs can be successful alternatives to incarceration if probation or parole officers are familiar with the complexity of battered offenders' cases.¹⁷⁶

XIII. MUTUAL PROTECTIVE ORDERS SHOULD ONLY BE ISSUED IN THE RARE CASES FOR WHICH MUTUAL COMBAT HAS BEEN DETERMINED.

A. *The legislative intent of protective orders is to prevent further harm to the true abuse victim(s).* The court must be careful to only provide relief to the injured party. While this may sound obvious, some batterers are able to obtain mutual orders simply by saying, "I want her to stay away from me, too." Sometimes counsel for both parties will stipulate to mutual orders as it may appear to be a harmless concession. However, mutual orders are problematic for *all* parties involved: it can be a set-up for the abuser who is much more likely to re-offend without the clear prohibition. For the true victim and children, their safety is needlessly compromised.

B. *Mutual protective orders are problematic for the police to enforce, as it is difficult for them to ascertain who is the true abuse victim.* Law enforcement officers should not be placed in the position of attempting to determine which party deserves the protection and which one should be arrested for abuse. Often responding late at night or on the week-end, and hampered by time and staffing constraints, officers must be provided with clear orders if we expect them to protect the victims.

C. *Children are further traumatized when they fail to see the true victim provided protection and witness the batterer gain powerful leverage via a mutual order.* Not only is the adult victim endangered by mutual orders, but the children also are placed at greater risk for future harm. Our children need to see that the laws will protect them in their homes as well as on the street,

¹⁷³ Id. at 112.

¹⁷⁴ Ellen Barry, R. Ginchild & D. Lee, *Legal Issues for Prisoners With Children*, in K. Gabel & D. Johnston (eds.) CHILDREN OF INCARCERATED PARENTS 147 (1995).

¹⁷⁵ M. Kaplan, & J. Sasser, *Women behind bars: Trends and policy issues*, J. of SOCIOLOGY & SOC. WELFARE 23, 43-56 (1996); L. Najavits, R. Weiss, & B. Liese, *Group cognitive-behavioral therapy for women with PTSD and substance use disorder*, J. of SUBST. ABUSE TRTMT., 13, 13-22 (1996); M. I. Singer, J. Bussey, L.Y. Song, & L. Lunghofer, 40 SOCIAL WORK 40, 103-113 (1995).

¹⁷⁶ Barry, *supra* note 167,

regardless of how smooth the batterer is. The court allows the batterer to successfully nullify the protective order's possible safety net when mutual orders are permitted.

D. Since we are so quick to condemn those victims staying with the abuser and those wishing to dismiss orders, the least we can do is take seriously the victims brave enough to seek protection. Unless the court finds that mutual combat has taken place,¹⁷⁷ and absent one party acting in self-defense, orders issued to both parties will have a chilling effect on the true victim coming forward for help again.

XIV. MEDIATION IS CONTRAINDICATED IN MOST CASES INVOLVING DOMESTIC VIOLENCE.¹⁷⁸

A. Regardless of the mediator's skill, the victim is endangered for disclosing any information about the batterer's behavior. Since there is little the victim can reveal without fear of retaliation, the mediator's attempts to negotiate a peaceful resolution can only be viewed as disingenuous. The power imbalance between victim and offender is too great: what is the victim supposed to give in exchange for safety?¹⁷⁹ Custodial interference and prolonged custody battles are common tactics of batterers after separation. The victim must have a forum which will treat the renewed abuse seriously and make clear to the batterer that his behavior will not be tolerated.¹⁸⁰ We do not mediate civil rights' offenses because persons of color have a *right* to be free from abuse *and* the offender is to receive the unequivocal message that racist behavior will not be tolerated. If the court insists that mediation must occur, ensure that the victim and offender are not in the same room,¹⁸¹ and that the parties have legal counsel present.¹⁸²

B. Batterer's experts report that most batterers will not negotiate in good faith. Mediation relies on the assumption that both parties will enter all agreements with the intention of compliance. However, since batterers operate on the premise that they are *entitled* to use violence to achieve their goals, mediation is an inappropriate venue to attempt resolution of domestic violence.¹⁸³ Given that most mediators are not familiar with the complex dynamics of family violence and the batterer's

¹⁷⁷ Det. Charles Masino, Chief of the Phoenix Police Dept's Domestic Violence Unit, states that mutual combat arrests should occur in no more than 3% of the arrests, and that even that number is probably too high, and that mutual orders place the officers at greater risk because the abuser has not been given a clear message.

¹⁷⁸ Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAMILY AND CONCILIATION COURTS REV. 335 (July 1999); and *infra*.

¹⁷⁹ Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 322 (Summer 1990); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOM. L.J. 272 (1992).

¹⁸⁰ *Id.*

¹⁸¹ Harvey I. Hauer, *Making Mediation Work*, FAMILY ADVOCATE, American Bar Association's Family Law Section Journal, p. 27 (Spring 1997).

¹⁸² Unrepresented women tend to feel coerced and have greater difficulty participating. Eric Galton. MEDIATION: A TEXAS PRACTICE GUIDE p. 100 (Texas Lawyer Press, 1993), as cited in Melanie Kane-Gonzales, *supra* note 83 at 28.

¹⁸³ David Adams, *supra* note 5.

relentless persecution of the victim, without sufficient, on-going training mediators cannot be expected to effect safe resolutions.¹⁸⁴

C. *State's Alternative Dispute Resolution Statutes should be amended to prohibit mediation in cases involving domestic violence, subsequent to confidential screening of incoming cases.* A case in point is the policy statement of the Texas Alternative Dispute Resolution Statute, which rightly encourages amicable resolutions of disputes, with particular emphasis placed on conservatorship, possession and child support matters.¹⁸⁵ Yet, there exists no provision for abuse victims to opt out, thus leading most courts to assume they need only refer contested family matters to mediation.¹⁸⁶ While Texas mediators must complete a 40-hour training, with an additional 24 hours of instruction for those dealing with family cases,¹⁸⁷ “domestic violence” is not a required component. Further, since there is not now an entity to certify completion of the trainings nor to accredit the training programs, one should be designated with input from experienced domestic violence case practitioners.

D. *For all the same reasons listed in A, B and C, couple's counseling is also dangerous and ill-advised.* Battered women's advocates have long opposed mediation in domestic violence cases, largely for safety reasons.¹⁸⁸ It has, therefore, been difficult to understand why some legal advisors would then refer their battered and batterer clients for couple's counseling where the same power imbalance and lack of protections exist.

XV. IF NEEDED, ENSURE ECONOMIC EMPOWERMENT OF THE VICTIM THROUGH REFERRALS TO GUIDANCE COUNSELORS, JOB AND EDUCATIONAL COUNSELING, JOB TRAINING AND MENTOR PROGRAMS.

A. *Given that the lack of money forces many victims to return to the perpetrator, attorneys and courts must provide information about achieving economic self-sufficiency.* Part of improving our interventions with abuse victims and offenders is to expand the notions of what constitutes the practice of law; to make the driving force the response to the question, “What action will increase victim safety?”¹⁸⁹ For many victims, part of that answer lies in their need for money. Thus, a critical component of safety planning is economic empowerment.

B. *While domestic violence spans all income groups, fleeing it is exacerbated by lack of financial resources and job skills.* Upper income abuse victims often report that the perpetrator

¹⁸⁴ Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2131-32 (1993).

¹⁸⁵ V.T.C.A. Civil Prac. and Rem. Code sec. 154.002.

¹⁸⁶ See e.g. the Travis County standing order that all jury trial cases, and those non-jury matters longer than half a day, must be referred to mediation. “Order concerning Mediation of Cases Set on the Merits, Travis County District Clerk's File No. 121,012 In the District Courts of Travis County, Texas, pg. 1, as cited in Melanie Kane-Gonzales, *supra* note 83 at 24; Currently 29 states allow some form of mediation in divorce cases. Rita Henley Jensen, *Divorce-Mediation Style*, 83 ABA JOURNAL 56 (February, 1977).

¹⁸⁷ V.I.C.A. *supra* note 125 at sec. 154.052.

¹⁸⁸ Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39, 44 (1990).

¹⁸⁹ Attorney Loretta Fredrick, speaking at Minnesota Legal Services Domestic Violence Conference, August, 1994.

controls all the finances, intentionally precluding access to even minimal living expenses. Without information about job and educational opportunities, too many victims are forced to return to the abuser. It is imperative that all intervenors incorporate into their practices a mechanism for asking victims about their economic status, their life plans and then, creating a step-by-step “action plan” to achieve financial independence. Children, teens and some batterers can also benefit from this process. Many professionals, such as attorneys (whether prosecution, defense, family or other), physicians (whether surgeons, pediatrician, obstetrician-gynecologists or other), and a range of professionals may initially think that it is beyond the purview of their job to delve into matters of economic empowerment with abuse victims or offenders. However, if life-planning is the best mechanisms to achieve safety, that professional then has the legal obligation to engage in such a process and make appropriate referrals.

C. Even as an emergency resource, welfare benefits are increasingly unavailable to domestic violence victims, making our efforts at economic empowerment all the more necessary. Welfare programs fail to provide enough money with which to support a family of any size, given that three-quarters of the states pay less than \$400. per month in benefits for a family of three. Additionally, when adjusted for inflation, every state has reduced their welfare benefits from 1970 to 1996, ranging from Texas slashing theirs by 68 percent to California cutting 18 percent. Currently, a family of three in Tennessee receives just \$185. per month, Texas provides \$208. per month in welfare benefits, while the same family in Washington state would get \$546.¹⁹⁰ Not surprising, then, that for women and children, family violence is the leading cause of homelessness and poverty.¹⁹¹ In the climate of current backlash against the poor, true reform offering meaningful job and education counseling, training and connections must be insisted upon from our government *and* the private sector. It is incumbent upon the community to ensure that the focus shifts to enable victims to *empower themselves*, utilizing the resources made available through the above initiatives, including *affordable* and safe child care.

XVI. EFFECTIVE BATTERER INTERVENTION SYSTEMS MUST BE UTILIZED TO HOLD PERPETRATORS ACCOUNTABLE.¹⁹²

Batterer’s intervention programs should not be viewed as a panacea, particularly without other community support services in place. Certainly, they have a greater chance of reducing recidivism if

¹⁹⁰Peter T. Kilborn, “Welfare All Over the Map,” *The New York Times*, December 8, 1996, p. E3, col. 1. Note that most of the states providing higher benefits are in the north, where heating and winter-related costs negate the small differential.

¹⁹¹ U.S. GAO, GAO/HEHS-95-28, WELFARE TO WORK 12 (1994); WASHINGTON STATE INST. FOR PUB. POLICY, OVER HALF OF THE WOMEN ON PUBLIC ASSISTANCE IN WASHINGTON STATE REPORTED PHYSICAL OR SEXUAL ABUSE AS ADULTS (1992); Jody Raphael, *Domestic Violence and Welfare Reform, POVERTY & RACE*, Jan./Feb. 1995, at 19; Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991); Maria Arias, *Lack of Housing for Domestic Violence Victims*, N.Y. L.J., July 26, 1988, at 3 (reporting that between 35% to 40% of the homeless population of New York City consists of battered women and their children); see B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 SOC. WORK 350 (1985). As cited in Lynn Hecht Schafran, *There’s No Accounting For Judges*, 58 ALB. L.REV. 1063, 1074 (1995).

¹⁹² Contact the Battered Women’s Justice Project for information about reputable batterer’s intervention programs and general information regarding batterers: #1-800-903-0111.

the police and courts treat domestic violence seriously and will ensure that sanctions result from violations. Comprehensive, recent research indicates that arrest and court-ordered batterer's intervention programs appear to result in sustained violence cessation.¹⁹³ Lawyers representing batterers also wield much influence in their clients' attitudes toward counseling and intervention programs.¹⁹⁴ Just as counsel would say to a recidivist drunk driver client, so too a batterer should be told, "You can't keep doing this. You have to choose to stop or you may ruin your life." Some defense attorneys now condition their representation on the batterer making diligent efforts to successfully complete a certified batterer's intervention program, as this appear to be most helpful to the client.¹⁹⁵

As a starting point, it is helpful to learn more about the perpetrators. The following "batterer profile" is not meant to describe every abuser, but rather to offer several generalized, common characteristics in an effort to provide insight, and thus, better shape the interventions forcing offenders to choose not to be violent.¹⁹⁶

A. Batterer's public behavior is frequently quite different from their private actions.¹⁹⁷

Many abusers are charming, charismatic and non-violent around others, and indeed, even with the victim -- at first. It is important for family, friends, co-workers, judges and others to not challenge the victim's credibility based on the batterer's stature and public behavior. Experienced batterer's experts report that public behavior is not an accurate predictor of who will commit violence toward a partner.

B. Most batterers do not have a problem with anger or "poor impulse control," rather they exert what Dr. David Adams calls "a planned pattern of coercive control". Since many of us were sending perpetrators to short-term "anger management" programs in the belief that we were helping, it was shocking to learn from renowned batterer's experts that most abusers are not "out of control" or angry. On the contrary, they use anger to manipulate and control their partners and children. As Paul Kivel, the co-founder of the Oakland Men's Project, says, "Anger is not the problem."¹⁹⁸

C. Excusing and minimizing the violent behavior is a common tactic of batterers.

1. "I lost control." Some victims believe their battering partners just "lost it,"¹⁹⁹ but batterer's experts tell us that probably less than five percent of batterers are "out of control". By listening to perpetrators *and* examining their behavior, counselors have learned that the violent behavior is most

¹⁹³ Gondolf, *supra* note 2 at 200.

¹⁹⁴ Lee S. Rosen, *Zealous and Ethical Representation of Batterers* in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, pp. 2-25 to 2-28 (1996).

¹⁹⁵ *Id.*

¹⁹⁶ *See, generally*, Lundy Bancroft, *supra* note 2.

¹⁹⁷ Lundy Bancroft, *Id.* at 69; David Adams, *supra* note 5 at 23.

¹⁹⁸ Paul Kivel, UNLEARNING VIOLENCE: A BREAKTHROUGH BOOK FOR VIOLENT MEN AND ALL THOSE WHO LOVE THEM, How To Replace Domestic Abuse With New Rules and New Roles, Real Power and Responsible Action, p. 100 (1992). *See also*, Bancroft, *supra* note 2 at 387, "Anger and conflict are *not* the problem; they are normal aspects of life."

¹⁹⁹ *Id.* at 119.

often deliberate.²⁰⁰ While there are some batterers who exhibit generalized violence, most will not assault the police officer who gives them a speeding ticket or their boss who yells at them for being late to work. Indeed, most abusers with a criminal record have either assaulted other intimate partners or been convicted of drunk driving or substance abuse offenses.²⁰¹

2. ***“She drove me to it”*** is an excuse of batterers who are intent to blame others for their violent behavior.²⁰² Dr. Adams explains that those abusers who have not been held accountable are quick to divert attention from their crimes by claiming to be the *real* victim. Too often, he says, the focus becomes the victim’s behavior, which “is a disservice to the abuser because it reinforces his denial of responsibility.”²⁰³

3. ***“I was drunk so you should forget it.”*** ranks high among the abuser’s excuses. In spite of the high correlation between substance abuse and domestic violence,²⁰⁴ batterer’s experts report that, while the alcohol or drugs might act as a disinhibitor, they do not *cause* the violence. Therefore, it is imperative that abusers who exhibit both violence and substance abuse, have two separate problems for which they must be held accountable and get help.²⁰⁵

4. ***The batterer’s manipulation of the children frequently increases after separation ranging from direct threats to forcing their collusion in further harassment of the battered victim.***²⁰⁶ Batterers may demand that the children spy on their mother, then report any interactions with males or behavior he considers suspicious. In the presence of the children, cursing, name-calling, threats and excessive criticism of the victim are also common. Particularly when a protective order prohibits direct contact, many abusers use the children to relay their threatening messages or pleas to return home.²⁰⁷

²⁰⁰ Bancroft, *supra* note 2 at 33-37.

²⁰¹ Nancy Isaac, Donald Cochran, Marjorie Brown, and Sandra Adams, *Men Who Batter, Profile From a Restraining Order Database*, 3 ARCH. FAM. MED. 50 (Jan. 1994).

²⁰² Lundy Bancroft, *supra* note 2 at 22; David Adams, *supra* note 5 at 24.

²⁰³ Adams, *Id.*

²⁰⁴ *Id.* at 25, citing studies reporting from 48 to 70 percent correlation between substance abuse and family violence; and see Bancroft, *supra* note 2 at 151-209, *Chapter 8, Abusive Men and Addicton.*

²⁰⁵ Bancroft, *Id.* at 209.

²⁰⁶ Adams, *supra* note 5 at 24 and 25.

²⁰⁷ Bancroft, *supra* note 2 at 100-101; and Anne Ganley, Ph.D., presentation to Washington State Judges Domestic Violence Conference, November 18, 1999 in Seattle, WA. (Dr. Ganley has 23 years experience running batterer’s intervention programs.)

5. In order to reduce recidivism, batterer's intervention programs must be long-term,²⁰⁸ culturally competent,²⁰⁹ and behavior-based²¹⁰, with community support to provide sanctions for new incidents²¹¹ and on-going partner contacts.²¹² Professor Gondolf's research indicates that while almost half of the men recidivated within the 4-year follow-up, most did so within the first 9 months after starting a batterer's intervention program. 2 ½ years after the initial assault, more than 80% of the men had not recidivated within the prior year, and at the 4-year mark, more than 90% had not reassaulted their partners for at least a year.²¹³ Furthermore, Dr. Gondolf reports a decrease in the severity of the reassaults, as well as a pronounced reduction in the verbal abuse, threats and controlling behaviors of the batterers. The most accurate indicators for the recidivist batterers were the victims' predictions of further abuse and the men's intoxication, in addition to those typical of other violent offenders: a lengthy criminal record, prior severe assaults against intimate partners, and serious mental illness.²¹⁴

Former batterer Hamish Sinclair runs a long-term batterer's intervention program, called Man Alive, in San Francisco, Sacramento and Marin Counties in California, as well as in the California Prison System. Man Alive is a *three year* program, designed to allow successful participants to act as co-facilitators in their last year. Mr. Sinclair states that his program's success is due in part to its length, but also to the fact that participants are taught both that their violence is inexcusable *and* that they can go back to their communities to teach others to be non-violent.²¹⁵

²⁰⁸ Experts suggest that a minimum of one year is essential since many batterers do not even emerge from the denial phase for about six months. At the Pivot Project in Houston, the Men's Education Network in Tyler (TX.) and Family Services of Beaumont, (TX.) Inc., batterers are encouraged to continue attending sessions after completing the standard program. As with Man Alive, some of these "graduates" are then able to confront the new batterers entering the program with a myriad excuses. At the Family Diversion Network in Austin (TX.) and the Women's Haven of Tarrant County batterers who have finished their program can attend a weekly support group. For more information about batterer's intervention programs, contact the Battered Women's Justice Project at #1-800-903-0111 (they are one of five national domestic violence resource centers).

²⁰⁹ See Oliver J. Williams and R.Lance Becker, *Domestic Partner Abuse Treatment Programs and Cultural Competence: The Results of a National Survey* in VIOLENCE and VICTIMS (1994).

²¹⁰ See above discussion as to the contraindication of "Anger Management" programs since domestic violence is not about the inability to control anger, but, rather is based on the abuse of power and control with violence. Thus, Dr. David Adams asserts, batterers need to be taught that they will be held responsible for their actions, just as everyone else is.

²¹¹ The Quincy (MA.) Court Probation Department's Domestic Violence Unit (Chief Andy Klein and Deputy Chief Bruce Carr) takes a tough, no-nonsense approach to batterers who violate the terms and conditions of their pre-trial release or sentences. By establishing a "revocation session" every Tuesday morning, Presiding Judge Charles Black further reinforces the message that there will be sanctions for the violation of protective or any other court orders.

²¹² Beth Ledoux, a survivor and veteran legal advocate, also served as the post-conviction liaison with victims at the Quincy (MA.) Court Probation Department. As a result of her on-going contacts and safety planning, the Court was able to dramatically increase the number of victims reporting violations and seeking obtaining the help they needed to escape.

²¹³ Gondolf, *supra* note 2 at 200.

²¹⁴ *Id* at 202.

²¹⁵ Presentation by Hamish Sinclair, Sacramento County District Attorney's Domestic Violence Conference, Sacramento, CA., May 5, 1998.

6. Ensure that adolescent batterers' programs have an intervention methodology and curriculum that focus on victim safety and offender accountability. The Massachusetts Department of Public Health has promulgated *PILOT PROGRAM SPECIFICATIONS for Intervention with Adolescent Perpetrators of Teen Dating and Domestic Violence*. The eleven-page outline provides guidelines for establishing such a program, complete with sections addressing 3.3 *Minimum Qualifications For Program Staff*, 4.0 *Intervention Methodology*, 4.1 *Inappropriate Methods*, 4.2 *Educational Component* (with ten suggested topic areas), 5.0 *Client Intake*, 5.1 *Evaluation* (of batterers) and various other necessary sections.²¹⁶ Nashville's *TeenPEACE* (Project to End Abuse through Counseling and Education) provides intensive group sessions for adolescent males who have assaulted a female and are on probation. Through the juvenile court, the 12-week program intervenes with at-risk youth. "Through knowledge attainment, skill building and attitude change, *TeenPEACE* helps participants end domestic violence in their relationships and in their community. *TeenPEACE* helps participants identify the abusive or controlling behaviors they use and teaches them *abstinence based* skills for solving conflicts and handling disappointments in a positive and non-abusive manner."²¹⁷

7. Ensure that prevention programs are undertaken in the schools to teach our youth non-violent tactics for problem solving. Since 1989, Austin's *Expect Respect* program has provided a stellar model of school based intervention and education, operating in elementary, middle and high schools. In addition to classroom presentations, they offer support groups, individual counseling as well as staff training and technical assistance, and evaluation. Fully administered by the *SafePlace* shelter, the program was able to exponentially expand as a result of their receiving a Centers for Disease Control grant.²¹⁸

8. Ensure that attorneys, law enforcement and other powerful batterers are disciplined according to the law. Attorneys who batter their partners are violating the American Bar Association's Model Code of Professional Conduct, as well as state law.²¹⁹ Several states have taken such cases seriously. New Jersey's Supreme Court, in *In the Matter of Lawrence G. Magid*,²²⁰ and in *In the Matter of Salvatore Principato*,²²¹ ruled that these lawyers' conviction for assault against their partners constituted a violation of Rule 8.4. Not only did the Court order a public reprimand of

²¹⁶ This document, dated May 14, 1999, may be obtained from the Massachusetts Department of Public Health at # (617) 624-5497.

²¹⁷ From the *TeenPEACE* brochure, PEACE, Inc. 211 Union Street, Suite 615, Nashville, TN 32701, phone # (615)255-0711.

²¹⁸ From the *Expect Respect, SafePlace School-Based Services, Promoting Safe & Healthy Relationships for All Youth*, brochure and hand-out, dated January 14, 1999. The *Expect Respect* Curriculum is available for \$35. or a free information packet, from phone # (512) 385-0662, SafePlace attn: Expect Respect, P.O. Box 19454, Austin, TX 78760.

²¹⁹ Rule 8.4 specifies that it is a professional misconduct for a lawyer to "(b) commit a criminal act. . ."; as cited in Heidi McNeil, *disciplining Attorneys Who Have Battered Their Partners*, 1 DOMESTIC VIOLENCE REPORT 1 (April/May 1996).

²²⁰ 655 A.2d 916 (N.J. 1995).

²²¹ 655 A.2d 920 (N.J. 1995).

the lawyers, but also stated: “We caution members of the bar, however, that the court in the future will ordinarily suspend an attorney who is convicted of an act of domestic violence.”²²²

Similarly, anyone convicted of specific misdemeanor domestic violence crimes or while subject to a Protection Order is prohibited from possessing guns or ammunition under the 1996 amendment to the Gun Control Act of 1968.²²³ This law, also known as the Lautenberg Amendment (so named for the bill’s sponsor, Frank Lautenberg (D-N.J.)), applies to law enforcement officers, as well as all other citizens.

XVII. ROLE OF PROBATION AND PAROLE

*A. Pre-Trial probation conditions should mandate weapon forfeiture, no contact with victims, psychological evaluations and other accountability measures that will increase victim safety.*²²⁴

*B. Post-adjudication probation conditions should be geared to accomplish punishment, retribution, rehabilitation, and victim safety.*²²⁵ As **punishment**, the Quincy Court’s Probation Department ordered financial penalties, including court fees, fines, and necessary attorney fees for the victim if she must face the abuser in custody or divorce matters. Routinely, community work service was ordered to buttress the abuser’s understanding that domestic violence constitutes a crime against the whole community. Curfews, short-term jail sentences, or house arrest with intensive probation supervision or electronic monitoring can also be utilized. To effect **retribution**, a batterer must pay restitution for all costs the victim incurs as a result of the crimes, including destruction of her property, changing locks, unreimbursed medical and counseling bills, and moving expenses. Compliance with child support orders should also be mandated. **Rehabilitation** efforts consist of (court-ordered) completion of a certified, batterer’s intervention program and, if indicated, substance abuse treatment, including random drug tests.²²⁶ An order to abstain from using drugs and alcohol can help the offender, particularly if a violation results in an immediate revocation hearing. **Victim safety** measures should require adherence to all existing court orders, including child support and protective orders. The offender should surrender all firearms for the duration of his probation, and cooperate with requests for supervised visitation.²²⁷

C. Specially trained probation enforcement teams should ensure compliance with pre-trial and post-conviction court orders. All probation and parole officers should be trained to handle domestic violence issues within their caseloads. Under the leadership of Chief Probation

²²² McNeil, *supra* note 151 at 2.

²²³ Gun Control Act, 18 U.S.C. 922 (g).

²²⁴ FAMILY VIOLENCE, STATE-OF-THE-ART COURT PROGRAMS, NAT’L COUNCIL of JUVENILE & FAMILY COURT JUDGES 76 (1992);

²²⁵ THE QUINCY COURT MODEL DOMESTIC ABUSE PROGRAM MANUAL 36 (1994).

²²⁶ *Id.*

²²⁷ *Id.* at 38.

Officer Andy Klein and Director of the Probation Department's Domestic Violence Unit Bruce Carr, the Quincy (MA.) District Court's Probation Department ensured all staff received on-going training.²²⁸

XVIII. ALL RELEVANT STAKEHOLDERS SHOULD PARTICIPATE IN THEIR LOCAL FAMILY VIOLENCE COUNCIL TO ENSURE ON-GOING EFFORTS TO IMPROVE THE LEGAL SYSTEM.²²⁹

Across the country, lawyers, advocates, judges, law enforcement, probation officers and other intervenors have been instrumental in starting and maintaining Family Violence Councils, found to be one of the best mechanisms for reform.

A. *Judges, lawyers and probation officers are particularly powerful systems' change agents and have the responsibility to work toward improving the courts.* To address the concern of some judges that such involvement might compromise their obligation to maintain the appearance of neutrality, Judge Stephen Herrell²³⁰ has written an article assuring them that it is, in fact, their *responsibility* to become involved in improving the justice system. Judge Herrell argues that, not only should judges serve on family violence councils, but can be instrumental in bringing together the necessary players to create an effective system.²³¹ Starting, chairing and/or serving on a Family Violence Council can increase the morale of judges, practicing attorneys, court staff and the myriad community players who participate.

B. *The Family Violence Council must be multi-disciplinary, diverse and inclusive.* Not only does the Council need the court-related personnel (prosecutors, advocates, law enforcement, probation/parole, clerks and judges), but also defense and family law attorneys, child protective services, CASA's, clergy, educators, legal aid, corrections, public housing staff, survivors, medical and mental health providers, business representatives, and other interested citizens. It is essential that the racial and cultural diversity of the community be reflected within the Council membership. Additionally, within each profession invited to attend, the top decision-makers should also bring their front-line staff. The police chief is wanted for his/her power to ensure solid policies, but the officers who directly respond to domestic violence calls are needed, as well.

²²⁸ I worked with both Andy Klein and Bruce Carr from 1991 – 1996 at the Quincy District Court, and took part in many of their training programs.

²²⁹ See Leonard Edwards, Honorable, *Reducing Family Violence: The Role of the Family Violence Council*, JUV. & FAM. COURT J. 1-17 (1992); Edwin Kelly, *The Judge's Role in Domestic Violence Cases*, N.H. BAR J. 37-41 (June 1994); and for packet of information call the National Council of Juvenile and Family Court Judges Family Violence Project #1-800-52-PEACE.

²³⁰ Judge Stephen B. Herrell is the '97-'98 President of the National Council of Juvenile & Family Court Judges. He is a judge in the Multnomah County Court in Portland, Oregon.

²³¹ Stephen B. Herrell, Honorable. *The Judge as Key Player in an Effective Community Response to Family Violence*, FAMILY VIOLENCE: STATE-OF-THE -ART COURT PROGRAMS, National Council of Juvenile and Family Court Judges, (1992).

C. The Council should probably have rotating co-chairs, with most of the work done in committees. All members should have an opportunity to co-chair meetings, setting the agenda, sending out notices and running the meeting. There are some rare exceptions, in which a judge or other member serving as chair is adept at keeping the momentum of the Council, while making ensuring maximum utilization of all participants. Sometimes a Council can be re-energized by involving more members in the leadership roles and becoming action focused. If the Council's work is done in designated committees (maybe children/ Child Protective Services issues, court issues, legislative, shelter, etc.), each committee is free to set its own agenda, recruit the needed players and avoid any one issue taking over the larger meetings.

D. Meetings should be held monthly, at a convenient location and with snacks. No community is so lacking in family violence-related problems that they can afford to meet less frequently than monthly. Minimal as it may seem, refreshments can help create a positive association with Council meetings.

E. An action-oriented, three-prong approach should be taken toward problem solving. The first prong involves the Council participants honestly identifying the challenges and problems their community faces. Second, they name who is responsible for ensuring the needed changes happen. Finally, the Council must devise an action plan, utilizing their members, to bring about the reforms.²³²

XIX. ENSURE THAT ALL EMPLOYERS, INCLUDING SHELTERS, PROSECUTORS, LAW ENFORCEMENT, COURTS AND ALL INTERVENORS, ADOPT POLICIES TO ADDRESS DOMESTIC VIOLENCE IN THE WORKPLACE.

Employers can play a powerful role in helping stop domestic abuse and can be held liable for their failure to adequately protect victims in the workplace.²³³ The family of Francesca LaRose agreed to a settlement of \$350,000. from Houston's State Mutual Life Assurance Company and the Duddleston Management Company, after Ms. LaRose was murdered at work in 1995. Ms. LaRose had requested that her employer help protect her from ex-boyfriend, Patrick Thomas, who had threatened to murder her. Sadly, her employer's response was to admonish Ms. LaRose to keep her personal problems out of the workplace.²³⁴ Similarly, a San Francisco jury awarded \$5 million dollars to the families of a battered woman's co-workers, who were murdered at work by the woman's estranged husband. The victim's employer, the Equitable Life Assurance Society, denied assistance,

²³² See also Sarah M. Buel, *Family Violence Council to the Rescue to Coordinate Your Resources*, THE TEXAS PROSECUTOR 12 (July/August 1997).

²³³ See e.g. *Yunker v. Honeywell, Inc.*, 496 N.W. 2d 419 (1993) for negligent response to threats; *Degenhart v. Knights of Columbus*, 420 S.E. 2d 495 (1992) for negligent retention and supervision; *Coath v. Jones*, 419 A.2d 1249 (1980) for negligent failure to warn; *Vaughn v. Granite City Steel*, 576 N.E. 2d 874 (1991) for premises liability; and 29 U.S.C. sec. 654(a)(1) OSHA regulations with general duty to provide safe workplace. See www.cavnet.com for copy of excellent law student paper and model guidelines, *Employers Beware! Ignoring Domestic Violence Costs You Money* by Courtney McQuien (1999).

²³⁴ Joseph Pereira, "Employers Confront Domestic Abuse," THE WALL STREET JOURNAL, March 2, 1995, p. B1, col.1.

thus endangering not only the victim, but her co-workers, as well.²³⁵ Employers have a responsibility to provide all employees with a copy of written guidelines, covering treatment of victims and offenders in the workplace. At a minimum, employers should make available SAFETY PLANS and community resource information, and the National Hotline #1-800-799-SAFE.

Employers are urged to follow the Polaroid Corporation's model, which not only provides victims with company time for individual counseling and/or support groups, but also allows up to three weeks paid leave for victims to handle their affairs (go to court for a protective order or bail hearing, move, etc.), and up to one year unpaid leave with a guarantee of their present job back. Dr. James Hardeman, the manager of their employee assistance program, also meets with every perpetrator-employee to explain that his continued employment is dependent upon not reoffending and the successful completion of a certified, one-year batterer's intervention program.²³⁶ All employers, from police departments and hospitals, to two-person practices and courts, should have such a policy that makes victim safety a priority. If more employers adopt guidelines clarifying that we are here to help prevent further harm, many more victims and their children could be alive tomorrow. Additionally, batterers may obtain the interventions they need to avoid recidivism and possibly prison.

An outstanding model which could be replicated in most areas is the "Polaroid CEO Project". Polaroid's CEO Gary DiCamillo recruited about sixty other Massachusetts' corporate CEO's to enlist their company's support in "adopting" a domestic violence program (mostly shelters) or visitation center. The corporations are not asked to give large cash donations, though they are certainly free to do so. Rather, the corporations work with their adopted programs to identify needs (such as maintenance, financial planning, fundraising, etc.) for which the company could help. One of Polaroid's additional contributions was to pledge to provide job training to one hundred battered women per year, enabling them to learn valuable job skills, while gaining economic empowerment and self-esteem. This is the program through which Newton-Wellesley (MA.) Hospital adopted their local shelter, providing free medical care and financial planning, among other assistance.

XV. CONCLUSION

This article has offered recommendations for improving lawyers,' judges' and probation officers' interventions in domestic violence legal matters regarding children and their families, but it is hoped that other intervenors will also find it useful. We should be celebrating that domestic violence victims and children are increasingly turning to the courts for protection from abuse. Retired Nashville Police Lt. Mark Wynn says we have the privilege of making the law keep its promise to abuse victims: affording them equal protection, due process and freedom from domestic tyranny. As Lt. Wynn has shown with his 20 years of remarkable efforts in Nashville, one key is applying *gentle, relentless pressure* to achieve the protections our victims deserve. We can interrupt the intergenerational cycle

²³⁵ *Tepel v. Equitable Life Assurance Society* (1990).

²³⁶ To receive more information about the Polaroid Corporation's Domestic Violence Guidelines and other employer assistance, you may contact the Workplace Violence Project (of the Family Violence Prevention Fund) at #415-252-8900.

of learned abuse by teaching our children that the community will not tolerate the violence. “We have a choice,” Judge Dale Harris says, “Will our children and their mothers have homes they can run to or homes they must run away from?”²³⁷

²³⁷ Judge Dale Harris presides over the Juvenile and Family Court in Lynchburg, Va.