

Reviled Mothers¹: Custody Modification Cases Involving Domestic Violence

MEGAN SHIPLEY*

Consider the following custody case: Amy and Brandon Webb had a daughter together in March 2003.² Their marriage ended about two and a half years later, and they agreed as part of their divorce to share parenting time equally.³ For the first year after the divorce, they were able to agree on an equal visitation schedule, but as of the summer of 2006, their daughter stayed with Amy most of the time and saw Brandon only every other weekend.⁴

Amy started dating a man who was abusive. In the fall of 2007, he assaulted her and she escaped to a domestic violence shelter with her daughter, who was then about five years old.⁵ While at the shelter, Amy got an order of protection against her ex-boyfriend.⁶ Amy also became friends with another mother at the shelter, and they moved in together with their children when they left the shelter.⁷

In January 2008, Amy started dating a new boyfriend and allowed him to stay overnight while her child was in the house.⁸ Her abusive ex-boyfriend violated the protective order at least once in early 2008.⁹ In March 2008, Brandon filed a motion to modify the parenting plan because he was concerned about the effect of domestic violence on his daughter and about Amy's ability to care for the child.¹⁰ He alleged that Amy had abused drugs and alcohol and that she was not taking the child to school regularly.¹¹

This case demonstrates several factors common in custody modification cases involving domestic violence: the child had been exposed to severe violence, the degree of danger from the abusive ex-boyfriend was uncertain but seemed to be significant and ongoing, the living situation of the mother and child had become

1. "Battered women who are mothers are reviled." ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 148 (2000).

* J.D. Candidate 2011, Indiana University Maurer School of Law; B.A. 2008, Kenyon College.

2. *Webb v. Webb*, No. M2008-02039-COA-R3-CV, 2009 WL 3321038, at *1 (Tenn. Ct. App. Oct. 14, 2009).

3. *Id.*

4. *See id.* This change in the custody was informal and was never approved by a court. *See id.* at *2.

5. *See id.* at *1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* The appeals court did not say whether the ex-boyfriend's violations of the protective order were violent. *See id.*

10. *See id.* At the time of the custody hearing, Brandon was employed, while Amy was living on disability payments and other government assistance. *Id.* at *6; *see also id.* at *5 (stating that father could provide the "stability" that the child needed).

11. *Id.* at *1. There had also been a report made to the Department of Child Services (DCS) because of bruises on the child's back, but the DCS did not find any indication of abuse or neglect. *Id.* at *1-2.

unstable as a result of the domestic violence, and there were allegations that the mother was not a good parent. The outcome in Amy and Brandon's case was also typical of these types of cases. The trial court designated Brandon as the primary residential parent and gave Amy only limited visitation.¹² A year later, the appellate court upheld the decision because of the instability in Amy's life caused by the "poor personal choices she has made with respect to the men she has become romantically involved with and whom she allows to come into contact with the child."¹³

Scholars and advocates for victims of domestic violence have long argued that courts should take seriously the harmful effects of domestic violence on children.¹⁴ In "typical" custody cases involving domestic violence—that is, where an abused mother and her abusive ex-husband or ex-boyfriend are disputing the custody of their shared children—there is often significant bias against abused mothers, and courts tend to disbelieve or minimize mothers' accounts of domestic violence.¹⁵ Almost all states now have statutes that require or allow judges to consider domestic violence in making custody decisions.¹⁶ Even with these statutes in place, however, victims of domestic violence often face considerable difficulties in getting courts to take domestic violence seriously in custody disputes.

But there is one type of private custody case, like *Webb v. Webb* described above, where courts do seem willing to view domestic violence as a significant threat to children: when a mother who has physical custody of her children is abused by a new boyfriend or husband, and the biological father of the children asks a court to grant him custody to prevent the children from being exposed to domestic violence.¹⁷ In these cases, it is the father rather than the mother who is asking the court to consider evidence of domestic violence, and the threat to the

12. *Id.* at *2. The trial court's order did not include specific findings of fact. *Id.* at *4.

13. *Id.*

14. *E.g.*, Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

15. *See infra* Part II.B.

16. *See* Kristina C. Evans, Note, *Can a Leopard Change His Spots?: Child Custody and Batterer's Intervention*, 11 DUKE J. GENDER L. & POL'Y 121, 125 & nn.35–36 (2004) (listing the state statutes and describing some variations in how they work). These statutes were passed in the late 1980s and the 1990s in response to what was seen as a failure of the courts to give appropriate weight to domestic violence in custody cases. *See Cahn, supra* note 14, at 1062–71.

17. This Note refers to abused women (mothers) and abusive men (boyfriends and husbands) because nearly all of the cases discussed involve male-to-female violence. *But see* Warren v. Warren, No. 2009-CA-000979-ME, 2010 WL 135174, at *2 (Ky. Ct. App. Jan. 15, 2010) (discussing, in a custody modification case, allegations that the custodial mother was the "aggressor" in a domestic violence incident with her boyfriend). A gendered depiction of domestic violence is also appropriate because most studies show that male-to-female intimate partner violence is much more common than female-to-male. *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1702–10. Although some studies do show that there is significant female-to-male intimate partner violence, these studies measure *frequency* of violence rather than context or severity. *Id.* Female violence is likely to be self-defensive or cause only minor injury, while male violence is more likely to be aggressive and severe. *Id.*

children comes from a new boyfriend or husband (and from the mother who has “allowed” her children to be exposed to the violence) rather than from the children’s biological father. As this Note demonstrates, courts in these cases generally seem willing to change custody to the father.

These are difficult cases. On the one hand, it is very important for children to be protected from the potential physical and emotional harms associated with exposure to domestic violence. On the other, the change in custody will further disrupt a child whose life may already be chaotic. Taking custody away from an abused mother seems to penalize her for being the victim of domestic violence, and it discourages other mothers from seeking help or reporting domestic violence for fear of losing custody of their children.

This Note examines this type of custody modification case, which has not previously received much attention in the academic literature.¹⁸ It analyzes how courts approach the issues in these cases, and it argues that courts are often hostile toward abused women and that they lack an understanding of the dynamics of domestic violence. It then argues that this bias against abused mothers is harmful to individual mothers and children involved in cases and to victims of domestic violence generally. This Note does not argue that mothers should always retain custody in these situations, but rather that the cases show courts’ bias against them.

Part I discusses background information on the standards courts use to make custody decisions. Part II describes the effects that witnessing domestic violence can have on children and discusses how courts generally approach custody decisions involving domestic violence. It argues that abused mothers are often at a disadvantage in custody cases because of the biases of the courts and because of the challenges that result from domestic violence. Part III examines how these biases affect a narrow category of custody cases: fathers’ requests for custody modification because of domestic violence perpetrated against the mother by her new boyfriend or husband. Part IV discusses whether bias against abused mothers should be considered in making custody modification decisions. It argues that a less biased approach will reduce unnecessary transfers of custody and reduce the disincentive for mothers to seek help for domestic violence. Finally, Part V discusses cases in which courts have *not* granted fathers’ requests for custody

18. The most extensive discussion of this type of case appears in Leslie Joan Harris, *Failure to Protect from Exposure to Domestic Violence in Private Custody Contests*, 44 FAM. L.Q. 169 (2010). Professor Harris describes cases in which courts have transferred custody to the father because of the child’s exposure to domestic violence while in the mother’s care, and she compares these private custody cases to failure-to-protect cases brought by child protection systems. *See id.* at 178–86. Professor Harris suggests legislative and judicial changes to improve judges’ access to evidence about the domestic violence and ultimately to improve outcomes for children. *See id.* at 192–95.

There is also a brief discussion of this type of case in Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2112 (1993). Ms. Horne identifies cases in which courts changed custody because of a stepfather’s violence toward the mother, and she concludes that these types of modification decisions are not likely to be affected by judges’ gender bias. *Id.* However, she recognizes that “these cases are painful in that they punish those who are subject to abuse rather than those who are abusive.” *Id.*

modification despite the fact that the children were exposed to domestic violence while in their mothers' care, and it identifies what is different about these courts' approaches.

I. STANDARDS FOR INITIAL CHILD CUSTODY DECISIONS AND CUSTODY MODIFICATIONS

Today, every state uses some type of "best interests of the child" standard to make initial child custody decisions upon the divorce or separation of the parents.¹⁹ This standard instructs judges to do a case-by-case analysis of the best interests of the children involved, with no presumption in favor of either mothers or fathers.²⁰ Most states lay out factors that judges may or must consider, such as the child's relationship with each parent; the parents' and child's wishes; the child's adjustment to home, school, and community; the mental and physical health of all individuals involved; and evidence of domestic or family violence.²¹ The purpose of these lists of factors is to make judges' custody decisions more specific and predictable.²² But because most states' statutes do not instruct judges on how much weight to give each factor, judges have significant discretion in making custody decisions, and it is often difficult to predict what a judge will do in a particular case.²³

After the initial custody determination has been made, courts can modify the arrangement, but they are generally hesitant to do so because of the importance of maintaining stability and continuity in the child's life.²⁴ Most states require trial courts to find (1) that there has been a substantial change in circumstances since the original custody determination and (2) that the modification of custody is in the

19. DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 685–86 (2d ed. 2006); MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 152–59 (2005). This Note uses the term "custody" for uniformity and clarity, but some states have moved away from this term. Tennessee, for example, uses the term "primary residential parent" rather than "custodial parent." *See, e.g.,* Webb v. Webb, No. M2008-02039-COA-R3-CV, 2009 WL 3321038, at *2 (Tenn. Ct. App. Oct. 14, 2009). Indiana uses the term "parenting time" rather than "visitation." INDIANA PARENTING TIME GUIDELINES, INDIANA RULES OF COURT, available at <http://www.in.gov/judiciary/rules/parenting/index.html>.

20. *See* ABRAMS ET AL., *supra* note 19, at 686.

21. *See* GUGGENHEIM, *supra* note 19, at 152; *see, e.g.,* IND. CODE ANN. § 31-17-2-8 (West 2008).

22. *See* Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 472 (1999).

23. *See id.* at 472–73 (describing the weaknesses of a "factors" approach).

24. *See* ABRAMS ET AL., *supra* note 19, at 837; Michael G. Ruppert, Joseph W. Ruppert & Joni L. Sedberry, *Recent Developments: Indiana Family Law*, 41 IND. L. REV. 1021, 1045 (2008) (citing *In re Marriage of Kenda*, 873 N.E.2d 729, 737 (Ind. Ct. App. 2007)).

best interests of the child.²⁵ At the second step, the court will engage in a best interests evaluation using the statutory factors described above.²⁶

Most states require that the change in circumstances be a change in the custodial parent's circumstances, "not on improvements in the non-custodial parent's circumstances that might have supported that parent's initial custody claim."²⁷ A few states allow modification based solely on the best interests of the child and do not require a substantial change in circumstances,²⁸ and states also vary about how significant the change has to be.²⁹ But in general, courts are reluctant to change custody arrangements, and appellate courts are likely to defer to the trial courts' decisions about whether a change in circumstances has occurred and whether modification of custody is in the best interests of the child.³⁰

II. DOMESTIC VIOLENCE AND INITIAL CUSTODY DECISIONS

A. *The Effects on Children of Witnessing Domestic Violence*

There has been extensive research on the harmful effects on children of witnessing domestic violence or living in a home where there is domestic violence.³¹ While researchers and experts agree that there are many potential

25. *E.g.*, IND. CODE ANN. § 31-17-2-21 (West 2008); *see* ABRAMS ET AL., *supra* note 19, at 837.

26. *See supra* text accompanying note 21.

27. ABRAMS ET AL., *supra* note 19, at 838. For example, a noncustodial parent's recovery from mental illness is usually not enough to justify modification of custody, even though he or she would likely have had a better chance of gaining custody if he or she had been healthy at the time of the initial custody decision. *Id.*

28. *Id.* These states include Georgia, Kansas, and New Hampshire. *Id.*

29. In Ohio, for example, the change "need not be a substantial one, but must be more than a slight or inconsequential change." *McClay v. Reed*, No. 2004CA-4, 2004 WL 3563008, at *1 (Ohio Ct. App. Dec. 29, 2004) (citing *Davis v. Flickinger*, 674 N.E.2d 1159, 1162 (Ohio 1997)). In contrast, Indiana requires the change in circumstances to be "so decisive in nature as to make a change in custody necessary for the welfare of the child." *In re Paternity of Winkler*, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000). In Tennessee, courts must consider "(1) whether the change occurred after the entry of the order sought to be modified; (2) whether the change was known or reasonably anticipated when the order was entered; and (3) whether the change is one that affects the child's well-being in a meaningful way." *Webb v. Webb*, No. M2008-02039-COA-R3-CV, 2009 WL 3321038, at *3 (Tenn. Ct. App. Oct. 14, 2009) (citing *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003)).

30. *See, e.g.*, *Walker v. Nelson*, 911 N.E.2d 124, 128 (Ind. Ct. App. 2009) ("Judgments in custody matters generally turn on essential factual determinations and will be set aside only when they are clearly erroneous. We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." (citation omitted)).

31. Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk and Resilience Framework for Research and Intervention*, 22 J. FAM. VIOLENCE 151, 155 (2007) ("Almost one hundred published studies report associations between exposure to intimate partner violence and current child problems or later adult problems.").

In a significant number of families where there is domestic violence, there is also child abuse or maltreatment. *See id.* (summarizing studies that have found high co-

negative effects on children, there is little agreement about the frequency and permanence of these harms.

Parents in abusive relationships often try to protect children from witnessing the abuse, but most children in violent families do witness either the abuse or its effects, such as mothers' injuries.³² Even when parents believe that they have successfully shielded their children from exposure to the abuse, children are often able to give "detailed descriptions about the pattern of escalating violence."³³

Children who witness domestic violence may experience a number of negative psychological effects. Young children may suffer nightmares and sleep disturbances, as well as insecurity, fear of being abandoned, and "excessive clinging to adults."³⁴ Children of all ages also exhibit more internalizing behavior (anxiety, depression, and withdrawal) and externalizing behavior (aggression and destruction) than their peers who are not exposed to domestic violence.³⁵ They may develop post-traumatic stress disorder,³⁶ and they may suffer negative impacts on their cognitive and academic development.³⁷

Exposure to domestic violence can cause children to feel responsible for the violence or to feel that they have to protect their mothers or siblings.³⁸ Teenagers may cope with the stress by using drugs or alcohol, and they often become involved in abusive dating relationships themselves.³⁹ Teenage boys who have been exposed to domestic violence are more likely to become abusers, and girls are "less likely to question violence" in their dating relationships.⁴⁰

occurrence of child abuse and adult domestic violence); Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134, 136 (1999). This Note only discusses cases in which there are allegations of domestic violence and not child abuse. Child abuse cases often involve state agencies like Child Protective Services, and so they raise a range of practical and legal issues that are beyond the scope of this Note.

32. N. Zoe Hilton, *Battered Women's Concerns About Their Children Witnessing Wife Assault*, 7 J. INTERPERSONAL VIOLENCE 77, 80, 83 (1992).

33. Stephen E. Doyne, Janet M. Bowermaster, J. Reid Meloy, Donald Dutton, Peter Jaffe, Stephen Temko & Paul Mones, *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, JUV. & FAM. CT. J., Spring 1999, at 1, 3.

34. *Id.* at 4.

35. See Patricia Van Horn & Betsy McAlister Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions*, JUV. & FAM. CT. J., Winter 2006, at 51, 52 (summarizing the literature on the effects on children of witnessing domestic violence).

36. *Id.*

37. See Allison C. Morrill, Jianyu Dai, Samantha Dunn, Iyue Sung & Kevin Smith, *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1077 (2005); Van Horn et al., *supra* note 35, at 52–53.

38. Doyne et al., *supra* note 33, at 4; see *McClay v. Reed*, No. 2004CA-4, 2004 WL 3563008, at *3 (Ohio Ct. App. Dec. 29, 2004) (describing a counselor's testimony in a custody modification case that the child who witnessed domestic violence "does not see her mother as a protector, but rather sees herself as the protector of her baby sister Ashley").

39. Doyne et al., *supra* note 33, at 4.

40. *Id.*

Children may also be physically injured as a result of domestic violence against their mother. In one recent survey of abused mothers, “[o]ver a third reported their children were accidentally injured during an incident of adult domestic violence, and over a quarter reported the abusive partner intentionally injured their children when the child intervened to stop abuse of their mother.”⁴¹

Despite the very serious potential for negative effects on children, not all children are affected the same way, and some may not be greatly affected or may be able to recover quickly.⁴² A study of children living with their mothers in domestic violence shelters found that different children react differently to exposure to domestic violence:

In contrast to prior research suggesting that children exposed to domestic violence exhibit increased levels of virtually all kinds of behavioral and emotional problems, our cluster analysis indicated that close to one third (30%) of children developed both internalizing and externalizing problems and that a similar number (31%) did not exhibit any signs of maladjustment. Others demonstrated only externalizing (21%) or only internalizing (18%) problems.⁴³

Similarly, another study of children living in a domestic violence shelter found that about 60% of the children were “not distressed” or “very mildly distressed,” meaning that they had low or average numbers of behavioral problems, no anxiety or mild anxiety, and average or high levels of self-esteem.⁴⁴ The other 40% of the children did develop more severe problems.⁴⁵

41. Lyungai F. Mbilinyi, Jeffrey L. Edleson, Annelies K. Hagemester & Sandra K. Beeman, *What Happens to Children When Their Mothers Are Battered? Reports from a Four City Anonymous Telephone Survey*, 22 J. FAM. VIOLENCE 309, 315 (2007).

42. See Cris M. Sullivan, Jennifer Juras, Deborah Bybee, Huong Nguyen & Nicole Allen, *How Children’s Adjustment Is Affected by Their Relationships to Their Mothers’ Abusers*, 15 J. INTERPERSONAL VIOLENCE 587, 589 (2000).

43. See John H. Grych, Ernest N. Jouriles, Paul R. Swank, Renee McDonald & William D. Norwood, *Patterns of Adjustment Among Children of Battered Women*, 68 J. CONSULTING & CLINICAL PSYCHOL. 84, 91 (2000).

44. Honore M. Hughes & Douglas A. Luke, *Heterogeneity in Adjustment Among Children of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 185, 198–99, 205 (George W. Holden, Robert Geffner & Ernest N. Jouriles, eds. 1998).

45. *Id.* at 205. A few studies have found virtually *no* differences between children who are exposed to domestic violence and their peers from nonviolent homes in terms of depression, behavioral problems, and social competence. See Sullivan et al., *supra* note 42, at 588–89 (summarizing the literature) (“[The data] raise the issue that a significant proportion of the children in question do not seem to be clinically depressed or acting out, and that some children appear to be more resilient than others following exposure to domestic violence.”). For example, a study of children whose mothers had been battered in the previous four months found that the children’s average score on a self-competency scale was within the normal range. *Id.* at 598–99, 590–91. This study aimed to test whether the identity of the abuser (biological father, stepfather, or non-father-figure) affected the degree of impact on children. *Id.* at 589. It found that children who were exposed to violence perpetrated by their biological fathers had lower self-competency scores as compared to children who were exposed to violence by their stepfathers or non-father-figures. *Id.* at 598–

These studies show that some children do not suffer severe, long-term effects from their exposure to domestic violence. One expert described this surprising result: “[O]ne of the most dramatic experiences that advocates in the domestic violence movement have had is watching [children’s] problems that seem to be quite profound and clinically significant abate after a relatively short period of safety . . . and security was provided.”⁴⁶

B. Initial Custody Decisions Involving Domestic Violence

This subpart discusses how custody decisions are made in the typical custody case involving domestic violence, that is, when an abused mother and her abusive ex-husband or ex-boyfriend are disputing the custody of their shared children. Scholars and advocates have documented the difficulties and biases that abused mothers face in these types of custody cases.⁴⁷ This subpart provides an overview of these issues as a basis for comparison to the cases that are the main focus of this Note: requests for custody modifications because of the custodial mother’s abusive relationship with a new intimate partner.

1. Frequency of Domestic Violence in Custody Cases

A surprisingly high number of litigated custody cases involve domestic violence. According to studies cited by the American Bar Association, 25% to 50% of “disputed custody cases involve domestic violence.”⁴⁸ Other studies have placed the rate somewhere between 11% and 15%.⁴⁹

99. However, the average scores of all groups were within the normal range on a self-competency scale. *Id.*

46. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 198 (E.D.N.Y. 2002) (third alteration in original) (quoting testimony of expert Evan Stark). *Nicholson* is a recent high-profile case that examined at length the question of the impact on children of exposure to domestic violence. In *Nicholson*, abused mothers challenged New York’s practice of prosecuting mothers and putting their children in foster care because of the mothers’ “failure to protect” the children from exposure to domestic violence. *Id.* at 163–64. Although it raised similar issues, *Nicholson* is different from the custody modification cases that are the focus of this Note because *Nicholson* dealt with state action rather than private custody disputes.

47. This subpart only discusses biases that affect abused mothers when they contest custody in court, because the focus of this Note is on custody modification cases that are decided by courts. But it is important to note that abused mothers are disadvantaged in all aspects of the custody process, including those outside the courtroom. For example, an abuser may use the mediation process to emotionally and physically intimidate his ex-spouse. Clare Dalton, Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, JUV. & FAM. CT. J., Fall 2003, at 11, 21–22. An abused mother might also agree to a reduced financial settlement in exchange for custody of her children. See SCHNEIDER, *supra* note 1, at 168–69; Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 191 (1992).

48. AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, 10 MYTHS ABOUT CUSTODY AND DOMESTIC VIOLENCE AND HOW TO COUNTER THEM (2006) [hereinafter ABA, 10 MYTHS], available at http://www.abanet.org/domviol/custody_myths.pdf (citing SUSAN L. KEILITZ, NATIONAL CENTER FOR STATE COURTS, DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 4–8 (1997), and Janet R. Johnston, *High-Conflict Divorce*, FUTURE OF CHILD., Spring 1994, at 165).

49. See Mary A. Kernic, Daphne J. Monary-Ernsdorff, Jennifer K. Koepsell & Victoria

Because of the potential harm to children from domestic violence, described in Part II.A, a straightforward consideration of the best interests of the child would suggest that courts would try to keep children away from their abusive fathers.⁵⁰ But in fact, a history of abuse does not appear to affect abusive fathers' ability to get custody in disputed custody cases.⁵¹ A study of custody disputes in Seattle, Washington, showed that allegations of male-to-female domestic violence did not affect the rate at which mothers and fathers were awarded custody, as compared to cases where there were no allegations of domestic violence.⁵²

2. Courts Tend Not to Consider or Believe Abused Mothers' Testimony About Domestic Violence

Abused mothers face a number of difficulties in getting judges to acknowledge domestic violence and to believe that it has occurred. This subpart summarizes some of these difficulties, including problems getting evidence of domestic violence into the record, the perception of abused mothers as overdramatic or hysterical, and judges' frustrations with parents whom they believe to be overly litigious and uncooperative.

Sometimes, evidence of the violence is never entered into the record. One study of custody disputes in Seattle, Washington, evaluated the divorce and custody case files of couples who had histories of "police- or court-reported" intimate partner violence (meaning that official records that supported the allegations of violence were easily available).⁵³ Almost half of these case files did not mention domestic violence at all, and an additional 28.9% included unsubstantiated allegations of domestic violence but did not include the police or court records that would have provided support for the allegations.⁵⁴ Keep in mind that this study focused on cases where there were official records of domestic violence; in many cases, there is no "verifiable evidence" and abused mothers can only offer their own testimony of what happened.⁵⁵

L. Holt, *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 992 (2005) (summarizing literature that suggests that more than 150,000 of the one million children who are subject to custody determinations each year live in homes with domestic violence); *id.* at 1005, 1013 (finding that 11.4% of divorce and custody proceedings in Seattle, Washington in 1998–1999 involved domestic violence, and extrapolating this rate to the whole United States).

50. See ABA, 10 MYTHS, *supra* note 48 (listing the belief that "[a]busive fathers don't get custody" as one of ten myths about custody and domestic violence).

51. An ABA publication even argues that abusive fathers are more likely than nonviolent fathers to seek and get sole custody. ABA, 10 MYTHS, *supra* note 48.

52. Kernic et al., *supra* note 49, at 1006. The authors of the study noted that all women, whether or not they were victims of intimate partner violence, were much more likely than men to get custody of their children, which could affect the authors' "ability to detect group differences." *Id.* at 1014.

53. Kernic et al., *supra* note 49, at 999–1001.

54. *Id.* at 1005, 1013.

55. Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 183–84 (2009).

Factors that contribute to the absence of consideration of domestic violence in custody cases include “inadequate screening for [intimate partner violence] by family courts”⁵⁶ and the “lack of coordination of domestic violence services across different courts and the consequent failure to apply findings of [intimate partner violence] from other courts to the custody proceedings.”⁵⁷ Women are often reluctant to tell attorneys, judges, or other officials about domestic violence because of shame, fear of retaliation from the abuser, or a belief that abuse is normal or acceptable.⁵⁸ Abused women also “tend to minimize and deny abuse while understating the amount and severity of abuse.”⁵⁹ Finally, many parties in custody and divorce cases proceed pro se, which means that abused mothers are themselves responsible for making the court aware of histories of domestic violence and producing evidence to support the allegations.⁶⁰

Despite the prevalence of domestic violence, particularly in child custody disputes,⁶¹ and despite the tendency of abused women to deny or minimize the abuse,⁶² judges tend to doubt women’s testimony and to expect it to be exaggerated.⁶³ This unwillingness to believe abused mothers may result in part from general bias against female witnesses since “judges and other key players in

56. Kernic et al., *supra* note 49, at 1013–14 (citing Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 567 (2003), and Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 371 (George W. Holden, Robert Geffner & Ernest N. Jouriles, eds. 1998)).

57. *Id.* at 1014 (citing LOUIS W. MCHARDY & MEREDITH HOFFORD, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FINAL REPORT OF THE CHILD CUSTODY AND VISITATION FOCUS GROUP (1999), and Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 FORDHAM URB. L.J. 875 (2000)).

58. See SCHNEIDER, *supra* note 1, at 104–08; FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 397 (2003) [hereinafter PENNSYLVANIA REPORT] (“To maintain her safety, a survivor may at first feel compelled to withhold information, or may blame herself, thereby accepting the abuser’s distorted version of events.”).

59. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 684 (2003).

60. See Kernic et al., *supra* note 49, at 1014; *cf.* PENNSYLVANIA REPORT, *supra* note 58, at 394 (describing the difficulties faced by domestic violence victims who represent themselves at protective order hearings).

61. See *supra* notes 48–52 and accompanying text.

62. Meier, *supra* note 59, at 684.

63. Interestingly, judges seem to be willing to believe allegations of domestic violence in other contexts, such as protective order hearings. Meier, *supra* note 59, at 667–71. Extensive activism and efforts at judicial education have made it possible to successfully allege domestic violence in some types of cases (which was often impossible as recently as the 1980s), but once children are involved, judges become much more reluctant to believe victims. *Id.* at 667–71, 686.

our legal system generally view women as less credible than men.”⁶⁴ Abused women are at a particular disadvantage because of judges’ lack of knowledge about patterns of domestic violence and their tendency to interpret victim’s stories as irrational or overdramatic:

[W]hen exaggeration is at issue there is a good probability that the person suspected of offering the offending testimony is a woman. . . .

The victim’s story may seem to defy logic. Without a great understanding of the dynamics of intimate partner violence, a judge may question the ability of an individual to tolerate such severe acts of violence for so long. As a result, the judge may question the actual level of violence or the victim’s motives if she remained in the abusive relationship for an extended period of time.⁶⁵

Many abused women do not appear credible in court because they are “angry or emotional” and may be suffering from post-traumatic stress disorder, which can cause them “to over-react to ostensibly trivial issues, to display a strange lack of affect when discussing the violence, or to giggle inappropriately.”⁶⁶ Abusers, on the other hand, are often calm, charming, and believable in court.⁶⁷ Abusers are often able to convince themselves and others that they have done nothing wrong and that their intimate partner is the one who is somehow at fault.⁶⁸

One survey of abused women and victim advocates found that abused mothers were treated as “hysterical and unreasonable” in their interactions with judges, family services officials, and guardians ad litem.⁶⁹ Feminist writers have argued that abused women are characterized as dysfunctional, weak, or crazy, and therefore unable to take care of their children: “[The stereotype of battered women] blames women for not leaving, instead of men for perpetrating the abuse; it also characterizes ‘batteredness’ as deviant, abnormal, and different from what ‘normal’ women experience.”⁷⁰

Finally, judges tend to see abusive relationships as “messes” or “disasters” with both sides contributing to the arguments and violence, even when one parent is clearly the aggressor.⁷¹ In an extreme example from a custody case, a judge chastised both parties for assaulting each other; the father had broken into the mother’s home and stabbed her, and the mother hit him with a vase in self-defense.⁷² When there are allegations of violence by both parties, even when one party is more aggressive and dangerous, judges tend to “neutralize” the allegations

64. Conner, *supra* note 55, at 176.

65. *Id.* at 176–77 (citations omitted).

66. Meier, *supra* note 59, at 691–92 (citation omitted).

67. *Id.* at 690–91.

68. *Id.*

69. *Id.* at 672 (quoting Kristen Lombardi, *Custodians of Abuse*, BOS. PHOENIX, Jan. 9, 2003) (citing BATTERED MOTHERS’ TESTIMONY PROJECT, WELLESLEY CTRS. FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (2002)).

70. SCHNEIDER, *supra* note 1, at 170.

71. See Meier, *supra* note 59, at 692–93.

72. *Id.* at 693 (describing a custody case from Professor Meier’s own practice).

and treat the parties as having equal blame and equal standing to get custody of the child.⁷³

All of these factors tend to make judges disbelieve or minimize allegations of domestic violence, which is compounded by the fact that these allegations are presented in the adversarial setting of custody disputes.⁷⁴ Both parents are litigants who have motivation to lie or exaggerate about the other party because one will win and the other will lose, and the stakes of who will get custody of the children are very high. When the father tells a “reasonable” story about the mother’s vindictiveness and instability, and the mother has a strange affect and tells an “unreasonable” story about extreme abuse, the judge is more likely to believe that the mother is lying or exaggerating.

3. Effect of Domestic Violence on Mothers’ Economic and Emotional Stability

It is very difficult to leave a relationship involving domestic violence. The period of separation is one of the most dangerous times in a violent relationship for the victim, and there is a high risk of severe abuse when a woman announces her intention to leave or actually does leave.⁷⁵ Leaving a violent relationship also throws many women into financial instability, and they may have to live in domestic violence shelters or in a series of temporary homes for a time after the separation.⁷⁶ Unfortunately, women’s efforts to end violent relationships are sometimes interpreted by the courts as indicating parental instability; for example, a woman who moves into temporary housing may be found to have disrupted her child’s education or to be unable to provide safe, stable housing.⁷⁷ This can hurt women in custody disputes:

[D]omestic violence is itself responsible for many of the conditions and phenomena that then are used as independent ground for assessing what represents children’s welfare. In this sense, not only is violence not addressed, but its workings also are deeply and invisibly embedded in how we resolve questions of children’s interests.⁷⁸

In addition, domestic violence may actually affect mothers’ ability to parent. Drug and alcohol abuse is common among abused women as a way of dealing with the violence.⁷⁹ Domestic violence also causes depression, anxiety, sleep disturbances, emotional numbing, and other mental disorders, which may interfere

73. *Id.* at 692–93.

74. *See id.* at 684–86.

75. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64–65 (1991).

76. *See* Jennifer L. Woolard & Sarah L. Cook, *Common Goals, Competing Interests: Preventing Violence Against Spouses and Children*, 69 UMKC L. REV. 197, 212 (2000).

77. *Id.*

78. Martha McMahon & Ellen Pence, *Doing More Harm than Good? Some Cautions on Visitation Centers*, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 186, 201 (Einat Peled, Peter G. Jaffe & Jeffrey L. Edleson eds., 1995).

79. *See* Meier, *supra* note 59, at 696–97.

with parenting abilities.⁸⁰ If the court that is deciding the custody case looks only at the parents' current ability to control and nurture the children, mothers who have been severely affected by domestic violence may appear to be less capable parents than the abusers.⁸¹ A narrowly focused consideration of parenting skills fails to take into account why the mother is depressed or traumatized, or that her "craziness" may be the result of the violence.⁸²

III. CUSTODY MODIFICATION WHEN THE MOTHER IS ABUSED BY A NEW INTIMATE PARTNER

Given the difficulties that abused mothers have getting courts to believe and act on their allegations of domestic violence, it is surprising to find a category of cases in which courts do take domestic violence seriously: cases where a father asks the court to modify custody because of domestic violence perpetrated against the mother by her new intimate partner. In these cases, courts appear to take to heart the arguments made by advocates about the harmful effects of domestic violence on children.⁸³ It would seem to be encouraging that courts are taking domestic violence seriously and recognizing the actual and potential harms for children in violent households.⁸⁴ The results in these cases are "consistent with the general view that living with domestic violence is both traumatic and physically dangerous to children,"⁸⁵ and judges who make these decisions put forward compelling arguments about the safety of the children involved. But a troubling pattern emerges in these cases: women who are victims of domestic violence are losing custody of their children *because of* their victimization.

80. *See id.*; Dalton et al., *supra* note 47, at 20.

81. Meier, *supra* note 59, at 697.

82. *See id.*

83. For example, in a custody modification case that centered on domestic violence perpetrated against the mother by her boyfriend, the Supreme Court of Alaska cited two law review pieces that discuss the harmful effects on children of witnessing domestic violence. Iverson v. Griffith, No. S-11843, 2006 WL 2578692, at *4 n.11, n.14 (Alaska Sept. 6, 2006) (citing Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 832-33 (2000), and Rachel L. Melissa, Comment, *Oregon's Response to the Impact of Domestic Violence on Children*, 82 OR. L. REV. 1125, 1128-29 (2003)).

84. *See, e.g.*, Dennis v. Dennis, 1990 WL 207392, at *5 (Tenn. Ct. App. Dec. 19, 1990). In this case, a noncustodial father successfully requested sole custody of his seven-year-old daughter. *Id.* at *2, *5. The trial court stated that children can suffer harm from domestic violence even when they do not witness it directly: "[T]he disharmony in the home has got to be transmitted over to the child whether the child actually sees it or not . . . [T]he child has to sense the frustration that exists between the mother and a stepparent." *Id.* at *5 (quoting and agreeing with the trial court's decision). Another Tennessee court also recognized the potential for future harm to a child who was living in a home with domestic violence, even though a psychiatrist and a social worker found that the child had suffered no ill effects up to that point. Peters v. Peters, No. 02A01-9810-CH-00283, 1999 WL 285891, at *2-3, *8 (Tenn. Ct. App. May 10, 1999).

85. Horne, *supra* note 18, at 2112.

Feminist scholars engage in a practice of “asking the woman question” as a way to “identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.”⁸⁶ For example, feminists ask: What are women’s experiences of the “life situation” addressed in this area of law?⁸⁷ What assumptions about gender or about experiences does the law make?⁸⁸

This Note asks the woman question by challenging the neutral explanations for the tendency of courts to take custody away from mothers who are abused by their new intimate partners. It asks why it is abused women who are generally the losers in these cases, and it examines how courts understand and portray these women.

A review of the relevant cases shows how difficult they are; the violence is often horrific, and in some cases the threat of harm to the children is apparent. Abused mothers emerge as complicated and sometimes unsympathetic actors. But unpacking the revulsion that observers and judges sometimes feel about the mothers in these cases reveals important biases and assumptions. This Part focuses on how courts understand and react to abused mothers.

The cases described in this Part follow the same general fact pattern: after a mother and father separate or divorce, the mother becomes involved in an abusive relationship with a new boyfriend or husband, and the father petitions the court to modify custody to protect the children from exposure to the violence.⁸⁹ This Part

86. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

87. Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN’S L.J. 64, 72–73 (1985).

88. *Id.* at 74.

89. I have based my analysis on thirty-nine cases from fifteen states, all following the same basic fact pattern. These cases are all appellate cases that appear in reporters or on electronic databases. I have included cases from as long as twenty years ago, but I have focused on more recent cases. The cases include: *J.M. v. D.V.*, 877 So. 2d 623 (Ala. Civ. App. 2003); *Bratton v. Romine*, 819 So. 2d 58 (Ala. Civ. App. 2001); *Iverson v. Griffith*, No. S-11843, 2006 WL 2578692 (Alaska Sept. 6, 2006); *Handley v. Handley*, No. CA 08-21, 2008 WL 4724105 (Ark. Ct. App. Oct. 22, 2008); *John O. v. Margaret E.*, No. D054020, 2009 WL 2564846 (Cal. Ct. App. Aug. 19, 2009); *In re Paulson*, No. CS99-03153, 2006 WL 4555227 (Del. Fam. Ct. Sept. 15, 2006); *R.J.J. v. S.C.*, No. CN95-09779, 2004 WL 2334312 (Del. Fam. Ct. Apr. 20, 2004); *H.B. v. J.R.*, No. 36A01-1005-JP-255, 2010 WL 5387476 (Ind. Ct. App. Dec. 29, 2010); *Fisher v. Fisher*, No. 37A03-0609-CV-415, 2007 WL 914621 (Ind. Ct. App. Mar. 28, 2007); *In re Marriage of Engle*, No. 09-1055, 2010 WL 446987 (Iowa Ct. App. Feb. 10, 2010); *P.C. v. S.C.*, No. 2008-CA-001873-ME, 2009 WL 960682 (Ky. Ct. App. Apr. 10, 2009); *T.L. v. T.M.*, No. 2007-CA-001877-ME, 2008 WL 4271038 (Ky. Ct. App. Sept. 19, 2008); *Snyder v. Snyder*, No. 2005-CA-002074-ME, 2006 WL 1195927 (Ky. Ct. App. May 5, 2006); *Chapman v. Chapman*, No. 2002-CA-001816-MR, 2003 WL 21513513 (Ky. Ct. App. July 3, 2003); *Rongstad v. Rongstad*, No. C1-00-1727, 2001 WL 1328404 (Minn. Ct. App. Oct. 22, 2001); *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999); *Pruett v. Prinz*, 979 So. 2d 745 (Miss. Ct. App. 2008); *Scott QQ v. Stephanie RR*, 905 N.Y.S.2d 347 (N.Y. App. Div. 2010); *Rue v. Carpenter*, 893 N.Y.S.2d 696 (N.Y. App. Div. 2010); *Martin v. Martin*, 878 N.Y.S.2d 475, 477 (N.Y. App. Div. 2009); *Wentland v. Rousseau*, 875 N.Y.S.2d 280 (N.Y. App. Div. 2009); *Battista v. Fasano*, 838 N.Y.S.2d 178 (N.Y. App. Div. 2007); *Drew v. Gillin*, 792 N.Y.S.2d 691 (N.Y. App. Div. 2005); *Assini v. Assini*, 783 N.Y.S.2d 51 (N.Y. App. Div. 2004); *Scialdo v. Kernan*, 754 N.Y.S.2d 406 (N.Y. App. Div. 2003); *K.D. v. J.D.*, No. V-16584-03, 2004 WL 1753417 (N.Y. Fam. Ct. June 30, 2004); *Pheasant v. McKibben*, 396 S.E.2d 333 (N.C. Ct. App. 1990); *Wartman v.*

argues that courts (1) fail to recognize that mothers are acting in the context of domestic violence, (2) view abused mothers as inherently bad parents because of their involvement with domestic violence, (3) fail to recognize abused mothers' parenting abilities, and (4) sometimes transfer custody to a noncustodial father who has committed domestic violence in the past. This Note argues that these tendencies demonstrate bias against abused mothers in this type of custody modification case.

A. Failure to Recognize the Context of Domestic Violence

Abused mothers' actions can seem bizarre and irrational if they are considered without reference to the context of domestic violence,⁹⁰ and this subpart argues that courts tend not to recognize the context of domestic violence when making custody modification decisions. Courts view mothers' abusive relationships with new intimate partners as bad parenting choices, and they blame mothers for economic and emotional instability that was caused at least in part by the domestic violence. Mothers therefore end up with two strikes against them: they are victims of domestic violence *and* they are making bad parenting choices; they are victims of domestic violence *and* they have financial problems; they are victims of domestic violence *and* they are emotionally unstable. This subpart does not argue that the mothers in these cases should always retain custody, but rather it argues that courts treat abused mothers unfairly by considering the effects of domestic violence as independent of the context of domestic violence.

1. Abusive Relationships as Bad Parenting Choices

Courts sometimes view mothers' abusive relationships with new husbands or boyfriends as irresponsible choices. In *Fisher v. Fisher*, a 2007 Indiana case, the trial court agreed with a custody evaluator who found that the mother was "currently making bad parenting decisions" in part because of her reconciliation with her second husband, who had been charged with domestic battery about nine months before the custody hearing.⁹¹ Similarly, an Alaska trial court described a

Livengood, No. 2009CA00284, 2010 WL 5071111 (Ohio Ct. App. Nov. 29, 2010); Sheppard v. Brown, 2008 WL 186670 (Ohio Ct. App. Jan. 11, 2008); McClay v. Reed, No. 2004CA-4, 2004 WL 3563008 (Ohio Ct. App. Dec. 29, 2004); Webb v. Webb, No. M2008-02039-COA-R3-CV, 2009 WL 3321038 (Tenn. Ct. App. Oct. 14, 2009); *In re* T.C.D., 261 S.W.3d 734 (Tenn. Ct. App. 2007); McEvoy v. Brewer, No. M2001-02054-COA-R3-CV, 2003 WL 22794521 (Tenn. Ct. App. Nov. 25, 2003); Peters v. Peters, No. 02A01-9810-CH-00283, 1999 WL 285891 (Tenn. Ct. App. May 10, 1999); Newport v. Newport, No. 03A01-9712-JV-00543, 1998 WL 820765 (Tenn. Ct. App. Nov. 24, 1998); Bjork v. Bjork, No. 01A01-9702-CV-00087, 1997 WL 653917 (Tenn. Ct. App. Oct. 22, 1997); Smith v. Smith, No. 03A01-9508-CH-00292, 1996 WL 33177 (Tenn. Ct. App. Jan. 30, 1996); Dennis v. Dennis, 1990 WL 207392 (Tenn. Ct. App. Dec. 19, 1990); Cobb v. Cobb, 2 P.3d 578 (Wyo. 2000).

90. *See supra* text accompanying notes 69–70.

91. 2007 WL 914621, at *3 (quoting the trial court's opinion). The court made a permanent modification of physical custody of the two children from the mother to the father because of the domestic violence between the mother and her second husband, the second husband's use of marijuana and alcohol, and the mother's failure to commit fully to counseling or to pursue additional education. *Id.*

child's exposure to domestic violence perpetrated by the mother's boyfriend as "poor judgment on the part of her mother."⁹²

This view that mothers are making irresponsible choices by staying with their abusive intimate partners assumes that mothers could have (and should have) left.⁹³ It characterizes mothers' actions as irrational "choices," when in fact they may not have been irrational, or they may not have been choices at all. Although the cases seldom provide details about the financial situations of the mothers, we do know that the mother in *Fisher* was not fully employed at the time of the custody hearing.⁹⁴ She had also been prevented by a previous court order from moving with her children to a different county to be closer to her mother and pursue a career as a dental hygienist.⁹⁵ Perhaps this mother was struggling financially and had few options for herself and her children other than staying with her abusive second husband. But the custody evaluator's opinion (and the trial court's endorsement of it) characterizes her reconciliation with her second husband as an irresponsible and irrational choice. When a mother's actions are framed as simply poor parenting choices, without consideration of the difficulties and pressures that domestic

92. *Iverson*, 2006 WL 2578692, at *3 (quoting the trial court's opinion).

Another recent example of this "poor decision making" language comes from *H.B. v. J.R.*, an Indiana case: "There is no question in the Court's mind that [the mother] loves her children. However, the evidence has raised substantial and legitimate questions about her judgment in exposing her children to an unstable environment where domestic violence has occurred and where ongoing risks of domestic violence exist." 2010 WL 5387476, at *2 (quoting and affirming the trial court's order). In this case, the evidence of domestic violence came from the protective order the mother had obtained against an ex-boyfriend because of his physical violence and threats. *Id.* at *1-2.

In other cases, a court's characterization of a mother's action as a "decision" strains credibility. In *Scialdo v. Kernan*, 754 N.Y.S.2d 406 (N.Y. App. Div. 2003), the mother called the police multiple times because of her third husband's violence:

In another example of poor decision-making, after having her most recent former husband removed from the home for domestic violence that was witnessed by [her son] and required police intervention, she allowed him back into the home two days later only to have him arrested for a second incident of domestic violence, again witnessed by her son.

Id. at 408. This description of the violence puts the blame squarely on the mother for her "decision" to allow her former husband to enter the home and commit violence so severe that it required police intervention. But this version of events doesn't make much sense; although we do not have any facts beyond what the court has provided, it seems unlikely that the mother had much of a choice about allowing her former husband into the home or that she had any control over what he did once he was there. Despite the court's apparent bias against the mother, however, there was substantial evidence that supported the court's decision, including evidence of the mother's drug and alcohol abuse and lack of supervision of the child. *See id.*

93. *See Mahoney, supra* note 75, at 61 ("The 'shopworn question' [of 'why didn't she leave?'] persists in the cases, legal scholarship, and social science literature. It reveals several assumptions about separation: that the right solution is separation, that it is the woman's responsibility to achieve separation, and that she could have separated." (footnote omitted)).

94. 2007 WL 914621, at *3.

95. *Id.* at *1.

violence creates, it is easier for courts to view them as dysfunctional, bad parents who should not be trusted with custody of their children.

Another example of the “choice” language appeared in *Webb v. Webb*, the case that introduced this Note. The court blamed the mother for the choices she had made that led to instability in her life:

The child is now entering kindergarten requiring a more stable home life in order to attend school and establish relationships with her classmates. Moreover, while the child’s life requires more stability, Mother’s life has become increasingly less stable due to poor personal choices she has made with respect to the men she has become romantically involved with and whom she allows to come into contact with the child.⁹⁶

Although most of the instability in the mother’s life—such as moving into a shelter and then moving in with a friend—resulted from domestic violence, the court portrayed the instability as the result of the mother’s poor choices.⁹⁷

2. Mothers’ Financial and Housing Problems After Leaving an Abusive Relationship

As described above,⁹⁸ the period immediately after leaving an abusive relationship can be extremely dangerous and unstable. Abused mothers may need to move with their children to a domestic violence shelter or to a series of friends’ or relatives’ houses, and courts sometimes fault mothers for this instability.⁹⁹ Courts may also fault abused mothers for their failure to retain steady employment in the aftermath of leaving abusive relationships.¹⁰⁰ In *P.C. v. S.C.*, the custodial mother had ended her relationships with two abusive boyfriends, but she and her child “had lived at various times in hotels and domestic violence shelters.”¹⁰¹ At the time of the custody hearing, the house she was renting had been foreclosed upon, and she was having trouble paying for utilities.¹⁰² The trial court transferred custody of the child to the father, finding that the mother “had not maintained steady employment . . . had lived in numerous places and often failed to provide [the child] with a suitable home.”¹⁰³ At least some of the mother’s financial and housing-related instability resulted from trying to leave violent relationships, but neither the trial court nor the appellate court acknowledged this connection.¹⁰⁴

96. *Webb v. Webb*, No. M2008-02039-COA-R3-CV, 2009 WL 3321038, at *4 (Tenn. Ct. App. Oct. 14, 2009).

97. *See id.* at *1.

98. *See supra* Part II.B.3.

99. *See supra* notes 76–78 and accompanying text.

100. *Cf. supra* notes 76–78 and accompanying text.

101. No. 2008-CA-001873-ME, 2009 WL 960682, at *1 (Ky. Ct. App. Apr. 10, 2009).

102. *Id.* at *3.

103. *Id.* at *1.

104. *See id.* at *3.

3. Emotional Problems Created by Domestic Violence

Domestic violence can also cause mothers to suffer emotional problems and to turn to drugs and alcohol.¹⁰⁵ In one sad case, the mother claimed to have been abused by the father during their marriage (although the court only mentioned and did not discuss this allegation), and she was also abused by her second husband.¹⁰⁶ She was initially awarded custody of the two children, but because of a nervous breakdown, alcohol and prescription drug abuse, and a stay at a mental health hospital, the court awarded emergency and then permanent custody of the children to the father.¹⁰⁷ The mother's mother told the court that she believed that her daughter's problems "resulted from her being a victim of domestic violence."¹⁰⁸ Although the facts (as presented by the appellate court) suggest that the mother may not have been able to be a good parent to her children at the time of the custody modification, it is problematic that the court did not seem to recognize any connection between the mother's history of being the victim of domestic violence and her substance abuse and mental health problems. Like the mothers who were faulted both for being in abusive relationships and moving to new housing to get out of them, this mother's history of abusive relationships, substance abuse problems, and mental health problems were treated as independent factors used to show that it was not in the best interests of the children for her to have custody.

B. Abused Mothers as Inherently Bad Parents

In custody modification cases, courts tend to view mothers who have been the victims of domestic violence as inherently bad mothers. This is demonstrated by cases in which courts discuss the mother's history of abusive relationships as a "personality trait," as well as cases in which courts transfer custody after the abusive relationship is over.

1. Abusive Relationships as a Personality Trait

As in other custody cases involving domestic violence, courts making custody modification decisions often view the mother as "dysfunctional."¹⁰⁹ In *Rongstad v. Rongstad*, a court changed custody from the mother to the father in part because the mother "[had] developed the personality trait of seeking out relationships with abusive individuals, thereby exposing her children to danger."¹¹⁰ In *Handley v. Handley*, a mother who had been involved in incidents of domestic violence with

105. See *supra* notes 79–82 and accompanying text.

106. See *In re Paulson*, No. CS99-03153, 2006 WL 4555227, at *2, *6 (Del. Fam. Ct. Sept. 15, 2006).

107. *Id.* at *1–2.

108. *Id.* at *6.

109. See Mahoney, *supra* note 75, at 46; see also *supra* notes 66–70 and accompanying text. Mahoney argues that cultural images of battered women as helpless and dysfunctional "may be interpreted as making [a battered woman] a poor model in childrearing and possibly a poor caregiver as well when custody is in question." Mahoney, *supra* note 75, at 49.

110. No. C1-00-1727, 2001 WL 1328404, at *2 (Minn. Ct. App. Oct. 22, 2001).

her second husband was lectured by the trial judge, “If nothing else, you’re overly dramatic and you’re overly histrionic, and it gets to a level of danger for you and for your children.”¹¹¹ When battered women are pathologized in this way, it makes it easier for courts to view them as bad, incompetent mothers.¹¹²

2. Modifying Custody Even After the Abusive Relationship Is Over

Courts seem willing to transfer custody from an abused mother to the father even after the abusive relationship is over. In *Assini v. Assini*, the mother filed the complaint that led to her abusive boyfriend’s arrest, obtained an order of protection against him, and apparently ended the relationship.¹¹³ Nonetheless, the trial court granted temporary custody to the father because the fact that the abusive boyfriend “was no longer residing with [the mother] because she had obtained an order of protection against him, did not overcome the detrimental effect of allowing the child to be subject to such repeated instances of domestic violence.”¹¹⁴ Similarly, a Tennessee appellate court reversed the trial court’s denial of custody modification because of the mother’s history of violent relationships, despite the fact that the court apparently believed that her current marriage was fairly stable, with no violent incidents for about a year and a half.¹¹⁵ These cases, in which courts order custody modification at least in part because of previous abusive relationships that no longer threaten to harm the children, seem to show that courts view abused mothers as inherently incapable parents who will never achieve stability or good parenting.¹¹⁶ Again, courts seem to view the abusive relationships as the mother’s fault.

C. Failure to Recognize Mothers’ Parenting Abilities

Courts are quick to point out children’s academic and social difficulties as support for modifying custody,¹¹⁷ and it is true that exposure to domestic violence

111. No. CA 08-21, 2008 WL 4724105, at *4 (Ark. Ct. App. Oct. 22, 2008). This case involved three incidents where both the mother and her second husband were violent. *Id.* at *1–2. In all three, the mother claimed that she acted in self-defense in response to her second husband’s violence. *Id.* at *3.

112. See SCHNEIDER, *supra* note 1, at 149.

113. 783 N.Y.S.2d 51, 53 (N.Y. App. Div. 2004). This case involved a temporary custody determination rather than a final one, but the same best interests of the child standard applied. *Id.*

114. *Id.* at 52–53.

115. *Peters v. Peters*, No. 02A01-9810-CH-00283, 1999 WL 285891, at *2, *8 (Tenn. Ct. App. May 10, 1999). After divorcing the father, the mother had had two violent marriages that ended in divorce. *Id.* at *1. She and her current husband had been involved in one incident of domestic violence while they were dating, which resulted in both being charged with aggravated assault. *Id.* at *2. There had been no incidents of domestic violence since then, and the trial court described them as appearing “to be doing very well.” *Id.* at *3.

116. See also *P.C. v. S.C.*, No. 2008-CA-001873-ME, 2009 WL 960682, at *2–3 (Ky. Ct. App. Apr. 10, 2009) (changing custody to the father in part because of the mother’s two abusive relationships, even though she had terminated the relationships).

117. See, e.g., *Dennis v. Dennis*, 1990 WL 207392, at *5 (Tenn. Ct. App. Dec. 19, 1990)

can cause problems with children's academic and cognitive development.¹¹⁸ But courts fail to credit abused mothers when their children are found to be doing well despite the domestic violence. In *Peters v. Peters*, a psychiatrist found that Brianna, a child whose custodial mother had been involved in three abusive relationships, was functioning well socially and academically and had no symptoms of psychiatric disorders.¹¹⁹ However, he warned that "[h]er current environment appears to be potentially unstable, unpredictable, and possibly violent. . . . Indeed, her current lack of psychiatric pathology is a tribute to her psychological resilience rather than her being in an ideal environmental setting."¹²⁰ The court recognized that the mother had been Brianna's primary caregiver and gave her some credit for Brianna's well-being.¹²¹ But the court endorsed the psychiatrist's assertion that Brianna's "psychological resilience" was largely responsible for her mental health and successes at school, and it awarded custody to the father.¹²² Despite Brianna's mother's achievement of providing her with "a suitable home, education and the necessities" while dealing with turbulence in her own life, the court decided to transfer custody to the father.¹²³ Courts do not recognize abused mothers' good parenting in bad situations.¹²⁴ This tendency illustrates Mary Becker's argument that "our culture tends to deny and hence undervalue women's caretaking of children."¹²⁵ Mothering by abused women becomes invisible; the value of Brianna's mother's seven years of caretaking, which resulted in an apparently happy and healthy child, was not given much weight by the courts.

D. Awarding Custody to Batterers

In some cases, courts have transferred custody from a mother who was abused by a new intimate partner to a father who had been abusive toward her in the past. In *Handley v. Handley*, the mother testified that she had been abused by the father during their marriage and that her children had told her about domestic violence between the father and his new girlfriend.¹²⁶ A friend who testified also supported

(citing child's poor academic performance as proof of the negative effect on the child of exposure to domestic violence).

118. See Morrill et al., *supra* note 37, at 1077; Van Horn et al., *supra* note 35, at 52; *supra* text accompanying note 37.

119. 1999 WL 285891, at *2.

120. *Id.*

121. *Id.* at *7.

122. *Id.* at *7-8.

123. *Id.* at *7.

124. See also *P.C. v. S.C.*, No. 2008-CA-001873-ME, 2009 WL 960682, at *2-3 (Ky. Ct. App. Apr. 10, 2009). The trial court spoke to the child and found that he "is an engaging young man and excelled in his academic performance at school. He would benefit from the increased stability of living primarily with his father." *Id.* at *3 (quoting trial court's opinion).

125. Becker, *supra* note 47, at 204.

126. No. CA 08-21, 2008 WL 4724105, at *4 (Ark. Ct. App. Oct. 22, 2008). Some evidence indicated that the mother in *Handley* had herself been violent, but she claimed that her violence was all in self-defense. *Id.* at *3.

these allegations about the father's violence.¹²⁷ The trial court transferred custody to the father, in part because it did not believe the mother's testimony.¹²⁸

Even in cases where there was strong evidence of domestic violence by the father, courts have transferred custody.¹²⁹ In *Fisher v. Fisher*, the father had been convicted of battery upon the mother during their marriage, which had ended six years before.¹³⁰ The mother was subsequently battered by her second husband, and the court transferred custody of the children to the father in part because of the domestic violence in the mother's new relationship.¹³¹ Neither the trial court nor the appellate court discussed the father's conviction for domestic battery, except to mention it in passing.¹³²

These cases reflect courts' confused attitude toward domestic violence. Courts emphasize the seriousness of the domestic violence in the mother's new relationship (where the mother is the victim) while simultaneously discounting or disbelieving evidence that the father himself perpetrated domestic violence in the past. Courts are even willing to ignore previous convictions for domestic violence—unmistakable evidence that the father was violent in the past.

127. *See id.* at *6.

128. *See id.* at *4. The trial court noted the mother's testimony about the abuse, but put more weight on the fact that the mother had wanted to reconcile with the father at some point. *Id.* "The trial court noted that if [the father] was an abuser and [the mother] wanted to go back to him, then [she] needed serious counseling." *Id.* The trial court viewed the mother as either crazy or a liar.

129. In another case where there was an official record of domestic violence, *Wentland v. Rousseau*, the trial court apparently did not mention the father's criminal conviction for assaulting the mother in making its decision to grant custody to the father because of domestic violence in the mother's new relationship. 875 N.Y.S.2d 280, 282–83 (N.Y. App. Div. 2009). The appellate court held that the trial court's focus "on the mother's and [her abusive boyfriend's] recent behavior and their admitted abuse of alcohol," without discussion of the older criminal conviction, was appropriate. *Id.* at 283. *Wentland* is an initial custody determination rather than a custody modification case because the parents had never entered into a formal custody agreement. *Id.* at 281–82. But since the child had lived primarily with the mother for about four years after the parents broke up, it presents similar issues even though the court only performed a "best interests" analysis rather than the two-step custody modification analysis. *See id.*

130. No. 37A03-0609-CV-415, 2007 WL 914621, at *1 (Ind. Ct. App. Mar. 28, 2007).

131. *Id.* at *3.

132. *See id.* at *1. Another example of a court transferring custody to an abusive father is *Rongstad v. Rongstad*, No. C1-00-1727, 2001 WL 1328404 (Minn. Ct. App. Oct. 22, 2001). In *Rongstad*, the mother claimed the trial court "refused to hear evidence" of the father's "abusive nature." *Id.* at *3. The court transferred custody to the father because of domestic violence perpetrated by the mother's second husband and because of the mother's illegal drug use. *Id.* In reviewing the trial court's decision, the appellate court stated: "We . . . note the evidence of some violence during [the mother and father's] marriage. But the record shows that the children were exposed to far greater levels of violence after that marriage ended and [the mother] became involved with [her second husband]." *Id.*

This Part has argued that courts do not recognize that abused mothers' problems with financial instability, emotional instability, and drug and alcohol abuse are often related to domestic violence. Courts often cite these problems as independent reasons to take custody away from mothers in favor of fathers. In addition, courts often blame mothers for their abusive relationships with new intimate partners, and courts seem to believe that abused mothers are not capable of good parenting, even after they end abusive relationships or take steps to address the violence. Finally, courts sometimes transfer custody to a father who has committed domestic violence in the past, which demonstrates uncertainty on the courts' part about the seriousness of domestic violence.

IV. SHOULD WE CONSIDER FAIRNESS TO MOTHERS?

The cases described in Part III illustrate the variety of ways in which courts are biased against abused mothers in custody modification decisions. But fairness to the parents is not supposed to be the paramount concern in custody cases; rather, the best interests standard requires courts to focus on the needs of the child.¹³³ Even if you agree that courts blame abused mothers for the domestic violence and view them as inherently poor parents, as argued in Part III, you may consider this unfairness to be simply irrelevant if you believe that courts are appropriately focused on the best interests of the child.

This Part argues that courts are not making (and probably cannot make) custody modification decisions that are focused solely on some objective understanding of what is best for the child, and it argues that the unfair decisions courts are currently making are harmful to both mothers and children.

A. The Ideal of an Objective "Best Interests" Analysis

Many courts and observers believe that courts are able to make custody decisions that are truly focused solely on the best interests of the child. For example, in *Iverson v. Griffith*, a case involving a mother who relocated multiple times to get away from abusive relationships, the Alaska Supreme Court argued that fairness to the mother is simply irrelevant in determining the best interests of the child:

[The mother] argues that the superior court erred by considering her moves because doing so penalized her for leaving abusive partners. [She] explains that court consideration of relocations places her and other victims of domestic violence in a Catch-22. The victim of violence would be criticized for staying with her child in the home of an abusive partner but is deemed to offer an unstable living situation if she moves out. While [the mother] may be correct that the superior court would look unfavorably at the home she offers in either

133. *E.g.*, *Mayes v. Hagen*, No. 09-1068, 2010 WL 625050, at *3 (Iowa Ct. App. Feb. 24, 2010) ("When we determine physical care, our primary concern is the best interests of the child, not the perceived fairness to the parents." (citing *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007))).

circumstance, she is incorrect when she views this result as a penalty to her. The superior court is charged with determining the best interests of the child, and if one parent is repeatedly faced with either moving or remaining in an abusive relationship, it could well be in the child's best interest to live with the other parent.¹³⁴

This passage presents the trial court's decision about the best interests of the child as neutral and removed from the pettiness of punishing or rewarding parents. In fact, decisions about the best interests of the child do involve direct and detailed comparison of parents. Courts making custody decisions look at a number of intimate factors about the parents' lives, including the child's relationship with each parent; the parents' and child's wishes; the home, school, and community that each parent could provide; and the mental and physical health of the parents.¹³⁵ Under this framework, judges are required to compare the lives and personalities of the parents in order to reach their decisions. It is inevitable that judges' own values and biases enter their analysis because, as Katharine Bartlett points out, there is no generally agreed-upon definition about exactly what the "best interests of the child" should mean:

[T]here are many ways to think about the child's best interests. In serving these interests, there are many different goals that we might be trying to achieve—continuity, emotional security, discipline, safety, citizenship values, creativity, academic achievement, absence of race or sex bias—and these goals might not all point in the same direction.¹³⁶

The uncertainty of the best interests standard and the fact that judges have to make comparisons about intimate details of parents' lives mean that the ideal of the completely neutral family law judge who considers only the interests of the child is not realistic.¹³⁷ Bias against abused mothers in custody modification cases is not, therefore, irrelevant. It affects how courts evaluate what would be best for the child, and it affects outcomes. The next subpart argues that these effects are harmful.

B. The Harms of Biased Decision Making in Custody Modification Cases

1. Unnecessary Transfers of Custody

The most concrete and immediate harm of the current bias against abused mothers in custody modification cases is that it increases the likelihood of

134. No. S-11843, 2006 WL 2578692, at *6 n.20 (Alaska Sept. 6, 2006).

135. *See, e.g.*, IND. CODE ANN. § 31-17-2-8 (West 2008). The Indiana best interests statute, which is fairly representative of other states' statutes, requires courts to consider the following factors: the child's age and sex; the child's relationship with each parent; the parents' and child's wishes; the child's adjustment to home, school, and community; the mental and physical health of all involved; and evidence of domestic violence. *Id.*

136. Bartlett, *supra* note 22, at 468.

137. *Cf.* GUGGENHEIM, *supra* note 19, at 157–58. In his critique of the best interests standard, Guggenheim argues that this child-centered ideal is powerful and widespread, but not accurate. *Id.*

unnecessary transfers of custody. If we accept that courts necessarily make value-based comparisons between parents when modifying custody, as argued above in Part IV.A, and that courts are currently biased against abused mothers in these cases, as argued in Part III, it is likely that courts sometimes transfer custody to the father when doing so is not really necessary to protect the best interests of the child. Some of the cases described in Part III represent this type of unnecessary custody modification. When a court transfers custody even after the mother has ended the abusive relationship, for example, it may be an unnecessary modification that the court justifies by the assumption that a mother is a “bad mother” because she was in an abusive relationship.¹³⁸ Similarly, a judge who believes that all abused mothers are dysfunctional is more likely to order custody modification even if it would be possible for the child to stay with his or her mother.¹³⁹

In some of the cases described in this Note, judges may err on the side of transferring custody to the father because they believe that exposure to domestic violence is always permanently harmful to children.¹⁴⁰ But, as described above, research shows that some children who are exposed to domestic violence are affected more than others; some suffer severe negative psychological effects while a significant number seem to recover completely after the immediate danger is addressed.¹⁴¹ This variation in how children react to exposure to domestic violence, which depends on factors such as parents’ mental health and parenting skills, the family’s social support, and the child’s individual coping skills, temperament, and feelings of control,¹⁴² is too unpredictable and fact-specific to support a rule in favor of automatic transfer of custody.¹⁴³

It is widely accepted by the courts that unnecessary changes of custody are harmful to children and should be avoided; courts have “repeatedly emphasized that continuation of the child’s successful relationship with the primary caregiver normally provides stability that outweighs possible advantages that might result from a custodial change.”¹⁴⁴ Experts stress the importance of “a consistent relationship with a primary caretaker to a child’s health development.”¹⁴⁵

In the cases described in this Note, transferring custody away from the mother often creates considerable disruption in the child’s life. In most cases, the mother had been the primary caretaker since the child was very young. For example, in *Peters v. Peters*, the mother had been the primary caretaker for her daughter’s whole life, and she had primary custody from when the child was two until the

138. See *supra* Part III.B.2.

139. See *supra* Part III.B.1.

140. See *supra* notes 83–84 and accompanying text.

141. See *supra* Part II.A.

142. See Hughes & Luke, *supra* note 44, at 206–10 (describing factors that are believed to contribute to children’s adjustment after exposure to domestic violence).

143. Cf. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 250–51 (E.D.N.Y. 2002) (finding that New York’s policy of automatically removing children from abused mothers and putting them in foster care did not further the state interest in protecting children).

144. *Peters v. Peters*, No. 02A01-9810-CH-00283, 1999 WL 285891, at *7 (Tenn. Ct. App. May 10, 1999).

145. *Nicholson*, 203 F. Supp. 2d at 199 (describing expert testimony of Dr. Evan Stark).

child was nine.¹⁴⁶ The trial court, which denied the father's request for custody modification, recognized that a change in custody would "remove the child from the custody of a dutiful and loving mother, away from her friends and family into an environment to which she is only vaguely familiar."¹⁴⁷ But the appellate court reversed the trial court's decision and ordered a change in custody to the father because of its concern about exposure to domestic violence.¹⁴⁸ Since protecting primary caretaker relationships and preserving continuity in the child's life are important to the courts,¹⁴⁹ this kind of change in the child's life should only be undertaken when truly necessary.

Getting rid of bias against abused mothers would result in better outcomes because it would prevent unnecessary transfers of custody. At the very least, it can't possibly hurt children, because a court that does not blame the mother for her victimization or subscribe to negative stereotypes of abused mothers as a group would still be able to find that a change in custody is appropriate because of the threat of exposure to domestic violence in a particular case.

2. Discouraging Abused Mothers from Seeking Help

If mothers know that they will lose custody of their children because of domestic violence by their new boyfriends or husbands, they will be less likely to seek help from the courts, police, or state agencies. Seeking help creates records like police reports and protective orders that can then be used against mothers in custody modification cases. In many of the cases described in Part III, courts relied on these types of official records in support of their decision to transfer custody to the father.¹⁵⁰ In *T.L. v. T.M.*, for example, the court admitted a police report about the arrest of the mother's boyfriend for domestic violence as well as police photographs of the mother's injuries.¹⁵¹ The mother objected to admission of these records as hearsay, but the court of appeals upheld their admission under the prior inconsistent statements exception because the mother had denied the domestic violence.¹⁵²

Mothers in these cases are in a difficult position; they can admit that their children were exposed to domestic violence, which by itself may be enough for the court to transfer custody, or they can try to deny or minimize the violence, in which case the court may fault them for not recognizing the danger to their children. In this situation, it would be logical for mothers who believe that it is best for their

146. 1999 WL 285891, at *7. The trial court denied the request for custody modification when the child was seven years old, but the appellate court reversed and transferred custody to the father when the child was nine. *Id.* at *2-3.

147. *Id.* at *3.

148. *Id.* at *8.

149. See Harris, *supra* note 18, at 172 ("Today, statutes or case law in all jurisdictions provide that placing a child with the primary caretaker is at least important for courts to consider in making the best interests decision.")

150. See, e.g., Peters, 1999 WL 285891, at *1 (discussing police response to a domestic violence call and a restraining order).

151. No. 2007-CA-001877-ME, 2008 WL 4271038, at *7 (Ky. Ct. App. Sept. 19, 2008).

152. *Id.*

children to stay with them to avoid calling the police and to not pursue protective orders against their abusive boyfriends or husbands—obviously not a good outcome.

3. Reinforcing the Belief that Domestic Violence Is the Victim's Fault

More generally, the courts' current willingness to transfer custody because of domestic violence reinforces the idea that the violence is the victim's fault (even if the court insists that it is considering only the best interests of the child). When courts say that abused mothers make "poor decisions" by allowing their abusive intimate partners in their lives,¹⁵³ or that abused mothers have the "personality trait" of being abused,¹⁵⁴ courts are reinforcing the already powerful myth that victims are to blame for domestic violence.¹⁵⁵ By making biased decisions, courts are legitimizing biased views of abused mothers. This legitimization of bias impacts not only the abused mothers and other direct participants in particular cases, but also lawyers, court staff, and others involved in the judicial system.

V. ALTERNATIVE APPROACHES

A. Case Examples

In some cases, courts deny fathers' requests for modification of custody despite finding that the children had been exposed to domestic violence while in the mothers' care. This subpart describes cases in which courts have reached this decision in a way that recognizes the context of domestic violence and refuses to blame mothers for the violence. There are two main themes in these decisions: a strict application of the "significant change in circumstances" prong of the custody modification test, and a recognition of the efforts of the mother to respond to the abusive relationship.

An Indiana case, *Hood v. Hood*, has facts that easily could have led to a transfer of custody.¹⁵⁶ The mother, Robbin, had two abusive marriages prior to her marriage to the father, Michael.¹⁵⁷ After her marriage to Michael ended in divorce, Robbin was awarded physical custody of their child.¹⁵⁸ Two years later, Michael asked the court to modify custody in response to an incident of domestic violence perpetrated by Robbin's boyfriend, in which the boyfriend had pushed Robbin to the floor in the presence of her children.¹⁵⁹ Robbin's boyfriend had been charged with battery, and Robbin had cooperated with the police and obtained a protective order against him.¹⁶⁰ After the boyfriend apologized to Robbin and her children and started anger

153. *See supra* Part III.A.1.

154. *See supra* Part III.B.1.

155. *See* PENNSYLVANIA REPORT, *supra* note 58, at 405 (describing tendency to disbelieve and blame victims of domestic violence).

156. No. 49A02-0711-CV-996, 2008 WL 4307443 (Ind. Ct. App. Sept. 23, 2008).

157. *Id.* at *1–2.

158. *Id.* at *1.

159. *Id.*

160. *Id.*

management counseling, Robbin resumed contact with him but at the time of the hearing was no longer in a romantic relationship with him.¹⁶¹ Facts like these have been used against mothers in other custody modification cases—a court might have found that Robbin had the “personality trait” of getting into abusive relationships,¹⁶² or that she had repeatedly made poor choices about men.¹⁶³ A court might also have found that there was an ongoing threat from Robbin’s relationship with her ex-boyfriend because she had not cut off all contact with him.¹⁶⁴

However, the court in *Hood* denied Michael’s request for modification of custody because it found that there had not been a change in circumstances.¹⁶⁵ The court of appeals agreed because it viewed her boyfriend’s violence as an isolated incident during a “long period[]” of no violence in Robbin’s life.¹⁶⁶ Further, the court recognized Robbin’s efforts in response to the domestic violence:

We . . . find it significant that Mother has not stayed in abusive relationships. After [her first husband] assaulted her, she promptly divorced him. When [her second husband] became physically abusive, Mother obtained a protective order and divorced him. . . . After [her most recent boyfriend] physically assaulted her, Mother cooperated in his prosecution. She then ended her relationship with [him] and obtained a protective order against him.¹⁶⁷

The court also characterized Robbin’s decision to let her ex-boyfriend back into her life¹⁶⁸ as reasonable given the “precautions and conditions” Robbin has put in place.¹⁶⁹

The outcome in *Hood* seems extraordinary compared to other cases with similar facts. The court does not treat the mother as dysfunctional or deviant for her history of abusive relationships.¹⁷⁰ And it respects the mother’s decisions about the best way to get out of abusive relationships.

A court reached a similar outcome in *Scott QQ v. Stephanie RR*.¹⁷¹ In that case, the mother admitted that her boyfriend had abused her and that he had a drinking problem.¹⁷² But the court found that there had not been a change in circumstances because there was insufficient evidence to establish that “the mother was the victim of repeated domestic violence at the hands of her boyfriend or that the child

161. *Id.*

162. *See supra* Part III.B.1.

163. *See supra* Part III.A.1.

164. *See supra* Part III.B.2.

165. *Hood*, 2008 WL 4307443, at *4.

166. *Id.*

167. *Id.* at *5.

168. She carpooled to work with him, and he sometimes brought his son to her house to play with her son. *Id.*

169. *Id.*

170. *See supra* notes 69–70 and accompanying text (describing characterization of abused women as dysfunctional or abnormal).

171. 905 N.Y.S.2d 347 (N.Y. App. Div. 2010).

172. *Id.* at 349.

witnessed it.”¹⁷³ Further, the court found that the mother “took appropriate action by terminating her relationship and changing the locks.”¹⁷⁴

The two themes that emerge in these cases are a skeptical approach to the “change in circumstances” prong of the custody modification test and respect for the mother’s efforts toward getting out of abusive relationships. These cases are not “unbiased” simply because they allow the mother to retain custody—of course, a court could treat an abused mother fairly and still order a custody modification. Rather, they are unbiased because they do not rely on stereotypes about abused mothers and they credit mothers for their efforts to get out of abusive relationships, while recognizing the difficulties that this can present.

B. Implementation

By recognizing mothers’ efforts to get out of abusive relationships and taking a skeptical approach to the “change in circumstances” prong, courts avoid the harms created by current biased decision making in these types of custody cases.¹⁷⁵ These approaches do not discourage mothers from seeking help for domestic violence (and they may encourage them to do so); they make unnecessary changes of custody less likely; and they avoid placing general blame on the victim of domestic violence.

But how can better approaches to custody modification be implemented? A legislative solution is likely unworkable. The factors-based best interest analysis, which relies on extensive judicial discretion, is firmly entrenched in state laws¹⁷⁶ and the popular imagination.¹⁷⁷ And in the types of cases described in this Note, it is probably best to retain close judicial review of the facts and circumstances because of the real possibility of harm to children who may be exposed to domestic violence.¹⁷⁸ In addition, the cases described in this Note represent only a small proportion of custody modification cases, so a legislative change would likely be too broad and could have unintended consequences.¹⁷⁹

173. *Id.*

174. *Id.* In another case where the court refused to modify custody, the appellate court stated:

Although we are troubled by the fact that the child was exposed to the attack on his mother, we note that the mother, who was asleep when her then boyfriend broke down the door and tried to strangle her, responded appropriately to the incident by ending her relationship with him, having him arrested, and obtaining an order of protection against him.

Martin v. Martin, 878 N.Y.S.2d 475, 477 (N.Y. App. Div. 2009).

175. *See supra* Part IV.B.

176. *See supra* Part I.

177. *See* GUGGENHEIM, *supra* note 19, at 146–53.

178. *See supra* Part II.A.

179. On the other hand, changes in statutory language could have virtually no effect. Despite differences in wording of custody modification statutes in different states, *see supra* note 29, there were no notable state-to-state differences in the cases examined in this Note, *see supra* note 89 (listing the cases—thirty-nine cases from fifteen states—discussed in this Note). Custody modification statutes focus on factors that judges can or should consider, which gives judges significant discretion. This means that slight changes in wording may not

Because judicial discretion is and will probably remain very important in custody modification cases, judicial education seems to be the best way to improve outcomes for abused mothers in these cases. Judicial education about domestic violence has proven to be difficult and slow-going, but over the last twenty to thirty years there have been significant improvements in judges' willingness to "respect women's right to seek protection" and to believe their allegations about domestic violence.¹⁸⁰ There have also been a number of projects that aim to give courts guidance on handling custody cases that involve domestic violence.¹⁸¹

This Note has identified two approaches that avoid the harms created by biased decision making: a careful and skeptical application of the "change in circumstances" prong, and a recognition of the efforts of mothers to respond to the violent relationships. Encouraging judges to take these approaches, through education about the problems created by domestic violence and its effect on children, will create better outcomes for mothers and children in custody modification cases.

CONCLUSION

It is easy to criticize mothers who fail to meet our high expectations by exposing their children to their abusive relationships.¹⁸² But abused mothers deserve unbiased treatment in custody modification hearings, and their children deserve the opportunity to stay with their primary-caretaker mothers when possible. Custody modification cases involving mothers abused by their intimate partners demonstrate courts' biases, and it is important that we address this problem to achieve better outcomes for these mothers and their children.

have much effect on how judges handle these types of cases.

180. Meier, *supra* note 59, at 669. These efforts have generally been more successful in cases like protective order hearings where the violence is the primary concern of the court proceeding. *Id.*

181. *See, e.g.,* KEILITZ, *supra* note 48.

182. "Mothers carry enormous ideological weight in our culture. Because we consider that a mother's fundamental duty is to protect her children, maternal behavior that exposes children to harm is viewed as unthinkable, unnatural, and incomprehensible." SCHNEIDER, *supra* note 1, at 148.

