Introduction

Divorce can be a dangerous process for victims of domestic violence. Violence and control do not always end when a relationship ends; an abuser, in response to losing control of his victim, may harass his former partner as an attempt to reassert control. Custody evaluations are a tool used in disputed custody cases in which a third party evaluator assists the court by assessing various factors relevant to custody decisions. While multiple researchers have found that domestic violence allegations are very common in disputed custody cases, only one state, California, mandates that its custody evaluators undergo domestic violence training. Despite the obvious necessity, forty-nine states do not legally require that evaluators have knowledge of domestic violence and its impact on victims and children. Research also shows that evaluators with inadequate domestic violence knowledge tend to recommend unsafe parenting plans for domestic violence victims and their children.

Part I of this paper discusses research indicating that the unpredictability and lack of safety in recommendations can be traced to varying amounts of knowledge held by evaluators, as well as their beliefs about domestic violence. Part II argues that these beliefs are the result of

1 J.D. Candidate 2016, the George Washington University Law School. The author would like to thank Professor Joan Meier of the George Washington University Law School for her guidance and support throughout the writing process.


3 Id. at 721.


5 See Erickson, supra note 4, at 9.

6 See, e.g., Logan, supra note 2, at 735; Haselschwerdt, supra note 4, at 1711.
implicit gender bias and bias against victims. Part III proposes strategies for custody evaluators to overcome these biases.

I. What Drives Custody Evaluators’ Recommendations?

In one case involving a history of domestic violence, four custody evaluations were performed as a result of a modification petition. Each was conducted by a different evaluator and each resulted in a different recommendation, including sole custody to the mother, sole custody to the father, and joint custody.7 This paper draws from five studies, four empirical and one qualitative, that analyzed the variability of recommendations made by custody evaluators in domestic violence cases.8 Broadly, these studies identify the same problem; while a custody recommendation should be determined by the facts of a case, instead, the knowledge and beliefs of the evaluator are greater factors in the outcome.

A. Evaluators’ Knowledge of Domestic Violence

Custody evaluators often fail to recognize domestic violence when it is present. In one study, conducted by Haselschwerdt, custody evaluators were interviewed and assigned to groups based on their theoretical perspective.9 Those who believed that domestic violence is rooted in coercive control were labeled as belonging to one group, and those who believed it is conflict-based were labeled as another group.10 The main difference between the two groups was the amount of training that they had in domestic violence; those who understood domestic violence as the result of power and control had more knowledge, while the group who believed it was the

8 These studies are Logan (2002), Saunders (2010), Davis (2011), Haselschwerdt (2011), and Pence (2012).
9 See Haselschwerdt, supra note 4, at 1699 (focusing on evaluations done in one Midwestern state).
10 Id. at 1703.
result of marital conflict had less knowledge.\textsuperscript{11} The more knowledgeable group relied on their training and was therefore able to recognize domestic violence when they encountered it.\textsuperscript{12} The evaluators in less-knowledgeable group reported never having seen “real DV,” which they described as having elements of coercive control.\textsuperscript{13} While they recognized that coercive control existed, they said that they only saw conflict-based situational couple violence.\textsuperscript{14} To them, “real DV” required “very severe bruising” and “broken bones,” with “violent, evil and horrible” abusers, and “very dependent, distraught and passive victim[s]”.\textsuperscript{15} This group, lacking specific domestic violence knowledge, instead employed general training in the dynamics of divorcing parents.\textsuperscript{16} This study reveals the result of inconsistent domestic violence training—evaluators’ knowledge of domestic violence, or lack thereof, determines the recommendation, not the presence of domestic violence. Evaluators even disbelieve allegations of domestic violence when they are supported by corroborating evidence.\textsuperscript{17}

Studies also indicate that evaluators lack an understanding of the role of power and control, possibly causing them to overlook both a history of domestic violence and post-separation risks. Logan found that evaluators do not consider how the frequent contact required by joint custody may contribute to future violence.\textsuperscript{18} In Davis’ study, researchers found that the

\begin{flushleft}
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 1714.
\textsuperscript{13} Id. at 1708.
\textsuperscript{14} Id. The study, and the evaluators, distinguish between “intimate terrorism” and “situational couple violence.” Intimate terrorism refers to an abusive relationship rooted in power and control, while situational couple violence refers to violence in a relationship without coercive control. The implication is that situational couple violence is a less serious form of violence.
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 1714.
\textsuperscript{17} Michael Davis, Chris O’Sullivan, Kim Susser, and Hon. Marjory Fields, Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators 37 (2011) (studying cases from New York with credible claims of abuse by reviewing evaluations and interviewing evaluators).
\textsuperscript{18} See Logan, supra note 2, at 737.
\end{flushleft}
safest parenting plans were recommended by those who considered the role of power and control.\textsuperscript{19} Unfortunately, only a quarter of the evaluations analyzed referenced power and control.\textsuperscript{20} In a study by Saunders, which surveyed custody evaluators and other legal professionals in order to analyze the beliefs held by evaluators, the evaluators were given a vignette depicting severe domestic violence. Those evaluators who stated that they would explore coercive control were more likely to believe that domestic violence was relevant to custody evaluations.\textsuperscript{21}

When evaluators do recognize domestic violence, research indicates that they do not take it into account. A regional study by Logan, comparing cases with and without domestic violence, found that the presence of violence made little difference in the recommendations of evaluators.\textsuperscript{22} In both sets of cases, evaluators most often recommended joint legal custody with physical custody to the mother, despite the potential for joint custody to provide further opportunities for abuse.\textsuperscript{23} Evaluators did not investigate the nature and extent of domestic violence allegations and did not discuss abuse as a factor determining what was in the child’s best interest.\textsuperscript{24} As a result, there was very little difference between the evaluator recommendations in the domestic violence and non-domestic violence cases.\textsuperscript{25} In some cases, documented histories of violence were overlooked entirely.\textsuperscript{26}

\begin{thebibliography}{00}
\item Davis, \textit{supra} note 17, at 80.
\item \textit{Id.} at 81.
\item David Saunders, Kathleen Faller, & Richard Tolman, Child Custody Evaluators’ Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations 8 (2012). This study is particularly significant; it is the largest and only nation-wide study about evaluator beliefs.
\item Logan, \textit{supra} note 2, at 729, 737.
\item \textit{Id.} at 731.
\item \textit{Id.} at 735.
\item \textit{Id.}
\item \textit{Id.} at 736.
\end{thebibliography}
Though in the Davis study domestic violence was believed by evaluators in nearly two-thirds of their cases, very few recommendations emphasized safety.\textsuperscript{27} Researchers found that the safest plans were recommended by those who had knowledge of domestic violence and analyzed the risk of future violence.\textsuperscript{28} Even so, the majority of the evaluations did not include assessments of the risk factors of future danger.\textsuperscript{29} The study concluded that “most evaluations recommended custody and visitation arrangements that would not protect the mother and children from further abuse.”\textsuperscript{30}

In a report by the Battered Women’s Justice Project (BWJP), researchers analyzed several custody evaluations where domestic violence was alleged, focusing on how the domestic violence affected the recommendation.\textsuperscript{31} The report similarly found that domestic violence tended not to influence evaluator decision-making, and that there was no consistent description or explanation of domestic violence in the recommendations.\textsuperscript{32} Rather, evaluators tended to package incidents of abuse, concluding that “domestic violence has occurred between the parents,” while failing to specify the facts of the abuse.\textsuperscript{33} The domestic violence that “occurred between the parents” included an incident where the father punched the mother in the face while she held their baby.\textsuperscript{34} In another case, an evaluator stated that “the Court…found domestic abuse occurred by [the father] against [the mother]” and went on to recommend joint custody, knowing

\textsuperscript{27} See Davis, supra note 17, at 71.
\textsuperscript{28} Id. at 80.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 85.
\textsuperscript{31} Pence, supra note 7. This report consists of a qualitative analysis of custody evaluations’ handling of domestic violence. Evaluations were solicited from courts, evaluators, attorneys, and professional associations.
\textsuperscript{32} Id. at 5.
\textsuperscript{33} Id. at 7.
\textsuperscript{34} Id.
that the aforementioned “domestic abuse” was a sexual assault that occurred in front of the child.35

The Logan study also revealed a lack of understanding of how the dynamics of domestic violence are relevant to the custody process. Over half of the evaluators reported that they interviewed the parents together, even if domestic violence was alleged.36 Interviewing a victim in the presence of her abuser could elicit less open responses and risk violence from the abuser in retaliation.37 By interviewing the parents together, the custody evaluator fails to get the full story of the abuse, and is therefore unable to fully understand the history of domestic violence.

B. Evaluators’ Beliefs about Domestic Violence and Custody

Research studies universally show that the beliefs that custody evaluators hold are key to the recommendations that they make. Evaluators often hold false beliefs about domestic violence, beliefs often held by laypeople. This section discusses four of those beliefs; that domestic violence is irrelevant to custody, that allegations of abuse are often false, that the involvement of the father in the child’s life is of paramount importance, and that victims are at fault for their own abuse. These beliefs cause custody evaluators to overlook or actively ignore domestic violence where it exists, to the detriment of children and their nonviolent parent.

1. Domestic violence is irrelevant to an abuser’s ability to parent.

There are several ways in which a history of domestic violence is, in fact, relevant to an abuser’s ability to parent. The effects associated with witnessing domestic violence on child development are well documented. Sons of abusers are at an “increased risk of becoming

35 Id. at 11.
36 Logan, supra note 2, at 735.
37 Id.
[abusers] themselves than male children generally, since they tend to adopt the beliefs of their abusive parent. 38 Children who witness domestic violence often have more emotional and behavioral problems than other children, and are more likely to have anxiety, depression, trauma symptoms, and temperament problems. 39 In addition, behavior that abusers exhibit towards their children is often similar to the abusive behavior that they exhibit towards their partner. 40 Abusers are often controlling and coercive with their children, and have poor emotional boundaries with them. 41 Abusive parents are also more likely to abuse children, both physically and sexually, than non-abusive parents, due to poor emotional boundaries and their equating of love with violence. 42

Evaluators may believe that domestic violence is not about the children, and therefore does not need to be explored in the evaluation. In the BWJP report, several evaluators concluded that domestic violence had no impact on children or that it was irrelevant to custody. 43 Evaluators concluded this even where children were present during physical and sexual assaults of their mothers. 44 Logan also pointed out that even though, in the evaluations studied, one in three children had witnessed abuse, little attention was paid to how this affected the children. 45 The Haselschwerdt study found that where the evaluators with less domestic violence knowledge distinguished between the parent’s relationship during and after marriage, stating that that the abuse was irrelevant to the abuser’s ability to coparent. 46

38 Lundy Bancroft et al, Batterer as Parent 8 (2d ed. 2002).
40 See Bancroft, supra note 48, at 8.
41 Id. at 8, 11.
42 Id. at 16.
43 Pence, supra note 7, at 20.
44 Id. at 7.
45 Logan, supra note 2, at 736.
46 Haselschwerdt, supra note 4, at 1708.
Research also indicates that those who believe that domestic violence is irrelevant to custody recommend less safe parenting plans. Saunders’ study measured several beliefs of custody evaluators and their relation to recommended parenting plans. Evaluators with a history of recommending unsupervised visitation to abusers were more likely to believe that domestic violence was not relevant to custody.\(^47\) In response to the vignette depicting severe domestic violence, 47% of the custody evaluators recommended joint legal custody with the victim getting physical custody and 47% recommended unsupervised visitation.\(^48\) Moreover, the study found that the belief that domestic violence was not relevant to child custody was correlated with the beliefs that domestic violence victims will alienate their children, that children are hurt by a parents’ reluctance to coparent, that domestic violence survivors falsely allege child abuse, and the belief that mothers make false allegations of domestic violence.\(^49\)

However, some studies showed evaluators treating domestic violence as relevant solely in relation to how it affects the mother’s parenting abilities.\(^50\) The Haselschwerdt study found that the evaluators with less domestic violence knowledge thought that while an abuser’s behavior during a marriage was irrelevant to his ability to coparent after separation, a victim’s ability to coparent may be compromised.\(^51\) One evaluation in the BWJP report discussed the mother’s disclosures of abuse and the fact that her husband made her feel crazy and like she was a bad mother.\(^52\) This caused the evaluator to have concerns about the mother’s ability to coparent, resulting in the evaluator recommending custody to the father.\(^53\)

---

\(^{47}\) Saunders, *supra* note 21, at 70.
\(^{48}\) *Id.* at 7.
\(^{49}\) *Id.* at 8.
\(^{50}\) Haselschwerdt, *supra* note 4, at 1708.
\(^{51}\) *Id.* at 1709.
\(^{52}\) Pence, *supra* note 7, at 8-9.
\(^{53}\) *Id.* at 9.
2. Allegations of domestic violence and child abuse are often false.

There is a misconception that mothers often falsely allege domestic violence or child abuse in order to gain an advantage in custody cases. In fact, it is much more likely that domestic violence is under-reported; the majority of intimate partner victimizations are never reported to the police.\(^{54}\) In addition, child sexual abuse is only alleged in 2% of all contested custody cases.\(^ {55}\) In fact, research shows that allegations made during custody cases are no more likely to be false than allegations made at any other time.\(^ {56}\) Problematically, unsubstantiated allegations, which refers to the result of an investigation into child abuse, are often conflated with intentionally false allegations, reinforcing the exaggerated belief that child abuse is often falsely alleged.\(^ {57}\) One study found the rate of intentionally false allegations of child abuse to be 12% for cases involving custody.\(^ {58}\)

Often, a lack of third party evidence leads evaluators to question the veracity of allegations.\(^ {59}\) In the Haselschwerdt study, many of the evaluators in the group with less domestic violence knowledge said that victims of “real DV” were likely to have reported the violence earlier.\(^ {60}\) These evaluators believed that if a woman had experienced “real DV,” there would be no need for a custody evaluation, because the police would have already intervened.\(^ {61}\) This is a misconception; in fact, there is often no outside evidence present when domestic violence is

---


\(^{56}\) See Thoennes, supra note 55.

\(^{57}\) Nico Trocme & Nicholas Bala, False allegations of abuse and neglect when parents separate, 29 Child Abuse & Neglect 1333, 1334-35 (2005).

\(^{58}\) Id. at 1342.

\(^{59}\) See Haselschwerdt, supra note 4, at 1698.

\(^{60}\) Id. at 1708.

\(^{61}\) Id.
alleged in custody cases, because abused women often do not seek help prior to separation. In contrast, the more knowledgeable evaluators in the Haselschwerdt study were more likely to believe that false allegations of abuse were rare, and that a lack of documentation does not mean abuse has not occurred.

In the Saunders study, evaluators estimated that 22% of mothers that they evaluated made false allegations of domestic violence. Other studies have found that, more often than not, custody evaluators doubt mothers’ allegations of father-perpetrated child abuse. In the Davis study, the evaluators credited allegations of child abuse only 41% of the time. This is even less frequently than when custody evaluators credit allegations of domestic violence. In the Saunders study, evaluators estimated that between 25% and 33% of child abuse claims are false.

Saunders found a correlation between evaluators’ belief in false allegations of domestic violence and the other false custody beliefs measured— that survivors alienate children from the other parent, that domestic violence is not an important factor in custody, that children are hurt when survivors resist coparenting, and that survivors make false allegations of child abuse. The study also found the belief that women make false allegations of abuse to be correlated with recommendations that favored the abuser over the victim.

3. The involvement of a father in a child’s life is of paramount importance.

---

62 Id. at 1698.
63 Id. at 1705-06.
64 Saunders, supra note 21, at 117.
65 Davis, supra note 17, at 48 (finding evaluators credited 61% of such allegations); Saunders, supra note 21, at 117 (finding 46%).
66 Saunders, supra note 21, at 117.
67 Id. at 120.
The family court system often overemphasizes the importance of a father’s involvement in child care. In fact, it is emphasized to such an extent that courts ignore abuse and create unsafe plans so that a father may remain involved, often with a deleterious effect on the child.68 However, [w]hile it would be a seemingly obvious proposition to most of us, that fathers' consistent and substantial involvement in child care would benefit the child, this appears to have not been well established. The relationship between paternal involvement and children's well-being seems to be mediated by a number of other conditions that involve the father, the mother, and the child. In other words, increased paternal involvement does not automatically result in improved child outcomes.69

Parenting plans that involve significant contact between the parents, even though one parent has been abusive to the other, reflect this emphasis that family courts place on fathers’ involvement in a child’s life.70 Research has shown that joint custody, or shared parenting, wherein both parents make decisions and share time with the child, is inappropriate where there is a history of domestic violence.71 Joint custody arrangements have had success in couples willing to coparent, but this is highly unlikely in situations where one parent has abused the other.72 Abusers use the requisite continued contact with their victims as a means of establishing control through verbal harassment as well as emotional and physical abuse.73 While a father’s continued involvement in a child’s life is normally important, assessing domestic violence and child abuse is necessary to

70 See Saunders, *supra* note 68.
71 Id.
72 Id.
ensure the safety of mothers who allege abuse and their children.\textsuperscript{74} This arrangement ignores the probability of continued violence and fails to protect children from future harm.

This overemphasis appears to contribute to evaluators’ overlooking of domestic violence.\textsuperscript{75} Recommendations by evaluators with less domestic violence knowledge in the Haselschwerdt study were more likely to recommend plans that emphasized coparenting and contact with the non-custodial parent.\textsuperscript{76} Significantly, when an evaluator suspected that a mother was alienating a child from the father or was making false allegations of abuse, the evaluator was more likely to recommend custody to the father.\textsuperscript{77} In contrast, the evaluators with more domestic violence knowledge were found to be more likely to prioritize victim safety over the father’s parental rights and to recommend supervised visitation in cases where coercive control was present.\textsuperscript{78}

The importance placed on the father-child relationship may cause the evaluator to view the mother as uncooperative or alienating. For example, one evaluation in the BWJP report recommended that the mother stop talking about her abuse because it was hurting her daughter.\textsuperscript{79} It was not the abuse that hurt their child, but the mother discussing it. The importance placed on the child’s relationship with the abuser may lead evaluators to believe the abuser is a better parent than the victim. “Friendly parent” statutes, which the majority of states have, prefer the parent who is more willing to encourage the child’s relationship with the other parent.\textsuperscript{80} The result is that when victims are unable or unwilling to coparent, they are seen as the less

\textsuperscript{74} Logan, supra note 2, at 738.
\textsuperscript{75} Id. at 737; Haselschwerdt, supra note 4, at 1698.
\textsuperscript{76} Haselschwerdt, supra note 4, at 1711.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1706.
\textsuperscript{79} Pence, supra note 7, at 11.
\textsuperscript{80} Joan Zorza, the “Friendly Parent” Concept—Another Gender-Biased Legacy From Richard Gardner, 12 Domestic Violence Rep. 65, 66 (2007).
“friendly” parent. This overlooks the importance and relevance of domestic violence to the post-separation relationship of the parents. The Logan study noted that it was possibly the overemphasis on the rights of parents that led evaluators to recommend joint custody nearly half the time without considering how such an arrangement may create an opportunity for more violence.81

4. The victim is, to some extent, responsible for her abuse.

Though the statement may seem obvious to many, a victim of domestic violence is not responsible for her own abuse, nor is she at fault for the effects it has on her children. Domestic violence is not caused by an abuser’s loss of control in response to a victim’s actions, but rather an abuser’s desire to control and dominate his victim.82 This dominance also explains one reason why it is so difficult for victims to leave their abusers; it often results in victims’ financial dependence and social isolation, making leaving a practical difficulty.83

While none of the studies specifically discuss faulting the victim for her own abuse as a false belief of evaluators, it is a common theme throughout the studies. In the Haselschwerdt study, one evaluator in the less-knowledgeable group referred to sexual assault as “conflicts over sex,” attributing blame equally to both parties.84 Similarly, evaluations in the BWJP report referred to marriages with domestic violence as “high conflict,” or “ongoing conflict,” failing to attribute blame to the abuser. Another evaluator in the Haselschwerdt study reported that safety measures in evaluations would consist of “coach[ing] ex-spouses not to give the perpetrator opportunities to be violent.” In Davis’ study, the researchers found that 31% of evaluators

81 Logan, supra note 2, at 737.
83 Id. at 40
84 Haselschwerdt, supra note 4, at 1708.
viewed abuse as a conflict between the parents.\textsuperscript{85} Some evaluators also believed that the victim could stop the abuse by leaving, and that the victim participates in the continuation of abuse because of a need for retribution and because of bitterness.\textsuperscript{86} These comments indicate a lack of understanding of the dynamics of domestic violence.

The Davis study also suggests that custody evaluators do not blame the abuser. Only 58% of the evaluators surveyed responded that the abuse was the primary responsibility of the more violent person. Sixteen percent stated they would fault the mother for the abuse.\textsuperscript{87} Many evaluators were hesitant to wholly blame either party, with only 25% finding the father “fully responsible” for the effect of the domestic violence on his children.\textsuperscript{88} Twenty-four percent of the evaluators thought the mother was partially responsible for the psychological and emotional impact of the domestic violence on her children.\textsuperscript{89} These statistics indicate that many evaluators consider a victim at fault for her own abuse, as well as the impact of that abuse on the children.

II. Bias and Custody Evaluations

The beliefs held by many custody evaluators—that domestic violence is irrelevant to custody, that women often make false allegations of abuse, that a father’s parental rights are the most important consideration, and that victims are partially responsible for their own abuse—can be explained by gender bias and certain other biases that cause victim-blaming. These biases are evident in the beliefs they hold and are often influenced by their lack of knowledge about domestic violence and victimhood. These biases then affect the recommendations that evaluators make.

\textsuperscript{85} Davis, \textit{supra} note 17, at 39.
\textsuperscript{86} \textit{Id.} at 69.
\textsuperscript{87} \textit{Id.} at 39.
\textsuperscript{88} \textit{Id.} at 41.
\textsuperscript{89} \textit{Id.} at 40.
A. Implicit Gender Bias

Implicit bias refers to “attitudes or stereotypes that affect our understandings, actions, and decisions in an unconscious manner.”  Implicit biases are associations that people develop and reinforce over time, beginning at a very early age. The beliefs that domestic violence is irrelevant to custody, that mothers make false allegations of abuse, that a father’s rights are more important than victim safety, and that victims are responsible for their own abuse can be partially explained by implicit gender bias.

Beliefs about domestic violence and beliefs about gender are linked. Culturally, traditional beliefs about a woman’s role in society are positively correlated with the belief that abuse is justified. Conversely, more liberal beliefs about a woman’s role in society are correlated with sympathy for victims. Researchers have determined this to be specifically true with respect to custody evaluators. Saunders’ study found a correlation among evaluators between belief in patriarchal norms and certain false beliefs about custody and domestic violence. Saunders measured evaluators’ belief in patriarchal norms using the Modern Sexism Scale (MSS), an assessment of subtle forms of sexist attitudes. Implicit bias is described in a similar manner as the sexism measured by the MSS—it is not an explicit gender bias that

---

91 Id.
92 Id.
93 David Saunders, Ann Lynch, Marcia Grayson, & Daniel Linz, Inventory of Beliefs about Wife Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes, 2 Violence & Victims 39, 49 (1987).
94 Id.
95 Saunders, supra note 21, at 11.
96 Id. at 41.
someone knows he or she holds, but rather an implicit, subtle bias of which he or she is unaware.97

One result of such bias is that women’s concerns tend to be placed behind men’s in custody disputes.98 This, combined with a lack of understanding of domestic violence, causes evaluators to delegitimize mothers’ concerns for themselves and their children. A victim’s demeanor is often used as a basis for ignoring her concerns and devaluing her ability to parent. Domestic violence victims may be seen as unstable and overdramatic when they disclose abuse or voice safety concerns.99 Evaluators may interpret a nervous or fearful appearance as evidence that the victim cannot be a good mother.100 Rather than interpreting this behavior as a product of abuse, and in response recommending a plan to minimize the possibility of abuse, evaluators may see this as a reason to recommend custody to the abuser. In addition, the same psychological symptoms can be interpreted differently in men and women because of gender stereotypes.101

The overemphasis on coparenting, even in domestic violence cases, is another reason that an evaluator may conclude that the abuser is the better parent. In the Saunders study, belief in patriarchal norms was correlated with the belief that victims hurt their children when they refuse to coparent.102 One evaluator interviewed in the Haselschwerdt study stated, “[y]ou can have a situation where the victim isn’t really able to coparent effectively because of all her issues, and so the most effective parent is actually the abuser.”103 While an emphasis is often placed on the victim’s inability to coparent because of the trauma of abuse and the concern over future safety,

97 Kirwan Institute, supra note 9, at 16.
98 Joan Zorza, Protecting the Children in Custody: Disputes When One Parent Abuses the Other, 29 Clearinghouse Rev. 1113, 1120 (1996).
99 Id. at 1698, 1710.
100 Saunders, supra note 21, at 18.
101 Id. at 20.
102 Id. at 11.
103 Haselschwerdt, supra note 4, at 1709.
(or as this evaluator put it, “all her issues”) evaluators do not express the same concerns over an abuser’s ability to parent. While not overtly sexist, evaluators likely rely on biased understandings of male and female demeanor in order to interpret their behavior.

Negative stereotypes about women encourage the myth that mothers are likely to make false allegations of domestic violence or child abuse to gain advantage in custody litigation. Misogynistic stereotypes that women are “petty, angry, or vindictive” cause people to overestimate the frequency of false allegations.\(^\text{104}\) The unequal placed on men’s concerns contributes to disbelieving women’s allegations, particularly those of child physical and sexual abuse.\(^\text{105}\) Some research suggests that because of the particular mistrust of women who allege child abuse, abusers who physically or sexually abuse their children are more likely to get custody than abusers who don’t.\(^\text{106}\) If a victim differs from a stereotypical passive victim, and, for example, expresses anger over her abuse, an evaluator may incorrectly conclude that domestic violence does not exist where it does.\(^\text{107}\) Importantly, Saunders found that the belief that women make false allegations of domestic violence and child abuse was correlated with belief in patriarchal norms. The result is that when evaluators want to determine the legitimacy of an allegation, they draw inferences from bias and myth.

B. Bias Against Victims

The belief that a victim is responsible for her own abuse, on its own, explains some of the other beliefs custody evaluators hold. If an evaluator believes that each person shares equal culpability, abuse seems less relevant to custody. If a victim is at fault, her refusals to coparent

\(^{104}\) Zorza, supra note 79, at 1121.
\(^{105}\) Id. at 1120-21.
\(^{106}\) Id. at 1121.
\(^{107}\) Haselschwerdt, supra note 4, at 1698.
may seem unjustified. Blaming victims of domestic violence for their abuse is at least partially explained by a lack of adequate information about domestic violence. Inadequate education about power and control, about why a victim may stay in a relationship, and about post-separation violence may lead an evaluator to blame a victim for her abuse. However, there is more at play than inadequate knowledge; there are subconscious biases that cause individuals to doubt and blame victims.

The “hindsight effect” is one such bias.108 When a person learns of the outcome of an event, s/he is unable to ignore it. This leads the person to have an exaggerated perception of the likelihood of the event.109 For example, one study tested hindsight bias by giving two groups of people identical stories of an interaction between a male and female college student, with the exception of the final line.110 In one version, the story concluded with the woman being raped; in the other, it concluded with her going home. Then, given four choices, those who had read the rape outcome were significantly more likely to believe that rape was the most likely outcome than those who had read the neutral outcome.111

Hindsight bias can also be applied to beliefs that custody evaluators hold about domestic violence victims. A study found a correlation between how people view the behavior of domestic violence victims and how they view behavior of rape victims; in both cases the victim’s behavior was often seen as a precipitant to the violence.112 This similarity can be explained by the hindsight effect. In the context of custody evaluations, when an evaluator hears of specific

109 *Id.*
110 *Id.* at 164.
111 *Id.* at 165.
112 Lynch, *supra* note 93, at 45. This correlation was found when participants were asked about specific situations, rather than about whether or not abuse is justified in general.
incidents of abuse, s/he may be unable to ignore actions that preceded the violence, and be likelier to attribute beatings to those actions. Moreover, if the abuser’s account blames the victim, it is no wonder that evaluators come to the conclusion that these are not assaults, but “conflicts.” This may also explain why evaluators can overlook coercive control—assaults can be seen as isolated incidences if an evaluator separately focuses on the victim’s behavior leading up to each episode of violence.113

There is research indicating that outgroup bias may result in disbelieving victims. We are less likely to believe someone describing an unusual event, like abuse, than an ordinary event. Researchers have attributed this to outgroup bias; people are less likely to believe someone unlike themselves.114 One study tested how the credibility of complainants was judged when reporting everyday events and domestic abuse when those reports were slightly inconsistent.115 The study participants who read the inconsistent description of everyday events judged the complainant as more positive than the complainant describing domestic violence.116 They also rated the complainant who reported everyday events as more similar to themselves.117

Another explanation for evaluators’ inclination to doubt or blame victims is the just world theory, also called the just world fallacy. People are inclined to believe that bad things do not happen, but when they do, they happen to bad people, and that there is always a reason for everything.118 Saunders’ study examined custody evaluators’ belief in a just world and found that

113 Pence, supra note 7, at 27.
115 Id. at 471-72.
116 Id. at 477.
117 Id. at 478.
118 Saunders, supra note 21, at 42.
a correlation existed with certain custody beliefs.\textsuperscript{119} Saunders found that the belief in a just world is correlated with the belief that domestic violence is not relevant to custody, that mothers make false allegations about domestic violence, that mothers alienate children, and that victims hurt their children when they resist coparenting.\textsuperscript{120} It was also correlated with past recommendations that favored abusers.\textsuperscript{121}

Just world theory helps explain the beliefs of custody evaluators. It may be easier to believe that a woman is alleging domestic violence falsely than actually believe it happened, particularly where there is no documentation. This is also true, possibly even more so, when it comes to allegations of child physical and sexual abuse, which, as Davis found, are believed less often than domestic violence allegations. It is simpler to believe that someone who seems like a good parent \textit{is} a good parent. This is particularly true in a context where the accused seems like a better parent than the accuser, since often, to evaluators, abusers appear to be better parents than their traumatized victims.\textsuperscript{122} The belief in a just world also helps to explain why evaluators often believe that if allegations were true, the abusers would have been punished already, as found in the Haselschwerdt study.\textsuperscript{123}

III. Proposed Remedies

A. Custody Evaluator Trainings

Evaluators’ lack of knowledge about domestic violence and their inaccurate beliefs about custody may be overcome with education. This education must include instruction on bias and

\begin{footnotesize}
\begin{enumerate}
\item[119] \textit{Id.}
\item[120] \textit{Id.} at 11.
\item[121] \textit{Id.} at 125.
\item[123] Haselschwerdt, \textit{supra} note 4, at 1078.
\end{enumerate}
\end{footnotesize}
how it affects evaluations. It must also teach evaluators the ability to recognize and address their own bias. Currently, California is the only state that mandates training for evaluators. The statute requires both an initial training and one every year after.\textsuperscript{124} Included in the statute’s required education is instruction in the “appropriate structuring of the child custody evaluation process” which includes “maintaining objectivity,” “gathering balanced information from both parties” and “controlling for bias.”\textsuperscript{125} The statute emphasizes the importance of understanding the dynamics of domestic violence and, importantly, risk factors for future violence. It also underscores the “unique issues” present in domestic violence cases, including “the effects of exposure to domestic violence and psychological trauma on children” and “the relationship between child physical abuse, child sexual abuse, and domestic violence,” as well as the “impact on parenting abilities of being a victim or perpetrator of domestic violence.”\textsuperscript{126} The statute also mandates education in the “the importance of discouraging [evaluators] from blaming victims of domestic violence for the violence and from minimizing allegations of domestic violence.”\textsuperscript{127}

1. Comprehensive Domestic Violence Training

Custody evaluators must be educated about domestic violence. The frequency with which domestic violence is alleged in contested custody cases necessitates that evaluators be able to screen for and evaluate allegations of abuse. While research suggests that the majority of evaluators have some form of domestic violence training,\textsuperscript{128} a more thorough understanding of

\textsuperscript{124} Cal. Rules of Court, Rule 5.230 (d)(1), (2).
\textsuperscript{125} Id. at 5.230 (d)(1)(A)(i).
\textsuperscript{126} Id. at 5.230 (d)(1)(A)(v)(a).
\textsuperscript{127} Id. at 5.230 (d)(1)(A)(v)(k).
domestic violence is necessary. Evaluators must be trained to assess abuse in order to determine the most appropriate parenting plan for the child.

Evaluators must also be able to recognize domestic violence and assess the risk of future violence to the victim and children. When evaluators have knowledge of post-separation violence and how to screen for domestic violence, they make safer recommendations. They are also more likely to believe that domestic violence is important to custody. Specifically, evaluators must be educated about coercive control and how to recognize it, so that they can recommend safer plans.

A study conducted by Morrill on the effect of domestic violence education on family court judges showed that “[e]ducation enhanced judges’ knowledge and attitudes” about domestic violence. Judges who had domestic violence training were more likely to give sole legal custody to victims. However, the judges with such education were likelier to recommend supervision when recommending sole custody than when recommending joint custody, even though the risk to victims is greater when custody is shared. This study indicates the importance of emphasizing the risks of joint custody and post-separation violence, as was also evident in the previously discussed studies of custody evaluators. Education of evaluators, therefore, must not only educate about the dynamics of domestic violence, but also about risk-assessment strategies and how to determine safe parenting plans in high-risk situations.

2. Training to Recognize and Overcome Bias

129 Saunders, supra note 21, at 82.
130 Id.
131 Morrill, supra note 122, at 1100.
132 Id. at 1099.
133 Id.
Substantive learning about domestic violence is a start, but it is not enough to enable custody evaluators overcome their bias. Evaluators must also be taught about bias itself and how they are affected by it, as well as strategies to overcome it.

It is possible to unlearn bias. Biases can be overcome by creating new mental associations that must be reinforced with repeated practice. The first step to overcoming bias is recognizing that one has it. Research on judicial education has shown that simply educating judges about implicit bias is useful in overcoming it. Custody evaluators must be taught about the interplay between gender bias, domestic violence and custody, in order to understand how gender bias affects them. They also need to understand hindsight bias, outgroup bias, and the just world fallacy and how this affects their understanding of victimhood. Research suggests that people make less biased decisions once they are aware of how bias affects them.

Another way to teach evaluators to overcome gender bias is to ask them to practice gender-switching when they are considering a case. One article on juror bias proposed race-switching to prevent relying on implicit racial bias. Jurors would be asked to consider all of the same facts in a case, but to switch the races of the defendant and victim. Custody evaluators can apply the same logic to the genders of parties in a case, and consider how they would evaluate the same behaviors and emotions if they were coming from the opposite gender.

---

134 Kirwan Institute, supra note 90, at 17.
135 Id. at 20.
“Intergroup contact” has also been proposed to decrease bias.\textsuperscript{139} The findings of some of the discussed studies indicate that contact with domestic violence victims makes custody evaluators have more positive feelings towards them. For example, in the Saunders study, evaluators who had a family member who was a victim of a domestic violence were more likely to believe that domestic violence was relevant to custody and that mothers do not make false allegations of domestic violence.\textsuperscript{140} It is possible that training sessions that include discussions with victims of domestic violence, particularly those who do not meet the stereotypes that custody evaluators often hold, may help to decrease bias against victims of domestic violence.

B. Statutory Guidelines

While any statute should include specific training requirements like those in California, it should also provide guidelines on how evaluations should be conducted and what must be included in them. Various organizations have created model guidelines for custody evaluators.\textsuperscript{141} Guidelines should make the evaluation process more deliberative for the evaluator and thereby reduce the opportunity for bias. Research on defense attorneys and racial bias suggests that people can reduce bias by using objective, measurable standards.\textsuperscript{142} Requiring the use of standard practices can ensure the accountability of legal professionals in situations where they are likely to encounter their bias.\textsuperscript{143} More often than not, even though domestic violence allegations are common, evaluators do not use standard screening methods for domestic violence allegations.

\textsuperscript{139} Kirwan Institute, supra note 90, at 23.
\textsuperscript{140} Saunders, supra note 21, at 9.
\textsuperscript{142} Lee, supra note 138, at 2645.
\textsuperscript{143} Id.
in evaluations. Guidelines must include standard processes so that even where domestic violence is not alleged, each case will be screened for abuse. This will reduce the need for evaluators to rely on inferences. They should also use standard methods in interviews and in evaluating records to avoid making inappropriate inferences based on biases.

C. Evaluator Screenings and Certification

Finally, upon completion of the required training, evaluators should be required to be certified by passing an exam that tests their understanding of domestic violence and bias, as well as screens their bias. There is a test that can be used to measure implicit bias, called the Implicit Association Test (IAT). The IAT is a computer-based test that requires the subject to quickly sort words and ideas. It tests reaction times when viewing pairings of words to determine whether or not a person implicitly associates the words paired with each other. Perhaps as part of a certification exam, evaluators should be required to have a certain score on the IAT. Additionally, tests can be developed to screen for bias against victims. By including questions about, for example, the causes of domestic violence, the exam could exclude candidates who believe that victims cause violence.

IV. Conclusion

Too often, custody evaluations are determined by the characteristics of the evaluator performing the evaluation rather than the facts of each case, leading to dangerous outcomes. Evaluators’ knowledge and beliefs about domestic violence, rather than the severity of the violence, determine their recommendations. Beliefs held by custody evaluators that influence

144 Bow, supra note 128, at 1403; Saunders, supra note 21, at 124.
145 Bow, supra note 128, at 1396.
146 Kang, supra note 136, at 1130.
147 Id.
their recommendations include; that domestic violence is irrelevant to custody, that mothers make false allegations of abuse, that fathers’ involvement is of paramount importance, and that victims are responsible for their abuse. Evaluators’ beliefs, combined with inadequate domestic violence education, result in unsafe parenting plans for victims and their children. These beliefs are the product of gender bias as well as biases against victims. Bias can be overcome with education about both domestic violence and bias. Evaluators should be required to participate in trainings and pass a certification exam. Mandatory guidelines should be created to assist evaluators in making unbiased conclusions about victims and children. Trainings and certification can contribute to evaluators’ ability to effectively determine the best, safest plan for the child and parents.