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# OVERCOMING BIASED VIEWS OF GENDER AND VICTIMHOOD IN CUSTODY EVALUATIONS WHEN DOMESTIC VIOLENCE IS ALLEGED

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## I. 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Research also shows that evaluators with inadequate domestic violence knowledge tend to recommend unsafe parenting plans for domestic violence victims and their children.<sup>5</sup>

Part I of this Article discusses research indicating that the unpredictability and lack of safety in recommendations can be attributed 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 implicit gender bias and bias against victims. Part III proposes strategies for custody evaluators to overcome these biases.

## II. WHAT DRIVES CUSTODY EVALUATORS' RECOMMENDATIONS?

In one case involving a history of domestic violence, four custody

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1. See T.K. Logan et al., *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE & VICTIMS 719, 720 (2002).

2. See *id.* at 721.

3. See Nancy Erickson & Chris O'Sullivan, *Doing Our Best for New York's Children: Custody Evaluations When Domestic Violence is Alleged*, 23 NYS PSYCHOLOGIST 9, 9-10 (2011); Megan Haselschwerdt et al., *Custody Evaluators Beliefs about Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1694-95 (2011).

4. See Erickson & O'Sullivan, *supra* note 3, at 9.

5. See, e.g., Haselschwerdt et al., *supra* note 3, at 1711; Logan et al., *supra* note 1, at 735.

evaluations were performed as a result of a modification petition.<sup>6</sup> 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.<sup>7</sup> This paper draws from five studies, four empirical and one qualitative, that analyze the variability of recommendations made by custody evaluators in domestic violence cases.<sup>8</sup> Broadly, these studies identify the same problem: a custody recommendation should be determined by the facts of a case; however, 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. Haselschwerdt, Hardesty, and Hans, researchers at the University of Illinois Department of Human Development and Family Studies, performed a study in which custody evaluators were interviewed and assigned to groups based on their theoretical perspectives.<sup>9</sup> Those who believed that domestic violence is rooted in coercive control were labeled as one group, and those who believed it is conflict-based were labeled as another group.<sup>10</sup> 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 result of marital conflict had less knowledge.<sup>11</sup> The more knowledgeable group relied on their training and was able to recognize domestic violence when they encountered it.<sup>12</sup> The evaluators in the less-knowledgeable group reported never having seen “real DV,” which they described as having elements of

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6. See ELLEN PENCE ET AL., MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 30 (2012).

7. See *id.* at 29-30.

8. See generally MICHAEL DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 3 (2011); Haselschwerdt et al., *supra* note 3, at 1694-95; Logan et al., *supra* note 1, at 719; PENCE ET AL., *supra* note 6, at 2; DAVID SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 6 (2012) [hereinafter SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS].

9. See Haselschwerdt et al., *supra* note 3, at 1699-1700 (focusing on evaluations done in one Midwestern state).

10. See *id.* at 1700, 1703.

11. See *id.* at 1703-04.

12. See *id.* at 1713-14.

coercive control.<sup>13</sup> While they recognized that coercive control existed, they said that they only saw conflict-based, situational couple violence.<sup>14</sup> 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] . . .”<sup>15</sup> This group, lacking specific domestic violence knowledge, employed general training in the dynamics of divorcing parents.<sup>16</sup> This study reveals the result of inconsistent domestic violence training, and that the evaluators’ knowledge of domestic violence, or lack thereof, determines the recommendation, not the presence of domestic violence. Evaluators even discredit allegations of domestic violence when the allegations are supported by corroborating evidence.<sup>17</sup>

Studies also indicate that evaluators lack an understanding of the role of power and control, which may cause them to overlook both a history of domestic violence and post-separation risks. A study out of the University of Kentucky, Office for Policy Studies on Violence Against Women, conducted by Logan, Walker, Jordan and Horvath, found that evaluators do not consider how the frequent contact required by joint custody may contribute to future violence.<sup>18</sup> A 2010 report funded by the National Institute of Justice of the U.S. Department of Justice, and investigated and authored by Davis, O’Sullivan, Susser, and Fields of the New York Legal Assistance Project, found that the safest parenting plans were recommended by those who considered the role of power and control.<sup>19</sup> Unfortunately, only a quarter of the evaluations analyzed referenced power and control.<sup>20</sup> A 2011 report funded by and submitted to the National Institute of Justice of the U.S. Department of Justice by Saunders, Faller, and Tolman surveyed custody evaluators and other types of legal professionals from across the country and analyzed various beliefs they held about domestic violence and custody.<sup>21</sup> As part of the study, custody evaluators were given a vignette depicting severe domestic violence.<sup>22</sup>

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13. *See id.* at 1708.

14. *See id.* at 1696 (distinguishing 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.); *id.* at 1708.

15. *See id.* at 1708.

16. *See id.* at 1714.

17. *See* DAVIS ET AL., *supra* note 8, at 37.

18. *See* Logan et al., *supra* note 1, at 737.

19. *See* DAVIS ET AL., *supra* note 8, at 80.

20. *See id.* at 81.

21. *See* SAUNDERS, ET. AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8.

22. *See id.* at 44.

Those evaluators who stated that they would explore coercive control were more likely to believe that domestic violence was relevant to custody evaluations.<sup>23</sup>

When evaluators do recognize domestic violence, research indicates that they do not take it into account when making their custody recommendations. The study by Logan, comparing custody cases with and without domestic violence, found that the presence of violence made little difference in the recommendations of evaluators.<sup>24</sup> In both types 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.<sup>25</sup> 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.<sup>26</sup> As a result, there was very little difference between the evaluator recommendations in the domestic violence and non-domestic violence cases.<sup>27</sup> In some instances, documented histories of violence were overlooked entirely.<sup>28</sup>

Though evaluators in this study believed allegations of domestic violence in nearly two-thirds of their cases, very few recommendations emphasized safety.<sup>29</sup> Researchers found that the safest plans were recommended by those who had knowledge of domestic violence and analyzed the risk of future violence.<sup>30</sup> Even so, the majority of the evaluations did not include assessments of the risk factors of future danger.<sup>31</sup> The study concluded that "most evaluations recommended custody and visitation arrangements that would not protect the mother and children from further abuse."<sup>32</sup>

A report by the Battered Women's Justice Project (BWJP) similarly found that even when custody evaluators believed that a parent had committed domestic violence against the other parent, the violence did not affect the evaluators' recommendations. In this report, BWJP analyzed several custody evaluations where domestic violence was alleged, focusing

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23. *See id.* at 8 (This study is particularly significant because it is the largest and the only nationwide study about evaluator beliefs).

24. *See Logan et al., supra* note 1, at 729, 737.

25. *See id.* at 731.

26. *See id.* at 735.

27. *See id.*

28. *See id.* at 736.

29. *See DAVIS ET AL., supra* note 8, at 84.

30. *See id.* at 80.

31. *See id.*

32. *Id.* at 85.

on how the domestic violence affected the recommendation.<sup>33</sup> They found that domestic violence tended not to influence evaluator decision-making, and that there were no consistent descriptions or explanations of domestic violence in the recommendations.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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 despite knowing that the “domestic abuse” was a sexual assault that occurred in front of the child.<sup>37</sup>

The Logan study additionally revealed that custody evaluators lack understanding about how the dynamics of domestic violence are relevant to the custody process itself. Over half of the evaluators reported that they interviewed the parents together, even if domestic violence was alleged.<sup>38</sup> Interviewing a victim in the presence of her abuser could elicit less open responses and risk violence from the abuser in retaliation.<sup>39</sup> By interviewing the parents together, the custody evaluator fails to get the full story of the abuse and is unable to 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 that are often held by laypeople without domestic violence expertise.<sup>40</sup> This section discusses the false beliefs that: domestic violence is irrelevant to custody; allegations of abuse are often false; the involvement of the father in the child's life is of paramount importance; and victims are at fault for their own abuse. These

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33. See generally PENCE ET AL., *supra* note 6, at 2-3 (noting that this report consists of a qualitative analysis of custody evaluations' handling of domestic violence. Evaluations were solicited from courts, evaluators, attorneys, and professional associations.).

34. See *id.* at 5.

35. *Id.* at 7.

36. See *id.*

37. See *id.* at 11.

38. See Logan et al., *supra* note 1, at 735.

39. See *id.*

40. See Erickson & O'Sullivan, *supra* note 3, at 10. See generally Saunders, CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8.

beliefs cause custody evaluators to overlook or actively ignore domestic violence where it exists to the detriment of children and their nonviolent parent.<sup>41</sup>

*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 one parent abusing the other on a child's development are well documented. Sons of abusers have a higher "risk of becoming [abusers] themselves" than other male children since they tend to adopt the beliefs of the abusive parent.<sup>42</sup> 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.<sup>43</sup> In addition, behavior that abusers exhibit towards their children is often similar to the abusive behavior that they exhibit towards their spouse.<sup>44</sup> Abusers are often controlling, coercive, and have poor emotional boundaries with their children.<sup>45</sup> Due to these poor emotional boundaries and the fact that abusers tend to equate love with violence, parents that abuse their spouses are also more likely to abuse their children, both physically and sexually, than parents who do not abuse their spouses.<sup>46</sup>

Evaluators may believe that domestic violence is not about the children and it 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.<sup>47</sup> Evaluators concluded this even where children were present during physical and sexual assaults of their mothers.<sup>48</sup> Logan also pointed out that even though one in three children had witnessed abuse, little attention was paid to how this affected the children.<sup>49</sup> The Haselchwerdt study also found that, among the evaluators who has less domestic violence knowledge, evaluations did not consider abuse that occurred during the marriage

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41. See DAVIS ET AL., *supra* note 8, at 80; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 130.

42. See LUNDY BANCROFT ET AL., BATTERER AS PARENT 2 (2d ed. 2002).

43. See Jeffrey Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839, 846 (1999).

44. See BANCROFT ET AL., *supra* note 42, at 6-7.

45. See *id.* at 7, 13.

46. See *id.* at 2, 13.

47. See PENCE ET AL., *supra* note 6, at 20-21.

48. See *id.* at 7-8.

49. See Logan et al., *supra* note 1, at 736.

relevant to an abuser's ability to co-parent once that marriage had ended.<sup>50</sup>

Research indicates that those who believe that domestic violence is irrelevant to custody also recommend less safe parenting plans. Saunders's 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.<sup>51</sup> 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.<sup>52</sup> 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 parent's reluctance to co-parent, that domestic violence survivors falsely allege child abuse, and the belief that mothers make false allegations of domestic violence.<sup>53</sup>

However, some studies showed evaluators treating domestic violence as relevant solely in relation to how it affects the mother's parenting abilities.<sup>54</sup> 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 co-parent after separation, a victim's ability to co-parent may be compromised.<sup>55</sup> 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.<sup>56</sup> This caused the evaluator to have concerns about the mother's ability to co-parent, resulting in the evaluator recommending custody to the father.<sup>57</sup>

## 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.<sup>58</sup> In fact, it is much more likely that domestic violence is under-alleged; the majority of intimate partner victimizations are never reported to the

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50. See Haselschwerdt et al., *supra* note 3, at 1709.

51. See SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 70.

52. *Id.* at 7.

53. See *id.* at 8.

54. See Haselschwerdt et al., *supra* note 3, at 1709.

55. See *id.*

56. See PENCE ET AL., *supra* note 6, at 8-9.

57. See *id.* at 9.

58. See DAVIS ET AL., *supra* note 8, at 61-62; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 6.



police.<sup>59</sup> In addition, child sexual abuse is only alleged in 2% of all contested custody cases.<sup>60</sup> In fact, research shows that allegations made during custody cases are no more likely to be false than allegations made at any other time.<sup>61</sup> Problematically, unsubstantiated allegations are often conflated with intentionally false allegations that reinforce the exaggerated belief that child abuse is often falsely alleged.<sup>62</sup> One study found the rate of intentionally false allegations of child abuse to be 12% for cases involving custody.<sup>63</sup>

Often, a lack of third party evidence leads evaluators to question the veracity of allegations.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> This is a misconception. In fact, there is often no outside evidence present when domestic violence is alleged in custody cases because abused women often do not seek help prior to separation.<sup>67</sup> 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.<sup>68</sup>

In the Saunders study, evaluators estimated that 22% of mothers evaluated made false allegations of domestic violence.<sup>69</sup> 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.<sup>70</sup> This

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59. See Haselschwerdt et al., *supra* note 3, at 1698, 1706.

60. Nancy Thoennes & Patricia Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Divorce Disputes*, 14 CHILD ABUSE & NEGLECT 151, 151 (1990).

61. See *id.* at 162.

62. See Nico Trocme & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333, 1334-35 (2005).

63. *Id.* at 1333.

64. See Haselschwerdt et al., *supra* note 3, at 1698.

65. See *id.* at 1708.

66. See *id.*

67. See *id.* at 1698.

68. See *id.* at 1705-06.

69. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 117.

70. DAVIS ET AL., *supra* note 8, at 48 (finding evaluators credited 61% of such allegations).

is even less frequently than when custody evaluators credit allegations of domestic violence by one parent against the other.<sup>71</sup> In the Saunders study, evaluators estimated that between 25% and 33% of child abuse claims are false.<sup>72</sup>

Saunders found that evaluators who believed that false allegations of domestic violence and child abuse were common also believed 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 co-parenting, and that survivors make false allegations of child abuse.<sup>73</sup> The study also found that when evaluators believe women frequently make false allegations of abuse, they tend to recommend parenting plans that favor the abuser over the victims.<sup>74</sup>

### 3. *The Involvement of a Father in a Child's Life Is of Paramount Importance.*

Courts and custody evaluators often overemphasize the importance of a father's involvement in child care.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

Parenting plans that involve significant contact between the parents, even though one parent has been abusive to the other, reflect the emphasis that family courts place on fathers' involvement in a child's life.<sup>78</sup>

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71. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 117 (finding evaluators credited 46% of such allegations).

72. *See id.*

73. *See id.*

74. *See id.* at 120.

75. *See* DAVIS ET AL., *supra* note 8, at 9, 80.

76. *See id.* at 120-21.

77. Koray Tanfer & Frank Mott, *The Meaning of Fatherhood for Men*, in NURTURING FATHERHOOD: IMPROVING DATA AND RESEARCH ON MALE FERTILITY, FAMILY FORMATION AND FATHERHOOD, APPENDIX C 266 (1998), [https://www.childstats.gov/pdf/other\\_pubs/nurturing\\_fatherhood.pdf](https://www.childstats.gov/pdf/other_pubs/nurturing_fatherhood.pdf).

78. *See* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 121.

Research has shown that joint custody, where both parents make decisions and share time with the child, is inappropriate where there is a history of domestic violence.<sup>79</sup> Joint custody arrangements have had success with couples willing to co-parent, but this is highly unlikely in situations where one parent has abused the other.<sup>80</sup> Abusers use the requisite continued contact with their victims as a means of maintaining control through verbal harassment as well as emotional and physical abuse.<sup>81</sup> While a father's continued involvement in a child's life is normally important, assessing domestic violence and child abuse is necessary to ensure the safety of mothers who allege abuse.<sup>82</sup> Recommending frequent contact with an abusive parent ignores the probability of continued violence and fails to protect children from future harm.<sup>83</sup>

This overemphasis on joint custody arrangements appears to contribute to evaluators' overlooking of domestic violence.<sup>84</sup> In the Haselschwerdt study, evaluators with less domestic violence knowledge were more likely to recommend plans that emphasized co-parenting and contact with the non-custodial parent.<sup>85</sup> 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.<sup>86</sup> In contrast, the evaluators with more domestic violence knowledge were more likely to prioritize victim safety over the father's parental rights and to recommend supervised visitation in cases where coercive control was present.<sup>87</sup>

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.<sup>88</sup> It was not the abuse that hurt the child, but the mother discussing it.<sup>89</sup> 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"

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79. See Judith Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. L. REV. 403, 411 (2005).

80. *See id.*

81. *See id.* at 411-12.

82. *See* Logan et al., *supra* note 1, at 738.

83. *Id.*

84. *Id.* at 737; Haselschwerdt et al., *supra* note 3, at 1698.

85. *Id.* at 1711.

86. *Id.*

87. *Id.* at 1706.

88. PENCE ET AL., *supra* note 6, at 11.

89. *See id.*

statutes, which the majority of states have, favor the parent who is more willing to encourage the child's relationship with the other parent.<sup>90</sup> The result is that when victims are unable or unwilling to co-parent, they are seen as the less "friendly" parent.<sup>91</sup> 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.<sup>92</sup>

#### 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.<sup>93</sup> 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.<sup>94</sup>

While none of the studies explicitly 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.<sup>95</sup> 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.<sup>96</sup> 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."<sup>97</sup> In Davis's study, the researchers found that 31% of evaluators viewed abuse as a conflict between the

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90. Joan Zorza, *The "Friendly Parent" Concept—Another Gender-Biased Legacy From Richard Gardner*, 12 DOMESTIC VIOLENCE REP. 65, 75 (2007) [hereinafter Zorza, *The "Friendly Parent" Concept*].

91. *Id.*

92. Logan et al., *supra* note 1, at 737.

93. Judith Wolfer, *Top 10 Myths about Domestic Violence*, 42 MD. BAR J. 38 (2009).

94. *Id.* at 40.

95. Haselschwerdt et al., *supra* note 3, at 1708.

96. PENCE ET AL., *supra* note 6, at 11.

97. Haselschwerdt et al., *supra* note 3, at 1712.

parents.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> Sixteen percent stated they would fault the mother for the abuse.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.

### III. 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—may be explained by gender bias and certain other cognitive 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. The biases then affect the recommendations that evaluators make.

#### A. *Implicit Gender Bias*

Implicit bias refers to “attitudes or stereotypes that affect our understandings, actions, and decisions in an unconscious manner.”<sup>104</sup> Individuals are unaware of their implicit biases and the effect that these biases can have on their choices.<sup>105</sup> Implicit biases are associations that

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98. DAVIS ET AL., *supra* note 8, at 39.

99. *Id.* at 69.

100. *Id.* at 39.

101. *Id.*

102. *Id.* at 41.

103. *Id.* at 40.

104. Cheryl Staats, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW, 2014, at 16.

105. *Id.*

people develop and reinforce over time, beginning at a very early age.<sup>106</sup> Believing 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 may be partially explained by implicit gender bias.<sup>107</sup>

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.<sup>108</sup> Conversely, more liberal beliefs about a woman's role in society are correlated with sympathy for victims.<sup>109</sup> Researchers have determined this to be specifically true with respect to custody evaluators. Saunders' study found a correlation among evaluators between beliefs in patriarchal norms and false beliefs about custody and domestic violence.<sup>110</sup> Saunders measured evaluators' beliefs in patriarchal norms using the Modern Sexism Scale (MSS), an assessment of subtle forms of sexist attitudes.<sup>111</sup> Implicit bias is described in a similar manner as the sexism measured by the MSS—it is not an explicit gender bias that someone knows he or she holds, but rather an implicit, subtle bias of which he or she is unaware.<sup>112</sup>

One result of such bias is that women's concerns tend to be placed behind men's in custody disputes.<sup>113</sup> This, combined with a lack of understanding of domestic violence, causes evaluators to delegitimize mothers' concerns for themselves and their children.<sup>114</sup> A victim's demeanor is often used as a basis for ignoring her concerns and devaluing her ability to parent.<sup>115</sup> Domestic violence victims may be seen as unstable and overdramatic when they disclose abuse or safety concerns.<sup>116</sup> Evaluators may interpret a nervous or fearful demeanor as evidence that the

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106. *Id.*

107. See Erickson & O'Sullivan, *supra* note 3, at 10; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 18, 20, 27.

108. David Saunders et al., *Inventory of Beliefs about Wife Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes*, 2 VIOLENCE & VICTIMS 39, 49 (1987) [hereinafter Saunders et al., *Inventory of Beliefs*].

109. *Id.*

110. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 11.

111. *Id.* at 41.

112. Staats, *supra* note 104, at 16.

113. Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1120 (1996) [hereinafter Zorza, *Protecting the Children in Custody*].

114. *Id.*

115. *Id.* at 1120-21.

116. Haselschwerdt et al., *supra* note 3, at 1698, 1710.

victim cannot be a good mother.<sup>117</sup> 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.<sup>118</sup> In addition, the same psychological symptoms can be interpreted differently in men and women because of gender stereotypes.<sup>119</sup>

The overemphasis on co-parenting, even in domestic violence cases, is another reason that an evaluator may conclude that the abuser is the better parent. In the Saunders study, the belief in patriarchal norms was correlated with the belief that victims hurt their children when they refuse to co-parent.<sup>120</sup> One evaluator interviewed in the Haselschwerdt study stated, “[y]ou can have a situation where the victim isn’t really able to co-parent effectively because of all her issues, and so the most effective parent is actually the abuser.”<sup>121</sup> While an emphasis is often placed on the victim’s inability to co-parent because of the trauma of abuse and the concern over future safety, evaluators do not express the same concerns over an abuser’s ability to parent.<sup>122</sup> 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.<sup>123</sup> Misogynistic stereotypes that women are “petty, angry, or vindictive” cause people to overestimate the frequency of false allegations.<sup>124</sup> The unequal emphasis placed on men’s concerns contributes to the discrediting of women’s allegations, particularly allegations that involve the physical and sexual abuse of children.<sup>125</sup> 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 do not.<sup>126</sup> If a victim differs from a stereotypical passive victim, and, for example, expresses anger over her abuse, an evaluator may incorrectly conclude that domestic

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117. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 20.

118. *Id.*

119. *Id.*

120. *Id.* at 11.

121. Haselschwerdt et al., *supra* note 3, at 1709.

122. *Id.* (The evaluator in this example said the inability to co-parent was because of “all of [the victim’s] issues.”)

123. Zorza, *Protecting the Children in Custody*, *supra* note 113, at 1120-21.

124. *Id.* at 1121.

125. *Id.* at 1120-21.

126. *Id.* at 1121.

violence does not exist where it does.<sup>127</sup> Importantly, Saunders found that the belief that women make false allegations of domestic violence and child abuse was correlated with belief in patriarchal norms.<sup>128</sup> The result is that when evaluators want to determine the legitimacy of an allegation, they draw inferences from bias and myth.<sup>129</sup>

### 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 co-parent may seem unjustified. Blaming victims of domestic violence for their abuse may be explained by a lack of adequate education about domestic violence.<sup>130</sup> As the discussed studies indicate, many custody evaluators lack education about the dynamics of power and control, why a victim may stay in a relationship, and post-separation violence.<sup>131</sup> This lack of domestic violence-specific knowledge may cause evaluators to blame victims. However, there is more at play than inadequate knowledge; there are subconscious biases that cause individuals to doubt and blame victims.<sup>132</sup>

The “hindsight effect” is one such bias.<sup>133</sup> When a person learns of the outcome of an event, he or she is unable to ignore it.<sup>134</sup> This leads the person to have an exaggerated perception of the likelihood of the event.<sup>135</sup> For example, one study tested hindsight bias by giving two groups of people identical stories about an interaction between a male and female college student, with the exception of the final line.<sup>136</sup> In one version, the story concluded with the woman being raped; in the other, it concluded with her going home. Those in the former group were significantly more

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127. Haselschwerdt et al., *supra* note 3, at 1698.

128. Saunders et al., *Inventory of Beliefs*, *supra* note 108, at 40.

129. *Id.* at 49.

130. See DAVIS ET AL., *supra* note 8, at 89; Erickson & O’Sullivan, *supra* note 3, at 10; PENCE ET AL., *supra* note 6, at 35; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 23-24.

131. See SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 13-14.

132. See generally Saunders et al., *Inventory of Beliefs*, *supra* note 108.

133. Ronnie Janoff-Bulman et al., *Cognitive Biases in Blaming the Victim*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 161, 161 (1985).

134. *Id.* at 162-63.

135. *Id.* at 162.

136. *Id.* at 164.



likely to believe that rape was the most likely outcome in that scenario than the latter group.<sup>137</sup>

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, and in both cases the victim's behavior was often seen as a precipitant to the violence.<sup>138</sup> The similarity can be explained by the hindsight effect. In the context of custody evaluations, when an evaluator hears of specific 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, evaluators may come to the conclusion that these are not assaults, but "conflicts."<sup>139</sup> 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.<sup>140</sup>

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.<sup>141</sup> Researchers have attributed this to outgroup bias; people are less likely to believe someone unlike themselves.<sup>142</sup> One study tested how the credibility of complainants was judged when reporting everyday events and domestic abuse when those reports were slightly inconsistent.<sup>143</sup> The participants who read the inconsistent description of everyday events judged the complainant as more positive than the complainant describing domestic violence.<sup>144</sup> They also rated the complainant who reported everyday events as more similar to themselves.<sup>145</sup>

Another explanation for evaluators' inclination to doubt or blame victims may be the "just world theory," which "posits that people have a need to

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137. *Id.* at 165.

138. Saunders et al., *Inventory of Beliefs*, *supra* note 108, at 45 (This correlation was found when participants were asked about specific situations, rather than about whether or not abuse is justified in general).

139. PENCE ET AL., *supra* note 6, at 11.

140. *Id.* at 27.

141. Sarah Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 *LAW & HUM. BEHAV.* 470, 477 (2009).

142. *Id.* at 471.

143. *Id.* at 472.

144. *Id.* at 477.

145. *Id.* at 478.

believe that the world they live in is just.”<sup>146</sup> People are subconsciously inclined to believe that bad things happen to bad people, and good things happen to good people.<sup>147</sup> Applied to the context of domestic violence, the just world theory would indicate that those who have experienced domestic violence somehow caused or deserved it. Saunders’ study examined whether or not custody evaluators believed in the just world theory, and found that those evaluators who did were more likely to hold certain false beliefs about custody.<sup>148</sup> For example, 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 co-parenting.<sup>149</sup> It was also correlated with past recommendations that favored abusers.<sup>150</sup>

Just world theory helps explain the beliefs of custody evaluators. It may be easier to believe that a woman is falsely alleging domestic violence than to 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.<sup>151</sup> It is simpler to believe that someone who seems like a good parent *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.<sup>152</sup> 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.<sup>153</sup>

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146. See SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 41-42.

147. *Id.* at 42.

148. *Id.*

149. *Id.* at 11.

150. *Id.* at 125 (For example, the study found that evaluators whose responses indicated a belief in a just world were also likely to have recommended in the past that a perpetrator of domestic violence have sole custody, that a perpetrator and victim have joint custody).

151. DAVIS ET AL., *supra* note 8, at 47.

152. Allison Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1078 (2005).

153. Haselschwerdt et al., *supra* note 3, at 1078.

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#### IV. PROPOSED REMEDIES

##### A. *Custody Evaluator Trainings*

Evaluators' lack of knowledge about domestic violence and their inaccurate beliefs about custody may be overcome with education. Education must include instruction on bias and 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.<sup>154</sup> Included in the statute 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."<sup>155</sup> The statute emphasizes the importance of understanding the dynamics of domestic violence and, importantly, risk factors for future violence.<sup>156</sup> 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."<sup>157</sup> The statute emphasizes education in "the importance of discouraging [evaluators] from blaming victims of domestic violence for the violence and from minimizing allegations of domestic violence."<sup>158</sup>

##### 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,<sup>159</sup> a more thorough understanding of 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

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154. Cal. Rules of Ct., Rule 5.230 (d)(1), (2).

155. *Id.* at 5.230 (d)(1)(A)(i).

156. *Id.* at 5.230(d)(1)(A)(v).

157. *Id.* at 5.230 (d)(1)(A)(v)(a).

158. *Id.* at 5.230 (d)(1)(A)(v)(k).

159. James Bow & Paul Boxer, *Assessing Allegations of Domestic Violence in Child Custody Evaluations*, 18 J. INTERPERSONAL VIOLENCE 1394, 1405 (2003).

the risk of future violence to the victim and children. When evaluators have knowledge of post-separation violence and domestic violence screening, they make safer recommendations.<sup>160</sup> They are also more likely to believe that domestic violence is important to custody.<sup>161</sup> 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.<sup>162</sup> Judges who had domestic violence training were more likely to give sole legal custody to victims.<sup>163</sup> 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.<sup>164</sup> 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 include the dynamics of domestic violence, but also risk-assessment strategies and methods for determining safe parenting plans in high-risk situations.

## 2. *Training to Recognize and Overcome Bias*

Substantive learning about domestic violence is a start, but it is not enough to enable custody evaluators to 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.<sup>165</sup> Biases can be overcome by creating new mental associations that must be reinforced with repeated practice.<sup>166</sup> The first step to overcoming bias is recognizing that one has it.<sup>167</sup> Research on judicial education has shown that simply educating judges about implicit bias is useful in overcoming it.<sup>168</sup> Custody evaluators must be taught about the interplay between gender bias, domestic violence, and custody, in order

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160. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 82.

161. *Id.*

162. Morrill et al., *supra* note 152, at 1100.

163. *Id.* at 1099.

164. *Id.*

165. Staats, *supra* note 104, at 17.

166. *Id.* at 20.

167. *Id.* (“Education efforts aimed at raising awareness about implicit bias can help debias individuals.”).

168. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172 (2012).

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.<sup>169</sup>

Another way to teach evaluators to overcome gender bias is 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.<sup>170</sup> Jurors would be asked to consider all of the same facts in a case, but to switch the races of the defendant and victim.<sup>171</sup> 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.

“Intergroup contact” has also been proposed to decrease bias.<sup>172</sup> 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.<sup>173</sup> 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 regarding custodial evaluations should include specific training requirements like those in California, it should also provide guidelines on how evaluations should be conducted. Various organizations have created model guidelines for custody evaluators.<sup>174</sup> Guidelines should make the evaluation process more deliberative for the evaluator and

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169. L. Song Richardson & Phillip Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2645–46 (2013).

170. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Racial Bias in a Not Yet Post Racial Society*, 91 N.C. L. REV. 1555, 1599–1600 (2013).

171. Staats, *supra* note 104, at 20.

172. *Id.* at 23.

173. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 8, at 9.

174. ASS’N OF FAMILY AND CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATORS, (2006), <http://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf?ver=2013-08-21-071826-000>; American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 863-67 (2010).

thereby reduce the opportunity for bias. Research on defense attorneys and racial bias suggests that people can reduce bias by using objective, measurable standards.<sup>175</sup> Requiring the use of standard practices can ensure the accountability of legal professionals in situations where they are likely to encounter their bias.<sup>176</sup> More often than not, even though domestic violence allegations are common, evaluators do not use standard screening methods for domestic violence in evaluations.<sup>177</sup> Guidelines must include standard processes so that even where domestic violence is not alleged, each case will be screened for abuse.<sup>178</sup> 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 in 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).<sup>179</sup> The IAT is a computer-based test that requires the subject to quickly sort words and ideas.<sup>180</sup> It tests reaction times when viewing pairings of words to determine whether or not a person implicitly associates the words paired with each other.<sup>181</sup> 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 should exclude candidates who believe that victims cause violence.

## V. 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

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175. Lee, *supra* note 170, at 1564.

176. *Id.* at 1589.

177. Bow & Boxer, *supra* note 159, at 1403; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 8, at 124.

178. Bow & Boxer, *supra* note 159, at 1396.

179. Staats, *supra* note 104, at 18.

180. Kang et al., *supra* note 168, at 1130.

181. *Id.*

recommendations. Beliefs held by custody evaluators that influence 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.