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Childhood Exposure to Domestic Violence and the Legal System: Moving  
Towards Statutory Reform

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## I. Introduction

As a child grows and learns to interpret and experience their world, the home environment is critical to building a successful foundation. A child learns appropriate physical and emotional behavior from their home environment, particularly parents or parental figures. Of course, parental figures are human and often will engage in conflict or disagreements. Occasionally, these conflicts or disagreements will be physically or emotionally abusive, exposing children in the household to behavior that is can be traumatic in the child's life. Social science research has continuously reaffirmed that children exposed to interparental violence are significantly more likely than non-exposed children to develop a range of maladaptation, including but not limited to: negative mental and physical health disorders (Black et al., 2010; Felitti et al., 1998), lower educational attainment than their non-exposed counterparts (Stith et al., 2000; Niolon et al., 2017), and behavioral maladaptation (including the perpetuation of domestic violence in adolescence and adulthood) (Cui et al., 2013; Black et al., 2010). However, these are not findings of causality. Research suggests that the intensity, duration, frequency, and relative location to the violence are all important facets to a child's outcomes from the experience of trauma, as well as the child's age, supportive features in their life, and intrinsic personality characteristics. This means that even if twins were to be exposed to the same traumatic experience, one may have long-term emotional/behavioral consequences while the other does not.

For policymakers, this presents a host of issues. To change status-quo responses to childhood exposure to domestic violence means being able to hold equal consideration for one child's benefits and another's harms. Further, while this analysis is focused on the promotion of child welfare, the welfare of the battered parent should be taken into consideration as well, to the

extent that a parent's welfare benefits the child's welfare, suggesting the need for a very nuanced legal response to childhood exposure to domestic violence. Presently, there is a high level of variation in responses to families experiencing violence across state lines. Efforts at statutory reform have taken a range of approaches, from expanding the grounds for child protective services intervention in violent families, to limiting a batterer's custody rights, to prosecution of exposing children to domestic violence.

Through this analysis, I seek to examine past and current efforts at statutory reform that characterize children's exposure to domestic violence as a form of child abuse or neglect. This may take the form of expanding a codified definition of child maltreatment, or simply informal policies and practices of an agency. I evaluate the soundness of these various child protection strategies from theoretical and practical standpoints, culminating in a recommendation of the policy initiatives that are most likely to achieve the stated goals while minimizing unintended negative consequences.

First, in order to clarify the need for state intervention in a violent home, I address the ways that traumatic events in general can impact a child's life and economic outcomes. Following, I address the ways that childhood exposure to domestic violence can be a traumatic event, fitting into our understanding of adverse childhood experiences. In Part IV, I address the legal system's past and current responses to childhood exposure to domestic violence. This part seeks to evaluate how child maltreatment statutes are working in the jurisdictions that have adopted them. I identify features of statutory reform that contribute to their success, or lack thereof. Finally, in Part V, I present steps towards legal reform. I conclude that statutes explicitly bringing children exposed to domestic violence within jurisdiction of the courts has the promise

of interrupting the violence that places these children at risk, with the restriction that a heterogenous population will only ever be benefitted with a heterogeneous response.

While no original quantitative or qualitative data analysis is used in this article, secondary data synthesis will be employed to answer the research question. This data will be comprised of social science and legal research, the former used for situational framing and analysis of policy effectiveness, while the latter will be used for a review of the state's involvement with childhood exposure to domestic violence through the legal system. These sources have been found through a variety of legal and social science databases including, but not limited to, Westlaw Edge, SSRN, JSTOR, Taylor & Francis, and Google Scholar. Additionally, some sources were found through cited work within other articles. The primary search terms in these databases were "Domestic Violence," "Legal," "Child Maltreatment," and "Child Abuse." In searches where child maltreatment or child abuse were primary search terms, domestic violence was specified as a necessary component in the search categorization. There have been no issues regarding access to these data. This method of analysis was chosen over primary data analysis so as to prioritize legal literature and reasoning. Legal literature and reasoning will provide the dimensions of due process and an understanding of balancing the needs of exposed children with the needs of battered parents. It is unlikely that within the span of this article these dimensions could be addressed through primary data analysis.

The layout of this article is informed by the processes it seeks to interpret. Traditionally, family courts, child welfare services, and the criminal justice system are disparate organizations. While some overlap exists, in practice these organizations have little communication or understanding of one another, despite the fact that a single individual could very easily be involved in all three for a singular action. The theoretical framework of this article, therefore,

reflects the disparate nature of these structures to emphasize the need for interagency communication and strategy.

As suggested in the previous paragraph, the alternatives for addressing this research question lie in separating the analysis into three separate paper. This is the approach that most researchers have taken in order to adequately address the issues inherent in each of the three systems. This can be seen in papers such as Lois Weithorn's "*Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*," Christine Dunlap's "*Sometimes I Feel Like A Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*," and Lynn Beller's "*When in Doubt Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*." As suggested, there is an inherent limitation in the selected methodology because of this framework. I will not be able to fully address the nuances in state-by-state variation in each government structure, the existing geo-cultural variation in practices (considering both parental and government practices), nor the locality difference in child protective services policies.

## II. Adverse Childhood Experiences

Decades of research has established the link between experiencing domestic violence in childhood and negative outcomes later in life, however, only recently has there been a push to examine the effects of exposure to domestic violence in childhood on adult outcomes (Felitti et al., 1998; Fantuzzo, 1999; Meir, 2003; Weithorn, 2002). I use the term "exposure to domestic violence" as an intentionally general phrase, encompassing both the witnessing of physical Intimate Partner Violence (IPV) and the broader experience of being *exposed* to the aftermath of physical IPV. For example, a child may overhear the violence, witness a bloody aftermath, or be

present when police arrive and forcibly remove the abuser. While all of these events can be traumatic alone, the concept of ‘childhood exposure to domestic violence’ assumes the experience of one or more of these events over the course of the exposure period, therefore distinguishing ‘childhood exposure to domestic violence’ as distinct from solely ‘childhood witness to IPV.’ Unfortunately, it’s difficult to fully capture the scope of childhood exposure to domestic violence. Domestic violence is typically a hidden crime, underreported to both authorities and researchers. The National Survey of Children’s Exposure to Violence found that 16.3% of a nationally representative sample of youth aged 0 to 17 had ever witnessed a physical assault between their parents in their lifetime. Among children who reported experiencing maltreatment themselves, this percentage climbs to 49.6% during their lifetime (Hamby, Finkelhor, Turner, & Ormrod, 2010). These percentages are concerning on their own, even more so when considering that they are likely underestimates of the prevalence of childhood exposure to domestic violence.

Given the frequency that children are exposed to domestic violence, we should be concerned with the future implications of this experience. Like all experiences in childhood, it is likely that exposure to domestic violence may have a significant impact on a child’s adult life. In thinking about the ways that childhood exposure to domestic violence can impact their future outcomes, it is useful to consider Felitti et al.’s framework of Adverse Childhood Experiences (ACEs). An individual’s ACE score is the combination of abuse, neglect, and overall household dysfunction which occurred before the age of 18. While the score is additive, the effects are generally compounded. That is, for every additional ACE, the probability of experiencing an event on the ACE pyramid increases at an increasing rate.<sup>1</sup> Felitti et al. (1998) found that

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<sup>1</sup> See Appendix Figure 1 for the ACE pyramid, provided by the CDC.

individuals with higher ACE scores had increased risks for a litany of effects associated with a lower quality of life and increased mortality risk. While this study is limited in its cross-cultural competency and relies on adults recalling past events possibly decades later, it provides an important quantitative basis for understanding the frequency of ACE in the population. Further literature in this topic has found that adverse experiences commonly co-exist (Felitti et al., 1998; Fantuzzo et al. 1999; Roberts et al., 2010). Some studies estimate as high as 60-75% of families experiencing IPV also experience child maltreatment (Osofsky, 2003). Co-existing adverse experiences also lead to a compounding effect in children, who often exhibit more externalizing problems than children with fewer adverse experiences (Appleyard et al., 2005; Cunningham 2003; Heyman and Slep 2002). Co-existing adverse experiences as well as more externalized problems in childhood present compounding risk for later perpetration and victimization of domestic violence.

### III. Impacts of Childhood Exposure to Domestic Violence

While children with higher ACE scores lead statistically shorter lives with poorer economic outcomes, childhood exposure to domestic violence alone is linked to higher adulthood BMIs, lower graduation rates, poorer overall happiness in adulthood, and in one study, poorer test scores of classmates (Felitti et al., 1998; Black et al., 2010; Carrell and Hoekstra, 2010). The ACE pyramid (see Appendix 1) is a helpful way to understand the mechanism of these effects developing. Below the actual experience is Social Conditions/ Local Context and Generational Embodiment/Historical Trauma. A lower societal rank in these areas can have similar effects in adult outcomes as ACEs. After ACEs on the pyramid is disrupted neurodevelopment and social, emotional, & cognitive impairment. Researchers theorize that

these effects are related to high levels of stress in the body and maladaptive socialization in childhood (Felitti et al., 1998). Moving up the pyramid, we can see that as a child approaches adulthood, the effects can lead to the adoption of health risk behavior (the next level on the pyramid), further leading to disease, disability, & social problems, culminating in an early death. As cited in the original study by Felitti et al., there are a number of possible events that occur in childhood that could have similar effects as childhood exposure to domestic violence, this can be understood through the ACE pyramid framework.

Specific to childhood exposure to domestic violence, however, adverse childhood outcomes include an increased risk of psychological, social, emotional, and behavioral problems including post-traumatic stress disorder, mood and anxiety disorders, substance abuse, and school related problems. Possibly more concerning than the existence of individual effects for the child is the increased likelihood of the intergenerational transmission of violence. There is research to suggest that the most pervasive effect of childhood exposure to domestic violence is in the way that it shapes future relationships in that child's life. Childhood exposure to domestic violence is statistically linked to the perpetration of IPV and child maltreatment in adolescent and adult relationships (Cunningham, 2003; Miller, 2011). The risk of experiencing physical domestic violence in emerging and young adulthood increases with exposure to physical domestic violence in adolescent relationships (Cui et al., 2011). Elizabeth Miller et al. found that controlling for all other ACEs in a child's life, childhood exposure to physical domestic violence led to a 14.6% increase in the likelihood of domestic violence perpetration and a 12.7% increase in the likelihood of domestic violence victimization (Miller et al., 2011). It's possible that children exposed to domestic violence learn the dual message that violence resolves conflict and that it is normal for a partner to hit another (Dunlap, 2004).

It is worth noting that all of the studies cited are not causally linking childhood exposure to domestic violence to negative outcomes in adulthood. Because of the time lapse between childhood exposure to domestic violence and outcomes in adulthood, it is nearly impossible to identify one individual instance as a trigger event for an entire population. However, the addressed literature points out serious concerns for policymakers. Children exposed to domestic violence are more likely than those not exposed to not only experience the negative health and social costs associated with adverse childhood experiences, but to perpetuate the violence witnessed at home in their later families. This puts another cohort of children at risk for the same consequences as the parent who was exposed in childhood, furthering an intergenerational cycle of violence.

While all social support systems should take concern with the implications of this cycle, the legal system may be better poised to interrupt this cycle than other social infrastructures. For example, the healthcare and educational systems are structured in a way that addresses intergenerational violence at a familial unit level, where healthcare workers or teachers can only decrease the harms caused family by family (or child by child). The legal system, however, is capable of generating institutional change, disrupting the cycle of violence on a more macro scale by changing the ways that all social support systems address childhood exposure to domestic violence.

#### **IV. The Legal System and Childhood Exposure to Domestic Violence**

In understanding the potential harms in a child's life resulting from the exposure to domestic violence, the question shifts from what harm is perpetrated, to how. That is, if we know that something occurring in child's life is both illegal and carries a high potential for correlation with future harms in the child's life, then the legal system will intervene to prevent harm to the

child. The trouble with a child only being exposed to domestic violence (as opposed to experiencing domestic violence) is that it's not always clear what the harms a child will internalize. Since a child's response to traumatic events depends so much on both internal and external factors related to the event, the same interventions are not always equally necessary or justified. That is, the consequences for a child's overall wellbeing may be greater than the benefits from certain statutes. To the point of this analysis, there is substantial variation across states in terms of how statutes address children exposed to domestic violence. This provides an opportunity to examine the components and features of successful statutory intervention for the promotion of children's wellbeing. There are three primary categories of statutes that target different features of a family's interactions with the legal system. Within each category, different types of legal interventions are made available, the margins of which are dependent upon the language and implementation of the statute. The first category of laws discussed addresses child welfare service agencies, in which statutes construct childhood exposure to domestic violence as a type of child maltreatment. A second category addressed identifies the statutory criteria for the determination of child custody in private disputes between parents, typically in the context of divorce. A third and final category addresses criminal laws that distinguish penalties for violent crimes committed in the presence of a child. In each of these sections, I identify factors that contribute to the statute's success, or lack thereof. The underlying assumption of this section is that statutory reform is both possible and necessary to improve the overall well-being of children exposed to domestic violence. In covering the successes and failures of both present and past statutory efforts at reform, the necessary steps for states to take to fill the existing gaps will become clear. The following section will address steps towards statutory reform.

## Child Welfare Services

Child welfare services are typically the liaison between the family and the courts. In most cases, they are contacted by the police, making them the first decision-maker in how to proceed with a family's particular circumstance. Depending on jurisdictional or agency policy, the caseworker may have the discretion to allow the child to remain in the home or they will be required to remove the child on the grounds that they are at risk for harm from the batterer. There is significant literature suggesting that these decisions are heavily influenced by race, class, and gender biases (Ards et al., 2012, Rivaux et al., 2008; Dettlaff et al., 2011). Further, some states have more centralized structures, while others leave more discretion at the local level. This leads to a wide range of practices across jurisdictions. In cases where the child was removed from the home, the caseworker must present to the court their justification for the child's removal from the house within a short period of time. The court then determines how to proceed in the short run, whether to keep the child in out-of-home care, or to return them to their families of origin. There is serious cause for concern, however, that the state will remove children in cases where it may not be necessary. This is a constitutional due process issue for the adult caretakers involved, but of more concern to this analysis is the risks that unnecessary removal can have on children's physical and psychological wellbeing. In explaining a preference for maintaining the integrity of the family of origin, even in cases of abuse or neglect, the Connecticut Supreme Court writes:

“...[It must be stressed]... that the right to family integrity is not a right of the parents alone, but “encompasses the reciprocal rights of both parents and children. It is in the interest of the parent in the ‘companionship, care, custody, and management of his or her children,’ and of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent” ” (In re Juvenile Appeal (83-CD)).

But not all child welfare advocates agree that family of origin maintenance is the best approach to maintain or improve children's welfare. Proponents of expanding child welfare services' responsibilities for family intervention argue that expanding child welfare services offers more protection for vulnerable children. So-called 'protection laws' may trigger immediate assistance for children in violent homes while also serving as a clear message that domestic violence is unacceptable and children are secondary victims (Jaffe, Crooks, and Wolfe, 2003). This overlap between domestic violence advocates and child protection workers has led to innovative training efforts and distribution of expertise in some jurisdictions, as well as broader advocacy by national organizations (National Council of Juvenile and Family Court Judges, 1999). However, there have been significant consequences in expanding grounds for state interventions by child protection authorities. Two of the most obvious examples are New York's *Nicholson v. Williams* and Minnesota's legislative expansion.

In the case of *Nicholson v. Williams*, the state of New York's Administration for Children's Services (ACS) had been increasing the rate of child removal cases pursued in which battered women were being charged with failing to protect their children when the children were present during episodes of domestic violence. Some researchers suggest that one case in particular set this precedent, the 1998 case *In re Lonell J.*, which held that the government need not offer expert testimony to prove harm alleged to have been caused by witnessing domestic violence (Dunlap, 2005). Effectively, this decision was interpreted as adopting a standard that witnessing domestic violence constitutes neglect by the battered parent (Dunlap, 2005). This standard combined with a pervasive misunderstanding of the functioning of abusive power dynamics in homes where children could be exposed to domestic violence helped to create a situation where at-risk children were twice traumatized: once by their parents and again by

unnecessary state removal. Judge Jack Weinstein concluded that “a mother’s inability to prevent her children from witnessing domestic violence does not in itself constitute neglect, and therefore cannot be the sole basis for an administrative agency’s removal of her children from their family home” (Beller, 2015). In the decade following Nicholson, the removal of children has declined dramatically, as have the number of instances where a mother was cited for neglect because of domestic violence. Additionally, in-organizational reforms have been made to the ways that ACS and similar child welfare organizations approach domestic violence (Beller, 2015).

A second example of the negative consequences from expanding the grounds for child welfare services intervention to included exposure to domestic violence is demonstrated in the state of Minnesota. While New York addressed the ways that child welfare services responded to allegations of child exposure to domestic violence, Minnesota worked to address all cases of childhood exposure to domestic violence, rather than improving the responses to the ones already reported. Lois Weithorn describes Minnesota’s efforts as “overloading the system,” suggesting the importance of considering where within the child protective system reforms are targeted (Weithorn, 2002). Minnesota changed the definition of child neglect, effectively bringing the experience of childhood exposure to domestic violence within the scope of Minnesota’s child maltreatment *reporting* law. The statute specifically provided that, for the purposes of reporting suspected child maltreatment, the term neglect includes circumstances in which:

“the parent or other person responsible for the care of the child: (i) engages in violent behavior that demonstrates a disregard for the well-being of the child as indicated by action that could reasonably result in serious physical, mental, or threatened injury, or emotional damage to the child; (ii) engages in repeated domestic assault [as defined in by specified criminal provisions]; (iii) intentionally inflicts or attempts to inflict bodily harm against a family or household member [who] is within sight or sound of the child; or (iv) subjects the child to ongoing domestic violence by the abuser in the home environment that is likely to have a detrimental effect on the well-being of the child” (Weithorn, 2002).

Taken together, these provisions effectively cover every conceivable scenario of domestic violence that occurs within the household in which children reside. It's important to note that none of the sections require a showing of *actual* harm, merely a showing that the action could *reasonably* result in harm. It's also important to note that the harms addressed in the statute encompass all possible harms, physical, mental, threatened injury, or emotional damage. Arguably the broadest of these four is emotional damage, which could occur if the child witnesses the mother distraught or depressed in the aftermath of IPV. Because this statute shifts the focus of harm perpetration from the offending parent to the non-offending adult caretakers, battering victims come under scrutiny from mandated reporters, who may be subject to a maltreatment determination under this provision. Simply, this child maltreatment statute can be (and was) used to find that a battering victim failed to protect her child by remaining in a violent situation. Policy makers found that women with children in domestic violence shelters fell under scrutiny from mandated reporters, who were required to disclose their location if they have children in their custody, placing both the mother and the child's safety at risk from the abuser (Weithorn, 2002). Additionally, the expansion of a statutory definition of child maltreatment without appropriate training and resources for child welfare professionals lead to a "100% increase in child maltreatment cases," which overloaded child protective services and juvenile courts (Weithorn, 2002). It's unclear that a legislative expansion of this type could have been beneficial to the target population with the proper administrative and structural support. Regardless of what could have been, child protective intervention by process of home removal was overly intrusive and did not target at families in greatest need of intervention.

In both examples of Nicholson and Minnesota, the legislative changes were intended to ensure adequate protection and access to service for children in violent homes. However, these

changes hinged on the assumption that children exposed to domestic violence require the same type and level of community support and state intervention as children who are direct victims of abuse and/or neglect. As addressed earlier, it is unclear that childhood exposure to violence manifests negative short- or long-term consequences to the same consistency as direct childhood abuse. It should be noted that a sizeable percentage of children from these homes appear to have normal development and benefit from the resources and protective factors originating in their families of origin (Jaffe, Crooks, & Wolfe, 2003). It should be noted that the primary shortcomings in the examples provided lies in the homogeneous response to a heterogeneous population. The current child welfare protection resources lack the abilities and structures to differentiate children who will need extreme intervention from the children who only need minor support. It's possible that the extreme intervention of removal from the family of origin and the prolonged state intervention as a result of removal will have a more harmful psychological impact on the exposed child than the original instance of violence. By mandating state agencies to perform in a uniform fashion across all instances of childhood exposure to domestic violence, the state removes voluntary access to community resources, in turn disincentivizing battered parents from seeking support for fear of state retribution.

### Family Court: Child Custody Disputes

The issue of children exposed to domestic violence is an important circumstance for a judge to consider when determining child custody and visitation schedules after parents separate. These types of cases are considered private matters that require mediation, rather than criminal offenses to the public which mandate state intervention. This distinction means that legal protection is not provided (nor mandated) by the state. Both parties involved are allowed to present charges and counter charges against the opposite party, and the standard of evidence

necessary is much lower. Statutes in all fifty states and the District of Columbia require courts to consider domestic violence committed by one parent against the other in resolving a custody or visitation dispute between parents, however some states require a higher standard of proof that a child's wellbeing will not be endangered by custody with the batterer (Harris, 2010).

The main question that the courts are faced with in the context of childhood exposure to domestic violence is: how we can decide what custody situations are best for children? As suggested above, there are many barriers to answering this question in child custody disputes, the highest of which is that the courts in this context are without a third-party perspective to determine the child's best interests. It is impossible for a judge to know the individuals in a case well enough to know for certainty where the child's best interests will be served without creating a conflict of interest. Judges and child advocates are then left comparing the observed realities of a situation with the standard set forth by the court. This leaves the opportunity for internal biases to influence a custody outcome, particularly when individuals are not represented by trained legal counsel. Further, this structure allows for miscommunication between parents, judges, child advocates, and child welfare workers on key terms. For example, the terms "conflict" and "abuse" are often conflated in the literature and in practice (Davis, 2015). This could lead to custody agreements which are detrimental to the child's long-term outcomes or wellbeing.

As addressed above, the state cannot provide legal counsel for litigants to defend themselves from allegations of parental fitness. This means that in the vast majority of cases, at least one party is unrepresented (Grecean, 2003; Harris, 2010). In instances of domestic abuse, this structure is particularly concerning. In certain instances, it may inherently advantage the abusive partner, further placing the child at risk for exposure to or experience of future harms. Unfortunately, states' responses to allegations of domestic violence in custody disputes vary

greatly. Responses range from a rebuttable presumption against awarding custody to a perpetrator of domestic violence, to appointing volunteer guardian ad litem to determine the circumstances of best interest, to simply advising the judge to consider instances of domestic violence when determining custody (Jaffe, Crooks, & Wolfe, 2003). Nearly one-half of states have some form of a rebuttable presumption, but again the level of specificity in the statute varies. For example, in states such as California and Hawaii, any recorded history of domestic violence means the court will presume that the abuser is not fit for custodial parent responsibilities. The alleged abuser will have to prove their parenting capacities over the course of a many supervised visits with the children and non-offending parent before the court will consider overcoming the presumption. The appointment of a guardian ad litem varies from state to state as well, some states clearly define the instances of appointment and responsibilities, while others simply allow for their appointment in cases of disputed custody. Even still, some states simply place demands on the court to explore any alleged history of domestic violence and outline the weight this allegation was given in the final judgement (Jaffe, Crooks, & Wolfe, 2003).

In states where statutes encourage courts to consider domestic violence victimization against a parent seeking custody or visitation, the needs of the child can be easily overlooked if the court seeks to punish a battered parent for exposure to domestic violence rather than punishing the batterer. For example, Charlotte W. lost custody of her son to the child's father (who had previously been convicted of assaulting her), when the child's father alleged that violence had occurred between Charlotte and her new boyfriend in the presence of the child, despite the fact that Charlotte had left the boyfriend by the time of the case (Wentland v. Rosseau, 2009). While it's unclear whether the child's father had ever physically harmed the

child, it is concerning that the child would be barred from a relationship with their mother on the basis of his mother's victimhood. Even though Charlotte attempted to protect her child by removing herself from her abusive partners, the unreliable fact-recording process in custody proceedings means that the court has little ability to accurately determine the risk a parent poses to the child. In this context, attempts to protect the child from the batterer can be readily be interpreted as a battered parent attempting to interfere with a batterer's custodial rights. Simply put, family courts addressing child custody disputes are at a disadvantage for finding a custody agreement that will provide the most benefit to the child's life. For children who have been exposed to domestic violence, the removal of a battered parent with whom the child experienced a close relationship can be as emotionally or psychologically disruptive as continued exposure to domestic violence (Weithorn, 2002).

## Criminal Justice Courts

In the most recent report from the Child Welfare Information Gateway, of the 24 states and 1 territory which address childhood exposure to domestic violence in their statutes, 21 do so through criminal statutes (Child Welfare Information Gateway). Because of a lack of empirical research and baseline data comparison, it is difficult to determine whether the state by state variations are successful in decreasing childhood exposure to domestic violence. However, without evaluating each state's approach, there are a few concerns that we can address. In 26 states, there are no statutory guidelines for addressing childhood exposure to domestic violence. Of course, this doesn't mean that there are no policy standards in child welfare agencies or legal precedent to address such an instance, but it does mean that the legal response to can vary from jurisdiction to jurisdiction, even within a state. This means that there may be a high level of confusion for child and domestic violence advocates regarding the kind of protection and

resources available to survivors. Some jurisdictions have criminal statutes which provide ‘blanket coverage’ for victims<sup>2</sup>, while others allow for children’s exposure to domestic violence to be considered by a judge in determining the appropriate sentence. Of course, the variability in consequences for batterers leads to high variability in the outcomes for their victims. If a batterer is arrested and jailed, the immediate physical risk to the family may be alleviated, but the issue of financial dependence remains. It’s very possible that the victim depends on the batterer in aspects of their life that disincentivizes reporting. Without supplementary services, efforts to remove the batterer from the home can have the unintended effect of disincentivizing reporting. Similarly, by uniformly criminalizing exposure of children to domestic violence, battered women and/or exposed children become necessary witnesses in the state’s case against the batterer. This can lead to contempt of court charges for non-complying witnesses or perjury for changing their stories.

California has taken a different approach to the issue of childhood exposure to domestic violence than most states. To address the nuances of the issue itself, California state prosecutors have elected to use the state’s current child abuse statute as a way to prosecute abusers. Under California Penal Code section 273a(b), California prosecutors can charge the offender with “one count of child abuse for each child who witnesses the assault, along with the felony charge of domestic abuse” (Kershaw, 1998). Additionally, the child abuse statute allows for the prosecution of “any person who willfully causes or permits a child to experience mental suffering,” and the domestic abuse statute requires that the offender be a “spouse, cohabiter, or that the offender and the victim have a child together” (Kershaw, 1998). California Penal Code

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<sup>2</sup> In ‘blanket coverage’ situations, lawmakers have established exposing a child to violence as either a mandatory criminal child abuse charge or a mandatory sentence imposition if found guilty. The legal implications of a mandatory charge or sentence impositions are significant but extend beyond the scope of this analysis.

Section 7(1) defines “willfully” as “simply a purpose or willingness to commit the act” (Kershaw, 1998). The combination of these two statutes with the definition of “willfully” allows for state prosecutors to limit prosecutions of domestic violence as child abuse to the most serious conditions, where the violence causes serious injury, there is a pattern of domestic violence in the household, or where the child is involved in the violence in some manner. State lawmakers say that the purpose of these penal codes and their respective sentencing standards is to change the state of mind of the offender, to make clear how seriously the state considers the nature of their actions, rather than simply adding more individuals to an already overloaded criminal justice system. Kershaw argues that “[a]rrest is the linchpin of an effective police response because it communicates... to the batterer...that society condemns his conduct and will hold him accountable for it.” Early pilot studies of this approach found positive results, that arresting the offender decreased the likelihood of further domestic violence perpetration, but a lack of replication in surrounding jurisdictions tempered the hopes of a widespread solution (Sherman & Berk, 1984; Jaffe, Hastings, Reitzel & Austin, 1993). Unfortunately, these studies failed to examine the effects of these legislative changes on the victims and their families, particularly the children exposed to the violence.

Without a strong baseline of empirical results, the analysis of specific statutory reform efforts becomes difficult. California’s flexible approach to batterer prosecution benefits children by focusing the state’s intervention capabilities on the cases where batterer removal and prosecution are in the best interests of the child. Unlike child welfare services intervention, the criminal justice system removes the batterer from the home, which may be less traumatic for the child than being removed from the home themselves. Criminal prosecution of childhood exposure to domestic violence also may result in exposed children having more access to

psychological and medical support services, either from law enforcement at the scene or from later referrals to child protective services for screening. The biggest benefit of criminal justice prosecution for exposure to domestic violence is that it can both remove the batterer and insert a third party in the home to evaluate the child's needs.

Despite the addressed need for heterogeneous responses to an issue as multifaceted as childhood exposure to domestic violence, some authors take a more hardline approach to the criminality of the act. In a 2013 Women's Rights Law Reporter article from Rutgers University, Terrence Rogers presents an argument for childhood exposure to domestic violence to be considered child abuse in both domestic and international law. His argument hinges on the long-term risk of childhood exposure to domestic violence, arguing that this should be criminalized in accordance with the long-term risk to emotional and physical health. Unfortunately, I find that his argument fails to capture the nuance in responses to childhood exposure to domestic violence. Many children have enough resilience factors in their life to outweigh the damaging effects of exposure to violence, making state intervention in their lives potentially far more harmful than the exposure to violence. Throughout the article, Rogers fails to adequately address competing theories, immediately brushing them off if he addressed them at all. The crux of his assertion that childhood exposure to domestic violence should be considered illegal is based on one citation that suggests that victims of exposure to domestic violence experiences the same emotional milieu as childhood victims of physical violence. The conflation of these two experiences is entirely inaccurate on the basis of developmental psychological research, as well as economic research that has failed to establish a consistently significant connection between childhood exposure to domestic violence and negative outcomes in the same ways that experiencing violence in childhood leads to negative outcomes (Cui et al., 2011; Black et al.,

2010; Carrell and Hoekstra, 2010). If ACEs can be thought of as compounding events, then the occurrence of two ACEs (exposure to domestic violence and physical abuse) cannot be equated.

Furthermore, the premise that an act we don't think should be happening is widespread is not justification for criminalizing said act. Although we should do as much as possible to decrease the number of children exposed to domestic violence (which is the purpose of this analysis), there are significant externalities that should be considered before criminalizing an act. As addressed in the subsections on child custody dispute resolution and child welfare services, women are often criminalized for the actions of their batterer in the context of failure to protect their children from exposure to domestic violence. In creating a blanket criminalization on the basis of potential danger to future children, we risk revictimizing the vulnerable groups the system is designed to protect. Further, if his proposal were to be implemented, we would likely see the legislation change much faster than the practical implementation of the laws. Sensitivity and awareness training for police, prosecutors, judges, and attorneys takes time and resources, which may exceed the capacity and ability of the criminal justice system in a fashion similar to the Minnesota example of overloading the child welfare system.

## V. Steps Toward Statutory Reform

A state statute addressing the legal system's role in addressing childhood exposure to domestic violence offers the hope of interrupting the violence that endangers the child's wellbeing. It provides consistency across jurisdictions and offers the promise of protection and access to remedial services. It underscores the importance of children's wellbeing, acknowledging that even in the absence of physical scars, children's psychological wellbeing may be seriously compromised. To this point, I have addressed current legal responses to childhood exposure to domestic violence, including potential benefits of each avenue's approach,

as well as practical concerns for children's wellbeing. The overarching goal that fuels any legal intervention is to discontinue a child's exposure to domestic violence. In discontinuing the exposure to violence, the legal system should also aim to ensure that any harms caused by exposure to violence have been corrected. As the examples from the previous sections show, any expansion of the status quo response must be part of a comprehensive scheme of policy reform. Several elements seem critical to successful statutory reform: developing institutional capacity to ensure a heterogeneous response, allocating adequate funding for capacity-building and on-going implementation, and designing baseline as well as on-going evaluation of the statute's effects.

### Developing Institutional Capacity to Ensure a Heterogeneous Response

By the late 1990s, the legal system had begun to grapple with how to address the co-occurrence of child maltreatment and domestic violence. In 1999, the National Council of Juvenile and Family Court Judges published *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* (also known as the 'Greenbook'), which provided framework for the three avenues addressed in this paper to collaborate in addressing the experiences of families with children experiencing domestic violence. *The Greenbook* recognized the different mandates of each primary system and recommended ways to improve responses both within each system and, through collaborative efforts, across systems. The suggestions and guidelines from this text were implemented in 6 different test sites and were evaluated bi-annually for two decades. Responses from the partners indicated ongoing issues surrounding cross-agency trust and power dynamics. Although all six sites reported an overall positively improved collaboration efforts, it took as many as 12 years for sites to find effective systems (National Council of Juvenile and Family Court Judges, 1999).

A major component of *The Greenbook* recommendations for jurisdictions is an emphasis on education and specialty experience. Training programs placed an emphasis on interactive discussions, booster sessions, and involving specialist domestic violence advocates. The training programs were found to improve participant's knowledge, attitudes, and competence for up to a year after delivery (National Council of Juvenile and Family Court Judges, 1999). *Greenbook* sites were encouraged to hire specialty domestic violence practitioners for case management and evaluation. In hiring specialists for case management and evaluation, as well as training all professionals involved with such a vulnerable population, the capacity of the legal system as an institution is expanded. Professionals involved with these cases in child protective services, custody dispute resolution, and criminal justice prosecution have a more nuanced understanding of the unique pressures associated with living in a violent family and can use this training to apply services more heterogeneously.

Further important takeaways from the *Greenbook* sites include: Accomplishing change requires significant resources and persistent effort; shared focus and effort was integral for motivating and achieving change; and importantly, different partners, structures, and activities should be involved at different times, both in the larger cross-system collaborative and within systems (National Council of Juvenile and Family Court Judges, 1999). When the pilot programs ended in 2010, all six sites sought grant opportunities and additional funding to sustain the specialized positions and many of the training programs developed over the course of the initiative. The capacity that each site built over the course of implementing *Greenbook* initiatives provides a blueprint for how jurisdictions can improve their responses to children exposed to domestic violence.

## Adequate Funding for Capacity Building

To ensure that states have the ability to support the administrative burden of ensuring a heterogeneous response for children exposed to domestic violence, there must be a sufficient level of funding to allow for capacity building trainings and adding staff with particular types of expertise. Additionally, if the statutes in question expand the court's jurisdiction by including cases that might not have been processed prior to statutory reform, the department's budget must expand to accommodate these increases. A major reason mentioned by the *Greenbook* sites for their success in responses to childhood exposure to domestic violence is the funding allocated by federal grants. At a minimum, states attempting comprehensive statutory reform to address this issue should be prepared to increase their budgets appropriately. Under the current administration, it is unlikely that the federal government would undertake expenditures in the form of block grants to states as incentive for statutory reform, although the political infeasibility of such steps should not detract from the support that top-down funding would provide for children exposed to domestic violence. Funding for state programs from the federal level would incentivize all states to take steps towards statutory reform, ideally decreasing the amount of cross-state variation in statutes.

Funding for comprehensive, systematic statutory reform is inherently expensive. Yet as we've seen from the previous sections, we need total system collaboration to find meaningful outcomes and avoid unintended consequences. Clearly, the financial costs of these programs must be evaluated, together with the effects that these policy changes have for the children involved, the larger community, and the functioning of the legal system.

## Designing Baseline As Well As On-Going Evaluation Of The Statute's Effects

As with any changes to social policies, a critical prerequisite to reform is high quality baseline data on the nature of children and adults who engage with the legal system for childhood exposure to domestic violence. Presently, there is very little systematic evaluation of the statutory changes described in Part IV. An essential component of effective policy reform is understanding whether or not the targeted demographic would have experienced the same outcomes regardless of state intervention. It's important to know whether professionals in administration or on the front lines feel that the legislation is having its intended effects, or if there is a more effective approach to reach the same conclusions. We should also want to know if the effects of the legislation are in fact the intended effects. To address all of these concerns, careful and comprehensive data should be collected both before and during any intended policy changes. This of course entails identifying the appropriate variables to measure a child being 'benefited' by a policy, identifying the sample population (including the control group), and so on.

As most social scientists would agree, the answer of whether or not a policy intervention was 'successful' is never a simple 'yes' or 'no.' The general public is inherently a heterogeneous population who are impacted differently by policies. Families who experience domestic violence are no different, and as been described above, it is most likely that some interventions will be more or less successful in specific situations and/or with specific children or families (Weithorn, 2002). Without comprehensive quantitative analysis, observers may conclude that a policy 'doesn't work,' even if the policy is highly successful for a niche population.

Homogeneous responses are ineffective and inappropriate for heterogeneous populations. By establishing programs for data collection and analysis both before and during the suggested

policy changes, lawmakers will be much more prepared to make necessary adjustments to statutes to best support children exposed to domestic violence.

## VI. Summary and Conclusions

Every year, at least 1 in 15 children are exposed to intimate partner violence. Of these children, roughly 90% are eyewitnesses to the violence (NCADV). Despite these shocking statistics, we have only just begun to recognize and direct resources to the relationship between these two phenomena. In reviewing historical and contemporary efforts to support the wellbeing of children exposed to domestic violence, it is difficult to distinguish whether the reform efforts are theoretically faulted or simply suffered from inadequate implementation.

Despite the variation in approaches to solving this issue, there is consensus that a child's well-being and healing are priorities. The challenge becomes finding ways to operationalize these priorities in ways that do not punish battered parents or inflict further harm in the child's life. From previous efforts in reform, it seems clear that interagency coordination provides the most opportunities for administrative checks and mobilize resources across organizations. To implement such a system in jurisdictions nationwide, however, there needs to be a major refocusing of priorities. First, jurisdictions need to recognize these goals as priorities and develop institutional capacity. *The Greenbook* provides useful guidelines to develop the capacity necessary to ensure a heterogeneous response to children exposed to domestic violence. Second, jurisdictions need to make sure that adequate funding is allocated to support the institutional capacity developed from the first step. Finally, high-quality data is essential to the evaluation of reform programs, as well as further scientific understanding of the ways in which children are harmed by the exposure to domestic violence. Statutory efforts at reform require high levels of

involvement and dedication from all those involved, but without these three components they are unlikely to have substantially different results from previous efforts.

Children's wellbeing matters. Besides the inherent importance of childhood wellbeing, children become adults whose childhood traumas impact daily life. In the interest of disrupting an intergenerational cycle of violence and preventing harms to families, jurisdictions should take the recommended steps towards statutory reform.

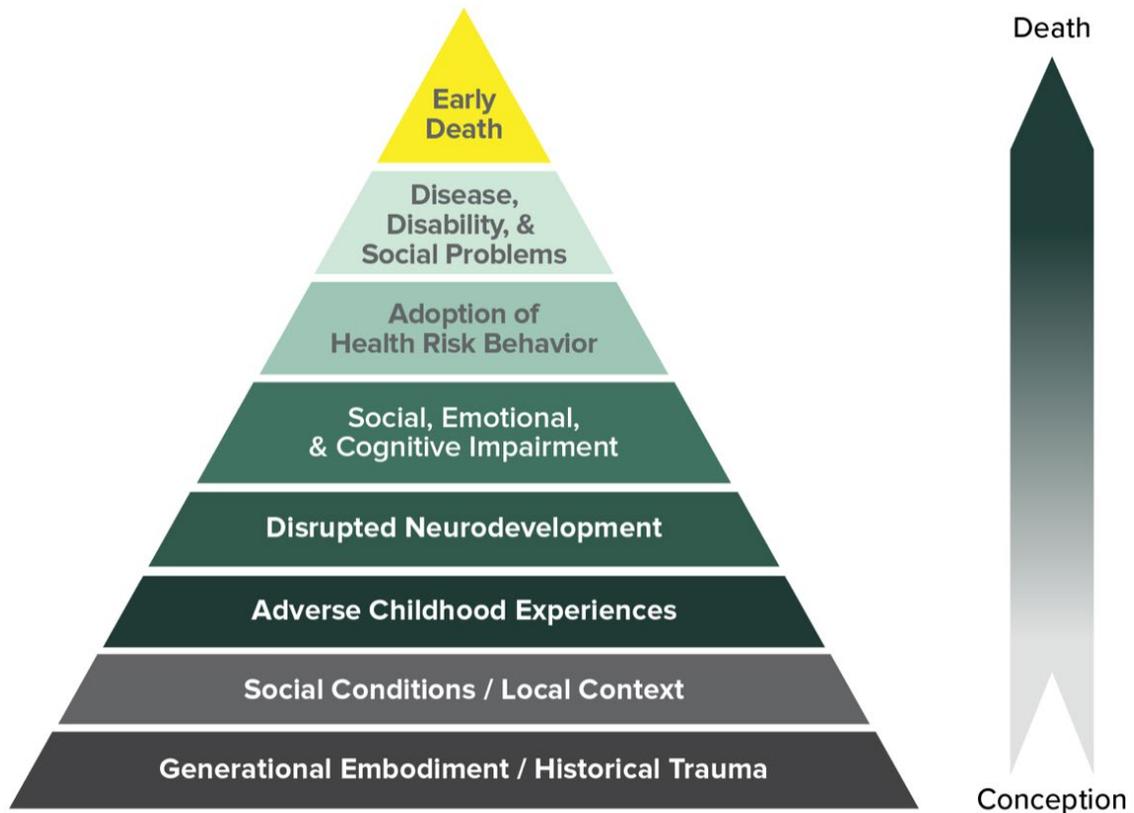
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Appendix 1:



**Mechanism by which Adverse Childhood Experiences Influence Health and Well-being Throughout the Lifespan**

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