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# Women in the New York State Court System: A Report on Domestic Relations Law

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WOMEN IN THE NEW YORK STATE COURT SYSTEM:  
A REPORT ON DOMESTIC RELATIONS LAW

By  
Kaitlin Canty

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Submitted in partial fulfillment  
of the requirements for  
Honors in the Departments of Political Science and  
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## ABSTRACT

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The state court system impacts the lives of women throughout New York. The New York State chapter of the National Organization for Women focuses on lobbying efforts to encourage or oppose policies based on how they affect women and families. In partnership with the president of the state chapter, the following is a report concerning issues influencing women in the state court system in the area of domestic relations law.

This thesis explores the debate surrounding a recent proposal to institute unilateral no-fault divorce in New York, initiatives for mandatory joint custody and mandatory mediation in custody disputes, and gender bias in the court system. For each, background information and competing perspectives are presented. Additionally, specific policy recommendations will be addressed with consideration toward bettering women and children.

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## **The National Organization for Women and Domestic Relations**

Everyone in our society is subject to the laws under which we live. Laws affect many aspects of our lives, including the speed at which we can drive, how much money gets taken out of our paychecks, and whom we may marry. Though some politicians purport that we live in a society in which justice is blind to race, sex, gender, ethnicity, and religion, members of historically underrepresented groups often have a different experience. Women have had a mixed relationship with the law; essentially, they have often been at the subordinate end of the law. For instance, law prohibited women to vote until women's seventy year struggle culminated in the passage of the nineteenth amendment in 1920. Contraception was against the law for married people until 1964 and for single people until 1972, and just three decades ago, women could not receive credit cards in their own name under the law. Thus, the law in some ways grants and, in other ways, limits options for women, exerting an extraordinary power both to restrict and to liberate women. The branch of government responsible for interpreting these laws and applying the law is the judiciary; on the state level, it is the state court. This thesis attempts to explore some of the most prominent issues facing women in the New York State court system today in domestic relations law from the standpoint of the New York State Chapter of the National Organization for Women (NOW-NYS). I will begin with a brief overview of the National Organization for Women and then provide an outline of the following three chapters.

The National Organization for Women (NOW) is the largest, most comprehensive feminist advocacy group in the United States. Their purpose is "to take action to bring women into full participation in society — sharing equal rights, responsibilities and

opportunities with men, while living free from discrimination.”<sup>1</sup> After the Civil Rights Act passed in 1964, which included the last minute addition of sex, feminists rejoiced. However, women in the workforce still faced rampant discrimination. In response, the Equal Employment Opportunity Commission (EEOC) was formed in 1965 to enforce the Civil Rights Act. However, in September of 1965, the EEOC ruled 3-2 (those against were future NOW founders Aileen Hernandez and Richard Graham) that sex segregation in job advertising was permissible. This issue was not over, however: “A month later, at a conference on Title VII [outlawing sex discrimination] and the EEOC, Dr. Pauli Murray—a law professor at Yale and a member of the President’s Commission on the Status of Women—denounced the EEOC and its stance permitting Help Wanted Male and Help Wanted Female segregated job advertising.”<sup>2</sup> Betty Friedan, author of the groundbreaking book The Feminine Mystique contacted Dr. Murray about the issue and the feminist movement was soon reignited.

On June 28-30, 1966, the Third National Conference of Commissions on the Status of Women took place in Washington, D.C. “The theme was ‘Targets for Action,’ and many of the delegates wanted to pass a resolution demanding that the EEOC carry out its legal mandate to end sex discrimination in employment. They [the delegates] were told that they had no authority, not even to pass a resolution, but they were determined to take action,”<sup>3</sup> NOW’s founding page reports. There were stirrings to form a new organization for women, similar to the civil rights organizations blacks had created: “Friedan wrote the acronym N O W on a paper napkin. Some 15-20 women assembled in

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<sup>1</sup> National Organization for Women. “About NOW.” Retrieved 19 May 2008  
<<http://www.now.org/about.html>>.

<sup>2</sup> National Organization for Women. “The Founding of NOW.” Retrieved 19 May 2008  
<[http://www.now.org/history/the\\_founding.html](http://www.now.org/history/the_founding.html)>.

<sup>3</sup> Ibid.

Friedan's hotel room that night. Among them were: Catherine Conroy, Inka O'Hanrahan, Rosalind Loring, Mary Eastwood, Dorothy Haener, Pauli Murray, and Kay Clarenbach.”<sup>4</sup> In a hurried fashion toward the end of the conference, Gene Boyer recalls that “Catherine Conroy pulled out a five-dollar bill from her wallet and, in her usual terse style, invited us to ‘put your money down and sign your name.’ NOW was a reality and I think we all felt somehow we had participated in a significant beginning.”<sup>5</sup> Founded by 28 women, NOW’s purpose was: “To take action to bring women into full participation in the mainstream of American society now, assuming all the privileges and responsibilities thereof in truly equal partnership with men.”<sup>6</sup> Today, NOW has more than 500,000 contributing members and hundreds of chapters across the U.S., including a New York state chapter based in Albany. It is an activist organization, meaning that it “seeks to effect change through lobbying, advocacy, education and protest, and does not serve clients.”<sup>7</sup>

NOW-NYS is the largest women’s political action organization in New York, representing over 14,000 women and men in 24 chapters. The organization is “dedicated to fighting for women’s equality and to improving the status of women in New York.”<sup>8</sup> NOW-NYS is governed by an Executive Committee and a State Council. Officers include: President: Marcia Pappas, Albany, NY; Executive Vice President: Lori Gardner, Gronton, NY; Legislative Vice President: Barbara Kirkpatrick, Syracuse, NY; Secretary: Gaby Moreno, New York City; and Chair: Alberta S. Roesser, Rochester, NY.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> National Organization for Women – New York State. “About NOW-New York State.” Retrieved 19 May 2008 <<http://www.nownys.org/about.html>>.

<sup>8</sup> Ibid.

Priority issue areas include the Equal Rights Amendment, reproductive freedom and health care, ending racial discrimination, lesbian rights, ending violence against women, ending the business of human trafficking, pay equity, and domestic relations. Of these priority areas, this thesis is focused on the area of domestic relations law. NOW asserts that “[a]s a result of current divorce practices and laws, women and children are falling into poverty. Every effort must be made to assure fairness in all domestic relations law.”<sup>9</sup>

The three issue areas I focus on with respect to state domestic relations law are: the proposal to enact unilateral no-fault divorce, proposals to make both joint custody and mediation mandatory in custody disputes, and gender bias in the state court system. Chapter one examines the movement by proponents of no-fault divorce, including bar associations and lawyers associations, and opponents’ responses. I conclude that the time is ripe for divorce reform, but no-fault divorce is not one that should be enacted. Chapter two discusses mandatory policy initiatives currently in front of the Assembly. There is action toward making joint custody mandatory, mainly led by fathers’ rights groups. Opposition comes from women’s groups, such as NOW, concerned about women and children’s well-being. I also examine mandatory mediation and conclude that its effects on the power imbalance between the spouses and on domestic violence victims make it bad policy. Finally, I provide an examination of gender bias in the court system, with special attention to the state court system and a comprehensive survey conducted by the New York State Judicial Committee on Women in the Courts. There is pervasive gender bias and specific policy recommendations are suggested.

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<sup>9</sup> National Organization for Women-New York State. “NOW-New York State’s Issues.” Retrieved 19 May 2008 <<http://www.nownys.org/issues.html>>.



Overall, the following chapters seek to provide an examination into some of the most important issues in domestic relations law facing New York women today: unilateral no-fault divorce, mandatory joint custody and mandatory mediation, and gender bias. NOW-NYS has taken a firm stand on all of these issues and will continue to advocate for policies that favor women and children.

## **The Movement for No-Fault Divorce in New York State**

Marriage is undoubtedly one of the most important social and civil institutions in American society. Indeed, children are socialized early on that marriage is the appropriate expression of a healthy adult relationship. Despite marriage's status as a staple of society, its definition has been changed multiple times and the rights of individuals who choose to marry and then divorce have been altered throughout history. In today's society, the reality is that many marriages end in divorce – about 40 to 45 percent of marriages will dissolve.<sup>10</sup> Laws regarding divorce differ based upon the state residence of the spouses, and often dictate the grounds upon which a couple may divorce. This chapter will focus specifically on the debate surrounding fault grounds versus no-fault divorce.

All states, except New York State, offer divorce on unilateral no-fault grounds. Unilateral no-fault divorce is the dissolution of a marriage granted on the basis of a showing by either spouse that a marriage is “irretrievably broken.” Essentially, both spouses do not have to agree to end the marriage in a unilateral divorce. In a no-fault divorce, one spouse claims that s/he is in a broken marriage for a specified period of time, such as six months or one year, depending on the state, and s/he can obtain a divorce without the consent of his/her spouse. In contrast, a fault divorce requires proof of fault on one spouse's part in order to obtain the divorce. Fault grounds vary by state, but often include adultery, conviction of a felony, cruel and inhuman treatment, and willful desertion. The prime purpose of this chapter is to evaluate the proposal to enact unilateral no-fault divorce in New York. I will first examine a brief history of changes to

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<sup>10</sup> Crary, David. 2007. “U.S. Divorce Rate Lowest Since 1970.” *Associated Press*. Retrieved 3 April 2008 <[http://www.breitbart.com/article.php?id=D8P1MG601&show\\_article=1](http://www.breitbart.com/article.php?id=D8P1MG601&show_article=1)>.

marriage and then specifically to no-fault divorce, then move to discuss the current divorce law in New York, other states' divorce reforms, and proponents' and opponents' arguments regarding the measure. Finally, I will offer what I deem to be the best route for New York to take in divorce reform.

### **Historical Changes to Marriage**

Evan Wolfson argues that there have been four extensive changes to marriage throughout history: divorce, women as legally subordinate to their husbands, marriage and choices about sex and parenting, and race discrimination in marriage.<sup>11</sup> I will briefly touch upon the first two reforms, as my purpose here is to highlight divorce and the historical inequality of the spouses.

When one married legally in the sixteenth century, it meant for life, despite adultery or any irreconcilable differences. Divorce first emerged in most states following the American Revolution. The connection between the colonists breaking free from their mother country and citizens gaining the freedom to divorce can essentially be expressed by the sentiment: "How could consent in marriage (as in government) be considered fully voluntary, if it could not be withdrawn by an injured partner?"<sup>12</sup> Legislators outlined a few clear grounds for divorce, including adultery, sexual incapacity, and an extended period of desertion.<sup>13</sup> According to historian Nancy Cott, during this time, "If a spouse was divorceable, it was because he or she had committed a public wrong against the marriage as much as a private one against the partner; the public wrong justified the

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<sup>11</sup> Wolfson, Evan. 2004. Why Marriage Matters: America, Equality, and Gay People's Right to Marry. New York: Simon & Schuster Paperbacks.

<sup>12</sup> Cott, Nancy F. 2000. Public Vows: A History of Marriage and the Nation. Cambridge: Harvard University Press, p. 47.

<sup>13</sup> Ibid., p. 48.

state's interposing its authority.”<sup>14</sup> In divorces, men had to prove their manhood by showing that they provided for their dependents and women were often called upon to demonstrate that they had been properly obedient.

Later, more grounds for divorce were added in several states. These reforms included extreme cruelty, fraudulent marriage contract, gross neglect of duty, and habitual drunkenness.<sup>15</sup> As divorce became more salient, religious leaders spoke out against the perceived reprehensible disrespect for the institution of marriage. Though divorce gave men and women more freedom in their intimate and private decisions of a life mate, some religions, most notably Catholicism, taught that marriage would be harmed by such a change. It is true that once the legal system became more accepting of divorce, more divorces occurred, but marriage did not dissipate. Rather, divorce allowed citizens to correct mistakes, rather than subject themselves to a lifetime of misery.

A second change to marriage was the lifting of coverture and marital unity laws that placed women in inferior positions to their spouses. A husband and wife were one person in the eyes of the law under coverture and the theory of unity. This raised important questions about what, if any, individual rights each spouse held. Historically, women were on the subordinate end of the rights of married persons since wives' identities were essentially absorbed into that of their husbands. Wives were unable to apply for credit until a few decades ago, husbands were allowed to abuse them, and the concept of marital rape was unheard of. Indeed, in Rebecca Ryan's piece, "The Sex Right: A Legal History of the Marital Rape Exemption," she quotes Rollin M. Perkins's treatise on criminal law from 1957: "A man does not commit rape by having sexual

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<sup>14</sup> Ibid., p. 49.

<sup>15</sup> Ibid., p. 50.

intercourse with his lawful wife, even if he does so by force and against her will.”<sup>16</sup>

Essentially, a wife was a husband’s property and he could use her as he saw fit, even violently or sexually.

The women’s liberation movement of the 1960s and 1970s raised public consciousness about rape and violence against women. Violence against wives was brought to the forefront during this time, but it was not until 1984 that a New York appellate court overturned the state’s marital rape exemption and other states followed. Many believed that this and other allowances of women as separate from their husbands would undermine marriage. As recently as 1998, the Southern Baptist Convention called for a woman “to submit herself graciously to the servant leadership of her husband.”<sup>17</sup> Though some oppose changes to gender roles, most would agree that women are entitled to retain rights after marriage.

I highlight this history to identify that marriage reform has been an ongoing process for centuries and the latest reform facing New York State – no-fault divorce – is just one proposal in a long line of changes to matrimonial law. The historically disadvantaged position of women in marriage is also relevant to their ability to secure a fair settlement following the dissolution of marriage. The position of women during and after a divorce will be central to the discussion of unilateral no-fault divorce proposals.

### **No-Fault Divorce**

As early as 1948, “the American Bar Association’s section on divorce recommended moving to a no-fault principle, pointing out that 85 to 90 percent of

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<sup>16</sup> Ryan, Rebecca M. 1995. “The Sex Right: A Legal History of the Marital Rape Exemption.” *Law & Social Inquiry* 20(4): 941-1001, p. 941.

<sup>17</sup> As cited in Wolfson, Evan, p. 65.

divorces were uncontested and therefore denoted marital breakdown on both sides.”<sup>18</sup>

The fundamental justification for no-fault divorce is that “most Americans could obtain a divorce by claiming ‘irreconcilable differences’ or ‘an irretrievable breakdown’ – in other words, by simply asserting that their marriages no longer worked”<sup>19</sup>

In 1963, the California legislature passed a House Resolution to initiate a study of the laws of divorce, from which four major themes were observed:

1. the high divorce rate
2. the adversary process creating hostility, acrimony, and trauma
3. a need to recognize the inevitability of divorce for some couples and attempt to make the legal process less destructive for them and their children
4. charges made by divorced men that the divorce law and its practitioners worked with divorced women to acquire an unfair advantage over former husbands<sup>20</sup>

No legislation was recommended from these hearings, but they served as a catalyst for a twenty-two member Commission on the Family established by Governor Edmund G. Brown in 1966.<sup>21</sup> The Commission recommended the creation of a family court, the elimination of fault as grounds for divorce, and a revision to the community property distribution rules.<sup>22</sup> These were not immediately enacted, but they served as the basis for the bills introduced in the California assembly and senate during 1969. James A. Hayes, a member of the Assembly Judiciary Committee, was appointed chairman of the Assembly Judiciary Committee in 1969, and he introduced Assembly Bill 530, the Domestic Relations Act of 1969, which specified that the only grounds for divorce were

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<sup>18</sup> Cott, Nancy, p. 196.

<sup>19</sup> Wolfinger, Nicholas H. 2005. Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages. New York: Cambridge University Press, p. 79.

<sup>20</sup> Parkman, Allen M. 2000. Good Intentions Gone Awry. Maryland: Rowman & Littlefield Publishers, Inc., p. 73.

<sup>21</sup> Ibid., p. 73.

<sup>22</sup> Ibid., p. 74.

irreconcilable differences and incurable insanity.<sup>23</sup> Though this particular bill did not pass, a very similar bill was enacted as the Family Law Act of 1969. The California law set precedent for a strict no-fault divorce based upon six innovations:

1. No grounds are needed to obtain a divorce. This permissive standard facilitates divorce and represents a dramatic departure from the restrictive norms of the traditional law.
2. Neither spouse has to prove fault or guilt to obtain a divorce. This too is a radical change signaling a rejection of the moral framework of the old law.
3. One spouse can decide unilaterally to get a divorce without the consent or agreement of the other spouse.
4. Financial awards are no longer linked to fault. The new standards are based on the parties' current financial needs and resources rather than their past behavior, whether guilt or innocence.
5. New standards for alimony and property awards seek to treat men and women 'equally,' thereby repudiating the sex-based assumptions of the traditional law.
6. New procedures aim at undermining the adversarial process and creating a social psychological climate that fosters amicable divorce.<sup>24</sup>

Other divorce reformers who were trying to institute no-fault divorce in other states were encouraged by California's example. On August 6, 1970, the Uniform Marriage and Divorce Act, a comprehensive marriage and divorce act, was passed by a national body of lawyers known as the Uniform Law Commission. The act encourages that states adopt "irretrievable breakdown," essentially no-fault, as a basis for divorce. As Kargman writes, it "is not law but a model for state legislatures to accept or deny in part."<sup>25</sup> By 1985, most other states followed this model and enacted some form of no-fault divorce.

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<sup>23</sup> Ibid., p. 74.

<sup>24</sup> Weitzman, Lenore J. 1985. The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America. New York: The Free Press, p. 15-16.

<sup>25</sup> Kargman, Marie W. 1973. "The Revolution in Divorce Law." *National Council on Family Relations* 22(2): 245-248, p. 246.

## **New York State Divorce Law**

New York is currently considered a fault state meaning that if both parties do not agree to a divorce, one party must show grounds. New York has a no-fault ground based on a husband's and wife's negotiation of a written agreement of issues in a divorce in partnership with living apart. There is no unilateral (undertaken by one spouse and opposed by the other) no-fault divorce ground. The four fault grounds for divorce in New York are: cruel and inhuman treatment, abandonment for at least a year, adultery, or imprisonment for at least three years.<sup>26</sup> Two additional grounds for divorce exist: "Living separate and apart pursuant to a decree of separation for a period of one or more years [and] [l]iving separate and apart pursuant to a written agreement of separation, for a period of one or more years after the execution of such agreement."<sup>27</sup> In other words, if both parties want a divorce, they can negotiate an agreement including issues such as custody, child support, maintenance, and property division, and upon living apart for one year, the contract becomes grounds for divorce.

On September 12, 2007, no-fault legislation Assembly bill A9398-A was introduced by Assemblyman Adam Bradley. The bill would amend Section 1, Section 170 of the domestic relations law by adding a new subdivision 7:

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. Except under exigent circumstances placed on the record by the court, no judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expense as well as the custody and visitation with the infant children of

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<sup>26</sup> Grossman, Joanna. 20 October 2004. "Will New York Finally Adopt True No-Fault Divorce?" FindLaw. Retrieved 3 April 2008 <<http://writ.lp.findlaw.com/grossman/20041020.html>>.

<sup>27</sup> WomansDivorce. "Divorce in New York." Retrieved 3 April 2008 <<http://www.womansdivorce.com/new-york.html>>.



the marriage have been resolved by the parties or determined by the court and incorporated into the judgment of divorce.<sup>28</sup>

Essentially, the bill would amend current divorce law to allow for a no-fault provision in New York. The existing six provisions listed above would still be legally viable; this bill would add a no-fault option. One spouse would have to testify that he/she cannot get along with his/her spouse and that it has been this way for at least six months. Divorce would then be granted after a resolution of property distribution, maintenance (spousal support), child support, counsel fees, and custody has been established, “except under exigent circumstances.” The latter phraseology has not been explained by the drafters of the bill and thus it appears likely that many conditions may be applied under this provision. The bill has been read once and it was referred to the Committee on Judiciary on January 9, 2008.

### **A Look at Other States’ Divorce Reforms**

All states besides New York have an unilateral no-fault divorce provision. However, not all states have retained their original strict no-fault divorce laws. Here, I will examine two states: Louisiana and California (the state that started the wave of divorce reform).

Louisiana divorce law, except in the case of covenant marriage, currently has a no-fault ground with a separation period of 180 days if no minor children exist or if physical or sexual abuse against the spouse or a child of the spouse has been shown.

There is also a separation of 365 days when there are minor children of the marriage.<sup>29</sup>

Robin Fretwell Wilson, a law professor, reports that “a group of more than 100 legal and

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<sup>28</sup> Draft of bill obtained from “Forum: The Need for No-Fault Divorce” on October 11, 2007 at the Association of the Bar of the City of New York. Online access can be found at <<http://assembly.state.ny.us/leg/?bn=A09398>>.

<sup>29</sup> Louisiana Civil Code § 103.1.

family scholars...released a report [in the fall of 2006] urging legislators to consider passing extended waiting periods for no-fault divorce.”<sup>30</sup> The fault grounds available in the state include adultery and when the other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.<sup>31</sup> In 1997, Louisiana’s Legislature became “the first in the nation to approve a law allowing a new and more binding form of marriage contract, one that would permit divorce only in narrow circumstances such as adultery, abuse, abandonment, a lengthy marital separation or imprisonment on a felony.”<sup>32</sup> This covenant marriage option was mainly the result of the movement led by conservative Christians and pro-family activists to rewrite or repeal no-fault divorce laws, and to date, Arkansas and Arizona have also added covenant marriage. No-fault divorce is still an option in Louisiana, but recent legislation of covenant marriage and longer waiting periods has made it more difficult for couples to get no-fault divorce.

California has two grounds upon which divorce may be granted: irreconcilable differences, which have caused the irremediable breakdown of the marriage, and incurable insanity.<sup>33</sup> There have been various proposals to modify no-fault divorce in the state due to concerns over the high divorce rate, its effects on children, and the high rate of poverty in single-parent homes. One analysis that served as a catalyst for legislative change was sociologist Dr. Lenore J. Weitzman’s study showing that women’s standards of living decrease by an average of 73 percent in the year after divorce while men’s increase by an average of 42 percent.<sup>34</sup> However, a reanalysis of the data in 1996 by

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<sup>30</sup> Ibid.

<sup>31</sup> Louisiana Civil Code § 103.

<sup>32</sup> Sack, Kevin. 24 June 1997. “Louisiana Approves Measure to Tighten Marriage Bonds.” *New York Times*. Retrieved 12 April 2008 <<http://query.nytimes.com/gst/fullpage.html?res=9800E2DF1631F937A15755C0A961958260>>.

<sup>33</sup> California Family Code §2310.

<sup>34</sup> Weitzman, Lenore, p. 339.

Richard R. Peterson revealed that this statistic was flawed. He concluded estimates of a 27 percent decline in women's standard of living and a 10 percent increase in men's standard of living after divorce.<sup>35</sup> Weitzman replied by asserting that, "My sample intentionally oversampled people in longer marriages and those with higher incomes where differences between husbands' and wives' post-divorce standards of living are the greatest. It may be that the weighting system used to reconstitute a representative sample was either not applied or was applied incorrectly."<sup>36</sup> However, she maintains that it was just one statistic in a 500-page study and defends her prime conclusion that women and children are unfairly and disproportionately burdened economically by divorce stands.<sup>37</sup>

One proposal to amend the current no-fault divorce law in California is AB 913, which would create the Family and Children Preservation Act. This bill would require

parties filing for dissolution, legal separation or nullity, and who have minor children to file a 'joint parenting plan,' or if the parents cannot agree on a parenting plan, to file a pre-mediation parenting questionnaire. The bill allows dissolution based on irreconcilable differences only upon the mutual consent of the parties and only upon completion of an education or counseling program, either separately or together. If the parties do not consent to the dissolution, party must prove fault by a preponderance of the evidence in order for the court to grant the dissolution."<sup>38</sup>

This act would severely limit spouses' ability to achieve no-fault divorce. Essentially, spouses with minor children who would like to divorce must come to an agreement about custody and maintenance issues prior to dissolution of the marriage. If they cannot agree, they would need to submit to mediation. Spouses must also attend an educational or

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<sup>35</sup> Peterson, Richard R. 1996. "A Re-evaluation of the Economic Consequences of Divorce." *American Sociological Review* 61(3): 528-536, p. 532.

<sup>36</sup> Weitzman, Lenore. 1996. "The Economic Consequences of Divorce are Still Unequal: Comment on Peterson." *American Sociological Review* 61(3): 537-538, p. 538.

<sup>37</sup> Ibid., p. 538.

<sup>38</sup> Hershkowitz, Donna S. and Drew R. Liebert. 1997. "The Direction of Divorce Reform in California: From Fault to No-Fault...And Back Again?" Retrieved 3 April 2008 <<http://www.library.ca.gov/crb/98/04/currentstate.pdf>>, p. 139.

counseling program. If both parties do not agree to a divorce, fault must be proven. It is not clear if additional grounds would be added under this proposal since the current grounds are irreconcilable differences and incurable insanity. A second proposal in California within the last fifteen years has been proposed statutory initiative 97RF0053, which

adds traditional fault-based grounds for dissolution and eliminates ‘irreconcilable differences’ as a ground for divorce when there is a minor child of the marriage or either of the parties has sole or joint physical custody of a child from a different relationship. The proposed initiative provides defenses to claims of fault which, if found to be true, prohibit the court from granting a dissolution.<sup>39</sup>

This bill would allow fault-grounds, likely adultery, abandonment, and cruel and unusual punishment, to California’s divorce law. It would also void irreconcilable differences as a legal ground for divorce when there are minor children involved. As is evident, both proposals focus on marriages with minor children and there have been concerns about the effect of divorce on children, which will be addressed in the arguments section. Neither initiative passed, but there is some momentum to attempt to enact these provisions again.

Other states have proposed their own initiatives in the last fifteen years to reform divorce law. There was a bill proposed in Georgia, for example, that would limit no-fault grounds only to consenting parties with no minor children or if one party has been convicted of domestic abuse or a protective order has been issued.<sup>40</sup> In addition, in Massachusetts, a bill was introduced to prohibit unilateral no-fault divorce for irretrievable breakdown of marriage.<sup>41</sup> There has been a general trend to reform divorce

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<sup>39</sup> Ibid., p. 140.

<sup>40</sup> Ibid., p. 140.

<sup>41</sup> Ibid., p. 140.

law and it is likely that this pattern will persist as interest groups and real people experiencing divorce continue to share their experiences.<sup>42</sup>

### **The Debate over No-Fault Divorce in New York**

With every other state in the nation adopting some form of no-fault divorce, the New York legislature has felt pressured to adopt the policy. The question that should concern legislators is whether or not reform would be good for New York women, men, and children. First, I will examine those groups that favor no-fault divorce and what arguments they provide. I will then present the opposing side and the reasons offered for blocking unilateral no-fault divorce in New York.

The push for no-fault divorce has been led by legal professionals. Organizations that favor the measure include the New York State Judicial Institute, Association of the Bar of the City of New York, Women's Bar Association of the State of New York (Family Law Section), New York State Bar Association, American Academy of Matrimonial Lawyers (New York Chapter), New York County Lawyers' Association, Pace University School of Law, and Hofstra University School of Law. All of these organizations sponsored a forum entitled "The Need for No-Fault Divorce" in October 2007. Other organizations that have endorsed no-fault divorce, but did not sponsor the forum, include the Capital District Women's Bar Association, The Legal Project, the Erie County Bar Association, the Onondaga County Bar Association, the Brooklyn Bar Association, and the League of Women Voters of New York State. Their arguments include that no-fault divorce will reduce the bitterness between parties, which hurts children, create a better option for victims of domestic violence, and reduce costs.

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<sup>42</sup> For more examples of state proposals, please see Ibid.

Proponents of no-fault divorce argue that it will eliminate the unnecessary finding of fault within a marriage. When partners need to find fault in their spouses, it encourages hostility and bitterness.<sup>43</sup> Attorneys also argue that the fact that one person must be at fault is demeaning to the courts, the attorneys, and the parties, especially if the partners do not agree that there is one partner to blame.<sup>44</sup> Some claim that “[i]n fact, an argument can be made that by permitting parties to end their marriages in a non-confrontational manner society is actually supporting marriages and healthy relationships, in that people can end marital relationships without destroying all the feelings that still might exist between the parties.”<sup>45</sup> This is especially important should there be children involved, as it sets up a more congenial environment, rather than one of blame. The hostility does not bode well for establishing a productive foundation for raising children.<sup>46</sup> In their book Children and Marital Conflict: The Impact of Family Dispute and Resolution, Cummings and Davies assert that “[a]pproximately 40% to 50% of children exposed to severe marital hostility (i.e. marital violence) exhibit extreme behavior problems...a proportion between 533% and 667% times the behavior problem rates in the general population.”<sup>47</sup> Without the heightened hostility of determining fault, opponents of fault divorce argue that children will be exposed to less conflict.

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<sup>43</sup> Rothbart, Lawrence N. November 2004. “Report by the Committee on Matrimonial Law: The Case for Amending the New York State Domestic Relations Law to Permit No Fault Divorces.” Obtained from Forum: The Need for No-Fault Divorce on October 11, 2007. See also Standard, Kenneth G. March 6, 2005. “Time for no-fault divorce?” *The New York Times*. In this opinion piece, he highlights the aggravation of conflict, the waste of judges’ time, and the immorality of forcing spouses to decide who is at fault.

<sup>44</sup> Rothbart, Lawrence N., p. 4. See also, Abramowitz, Alton L. “A New Era In New York’s Divorce Law; The Time has Come for No Fault Divorce.” Obtained from Forum: The Need for No-Fault Divorce on October 11, 2007.

<sup>45</sup> Rothbart, Lawrence N., p. 4.

<sup>46</sup> Ibid., p. 4.

<sup>47</sup> Cummings, E. Mark and Patrick Davies. 1994. Children and Marital Conflict: The Impact of Family Dispute and Resolution. New York: Guilford Press, p. 3. For other references on the effects on children and families, please see Amato, Paul R. and Alan Booth. 1997. A Generation at Risk: Growing up in an

Those who favor no-fault also highlight its effect on domestic violence victims. They argue that states that passed unilateral no-fault divorce saw a reduction in female suicides, domestic violence rates, and the number of women murdered by their partners, pointing to a 2003 study “Bargaining in the Shadow of the Law: Divorce Laws and Family Distress” by Betsey Stevenson and Justin Wolfers. By comparing the adoption of unilateral divorce to the rate of female suicide and intimate partner murder in the subsequent years, this study concludes that total female suicide declined by around 20% in the long run in states that adopted unilateral divorce statutes and domestic violence reports of husbands against wives were reduced by more than one-third.<sup>48</sup> Proponents of no-fault argue that there is a link between allowing spouses to exit a marriage without finding fault and the reduction of female suicides and the number of women murdered by their partners. Stevenson and Wolfers assert that they interpret their results as an indication that “the reduction in female suicides reflects both women escaping from bad marriages and the redistribution of power within marriages that results from increased access to divorce”<sup>49</sup> from no-fault divorce. Another concern for domestic violence victims is that they “may not be able to afford the cost and expense of a grounds trial” and a fault divorce would “force her to incur thousands of dollars in legal expenses.”<sup>50</sup> Those who favor unilateral no-fault divorce argue that it would allow victims to exit

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Era of Family Upheaval. Cambridge, MA: Harvard University Press.; Amato, Paul R., Laura Spencer Loomis, and Alan Booth. 1995. “Parental Divorce, Marital Conflict and Offspring Well-Being During Early Adulthood.” *Social Forces* 73: 895-916.

<sup>48</sup> Stevenson, Betsey and Justin Wolfers. 2003. “Bargaining in the Shadow of the Law: Divorce Laws and Family Distress.” NBER Working Paper #10175. Obtained from Forum: The Need for No-Fault Divorce on October 11, 2007. The study cited may be accessed through the National Bureau of Economic Research website at <<http://www.nber.org/papers/w10175>>.

<sup>49</sup> Ibid., p. 11.

<sup>50</sup> Women’s Bar Association of the State of New York. 2007. “An Open Letter in Support of No-Fault Divorce.” Obtained from Forum: The Need for No-Fault Divorce on October 11, 2007.

marriage to an abusive spouse without having to engage in a costly and emotionally draining legal battle.

Another assertion proponents of no-fault make is that under fault grounds, “a spouse who lacks economic resources may be forced to remain in a marriage that is not working for them.... [while] a spouse who has economic resources has the option of moving to a neighboring state to obtain a divorce under that state’s ‘no-fault’ statute.”<sup>51</sup> This, in turn, favors the wealthier spouse and provides more power to achieve divorce against the will of the other spouse.

Furthermore, the costs involved are unnecessary, say opponents of a fault-based system. The significant amount of time litigating fault costs taxpayers and litigants money that does not need to be spent.<sup>52</sup> Eliminating fault grounds, proponents say, would eliminate the need for costly litigation for both litigants and taxpayers.<sup>53</sup>

Opponents of no-fault divorce have largely been comprised of two strange bedfellows: conservative pro-family activists and women’s groups, specifically the National Organization for Women. The pro-family activists’ primary concern is keeping families intact, and they argue that no-fault makes it easier to divorce. Some call marriage under the current no-fault laws “notarized dating” rather than a firm commitment that marriage should be.<sup>54</sup> They identify the increase in divorce rates in states with no-fault. However, most studies indicate that following a ten-year period,

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<sup>51</sup> Rothbart, Lawrence N., p. 3.

<sup>52</sup> Ibid., p. 3.

<sup>53</sup> Kriseberg, Lois A. 2007. “No-Fault Divorce.” Opinion piece submitted to the National Organization for Women – New York State.

<sup>54</sup> Schoenfeld, Elizabeth. 1996. “Lighting the Match.” The Hoover Institution. Retrieved 3 April 2008 <<http://www.hoover.org/publications/policyreview/3583026.html>>.



divorce levels return to previous levels.<sup>55</sup> In response to this, some states, such as Louisiana, have instituted covenant marriage, which is harder to both enter into and dissolve, and groups have been lobbying for the repeal of no-fault laws.

Women's rights groups approach no-fault divorce from a very different angle. Their objective is to ensure that women and children receive the best possible outcome from a divorce. It is important to note that feminists were not at the forefront of the campaign for no-fault divorce; on the contrary, they were largely silent on this issue as it was spearheaded by those in the legal profession. Leading the fight against no-fault divorce in the state of New York is the state chapter of the National Organization for Women. They argue that there is a tragic effect on women and that no-fault divorce will not remedy women's current disadvantage in the courts. Their arguments include that unilateral no-fault divorce decreases the bargaining power of a woman who opposes divorce, fault-based divorce is still necessary when women's current financial state is taken into consideration, no-fault will disadvantage homemakers, and no-fault is not good for domestic violence victims.

NOW claims that approximately 95% of divorce cases in New York are resolved by negotiation between couples, which is the best possible process since it allows a bargaining process to occur thus leveling the ground between the spouses.<sup>56</sup> NOW asserts that no-fault takes away any bargaining leverage the non-moneyed spouse has since under current law this person can negotiate a fair agreement before agreeing to the

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<sup>55</sup> For the most recent study of this, please see Wolfers, Justin. 2003. "Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results." National Bureau of Economic Research. Available <[http://bpp.wharton.upenn.edu/jwolfers/Papers/Divorce\(AER\).pdf](http://bpp.wharton.upenn.edu/jwolfers/Papers/Divorce(AER).pdf)>.

<sup>56</sup> National Organization for Women. "No-Fault Divorce." January 2007. Retrieved 3 April 2008 <[http://www.nownys.org/leg\\_memos/oppose\\_a03027.htm](http://www.nownys.org/leg_memos/oppose_a03027.htm)>.

divorce.<sup>57</sup> If unilateral no-fault divorce were enacted, this would not be the case – the spouse with no grounds could “obtain a divorce over the objections of the less powerful spouse without negotiating a divorce settlement.”<sup>58</sup> For instance, NOW asserts that in the process of a divorce, a husband could transfer assets to a girlfriend, sister, or parent, essentially any third party, even while still married, thus giving the appearance of fewer financial resources. Right now under fault divorce, a woman can try to prevent her husband from dishonest behavior by wielding a valuable bargaining chip: her consent.<sup>59</sup> In addition, NOW highlights the ambiguity of the term “exigent circumstances” in the current bill. They wonder what standards will be applied to determine the definition of this legal language and the potential loopholes that will hurt women.

NOW also rejects the argument that women are doing better financially and do not need the protection of fault grounds. Some claim that the non-moneyed spouse is not always the woman since women have gained more job opportunities and are working outside the home. However, NOW asserts that there is still the gender pay gap, which is currently at 77 cents for white women, and they highlight the 2006 *New York Times* article entitled “Gender Pay Gap, Once Narrowing, Is Stuck in Place.”<sup>60</sup> They emphasize that “[l]ast year, college-educated women between 36 and 45 years old, for example, earned 74.7 cents in hourly pay for every dollar that men in the same group did, according to Labor Department data analyzed by the Economic Policy Institute. A decade

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<sup>57</sup> Ibid.

<sup>58</sup> National Organization for Women-New York State. 2005. “No Fault Divorce Legislation Hurts Women Op Ed.” Retrieved from state office.

<sup>59</sup> Gordon, Robert M. 1998. “The Limits of Limits on Divorce.” *The Yale Law Journal* 107(5): 1435-1465.

<sup>60</sup> Leonhardt, David. 2006. “Gender Pay Gap, Once Narrowing, Is Stuck in Place.” *New York Times*. Retrieved 3 April 2008 <<http://www.nytimes.com/2006/12/24/business/24gap.html>>.

earlier, the women earned 75.7 cents.”<sup>61</sup> Clearly, women cannot be assumed to be on an equal financial footing in marriage based solely on alleged claims of pay equity.

NOW also asserts that it is important to look at the effect on states that have already instituted unilateral no-fault divorce. NOW points to a July 1996 report entitled “Achieving Equal Justice for Women and Men in the California Courts” that finds that “the period for which support was awarded was getting shorter since the advent of no-fault divorce” and shortly after the passage of no-fault divorce, judges acknowledged that the law could negatively affect “displaced homemakers” after a marriage.<sup>62</sup> In one divorce case of a disabled woman who had been a housewife and mother for most of her 25 year marriage, the judge of the appellate court wrote: “If a woman is able to do so, she certainly should support herself. If, however, she has spent her productive years as a housewife and mother and has missed the opportunity to compete in the job market and improve her job skills, quite often she becomes, when divorced, simply a ‘displaced homemaker.’”<sup>63</sup> Some women commit to maintaining the household during the marriage and thus do not acquire job skills and experience, and upon divorce, they are in danger of financial ruin. No-fault divorce removes the bargaining leverage for homemakers to secure a better settlement since the moneyed spouse may leave the marriage without justification; her consent would no longer be required. Furthermore, homemakers often lack independent funds to secure proper legal counseling in order to negotiate a settlement and this would be exacerbated by the allowance of no-fault since the husband does not have to take blame in the courts for the dissolution of marriage, should that be

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<sup>61</sup> Ibid.

<sup>62</sup> Judicial Council of California Advisory Committee on Gender Bias in the Courts. 1996. “Achieving Equal Justice for Women and Men in the California Courts.” Retrieved 3 April 2008 <[www.courtinfo.ca.gov/programs/access/documents/f-report.pdf](http://www.courtinfo.ca.gov/programs/access/documents/f-report.pdf)>, p. 139.

<sup>63</sup> Ibid., p. 140.

the case. As the law stands now in New York, divorce cannot be granted unless fault grounds are proven or a settlement agreement is negotiated and spouses have separated for a year. For the moneyed spouse to exit the marriage, s/he needs to either show fault on the part of the non-moneyed spouse or negotiate. If this is not the case, the non-moneyed spouse loses her/his bargaining power of consent.

Maggie Gallagher, a nationally syndicated columnist and an affiliate scholar at the Institute for American Values in New York City, also argues that no-fault divorce doesn't differentiate between a marriage of four months and forty years, which leaves women who may have been counting on this continued standard of living with few options.<sup>64</sup> Unilateral no-fault divorce is problematic in that it will hinder the ability to negotiate reasonable settlements since the non-moneyed spouse gives up her bargaining leverage. Women who have been married for years may not be able to negotiate fair maintenance and property distribution settlements under no-fault divorce because their consent to divorce is not required.

Gallagher also asserts that "no-fault divorce facilitates domestic violence by failing to recognize and punish men financially for their marital crimes."<sup>65</sup> A NPR news piece from 2006 on no-fault divorce in New York asserts that fault grounds provide victims of domestic violence with the much-needed bargaining chip to negotiate health insurance and financial assets with the husband who likely controls all the finances that

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<sup>64</sup> Gallagher, Maggie. August/September 1997. "End No-Fault Divorce?" *First Things*, p. 24-30. Retrieved 3 April 2008 <<http://www.leaderu.com/ftissues/ft9708/articles/gallagher.html>>.

<sup>65</sup> Ibid.

they will need after the marriage.<sup>66</sup> For instance, as cited by the Domestic Violence Task Force of the Bar Association of the City of New York

Justice Silberman in *Havel v. Islam*, 273, A.D., 2d 164 (1st Dept. 2002), found that the husband's assault on his wife with a barbell was a critical factor in determining the allocation of marital resources. This hard won victory should not be undermined by enacting no-fault legislation that does not specifically address the role of fault in dividing marital property.<sup>67</sup>

In short, women's rights advocates find enacting no-fault divorce to be problematic for many reasons, including its effect of decreasing the non-moneyed spouse's bargaining power and the poor financial position in which it leaves some women, particularly homemakers. They see several other divorce reforms, such as counsel fees and better enforcement of domestic violence laws in divorce, that should be enacted instead of and before unilateral no-fault divorce.

### **Policy Recommendations for New York**

New York is the only state without unilateral no-fault grounds. Though this fact raises questions about whether or not New York is in the wrong, it also beckons the inquiry as to why New York seems to be holding out on this reform. This chapter has thus far looked at the changing institution of matrimony, a brief history of no-fault divorce, the current law in New York, other states' recent initiatives for divorce reform, proponents' arguments, and opponents' arguments. I now provide specific policy recommendations for New York's divorce law.

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<sup>66</sup> To listen to this broadcast "New York Reconsiders No-Fault Divorce" by Margot Adler, please visit <<http://www.npr.org/templates/story/story.php?storyId=5368225>>.

<sup>67</sup> National Organization for Women-New York State. "No Fault Divorce Hurts Women: NOW speaks out against legislation introduced to New York State." Retrieved 3 April 2008 <<http://albanyareanow.org/issues/family.htm>>.

New York should delay adopting no-fault divorce until other reforms are enacted. Although it seems as though the first instinct is to allow the freedom of someone to end the divorce whenever s/he desires, this leaves out considerations of what happens after the divorce is granted. The issue of how both spouses fair should be addressed in instituting divorce reform. By enacting no-fault divorce at this time, it appears that it would likely disadvantage women and children. Under the current system in which the vast majority of people negotiate their own settlements, spouses can include provisions that the court cannot initially order, such as child support until 21 years of age, but the court will still enforce such an agreement. This bodes well for children and the financial future of women. While both proponents of and opponents of no-fault divorce claim to look out for the economically disadvantaged spouse, the argument that fault provides a bargaining chip seems more plausible than the assertion that the non-moneyed spouse would be forced to remain in a marriage in which they may not want to be while the moneyed spouse moves to a neighboring state for a divorce. In reality, the argument that the moneyed spouse could travel to another state to get a divorce contradicts the fact that many states have residency requirements for those seeking a divorce. It is likely that this would come into play if a spouse attempts to get a divorce in a neighboring state against the will of the other spouse.

No-fault divorce, however, is not inherently bad. Marriage should not be a legally suffocating institution from which there is no reprieve. Rather, the choice to leave should be accompanied by an agreement fair to both parties. This agreement process is currently experienced by 95% of New York couples. The effects of no fault in hurting the economically disadvantaged spouse, often the woman, and leaving her in a job market in

which it is even more difficult to find work, particularly if she has been a housewife, is most alarming. It appears that these concerns, however, may be remedied through divorce reform, but not through the institution of no-fault divorce in the state.

Nancy Erikson, J.D., LL.M., M.A. (forensic psychology) has practiced and taught family law for over thirty years and performed custody evaluations with her M.A. degree. Her analysis of no-fault divorce and its timing is among the most relevant I have seen. She argues that the push for no-fault was led by the New York State Bar Association and it has overshadowed the real concerns of economically disadvantaged spouses going through divorces. She contends that no-fault will not only not relieve these concerns, for instance the lack of a counsel fee bill and an expert fee bill, but it may also exacerbate them. Her recommendation is that other reforms be “proposed, discussed, and enacted. Then a time period should be allowed to elapse in order to determine whether the reforms are working and are achieving their goals. Thereafter, assuming the playing field has been substantially leveled, the Legislature can once again take up the issue of no-fault divorce.”<sup>68</sup> This recommendation is what I am advocating.

She recommends several reforms prior to no-fault legislation. The following reforms are lacking in New York and appear to provide more substantive and positive change for the most vulnerable in divorce. These provisions should be enacted first and then the possibility of unilateral no-fault divorce should be revisited once these have provided a fairer situation for both spouses.

The first is attorneys’ fees/appointment of counsel for indigent spouses.<sup>69</sup>

Erikson asserts that if no-fault is enacted without the passing of this provision, then the

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<sup>68</sup> Erikson, Nancy. May 2006. “Comments on Assembly Bill 104450-A, A Bill Providing for ‘No Fault’ Divorce.” Retrieved from National Organization for Women, p. 1.

<sup>69</sup> Ibid., p. 8.

wife, if she is the non-moneyed spouse, may lose bargaining power. This is because she will not have access to a competent attorney and whatever the husband wants to offer, “she must accept unless she is prepared to litigate, and without sufficient funds to hire an attorney, she is unable to do so.”<sup>70</sup> The non-moneyed spouse lacks resources to hire an attorney and currently there is not a requirement to award counsel to this spouse and the court is also not mandated to explain why attorneys’ fees are being denied.<sup>71</sup> Joel R. Brandes, a practicing family law attorney in New York, concurs that counsel fees are in a court’s discretion. He writes, “The Court of Appeals in *DeCabrera v. DeCabrera-Rosete* noted that DRL §237 replaced §1169 of the Civil Practice Act and significantly omitted the word ‘necessary,’ which had preceded the phrase ‘to enable the wife to carry on or defend the action.’ This omission gave the courts some flexibility when considering an application for counsel fees. Indigence is not a prerequisite to an award of counsel fees.”<sup>72</sup> Likewise, the New York State Judicial Committee on Women in the Courts found that there is a “need for prompt awards of interim attorneys fees, made regularly during the course of litigation and made with adequate consideration of the amount the spouse with the greater financial resources is paying for an attorney.”<sup>73</sup> Due to the current discretion of the court and its failure to act on providing attorney fees, the non-moneyed spouse is left with few options in her attempt to secure counsel.

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<sup>70</sup> Ibid., p. 8.

<sup>71</sup> Ibid., p. 8.

<sup>72</sup> Brandes, Joel R. 1999. “More Equitable Counsel Fee Awards.” *New York Law Journal*. Retrieved 1 May 2008 <[http://www.brandeslaw.com/legal\\_fees/more\\_equitable\\_counsel\\_fee\\_award.htm](http://www.brandeslaw.com/legal_fees/more_equitable_counsel_fee_award.htm)>.

<sup>73</sup> New York State Judicial Committee on Women in the Courts. June 2002. “Women in the Courts: A Work in Progress 15 Years After the Report of the New York Task Force on Women in the Courts.” Retrieved 12 April 2008 <[http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf)>.



Erickson also lists better solutions for the problem of dependent spouses who need health insurance after divorce.<sup>74</sup> Spouses often receive health insurance through one partner and may accept jobs without adequate health insurance knowing that their husbands or wives have good benefits. When marriages dissolve, the benefits disappear as well, and under current no-fault proposals, health insurance is not provided for dependent spouses. A study done by Marc L. Berk, PhD and Amy K. Taylor, PhD found that “marital status is a major predictor of the health insurance coverage of women between 35 and 64 years of age. Divorced women are twice as likely to be uninsured as married women and they are also much more likely to depend on Medicaid assistance.”<sup>75</sup> These findings are even more alarming when one considers that divorce increases women’s risk for physical and mental health problems in addition to increased alcohol consumption.<sup>76</sup> Massachusetts is one state that has better medical coverage from the spouse who has the coverage to the noncovered spouse after divorce, and New York should follow this lead.<sup>77</sup>

Furthermore, Erickson argues that improvements in spousal support and maintenance laws need to be enacted prior to no-fault. Unilateral no-fault would allow even more detrimental maintenance since the bargaining leverage of consent from the non-moneyed spouse would be taken away. The moneyed spouse would have little incentive to compromise under no-fault divorce since irreconcilable differences would be sufficient grounds. This leaves the non-moneyed spouse without the bargaining chip of negotiating the exit of the marriage since currently consent is required by both parties,

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<sup>74</sup> Erickson, Nancy, p. 8.

<sup>75</sup> Berk, Marc L. and Amy K. Taylor. 1984. “Women and Divorce: Health Insurance Coverage, Utilization, and Health Care Expenditures.” *American Journal of Public Health* 74(11): 1276-1278, p. 1276.

<sup>76</sup> Prigerson, Holly G., Paul K. Maciejewski, and Robert A Rosenheck. 1999. *Medical Care* 37(9): 858-873.

<sup>77</sup> Erickson, Nancy, p. 9.

and under no-fault, divorce would be granted unilaterally. The need for this reform and the arguments regard women's decreased economic standing following a divorce has been substantiated by several studies. For instance, a longitudinal study by Karen C. Holden and Pamela J. Smock reveals that the economic consequences for women after a divorce are consistently worse than for men. This is due to "the division of labor during marriage, lower wages paid to women both during and after marriage, and the lack of adequate postdissolution transfers to women."<sup>78</sup>

The fourth reform is enforcement of the law to require that courts consider domestic violence in all custody/visitation cases. Erickson claims that this law is largely ignored, and this has a detrimental effect on victims of domestic violence.<sup>79</sup> Her statements are substantiated by the New York Judicial Committee on Women in the Courts, which found that "[v]ictims' access to the courts is limited by their being dissuaded by law enforcement officials and court personnel from proceedings in criminal and family courts and by having their claims trivialized or ignored."<sup>80</sup> Similarly, another reform that should be enacted is the extension of the statute of limitations for divorce on grounds of cruelty and on lawsuits by battered spouses against their abusers for damages for intentional torts. The current statute of limitations is 5 years from the last act of cruelty and Erickson makes the wise recommendation for it to be "5 years from the time the victim separates from the abuser, because while she is with him, she may not be able to take any steps toward divorce."<sup>81</sup> This extra time is especially important since the court's treatment of domestic violence often dissuades women from bringing their cases,

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<sup>78</sup> Holden, Karen C. and Pamela J. Smock. 1991. "The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?" *Annual Review of Sociology* 17: 51-78, p. 51.

<sup>79</sup> Erickson, Nancy, p. 11.

<sup>80</sup> New York State Judicial Committee on Women in the Courts, p. 12.

<sup>81</sup> Erickson, Nancy, p. 12.

as the New York Judicial Committee on Women in the Courts found: “A significant number of women who bring petitions for court-ordered protection fail to follow through, leading to dismissals for failure to prosecute. Women who fail to proceed are deterred in part by the hostile or indifferent treatment they receive in court.”<sup>82</sup>

In addition, Erickson argues for reforming the system of appointing mental health “experts” to perform custody evaluations. She states that there are no requirements for these experts with regard to their knowledge in several areas, including domestic violence, child development, New York law on custody, visitation, child support, and evidence.<sup>83</sup> As far back as 1987, the *New York Times* wrote that “[s]uch differences [between experts’ evaluations] are possible because there is no hard-and-fast procedure in making custody evaluations; each professional is free, within broad standards, to highlight some data while playing down others. And, even with the same observations, experts can arrive at differing interpretations.”<sup>84</sup> This discretion paired with the lack of expertise is of real concern in the effort to ensure the fairest and most beneficial outcome to families.

The final three reforms Erickson would like to see passed before no-fault are appointment of more judges in counties having huge backlogs on their dockets, a fully staffed Matrimonial Oversight office “to receive complaints and concerns of litigants and attorneys, to gather necessary statistics, and to make recommendations for changes in statutes and court rules,” and finally, sanctions for spouses who fail to disclose significant

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<sup>82</sup> New York State Judicial Committee on Women in the Courts, p. 12.

<sup>83</sup> Erickson, Nancy, p. 13.

<sup>84</sup> Goleman, Daniel. 1987. “Why Experts Differ in Custody Cases.” *The New York Times*. Retrieved 1 May 2008 <<http://query.nytimes.com/gst/fullpage.html?res=9B0DE7DE1130F933A25750C0A961948260>>.

income and/or assets or who commit perjury.”<sup>85</sup> These would allow more cases to be heard, more oversight to better serve clients, and more justice in penalizing spouses who lie and conceal important information.

These reforms would provide real change for the most vulnerable when seeking divorce. It is problematic that there is so much clamoring for divorce reform, yet these very real issues are not being adequately addressed. The counsel fee bill, the maintenance laws, and the sanctions for spouses who lie about their assets are the most pressing. I cannot make an informed judgment with regard to the effects of divorce reform on domestic violence victims since domestic violence attorneys are split over no-fault divorce reform. I can state that the well-being of marital abuse victims must be thoroughly assessed prior to any reforms and as stated in the chapter on gender bias, judges do not often recognize domestic violence. At the forum on no-fault divorce in New York City on October 2007, a question was asked about some of the above reforms, in particular the counsel fee bill. The response by the Honorable Sondra Miller was that we can get this no-fault bill in now and then work on passing the others after. However, historically it seems as though change comes slow, and when there is momentum for change, activists should take advantage of it and pass the most comprehensive reforms they can feasibly enact. No-fault divorce seems as though it mainly stems from a desire not to be the only state left out, though I do not hesitate to acknowledge that some points, such as the freedom to leave a marriage, are important. However, as Erickson writes

Perhaps in a perfect world, where both parties to the marriage had economic security and equal bargaining power, and where all courts could be counted upon to do justice between the parties when determining in custody, visitation, support, and equitable distribution of marital property, the freedom to choose to leave a marriage could be elevated above the

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<sup>85</sup> Erickson, Nancy, p. 7.

other partner's desire to continue the marriage. Unfortunately, we do not live in a perfect world.<sup>86</sup>

It is imperative that the above reforms be enacted prior to no-fault divorce in New York if the goal is to ensure the well-being of both parties involved. Only then should a unilateral no-fault divorce bill be considered and should this debate continue.

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<sup>86</sup> Ibid., p. 3.

## **Mandatory Policy Initiatives: Joint Custody and Mediation**

Recent policy proposals in New York have included bills to mandate joint custody and mediation in divorce proceedings. Supporters include father's rights groups, while opposition stems largely from NOW and women's groups. In this chapter, I will examine both of these mandatory policy initiatives. First, I will provide a brief history of custody of children following divorce then I will identify the proponents of mandatory joint custody and explain their arguments. Similarly, I will highlight opponents to this policy and outline their arguments then I will conclude with my recommendations. The second portion of this chapter will examine the current bill for mandatory mediation in the state Senate and Assembly. I will discuss proponents' arguments and then opponents' objections to the bill. Finally, I will finish with my own suggestions.

### **Joint Custody**

Historically, custody of the children was an uncontested notion. Fathers preserved all legal rights to their children under patria potestas in ancient Roman law. In the late eighteenth century, however, a shift occurred away from paternal power. In her book, From Father's Property to Children's Rights: The History of Child Custody in the United States, Mary Ann Mason writes

In the first hundred years of the new republic, from 1790 to 1890, after the end of the colonial period, there was a dramatic shift away from fathers' common law rights to custody and control of their children toward a modern emphasis on the best interests of the child, with a presumption in favor of mothers as the more nurturing parent.<sup>87</sup>

Women's increase in property rights and their rising influence within the family structure were largely responsible for this change. In the 1970s, however, "[m]ost states adopted

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<sup>87</sup> Mason, Mary Ann. 1994. From Father's Property to Children's Rights: The History of Child Custody in the United States. New York: Columbia University Press, p. xiii.

laws conferring equal status on custodial rights of mother and father with a favorable attitude toward joint custody.”<sup>88</sup> According to Nolo, a company that provides legal information resources, joint custody is defined as

An arrangement by which parents who do not live together share the upbringing of a child. Joint custody can be joint legal custody (in which both parents have a say in decisions affecting the child)[,] joint physical custody (in which the child spends a significant amount of time with both parents) or, very rarely, both.<sup>89</sup>

Many states have a preference or presumption of joint custody – some if parents agree, others, even if parents do not agree.<sup>90</sup> The focus of this half of the chapter will be on the debate over presumptive joint custody in New York, which currently has no custody mandate of this type.

According to Joel R. Brandes, a prominent family law attorney and author of the nine-volume Law and the Family New York 2d, “nothing in New York’s law prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interest of the child.”<sup>91</sup> This terminology “best interest of the child” came up repeatedly in the literature and there was no uniform definition. Joel R. Brandes, who practices in New York, asserts that many factors are taken into consideration and may include:

The effect of a separation of siblings; The wishes of the child, if of sufficient age; The length of time the present custody arrangement has continued; Abduction or abandonment of the child or other defiance of

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<sup>88</sup> Ibid., p. xiv.

<sup>89</sup> Nolo. “Glossary: Joint Custody.” Retrieved 13 March 2008

<<http://www.nolo.com/definition.cfm/Term/8298FA4E-EA10-498F-BBE1E087E11177DE/alpha/J/>>.

<sup>90</sup> For an incomplete, but still informative list of joint custody legislation in some states, please see “Joint Custody Legislation” at <<http://members.tripod.com/~mdcrc/legislation.html>>. For a graphic of states’ joint custody laws, please refer to National Conference of State Legislatures. 2003.

“Presumption/Preference for Joint Custody.” Retrieved 13 March 2008

<<http://204.131.235.67/programs/cyf/jointcustody.htm>>.

<sup>91</sup> Brandes, Joel R. 2000. “Child Custody: History, Definitions, New York Law.” Brandeslaw.com. Retrieved 13 March 2008 <[http://www.brandeslaw.com/child\\_custody/child\\_custody\\_art.htm](http://www.brandeslaw.com/child_custody/child_custody_art.htm)>.

legal process; The relative stability of the respective parents; The care and affection shown to the child by the parents; The atmosphere in the homes; The ability and availability of the parents; The morality of the parents; The prospective educational probabilities; The possible effect of a custodial change on the children; The financial standing of the parents; The parents' past conduct; The refusal of a parent to permit visitation and/or the willingness of a parent to encourage visitation; Unauthorized relocation of the parent and child to a distant domicile; Making unfounded accusations of child abuse.<sup>92</sup>

Generally, states, including New York, have a statute and established case law for patterns in custody disputes. Domestic Relations Law §240 states that in divorces, “the court shall require verification of the status of any child of the marriage with respect to such child’s custody and support, including any prior orders, and shall enter orders for custody and support as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the *best interests* of the child.”<sup>93</sup> Furthermore, in *Braiman v. Braiman* (1978), the Court of Appeals of New York stated that “[o]f course, whatever the ultimate disposition, it must be, as it has always been, in the best interest of the children.”<sup>94</sup> Though the doctrine of the best interest of the children has been established, its definition has been disputed. Both proponents and opponents of presumptive joint custody argue that they have the best interests of children at heart. There is currently a bill in the New York Assembly, A08627, sponsored by Assemblyman Benjamin that would establish a presumption of shared parenting of minor children in matrimonial proceedings.<sup>95</sup> The bill would provide for joint custody for minor children in a divorce, provided that there is not an allegation that this would be in

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<sup>92</sup> Brandes, Joel R. 1999. “Judging the ‘Best Interests of the Child.’” Brandeslaw.com. Retrieved 13 March 2008 <[http://www.brandeslaw.com/child\\_custody/judging\\_best\\_interest.htm](http://www.brandeslaw.com/child_custody/judging_best_interest.htm)>.

<sup>93</sup> Jdbar.com. “Domestic Relations Law 240: Custody and Child Support; Orders of Protection.” Retrieved 14 March 2008 <<http://www.jdbar.com/Statutes/drl-240.html>>, emphasis added.

<sup>94</sup> *Braiman v. Braiman*, 44 NY2d 584 (1978).

<sup>95</sup> A08627. For the text of this bill, please see <<http://assembly.state.ny.us/leg/?bn=A08627>>.



opposition to the best interests of the children. It states that “continuing contact with both parents through shared parenting is in the best interests of minor children.”<sup>96</sup> The bill also establishes an order of preference for custody, the top preference being joint custody. If the court decides against joint custody, it must state its reasons. It has been referred to judiciary twice, once on May 22, 2007 and again on January 9, 2008. I will now turn to look at proponents’ and opponents’ arguments with regard to mandatory joint custody in New York and conclude with my own analysis.

### **Proponents of Mandatory Joint Custody**

First, I will examine the justification for A08627 in the text of the bill. There are two primary explanations for the bill’s necessity: the best interest of children and to reduce the stress in divorce. The second reason is mentioned much more succinctly, thus I will reveal this reason first. The justification states that “[b]ecause presumptive shared parenting reduces litigation and re-litigation, it will also reduce the stress inherent in the divorce process.”<sup>97</sup> The remainder of the text addresses children’s adjustment after divorce. The bill states that “[c]urrent psychological studies, including state sponsored projects spanning 38 states, reveal convergent findings that children of all ages have better adjustment after divorce when they have full parenting participation from both parents.”<sup>98</sup> In addition, reports by the National Institute of Mental Health are cited to assert that “custody arrangements which effectively remove one parent from a child’s life interferes with the child’s normal development.”<sup>99</sup> Presumptive joint custody would also reject the notion that children should be used as bargaining chips. The bill

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

also denies the claim that voluntary joint custody is enough because Assemblyman Benjamin argues in the current system without a presumption of joint custody, “[s]tatistics have shown that in more than 95% of divorce or separation cases, the mother was awarded sole custody of the child, with the father limited to rights of visitation.”<sup>100</sup> Essentially, the bill’s justification relies upon the claims that children will be better off psychologically and mentally, and joint custody is rare in its current voluntary status.

Father’s rights groups examine the issue with a similar definition of children’s interests in mind. These organizations formed in the wake of feminism because many men felt their rights were in jeopardy. Father’s rights groups assist fathers in preserving what they deem to be best for men and children. In New York, these organizations include Father’s Rights Association of New York State, The Coalition of Fathers and Families NY, Inc., and several attorneys, such as Rinaldo Del Gallo III, who advocate for father’s rights. I will focus on two proponents of presumptive joint custody, Mike McCormick, Executive Director of the American Coalition for Fathers and Children, the world’s largest shared parenting organization, and Glenn Sacks, a columnist on men and fathers’ issues. I chose these men because both of them have written on and spoken out about New York’s legislative proposal for mandatory joint custody. Their main arguments are that the bill “will help reduce post-divorce conflict and greatly improve the lives of New York’s children of divorce.”<sup>101</sup>

Like the bill’s justification, father’s rights proponents’ prime argument is that joint custody is the best psychological, mental, and emotional solution for children. In a

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<sup>100</sup> Ibid.

<sup>101</sup> McCormick, Mike and Glenn Sacks. 2006. “A330 Would Help New York’s Children of Divorce.” BullsEye. Retrieved 14 March 2008 <<http://www.familykb.com/Uwe/Forum.aspx/child/2577/This-is-what-NOW-NY-is-affraid-of-the-truth-about-A330>>. Also available on [glennsacks.com](http://glennsacks.com), [parental-alienation-awareness.com](http://parental-alienation-awareness.com), and [americandaily.com](http://americandaily.com). A330 is the Shared Parenting Bill that failed in 2006.

joint piece about A330,<sup>102</sup> the failed shared parenting bill in 2006, McCormick and Sacks cite several studies to buttress their claims. They refer to the findings of a meta-analysis of 33 studies between 1982 to 1999 that examined 1,846 sole-custody and 814 joint-custody children conducted by psychologist Robert Bauserman and published by the American Psychological Association's *Journal of Family Psychology*: "children in joint custody settings had fewer behavior and emotional problems, higher self-esteem, better family relations, and better school performance than children in sole custody arrangements."<sup>103</sup> They also cite studies focusing on effects on academics following divorce: "A Harvard University study of 517 families conducted across a four-and-a-half year period measured depression, deviance, school effort, and school grades in children ranging in age from 10 to 18. The researchers found that the children in joint custody settings fared better in these areas than those in sole custody."<sup>104</sup> They also quote a study by psychologist Joan Kelly to indicate that children of divorce are more satisfied with joint physical custody than sole custody.

Another argument McCormick and Sacks use for presumptive joint custody is that "[r]esearch demonstrates that joint custody also leads to high rates of child support compliance" because parents are more involved in their children's lives.<sup>105</sup> This is a potentially appealing argument particularly to mothers and children. McCormick and Sacks also point to the costly legal battles in which non-custodial parents must engage in

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<sup>102</sup> The original text of the bill is no longer available. However, in Glenn Sacks' piece on this bill, its description is identical to the current bill in front of the Assembly: "A330 would 'require the court to award custody to both parents in the absence of allegations that shared parenting would be detrimental to the child.' It would place the burden of proof that shared parenting would be detrimental where it should be--on the parent requesting sole custody. The bill also establishes an order of preference for custody, the top preference being joint custody. If the court decides against joint custody, it must state its reasons." <<http://www.glennsacks.com/nysp/index.htm>>.

<sup>103</sup> McCormick, Mike and Glenn Sacks.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

order to seek time with their children. They also reject the notion that joint custody creates a confusing rearing environment for children. They claim that “[r]esearch shows that children fare best in the stability of a married, two parent household” but after a divorce, the best environment is to “protect their critical bonds with the two people they love most in the world – their mother and their father.”<sup>106</sup>

McCormick and Sacks also specifically reject women’s groups’ claims that joint custody does not work when there is conflict between parents. They cite a study in the *Journal of Divorce & Remarriage* that finds that “over time joint custody serves to help reduce conflict between divorced spouses” and another study by Texas Women’s University that indicates that “joint custody does not expose children to greater parental conflict.”<sup>107</sup> They also address concerns over protecting divorcing women who have been victims of domestic violence. They assert that “A330’s presumption of joint custody only applies to fit parents – abused women would receive sole custody.”<sup>108</sup>

Many father’s rights advocates also discuss what’s called parental alienation syndrome (PAS). In his article “Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?” Richard Gardner defines PAS as

a childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present, the

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

child's animosity may be justified and so the parental alienation syndrome explanation for the child's hostility is not applicable.<sup>109</sup>

Essentially, PAS is perpetrated by one parent who wishes to isolate the child from the other parent, usually the non-custodial parent. The Parental Alienation Awareness Organization (PAAO) was founded on the basis that most people do not know about PAS, despite their claims that it is a legitimate disorder. Father's rights groups cite PAS as a basis for the need to keep children with both parents so brainwashing will not occur.

### **Opponents of Presumptive Joint Custody**

While father's rights groups are at the forefront of advocating for presumptive joint custody, women's rights groups are actively fighting the passage of bills for mandatory shared parenting. The New York State chapter of the National Organization for Women is at the head of this debate with Stop Family Violence and the National Coalition for Family Justice behind it. NOW claims that *Braiman v. Braiman* is good precedent and should not be overturned and that children are hurt by presumptive joint custody since conflict is likely present between the parents. NOW favors a primary caregiver presumption, which would award custody to the parent who has been the principal caregiver.

NOW cites that in *Braiman v. Braiman* (1978), the Court of Appeals of New York wrote, "Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families."<sup>110</sup> The opinion continues by stating that "[i]t is understandable, therefore, that joint custody is

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<sup>109</sup> Gardner, Richard A. 2002. "Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?" *The American Journal of Family Therapy* 30:93–115. Retrieved from <<http://www.fact.on.ca/Info/pas/gard02b.htm>>.

<sup>110</sup> *Braiman v. Braiman* (1978).

encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion....As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.”<sup>111</sup> NOW highlights this ruling to emphasize that the voluntary nature of joint custody is crucial to its success as a custody arrangement.

NOW also asserts that lawmakers need to look at other states that have adopted presumptive joint custody and the effects that occurred there in order to better assess what will happen if New York adopts the measure. They specifically focus on California’s adoption of mandated joint custody. They assert that “[a]fter seeing the effects on children: convoluted living arrangements between relocated, possibly remarried parents, children being transferred from parent to parent in front of police stations, children being enrolled in two separate schools and other horror stories, the California legislature, in 1989, revoked its presumption.”<sup>112</sup> California’s current statute “now establishes ‘neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the Court and the family the widest discretion to choose a parenting plan which is in the best interest of the children or children’”<sup>113</sup> California NOW issued a report entitled “Disorder in the Courts,” within which was a piece entitled “Joint Custody – A Failed Proposition for Women, Children...and Loving Fathers.” In this article, Trish Wilson, a writer and member of the National Network on Family Law Policy, cites a study by Maccoby and Mnookin that

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<sup>111</sup> Ibid.

<sup>112</sup> National Organization for Women-New York State. 2005. “National Organization for Women – New York State, Inc. OPPOSES Mandatory Joint Custody.” Retrieved from NOW-NYS office October 2007.

<sup>113</sup> Ibid.

found that “when joint custody is ordered to resolve custody disputes, three years later the couples experienced more conflict and less cooperative parenting than couples for whom joint custody was the first choice of each parent.”<sup>114</sup> California NOW also asserts that presumptive joint custody fails to create individualized solutions and instead “caters to a minority of fathers who demand it.”<sup>115</sup> California NOW cites a study by Dr. Judith Wallerstein that indicates that joint custody is “harmful to children who cannot handle the restrictive schedule....They lose track of their friends and their extracurricular activities suffer when parents pay too much attention to when the children are supposed to be with them rather than on what their children would like to do with their own time.”<sup>116</sup>

Both California NOW and New York NOW point out that 95% of divorcing parents reach an agreement on custody arrangements without court intervention. For the court to presume joint custody is the best arrangement is to trounce on the wishes of negotiating parents, which make up the vast majority of separating couples. Many parents do not choose joint custody as the solution, and instead opt for custody with a primary caregiver for the children, often the mother.<sup>117</sup> NOW stresses that joint custody works when it is voluntary. They state that in the cases in which joint custody bodes well for children, all of the following are present:

the parents had an amicable relationship, their divorce was amicable with little or no conflict, they had higher-than-average incomes, they had only one child, neither parent (especially the father) had remarried, they lived within close proximity of each other, they had flexible job schedules, the child could handle the joint custody arrangement, the parents chose freely between themselves to try joint custody and they chose to make it work.<sup>118</sup>

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<sup>114</sup> Wilson, Trish. 2006. “Joint Custody – A Failed Proposition for Women, Children...and Loving Fathers.” *California NOW Disorder in the Courts*. Retrieved from NOW-NYS office October 2007.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

These circumstances are not present in all cases, and thus NOW asserts that the current system of individualized assessment works best for families.

NOW also questioned the effect that presumptive joint custody would have on domestic violence victims. NOW asserts that 95% of separating parents reach voluntary custody agreements and “[o]f the five percent of custody cases that do involve courtroom battles, at least three quarters of them involve domestic violence.”<sup>119</sup> NOW claims that the “[a]busers often use ongoing, costly litigation – seeking joint or sole custody – as a tactic to continue the abuse and to punish the mother for leaving.”<sup>120</sup> In addition, they cite a 2002 study of NYS Family Courts, which found that courts “never or rarely responded by denying visitation when there is a risk of violence.”<sup>121</sup> NOW and Stop Family Violence argue that Sacks and McCormick acknowledge that abusers should not have custody yet “they are promoting mandatory arrangements that will hamstring the choices of almost all separating families in order to benefit, at most, only 1.25% of them [the number of contested custody cases that do not involve domestic violence].”<sup>122</sup> NOW also asserts that marital violence is a “statistically significant predictor of physical child abuse,”<sup>123</sup> thus strengthening the argument that those abusive in a marriage are likely to inflict harm onto children should they be placed in their custody.

NOW also rejects the validity of PAS. They point out that PAS is not recognized by the American Psychological Association or any valid psychological or psychiatric

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<sup>119</sup> National Organization for Women-New York State. 2005. “National Organization for Women – New York State, Inc. OPPOSES Mandatory Joint Custody.”

<sup>120</sup> Ibid.

<sup>121</sup> National Organization for Women-New York State. “NOW-NYS Talking Points on Presumption of ‘Shared Parenting’ (Joint Custody).” Retrieved October 2007 from NOW-NYS office.

<sup>122</sup> National Organization for Women-New York State. 2005. “National Organization for Women – New York State, Inc. OPPOSES Mandatory Joint Custody.”

<sup>123</sup> National Organization for Women-New York State. “Child Custody and Abuse: The Myths and the Facts.” Retrieved October 2007 from NOW-NYS office.



association and it has only received validity in custody case law.<sup>124</sup> They also assert that it can be harmful in proceedings: “Because of the widespread acceptance in the courts of PAS (Parental Alienation Syndrome) mothers are afraid even to raise the issue of child abuse for fear of losing custody and possibly even visitation.”<sup>125</sup>

NOW advocates for primary caregiver presumption, which would award custody to the parent who has been the principal caregiver of the children during the marriage. In a 2006 editorial in the *Times Union*, NOW-NYS President Marcia Pappas reasons, “If a person is not involved in the lives of his or her children during the marriage, why would that involvement increase after divorce?”<sup>126</sup> Pappas asserts that this policy “would cut down on the abusive practice by the moneyed spouse (usually the husband) of coercing the non-moneyed spouse (usually the wife) to make monetary concessions rather than risk a custody battle before a biased court.”<sup>127</sup> She also divulges that Richard Neely, a lawyer in West Virginia “has acknowledged that he often gave that advice to male clients. When he became chief justice of the Supreme Court of Appeals in West Virginia, he was responsible for the passage of a primary caregiver bill.”<sup>128</sup> In addition, NOW points to California’s experience with mandating joint custody. Pappas writes:

In California, one of the first states to mandate joint custody, a report prepared fifteen years after divorce reform legislation, found in joint and sole custody arrangements followed up two and three years after the initial filing that the children’s contact with their parents varied considerably across custody types. One-third of joint-physical custody arrangements were indistinguishable in sole custody –visitation arrangements in the same population. “There is evidence that under appropriate circumstances parents and children benefit under joint custody arrangements after

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<sup>124</sup> “Child Custody and Abuse.”

<sup>125</sup> National Organization for Women-New York State. 2005. “National Organization for Women – New York State, Inc. OPPOSES Mandatory Joint Custody.”

<sup>126</sup> Pappas, Marcia. 2006. “Timesunion.com” Retrieved 15 March 2008  
<<http://womenasmothers.blogspot.com/2006/03/those-who-forget-history-are-doomed-to.html>>.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

divorce. There are, however, critical differences between voluntary joint custody arrangements and court-imposed joint custody over the reluctance of one parent.’ This concern extended to mediation-influenced joint custody. After seeing the harm wrought by court-ordered joint custody, such as, among other things, children attending two different schools, California ended its official bias in favor of joint custody awards on January 1, 1989, stating that ‘Proponents of joint custody argue that court-imposed joint custody encourages battling parents to work things out between themselves, but this assumption is based more on wishful thinking than reality’<sup>129</sup>

California is an example of a state that instituted presumptive joint custody but later realized the harm from a mandate in all family situations. Joint custody is not an automatic fix for custody disputes and to assert so is “wishful thinking,” as California found.

### **Recommended Course of Action**

Organizations on both sides of this issue are obviously passionate about their points of view. The debate largely revolves around three primary issues: the best interest of the children (including whether joint custody works when there is conflict between parents), the effect on domestic violence victims, and the validity of PAS. There is also the fundamental question of what might change if joint custody is mandated rather than remains voluntary.

There are studies supporting both claims that joint custody is best for the children and that sole custody is best. For instance, a study consisting of a child interview and parent questionnaire of 133 children found that “[c]hildren in joint custody arrangement reported a significantly greater number of positive experiences than children in maternal

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<sup>129</sup> National Organization for Women-New York State. 2005. “National Organization for Women – New York State, Inc. OPPOSES Mandatory Joint Custody.”

custody.”<sup>130</sup> However, certain behaviors by parents may indicate that joint custody may not be in the child’s best interest. Ira Daniel Turkat writes that “literature reveals a growing number of reports that many divorced and divorcing parents are not able to cooperate in the ways intended by the courts.”<sup>131</sup> In a separate article, Turkat quotes B.A. Coates’s book Divorce with Decency:

The problem is well-illustrated by Coates (1999, p. 13), who reported data from a series of 10,000 divorces: ‘... 35% of our cases involve at least one party who really hates the other’s guts and wants a prolonged fight to the death.’ He further noted (Coates, 1999, p. 14) that more than 50% of parents ‘... remain fanatically angry at one another more than a decade following their divorce.’<sup>132</sup>

This study indicates that animosity between parents is a serious concern and a reality for many couples undergoing divorce, and this chaos would not bode well for children.

Studies are present on both sides of the issue, and one study even indicated that joint or sole custody arrangements did not affect children’s post-divorce adjustment.<sup>133</sup>

Robert Bauserman’s meta-analysis, published by the American Psychological Association’s *Journal of Family Psychology* and cited by McCormick and Sacks, argues for joint custody’s benefits for child development. It potentially offers a comprehensive review of the literature in order to determine if and how child adjustment is impacted by joint and sole custody arrangements. However, his critique has received some criticism. Trish Wilson offers a lengthy critique of Bauserman’s meta-analysis. She writes, “One major error in his meta-analysis was in not adequately defining joint custody, especially

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<sup>130</sup> Wolchik, Sharlene A., Sanford L. Braver, and Irwin N. Sandler. 1985. “Maternal Versus Joint Custody: Children’s Postseparation Experiences and Adjustment.” *Journal of Clinical Psychology* 14(1): 5-10, p. 5.

<sup>131</sup> Turkat, Ira Daniel. 2002. “Shared Parenting Dysfunction.” *The American Journal of Family Therapy* 30:385-393, p. 386.

<sup>132</sup> Turkat, Ira Daniel. 2000. “Custody Battle Burnout.” *The American Journal of Family Therapy* 28: 201-215, p. 202.

<sup>133</sup> Kline, Marsha, Jeanne M. Tschann, Janet R. Johnston, and Judith S. Wallerstein. 1989. “Children’s Adjustment in Joint and Sole Physical Custody Families.” *Developmental Psychology* 25(3): 430-438.

joint physical custody. Joint physical custody, for instance, does not equal ‘50/50 parenting.’”<sup>134</sup> She explains that “[t]here is no differentiation between parents who split or rotate custody of their children as opposed to other forms of joint custody. In split custody, for example, mom has primary physical custody of one child and dad has primary physical custody of another” and Bauserman has not differentiated between these different types of custody.<sup>135</sup> Wilson also criticizes Bauserman’s selection of studies: “His method of selection alone severely limited his scope. It left him a total of 33 studies, 11 published and 22 unpublished. 21 of the unpublished studies were doctoral dissertations. Out of his two and 1/3 pages of references, only about 25 of the studies were dated post 1990.”<sup>136</sup> These criticisms raise concerns over the widespread applicability of Bauserman’s meta-analysis and it appears that both groups may find studies to support their claims.

Domestic violence victims who attempt to leave their husbands are often extremely vulnerable in the negotiation process. Father’s rights groups acknowledge that this would be one of the exceptions to mandatory joint custody, and NOW agrees that in cases of domestic violence, joint custody arrangements are never appropriate. However, NOW claims that this is not always addressed in the courts currently, even without a presumption of joint custody. The study cited by NOW by the NYS Family Courts which found that courts “never or rarely responded by denying visitation when there is a risk of violence”<sup>137</sup> was alarming and research indicates that the risk for violence escalates when

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<sup>134</sup> Wilson, Trish. 2002. “A Critique of ‘Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review.’” Retrieved 14 March 2008 <[http://users.adelphia.net/~enitria/trish\\_wilson/womensnetwork/joint\\_custody\\_bauserman.html](http://users.adelphia.net/~enitria/trish_wilson/womensnetwork/joint_custody_bauserman.html)>.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> National Organization for Women-New York State. “NOW-NYS Talking Points on Presumption of ‘Shared Parenting’ (Joint Custody).”

a woman leaves an abusive relationship. Hardesty and Chung cite a 1998 study that found that “[c]ompared to married women, divorced women...were 2.5 times more likely to experience violence in the past year, and separated women were 6.5 times more likely to experience violence.”<sup>138</sup> Hardesty and Chung also assert that “there is no system for routinely identifying abused women during the divorce process” and women may not volunteer information about abuse. When they do divulge abuse during a divorce, “they frequently are not supported by their attorneys or the courts may evoke hostile relations” and additionally (corroborating the Family Courts finding) “custody and visitation were rarely denied to parents with protective orders against them.”<sup>139</sup> These are very serious concerns about the enforcement of protections for domestic violence victims if presumptive joint custody were to be adopted.

Furthermore, the debate over PAS seems unfounded. The syndrome is not recognized by any psychological or psychiatric organization and a review of the literature reveals that there are serious empirical concerns with its validity. Jennifer Hoult conducted “a comprehensive analysis of the science, law, and policy issues involved in PAS’s evidentiary admissibility.”<sup>140</sup> She examines the precedent-setting cases, the writings of PAS’s originator Richard Gardner, and the policy issues associated with PAS. Hoult concludes that there are no meaningful peer-reviewed articles to verify empirical support for PAS and that PAS’s diagnosis error rate is unacceptably high. Carol Bruch, research professor of law at University of California Davis, also criticizes PAS. Among several reasons she cites is that “Gardner confounds a child’s developmentally related

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<sup>138</sup> Hardesty, Jennifer L. and Grace H. Chung. 2006. “Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research.” *Family Relations* 55: 200-210, p. 201.

<sup>139</sup> *Ibid.*, p. 203.

<sup>140</sup> Hoult, Jennifer. 2006. “The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy.” *Children’s Legal Rights Journal* 26(1): 1-61, p. 1.

reaction to divorce and high parental conflict (including violence) with psychosis. In doing so, he fails to recognize parents' and children's angry, often inappropriate, and totally predictable behavior following separation."<sup>141</sup> This raises serious questions about the diagnoses that Gardner proposes. In addition, Bruch also asserts that "PAS shifts attention away from the perhaps dangerous behavior of the parent seeking custody to that of the custodial parent. This person, who may be attempting to protect the child, is instead presumed to be lying and poisoning the child."<sup>142</sup> Children of parents in a violent relationship are especially vulnerable to this charge. A mother attempting to protect her children from an abusive husband may be suspected of trying to alienate the children from the parents, despite the violence. It is not clear why the courts have allowed PAS in the face of serious doubts. Hoult suggests that PAS became a way "to reduce these complex, time-consuming, and wrenching evidentiary investigations to medical diagnoses."<sup>143</sup> Without empirical data and no recognition by the American Psychological Association, it can be concluded that PAS should not be a factor in examining presumptive joint custody.<sup>144</sup>

My principal concern in mandating joint custody is the one-size-fits-all effect. If 95% of separating couples reach a custody agreement currently, why is there a need to

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<sup>141</sup> Bruch, Carol S. 2001. "Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases." *Family Law Quarterly*, 35: 527-552, p. 530.

<sup>142</sup> *Ibid.*, p. 532.

<sup>143</sup> Hoult, Jennifer, p. 22.

<sup>144</sup> For additional studies concerning PAS, please see Dallam, S. J. 1998. "Dr. Richard Gardner: A Review of His Theories and Opinions on Atypical Sexuality, Pedophilia, and Treatment Issues." *Treating Abuse Today*, 8(1): 15-23.; Dallam, S. J. 1999. "Parental Alienation Syndrome: Is it scientific?" In E. St. Charles & L. Crook (Eds.), *Expose: The Failure of Family Courts to Protect Children from Abuse in Custody Disputes*. Los Gatos, CA: Our Children Our Children Charitable Foundation.; Faller, K. C. 1998. "The Parental Alienation Syndrome: What is It and What Data Support It?" *Child Maltreatment* 3(2): 100-115.; Poliacoff, J. H., Greene, C. L., & Smith, L. 1999. "Parental Alienation Syndrome: Frye v. Gardner in the Family Courts." *Family Law Commentator* (Florida Bar) 25(4): 19-20, 30-33.; and Walker, L. E., K.L. Brantley and J.A. Rigsbee. 2005. "A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court." *Journal of Child Custody* 1(2): 47-74.

mandate joint custody? Why increase the amount of litigation to prove that the arrangement of sole custody, for example, is actually best for the couple? The state should not impose its mandatory policy on all couples for all situations. In her book Second Chances, Judith Wallerstein writes,

Joint custody can be helpful in families where it has been chosen voluntarily by both parents and is suitable for the child. But there is no evidence to support the notion that 'one size fits all' or even most. There is, in fact, a lot of evidence for the idea that different custody models are suitable for different families. The policy job ahead is to find the best match for each family. Sadly, when joint custody is imposed by the court on families fighting over custody of children the major consequences of the fighting are shifted onto the least able members of the family--the hapless and helpless children. The children can suffer serious psychological injury when this happens.<sup>145</sup>

Likewise, in her review of the literature and arguments for and against joint custody, Lita Linzer Swartz concluded: "After reviewing the arguments and factors presented, one can only conclude that there is no one answer best for all children or for all dissolved families. Child custody determinations must be made on a case-by-case basis rather than as a statutory preference."<sup>146</sup> Furthermore, the Matrimonial Commission was established by Chief Judge Judith S. Kaye in January 2004 to "examine every facet of the divorce and custody determination process and recommend reforms to reduce trauma, delay and cost to parents and children so personally impacted by the system."<sup>147</sup> The Commission concluded that "no presumptions regarding the awarding of custody whatsoever should be created by legislation, case law or otherwise"<sup>148</sup> with "the hope and expectation that well-trained, competent judges would evaluate each individual case and each individual

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<sup>145</sup> Wallerstein, Judith. 1996. Second Chances. New York: Houghton Mifflin, p. 304.

<sup>146</sup> Swartz, Lita Linzer. 1987. "Joint Custody: Is it Right for All Children?" *Journal of Family Psychology* 1(1): 120-134, p. 133.

<sup>147</sup> New York State Court System. 2006. "Matrimonial Commission Report to the Chief Judge of the State of New York." Retrieved 1 May 2008 <<http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>>, p. 1.

<sup>148</sup> *Ibid.*, p. vi.

child's needs without prejudice.”<sup>149</sup> This Commission, created by the Court Administration, offers a recommendation free from any ulterior motivations and their conclusion bolsters my recommendation that joint custody not be a presumptive policy. Elizabeth Scott, Professor at University of Virginia, argues that “the inquiry regarding future custody arrangements should focus on the past relationship of each parent to the child and do so in a more precise and individualized way.”<sup>150</sup> She elaborates by arguing: “If all, or even most, parents fully shared child care responsibilities, a joint custody rule would reflect a normative consensus about egalitarian parental roles. We are not at that point.”<sup>151</sup> Indeed, the literature reveals that there is not a need to mandate joint custody; rather it should be left for the couples to decide, and in the small number of cases where that cannot be resolved, the unique dynamics of the case should be evaluated. This will ensure that all parties' interests are best served.

### **Mandatory Mediation**

A second mandated policy that has recently gained attention in New York is that of mandatory mediation. Mediation is defined by Anthony M. Lanzone, who has contributed to many alternative dispute resolution (ADR) panels, as “a non-binding, confidential dispute resolution process before one or more third party neutrals.”<sup>152</sup> It dates back to the early 1970s through the 1980s: “as dissatisfaction with the judicial system mounted” and the backlog of cases grew, “state legislatures began to seek

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<sup>149</sup> Ibid., p. 19.

<sup>150</sup> Scott, Elizabeth S. 1992. “Pluralism, Parental Preference, and Child Custody.” *California Law Review* 80(3): 615-672, p. 617.

<sup>151</sup> Ibid., p. 672.

<sup>152</sup> Rifelman, Jeff D. 2005. “Mandatory Mediation Implications and Challenges.” Retrieved 15 March 2008 <<http://adrr.com/adr9/jeff.htm>>.



alternative methods of resolving legal disputes.”<sup>153</sup> Senator Perkins introduced a bill for mandated mediation in the New York Senate and Assemblyman Robinson introduced the identical bill in the Assembly. The bill

[c]reates the parent-mediation program for child custody disputes; requires parents, who were in a dispute over the custody of their child or children, to participate in a court sponsored mediation program; provides that the mediator would be responsible for submitting the results of the process to the court, which in turn would enter an appropriate custody and support order.<sup>154</sup>

This bill would stipulate that if parents could not come to an agreement about the custody of their child or children, the court would mandate that parents participate in a court sponsored mediation program. The mediator would then present the outcome to the court and then the court would make a court order resolving the issue. Current New York law does not make mediation mandatory and if the couple elects to participate, one or both parties pay for the process.<sup>155</sup> There are currently no official requirements with regard to who may act as a mediator. The bill was referred to judiciary twice, once on January 24, 2007 and again on January 9, 2008. The proponents of mandatory mediation in New York are not as visible as for no-fault divorce or for mandatory joint custody. This perhaps speaks to its lack of progress in the legislative arena. Thus, in lieu of focusing on one or two specific groups, I will present the arguments that I have found in the bill and select literature for enacting mandatory mediation. I will then discuss NOW’s opposition to the policy and conclude with my own recommendations.

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<sup>153</sup> The Harvard Law Review Association. 1990. “Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes (in Notes).” *Harvard Law Review* 103(5): 1086-1104, p. 1086-87.

<sup>154</sup> S02913. Retrieved 14 March 2008 <<http://assembly.state.ny.us/leg/?bn=S02913>>.

<sup>155</sup> Abel, Steven. “New York Divorce FAQs – Mediation.” Retrieved 15 March 2008 <<http://www.divorceinfo.com/nyfaqsmmediation.htm>>.

## **In Favor of Mandatory Mediation**

The justification for A3458, the bill in the Assembly, emphasizes the best interest of the children and asserts that mandatory mediation enforces this doctrine.

Assemblyman Robinson writes, “New York State Family Courts are inundated with child custody cases that are often very contentious. With the large influx of child custody cases within the court system, decisions may be made hastily and the best interests of the child (or children) involved may not be fully considered.”<sup>156</sup> The large docket of the court encourages speedy decisions that may not allow for proper attention to the children, and mediation provides the environment for more time and consideration. The justification also includes the claim that stress on parents will be mitigated by mediation:

“The parent-mediation program offers an opportunity to settle child custody disputes amicably. It would allow parents the opportunity to gain more control over parental arrangements, as well as determining what is best for their child (or children).”<sup>157</sup>

Robinson also asserts that child custody mediation programs have been successfully implemented in other states, such as California, North Carolina, and Pennsylvania. In these states, mediation offers “a neutral setting where each person’s right to due process and confidentiality is protected, and the needs of the children can be met.”<sup>158</sup>

Legally, there is some precedent for a court to order mandatory mediation. In his article, “Mandatory Mediation in Joint Parenting Agreements: IRMO Duffy [the court case],” Patrick J. Ahern wrote that “the 2nd District Appellate Court held that in a joint custody case mandatory mediation of child custody issues can be ordered by the trial court if the dispute resolution provision of the joint parenting agreement failed to require

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<sup>156</sup> A3458. Retrieved 15 March 2008 <<http://assembly.state.ny.us/leg/?bn=A03458>>.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

mediation.”<sup>159</sup> In this case, “the appellate court looked to other jurisdictions where mandatory mediation was approved by trial courts in custody and visitation disputes. The Missouri Court of Appeals found that mediation reduces the friction inherent in most custody arrangements and is necessary for successful ‘shared parenting’ in joint custody situations.”<sup>160</sup> Essentially, the court cited Missouri Court of Appeals’ reasoning that mediation helps to reduce conflict and is “necessary” for proper joint custody arrangements. The court, however, also noted that “[m]andatory mediation would also not be appropriate where factors existed which would have likely precluded joint custody such as a history of abuse or an inability to cooperate between the parties.”<sup>161</sup>

An additional argument for mandatory mediation in general, not specific to custody disputes, is that voluntary mediation is not currently used enough. People’s first inclination is to see their lawyer, not to mediate, and “[t]here is an unspoken resistance to alternative dispute resolution that derives in part from the tendency instilled by our [lawyers’] adversarial training to distrust alternative forms of consciousness, such as a focus on solving the problem rather than winning the case.”<sup>162</sup> By mandating the process, the benefits may be realized by more parties.

### **In Opposition to Mandatory Mediation**

NOW-NYS strongly opposes mandating mediation in the New York court system. They focus on power considerations between the parties, the pressure mediation causes, mediation’s tendency toward joint custody, and domestic violence victims.

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<sup>159</sup> Ahern, Patrick J. “Mandatory Mediation in Joint Parenting Agreements: IRMO Duffy.” Retrieved 15 March 2008 <<http://www.dcba.org/brief/janissue/2000/art40100.htm>>.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Peltz, Stephen. 1999. “Only For a Season: Mandatory Mediation as a Temporary Measure.” Retrieved 15 March 2008 <<http://cfcj-fcjc.org/clearinghouse/drpapers/onlyforaseason.htm>>.

NOW claims that in order “[t]o be effective, mediation should take place when there is equality of power between the parties.”<sup>163</sup> They assert that women are often at the weaker end of a marriage since they are either employed in an economy that still pays women 77 cents for every dollar a man makes or at home as the primary caregivers of children “thereby relinquishing their ability to acquire incomes reasonable enough to retain an attorney or other experts to represent them in court.”<sup>164</sup> NOW cites a 2007 study from the Howard Samuels Center that finds “only 61.6% of women with children work full-time as compared to 87.1% of men” and “the earnings of these women are equivalent to only 69% of their male counterpart’s earnings.”<sup>165</sup> The number of women who receive full pay while on maternity leave has also decreased: from twenty-seven percent in 1998 to eighteen percent in 2005, according to the 2005 National Study of Employers.<sup>166</sup> This unequal access to financial resources thus translates into unequal bargaining power in mediation, according to NOW. Furthermore, NOW argues that mediators, in an effort to settle the case, “exert pressure on the weaker party (usually the mother) to yield to the more dominant spouse (usually the father).”<sup>167</sup> This further puts women at a disadvantage in mediation, and to mandate the process would only make these inequities more widespread.

In addition, NOW asserts that “[a]lmost all mediated agreements provide for joint custody or ‘shared parenting’ without consideration of the best interest of the

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<sup>163</sup> Pappas, Marcia and Gloria Jacobs. 2008. “NOW-New York State OPPOSES Mandated Mediation.” Retrieved October 2007 from NOW-NYS, Inc. Also accessible online <[http://www.nownys.org/leg\\_memos/oppose\\_s344.htm](http://www.nownys.org/leg_memos/oppose_s344.htm)>.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

children.”<sup>168</sup> In essence, mandating mediation is akin to mandating joint custody due to the frequency with which it is the outcome of mediation, and as discussed previously in this chapter, joint custody as an overarching policy without individualized consideration is problematic.

NOW is also concerned about how mandatory mediation would affect victims of domestic violence. They point out that the bill does not provide an exemption in cases of domestic violence and abused women certainly do not have an equal bargaining ground. Intimidation of victims is only further exacerbated by mediation, NOW argues, and the threat of violence is real: “seventy percent of all instances of domestic violence in a marriage occur after the couple has separated.”<sup>169</sup> They also argue that even if a bill were proposed that included an exemption for domestic violence, there are still serious doubts about the screening process for domestic violence. NOW questions, “What level of specialized knowledge and training will be required of staff or those conducting the screening?”<sup>170</sup> They are doubtful of the current system’s ability to adequately detect domestic violence and properly exempt these parties from mediation. These reservations stem from the fact that mediators are not required to receive formal training on domestic violence issues and without an attorney present, women, including the most vulnerable abused women, may not be advised of their legal rights.

NOW also questions the credentials of mediators. There are no formal requirements for who may act as a mediator and they wonder, “Will mediators truly have

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> National Organization for Women-New York State. “NOW-NYS Talking Points on Child Custody Reform Act (Mediation).” Retrieved October 2007 from NOW-NYS.

the expertise necessary to reach equitable agreements between parties?”<sup>171</sup> They also point out that most cases are settled outside of court, so to force the most disagreeable parties into mediation is antithetical to the basis of mediation. Rather than further encourage this process, NOW would like to see the hiring of “additional in-court personnel who would try to obtain settlements within the court system, with attorneys present and with transcribed proceedings,” called “case management.”<sup>172</sup> Case management, NOW asserts, is “a more fair-minded, impartial, and evenhanded means to achieve agreement between the parties.”<sup>173</sup> In this process

the court or tribunal takes responsibility and initiatives to facilitate prompt, economical and fair processing of cases from commencement to final disposition. An important purpose of a case management system is to eliminate delay as a party tactic. Another important purpose is the exercise of discipline by the courts so as to limit procrastination by parties or their lawyers by forcing good preparation and effective settlement strategies early in the case.

They argue that this would be more impartial and help to provide equal bargaining power to the parties.

## **Recommendations**

Mandatory mediation in custody disputes appears to lack empirical evidence that would enable suggesting its adoption would be beneficial. Reducing the docket seems to serve the courts more than the parties involved since even if decisions are made hastily now, that does not necessarily mean that they would be better addressed in mediation.

Trina Grillo asserts that “[o]ften, the time allotted to a mandatory mediation is short.”<sup>174</sup>

She cites a study of the Connecticut, Los Angeles, and Minneapolis court-related custody

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<sup>171</sup> Pappas, Marcia and Gloria Jacobs.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Grillo, Trina. 1991. “The Mediation Alternative: Process Dangers for Women.” *The Yale Law Journal* 100(6): 1545-1610, p. 1583.

mediation systems that showed that cases averaged 1.5 sessions and 2.3 hours in Connecticut, 1.7 and 3.0 hours in Los Angeles, and 3.3 sessions and 4.3 hours in Minneapolis. She also asserts that “[i]n contrast to court-ordered mediations, voluntary integrated mediations (mediations involving all aspects of the dispute, not just the child custody issue) studied by Joan Kelly averaged ten sessions.”<sup>175</sup> This calls into question whether required mediation will provide a better environment to settle disputes.

Mandatory mediation also takes away power from the parties. Grillo asserts that “[w]hen mandatory mediation is part of the court system, the notion that the parties are actually making their own decisions is purely illusory”<sup>176</sup> since they haven’t chosen the process, haven’t been able to determine lawyer’s participation, and haven’t chosen the mediator. For the state to require mediation presupposes that it knows better than couples. As stated, the majority of cases are decided outside of court-ordered processes, and to mandate mediation would impose the state into cases in which this is not necessary.

The power imbalance of the spouses is exacerbated by mandatory mediation. In her piece “Custody Mediation in the United States: Empowerment of Social Control?” Linda K. Girdner argues that a mediator’s ideology informs how they mediate and a controlling mediator acknowledges that “equality of bargaining power between men and women is not the focus of a cooperative system. The system is designed to promote the child’s interest.”<sup>177</sup> In ignoring the power imbalance, a mediator can leave women in a vulnerable position, especially since joint custody is often the outcome of mediation.

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<sup>175</sup> Ibid., p. 1583.

<sup>176</sup> Ibid., p. 1581.

<sup>177</sup> Girdner, Linda K. 1989. “Custody Mediation in the United States: Empowerment of Social Control?” *Canadian Journal of Women & the Law* 3(1): 134-154, p. 144.

(Some mediators even admit that they see joint custody as the goal of mediation.)<sup>178</sup> An abused wife is vulnerable to this power imbalance and in mediation, she lacks an attorney in order to strengthen her position. The ability of the mediator to detect domestic violence is questionable as well since they are not required to undergo specific training in this area. In a non-random sample of 149 couples, Richard D. Mathis and Zoe Tanner found that “57% of all agreements between violent couples specified a form of shared custody, which is thought to promote too much future contact between the violent ex-spouses....wives need violence screening and special protective intervention measures to successfully negotiate safer, more restrictive sole custody agreements.”<sup>179</sup> In addition, Grillo notes that Donald Saposnek studied the California court mediation process and found “pathological liars who fooled everybody into believing that they were reasonable people and wonderful parents.”<sup>180</sup> Grillo admits that this could still be the case in court, but “in an informal process where nothing they say can be disproved, [liars] are in a much stronger position.”<sup>181</sup>

Especially troubling is the fact that New York has no formal requirements for who may act as a mediator. This seriously calls into question the arguments to mandate a process to provide power to someone who may not have the proper credentials to evaluate a custody dispute. Mediation’s tendency toward joint custody (as cited by the Illinois Court of Appeals) is also troubling since it appears that there is more emphasis on settling and dividing up children, rather than considering what may be best and most financially feasible in the long-run for families. In addition, the financial implications of

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<sup>178</sup> Ibid., p. 144.

<sup>179</sup> Mathis, Richard D. and Zoe Tanner. 1998. “Effects of Unscreened Spouse Violence on Mediated Agreements.” *The American Journal of Family Therapy* 26: 251-260, p. 251.

<sup>180</sup> Ibid., p. 1583-1584

<sup>181</sup> Ibid., p. 1584



the bill are “to be determined” according to the bill’s text. This is vague and needs more attention before consideration of adoption.

Mandatory mediation has many problematic aspects. Most salient are its lack of requirements for formally trained mediators, the process’s power imbalance between the spouses, and its lack of exemption for domestic violence victims. While the Matrimonial Commission of New York cites many positives of mediation, they steadfastly recommended “that the decision to refer a case to mediation, an early settlement panel, a parent coordinator or a combination of these should be by stipulation of both parties or at the judge’s discretion.” Requiring mediation would not only be unnecessary in most cases, but may be harmful in some, especially in those where abuse is present. At this time and with this bill, mandatory mediation is not recommended in New York.

### **Mandatory Policies in New York**

Before enacting either mandatory joint custody or mandatory mediation, it is imperative that substantial consideration be given to the empirical research and the possible effects. This especially applies to children and abused wives, two of the most vulnerable groups in divorce proceedings. To mandate policies removes the initial encouragement for parties to negotiate agreements among themselves. It is my recommendation, therefore, to oppose mandatory joint custody and mandatory mediation in New York unless the concerns I have outlined in this chapter are adequately addressed.

## **Gender Bias in the New York State Court System**

No matter the sex, race, ethnicity, or sexual orientation of the defendant, the courts purport to treat her or him identically. However, the courts are not always free of discrimination; one such form of prejudice is gender bias. The Judicial Council Advisory Committee on Gender Bias in California defines gender bias as “behavior or decision-making which is based on or reveals stereotypical attitudes about the nature and roles of men and women; perceptions of their relative worth; or myths and misconceptions about the social and economic realities encountered by both sexes.”<sup>182</sup> The Task Force on Gender Issues in Michigan defines gender bias as “the tendency to think about and behave toward others primarily on the basis of their sex. It is reflected in attitudes and behavior toward women and men which are based on stereotypical beliefs about the ‘true nature,’ ‘proper role’ and other ‘attributes’ of the gender.”<sup>183</sup> Though these are more formal definitions of gender bias, the important element that I seek to highlight and show here is women’s disadvantages in the courts.

Why should we care about gender bias? The Judicial Council of California provides three reasons. The Council argues that a courtroom free of gender bias is the right thing to do since it “enhances respect for the Court and the law, fosters respect for the equality of both sexes, and promotes respect by participants for each other, leading to increased civility in the courtroom.”<sup>184</sup> Secondly, they cite that it is the law in California, as specified by the California Code of Judicial Ethics. Many states have similar

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<sup>182</sup> Judicial Council of California. 1996. “Gender Bias: Guidelines for Judicial Officers: Avoiding the Appearance of Bias.” Retrieved 8 April 2008 <[www.courtinfo.ca.gov/programs/access/documents/genderb.pdf](http://www.courtinfo.ca.gov/programs/access/documents/genderb.pdf)>.

<sup>183</sup> Michigan Supreme Court Task Force on Gender Issues in the Courts. “Bias-free Behavior in the Courts.” Retrieved 8 April 2008 <<http://courts.michigan.gov/scao/resources/publications/pamphlets/bias.pdf>>.

<sup>184</sup> Judicial Council of California, p. 7.

provisions, including New York, which has a Code of Judicial Conduct (22 NYCRR Part 100.3 (B)). The third reason to eliminate gender bias in the courts is that it is time. Many state task forces have been created in the last 25 years and they have conducted statewide studies to recommend the implementation of changes. California, for example, conducted a study along with recommendations, all of which have not yet been enacted.

The problem of gender bias began to attract the attention of actors in the court in the 1970s and early 1980s. In response, some state courts began forming gender bias task forces to determine to what extent bias was impeding the justice system. In 1982, Chief Justice Robert N. Wilentz of the New Jersey Supreme Court commissioned the first gender bias task force. From this time until the early 1990s, more state task forces were created as well, including Florida, Texas, Michigan, California, and New York.<sup>185</sup> In 1992, the Ninth Circuit became the first federal court system to issue a report on gender bias in their courts and the Violence Against Women Act of 1994 allowed more federal exploration of gender bias in the federal court systems.<sup>186</sup> I will draw from some of these task forces' findings to illustrate that gender bias exists.

This chapter will examine gender bias in three areas (language in the courtroom, courtroom practices, and women in the legal profession) with the goal of showing that gender bias exists, particularly in New York. First, I will provide a background of the New York Judicial Committee on Women in the Courts and their survey on gender bias. Next, examples of gender bias in each of the three areas, including findings from the New

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<sup>185</sup> According to the NOW Legal Defense and Education Fund, the following states have gender bias task forces: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

<sup>186</sup> According to the NOW Legal Defense and Education Fund, the following federal task forces exist: First Circuit, Second Circuit, Third Circuit, Eighth Circuit, Ninth Circuit, and D.C. Circuit Court of Appeals.

York Judicial Committee on Women in the Courts, will be presented. Next, I will provide proposed solutions to the disadvantages that women face in the courtroom. I will then provide findings and solutions from the Truth Commission, which are based on first-hand experiences of women across eleven states. Finally, I will conclude with NOW's role and their focus on gender bias. Here, the goal is to demonstrate that women are negatively impacted in the courts and that their experiences need substantially more attention.

### **New York Judicial Committee on Women in the Courts**

In 1986, the New York Task Force on Women in the Courts found that “[g]ender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences.”<sup>187</sup> The Judicial Committee on Women in the Courts was created in response to the report issued by the task force in order to implement the recommendations in the report. Since 1986, this Committee has

- Organized numerous educational programs for New York judges.
- Helped train nonjudicial court personnel.
- Planned conferences and forums on a wide range of topics.
- Published pamphlets and books.
- Issued periodic reports.
- Conducted surveys and collected data.
- Advocated for change in court practices and operations that adversely effect litigants.
- Responded to complaints from the public and from advocacy groups.
- Helped write and implement policies that apply to court employees.
- Created and nurtured a network of local gender fairness and gender bias committees.<sup>188</sup>

There are currently nineteen members on the Committee, including Chair Hon. Betty Weinberg Ellerin, Vice Chair Fern Schair, and Counsel Jill Laurie Goodman. On their

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<sup>187</sup> Judicial Committee on Women in the Courts. 2007. “Background and History.” Retrieved 12 April 2008 <<http://www.courts.state.ny.us/ip/womeninthecourts/bandh.shtml>>.

<sup>188</sup> Ibid.

website they provide the contact information for the chairs of local gender bias and gender fairness committees as well as useful links such as Legal Information Institute: Feminist Jurisprudence, Probono.net, Lawhelp.org, and the Office for the Prevention of Domestic Violence.<sup>189</sup> The website also includes a link to their publications, two of which I will be referencing in this chapter: “On the Bench: Judicial Responses to Gender Bias” and “Fair Speech: Gender Neutral Language in the Courts.”

In June 2002, the Judicial Committee on Women in the Courts released a seventy-six page report entitled “Women in the Courts: A Work in Progress 15 Years After the Report of the New York Task Force on Women in the Courts.” In this document, the Committee describes the process for assessing bias fifteen years after the New York State Task Force was created in 1986:

the Committee embarked on two projects. First, the Committee used a questionnaire to ask those who spend their professional lives in New York’s courts their thoughts about change in the past 15 years. The Committee also organized a conference, which it titled “The Miles Traveled and the Miles Yet To Go,” as another vehicle for exploring the extent of progress in the decade and a half since the original 1986 Task Force Report.<sup>190</sup>

In late 2000 and early 2001, the Committee distributed about 4000 questionnaires to all New York judges and town and village justices, the state’s bar association presidents, law school deans, domestic violence advocacy organizations, and New York’s Attorney General, among others. They received approximately 140 survey responses, two-thirds

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<sup>189</sup> This information may be accessed at <<http://www.courts.state.ny.us/ip/womeninthecourts/genderbiascomm.shtml>> and <<http://www.courts.state.ny.us/ip/womeninthecourts/links.shtml>> respectively. They were last updated March 25, 2008 and March 20, 2008 respectively.

<sup>190</sup> New York State Judicial Committee on Women in the Courts. 2002. “Women in the Courts: A Work in Progress 15 Years After the Report of the New York Task Force on Women in the Courts.” Retrieved 12 April 2008 <[http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf)>.

of which were from New York Judges, about half New York State-paid judges and half town and village judges. The survey was

composed of six open-ended inquiries designed to elicit narrative responses on issues central to the 1986 Task Force Report. The questions asked respondents about the treatment of women on issues on which the 1986 Task Force Report had made its most pointed findings: child support and divorce; violence against women, both sexual assault and domestic violence; assessments of credibility; and opportunities for advancement in the profession.<sup>191</sup> (Please see Appendix A for the survey questionnaire.)

The 2002 report extensively reports on the findings of the surveys. Initially, it provides recommendations for court administrators, judges, judicial screening committees, the legislature, and bar associations and then moves to specific issue areas, such as family law, violence against women, and women in the profession, and provides findings along with specific recommendations. The report concludes with many selected responses in each issue area that provide a direct indication of the sense of gender bias from those in the courts everyday. For the purposes of this chapter, I will be discussing findings and solutions from other task forces and drawing from this comprehensive survey in order to emphasize the gender bias experienced by women in the state court system.

### **Examples and Findings of Gender Bias**

The Connecticut Task Force on Gender, Justice, and the Courts found that “women are treated differently from men in the justice system and, because of it, many suffer from unfairness, embarrassment, emotional pain, professional deprivation and economic hardship.”<sup>192</sup> Likewise, the Gender Bias Task Force created by the Supreme Court of Texas found that “women litigants often experience hostile, demeaning, or condescending treatment in the courtroom, and that male litigants are negatively affected

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<sup>191</sup> Ibid., p. 19.

<sup>192</sup> As cited in Resnik, Judith. 1996. “Asking about Gender in Courts.” *Signs* 21: 952-90, p. 958.

by gender stereotypes both in the family law system and in the criminal justice system.”<sup>193</sup> In this section, I will provide examples and findings from task forces about this gender bias with regard to three areas: biased language, courtroom practices, and women in the legal profession.

One of the reasons that gender bias is difficult to address is because often one does not realize that his or her behavior is characteristic of gender bias. This is particularly true in the area of biased language. Examples of biased language include telling an off-color joke in chambers, remarking to a female attorney that her family commitments might interfere with her responsibilities to the court, calling a woman by her first name but addressing a man as “Mister so-and-so,” referring to a female criminal defendant as a bimbo, and making remarks about a woman’s appearance, clothing, attractiveness or unattractiveness, either to her face or behind her back.<sup>194</sup> Witnesses face gender bias in the form of “treating women in such a way as to indicate that their opinions or statements are unimportant, irrational, or unduly emotional, referring to female witnesses by first names, terms of endearment, or diminutives, addressing female expert witnesses as Miss/Mrs./Ms. rather than by an earned title, such as Doctor/Professor.”<sup>195</sup> It is also important to note that so-called “positive bias” is included in gender bias. Making positive comments about a woman’s appearance and addressing the defendant as “hunk.” All of the above forms of gender biased language often occur nonchalantly and without repercussions, thus making it difficult to stop the cycle of bias.

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<sup>193</sup> The Texas Center for Legal Ethics and Professionalism. 2007. “Guidelines for Gender-Neutral Courtroom Procedures.” Retrieved 8 April 2008 <[http://www.txethics.org/reference\\_procedures.asp](http://www.txethics.org/reference_procedures.asp)>.

<sup>194</sup> Judicial Council of California, p. 1, 3.

<sup>195</sup> The Texas Center for Legal Ethics and Professionalism.

Gender bias also manifests itself within courtroom practices in family law and violence against women. In the area of child support, the New York Judicial Committee found that “[a]wards of child support are fairer than they were 15 years ago” and “[e]nforcement of child support obligations has improved,” yet “[t]he time and multiple court appearances often required to pursue these remedies burdens women.”<sup>196</sup> Women are most affected by this since they are most often the custodial parents and they must sacrifice time at their jobs and with their children in order to appear in court. In addition, the Committee found that “[t]he inadequacy of resources in Family Court, where poor women are most likely to appear, is severe enough to create conditions that routinely deprive litigants of fair, just and timely resolutions of their cases.”<sup>197</sup>

In the area of divorce, the New York Judicial Committee found that “[m]aintenance awards still are often not adequate to provide financially dependent spouses with sufficient support,” “the cost of a divorce is still a major obstacle for women who want to end a marriage,” and likewise, “counsel fee awards are often too low to provide a level playing field.”<sup>198</sup> Furthermore, in 1990, among the many findings of the Florida Supreme Court Gender Bias Study Commission were that “men customarily retain more than half of the assets of the marriage and leave with an enhanced earning capacity”<sup>199</sup> and “[w]omen who lack means are routinely denied their statutory right to retain competent legal representation.”<sup>200</sup>

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<sup>196</sup> New York State Judicial Committee on Women in the Courts. 2002, p. 7.

<sup>197</sup> Ibid., p. 11.

<sup>198</sup> Ibid., p. 9.

<sup>199</sup> The Florida Supreme Court. March 1990. “Report of the Florida Supreme Court Gender Bias Study: Executive Summary” Retrieved 8 April 2008 <[www.floridasupremecourt.org/pub\\_info/documents/bias.pdf](http://www.floridasupremecourt.org/pub_info/documents/bias.pdf)>, p. 4.

<sup>200</sup> Ibid., p. 5.



From the standpoint of custody, the New York Judicial Committee concluded that “[t]he use of gender-based stereotypes in custody decisions, in general, has lessened in the recent past,” but “[v]ictims of domestic violence find that often higher standards of parenting are applied to mothers than to fathers.”<sup>201</sup>

Bias against domestic violence and sexual assault victims includes regarding these crimes “as less serious than other criminal acts,” “minimizing victims’ experiences,” “questioning the credibility of female crime victims in ways that the credibility of male crime victims is not questioned,” and “blaming victims for causing the abuse or assault.”<sup>202</sup> Similarly across the board in areas of law, more than twenty jurisdictions found that the credibility of women witnesses is “readily questioned,”<sup>203</sup> and this was also found in New York: “women’s credibility, particularly in domestic violence cases, may be subjected to greater scrutiny than that of men.”<sup>204</sup> In the area of violence against women, the New York survey responses yielded that “[s]ome judges believe that jurors apply different and harsher tests of credibility to testimony of rape victims than they do to testimony of perpetrators or victims of other crimes” and “[s]ome attorneys and judges tend to dismiss applications for orders of protection made during matrimonial cases as mere tactical maneuvers.”<sup>205</sup>

Furthermore, the treatment of and the lack of women in the legal profession is a cause of concern. The Gender Bias Task Force in Texas found that “women lawyers are much more likely than men to be asked if they are attorneys”<sup>206</sup> and in the federal courts

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<sup>201</sup> New York State Judicial Committee on Women in the Courts. 2002, p. 10.

<sup>202</sup> Ibid.

<sup>203</sup> Resnik, Judith, p. 957.

<sup>204</sup> New York Judicial Committee on Women in the Courts. 2002, p. 15.

<sup>205</sup> Ibid., p. 11, 13.

<sup>206</sup> The Texas Center for Legal Ethics and Professionalism.

in the District of Colombia, “about a third of the women lawyers of color reported that a judge had questioned their status as lawyers.”<sup>207</sup> One woman wrote, ““I have personally been assumed to be a client because I am a woman of color. My suit did not even ‘tip off’ my opposing counsel.”<sup>208</sup> In addition, the Texas task force specifically found many examples of gender bias toward female attorneys. They were treated with “rudeness, condescension, or contempt” and treated differently than male attorneys based solely on their gender.<sup>209</sup> Furthermore, “[s]ome attorneys and judges still treat women less courteously or respectfully [and] women encounter ‘old boys’ networks and behavior that cast them in the role of outsider.”<sup>210</sup>

Despite this bias, the New York Judicial Committee found that more women are in the legal profession, but they still face obstacles, such as advancement and the fact that “time taken from work for child bearing or rearing is perceived as evidence of women’s lack of commitment to the legal profession and used against women when decisions are made about their careers.”<sup>211</sup> In addition, though the number of women in the judiciary has increased, there are still a disproportionate number of men as justices. Just 26% of appellate division justices in the New York are women and this figure is only 18% for City Court (Outside NYC). Furthermore, only 17% of the State Supreme Court is made up of women. (Please see Appendix B for the full figures on women in the New York justice system.)

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<sup>207</sup> Resnik, Judith, p. 957.

<sup>208</sup> New York Judicial Committee on Women in the Courts. 2002, p. 34.

<sup>209</sup> The Texas Center for Legal Ethics and Professionalism.

<sup>210</sup> Ibid., p. 15.

<sup>211</sup> Ibid., p. 16.

These findings overwhelmingly suggest that although there has been progress in each of these areas, there is still pervasive gender bias in the New York court system and many provisions need to be implemented in order to level the playing field for women.

## **Solutions**

The solutions for these three areas in which gender bias occurs are not the same. Addressing bias in custody awards or other areas of family law requires a much different approach than addressing the problem of judges calling women “honey.” Indeed, gender bias within the courtroom is its own microcosm, symptomatic of the larger systemic gender bias in society. In many ways, gender bias in the courtroom does not come as that much of a surprise when we live in a society that pays women less for doing the same work as men, that readily doubts women who are brave enough to come forward when sexually assaulted, and that has yet to pass an Equal Rights Amendment, despite the fact that it was proposed in 1923. The following solutions are specific ways to address biased language, courtroom practices, and the poor treatment of and lack of women in the legal profession, but by no means will they remedy sexism as a whole. This is an incremental process and these solutions should help propel the courts a few steps forward.

In the area of gender-neutral language, Hon. Judith S. Kaye, Chief Judge of the State of New York, argues for gender-neutral brief-writing on four grounds. Like the Judicial Council of California, Kaye argues that gender-neutral writing is “simply the right thing to do.”<sup>212</sup> She cites that “researchers have amply established that readers encountering masculine words think of men; common sense tells us that would be so.”<sup>213</sup>

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<sup>212</sup> The New York State Judicial Committee on Women in the Courts.” 1997. “Fair Speech: Gender-Neutral Language in the Courts.” Retrieved 8 April 2008 <<http://www.courts.state.ny.us/ip/womeninthecourts/fair-broch2.pdf>>, p. 13.

<sup>213</sup> Ibid., p. 14.

Since women are now a consistent aspect of the courtroom, Kaye believes that gender-specific language is archaic and disrespectful. Her second point is that “gender-neutral writing serves the sheer self-interest of the briefwriter.”<sup>214</sup> She argues that since gendered language is considered archaic, it could potentially distract the justice from the content of the brief and one should avoid cinders. Third, Kaye argues that gender-neutral writing is easy to acquire and internalize. There are several easy alternatives (as previously discussed) to traditionally gendered language. For instance, instead of saying policeman, one could use police officer. Kaye reasons, “If what is right and correct and in one’s self-interest is also easy to do, what can be the countervailing argument?”<sup>215</sup> Finally, Kaye argues that gender-neutral language provides “an example of appropriate behavior to the bar generally, as well as to clients and others in society.”<sup>216</sup> She asserts that lawyers are leaders in society and using fair speech is good for the profession as a whole. Kaye’s arguments along with the Judicial Council of California’s reasons indicate that the elimination of gender biased language is motivated by several factors, including morality, self-interest, the law, and setting a good example.

There are several ways to keep a bias-free courtroom. One easy implementation is gender-neutral language not only in brief writing, but also within the courtroom itself. In previous years, “man,” “he,” “him,” and other masculine pronouns were assumed to include women. This is no longer the appropriate way to use a singular noun to denote people of different genders, and could even create confusion. The New York State Judicial Committee on Women in the Courts cites a notorious case in the Supreme Court of the State of Washington which

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<sup>214</sup> Ibid., p. 14.

<sup>215</sup> Ibid., p. 16.

<sup>216</sup> Ibid., p. 18-19.

reversed a murder conviction in part because a jury was instructed on the ‘reasonable man’ standard for a claim of self-defense on behalf of a 5’4” woman attacked by a 6’2” man. In its opinion the Court faulted the ‘persistent use of the masculine gender’ that left the impression that the measure for reasonableness was an altercation between two men. *State v. Wanrow*, 599 P.2d 548, 558 (1977).<sup>217</sup>

This is obviously just one such circumstance, but it speaks to the issue of clarity, not just decency, in adopting gender-neutral language. There are several specific ways which can help to keep a courtroom gender-neutral.

Language in the courtroom should be inclusive, rather than in masculine forms. For instance, use chair, members of the jury, and colleagues, rather than chairman, gentleman of the jury, and brethren. Examples of positions include police officer, firefighter, worker, homemaker, nurse, executive, journalists, representative, Member of the Assembly, and Member of Congress or Representative, rather than policeman, fireman, workman, housewife, male nurse, businessman, gentlemen of the press, spokesman, Assemblyman, Congressman.<sup>218</sup>

One should also avoid “he” as a generic pronoun. In order to do this, the pronoun can be eliminated altogether. For instance, instead of saying “A court clerk can give you his advice on that form,” one may state, “A court clerk can give you advice on that form.”<sup>219</sup> In addition, one can find a neutral article or pronoun, such as “a” or “the,” rearrange the sentence to use “who” as the pronoun, replace the pronoun with a synonym, or use plural nouns.<sup>220</sup>

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<sup>217</sup> Ibid., p. 4.

<sup>218</sup> Ibid., p. 6. The Gender Bias Reform Implementation Committee from Texas also recommends this gender neutral language.

<sup>219</sup> Ibid., p. 8.

<sup>220</sup> Ibid., p. 8.

The New York State Judicial Committee on Women in the Courts and the Gender Bias Reform Implementation Committee from Texas also recommend that consistent forms of address be used. Ms. and Mr. are the correct forms of address when there is not another. Other feminine terms, such as Miss and Mrs., unlike Mr., draw attention to a woman's marital status. Formal titles, such as Doctor, Officer, or Counselor, should also be applied to both men and women.

Furthermore, formal, rather than informal, forms of address should be used. Women and men should not be called by their first names or other terms such as honey, sweetie, little lady, boy, or son since it is patronizing. Witnesses should be addressed with the same formal language.

Comments about or references to physical appearances, including body parts, pregnancy, dress style, or hair style, should be avoided. The Gender Bias Reform Implementation Committee from Texas asserts that “[c]omments on physical appearance can be seen as demeaning and put people at a disadvantage by drawing attention to their gender rather than the reason for their presence in the court.”<sup>221</sup> Furthermore, any jokes or remarks with sexual content or any comments, gestures, and touching that may offend others should not be used in the courthouse. Some of these may constitute sexual harassment and thus should be avoided.

Judges hold substantial power in the courtroom and set the tone for what conduct is acceptable. As the New York State Judicial Committee on Women in the Courts writes, “it is the job of judges to respond decisively, set matters straight, and so secure the

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<sup>221</sup> The Texas Center for Legal Ethics and Professionalism.

fairness of the proceedings before them.”<sup>222</sup> The New York State Judicial Committee on Women in the Courts published a pamphlet that explores a series of five real life scenarios of gender bias that occurred from 1997-1999 with suggested responses from New York State trial judges. I will present two of these scenarios in the area of biased language and the responses suggested by sitting judges:

#### SCENARIO ONE

During a calendar call, an attorney, who has been negotiating a complicated settlement with an insurance company’s lawyer, asks to be heard. She is visibly angry. She tells you that, while discussing the case in the hallway outside the courtroom, her adversary has treated her, she says, “in a degrading and demeaning fashion.” Before she has a chance to expound on the incident—and before you have an opportunity to respond in any way—the opposing lawyer interjects, “Your honor, I am sorry if I have offended counsel—or should I say counselette—but, hey, she should know, if you can’t stand the heat, you’d better get out of the kitchen.”

#### RESPONSES SUGGESTED BY SITTING JUDGES

1. Have the attorneys appear in the robing room. On the record the participants should state what happened. Opposing counsel should be admonished for his comments, made initially, and, if appropriate, for what occurred in the hallway. Counsel should be told that any repeat conduct will result in the transcripts being forwarded to the disciplinary committee.
2. “Counselor, I was not privy to what occurred in the hallway. However, the comment you have just made in my presence is offensive and unprofessional. I am placing you on notice that such comments are not acceptable either in or outside the courtroom.”
3. This is a situation calling for an off-the-record “robing room” conference with counsel. First, it is necessary to defuse the obvious acrimony between counsel. In the process, it is important for the Court to point out to counsel that personal attack—based on gender or any other individual qualities—is totally inappropriate and offensive. Second, and practically speaking, it is important to help counsel clear the air so that settlement may be achieved, and the importance of this practical consequence should also be brought to counsels’ attention.

#### COMMENTARY

When a lawyer makes this kind of remark, a judge must respond. While the precise nature of the response will depend on many things, including

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<sup>222</sup> New York State Judicial Committee on Women in the Courts. 1999. “On the Bench: Judicial Responses to Gender Bias.” Retrieved 8 April 2008 <<http://www.courts.state.ny.us/ip/womeninthecourts/OntheBench.pdf>>.

the stage in the proceedings, the judge's relations with the lawyers or the lawyers' relations with each other, a response—immediate and unequivocal—is essential.

#### SCENARIO FOUR

During a break in the proceedings, while the jury is deliberating, you hear two court officers telling sexually offensive jokes. They are talking to each other, but nonetheless you hear quite clearly what they are saying.

#### RESPONSES SUGGESTED BY SITTING JUDGES

1. I would confront the court officers. While they are in uniform in the courtroom they represent the court. Offensive jokes demean the court and cause the public to lose confidence in our judicial system. I would have them stop.
2. I would ask them to stop. If the situation occurred again, I would again tell them to stop and follow up with a report to their supervisor, if appropriate.
3. Tell them, “A lot of people find that kind of talk offensive...including me.”

#### COMMENTARY

A response is necessary. If a judge hears conversations of nonjudicial personnel, others may as well. The level of response, of course, will depend on the particulars of the situation, but neglecting to condemn unacceptable behavior creates the risk of appearing to condone it.<sup>223</sup>

Both of these scenarios represent inappropriate conduct in a courtroom setting, one through a complaint and another in which a judge directly heard the lewd comments. Each suggested response addresses the conduct directly and right away. It is important to note that the judge determines what behavior is appropriate in his or her courtroom and it is imperative that scenarios such as these be addressed promptly so that these scenarios do not become acceptable conduct. Biased language multiplies when it is ignored or condoned. A judge must remember the code of judicial conduct which states that “[a] judge shall perform judicial duties without bias or prejudice against or in favor of any person.”<sup>224</sup> Essentially, the Texas Center for Legal Ethics and Professionalism summed

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<sup>223</sup> Ibid.

<sup>224</sup> As cited in “On the Bench.”



up the suggestions well when they asserted that it is imperative to “treat women and men with dignity, respect, and attentiveness, mindful of their professional accomplishments.”<sup>225</sup>

In the area of courtroom practices, the New York Judicial Committee makes several recommendations in the fields of family law and violence against women. The New York Judicial Committee recommends that Court Administrators provide more opportunities for judges to educate themselves on child support and child custody issues and that they “[e]stablish wherever possible evening hours in Family Court and Supreme Court for enforcing orders for the payment of child support.”<sup>226</sup> In addition, the Committee recommends that “[t]he Legislature should enact legislation making interim awards of attorney fees mandatory in matrimonial cases” and “Court Administrators should assure that the assignment of judges to matrimonial parts is made so that those judges are experienced and well-informed about the kinds of issues that arise in such matters.”<sup>227</sup>

The New York Judicial Committee advises that “Court Administrators should assure that the annual Judicial Seminars provide meaningful opportunities for judges, especially those who are assigned to preside over matters where such issues regularly arise, to remain well-informed about the ways that sex-based stereotypes lead to the application of higher standards of parenting to mothers than to fathers.”<sup>228</sup> The New York Judicial Committee also recommends “appropriate funding for Family Court in amounts adequate to provide for the efficient, compassionate, and respectful

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<sup>225</sup> The Texas Center for Legal Ethics and Professionalism.

<sup>226</sup> New York State Judicial Committee on Women in the Courts. 2002, p. 8.

<sup>227</sup> Ibid., p. 10, 9.

<sup>228</sup> Ibid., p. 10.

administration of justice” and an increase in the salaries of attorneys assigned to family court cases.<sup>229</sup>

With specific regard to domestic violence, the New York Judicial Committee recommends that all those involved in a domestic violence case have a full understanding of both the power dynamics and “[t]he economic difficulties faced by many victims of domestic violence and the need for immediate orders of child support and/or maintenance.”<sup>230</sup> This will likely involve specific education for judges and court personnel on these subjects.

In the area of women in the legal profession, the New York Judicial Committee recommends “[e]ncourag[ing] legal employers to adopt employment policies that provide flexibility for parents to choose the extent of involvement in raising children without prejudice to their careers” and “[e]stablish[ing] programs to encourage senior attorneys to act as mentors for women attorneys and law students.”<sup>231</sup> In order to show women court professionals the respect they deserve, the Texas task force recommends that instead of questioning a woman about her profession, a question that applies to everyone should be used, such as “Will all attorneys please identify themselves to the court?”<sup>232</sup> Finally, the New York Judicial Committee concluded that: “many respondents concerned about women’s advancement in the profession recommended continuing to promote women to leadership roles, place them in increasingly important judicial posts, elevate them to Supreme Court, and find more women to teach at law school and assume deanships.”<sup>233</sup>

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<sup>229</sup> Ibid., p. 11.

<sup>230</sup> Ibid., p. 14.

<sup>231</sup> Ibid., p. 17.

<sup>232</sup> The Texas Center for Legal Ethics and Professionalism.

<sup>233</sup> New York Judicial Committee on Women in the Courts. 2002, p. 36.

All of these solutions will aid in improving the experiences of women in the court system at all levels. Some are easier than others, but all, particularly the courtroom practices solutions, are important. These are the recommendations that will truly impact the outcomes for women in the courtroom.

### **Truth Commission Findings and Solutions**

Before I conclude, I will briefly discuss Truth Commission's findings from the Fourth Battered Mothers Custody Conference in Albany, New York in January 2007 in order to share women's experiences as they told them to the Commission. The Truth Commission is a panel of eight members, some lawyers and others advocates. Sixteen women from eleven states testified about their experience with family law cases. I will discuss this document first since it covers a broader geographic area and illustrates general themes across state lines of gender bias. The most common theme from the women was that "there is a widespread problem of abusive parents being granted custody of children and protective parents having their custody limited or denied, and/or being otherwise punished."<sup>234</sup> While I am highlighting only select findings and proposed solutions, the Commission found several problems in the family court system.

According to the Commission's findings, "[c]ourt appointees, state actors and other professionals are frequently biased, particularly gender-biased, misogynistic, incompetent, and inadequately trained in domestic violence and child abuse."<sup>235</sup> They propose that additional and more comprehensive research needs to be conducted in order to determine "how many children are sent to live with abusers and how often custody

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<sup>234</sup> Battered Mothers Custody Conference. 2007. "Truth Commission Findings and Solutions." Retrieved 13 May 2008 <[www.batteredmotherscustodyconference.org/Truth\\_Commission\\_Findings\\_and\\_Solutions\\_Final\\_Draft.doc](http://www.batteredmotherscustodyconference.org/Truth_Commission_Findings_and_Solutions_Final_Draft.doc)>, p. 1.

<sup>235</sup> Ibid., p. 1.

scandal cases occur.”<sup>236</sup> They also advocate for “effective, quality, in depth training on domestic violence, child sexual abuse, child physical abuse...for all court professionals.”<sup>237</sup> They would also like to see a national training curriculum on domestic violence for all court personnel, legal professionals, and judges.

The Commission found that “[j]udges who preside over custody cases exhibit clear bias against women”<sup>238</sup> and the Commission calls for their identification and training to educate them on proper conduct. In addition, evaluators often performed biased assessments and they are not always selected based on “competency in evaluated domestic violence, child sexual abuse or child physical abuse.”<sup>239</sup> Because of this lack of competency and bias, they sometimes rely on questionable science, such as parental alienation syndrome. The Commission recommends that evaluators not be allowed to override judicial authority in custody disputes and that they should be required to have expertise in the area upon which they are called. Mediators also are used when they should not be, such as in cases with domestic violence or child abuse, and like evaluators, they often employ parental alienation syndrome. The Commission opposes mediators’ involvement in cases of domestic violence. Furthermore, the Commission found that “[a]ttorneys are sometimes biased against women....Abusers attorneys are often overaggressive and may suborn or encourage perjury.”<sup>240</sup> This has obvious negative implications on women, such there is often already a power imbalance in domestic violence cases, and if an abusive husband’s attorney is encouraging detrimental behavior, her chances of gaining custody and adequate maintenance are in serious jeopardy. In

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<sup>236</sup> Ibid., p. 2.

<sup>237</sup> Ibid., p. 2.

<sup>238</sup> Ibid., p. 2.

<sup>239</sup> Ibid., p. 3.

<sup>240</sup> Ibid., p. 5.

addition, some poor litigants, often mothers, lack an attorney, while the moneyed spouse has competent counsel. The Commission calls for close regulation of attorneys “by an independent citizen oversight committee to ensure that child and victim protection is their primary concern and to prevent abuse of power”<sup>241</sup> and that counsel fees must be awarded to level the playing field.

The Commission found that overall, “[p]rofessionals fail to give credence to abuse and disregard the safety of the children and their mothers”<sup>242</sup> and that “[t]here is a reliance on myths, not research.”<sup>243</sup> The Commission would like to see courts err on the side of safety for women and children in cases of abuse and they urge the establishment of clear guidelines and protocols to identify domestic violence. They also want to see all family court cases screened for domestic violence, child physical or sexual abuse and substance abuse through a nationally recognized valid domestic violence screening instrument. While the screening is taking place, the child should stay with the safe, protective parent. The Commission also recommends that if the primary aggressor does not complete an ordered program, such as anger management, supervised visitation should continue.

Another solution proposed by the Commission is the passage of a Protective Parent Reform Act. These acts prevent protective parents from being punished for trying to protect their children. One such act is currently in front of the New York State Assembly and Senate now. Bill number A07089 (and S6201) “[p]rovides that a person shall not be penalized in child custody hearings for making good faith efforts to protect a

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<sup>241</sup> Ibid., p. 5.

<sup>242</sup> Ibid., p. 6.

<sup>243</sup> Ibid., p. 6.

child against abuse.”<sup>244</sup> There has been intermittent action on the bill since it was introduced early last year. Most recently, on March 26, 2008, it passed in the Assembly, was delivered to the Senate, and was referred to Social Services, Children and Families. All 141 present members of the Assembly voted in favor of the act. Essentially, the act provides that “a good faith allegation of abuse cannot be held against the accuser in child custody proceedings.”<sup>245</sup> It also “required the court to consider the evidence of abuse in determining the visitation arrangement that is in the best interest of the child.”<sup>246</sup> This act helps to prevent gender bias in the court by protecting women against the tendency of judges to doubt the validity of abused women’s allegations and to trivialize their concerns of protecting their children. This act also addresses the danger that children end up in the hands of their abusers since it requires the court to consider abuse in visitation. This is a strong act that will hopefully become law in the near future.

The Truth Commission’s findings reflect an overall environment in which “[g]ender bias is blatant and epidemic by almost all the players in the court system.”<sup>247</sup> The lack of training of judges and court personnel in domestic violence, the lack of expertise of evaluators, and the failure to provide both litigants with adequate representation all make women’s court experiences more traumatic and difficult. The reforms the Commission proposes, including Protective Parent Reform Acts, are important steps to curbing the current bias. Much of their findings and solutions coincide with task forces’ work throughout the country, including New York, demonstrating the pervasiveness of the disorder in the courts.

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<sup>244</sup> Text of bill may be accessed at <<http://assembly.state.ny.us/leg/?bn=A07089>>.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Battered Mothers Custody Conference, p. 8.

## **The National Organization for Women**

The New York State chapter of the National Organization for Women knows that gender bias exists for women in the New York court system. Marcia Pappas, president of NOW New York State, asserts that “[m]any women choose to maintain their confidentiality for fear of retaliation from...officers of the courts....Any woman who feels that she has been a victim of bias in the courts, should send their complaints to NewYorkStateNOW@aol.com.”<sup>248</sup> NOW stresses that “[w]omen must be able to report biased judges without fear of being retaliated against by the court”<sup>249</sup> and since the court-appointed Judicial Committee on Women in the Courts finds that gender bias still exists, it must be addressed more aggressively.

Because of this fear of retaliation, many women do not come forward with gender bias complaints. One woman, however, made her case public and submitted a statement to NOW-NYS to let women know that they are not alone. Esther Yang, a survivor of domestic violence – verbally, psychologically, and financially abused – experienced threats from her husband (Mr. Carter) during their divorce as well and even obtained a temporary order of protection. She claims that he attempted to conceal his current and future disability benefits from her and the court while simultaneously trying to obtain custody of their daughter. Her husband did not readily supply his medical records nor fully disclose marital assets and income. However, the court issued a decision, awarding only \$5,000 in counsel fees and a temporary monthly maintenance of \$1,667.00 based on the incomplete and inaccurate information he provided. Esther Yang states that due to

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<sup>248</sup> National Organization for Women-New York State. December 2006. “National Organization for Women – New York State Questions the Alleged Bias and Punitive Decisions Made by NYS Supreme Court Judge Joan Lobis.” Retrieved 12 April 2008 <[http://www.nownys.org/pr\\_2006/pr\\_121806.html](http://www.nownys.org/pr_2006/pr_121806.html)>.

<sup>249</sup> Ibid.

her husband's lies and Justice Joan Lobis's (the judge in the case) allowances of her husband's tactics, she experienced gender bias within the court system. Yang claims that Lobis's law secretary, Ms. Sugarman "changed custody to my ex-husband without a custody hearing and denied us to be in front of a judge after my ex-husband retained a political patron."<sup>250</sup> (Please see Appendix C for her complete statement.)

NOW-NYS emphasizes that since we know that gender bias in the courts exists, we must be more cautious of policy initiatives that may cause additional harm to women. For example, NOW-NYS would like to see divorces settled outside of court by the parties involved rather than by a no-fault divorce arrangement. NOW-NYS reasons that if there is gender bias in the courts, it is likely that women will experience discrimination in court-ordered settlements, as the Judicial Committee on Women in the Courts found. It is imperative that the courts recognize that gender bias is a pervasive problem and it must be continually addressed, starting with the recommendations that the NYS Office of Court Administration has issued.

There have been three issue areas of gender bias that this chapter has explored: language, court practices, and women in the legal profession. The findings and solutions are all extremely relevant to the disadvantages that women face in the courts. I would like to highlight several reforms that appear most important to implement in order to work to eliminate the gender bias uncovered in the courts.

Structurally, a solution that stands out the most is to educate judges. Consistently, the Judicial Committee on Women in the Courts found that judges are not aware of the gender dynamics of family law cases and do not always look for all the issues that a woman may be experiencing in divorce, custody, and domestic violence cases. For

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<sup>250</sup> Ibid.



instance, judges do not always think to evaluate pre-divorce standards of living in maintenance awards, and thus their awards are often unrealistic. They also fail to regularly provide counsel fees, ignoring the often financially disadvantaged wife, and judges do not consider the double burden that many women experience in caring for the home and holding a job. Most troubling is judges' failure to recognize domestic violence and to address the issues associated with abuse. The lack of counsel fees awarded in these circumstances and the failure to comprehend the power and control that abuse victims experience jeopardizes the safety of the most vulnerable women. In addition, judges need to immediately dismiss any verbal comment of gender bias and encourage gender neutral language by using it themselves. They should serve as mentors to women lawyers and less senior women judges. Setting a positive example is crucial to establishing a court free of gender bias.

Furthermore, court administrators and the legislature play a role in eliminating gender bias as well. Court administrators need to ensure that judges, law guardians, forensic experts, and court personnel are educated on matrimonial and domestic violence issues and realize the importance of this education in family law cases. In addition, the legislature needs to make counsel fees mandatory in matrimonial cases, provide appropriate funding for programs to educate judges, and should increase pay to attorneys who are assigned to family law cases.

The National Organization for Women will remain available for women who experience gender bias. In order to prevent further gender bias, NOW advocates for mandatory counsel fees in matrimonial cases and opposes mandatory joint custody and mandatory mediation. As I stated previously, gender bias in the courtroom does not

occur in a vacuum. The court is directly impacted by societal norms and our society consistently discriminates against women in pay, taking their claims seriously, and in providing constitutional equality. Courtroom officials live in this society everyday and are bound to transfer biases they hold and observe to the courtroom. Though there are many solutions proposed here, none is a quick fix for gender bias. It is my and NOW's hope that continuously drawing attention to the matter will keep it as a salient issue that will demonstrate steady improvement. By enhancing NOW's partnerships with legal professionals and bar associations, NOW can continue to remain vigilant of women's experiences in the courtroom and attempt to encourage pro bono assistance in family court cases while ensuring that eliminating gender bias remains an important goal for both their organization and the legal community.

## **Disorder in the Courts**

This thesis examined three areas of importance to domestic relations law: unilateral no-fault divorce, mandatory joint custody and mandatory mediation, and gender bias in the court system. Unilateral no-fault divorce should not be enacted in New York at this time. Other divorce reforms, such as a counsel fee bill, improvements in maintenance laws, and the extension of the statute of limitations on domestic violence, should be implemented prior to examining any proposal for unilateral no-fault divorce. In addition, by making joint custody or mediation mandatory in all custody disputes, the court would be instituting dangerous one-size-fits-all policies. Currently, the overwhelming majority of separating couples reach a custody agreement on their own and this process should not be overridden by mandatory initiatives. Judges and mediators also are not thoroughly trained in detecting domestic violence and thus to mandate joint custody and mediation is dangerous for battered women. Furthermore, gender bias is a significant problem in the state court system and judges and court personnel must be educated in bias-free behavior, particularly in the dynamics of matrimonial cases and domestic violence.

All of these issue areas are compounded by one another. The gender bias in the courtroom reveals that judges and legal professionals are less versed in issues that come up in domestic relations law than they should be. They do not realize that maintenance awards should be higher and that the cost of divorce is a major obstacle for many women. If judges and other trained court officials do not take these issues into consideration, it is unlikely that mediators without strict credential standards will adequately address these concerns. Furthermore, the majority of the outcomes in mediation are joint custody with

many mediators even readily admitting that joint custody is the goal of the mediation. Girdner reports that “[a]ccording to one such mediator: ‘Mediation may thus be seen as a procedural handmaiden to joint custody and a device for implementing its values.’ When mediation is mandatory, this raises the question of the role of the state and mediation in the implementation of a new ideology.”<sup>251</sup> In the same chapter, I addressed how joint custody is problematic in some instances. In already embattled custody disputes, continued association between the parents can often exacerbate familial chaos, taking a direct toll on children. In addition, domestic violence victims are often left at the wayside since courts do not always recognize domestic abuse and abusive husbands may use custody as a tactic to punish their wives. Finally, divorce reforms must be enacted, but it is important to pass bills that will help women in a court with gender bias, rather than pass reforms, such as no-fault divorce, that will hinder women. Without a counsel fee bill and without the recognition of domestic violence, those who are most vulnerable (poor, abused women) are not helped by the court system.

NOW-NYS’s goal has always been to affect change for the thousands of women and children in the state. At this time and with these bills, unilateral no-fault divorce, mandatory joint custody, and mandatory mediation should not be enacted and gender bias in the court system must be addressed. NOW-NYS will continue to work for women and children and the organization makes domestic relations a priority issue because when marriages dissolve, women are often most vulnerable. NOW-NYS is proud to lobby on behalf of women and children and will persist in fighting disorder in the courts.

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<sup>251</sup> Girdner, Linda K. 1989. “Custody Mediation in the United States: Empowerment of Social Control?” *Canadian Journal of Women & the Law* 3(1): 134-154, p. 142.

## Appendix A: Survey Questionnaire

### **Judges' Assessments for the 15<sup>th</sup> Anniversary Report of the New York State Judicial Committee on Women in the Courts**

What significant changes have you seen in the past 15 years in the treatment of women in **child support or divorce** cases?

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What significant changes have you seen in the past 15 years in the treatment of **victims of domestic violence or sexual assault**?

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What significant changes have you seen in the past 15 years in the **treatment of women attorneys, judges, litigants or witnesses in the courtroom or the justice system generally** by judges, court personnel, court administrators and attorneys, regarding:

**A. Assessments of women's credibility?**

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**B. Opportunities for advancement in the profession?**

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**C. Other issues?**

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**What are the most important changes still needed in regard to the treatment of women in the courts?**

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**Name, Title and Address (optional)**

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Please send your response, by December 8, 2000, to:

**Jill Laurie Goodman, Counsel  
New York State Judicial Committee on Women in the Courts  
25 Beaver Street, Room 878  
New York, NY 10004**

Source: New York State Judicial Committee on Women in the Courts. June 2002. "Women in the Courts: A Work in Progress 15 Years After the Report of the New York Task Force on Women in the Courts." Retrieved 12 April 2008 <[http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf)>, p. 74-75.

## Appendix B: Women in the Justice System

### Women in New York State Judiciary 2001 (March)

Court	Women	Men	Total	Percent Women
Court of Appeals	3	4	7	43%
Appellate Division	10	39	49	26%
Administrative Judges	10	14	24	42%
Supreme Court	60	285	345	17%
Acting Supreme Court*	48	109	157	31%
Surrogates Court	4	18	22	18%
Court of Claims	8	53	61	13%
County Court (Outside NYC)**	10	101	111	9%
Family Court (Outside NYC)	24	41	65	37%
District Court (Nassau and Suffolk)	10	31	41	24%
City Court (Outside NYC)***	33	148	181	18%
NYC Family	22	15	37	60%
NYC Civil Court	36	40	76	47%
NYC Criminal Court	11	21	32	34%
Housing Court	22	27	49	45%
Totals	311	946	1257	25%

\* Judges from other trial level courts who are designated to sit in Supreme Court and Supervising Judges from New York's Civil, Family and Criminal Courts.

\*\* Judges who sit in County Court only and judges who combine service on the County Court with service on Family and/or Surrogates Court.

\*\*\* City Court Judges, Acting City Court Judges, and Chief Judges of the City Court.

## Women in New York State Judiciary 1988, 1999, and 2001

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Court	1988	1999	2001
Court of Appeals	14%	29%	43%
Appellate Division	14%	25%	26%
Administrative Judges	5%	41%	42%
Supreme Court	8%	15%	17%
Acting Supreme Court*	16%	31%	31%
Surrogates Court	7%	17%	18%
Court of Claims	10%	14%	13%
County Court (Outside NYC)**	4%	7%	9%
Family Court (Outside NYC)	10%	28%	37%
District Court (Nassau and Suffolk)	7%	33%	24%
City Court (Outside NYC)***	5%	19%	18%
NYC Family	54%	54%	60%
NYC Civil Court	20%	48%	47%
NYC Criminal Court	21%	38%	34%
Housing Court	N/A	46%	45%
Totals	11%	24%	25%

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\* Judges from other trial level courts who are designated to sit in Supreme Court and Supervising Judges from New York's Civil, Family and Criminal Courts.

\*\* Judges who sit in County Court only and judges who combine service on the County Court with service on Family and/or Surrogates Court.

\*\*\* City Court Judges, Acting City Court Judges, and Chief Judges of the City Court.



**Women Serving As Elected Supreme Court Justices 2001**  
 (April) (includes certificated justices)

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Court	Women	Men	Total	Percent Women
Third Judicial District	1	14	15	7%
Fourth Judicial District	0	14	14	0%
Fifth Judicial District	1	20	19	5%
Sixth Judicial District	1	11	12	8%
Seventh Judicial District	3	17	20	15%
Eighth Judicial District	5	26	31	16%
Ninth Judicial District	3	29	32	9%
Tenth Judicial District	10	62	72	14%
Subtotal Outside NYC	24	192	216	11%
First Judicial District	20	28	48	42%
Second Judicial District	15	57	72	21%
Eleventh Judicial District	8	41	49	16%
Twelfth Judicial District	8	22	30	27%
Subtotal for NYC	51	148	199	26%
Totals for New York State	75	340	415	18%

**Women Serving As Elected Supreme Court Justices 1998-2001**  
(includes certificated justices)

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Court	1998	1999	2000	2001
Third Judicial District	18%	12%	12%	7%
Fourth Judicial District	0%	0%	0%	0%
Fifth Judicial District	0%	0%	5%	5%
Sixth Judicial District	0%	0%	10%	8%
Seventh Judicial District	16%	15%	15%	15%
Eighth Judicial District	23%	21%	16%	16%
Ninth Judicial District	11%	10%	9%	9%
Tenth Judicial District	7%	10%	11%	14%
<b>Subtotal Outside NYC</b>	<b>11%</b>	<b>10%</b>	<b>10%</b>	<b>11%</b>
First Judicial District	43%	45%	44%	42%
Second Judicial District	17%	18%	20%	21%
Eleventh Judicial District	13%	14%	16%	16%
Twelfth Judicial District	15%	14%	21%	27%
<b>Subtotal for NYC</b>	<b>21%</b>	<b>22%</b>	<b>24%</b>	<b>26%</b>
<b>Totals for New York State</b>	<b>16%</b>	<b>16%</b>	<b>17%</b>	<b>18%</b>

Source: New York State Judicial Committee on Women in the Courts. June 2002. "Women in the Courts: A Work in Progress 15 Years After the Report of the New York Task Force on Women in the Courts." Retrieved 12 April 2008 <[http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf)>, p. 69-72

## Appendix C: Statement by Esther Yang

"I have always believed in the integrity of a judicial system that NEVER FAILS. My family raised me to believe that the truth always rises to the TOP.

I was dragged to the courtroom by my ex-husband who uses it as his scorched litigation bully playpen. I feel I have been victimized twice when Justice Lobis refused to acknowledge my ex-husband's fraudulent, pendent-lite (asking spousal support and child support). My ex-husband has admitted on the stand, that he claimed our daughter and me as dependents in VA disability then sued me for child support to double-dip, not to mention he has forged my signature to get money, submitted false documents, relocated 3 hours away, enrolled our minor daughter in a new school, shockingly was forced to relocate back, because Justice Lobis gave him the final decision on education, he then put our daughter in a failing school and in a failing district, got me arrested via a false police report and bogus charges. And, in Justice Lobis's recent ruling, unless I came up with \$3,000 by December 5, 2006, I would be jailed for 30 days with a civil and criminal record. My ex-husband has dragged me, as a defendant, to more than 6 different courts in different counties. What a waste of taxpayers' money! My ex-husband and his attorneys walk on water and are allowed to continuously lie in Justice Lobis's courtroom. My parents raised me to believe that in this great country of ours, the best liars don't win. Clearly that was not so in my case.

I am confused to why Justice Lobis chose to allow both forensic experts to NOT review my ex-husband's fraudulent VA disability nor read his medical records. If Justice Lobis is not looking out for our daughter's best interest, then who is??? Our daughter scored in the top 8 percentile from a testing bureau many top schools in Manhattan use, who can offer her scholarship.

Justice Lobis feels that it is okay to put our daughter in a failing State school and in a Title I Federal failing school. Clearly my ex-husband chooses to attack my Chinese culture where we believe education is important. My ex and his attorneys faxed a letter to her chambers that our daughter, who is half Chinese, cannot spend the Chinese New Year with me because "... The MOTHER IS NOT CHINESE.... " I cannot imagine our daughter not having a law guardian to protect her interests.

Since our daughter's abrupt relocation, Justice Lobis has changed our daughter's time with me 5 times in less than a year. Her law secretary, Ms. Sugarman, changed custody to my ex-husband without a custody hearing and denied us to be in front of a judge after my ex-husband retained a political patron, Saul and Adam Edelstein, to live in a home that has no certificate of occupancy from the Department of Buildings. I am confused as to how all of the above is in the best interest of our daughter."

Anonymous victim statement: "Justice Lobis and her law clerk, Ms. Marilyn Sugarman, are punitive to women and mothers. They neglect the innocent children they are entrusted to protect."

Statement by Mo Therese Hannah: "Throughout New York State, mothers who seek legal protections from abusive partners are, instead, being subjected to further abuse within the divorce/child custody court system. "Scorched-earth" litigation processes that culminate in gender-biased, unjust rulings become the primary vehicle by which abusive men re-abuse their partners. Women's groups throughout New York State are organizing to demand court reform and to express their outrage against these kinds of practices, which are harming so many women like Esther Yang." Mo Therese Hannah, Ph.D.Chair, Battered Mothers Custody Conference IV [www.batteredmotherscustodyconference.org](http://www.batteredmotherscustodyconference.org).

Source: National Organization for Women. Retrieved 12 April 2008  
<[http://www.nownys.org/pr\\_2006/pr\\_121806.html](http://www.nownys.org/pr_2006/pr_121806.html)>.

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