The concept of parental unfitness is used in private child custody disputes to justify refusal to award custody or visitation to a person who would otherwise be entitled to it. When custody and visitation decisions are structured, most strongly by a presumption but also by a preference or sometimes even a starting point, as a practical matter the most effective and sometimes the only legally possible way to obtain a result not dictated by the presumption, preference or starting point is to go negative – to show that the person in whose favor the rule runs is unfit, or, as often put today, that ruling in favor of that person would be detrimental to the child. Going negative is often more effective than going positive, and sometimes it presents the only opportunity to prevail because law says that being better does not justify a decision contrary to the rule of the presumption or preference.

For example, in some jurisdictions a modification from an existing custody arrangement requires proof not only that circumstances have changed but also that the existing arrangement is harmful to child, a rule that expresses a strong emphasis on the values of stability and continuity in a child’s life. Many American jurisdictions recognize a preference for joint custody or for custody with the child’s primary caretaker. These kinds of rules structure the more general best interests of the child analysis, are intended to reduce judicial discretion and make outcomes more predictable. They also express policy choices about what kind of placement is believed likely to be better for children or to advance other social goals. In some jurisdictions these preferences can be overcome by showing that an alternative is preferable, but in others proof that the preferred alternative is detrimental to the child is required, and, regardless of the legal rule, negative claims about the preferred alternative are always appropriate. And, of course, in contests between legal parents and nonparents, parents are preferred as custodians and their decisions regarding visitation are entitled to deference, reflecting the constitutional protection for parental rights.

To the extent that these rules regarding child custody and visitation encourage and, in some circumstances, require contestants to go negative, they have to potential to undermine fundamental goals of child custody dispute resolution – minimizing rather than inflaming differences between adults who need to cooperate for the interests of a

1 Dorothy Kliks Fones Professor, University of Oregon School of Law.
2 E.g., Harris v. Harris, 546 A2d 208, 214 (Vt 1988), holding that primary caretaker status should be given great weight unless primary caretaker is unfit.
3 See, e.g., UMDA sec. ____. Of course, in some states, once a change of circumstances is proven, the basis for deciding whether to change custody is best interests. E.g., (cite).
4 cites
child and encouraging these adults to resolve disputes themselves, rather than leaving them for judges to resolve. My argument in this paper is not to abolish such rules and to return to an unstructured best interests regime, but rather that we need to reevaluate how strong the rules should be and under what circumstances decision makers should deviate from the rules. Specifically, the paper will argue that the occasions for use of unfitness arguments should be minimized so as to facilitate collaborative decision making regarding the care of children among interested persons to the maximum extent possible.

The first part of this paper surveys some of the most important presumptions and preferences that structure private custody decisions in current law. Then, I discuss the relationship of claims of unfitness to these presumptions and preferences, highlighting how the meaning of unfitness varies, depending on context. This will include a more detailed discussion of parent versus parent disputes, followed by consideration of parent versus third party contests. The last section will examine how one particularly potent set of unfitness claims, those concerning domestic violence, are being used and misused today.

I. Presumptions and preferences that shape private private custody decision making

In the middle part of the last century, often the same kinds of facts led to a conclusion of parental unfitness, regardless of the context. In particular, the fact that a parent, most often a mother, was sexually active outside marriage was a very common basis for a claim that she was unfit. The claim might be brought by a father seeking to rebut the tender years presumption that favored mothers in custody suits or by a third party, often a grandparent, who sought to rebut the parental preference. For a variety of reasons, however, beginning in the 1960s and accelerating into the 1970s, the states backed away from the tender years presumption and from sexual conduct as primary test of parental fitness. In 1975 Professor Mnookin wrote that courts were using the concept of the psychological parent and the best interests standard to grant custody to third parties over parents’ objections. At the same time, this was the height of popularity of the best interests rule, which, if not limited by structuring presumptions or preferences, maximizes judicial discretion. These changes in custody law occurred for reasons that continue to be important determinants of the law today.

First, it is hard to overestimate the significance of Goldstein, Freud and Solnit’s lessons about the primacy of children’s emotional relationships, and the importance of stability in their lives. The current law’s emphasis on looking to the impact of custody

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7 Professor Clark’s hornbook said that the great majority of litigated custody cases in this era concerned sexual misconduct of a parent, most often the mother. Homer H. Clark, Jr., The Law of Domestic Relations in the United States 586 (1st ed. 1968).
8 June Carbone, From Parents to Partners 182(2000).
and visitation arrangements on the particular child, rather than on making abstract moral judgments about the adult claimants, is directly traceable to their work. The principle that a child’s relationship to his or her “psychological parent” should be protected at almost all costs is theirs. The psychological parent preference, in turn, gave rise to the primary caretaker preference or presumption, an alternative that is cheaper to implement than the psychological parent concept and one that does not rely so heavily on experts, who are so often mistrusted, not to mention expensive. In the early 1980s it appeared that the presumption for the primary caretaker might become the dominant rule for custody decision making, but the states have retreated and instead commonly provide that placing the child with the primary caretaker is an important consideration for courts to consider in making the best interests decision. This rule is today defended as identifying the person most likely to be the best caregiver for the child because of his or her experience and assumed emotional bond with the child, as well as because it is consistent with the more generally principles of promoting continuity and stability in the child’s life. Related to the primary caretaker rule is the ALI approximation rule – that

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12 J Goldstein, Anna Freud, & Albert Solnit, Beyond the Best Interests of the Child (1973). See also In re B.G., 523 P2d 244 (Cal 1974) (applying California statute that provided that custody may be awarded to a nonparent if the court finds “that an award to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.”)
13 Joseph Goldstein, Anna Freud, & Albert Solnit, Beyond the Best Interests of the Child 99 (1973) (they defined the least detrimental alternative as “that child placement . . . which maximizes, in accordance with the child’s sense of time . . . the child’s opportunity for being wanted. . . and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child’s psychological parent.”).
14 For a dismissal of the psychological parent test in custody contests between parents because of doubts that experts would agree which parent would be less detrimental to the child, because of difficulty of evaluating psychological relationships to this degree of fineness, and because relies on predictions that cannot be made with confidence see Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226, 287 (1975). Suggests instead alternate modes of dispute resolution, especially mediation, as promoting the child’s long-term relationships with both parents and because parents know more about the child than the judge. Thinks might even explore ways to pressure parents to come to agreement, such as refusing to grant a divorce unless parents have agreed about custody. Mandatory mediation is a less extreme form of pressure. Id. at 287-289.
16 James G. Dwyer, a Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships, 11 Wm. & Mary Bill Rts. J. 845, 919 (2003). Dwyer criticizes it as an imperfect proxy that fails to take account of facts of changes in family accompanying divorce and as, therefore, an imperfect proxy that does not further children’s welfare in a significant proportion of cases, but does not cite data. Id. at 924.
custody should be allocated so that the amount of time the child spends with each parent approximates the amount each parent spent performing caretaking functions before the separation.\footnote{17}  

However, the psychological claims of Golstein, Freud and Solnit did not go unchallenged. Other researchers argued that the concept of the psychological parent was too simplistic, that children have important relationships with other family members, particularly with both parents, and that custody law should protect these relationships as well.\footnote{18} This argument, as well as the emerging fathers’ rights movement, gave rise to another legal rule that structures the best interests analysis, the preference for joint custody.\footnote{19} California enacted legislation endorsing the policy of joint custody in 1979, though it was not the first state to have a statute that authorized it.\footnote{20} Within three years more than 30 states had enacted legislation authorizing joint custody in some form.\footnote{21} In many states joint legal custody has become far and away the norm.\footnote{22}  

Finally, of course, in parent versus non-parent disputes regarding custody and visitation, the Supreme Court’s 2000 decision in Troxel v. Granville\footnote{23} brought renewed emphasis on parental rights.  

In summary, today in the U.S. the best interests of the child analysis is structured by both joint custody and primary caretaker preferences in contests between parents, and by some kind of parental preference in contests between parents and nonparents. In theory, these preferences give decision makers less discretion than does a pure best interests test, but the claims that go to refute these preferences, claims of unfitness or “detriment to a child,” also can mean quite different things in different contexts. And, unlike a best interests rule, a rule that can only or best be refuted by a showing of unfitness or detriment changes the focus from what is good for a child to what is bad, indeed, unacceptable for a child.  

II. The varying meanings of unfitness

Regardless of the legal context, a claim that a person favored by a presumption

\footnote{20} June Carbone, From Parents to Partners 182 (2000).
\footnote{22} E.g., June Carbone, From Parents to Partners 184-184 (2000), discussing California and Wisconsin
\footnote{23} 530 U.S. 57 (2000).
or preference has committed serious child abuse or neglect included would, if proven, likely result in a decision unfavorable to that person. These kinds of claims are important but not the focus of this paper. Instead, the paper examines other, more disputable claims of unfitness that may vary with the legal context.

In theory, the type of conduct that should give rise to a plausible claim of unfitness should vary with the extent of the intrusion on parental authority that will result if unfitness is found. Thus, in theory only very serious behavior should count in a child welfare case because the effect of a finding of parental unfitness there is to remove the child from the parents to state custody. In theory, less serious conduct might result in a finding of unfitness or detriment in a contest between parents because the effect of the finding is to place the child with the other parent. Private custody disputes between parents and non-parents should fall somewhere in between. However, unfitness does not change in meaning in this linear fashion. Instead, some kinds of claims are made in some contexts but not in others, and those made in the child welfare context, for example, may not be obviously worse in kind than those made exclusively in parent versus parent contests. When the same kind of claim is made in more than one context, it is not necessarily true that the degree of severity increases from the parent versus parent contest through the parent versus third party dispute to actions brought by the state against parent. The reasons reflect the differences in the purposes that the law seeks to advance in the various kinds of contests.

In parent versus parent cases, can roughly be sorted into two categories, those where the parents have major value differences regarding how to live the good life, a dispute that often contributed to the break-up of the relationship (if there was one) and that plays out in disagreements over how to raise the child and those involving high conflict families.

In parent versus non-parent suits, most often the non-parent has had a significant relationship with the child, either living with child and parent (as in stepparent or parent’s former same-sex partner) or caring for child for a significant period because the parent was unable to do so. In these cases the person not recognized as a legal parent is fighting to maintain custody or at least contact through visitation. In a minority of cases, the non-parent seeks access to the child even though he or she has not had this kind of significant relationship with a child, perhaps where the parent denies visitation to a grandparent.

A. Parent against non-parent cases

With the exception of some grandparent visitation cases, where the claim is that relationship of grandparent per se gives some rights of access to a child, an argument substantially undercut by *Troxel*, contests between parents and non-parents involve people who have a significant relationship with the child which they are trying to maintain. The states are still evolving their responses to the mandate of *Troxel* that some special weight be given to the legal parents’ claims in these cases. Two fundamentally different approaches are emerging.

In many states, the non-parent is and remains a legal stranger to the child. These states presume that parents should have custody and that parents’ decisions

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24 See my earlier piece about *Troxel*. 
regarding visitation should be honored, and generally to prevail the non-parent must convince the courts that the parents’ conduct or decision is detrimental to the child. States vary in how much and what kind of evidence of detriment is required.\textsuperscript{25} This approach the problem assumes that the category of “legal parent” is fixed and includes only those biological parents whose parentage is legally recognized, as well as adoptive parents. Sometimes this approach is unexamined, taken for granted, though it can be justified by, i.e., arguments favoring certainty, etc.\textsuperscript{26}

The other approach to this problem is to recognize that the critical dispute is the validity of the claim of the nonadoptive, nonbiological parent’s claim that he or she should be accorded parental or quasi-parental status because of his or her functional relationship to the child. Some states have begun to develop laws that allow such a person to make this claim; if successful, the non-parent achieves a status equal to that of parents. This approach values parental rights as recognized in Troxel but does not treat parenthood as a pre-existing natural category and is open to arguments that the law should recognize and protect the lived relationships of children and their caretaking adults, without undue emphasis on biological ties and legal formalities.\textsuperscript{27} Examples are found in the case law of Arkansas\textsuperscript{28} and Pennsylvania\textsuperscript{29} and in the de facto custodian

\textsuperscript{25} articles
\textsuperscript{26} See my Fatherhood article
\textsuperscript{27} Oregon is unfortunate counterexample to this approach. Though it has one of the earliest statutes allowing nonparents to make claims to custody and visitation, based on the GSF psychological parent concept, as it has been amended and, more importantly, interpreted by the intermediate appellate court since Troxel, there is little room to argue that the psychological parent should be on an even footing with the parent. Or. Rev. Stat. 109.119; In re Marriage of Wilson, 110 P.3d 1106 (Or App 2005), -- stepfather trying to get custody of stepchild, custody of his bio child will follow custody of stepchild, he and mother are almost in equipoise but he is a little better on best interests, but loses because of parental preference; In the Matter of the Marriage of Dennis, 110 P3d 607 (Or App 2005), initial award of custody to maternal grandmother reversed on dad’s appeal. Grandmother has been primary caretaker since 2000 because during marriage mom and dad drink and use drugs and dad is abusive. Custody evaluator recommended custody with grandmother but see father more because he is cleaning up. Citing O’Donnell-Lamont and Lamont, 91 P3d 721 (Or 2004), says “ordinarily, a nonparent seeking to overcome the parental presumption will do so by proving that the parent is unable or unwilling to provide adequate care or that the parent is like to cause harm to the child.”

\textsuperscript{28} Robinson v. Robinson, -- SW --, 2005 WL 1041158 (Ark. 2005), stepfather seeks visitation after divorce. Held that court may award visitation to a stepparent in loco parentis over the objection of the natural parent. This is a little boy now 7 years old, stepmother has been with him since he was 18months old, bio mother has relinquished parental rights. Originally stepmom asked for custody, alleging that dad was unfit. Testimony is all about how parental stepmom is. Case law in this state says that bio parent gets custody u/nless stepparent proves unfitness. Does not apply here because this is visitation and because finding of in loco parentis status means that the person is “considered to be, in all practical respects, a non-custodial parent.” Dissent thinks that the parental preference is stronger.
B. Parent versus parent cases

In private custody cases incident to divorce, the norm is not to have a high level of legal conflict. At most it is estimated that 10 per cent of these cases are actually litigated. Nevertheless, the legal rules that govern litigation are important for all these settled cases because, as is widely accepted, the rules provide the backdrop against which negotiations occur. The deepest values that underlie the law in this area, which echo the emphasis on children’s psychological lives discussed above, is that the child’s emotional well-being should be protected, and the child’s relationship with both parents should be preserved in almost all cases, if not through joint custody, at least through visitation, which is denied only upon a showing that visitation would be seriously dangerous to the child.

29 Fausey v. Hiller, 851 A.2d 193 (Pa Super 2004), (upholding award of “partial custody,” i.e., substantial overnight visitation to maternal grandmother over father’s objection. Trial court awards grandmother “partial custody” (overnight visitation). Affirmed. Child and grandmother very close before mother’s death from cancer, father now cutting grandmother out. Affirmed as consistent with Troxel. “The trial court properly accorded father, as a fit parent, the presumption that his decisions regarding [the child’s] visits with grandmother were in [the child’s] best interest. Nevertheless, the trial court found that grandmother overcame the presumption and met her burden of showing: 1) that partial custody would be in [the child’s] best interest; and 2) that partial custody would not interfere with the parent-child relationship.”

30 Ky. Rev. Stat. § 270(1)(a) defines a de facto custodian as “a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age of older. . . Any period of time after a legal proceedings has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.” Ky. Rev. Stat. § 270(1)(b) says that a de facto custodian gets “the same standing in custody matters that is given to each parent under this section”


32 Mullin v. Phelps, 647 A2d 714 (vt 1994), where the court holds that it was error to rule that a father could have no contact with his sons unless he acknowledges sexually abusing them. Characterizes this as effective termination of parental rights and says that to do this evidence must be clear and convincing (Santosky), which it was not. Mom’s allegations of abuse were originally rejected as last ditch efforts to get custody when other efforts had failed. The claims begin in 1989, are evaluated by experts, and repeatedly rejected by experts and courts through 1992. In 1992 an expert finds the
1. The disagreement over lifestyle cases – examples

Some custody disputes between parents are best understood as deriving from the adults' deep differences over a fundamental choice about how to live a good life and what values to teach a child. Two examples of this kind of dispute concern religious disputes and sexual conduct.

When parents who adhere to very different religions fight over custody or visitation, sometimes issue is whether a parent would otherwise likely be the primary custodian will not be, and sometimes the question is whether a noncustodial parent's ability to expose the child to his or her religion will be restricted by limitations on visitation or by a direct order that requires the parent not to impart his or her religious beliefs to the child and not to include the child in his or her religious practices. Courts' responses to this kind of conflict vary significantly, with approaches ranging from the position that a court cannot consider the comparative merits of the parents' religions to the view that the child's spiritual welfare is important for the court to consider. The most challenging cases involve parents whose religion requires shunning nonbelievers, where the other parent is a nonbeliever. These cases go beyond a value clash and challenge the core value of preserving the child's relationship with both parents. Again, courts' responses to this problem vary. Some will award custody to the nonbeliever on

claims believable, saying that prior experts' dismissals were not reliable because of their inexperience. These are the experts who recommend changing custody to mother and denying father access until he admits the abuse and completes sex offender treatment. See also Fournier v. Fournier, 738 A2d 98 (Vt 1999), affirming a trial court order allowing the father visitation despite claims of sex abuse, based on affirmation of trial court finding that evidence not sufficient to decide by clear and convincing evidence; cases discusses strong legislative policy to maximize contact with both parents. 738 A2d at 103.


33 E.g., Quiner v. Quiner, 59 Cal Rptr 503 (Cal app 1967); In re Marriage of Hadeen, 619 P.2d 374 (Wash.App. 1980).
the assumption that to do otherwise will effectively end the relationship between that parent and the child, even where the other parent was the primary caregiver. Other courts find that this consideration of religion is inappropriate and make a custody decision that does not take into account the risk of alienation between the child and the nonbeliever parent.  

A second type of case that ordinarily involves parents’ conflicting values over lifestyle are those involving sexual identification or conduct. The ways that courts interpret the requirement that a parent’s conduct “harm the child” very pronounced in these cases. In a majority of states, that a parent is gay and lives as a gay person, including having a partner, does not in and of itself show a risk of harm sufficient for the court to act. However, in a minority of states, the moral distaste for homosexuality is still so strong that courts say that exposing children to a gay lifestyle is or may be morally or emotionally harmful.

37 See Justin K. Miller, Comment, Damned If You do, Damned If You Don’t: Religious Shunning and the Free Exercise Clause, 137 U Pa. L. Rev. 271 (1988). Discusses the religious practice of shunning. Quiner v. Quiner, 59 Cal Rptr 503 (Cal app 1967), is a case in which the court held that it was error for the trial court to consider the mother’s religion’s practice of shunning in awarding custody to the father. See also In re Marriage of Hadeen, 619 P.2d 374 (Wash.App. 1980); John v. Johnson, 564 P2d 71 (Alaska 1977). Compare E.g., Homonnay v. Homonnay, 2004 WL 1245636 (Ct. Super. 2004), mother belongs to a very authoritarian sect which teaches that those who do not belong are the enemy, and teaches children its tenets. Father does not belong and wife and children are critical of him for that. Father has sexual proclivities that cause a lot of tension (wants multiple people, brings in prostitutes, accesses pornography on family computer). Besides the authoritarian aspect of religion and shunning, religion also teaches not to eat too much, and father believes that the sons do not eat enough. Before mother became involved with this religion they were all Baptists. The “family relations officers, psych evaluator are worried about the impact of the religion on the boys and also to the boys’ exposure to their father, who also has anger issues. Father wants sole custody and mother wants joint custody. Court thinks neither one will make decisions in children’s best interests – father will make decisions out of anger and mother out of her religious concerns. The boys’ GAL wants custody to mom but prohibit exposure to her religion. Husband is also abusive and threatening to wife. So, orders joint custody so that they will cancel each other out! Primary residence with mother but with father on weekends and Wednesday nights. Mother cannot take children to religious activities or expose them to teachings of the religion.

38 For example, see Berry v. Berry, 2005 WL 1277847 (Tenn. App 2005) – order changing custody from mother to father because of mother’s living as lesbian reversed for lack of evidence that child is being harmed; child doing well in school and reported to be well-adjusted; concurrence emphasizes lack of expert testimony about adverse effect. For description of the current law and criticism that refusal to consider sexual infidelity unless it has harmed the child, see Lynn D. Wardle, Parental Infidelity and the “No-Harm” Rule in Custody Litigation, 52 Cath. U. L. Rev. 81 (2002).

39 Mississippi cases well known. Recent example: Davidson v. Colt, -- So2d --, 2005 WL 225327 (Miss App 2005), at divorce joint legal custody, children live mostly with mother. Three years later father moves to modify because the children “exposed” to
(commentary about how should not be analyzed as matter of fitness, instead principled way of deciding whether court should address the value conflict or not and, if so, how)

2. The high conflict cases

In high-conflict families, distrust about the other person’s parenting capacity and quality of child-rearing environment is common. Most often arises when father presses for custody, and this happens more where the father is concerned about the child’s well-being in the mother’s household, the father is hostile to the mother, and the father was involved with the children more before the litigation. Also common in high conflict cases are physical threats, psychological manipulation, mothers who dismiss the value of paternal contact. In these cases tension between emphasis on maintaining relationship with both parents and the values of stability and emotional continuity that underlie primary caretaker come into sharp conflict.

Unfitness claims of particular vehemence seem particularly likely here, given the emotional attractiveness of such claims to these warring parties and statutory or case law expressing at least preferences for joint custody, most time with the primary caretaker or both.

In the absence of convincing evidence of serious abuse or neglect of the child or, where it is regarded as actionable, lifestyle differences, to what do parties turn? One is not surprising – claims that one parent is alienating the child from the other. The other mother’s “lesbian lifestyle.” Trial court granted motion. Standard -- substantial change in circumstances having adverse impact on the welfare of the child. Mother claims no change in circumstances because everyone knew she was a lesbian at time of divorce. Experts testifies that the girls have gotten old enough to be aware that mom is sharing bed with a woman and they’ve seen movies and that this is “not particularly good for them mentally.” Court affirms because the change is that mother is now “exposing” children to sexual nature of relationship with other women.

41 June Carbone, From Parents to Partners 188 (2000).
42 See discussion in June Carbone, From Parents to Partners 192-194 (2000) parental alienation is often charged but rarely results in a change of custody. But see In re Marriage of Taraghi and Spanke-Taraghi, 977 P.2d 453 (Or.App. 1999) – this was critical in awarding custody to father, which he got despite evidence of father’s violence toward mother but also because mother had problems with depression.

Cranston v. Combs, 106 SW3d 641 (Tenn 2003) – custody changed from mother to father under standard of material change in circumstances making change in child’s best interests because of mother (Cranston)’s “deliberate pattern of consistent interference with Combs’ court-ordered visitation rights, Cranston’s interference in and monitoring of telephone conversations, Cranston’s refusal to allow the children to speak with Combs on the telephone, Cranston’s refusal to talk to Combs, Cranston’s refusal to provide relevant information to Combs about the children, and Cranston’s derogatory remarks about Combs in front of the children.” 106 SW3d at 645.
is very much a reflection of current trends in American family law that are quite recent – claims related to domestic violence. To this I now turn.

III. Domestic violence and assessments of parental fitness

A relatively new basis for claiming unfitness or detriment. In 1991 Naomi Cahn reviewed the role of dv in private custody disputes and reported that in most states the law was silent or said that it was irrelevant to custody.43 In 1989 fewer than 16 states had statutes concerning the role of dv in custody, but by 1997 more than 40 states and dc had statutes on point.44

The first wave of cases and statutes providing that dv should be considered in custody and visitation cases were disputes between parents. The cases and statutes said that judges should take into account domestic violence; in some jurisdictions there is a presumption against awarding custody to the violent parent.45 The rationales for these rules are that there is a risk that the child will also be harmed by the battering parent because of the association between partner and child abuse, as well as that the child may be harmed by being in a violent atmosphere.46 There has been substantial scholarship about this, reporting variations in application of principle.47 Some DV advocates argue that, notwithstanding the statutory provisions, courts not infrequently give custody or at least unsupervised visitation to batterers. And there is some evidence, as alleged, that friendly parent provisions backfire in these cases, resulting in a mother who makes claims of violence being criticized for undermining child’s relationship with father.48 However, other courts apply these principles quite strictly,

45 E.g., the Oregon statute. Cite articles too.
46 Jack M. Dalgleish Jr., Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions regarding, Domestic Violence in Awarding Custody of Children, 51 ALR5th 241 (1997, updated through 2004) –courts applying statutes that say that custody should not be awarded to a parent found to have been domestically violent, though often require more than one incident – a pattern. These are initial custody cases. Used to avoid joint custody. If both parents violent, custody given to the less violent one.
47 For example, see In re Marriage of Holcomb, 888 P2d 1046 (Or App 1995), rev denied 893 P2d 540 (1995), where the mother/primary caretaker of a 19-month-old child who kept a detailed diary of the father’s abusive behavior lost custody, even though the custody evaluator recommended that the mother have primary custody because she was more likely to foster relationship with father, primary caretaker. The trial court awarded custody to father because the judge disapproved of the mother’s plans to go to graduate school in Illinois, as indicating that she was more concerned about herself than the father’s interest in having a relationship with the child. See generally Joan S. Meier, Domestic Violence, Child Custody, and Child Protection: Understanding Judicial
even to the exclusion of other factors, so as to give custody to a parent who clearly would not otherwise get it, or even to deny visitation altogether, which is rare in American practice.49

More recently, evidence of domestic violence in the home has been used against the victims of the violence in much the way that it has been used in many jurisdictions in state-initiated child protection cases.50 Parents, usually but not always mothers, have been branded as failing to protect children from the adverse effects of exposure to violence in litigation between parents and between parents and third parties. A survey of reported appellate cases in the last three years turned up cases in which this claim was seriously discussed in cases from at least twelve states.

Appellate cases in the last three years in the following states involved this kind of claim in an initial custody dispute between parents (typically where the parents had been living apart under an informal arrangement for several years, so functionally like a modification) or in a modification proceeding: Alabama,51 Florida,52 Iowa,53 Kentucky,54


49 Examples: Vural v. Vural, 781 NE2d 881 (Mass. App. 2003) (unpublished opinion), initial custody granted to father because mother is violent, mother gets supervised visits, then visits terminated because she is so violent and abusive to children; Lawrence v. Delkamp, 658 NW2d 758 (ND 2003), modification from mom to dad sought. Dad has supervised visitation. Dad loses modification and visits suspended until he gets counseling for his violence, including threats to mother.

50 The Nicholson v. Scoppetta litigation

51 J.M. v. D.V., 877 So.2d 623 (Ala. 2003) (initial award of custody of 5-year-old child who has lived with mother since birth to father because mother’s husband is violent toward her).

52 Burger v. Burger, 862 So2d 828 (Fla. App. 2004) (trial court modified custody from mother to father because of mother’s meth use and because she had been victim of dv; reversed for lack of evidence that these things were new (changed circumstance) and that they had an adverse impact on the child); Hastings v. Hastings, 875 So.2d 772 (Fla. App. 2004), (trial court modified custody from mother to father because mother’s new husband is violent to others but nor her, based on recommendation of “parenting coordinator” who says that mom and whole family should be considered dv victims, and that mom won’t admit it, reversed for insufficient evidence).

53 In re Marriage of Bentley, 695 N.W.2d 44 (Iowa App 2004), father seeks modification of custody because of mother’s frequent moves and her relationships with two men who were abusive. Strong preference for stability makes it difficult to modify custody, but appellate court concludes that evidence does not show she is “doomed” to engage in future troubling relationships and that there is evidence that she is beginning to achieve long-term stability).

54 McAninch v. Pittman, 2003 WL 1227159 (Ky. App. 2003) (not for publication) (modification of custody from mom to dad affirmed because mother moved back in with abusive stepfather after juvenile court intervened on the basis of failure to protect, mother permitted only supervised visitation); Chapman v. Chapman, 2003 WL 21513513 (Ky. App. 2003) (not for publication), (modification of custody from dad to mom refused, where mother awarded custody when violent marriage to father broke up,
Michigan, 55 Missouri, 56 New York, 57 North Carolina, 58 and Tennessee. 59 These are definitely not the only states in which such claims are being made, but rather just a recent sample. 60

In states that require proof of parental unfitness to justify orders favoring nonparents over parents, nonparents have also argued that violence in the parent’s home not directed against the child, renders the parent unfit. In a particularly ironic twist, paternal grandparents in In re Jade E.G. 51 sought custody, arguing that the mother who had recently separated from her violent mate, their son, had endangered the child by, i.a., of allowing the child to be exposed to the violence! The trial court granted the motion, but the appellate court reversed for lack of evidence of sufficient detriment to the child, though it said that the grandparents, who had more or less raised the child, should get substantial visitation. I also found recent cases of this sort from Ohio 62 and

child welfare authorities placed child with father because mother’s new relationship was violent but returned child after mother broke off relationship at the insistence of the authorities and shortly thereafter dad sought custody).


56 Davidson v. Fisher, 96 SW3d 160 (Mo App 2003) (initial custody award of child who has been living with mother for three years because mother has been involved with violent man and is not a “friendly parent”)

57 Banks v Hairston, 775 NYS2d 124 (App Div 2004) (custody modified from dad to mom by trial court because Dad drinks, doesn’t supervise child, abuses girlfriend, reversed for lack of evidence of adverse effect on child or that child would be ok with mom, who has previously had kids taken away for neglect); K.D. v. J.D., 791 NYS2d 870 (Fam Ct 2004) (unpublished opinion) (custody modified from mom to dad because she is abused by boyfriend, even though she is the more capable and nurturing parent and kids are more bonded to her); Assini v. Assini, 783 NYS2d 51 (App Div 2004) (custody modified from mom to dad because mom’s boyfriend abuses her); Drew v. Gillin, 792 NYS2d 691 (App Div 2005) (primary custody modified from mom to dad because mom has been victim of dv in child’s presence, drinks too much (has been arrested for dwi); Neail v. Deshan, 796 NYS2d 435 (App Div 2005) (initial custody award of child who has been living with mother for four years because mom exposes child to violent relationships with men); Musgove v. Bloom, 2005 WL 1414461 (App Div 2005) (custody modified to dad from mom because mom withholds child from him and is in a new violent relationship).

58 Pheasant v. McKibben, 396 SE2d 333 (NC App 1990) (case involves dad’s claim to modify custody because of domestic violence between custodial mother and her new husband).

59 McEvoy v. Brewer, 2003 WL 22794521 (Tenn App 2003) (not for publication) (custody modified from mom to dad because mom’s new husband is violent to her).

60 See, for example, Exception: Weigand v. Houghton, 730 So2d 581 (Miss 1999) (father seeks modification of custody order that granted primary physical custody to mother because of stepfather’s violence to mother denied because dad is an openly gay man).

61 575 SE2d 325 (W Va 2002).
Oregon in my quick sample.

Judicial response to this failure to protect argument vary, but none say that the claim is invalid on its face. Instead, the variation here is like the variation in the cases involving the question of under what circumstances in a parent versus parent case a violent mate should get custody or unsupervised visitation – different approaches to the sufficiency of the evidence presented, both as to the adequacy of proof that there is significant violence and that the child is being harmed or is at risk of harm, and different approaches to the significance of the violence in comparison to other factors in the case.

The domestic violence cases present a dilemma. DV claims are among the most inflammatory today; certainly they are not conducive to adults’ developing collaborative shared responsibility for a child, but in cases where the claims are well-founded, the claims must be taken seriously, given the serious danger to the other parent and sometimes to the child. In the reported cases, the severity of the alleged violence varies tremendously, as does the degree of danger to the other parent and to the child, and courts’ responses to the claims vary as well. If claims are made too readily, there is a significant risk that courts and others will become so skeptical of the DV claim that truly dangerous situations will be ignored. But if courts are too willing to accept claims, they will be made routinely and will become easy weapons for warring parents to use against each other and for nonparents to use to undermine parental rights. This danger is readily apparent with the failure to protect claims.

IV. Conclusions – How Should Unfitness Claims Factor into Custody Decisions

A. Legal parent against third party
   1. Need mechanisms whereby nonparent can attain status of parent where appropriate and then be on an even footing legally
   2. Where nonparent does not make and prove this claim, analysis should turn on whether parent’s denial of access to child harms the child or for custody, some close in severity to child abuse or neglect

B. Parent against parent – major goals is to encourage private resolution of arrangements
   1. In cases of value conflicts, address problem clearly as one not of fault but state’s proper role is resolving such conflicts (which will often be to ignore them as not relevant to core values of child custody)
   2. For all cases, but especially to deal with high conflict cases

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62 Christopher A.L. v. Heather D.R., 2004 WL 1802987 (Ohio App 2004). (custody awarded to maternal grandparents rather than father because father is violent to current wife, has never lived with child, and drinks).
63 In the Matter of the Marriage of Dennis, 110 P3d 607 (Or App 2005) (initial award of custody to maternal grandmother instead of father reversed even though grandmother had been primary caretaker since 2000 because during marriage mom and dad drink and use drugs and dad is abusive and custody evaluator recommended custody with grandmother but see father more because he is cleaning up because evidence insufficient to show that father will not provide adequate care for child).
a. Avoid strong presumptions that require blockbuster negative arguments as only way to rebut the presumption
   b. Rethink use of dv evidence; some has to be relevant but in danger of getting out of hand
   c. Ironically, perhaps eliminate friendly parent preference because, ironically, increases some conflict by requiring that prove that other parent is truly horrible rather than being able to express concerns about that parent, ones own ability to work with parent or both in lower key way
   (to be continued)