

DANGEROUS LIAISONS*: A DOMESTIC VIOLENCE TYPOLOGY IN CUSTODY LITIGATION

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ABSTRACT

This article examines the use of a widely acclaimed social science typology of domestic violence in child custody litigation. Review of the case law suggests that courts and court-based evaluators frequently apply the typology so as to minimize or ignore a parent's domestic violence. Moreover, although the typology has been widely touted as empirically based, review of the latest empirical research suggests that it contains significant contradictions and gaps, and does not consistently support the key proposed distinctions between the "types" which matter to custody decisions, such as future dangerousness and post-separation risks to children. This case study of the intersection of social science and law suggests that the nuances, complexities and indeterminacy of social science research do not transfer neatly to legal cases, inevitably resulting in a simplistic use of labels, which can create harmful outcomes for children. Both family law and domestic violence professionals in family courts, where the typology has gained traction, and social science researchers developing and exploring such theories, are urged to employ greater caution in employing or advocating for employment of such social science constructs in family court decision-making.

* The title is taken from a well-received American 1988 historical drama film based on a French play by that name. See DANGEROUS LIAISONS (Lorimar Film Entertainment, 1988).

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TABLE OF CONTENTS

INTRODUCTION.....	117
I. FAMILY COURT CULTURE REGARDING FAMILY VIOLENCE.....	120
A. <i>Case Study</i>	120
B. <i>Family Court Culture</i>	121
II. JOHNSON'S TYPOLOGY	127
III. THE TYPOLOGY IN FAMILY COURT	131
A. <i>Treating Intimate Partner Violence in Custody Litigation</i> <i>as Presumptively SCV</i>	134
1. Does the Research Support Johnson's Prevalence and Sampling Theory Assertions?	137
a. <i>Prevalence of SCV vs. IT/CCV</i>	137
b. <i>Sampling Theory</i>	139
B. <i>Presumptions About the Dangerousness of Each Type</i>	141
1. Cases	141
2. What Does Empirical Research Show About the Dangerousness of the Different Types of Domestic Violence?	144
a. <i>Overall Dangerousness of IT/CCV vs. SCV</i>	146
b. <i>Post-Separation Risks</i>	149
c. <i>Post-Separation Dangerousness to Children</i>	152
i. Dangerousness of SCV to Children Post-divorce..	153
ii. Triggers for Situational Violence.....	156
C. <i>As a Practical Matter, Can We "Type" Cases?</i>	157
1. In Research	157
2. In Specific Cases.....	161
3. Case Examples.....	162
a. <i>False Negatives—Questionable SCV labelling</i>	163
b. <i>Courts' Resistance to Coercive Control</i>	164
4. Helpful Applications of IT/CCV.....	165
D. <i>Using the Typology to Negate Law</i>	167
E. <i>Overview—Application of Typology in Family Court</i>	168
IV. BEYOND JOHNSON'S TYPOLOGY.....	171
CONCLUSION.....	173

INTRODUCTION

While the relationship between science and law can be problematic,¹ these problems are compounded when it comes to social science.² Unlike the “hard” sciences, which are at least designed³ to provide concrete factual answers to concrete specific factual questions, such as bullet analysis or DNA evidence, social science is intrinsically less precise. Even its topics of inquiry, such as social trends or interpersonal dynamics, are amorphous and not amenable to objective yes/no answers.

The gulf between the disciplines of social science and law can be seen by comparing each profession’s approach to truth seeking. In the legal system, “truth”⁴ is derived from proof of specific facts about specific individuals or events. The litigation process is designed to use fair procedures to assure that the information considered possesses a threshold level of validity facilitated by uniform principles of admissibility (i.e., the rules of evidence). The purpose of admissible evidence is to assist the fact-finder in determining the truth of the parties’ claims about each other or the particular events at issue.⁵ The

1. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596–97 (1993) (“[T]here are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”).

2. Connie J. A. Beck et al., *Collaboration Between Judges and Social Science Researchers in Family Law*, 47 FAM. CT. REV. 451, 451–53 (2009) [hereinafter Beck, *Collaboration*] (exploring tensions between social science researchers and legal professionals in family law).

3. Even hard science used forensically has recently been found to be far less reliable than is often assumed. See DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF INJUSTICE* 72–75 (2014) (detailing the evolution of forensic science underlying shaken baby syndrome, which she argues now indicates many defendants were wrongly convicted). In 2009, the National Academy of Sciences produced a report cautioning legal professionals that much of the science routinely relied upon in court is less reliable than often assumed. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES CMTY., NAT’L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 4 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (“[I]n some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. . . . Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.”).

4. This is not to suggest that legal outcomes necessarily do find the truth—only that they aspire to.

5. See generally Judith Cashmore & Patrick Parkinson, *The Use and Abuse of Social Science Research Evidence in Children’s Cases*, 20 PSYCHOL. PUB. POL’Y & L. 239, 239 (2014).

social science field seeks truth in virtually the opposite manner—through academic research into broader truths about human beings in general or particular segments of humanity. In contrast to law, social science research and theory does not seek to prove that a particular thing did or did not happen. Rather, it explores nebulous phenomena such as trends and social behavior, and seeks to understand generalizable aspects of human behaviors, impacts, and implications for the future.⁶

Moreover, unlike legal adjudications, which must attain definite and final answers in specific cases, social science research and theories often do not attain a final resolution. Indeed, it is a staple of the social science field that most areas of inquiry are subject to evolving understandings over time as multiple investigators explore the same and related aspects of a topic and seek to test “competing hypotheses.”⁷ Those hypotheses that “do not survive the scientific process” are (hopefully) discarded.⁸ Incorporation of these tentative, evolving understandings from the social science field into the definitive and final adjudications in particular legal cases is thus inherently problematic.⁹

This Article examines the intersection of a particular social science theory, Michael Johnson’s typology of domestic violence, with the legal

6. Of course, social science also sometimes endeavors to answer factual questions in specific legal cases, e.g., when mental health experts evaluate parties or children in criminal and custody cases, to ascertain a litigant’s sanity, the truth of child abuse claims, or children’s “best interests” in custody litigation. See Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1, 9–10 (2005). While family courts often rely on such individual evaluations, and they are often deeply problematic when produced by individuals who lack genuine expertise in abuse, this article focuses instead on the application of a social science theory, the typology, which purports to derive from empirical research out of court. See Zoe Rathus, *Shifting Language and Meanings Between Social Science and the Law: Defining Family Violence*, 36 U. NEW S. WALES L.J. 359, 360, 383 (2013) [hereinafter Rathus, *Shifting Language*].

7. Beck, *Collaboration*, *supra* note 2, at 453.

8. *Id.* The extent to which psychological research is reproducible, and can thereby be considered valid science at all, has been the subject of significant professional and scholarly debate. Benedict Carey, *New Critique Sees Flaws in Landmark Analysis of Psychology Studies*, N.Y. TIMES (Mar. 3, 2016), http://www.nytimes.com/2016/03/04/science/psychology-replication-reproducibility-project.html?_r=0. See *infra* note 125 and accompanying text, for further discussion of this study.

9. Cashmore & Parkinson, *supra* note 5, at 243 (explaining that, when used in legal argument, social science research can “take on a level of definitiveness and authority that the original authors never claimed for it”); Rathus, *Shifting Language*, *supra* note 6, at 360 (“[S]ocial science is complex, changeable and contested, and its application is fraught with difficulties.”).

process in family courts.¹⁰ While the typology was invented by a self-described “pro-feminist” who cares deeply about domestic violence, the case law indicates that it is primarily being used by courts to minimize and deny concerns about family violence. Moreover, a survey of the subsequent empirical research into the typology suggests that empirical support for the two key types—*qua types*—is ambiguous, and at best, mixed.¹¹ This two-tiered analysis demonstrates the dangerousness of applying necessarily amorphous and evolving social science theories in family court, where children’s safety and welfare is critical. Such a theory is necessarily simplified in order to apply it to specific cases, and it is easily deployed in furtherance of courts’ institutional and cultural biases; these realities, along with the uncertainty of the typology’s empirical support, make use of the typology in family court¹² adjudications both dangerous and unwise.

Part I sets the stage with an overview of the institutional biases in family courts, and the polarization between domestic violence and family court professionals. Part II situates Johnson’s typology and the theoretical problems it seeks to resolve within this context. Part III compares courts’ applications of the typology with existing empirical research into the two key types. The legal survey demonstrates that courts have applied the typology most often to minimize abuse or concerns about a parent’s dangerousness, to the detriment of survivors of abuse, an outcome the proponents of the typology certainly did not intend. At the same time, the empirical survey demonstrates that these uses of the typology are not entirely supported by the research. Part IV concludes that both the lacunae in the social science and the occupational hazards of family courts combine to render the typology both insufficiently proven and often destructive to family court adjudications.

My critique is thus addressed both to social scientists who believe that such problems are purely the fault of the courts, and to legal

10. MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 81–83 (2008); *see infra* Part II.

11. *See infra* Part III.

12. While I make no claim regarding the uses of social science theories in criminal or other civil courts, where, in my experience, the rules of evidence are more strictly applied and scientific evidence or theories more carefully vetted, it is possible that elements of this critique are transferrable. *See generally* Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265 (2001) (discussing the concerns with the family courts’ great reliance on non-legal evaluators, including how it permits more subjective involvement of these evaluators to potentially undermine the courts’ legal integrity).

professionals who believe that social science theories and constructs are inherently objective and directly applicable to specific cases. Both social scientists and legal professionals should recognize—on one hand—the ambiguity, changeability and indeterminacy of empirical research, and on the other, the unavoidable necessity that such theories be simplified in order to be useful in specific cases. When the inherent fluidity and ambiguity of such a social science theory intersects with courts' specific needs and agendas, it can be expected to be deployed, as here, to further existing cultural norms or ideologies rather than to bring improved accuracy or better outcomes.

I. FAMILY COURT CULTURE REGARDING FAMILY VIOLENCE

A. Case Study¹³

In 2009, Ms. J. received a protection order after an altercation in which her husband slammed a door on her hand while keeping her out of her daughter's bedroom. During the ensuing custody litigation, the court found that Mr. J. had committed violence (an "intrafamily offense") against her twice: Once by pulling her toward him during an argument by pulling a dishtowel wrapped around the back of her neck, and once by grabbing, shaking, and throwing her down on a bed (while the baby was on the bed). The court rejected Ms. J.'s testimony that Mr. J. crossed the dishtowel in front of her neck and made as if to strangle her. The court said nothing about several other allegations of domestic violence including deliberately reckless driving intended to frighten her.

A custody evaluator appointed by the court characterized these incidents as "violence with a small v" and minor "situational" violence, rather than the presumably more serious "controlling" violence. Finding Ms. J. to be "rigid" and "unconsciously alienating" her daughters from their father because of her "irrational" or "excessive" fear of him, the evaluator rejected Ms. J.'s concerns and the children's reluctance to live half-time with him, judged her the greater psychological danger to the children due to the likelihood she would alienate the children from their father, and recommended joint custody.

Based in large part on the evaluator's opinion, the court held that the statute's presumption against joint custody (triggered by the father's

13. This case study describes the facts of *Jordan v. Jordan*, 14 A.3d 1136, 1140–45 (D.C. 2011). This rendition of the facts, shared with permission of the mother, derives from the author's representation of the plaintiff on appeal, not solely from the published opinion, which is incomplete.

past violence) was rebutted by the children's current or prospective "alienation" from their father, and ordered that the parents share custody and cooperate with a "parenting coordinator." Appeal of the order was unsuccessful.

The 12-year-old child refused to talk to her father or eat in his presence. The younger one was affectionate under observation, but, according to her mother, usually a wreck when she came home after unsupervised visits. Ms. J. resisted the court-ordered parenting coordination (which she also had to pay for) and refused to tell her children that their father was perfectly safe, as instructed by the parenting coordinator and evaluator. Eventually, in reaction to Ms. J.'s recalcitrance, the court awarded Mr. J. full custody of both children. The older one, who experienced excruciating stomach pains when in her father's presence, was hospitalized, reported abuse, and was eventually sent by her father to a boarding school, away from her mother, friends, sister, school, and all of her beloved activities.

Eventually the father permitted her to return to her mother, but the court refused to put a legal imprimatur on the arrangement and continued for some time to order the mother to pay child support to the father for the child she was now solely rearing. The younger child remains in the custody of her father, seeing her mother only on alternate weekends.

B. Family Court Culture

As the above example may suggest, the use of social science theories in court reaches its peak—and its nadir—in family courts. The reason for family courts' near universal¹⁴ reliance on psychological theories is simple: the core issue courts must determine in custody litigation, the "best interest of the children," is a non-legal one.¹⁵ Since individual psychological and interpersonal relationships are, in modern society, perceived to be key to children's "best interests," it is unsurprising that judges turn to mental health professionals for help with the

14. Australian family courts have an even more robust acceptance of and reliance on social science than American courts. However, it is being increasingly challenged, particularly as it pertains to family violence. See, e.g., Zoe Rathus, *A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making*, 26 AUSTL. J. FAM. L. 81, 87–88 (2012); Jane Wangmann, *Different Types of Intimate Partner Violence—What Do Family Law Decisions Reveal?*, 30 AUSTL. J. FAM. L. 77, 110 (2016) [hereinafter Wangmann, *What Do Family Law Decisions Reveal?*].

15. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 301 (1999).

determination. This tendency is compounded by courts' tendencies to perceive family abuse—particularly child sexual abuse—as alien territory, often requiring psychological expertise.

Unfortunately, family courts' heavy reliance on psychological theories and experts has been neither scientifically trustworthy nor beneficial for survivors of domestic violence and children at risk of abuse. In a thoughtful review of the uses of social science in courts, a team of social scientists and judges concluded that "the scientific evidence supporting major concepts [used in family court] . . . is scant; thus, custody evaluations can be biased and address the evaluators' favorite concepts (e.g., Parent Alienation Syndrome, Psychological Parent) as opposed to some objective truth."¹⁶ Indeed, most psychological theorizing in custody court has been devoted to denying and minimizing abuse, and criticizing mothers who report it. For instance, the pseudo-scientific theory of "parental alienation" posits that mothers and children who report paternal abuse in custody litigation are likely fueled by the mother's vengeance or pathology. Alienation analyses often treat the accused fathers as innocent victims of the mothers' malevolence, and turn the tables on a disclosing mother and child, treating them as the problem rather than the accused abuser.¹⁷ The result has been a growing trend toward mothers losing custody of children to abusive fathers.¹⁸

16. Beck, *Collaboration*, *supra* note 2, at 455–56 (citing Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005)); *see also id.* at 458 (noting that despite twenty years of research into mediation of divorce and custody, there were "remarkably few studies" meeting standards for valid empirical research). The authors of the article *Collaboration Between Judges and Social Science Researchers in Family Law* found that *predictions of future dangerousness* are among the least reliable when rendered by an individual professional's clinical judgment, as compared to statistical methods. *Id.* at 456 ("Statistical methods consistently outperform clinical integration of data in predicting future dangerousness."). While this critique might point toward a particular solution, which this author endorses—i.e., training psychological experts and requiring genuine expertise in abuse—this article focuses on a different aspect of the problem with social science in court: the use of a typological theory which is neither sufficiently empirically validated nor likely as a practical matter to be accurately applied in court. *See generally* Clare Huntington, Essay, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227 (2018).

17. Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 219–20, 227–29 (2010) [hereinafter *Getting Real*] (describing five cases in which mothers seeking to protect their children from abusive fathers were called "alienators" and the children's custody switched from mother to father); *see also* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 530–34 (2001); Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J.

Thus, critiques by domestic violence and abuse professionals of family courts' treatment of domestic violence and child abuse allegations abound.¹⁹ Scholars and advocates describe courts' and evaluators' common failure to treat abuse as either important or relevant to custody and visitation determinations;²⁰ skeptical or hostile treatment of mothers and children who allege adult or child abuse while giving alleged abusers a free pass; and beliefs that women have suspect motivations for reporting abuse, that both women and children who make such reports are psychologically unstable, pathological, or (in the

CHILD SEXUAL ABUSE 1, 1–2 (1995) (noting that close to a fifth of parents who alleged child sexual abuse were penalized by courts as alienators); Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 239 (2009).

18. This risk is especially great where mothers or children report child sexual abuse. Fallor & DeVoe, *supra* note 17, at 1–2; GERALDINE BUTTS STAHLY & NANCY STEUBNER, CALIFORNIA PROTECTIVE PARENTS ASS'N, PROTECTIVE PARENTS SURVEY, <https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/Geraldine%20Stahly%202016%20CA%20from%20366.pdf>. See generally Amy Neustein & Ann Goetting, *Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse*, 8 J. CHILD SEXUAL ABUSE 103 (1999). Pilot data from this author's federally supported three-year empirical research project indicates that alleging child sexual abuse resulted in a switch of custody to the alleged abuser sixty-eight percent of the time. Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311, 328–330 (2017).

19. See, e.g., LUNDY BANCROFT ET AL., THE BATTERER AS PARENT 255–61 (2d ed. 2012); Joan Zorza, *Child Custody Practices of the Family Courts in Cases Involving Domestic Violence*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 1–32 (Mo Therese Hannah & Barry Goldstein eds., 2010); PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 89–90 (2003); Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 63 (2003) [hereinafter *Common Misconceptions*]; Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 381 (George W. Holden et al. eds., 1998) (“[A] ‘no win’ situation occurs for many battered women in court . . . the nonidentification of domestic violence in divorce cases is the source of the real problems that occur.”); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 657, 667–75 (2003) [hereinafter Meier, *Domestic Violence*]; Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 314–17 (2009) [hereinafter Stark, *Rethinking*]; DANIEL G. SAUNDERS, VIOLENCE AGAINST WOMEN, CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES: LEGAL TRENDS, RISK FACTORS, AND SAFETY CONCERNS 1–9 (2007) [hereinafter SAUNDERS, CHILD CUSTODY AND VISITATION DECISIONS], http://vawnet.org/sites/default/files/materials/files/2016-09/AR_CustodyREVISED.pdf.

20. See sources cited *supra* note 19 and accompanying text; see discussion *infra* Section III.

case of children) brainwashed; and a general hostility toward women and children who report that a father is violent or dangerous.²¹ These critiques are supported by a variety of regional or small empirical studies,²² as well as this author's preliminary national research into family court outcomes.²³ That research has found that, in cases with parental alienation claims, domestic violence allegations had little impact on custody (in either direction), that mothers lost custody about half the time in general, and child sexual abuse allegations were correlated with a notable increase in transfers of custody *from* the mother alleging abuse *to* the accused father.²⁴ Other more localized studies have also found surprisingly high rates of awards of custody to alleged and adjudicated abusers, and common court orders for unprotected child visitation with abusive fathers.²⁵

21. See generally DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES (Mo Therese Hannah & Barry Goldstein eds., 2010); AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY WOMEN ARE RUNNING FROM THE FAMILY COURTS AND WHAT CAN BE DONE ABOUT IT 51–85 (2005); Meier, *Domestic Violence*, *supra* note 19, at 665, 681–92. See, e.g., BANCROFT ET AL., *supra* note 19, at 255–61; Bruch, *supra* note 17, at 530–34.

22. See, e.g., MICHAEL S. DAVIS ET AL., N.Y. LEGAL ASSISTANCE GRP., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS iii–iv (2010); Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1012–18 (2005); Allison C. Morrill et al., *Child Custody and Visitation Decisions when the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1100–04 (2005); See DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 4 (Nat'l. Inst. of Justice 2011) [hereinafter CHILD CUSTODY EVALUATORS' BELIEFS], <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf>.

23. Meier & Dickson, *supra* note 18, at 323–32.

24. *Id.* Data from an expanded study will be released in 2018. See generally SUB-CATEGORY D-III: DOMESTIC VIOLENCE AND CHILDREN: COMPENDIUM OF RESEARCH ON VIOLENCE AGAINST WOMEN 1993–2016 (2018), <https://www.ncjrs.gov/pdffiles1/nij/223572/223572-d-iii.pdf>.

25. See generally NEUSTEIN & LESHER, *supra* note 21; Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1367–95 (2005). The Leadership Council on Interpersonal Violence and Child Abuse has estimated that 58,000 children are ordered into unsafe contact with an abusive father each year. Press Release, The Leadership Council on Child Abuse and Interpersonal Violence, How Many Children are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce? (Sept. 22, 2008), <https://www.leadershipcouncil.org/1/med/PR3.html>; see also Sally Goldfarb, *The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenges*, Expert Paper for the United Nations

The causes of these dynamics are many and will not be fully explicated here; however, there can be no doubt that family courts are defined by a strong commitment to fathers' rights and maximizing their access to their children.²⁶ Co-parenting is a virtual holy grail of family court discourse and behavior.²⁷ At the same time, most family court professionals, including judges, evaluators, and guardians ad litem lack real expertise in domestic violence and child abuse, especially child sexual abuse.²⁸ This combination of emphasis on fathers and fathering with a lack of objective understanding of abuse renders particularly appealing social science frameworks which can explain away or minimize abuse allegations, and/or re-frame the accuser as the problem and the accused as harmless. Parental alienation theory has thus provided a remarkably effective pseudo-scientific analysis to justify and legitimize courts' preferred outcomes and attitudes.

Interestingly, family courts' attitudes toward abuse allegations contrasts sharply with the attitudes of civil and criminal courts.²⁹ Unlike the latter, which have embraced the need to forthrightly address domestic violence as a serious matter, family courts seem almost "old school" in their resistance to taking abuse seriously.

Not surprisingly, family court professionals do not share the domestic violence field's critique. Non-abuse professionals argue that

Division for the Advancement of Women 8–10 (2008), [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf); JOAN S. MEIER, DV LEAP, RATES AT WHICH ACCUSED AND ADJUDICATED BATTERERS RECEIVE SOLE OR JOINT CUSTODY (2013), <https://drive.google.com/open?id=1thySjuNQlrMh9qP13Nfon38fMDHNZeIY>; *Getting Real*, *supra* note 17, at 228–29; Kernic et al., *supra* note 22, at 991–1021 (noting that custody courts ordered few strong protections for children even where a history of intimate partner violence was substantiated).

26. Meier, *Domestic Violence*, *supra* note 19, at 676–81 (describing courts' emphasis on "parental equality" and desire to compensate for a presumed bias toward mothers in custody cases).

27. Andrea C. Farney & Roberta L. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 41 (2003).

28. *Common Misconceptions*, *supra* note 19, at 57; Stark, *Rethinking*, *supra* note 19, at 307; see also Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 11 (2003).

29. Meier, *Domestic Violence*, *supra* note 19, at 662–65 (describing phenomenon of judges taking domestic violence seriously in criminal or protection order context, but applying none of that awareness, even to the same parties, in the custody context); Stark, *Rethinking*, *supra* note 19, at 297–98 ("[A]t best, the family courts remain deeply ambivalent about the changing normative response to abuse. . . . [A]busive partners continue to be given primary or shared custody in an alarming number of cases, even where abuse is well documented.").

abuse professionals don't see the whole picture, that domestic violence and child abuse claims are often fabricated, and that children's best interests cannot be determined solely based on past family violence.³⁰ They are supported in this perspective by social science researchers who reject the "feminist" paradigm of domestic violence (driven by male dominance); these researchers claim that family violence is committed as much or more by women, that women tend to exaggerate men's violence and discount their own role in altercations, and that much intimate partner violence is not serious.³¹

In short, driven in large part by social science professionals, the custody/abuse field is highly polarized between those who view family violence as a function of male domination of women and a serious problem for women and children in custody litigation, and those who see it as gender-neutral, not always so serious, over-stated by women, and often inaccurately reported by children.³² While a few professionals from both "camps" have initiated collaborative efforts to develop family court policies on intimate partner violence, as well as trainings and scholarship to bridge the two perspectives,³³ family courts as a whole

30. See Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 FAM. CT. REV. 63, 66–67 (2013); Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 10–11 (2010).

31. DONALD G. DUTTON, *RETHINKING DOMESTIC VIOLENCE*, at ix–xi, 348–49 (2006); Murray A. Straus, *Why the Overwhelming Evidence on Partner Physical Violence by Women Has Not Been Perceived and Is Often Denied*, 18 J. AGGRESSION, MALTREATMENT & TRAUMA 552, 552–65 (2009).

32. See, e.g., *Getting Real*, *supra* note 17, at 220 ("Nothing is more polarized in the family law field than the debate over domestic abuse and parental alienation."); Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 59 JUV. & FAM. CT. J. 19, 29–30 (2008).

33. See Salem & Dunford-Jackson, *supra* note 32; Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 459 (2008). The Battered Womens' Justice Project (BWJP) and the National Council of Juvenile & Family Court Judges have worked to improve communication between domestic violence and family court professionals, as well as to educate the latter in more depth about how to address domestic violence in cases. See generally Gabrielle Davis et al., *Domestic Violence-Informed Child Custody Decision-Making Worksheets*, BATTERED WOMEN'S JUST. PROJECT (Oct. 2017), <http://www.bwjp.org/resource-center/resource-results/child-custody-decision-making-worksheets.html>, for examples and access to these materials.

have remained largely immune to the importunings by—and concerns of—the domestic violence and child abuse fields.³⁴

II. JOHNSON'S TYPOLOGY

Into this contentious and high stakes context comes Michael Johnson's typology of domestic violence.³⁵ Johnson's contribution, however, differs from other social science constructs commonly used against mothers reporting abuse. First, unlike parental alienation proponents, Johnson is a bona fide feminist who cares deeply about domestic violence.³⁶ And second, many feminists and domestic violence professionals have accepted and welcomed his approach. Thus, while some in the domestic violence field have expressed concerns,³⁷ the typology has spread like wildfire through the research community, the domestic violence field, and to some extent, the family courts.³⁸

34. While many concerned commentators have urged training and emphasis on improving the abuse expertise of custody and other forensic evaluators, see, e.g., Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694 (2011) [hereinafter Haselschwerdt et al., *Feminist and Family Violence Perspectives*], it is unlikely that training is an adequate solution. Among other reasons, thoughtful studies of evaluators consistently find that evaluators have their own ideologies or value systems which make them either receptive or not receptive to concerns about domestic violence. See generally CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 22; Haselschwerdt et al., *Feminist and Family Violence Perspectives*, *supra*. Evaluators who are hostile to what they deem "feminist" understandings of abuse are not likely to be changed by training. Moreover, as is explicated above, individuals' resistance to taking family abuse seriously is not simply a matter of ignorance but is also a product of structural, ideological and institutional culture. *Lost in System: Former Family Court Judge/Wistleblower Speaks Out Salcido*, YOUTUBE (Oct. 6, 2012), <https://www.youtube.com/watch?v=MvA5hfTdsWI> (interview with Judge Lee Ann Salcido, describing how she was trained and urged by judicial superiors to be skeptical of women's claims of child sexual abuse).

35. JOHNSON, *supra* note 10, at 81–83.

36. Johnson self-identifies as feminist, has worked in a domestic violence shelter, and is considered an ally by many in the field. Johnson's website states: "You're a feminist if you believe that (1) men are privileged relative to women, (2) that's not right, and (3) you're going to do something about it, even if it's only in your personal life." Michael P. Johnson, *Welcome*, PA. ST. U., <http://www.personal.psu.edu/mpj/MPJ/Welcome.html> (last visited Mar. 28, 2018).

37. See Ver Steegh & Dalton, *supra* note 33, at 459 (reporting that some participants expressed "strong concerns" about the dangers of misapplications of typologies, while also urging further research); Joan Zorza, *The New Domestic Violence Typologies: An Accurate Reconceptualization or Another Trivialization?*, 3 FAM. & INTIMATE PARTNER VIOLENCE Q. 225, 225–35 (2011).

38. See *infra* Section III.

Johnson's driving purpose in developing the typology was to reconcile two opposing paradigms of what domestic violence actually is: Feminist researchers and professionals have long asserted it is almost entirely male domination of women, while non-feminist (or "family violence" professionals) assert that it is virtually gender equal.³⁹ He posited that this conflict was an artifact of the fact that different professional groups study different sub-populations.⁴⁰ In his view, domestic violence advocates and researchers are focused on victims seeking services such as shelter or legal protection—and these victims are more afraid, more endangered, and more likely to be female victims of male violence aimed at power and domination.⁴¹ He hypothesized that non-feminist "family violence" researchers who study survey populations through anonymous phone surveys were tapping into a completely different population in which men and women appear to be equally violent to each other.⁴² Johnson suggested that these surveys were picking up "common couple violence," but very few of the "male domination" cases, precisely because women in such relationships are too at risk to be able to participate freely in such a survey.⁴³ Conversely, he posited, men and women involved in mutually violent or non-oppressive violent relationships were likely to be less fearful and less at risk, and therefore less likely to seek services such as shelter or legal protection.⁴⁴ In short, he argued, the two camps are analyzing two different populations, and their theories of domestic violence are distorted by "sample selection bias."⁴⁵

To capture these two different paradigms of domestic violence, Johnson coined two categories: "Common Couple Violence" (later termed "Situational Couple Violence," hereafter "SCV") and "Patriarchal Terrorism" (later termed "Intimate Terrorism" and "coercive controlling violence," hereafter "IT/CCV").⁴⁶ As previously

39. See JOHNSON, *supra* note 10, at 105–09; EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007) [hereinafter STARK, COERCIVE CONTROL] (definitive treatise on male dominance and coercive control in intimate partner violence).

40. *Id.* at 2–4.

41. *See id.* at 83.

42. *Id.* at 3.

43. *See id.*

44. *See id.* at 21.

45. *See id.*

46. *See id.* at 2–3. The fact that IPV can vary in its sources, causes, and dynamics, and that not all of it is control-based, has long been recognized. *See, e.g.*, ELLEN PENCE & SHAMITA DAS DASGUPTA, PRAXIS INT'L, RE-EXAMINING 'BATTERING': ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME? 5–6 (2006), <http://praxisinternational.org/wp-content/uploads/2016/02/ReexaminingBattering-1.pdf>.

described, the first type (SCV) is “violence that is not connected to a general pattern of control” but “involv[es] specific arguments that escalate to violence.”⁴⁷ The second type (“IT/CCV”) is “the attempt to dominate one’s partner and to exert general control over the relationship, domination that is manifested in the use of a wide range of power and control tactics, including violence.”⁴⁸ Johnson emphasized that IT/CCV is what feminist writers and advocates have historically meant by “domestic violence.”⁴⁹ According to Johnson’s original description of this type, IT/CCV is committed “almost entirely” by men against women, and is driven by patriarchal attitudes.⁵⁰ However, SVC is what the family violence researchers have been finding in anonymous phone surveys. These surveys found that SVC is committed roughly equally by men and women and is not linked to gender attitudes, although Johnson’s definition includes relationships in which only one partner is violent.⁵¹ *Johnson goes on to posit that SCV is far more common than IT.*⁵² This assertion, which has been repeated in many publications, is one of the most impactful and problematic aspects of his theory in family courts.⁵³

In short, the essence of the typology is Johnson’s distinction between intimate partner violence which is control-driven and

Moreover, a variety of other typologies have been developed by different researchers. See, e.g., Amy Holtzworth-Munroe & Jeffrey C. Meehan, *Typologies of Men who are Maritally Violent: Scientific and Clinical Implications*, 19 J. INTERPERSONAL VIOLENCE 1369, 1371–72 (2004); JANE WANGMANN, AUSTRALIAN DOMESTIC & FAMILY VIOLENCE CLEARINGHOUSE, DIFFERENT TYPES OF INTIMATE PARTNER VIOLENCE – AN EXPLORATION OF THE LITERATURE 3–12 (2011) [hereinafter WANGMANN, EXPLORATION OF THE LITERATURE] (providing an overview of several different and intersecting typologies developed by multiple researchers).

47. Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 322–23 (2005).

48. *Id.* at 323.

49. See *id.* at 322.

50. JOHNSON, *supra* note 10, at 2. Johnson’s descriptions of the types and the sampling theory have continued to evolve. See Michael P. Johnson et al., *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required*, 20 VIOLENCE AGAINST WOMEN 186, 187, 198 (2014) [hereinafter Johnson et al., *Intimate Terrorism*] (refining prior analyses of survey data to clarify that intimate terrorism is found among at least twenty percent of violent ex-husbands, but that it is close to absent (based on a high cut-point) among current marriages). The authors do not explain how ex-marriages can be full of coercive control while it is absent from current marriages—given that all ex-marriages were, at one time, “current.”

51. See Johnson et al., *Intimate Terrorism*, *supra* note 50, at 191–92.

52. See *id.* at 192.

53. See *infra* Section III.A.1.

presumptively male-on-female (IT/CCV), and violence which is merely “situational” and more gender-equal, and sometimes but not always, mutual (SCV).⁵⁴ Johnson’s recognition of men’s use of power and control to dominate and subordinate women reinforces and lends scientific credibility to the so-called “feminist” paradigm of domestic violence—which has been the dominant view of domestic violence since the “power and control wheel” was invented, based on women’s descriptions of their experiences in the mid-1980s.⁵⁵ At the same time, Johnson’s other key type, “situational couple violence,” lends reinforcement to non-feminist researchers’ belief that intimate partner violence is ungendered, and that women are as—or more—violent than men. In short, there is something for everyone to like in the typology. The SCV type’s similarity to old, trivializing images of domestic violence as a “domestic spat” did, however, generate some concerns.⁵⁶

Given that Johnson, a feminist domestic violence researcher, had no intention of undermining courts’ responses to domestic violence, the use of his theory for this purpose compels further inquiry, including: How empirically supported is the typology, particularly the SCV type? Can we empirically verify the existence of distinct types of intimate partner violence that have attributes that matter to custody decisions? Do we know which type is truly more common? Can and do courts apply the typology accurately? Finally, even if the answers to these questions are partially or wholly affirmative, can this theory be expected to increase accuracy and fairness in legal adjudications?⁵⁷

The remainder of this article explores these questions, both legally and empirically, to assess whether the typology is adequately proven as an empirical matter, and a beneficial tool for custody litigation.

54. JOHNSON, *supra* note 10, at 7–11.

55. Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962–63 (2004) [hereinafter Tuerkheimer, *Recognizing and Remediating the Harm of Battering*] (“[D]omestic violence is widely understood as an ongoing pattern of behavior defined by both physical and non-physical manifestations of power. This is a remarkably uncontroversial proposition.”); STARK, COERCIVE CONTROL, *supra* note 39, at 118–19; Domestic Abuse Intervention Program, *Power & Control Wheel*, THE DULUTH MODEL, <http://www.theduluthmodel.org/pdf/PowerandControl.pdf> (last visited Mar. 28, 2018) [hereinafter *Power & Control Wheel*].

56. Joan Zorza, *The New Domestic Violence Typologies: An Accurate Reconceptualization or Another Trivialization?*, 3 FAM. & INTIMATE PARTNER VIOLENCE Q. 225, 225–35 (2011); see, e.g., Meier, *Domestic Violence*, *supra* note 19, at 665–67.

57. See generally Clare Huntington, Essay, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227 (2017) (describing three problems with family courts’ reliance on empirical research and offering several recommendations for improvement).

III. THE TYPOLOGY IN FAMILY COURT

Johnson has been fierce in admonishing scholars and practitioners that:

It is no longer scientifically or ethically acceptable to speak of domestic violence without specifying, loudly and clearly, the type of violence to which we refer.⁵⁸

Notably, this admonition seems to have had little impact on programs and services for abuse victims;⁵⁹ but it has been taken to heart by many family court professionals. This may be the result of Johnson and others' publicizing of the typology to family courts,⁶⁰ and

58. Michael P. Johnson, *Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence*, 2 J. CHILD CUSTODY 43, 45 (2005) [hereinafter Johnson, *Apples and Oranges*]. See generally Johnson & Leone, *supra* note 47. Johnson also posits two additional types, which are less controversial, somewhat less salient for family courts, and which have not been empirically analyzed. "Violent resistance" describes women's violence in reaction to control-based (i.e., IT) violence: It is sometimes, but not always, self-defense, but may also be a violent reaction to a man's dominating violence. "Mutual violent control" describes couples in which both parties vie for control with violence. While Johnson is uncertain whether this category exists in sufficient numbers to examine, at least one subsequent researcher has identified a significant number of such cases empirically in a study of same sex relationships. JOHNSON, *supra* note 10, at 22–23; Andrew Frankland & Jac Brown, *Coercive Control in Same-Sex Intimate Partner Violence*, 29 J. FAM. VIOLENCE 15, 21 (2014). This article does not address the latter two types, except to note the use of the concept of violent resistance in one case. See *infra* Section III.C.3.b; see also *infra* Section III.C.4.

59. The sole exception of which this author is aware is a court-based domestic violence program which finds it helpful in triaging among high volumes of applications for assistance. Interview with D.C. Survivors and Advocates for Empowerment ("D.C. SAFE") (May 9, 2016). While many domestic violence providers have long appreciated the importance of coercive control in batterers counseling, legal advocacy, etc.—this concept pre-dates Johnson's typology—its validation and utilization may have broadened as a result of his work.

60. See, e.g., Jennifer L. Hardesty et al., *Domestic Violence and Child Custody, in PARENTING PLAN EVALUATIONS: RESEARCH FOR THE FAMILY COURT* 442, 467 (Kathryn F. Kuehnle & Leslie M. Drozd eds., 2012) [hereinafter Hardesty et al., *Domestic Violence and Child Custody*] (stating that different types imply different parenting plans, and urging custody courts to apply the typology); Jennifer L. Hardesty et al., *Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types*, 77 J. MARRIAGE & FAM. 833, 841 (2015) [hereinafter Hardesty et al., *Toward a Standard Approach*]; Joan B. Kelly & Michael P. Johnson, *Domestic Violence: Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 476–78 (2008). See also Jane Wangmann, *Gender, Intimate Partner Violence, and the Growing Recognition of Differences: A Useful Tool for Family Law?*, in FEMINISM IN THE SUBCONTINENT AND BEYOND: CHALLENGING LAWS, CHANGING LAWS 77,

likely also the SCV type's utility to court professionals who are inclined to minimize the significance of domestic violence allegations.⁶¹ Given this utility, it is not surprising that domestic violence advocates have complained that the typology is being used in ways that are harmful to abused women and children.⁶²

The validity of the typology—both as a matter of social science and of law—is thus quite critical for the domestic violence and family law fields. In an earlier article, I analyzed and critiqued the data upon which Johnson relied on as “proof” of the typology, concluding that those data do not adequately prove his assertions about the existence of two distinct types of intimate partner violence, one of which is common and the other of which is rare.⁶³ However, that critique could be superseded if the typology has since been replicated and the attributes of the types validated by subsequent research. Since by now there are more than seventy articles and studies applying the typology in an empirical context, the following discussion incorporates the findings of the newer research to determine whether the original and common understandings of the types are being confirmed.⁶⁴

86–89 (Jaya Sagade et al. eds., Eastern Book Co., Lucknow 2014) [hereinafter Wangmann, *Gender, Intimate Partner Violence*] (describing incorporation of typology into Australian Family Courts’ “Family Violence Best Practice Principles”).

61. See *supra* Part II. Two Australian social scientists have warned of the dangers of the SCV type in family courts. Rathus, *Shifting Language*, *supra* note 6, at 381 (“[T]he minimising term ‘situational couple violence’ may conceal potential risks.”); WANGMANN, *EXPLORATION OF THE LITERATURE*, *supra* note 46, at 17 (“[M]isapplication of the typologies could jeopardise safety.”); see also Cashmore & Parkinson, *supra* note 5, at 247 (stating that inadequate or over-stated research findings can “send the decision-maker down wrong pathways, potentially leading to detrimental outcomes for children”).

62. In addition to handling appeals where SCV played a destructive role (including the one recounted in Section II.A above), this author has heard these complaints at conferences where she has presented her critique of the typology, and from members of a national domestic violence lawyers’ listserv. I have also been told that Johnson and his co-authors have received complaints from domestic violence advocates about the typology. See *infra* for further discussion of how the SCV type feeds into family courts’ pre-existing problematic responses to family violence.

63. See generally Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?*, 12 J. CHILD CUSTODY 4 (2015) [hereinafter Meier, *Johnson’s Differentiation Theory*].

64. As previously noted, the reproducibility of psychological research has lately been the subject of scholarly debate. A comprehensive attempt by multiple researchers to reproduce the results of one hundred psychological studies published in three leading peer-reviewed journals in 2008 found that fewer than forty of the studies and results were able to be replicated. Open Science Collaboration, *Estimating the Reproducibility of Psychological Science*, 349 SCIENCE 943, 945–46 (2015). While this study has itself been criticized as statistically flawed, the authors of the study have countered that the critique

If the typology is to offer any guidance for family courts, this must be because the key types of domestic violence differ in their impact on the family and children, and their implications for future abuse. In this regard, Johnson has described SCV as less severe, less frequent, and less likely to escalate,⁶⁵ though he has also acknowledged that it can be severe.⁶⁶ Intimate terrorism, he says, is the type most likely to be frequent, brutal, and to escalate.⁶⁷ According to additional research by Johnson and his co-authors, IT/CCV victims have more injuries, pain, health impact, post-traumatic stress disorder and loss of work than SCV victims.⁶⁸ However, in an important caveat, Johnson also states that the severity and frequency of violence does not exclusively *define* each type, although the types do differ “on average.”⁶⁹ Rather, he emphasizes that the defining distinction between types is the presence or absence of the *motive to control* the partner—not the severity of the violence.⁷⁰ In other words, his typology is specifically aimed at shifting our focus from the *severity* of intimate partner violence, to the *control* dynamic in the relationship.⁷¹

In broad strokes, the typology seems to have important implications for custody courts: if there are two primary types of intimate partner

itself is biased and selective. Carey, *supra* note 8. This debate is itself emblematic of the indeterminacy of social science research—a clear *caveat* for courts seeking to rely on it.

65. JOHNSON, *supra* note 10, at 23.

66. *See id.* at 62.

67. *See id.* at 21, 23; Johnson, *Apples and Oranges*, *supra* note 58, at 45 (“[I]ntimate terrorism is the type most likely to be frequent and brutal.”).

68. Johnson & Leone, *supra* note 47, at 344. Consistent with Johnson’s depiction of intimate terrorism, another study exploring Johnson’s categories found factors associated with IT/CCV (defined even more broadly than by Johnson) to be similar to those associated with femicide. Victoria Frye et al., *The Distribution of and Factors Associated with Intimate Terrorism and Situational Couple Violence Among a Population-Based Sample of Urban Women in the United States*, 21 J. INTERPERSONAL VIOLENCE 1286, 1308 (2006).

69. Johnson & Leone, *supra* note 47, at 334.

70. *See id.* at 326.

71. *See id.* Unless control is *per se* linked to danger, it is not clear why Johnson’s focus on control, as opposed to severity of violence, should matter to *courts*, whose primary focus is necessarily on crimes, violence, and future dangerousness, unless control is equated with dangerousness. While Evan Stark compellingly argues that coercive control behavior is worse than violence and deserves as much or more attention in the general understanding of courts, *see generally* STARK, COERCIVE CONTROL, *supra* note 39, that view is not yet reflected in the American legal system. Moreover, while Johnson and others treat IT/CCV, such as high control, as intrinsically more dangerous, the research is actually mixed. *See discussion infra* Section III.B.2.a. (discussing research suggesting that severity and frequency may be as good or better predictors of future risk than control, and noting that situational couple violence can also be high risk).

violence, and one portends greater severity and danger than the other, a court might want to know the difference and apply it in custody cases involving domestic violence. And sure enough, many custody courts have utilized the typology, but they have done so in ways that reflect both lacunae in the definitions of the types and in courts' own ability to accurately apply them. The next Section identifies four problematic trends in how Johnson's "situational couple violence" type (SCV) has been understood and utilized by American courts. For each problem, the Article also surveys the relevant research to verify whether the ways in which the SCV and CCV types are understood and used are actually empirically supported. Some of these approaches are courts' errors in applying the typology; however some of the problems are understandable results of the ways the types have been described and understood. These trends include (i) assuming incorrectly that most abuse alleged in family courts is SCV; (ii) assuming that SCV represents little danger to adults or children; (iii) mislabeling cases as SCV; and (iv) even using the SCV label to negate the law. While to date three cases have applied the coercive control type in a beneficial, protective manner, the most common use of the typology in family courts has been to apply the SCV label to minimize or ignore abuse. These cases demonstrate how both the complexities and even the fundamentals of the typology can be lost in translation to the litigation context, to the detriment of child and adult survivors of family violence. Moreover, given that the research also indicates that the types' key characteristics are indeterminate or variable, these problems are not curable by improving judicial understanding and applications.

A. Treating Intimate Partner Violence in Custody Litigation as Presumptively SCV

Johnson's typology theory was based on a small number of prior research studies, some of which included a "community" population and/or populations seeking shelter or legal protection, primarily consisting of protection order litigants.⁷² None of the data on which Johnson relied to derive his distinct types included custody litigants. And in the book in which he synthesizes that data and comprehensively lays out his typology, he makes no express assertions—other than one

72. See Meier, *Johnson's Differentiation Theory*, *supra* note 63, at 13–15 (describing studies Johnson relied on).

vague speculation—about the likelihood that family court cases primarily involve SCV.⁷³ Subsequent articles are similarly vague.⁷⁴

Nonetheless, there are two aspects of the typology which make it unsurprising for custody courts to start with a presumption of SCV, rather than the more frightening IT/CCV.

The first is Johnson's repeated assertion that situational violence is by far the more dominant form of intimate partner violence in society (the "prevalence claim").⁷⁵ Integrally related to this prevalence claim is Johnson's "sampling theory," which posits that IT/CCV is primarily seen in criminal justice or shelter (or "agency") populations, while SCV dominates in general community or survey samples.⁷⁶

It seems reasonable to speculate that these assertions have helped fuel the over-application of the SCV type in family courts. First, Johnson's oft-repeated prevalence claim asserts that the vast majority of people experiencing violence in their relationships are experiencing SCV. If so, it is no leap to presume the same of custody litigants.

73. The book implies that custody litigants may be similar to phone survey respondents, i.e., a random sample of the population, rather than that relatively small slice of the population which he believes comprises couples involved in "intimate terrorism." JOHNSON, *supra* note 10, at 81–82.

74. See Kelly & Johnson, *supra* note 60, at 476–89 (suggesting the high rate of IPV allegations in custody litigation, along with a purportedly low number of reports of violence in mediation, indicates that some of these couples may have been experiencing SCV, but urging further study); Hardesty et al., *Domestic Violence and Child Custody*, *supra* note 60, at 467 (making no predictions about which type predominates in custody litigation). However, some of Johnson's co-authors have recently suggested that violence among divorcing or separating couples is more likely to involve coercive control. E-mails from Megan L. Haselschwerdt, Assistant Professor in Child and Family Studies, Univ. of Tenn., to author (Mar. 10, 2017 & July 15, 2015) (on file with author).

75. Johnson et al., *Intimate Terrorism*, *supra* note 50, at 187 (describing that intimate terrorism and violent resistance "are rare[:] . . . situational couple violence is by far the most common form of intimate partner violence"); Rathus, *Shifting Language*, *supra* note 6, at 384 ("[M]uch of the typology literature continues to claim that situational couple violence is the most common type.") (citing a presentation by Johnson in Brisbane in 2013).

76. The sampling theory is a fundamental pillar of Johnson's typology, as it elegantly reconciles the gendered and conflicting claims of feminist and non-feminist researchers and professionals about what domestic violence is and is not. See *supra* note 75; JOHNSON, *supra* note 10, at 105–09. But cf. Meier, *Johnson's Differentiation Theory*, *supra* note 63, at 16–21 (noting that Johnson's data showed sizeable numbers of "SCV" cases in his "agency" sample and IT/CCV cases in thirty-five percent of the phone survey sample (a finding he characterized as "surprising"), casting doubt on his sampling theory). Johnson has since argued that his error was in treating surveys of prior relationships the same as surveys of current ones; he now argues that if you exclude prior relationships from a community survey his prevalence claim is supported. See generally Johnson et al., *Intimate Terrorism*, *supra* note 50.

Second, the sampling theory reinforces this presumption, because it distinguishes between “agency” populations (typically shelters, and criminal courts) and the rest of the community. Custody litigants are not normally equated with these agency populations—but rather, with the broader community. While an argument can surely be—and has been—made that custody litigants probably *should* be presumed to reflect IT/CCV as much or more than SCV,⁷⁷ this is not a widely recognized view.

Indeed, multiple family law specialists have asserted, with little empirical basis, that custody litigants can be presumed to be reporting primarily situational—and not “power and control”—violence.⁷⁸ Indeed, the concept of a “situational” and generally less severe form of intimate partner violence converges naturally with family courts’ pre-existing beliefs that tend to minimize domestic violence, including theories like parental alienation.⁷⁹

This view—and convergence—is reflected in most of the cases utilizing the typology to date. Like the *Jordan* case narrated above,⁸⁰ the vast majority of these cases have applied the SCV label to mothers’ allegations and proof of domestic violence and then used that label to minimize the abuse and to disfavor the mothers’ claims that it matters for custody decisions.⁸¹ Some, like that case, have gone further and

77. See *supra* note 74 and accompanying text (noting a suggestion from Megan L. Haselschwerdt that custody litigants may be more likely than the average population to be battling coercive control IPV); Wangmann, *Gender, Intimate Partner Violence*, *supra* note 60, at 90–91, 105–06 (noting that it is an open question what percentage of cases before the family court involve SCV, coercive controlling violence, or other types, and noting that most attorneys interviewed saw coercive controlling violence as the norm among their cases); see also Haselschwerdt et al., *Feminist and Family Violence Perspectives*, *supra* note 34, at 1696–97.

78. Johnston & Ver Steegh, *supra* note 30, at 66–67 (describing proponents of current family court practice as believing intimate terrorism is rare in the “custody-disputing population,” and “violence is more often viewed as situational . . . often initiated by women if not by both parties”); Stark, *Rethinking*, *supra* note 19, at 307 (quoting a leading custody evaluator who claims that most child custody abuse histories lack power and control dynamics and are situational to the divorce and separation). See generally Robert A. Zibell, *Common Couple Aggression: Frequency and Implications for Child Custody and Access Evaluations*, 43 FAM. CT. REV. 454 (2005) (suggesting that custody litigants who complain of domestic violence are raising common couple violence, rather than patriarchal terrorism).

79. See *supra* Section I.B.

80. See *supra* Section I.A.

81. See discussion *infra* Sections III.B.1, III.C.3.a.; See also *McGrady v. McGrady*, Nos. S-14577 & S-14617, 2013 WL 1188943, at *3, *6 (Alaska Mar. 20, 2013) (holding that domestic violence was SCV); *Mallory D. v. Malcolm D.*, 290 P.3d 1194, 1201, 1207 (Alaska 2012) (finding that father’s chokings of mother and anger problems were merely SCV,

punished mothers for maintaining a stance that their ex-husbands are dangerous, in seeming defiance of the SCV label. Given the logic of treating custody litigants consistent with a perceived norm, it is important to determine whether and to what extent Johnson's assertion that SCV is far more common in the population than IT/CCV is empirically supported.

1. Does the Research Support Johnson's Prevalence and Sampling Theory Assertions?

- a. *Prevalence of SCV vs. IT/CCV*

Johnson's conclusion that SCV is common and IT/CCV is rare was drawn from his analysis of the data points in various pre-existing studies. As I have explained elsewhere,⁸² Johnson maps out data points he identifies based on the number of different types of control behaviors along a spectrum of degrees of control.⁸³ Identifying two separate clusters of data points along the spectrum, he treats the high control couples as IT/CCV and the lesser control couples as SCV.⁸⁴ Using similar cut-points, several early replication studies were able to corroborate Johnson's assertion that SCV is more prevalent than IT.⁸⁵ For instance, Laroche's study specifically adopted Johnson's cut-point (treating two or fewer control items as SCV)⁸⁶ and roughly replicated Johnson's prevalence results in an analysis of the 1999 Canadian General Social Survey.⁸⁷

comparable to mother's slapping father); *Stephanie F. v. George C.*, 270 P.3d 737, 740 (Alaska 2012); *Morrison v. Zacharia* (*In re Morrison & Zacharia*), No. A117627, 2009 WL 1163832, at *1, *5 (Cal. Ct. App. Apr. 30, 2009) (describing incident as "merely 'situational couple violence'"); *C.A. v. J.B.*, No. 55A04-1011-JP-723, 2011 WL 2847432, at *6-7 (Ind. Ct. App. July 19, 2011) (finding that "Situational . . . or . . . Separation Instigated Violence" is of minimal concern); *Malenko v. Handrahan*, 979 A.2d 1269, 1272 (Me. 2009) (quoting *Guardian Ad Litem*'s finding that the domestic violence was "not . . . typical" because the mother had more power and control). *But see* discussion *infra* Section III.C.4. (discussing two cases in which family courts used distinctions between situational or resistant violence and coercive control productively in "mutual violence" cases, to distinguish between defensive/reactive and aggressive violence).

82. Meier, *Johnson's Differentiation Theory*, *supra* note 63, at 14-16.

83. In fact, because some of the studies which he mined for data were not measuring control, he was forced to use proxy behaviors such as cursing, insulting, etc., to measure control. *See id.* at 14.

84. *Id.* at 17-19.

85. *Id.* at 18-19.

86. Johnson & Leone, *supra* note 47, at 329-33.

87. DENIS LAROCHE, INSTITUT DE LA STATISTIQUE DU QUÉBEC, ASPECTS OF THE CONTEXT AND CONSEQUENCES OF DOMESTIC VIOLENCE - SITUATIONAL COUPLE VIOLENCE

Yet a significant number of studies have also found *reversed* proportions of IT/CCV and SCV. For instance, one study (sometimes cited as validating the typology) expressly dissented from Johnson's choice of cut-points and his prevalence assertions.⁸⁸ Looking at a community sample, Victoria Frye and her co-authors found that sixty-nine percent of violent couples experienced at least one controlling behavior by a partner.⁸⁹ Concerning Johnson's own higher cut-point of three control behaviors to define IT/CCV, the authors stated,

[T]he choice of [three] as a cut point for controlling behaviors for assaulted women seems high.

. . . [E]ach of the other four controlling behavior items included in our index indicates serious attempts to control either the time, contacts, or access to financial resources of the respondents, and on their face, cannot be conceived of as innocuous relationship behaviors. . . . [IT/CCV] is the frequency with which tactics are used and how much control is achieved, rather than the number of different tactics[] that makes a difference.⁹⁰

The authors concluded that SCV—not IT/CCV—may be “the least common” form of domestic violence at the population level.⁹¹ Similar findings reversing Johnson's prevalence claims have been reported by several other researchers.⁹²

AND INTIMATE TERRORISM IN CANADA IN 1999, at 10 (James Lawler trans., 2005) (finding that seventy-four percent of female victims of current partners and eighty-one percent of male victims fit SCV type); see also Frankland & Brown, *supra* note 58 at 19–22 (finding roughly three times the amount of SCV as IT among same-sex partners).

88. Frye et al., *supra* note 68 at 1303–05, 1307–09.

89. *Id.* at 1300.

90. *Id.* at 1304.

91. *Id.* at 1305.

92. See Connie J. A. Beck et al., *Patterns of Intimate Partner Violence in a Large, Epidemiological Sample of Divorcing Couples*, 27 J. FAM. PSYCHOL. 743, 750 (2013) [hereinafter Beck et al., *Patterns*] (identifying two levels of coercive control and no SCV among divorcing couples); Janet L. Fanslow & Elizabeth M. Robinson, *Sticks, Stones, or Words? Counting the Prevalence of Different Types of Intimate Partner Violence Reported by New Zealand Women*, 20 J. AGGRESSION MALTREATMENT & TRAUMA 741, 750 (2011) (finding that 72.7% of most recent partners and 48.5% of current partners who used IPV also used coercive control); Samantha K. Nielsen et al., *Exploring Variations Within Situational Couple Violence and Comparisons With Coercive Controlling Violence and No Violence/No Control*, 22 VIOLENCE AGAINST WOMEN 206, 212 (2015) (finding 11.8% SCV, 44.1% coercive control and 24.6% nonviolent coercive control).

Doubts about the prevalence of SCV have been highlighted, particularly in research into diverse populations. A book review of Johnson's book, which also describes a study of IPV among African-American women, questions whether the dynamics in African-American IPV fit the typology, noting that the study showed that even when the women had more financial power and independence, the men's deliberate cruelty resembled coercive control.⁹³ And a study of Latino and non-Latino women found that both populations in a community sample had experienced some degree of coercive control.⁹⁴

b. Sampling Theory

Johnson's assertion that IT/CCV can be expected to be found at higher rates among shelters and courts ("agencies"), while SCV is predominant at the population level has also been both validated and contested in the subsequent research literature.⁹⁵

First, even three of the earliest studies to report "validation" of Johnson's typology contradict the sampling hypothesis in some respects. For instance, Ansara and Hindin found control-based IPV in the community sample, especially with past partners.⁹⁶ Laroche identified IT/CCV within the population survey and described another study that documented high rates of extreme control in a community sample.⁹⁷ And Frye and her co-authors not only found coercive control to constitute the majority of IPV, they found it in a non-agency, population

93. Laura Beckerman, Book Note, 24 BERKELEY J. GENDER L. & JUST. 75, 81–84 (2009) (reviewing JOHNSON, *supra* note 10, and HILLARY POTTER, BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE (2008)).

94. See Nancy Glass et al., *Patterns of Partners' Abusive Behaviors as Reported by Latina and Non-Latina Survivors*, 37 J. COMMUNITY PSYCHOL. 156, 164 (2009).

95. See Nicola Graham-Kevan & John Archer, *Intimate Terrorism and Common Couple Violence: A Test of Johnson's Predictions in Four British Samples*, 18 J. INTERPERSONAL VIOLENCE 1247, 1264 (2003) (finding higher rates of IT/CCV among women in shelters compared to student population, which contained much more common couple violence).

96. Donna L. Ansara & Michelle J. Hindin, *Exploring Gender Differences in the Patterns of Intimate Partner Violence in Canada: A Latent Class Approach*, 64 J. EPIDEMIOLOGY & COMMUNITY HEALTH 849, 853 (2010). Johnson appears to have now concluded that IT/CCV is indeed much more common in population surveys of *past* partners. See generally Johnson et al., *Intimate Terrorism*, *supra* note 50. He has not discussed any broader implications of this for the sampling theory and his assertion that SCV is most common within the community, especially given that all past partners were at one time "current."

97. LAROCHE, *supra* note 86, at 18–19.

survey.⁹⁸ Finally, in investigating the typology in the context of criminally reported intimate partner sexual assaults, O'Neal, Tellis, and Spohn found that, within a database of sexual assaults reported to police, 51 of a total of 134 cases were not part of an overall control dynamic, thus labelled SCV, contrary to the sampling theory, which posits that SCV is rare within an agency population.⁹⁹ Moreover, as the authors point out, because "sexual assault is inherently serious," the SCV label seems "insufficient."¹⁰⁰ These researchers assert that "the inherent control dynamics present in sexual assault make Johnson's entire power-based conceptualization useless."¹⁰¹

It thus appears that the subsequent research indicates that Johnson's assertions that SCV is common and IT/CCV is rare, and that IT/CCV is unlikely to be found at the population level, are, at the least, overstated. Existing research, as well as the very data Johnson originally analyzed,¹⁰² paints a more scattered picture of SCV and IT/CCV distributed to some degree across both populations and agencies. Assumptions that custody litigants are more likely to present SCV than IT/CCV are thus misplaced, both for this reason, and because, as Megan Haselschwerdt has pointed out,¹⁰³ couples litigating custody (i.e., separating couples) may in fact be more like the "agency" populations associated with IT/CCV than the broader community. This has significant implications for the accuracy of family court adjudications, given the current tendency for such courts to presume that any domestic violence is SCV.

98. See Frye et al., *supra* note 68, at 1310; see also Glass et al., *supra* note 87, at 164, 167.

99. Eryn Nicole O'Neal et al., *When the Bedroom is the Crime Scene: To What Extent Does Johnson's Typology Account for Intimate Partner Sexual Assault?*, 11 J. CHILD CUSTODY 278, 283–84, 298 (2015).

100. *Id.* at 297–301.

101. *Id.* at 301; see Glass et al., *supra* note 87, at 167 (forced sex was a dominant control mechanism in Latina population, but is not addressed by Johnson's typology). O'Neil and her co-authors go on to say that Johnson's failure to include sexual assault in his conceptualization of the types also casts doubt on the entire typology. O'Neil et al., *supra* note 99, at 297–99 (stating that the absence of sexual assault "undermine[s] the typology's utility").

102. See Meier, *Johnson's Differentiation Theory*, *supra* note 63, at 15 (describing (i) how Johnson's prevalence assertion stems from his determination to treat the two clusters of high control and low control as different types, although both populations have indicia of control; and (ii) Johnson's own "surprise" both that substantial proportions of IT/CCV appeared in the survey populations and that SCV appeared in the shelter population).

103. See E-mails from Megan L. Haselschwerdt, *supra* note 74.

B. Presumptions About the Dangerousness of Each Type

1. Cases

As the *Jordan* case shows,¹⁰⁴ the “situational” label is easily applied by evaluators and family courts to minimize the significance of past intimate partner violence.¹⁰⁵ There, the evaluators labeled Mr. Jordan’s two adjudicated assaults “situational” because they did not identify a pattern of control by him of his wife—his violence appeared to them to be a function of his explosive anger. In fact, the court described Mr. J as “more likely to lose his temper than most people” and concluded that he “used temper and intimidation to impose his will.”¹⁰⁶ While explosive anger might reasonably be considered to indicate a potentially serious parenting problem, and even potentially a controlling nature, neither the evaluators nor the judge made this connection, instead using the “situational” label to signify this father’s safety in a parenting role.¹⁰⁷ This minimizing of the father’s domestic violence with the SCV label allowed the court and the neutral facilitators to presume Mr. J. was entirely safe (“violence with a small v”), and to then castigate Ms. J. for refusing to so assure the children. The label also both reinforced the court’s treatment of her as “alienating” and led to her loss of custody,¹⁰⁸ and concomitant traumatic losses for the children.

A similar pattern can be seen in *Malenko v. Handrahan*.¹⁰⁹ Here, the Maine Supreme Judicial Court affirmed a trial court’s award of unsupervised visitation to a father who had committed a series of violent acts against his wife in close proximity to their infant.¹¹⁰ The appellate court quoted the guardian ad litem’s opinion:

[T]he guardian concluded that the episodes of domestic violence were attributable to “situational couple violence” arising from conflicts in the marriage, as opposed to “coercive controlling violence,” which is characterized by power and control and often results in serious injuries. . . . “This is not a typical domestic

104. See *supra* Section I.A.

105. *Jordan v. Jordan*, 14 A.3d 1136, 1142–43 (D.C. 2011).

106. Brief for Appellant at 11, *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011) (No. 09-FM-1152).

107. *Id.*

108. *Jordan*, 14 A.3d at 1143.

109. 979 A.2d 1269 (Me. 2009).

110. *Id.* at 1270.

violence situation, in that the person with the power and control in the relationship was clearly [the mother]”¹¹¹

As in *Jordan*, the mother in *Malenko* continued to report that the father was physically and sexually harming the toddler on visits, and to object to his unsupervised access. Given the negation of his violent history as merely “situational,” her reports were ignored and rejected, and she ultimately lost custody and all access to her child.¹¹² Here too, the “situational” moniker was used to not only minimize but essentially delete any risk associated with a father, leading to penalizing a protective mother, despite the father’s documented violence and rage toward his ex-wife, in a context which also endangered the infant.

Similarly, in *C.A. v. J.B.*,¹¹³ the appellate court affirmed the trial court’s finding that there was

no “pattern” of violence in either home. Much has been made of the battery case flowing from the parties [*sic*] break up, but under the Court’s understanding of current domestic violence analysis this appears to be an incident of Situational Couple Violence or more likely Separation Instigated Violence rather than the Coercive Controlling Violence which would give the court great concern. Under this analysis this factor only slightly favors the mother.¹¹⁴

111. *Id.* at 1272.

112. Lori Handrahan, *Judge Moskowitz & Mila in Maine*, MEDIUM (Jan 7, 2015), <https://medium.com/@LoriHandrahan2/judge-moskowitz-mila-in-maine-6f2de07e2783#dj5c93ibo>; Lori Handrahan, *Five Witness Statements Federal Obstruction of Justice Waxman & Malenko 2012*, SCRIBD, <https://www.scribd.com/document/195833068/Five-Witness-Statements-Federal-Obstruction-of-Justice-Waxman-Malenko-2012> (last visited Mar. 28, 2018).

113. No. 55A04-1011-JP-723, 2011 WL 2847432, at *1 (Ind. Ct. App. July 19, 2011).

114. *Id.* at *6. “Separation-instigated” violence is a construct invented by Joan Kelly; Johnson appears to have adopted it to some extent, although it lacks the empirical foundation Johnson asserts supports his own types. See Kelly & Johnson, *supra* note 60, at 477–79, 487–88. Indeed, Johnson’s seeming adoption of the notion of “separation-instigated” assault, as an aberration in an otherwise non-abusive relationship, compounds the problems with SCV. Separation assault, abuse, which reacts to a move toward independence by a partner, is a classic, well-recognized indication of control-based domestic violence, and if anything, should be interpreted as IT/CCV, and not SCV. Martha R. Mahoney, *Legal Images of Battered Violence: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 69 (1991) (coining the term and explaining separation assault as an outgrowth of power and control). See generally Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting*, 8 VIOLENCE AGAINST WOMEN 597 (2002). While separation assault is a notorious indicator of a controlling abuser,

As a result, the court awarded custody to the father; the appeals court affirmed.¹¹⁵ In *In re Morrison & Zacharia*,¹¹⁶ the court of appeals affirmed a trial court's refusal to allow a mother to relocate with her child, while characterizing the father's conceded pushing of her during an altercation as "merely" situational couple violence, despite the entry of a prior restraining order, which according to the typology should have pointed to IT.¹¹⁷ In *Mallory D. v. Malcolm D.*,¹¹⁸ the court treated a history of chokings, other violence, and drunkenness as "situational" and the equivalent of the mother's two slaps of the father—therefore the domestic violence did not preclude shared custody.¹¹⁹ In *Bookal v. Hardie*,¹²⁰ the court dismissed two past incidents of violence by the father against the mother as "isolated and situational," awarding the father with primary residence.¹²¹ And in *Kinas v Kinas*,¹²² an incident involving sexual assault and alleged strangulation was characterized by the anger management counselor as "situation specific" and consistent with primary custody to the father.¹²³

Even where courts do not explicitly use the "situational" label, evaluators often do, and their minimization is often reflected in the court's ultimate decision. For instance, in *In re Marriage of Burton*,¹²⁴ an evaluator who initially recommended primary custody with the mother reversed his position after investigating parental alienation, then concluding that the alienation outweighed mere SCV.¹²⁵ In *Sullwold v Sullwold*, the expert characterized the husband's history of abuse of the wife and children, which included derogatory verbal insults, as "situational;" the court said nothing about the domestic

"separation-instigated violence" implies a one-off event which is *not* indicative of dangerousness. See Kelly & Johnson, *supra* note 60, at 487. For present purposes, because "separation-instigated" violence was not part of Johnson's empirical analysis or the replication studies of his typology, it is not discussed further herein.

115. C.A., 2011 WL 2847432, at *8.

116. No. A117627, 2009 WL 1163832 (Cal. Ct. App. Apr. 30, 2009).

117. See *id.* at *5, *12.

118. 290 P.3d 1194, 1198 (Alaska 2012).

119. *Id.* at 1200–02. The court concluded that "neither party [was] less likely than the other' to perpetrate [future] domestic violence" (citing the state statute) and therefore refused to modify the parties' joint custody. *Id.* at 1201, 1206–07.

120. No. HHBFA124030179, 2014 WL 1674229 (Conn. Super. Ct. Mar. 31, 2014).

121. *Id.* at *3, *4, *8.

122. No. 98965, 2013 WL 3878173 (Ohio Ct. App. July 25, 2018).

123. *Id.* at *2.

124. No. 43997-2-II, 2014 WL 465849 (Wash. Ct. App. Feb. 4, 2014).

125. *Id.* at *1; Brief for Respondent at *12, *In re Marriage of Burton*, 2014 WL 465849, 2013 WL 6927604, at *12 (describing the violence as "more consistent with *mutual couple's conflict* [than] *coercive and control violence*") (emphasis in original).

violence.¹²⁶ And in *In re Marriage of Lin*, the expert characterized the parents' having "gotten physical" as "situational couple violence, which is mutual stuff like that."¹²⁷ Ironically and troublingly, on appeal, the appeals court reversed and removed the wife's restraining order, ruling that it was inconsistent with the court's award of visitation to the presumably safe father.¹²⁸

In short, while in some of these cases the "situational" label was not the sole reason for the troubling outcome (including in *Jordan* and *Malenko*, complete loss of custody from a non-offending and concededly fit mother), in each case, at minimum, it reinforced and facilitated the use of other theories such as parental alienation, or operated on its own to minimize the significance of a father's past violence.¹²⁹ The "situational" label allowed the courts to essentially ignore the history of abuse, and treat it as "violence with a small v,"¹³⁰ and on that basis, to ignore the statutory constraint on custody to perpetrators of domestic violence. In some cases, the courts went further and penalized the protective mothers for pressing the matter.¹³¹

These decisions beg the question: Are courts and evaluators correct in presuming that the "SCV" label—even if correctly applied—indicates that a parent's past violence warrants little concern, and need not be considered indicative of post-separation risk to children?

2. What Does Empirical Research Show About the Dangerousness of the Different Types of Domestic Violence?

Perhaps the most important question regarding the usefulness of the typology in custody litigation is whether the types differ with regard to future dangerousness—to both adult ex-partners and any children.

126. Petition for Writ of Mandate at *8, *17–*18, *Sullwold v. Sullwold*, No. C074268, 2013 WL 4052033 (Cal. Ct. App. July 12, 2013).

127. Reply Brief for Appellant at *5, *In re Lin*, 225 Cal. Rptr. 3d 34 (2014) (No. G049307), 2014 WL 10010502 at *5.

128. *Id.* at *20–21; see generally *In re Lin*, No. G049307 (Cal. Ct. App. filed May 22, 2015), <http://www.courts.ca.gov/opinions/nonpub/G049307.PDF>.

129. In *Jordan*, the court and evaluators ignored the older child's report that it was her father's lying about his behavior and his violent shaking of her (over a toothbrush), on a visit to his new home that turned her against him. Brief for Appellant at 29–30, 30 n.12, *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011) (Nos. 09-FM-1152, 09-FM-1337, 10-FM-375).

130. *Jordan*, 14 A.3d at 1142.

131. *Id.* at 1162 (confirming the custody order in favor of the defendant father); *Malenko*, 979 A.2d at 1279 (confirming the custody order in favor of the defendant father); see also sources cited *supra* note 81.

While Johnson defines the types based on the presence or absence of coercive control, he also characterizes them as more or less dangerous, both in the past and as predictors of the future. He and his co-authors state that IT/CCV “on average is . . . more severe, frequent, and injurious” violence, like what is traditionally thought of as “battering.”¹³² Moreover, “[o]ne of the major predictors of continued violence is the presence of the controlling behaviors that define Coercive Controlling Violence.”¹³³ In contrast, SCV is described as “less severe” and not typically characterized by fear.¹³⁴ SCV is said to typically have “a lower per-couple frequency of occurrence . . . and more often involves minor forms of violence . . . compared to Coercive Controlling Violence.”¹³⁵

This essential distinction between the types has clear implications for family court practice. If domestic violence in a given case is identified as Coercive Controlling Violence, the typology urges close attention; if, however, past violence is labeled SCV, the typology implies that it is of less concern, and not indicative of real dangerousness.¹³⁶ As surveyed above, this is precisely how courts have applied the SCV label—going so far as to castigate ex-wives who insist on pressing concerns of dangerousness once the label has been adopted.¹³⁷

It should be noted that Johnson and his co-authors regularly acknowledge exceptions to these generalizations. For example, they note that *some* SCV “is chronic and/or severe, even life-threatening.”¹³⁸ But, while such a caveat is important for Johnson as a scholar and for the research community generally, it should not be surprising that caveats such as this are not transferrable to specific cases in court: a typology by its very nature is designed to generalize; without the

132. Hardesty et al., *Domestic Violence and Child Custody*, *supra* note 60, at 444 (citation omitted).

133. Kelly & Johnson, *supra* note 60, at 483.

134. *See id.* at 481, 485–86.

135. *Id.* at 485 (citation omitted).

136. *See id.*

137. *See, e.g., Jordan v. Jordan*, 14 A.3d 1136, 1150 (D.C. 2011) (describing the intensity of violence deemed situational as “outlandishly exaggerated”); *Malenko v. Handrahan*, 979 A.2d 1269, 1272 (Me. 2009) (stating that, counter to mother’s urging, there was no evidence that father’s “situational” violence was “dangerous”).

138. JOHNSON, *supra* note 10, at 70 (noting “the [e]ssential [v]ariability of [s]ituational [c]ouple [v]iolence”); Jennifer L. Hardesty et al., *An Integrative Theoretical Model of Intimate Partner Violence, Coparenting After Separation, and Maternal and Child Well-Being*, 4 J. FAM. THEORY & REV. 318, 324 (2012) [hereinafter Hardesty et al., *An Integrative Theoretical Model*] (noting that SCV is sometimes chronic and/or severe, and more likely to be perpetrated by both men and women and to be mutual).

generalizations there is no utility to the categories.¹³⁹ If the nuances and caveats mean that both types require a specific analysis of the history of abuse in each case, the value of categorizing by type would be lost. Moreover, it is inherent in the use of a dualistic typology that exceptions to the general rule will be lost in translation to specific cases. Indeed, if courts were taught *not* to presume SCV is minor and low risk, the typology would serve little purpose, because it would no longer offer a shorthand for determining safety and future risks.¹⁴⁰ Thus, the types' utility in court – as opposed to the research literature – must be considered in light of the generalizations that define and distinguish them.

a. Overall Dangerousness of IT/CCV vs. SCV

Ample research supports Johnson's emphasis on the severity and harmfulness of coercive controlling violence. Early on, Johnson and Leone found that IT/CCV victims had more injuries, pain, health impact, post-traumatic stress disorder, and loss of work than SCV victims.¹⁴¹ Thereafter, Ansara and Hindin found that women experiencing high control experienced beatings, choking, fear for their lives, and injuries, while other groups of men and women experienced lesser violence;¹⁴² Graham-Kevan and Archer found that greater violence, harm and fear were present where there was greater control, and that "common couple violence" decreased over time;¹⁴³ Laroche found that physical or clinical consequences were correlated with IT/CCV and severe violence, which was also more repetitive;¹⁴⁴ Frye,

139. Distinguishing "types" of domestic violence based on whether they occur in a context of overall coercive control is likely both less problematic and more useful in the service—as opposed to the legal-context. Whether abuse is control-based or not might well point to different treatment and services, even apart from its severity or dangerousness. See, e.g., Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 110 PA. ST. L. REV. 337 (2015). It is far less obvious that control—which is the defining distinction between the types—is, without more, what courts need to look at in order to determine future risks to children and parents.

140. Family court adjudications would be safer and more accurate under a case-specific approach which started with the premise that mothers who fear their ex-spouses and seek to protect their children, even without a pattern or coercive control, are not necessarily over-reacting; and then evaluated not only coercive control but the severity and frequency of violence, risk assessments, and specific triggers for "situational" violence.

141. Johnson & Leone, *supra* note 47, at 344.

142. Ansara & Hindin, *supra* note 96, at 851.

143. See Graham-Kevan & Archer, *supra* note 94, at 1263.

144. See generally LAROCHE, *supra* note 86, at 10–19.

Manganello, Walton-Moss and Wilt found that even relationships with “moderate” control had characteristics that matched those correlated with femicide;¹⁴⁵ Johnson, Leone, and Xu found that IT/CCV victims who failed to seek help were afraid, while the SCV victims felt less need for help;¹⁴⁶ Hardesty and her co-authors found that divorcing women victimized by IT/CCV experienced more intrusion, manipulation and difficulty co-parenting than SCV victims;¹⁴⁷ Leone found that African American IT/CCV victims suffered greater harm than SCV victims;¹⁴⁸ and Myhill found that IT/CCV was more violent, frequent, severe, injurious and persistent, and led to greater help-seeking.¹⁴⁹

Interestingly, evidence has also emerged that suggests that *non-violent* coercive control *by itself* can cause virtually the same degree of fear and distress to the victim as coercive control accompanied by violence.¹⁵⁰ Anderson found that “a high level of relationship control is associated with negative health outcomes even when this control does not co-occur with violence.”¹⁵¹ Beck and Raghavan stated that their research affirmed “the argument that coercive control is an efficient and accurate signal of relationship distress” even without substantial violence.¹⁵² This research powerfully reinforces Evan Stark’s argument that the greater harm in coercive control is the deprivation of autonomy and individual security than acts of violence *per se*.¹⁵³

While the findings about non-violent coercive control underline the significance of coercive control, which might be seen as supporting Johnson’s IT type, they actually *undercut* the essential concept of

145. Frye et al., *supra* note 68, at 1304.

146. See Johnson et al., *Intimate Terrorism*, *supra* note 50, at 195–202.

147. Jennifer L. Hardesty et al., *Coparenting Relationships After Divorce: Variations by Type of Marital Violence and Fathers’ Role Differentiation*, 57 FAM. REL. 479, 489 (2008) [hereinafter Hardesty et al., *Coparenting Relationships After Divorce*].

148. Janel M. Leone, *Suicidal Behavior Among Low-Income, African-American Female Victims of Intimate Terrorism and Situational Couple Violence*, 26 J. INTERPERSONAL VIOLENCE 2568, 2584–85 (2011).

149. Andy Myhill, *Measuring Coercive Control: What Can We Learn From National Population Surveys?*, 21 VIOLENCE AGAINST WOMEN 355, 369 (2015).

150. See Beck et al., *Patterns*, *supra* note 91, at 747–51; MARY ANN DUTTON ET AL., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE: FINAL TECHNICAL REPORT 10 (2005) (noting that coercive control alone, apart from the degree of violence, was correlated with PTSD and fear).

151. Kristin L. Anderson, *Is Partner Violence Worse in the Context of Control?*, 70 J. MARRIAGE & FAM. 1157, 1166 (2008).

152. Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 562 (2010).

153. STARK, COERCIVE CONTROL *supra* note 39, at 10, 15–17.

IT/CCV as more physically dangerous than SCV. If coercive control itself does great harm *even without violence*, this means that both *harm and control* are de-linked from severity of violence—which contradicts the functional equation of IT/CCV with greater danger and violence.¹⁵⁴

At the same time, other research suggests that it is not control, but severity of violence, that is most harmful. For instance, a study of African-American and Hispanic/Latino populations found that in both populations “the violence scale alone [was] a slightly better predictor of depressive symptoms than the IT/SCV typology.”¹⁵⁵ Another study found that severity of violence, PTSD, and impact on employment correlated with degree of fear, and *cut across the two types*.¹⁵⁶ In her study of whether control or violence is more important, Anderson found violence to be a better predictor of injury and the victim’s decision to leave, although control predicted PTSD.¹⁵⁷ Finally, another study of African-American intimate partner violence reported that relatively low control was accompanied by severe violence and cruelty, mixing the characteristics of both types.¹⁵⁸

In addition to raising questions about whether IT/CCV is necessarily the more violent type, research also casts doubt on the belief that SCV is generally less dangerous or fear-instigating. A number of the studies specifically point out that where “SCV” is one-directional (i.e., not mutual) and repeated, a victim’s fear is both likely and significant.¹⁵⁹ Frye and her co-authors found that the few SCV cases they identified included severe fear,¹⁶⁰ Nielsen found that forty percent

154. These findings support Evan Stark’s argument that coercive control, not violence per se, is the fundamental and most essential harm to women from abuse. STARK, COERCIVE CONTROL *supra* note 39, *passim*. While accepting the seriousness of coercive control, in this author’s view, severe violence warrants a serious response and concern by the legal system regardless of control—which presents another question about the value of the typology in court.

155. Anne Bubriski-McKenzie & Jana L. Jasinski, *Mental Health Effects of Intimate Terrorism and Situational Couple Violence Among Black and Hispanic Women*, 19 VIOLENCE AGAINST WOMEN 1429, 1444 (2014).

156. Janel M. Leone et al., *Women’s Decisions to Not Seek Formal Help for Partner Violence: A Comparison of Intimate Terrorism and Situational Couple Violence*, 29 J. INTERPERSONAL VIOLENCE 1850, 1868–69 (2014).

157. Anderson, *supra* note 151, at 1162–67; *see also* Nielsen et al., *supra* note 92, at 220 (finding it more important to look at impact of severe violence than type).

158. Beckerman, *supra* note 93, at 75, 84 (reviewing study).

159. Anderson, *supra* note 151, at 1166. As I have argued elsewhere, where there is one-way fear and violence, control is almost unavoidable, potentially defeating the core distinction between the two types. *See* Meier, *Johnson’s Differentiation Theory*, *supra* note 63, at 17.

160. Frye et al., *supra* note 68, at 1308.

of SCV was very severe violence, and that SCV can “resemble[] [coercive controlling violence]” in its impact on depression and PTSD, and can cause even greater fear;¹⁶¹ and O’Neal and her co-authors found in their study of sexual assault that, although cases reported to police were often SCV (because they were not part of a controlling relationship), “the inherent seriousness of sexual assault, coupled with the injuries sustained by the victims and the nonviolent control tactics [used to effectuate the rape] . . . [indicated] SCV can have more detrimental consequences than initially thought.”¹⁶² And Graham-Kevan and Archer found that “the use of controlling behaviors predicted physical aggression and violence *both* for . . . IT [intimate terrorism], and . . . ‘common couple violence []’.”¹⁶³

In short, the research diverges from the typology’s construct of two primary and distinct types of domestic violence, one of which is relatively more severe and dangerous, and the other of which is not. A fair quantity of research suggests instead that coercive control, severe violence, and fear are *each* profoundly harmful, and that severe violence and fear may occur without relationship-wide coercive control. If dangerousness and harmfulness cut across *both* SCV and IT/CCV, then a history of SCV can also indicate real danger, contrary to the typology’s implications.

b. *Post-Separation Risks*

Even if the evidence were to support the theory that IT/CCV is correlated with greater, more severe violence than SCV, it is a separate question whether one type or the other is more likely to continue or escalate *post-separation*. In the context of custody litigation, this is the key question.

Johnson and co-authors, in encouraging custody courts to apply the typology, assert that coercive controlling violence—but not SCV—is correlated with continued post-separation violence, while SCV is likely

161. Nielsen et al., *supra* note 92, at 216–17; see also WANGMANN, EXPLORATION OF THE LITERATURE, *supra* note 46, at 13, 15 (SCV includes serious IPV).

162. O’Neal et al., *supra* note 99, at 298; see also Graham-Kevan & Archer, *supra* note 94, at 1254–55 (finding that controlling behavior was causally connected to levels of physical aggression across both IT/CCV and SCV). In their replication of Johnson’s typology, Frye and her co-authors similarly found that victims of “moderate levels of control” (lower than Johnson’s cut-point for IT) experienced several factors correlated with femicide. Frye et al., *supra* note 68, at 1304.

163. Nicola Graham-Kevan & John Archer, *Does Controlling Behavior Predict Physical Aggression and Violence to Partners?*, 23 J. FAM. VIOLENCE 539, 545 (2008) (emphasis added).

to cease after the parties separate.¹⁶⁴ What does the subsequent replication research show?

There is a small but growing body of research analyzing the typology in context of post-separation violence. Jennifer Hardesty, Connie Beck and each of their co-authors have begun to amass an important portfolio of research into divorcing couples. Much of this research links IT/CCV to post-divorce problems for mothers: Hardesty and her co-authors found a correlation between past coercive controlling violence and post-separation harassment and violence;¹⁶⁵ and Beck and Raghavan found that coercive control during the marriage was predictive of escalating physical violence, forced sex and threats to life post-separation.¹⁶⁶ Interestingly, comparable problems have also been found where there is a history of *non-violent* coercive control: Tanha and her co-authors found that such behavior was correlated with post-divorce assault, sexual assault, and threats to life;¹⁶⁷ and Crossman, Hardesty, and Raghavan¹⁶⁸ found that divorcing mothers who had experienced non-violent coercive control in the marriage experienced similar levels of fear and control during marriage as—and *more post-separation fear* than—victims of *violent* IT/CCV.¹⁶⁹

Hardesty and co-authors have also found that child access rights of abusive (and controlling) ex-husbands post-divorce provided opportunities for continued abuse of the mothers.¹⁷⁰ This is consistent with previous findings in the domestic violence literature which did not focus on different “types.”¹⁷¹ In additional qualitative studies of the typology in populations during and after divorce, Hardesty also found

164. Kelly & Johnson, *supra* note 60, at 483, 486.

165. Hardesty et al., *Toward a Standard Approach*, *supra* note 60, at 841.

166. Beck & Raghavan, *supra* note 152, at 560.

167. See Marieh Tanha et al., *Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence*, 25 J. INTERPERSONAL VIOLENCE 1836, 1844–45 (2010).

168. Kimberly A. Crossman et al., *“He Could Scare Me Without Laying a Hand on Me”: Mothers’ Experiences of Nonviolent Coercive Control During Marriage and After Separation*, 22 VIOLENCE AGAINST WOMEN 454, 461–64, 467 (2016).

169. *Id.*

170. Jennifer L. Hardesty & Lawrence H. Ganong, *How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands*, 23 J. SOC. & PERS. RELATIONSHIPS 543, 554–55, 558 (2006).

171. See SAUNDERS, CHILD CUSTODY AND VISITATION DECISIONS, *supra* note 19, at 4 (“Parental separation or divorce does not prevent abuse to children or their mothers.”); BANCROFT ET AL., *supra* note 19, at 1 (noting that batterers abuse not only mother but children post-separation).

that coercively controlling abusers are much more problematic co-parents post-divorce—harassing, abusing and undermining mothers.¹⁷²

Regarding SCV, a significant study of divorcing mothers found significant variability in regard to frequency and severity of violence, harassment, and fear.¹⁷³ In fact, the authors found that a significant minority of situational couple violence cases generated sufficient fear, trauma and depression, and involved so much post-separation harassment that the impact was comparable to coercive controlling violence.¹⁷⁴ The authors also found “no differences in depression and PTSD symptoms regardless of the presence or type of IPV.”¹⁷⁵

Thus, it appears that the small but growing body of research into the typology in divorcing populations confirms that coercive control predicts violence and harassment post-divorce. Hardesty’s qualitative studies seem to also suggest that at least some SCV cases may permit better co-parenting potential post-divorce.¹⁷⁶ Of course, if it is true, as Beck and to a lesser degree, Hardesty, have found, that the majority of divorcing couples have histories of both violence and control rather than SCV, then the most important message that can be given to family courts is to *presume coercive control* until proven otherwise—and likewise to presume dangerousness, until proven otherwise. Despite Johnson’s admonitions to this effect,¹⁷⁷ as is described below, this is precisely the opposite of what most U.S. family courts have done with the typology to date.¹⁷⁸

Overall, then, the research is limited regarding differences between IT/CCV and SCV in severity of violence and post-separation risks. The divorce studies appear to indicate that relationships with a history of coercive control portend greater violence, harassment, and disruption post-separation than those with a history of SCV.¹⁷⁹ However, some

172. Hardesty et al., *Coparenting Relationships After Divorce*, *supra* note 147, at 498.

173. Nielsen et al., *supra* note 92, at 206–07.

174. *Id.* at 218–19. The authors pointedly call for more research into the effects of “frequent and severe violence, regardless of type.” *Id.* at 220 (emphasis added).

175. *Id.* at 220.

176. Hardesty et al., *Coparenting Relationships After Divorce*, *supra* note 147, at 489–90 (finding that more SCV perpetrators were able to differentiate their roles as parents from their spousal relationship and were less disruptive and intrusive post-divorce).

177. Johnson, *Apples and Oranges*, *supra* note 58, at 50 (“We need to err on the side of safety. Assume that all violence is intimate terrorism until proven otherwise.”).

178. See Samantha Jeffries, *In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the “Expert” Assessments That Guide Judicial Determinations*, 5 LAWS 1, at 6–7 (2016).

179. Hardesty et al., *Coparenting Relationships After Divorce*, *supra* note 147, at 489–90; Hardesty et al., *An Integrative Theoretical Model*, *supra* note 138, at 326–27.

research also suggests that close to half of SCV relationships experienced comparable post-separation harassment to mothers from IT/CCV relationships.¹⁸⁰ While many researchers have confirmed that coercive controlling violence is correlated to greater victim distress and injurious impacts, the same appears true of non-violent coercive control.¹⁸¹ Moreover, severe violence, cruelty, and high levels of fear are found in SCV populations,¹⁸² and severity of violence and degree of fear have been found to be better predictors of victim distress than control in some populations.

Overall, this research suggests that, while coercive control is likely a true red flag for dangerousness, the *absence* of coercive control cannot be presumed to predict the *absence* of dangerousness. Rather, the research counsels us to also consider past violence, severity and frequency, the same things that have long been considered indicative of future danger by the domestic violence field. Such an expansion of the lens, however, undercuts the fundamental thrust of the typology, which is to shift our focus away from severity of violence to control. It seems clear that, if courts want to assess future dangerousness, they should examine both the severity of past violence and degree of fear, *and* the degree of coercive control.¹⁸³

c. *Post-Separation Dangerousness to Children*

While Johnson's *magnum opus*, his book, said little about the impact of the different types on children, he has urged application of the typology to custody and visitation litigation.¹⁸⁴ The typology's clear message that IT/CCV is dangerous and SCV generally less so, is easily intuitively extrapolated to children. However, it should not be assumed that the adult dynamics necessarily predict a perpetrator's treatment of

180. Nielsen et al., *supra* note 92, at 218–19.

181. See generally Tanha et al., *supra* note 167; Crossman et al., *supra* note 168; Beck & Raghavan, *supra* note 152.

182. Beckerman, *supra* note 93, at 77–78; O'Neal et al., *supra* note 99, at 281–82 (sexual assault is intrinsically severe and controlling, regardless of the larger relationship framework, rendering Johnson's typology un-useful).

183. As is discussed in Section III.B.2.c, immediately following, when partner abuse is deemed "situational," judges and evaluators should also assess the *situational triggers* for the violence and whether they will be present going forward, for example, when the perpetrator is with the children.

184. JOHNSON, *supra* note 10, at 81–83; Hardesty et al., *Domestic Violence and Custody*, *supra* note 60, *passim*; Johnson, *Apples and Oranges*, *supra* note 58, *passim*; Kelly & Johnson, *supra* note 60, at 477–78.

children—especially after separation, when children may begin spending time with that parent alone for the first time.

Thus, before the typology is considered reliable for application in family courts, it is essential to know two things: first, what the research does or does not show about the risks to *children* from perpetrators of IT/CCV or SCV; second, given that SCV is “conflict-triggered” violence, can the courts be expected to determine what those “conflict triggers” are for a particular perpetrator, in order to assure themselves that such conflict triggers will not arise with children post-divorce? For instance, if it is inter-personal conflict which triggers a parent’s violence toward his spouse, this very “trigger” will likely arise between the parent and child, just as much as—or more than—between the two parents, especially if the child is disobedient or developmentally oppositional (e.g., two-year-olds, adolescents, and/or children acting out for other reasons).

i. Dangerousness of SCV to Children Post-divorce

While there is a plethora of research into the effects of domestic violence on children, very little of it addresses whether different types of IPV “impact differently on children living in the household.”¹⁸⁵ One qualitative study of children in a shelter found that coercive control accompanied by severe and/or life-threatening violence against mothers, as well as “bizarre acts,” caused the children to live in constant and destructive fear and anxiety.¹⁸⁶

A more recent study from the U.K. did a qualitative examination of the negative effects of coercively controlling fathers on their children,

185. WANGMANN, EXPLORATION OF THE LITERATURE, *supra* note 46, at 11 (citation omitted); see also Hardesty et al., *An Integrative Theoretical Model*, *supra* note 138, at 324 (“Whether different types of IPV have differential effects for children has not been examined.”). One 2014 study found control correlated to level of child’s distress, but it measured the control in the particular violent incident, rather than in the relationship as a whole. Compare Ernest N. Jouriles & Renee McDonald, *Intimate Partner Violence, Coercive Control, and Child Adjustment Problems*, 30 J. INTERPERSONAL VIOLENCE 459, 463–64 (2015), with JOHNSON, *supra* note 10, at 11 (SCV can involve a control motive, but IT/CCV requires imposition of control over the relationship as a whole).

186. Carolina Øverlien, *The Children of Patriarchal Terrorism*, 28 J. FAM. VIOLENCE 277, 278 (2013). While this study found only 40% (10 out of 25) of the shelter children expressed strong fear and surmised equated this with coercive control, *id.* at 277, I thank Evan Stark for the observation that fear is not the only indicator or damage of coercive control; it undermines children’s well-being in a host of ways. In any event, the study’s finding—if correct—that only a minority of children in a shelter came from IT/CCV families contradicts Johnson’s paradigm of IT/CCV being predominant in families in shelters.

pre-separation.¹⁸⁷ The study describes how coercively controlling fathers limited children's lives in myriad ways, including restricting their access to their mothers, grandparents, and friends, and to extra-curricular activities.¹⁸⁸ Although many of these families had not experienced substantial violence, children in both violent and non-violent families experienced similar negative effects from coercive control.¹⁸⁹ All were "directly emotionally abused" by their fathers, and some were also physically and/or sexually abused.¹⁹⁰ "[M]any perpetrators . . . directly attacked and undermined children's relationships with their mothers."¹⁹¹ Overall, the fathers' coercive control "isolated mothers (and . . . children) from sources of support . . . and entrapped children (and their mothers) in constrained situations where children's access to resilience-building and developmentally-helpful persons and activities was limited."¹⁹²

It should not be surprising that this depiction of how coercive control in the family undermines mother-child relationships and children's opportunities to build outside support and resilience appears to mirror Hardesty's findings about how coercively controlling fathers undermine, harass and re-victimize mothers and children post-separation. Hardesty's study also noted that half of the mothers studied, having started out prioritizing the children's relationships with their fathers, eventually found that the fathers were emotionally destructive to the children, and shifted their positions.¹⁹³

However, while the psychological harm to children from coercive control in the family—both pre- and post-separation—is fairly clear, none of these studies appears to have identified greater risks of *physical harm* to children from IT/CCV than SCV. This is surprising. Consistent with the gestalt attached to IT/CCV, several leading practitioners and scholars have asserted that coercive controlling abuse is a far greater threat to children's safety.¹⁹⁴ These authors have cited to the robust *pre-*

187. Emma Katz, *Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed by and Resist Regimes of Coercive Control*, 25 CHILD ABUSE REV. 46, 46 (2016).

188. *See id.* at 53.

189. *See id.* at 55–57.

190. *See id.* at 52.

191. *See id.* (citations omitted).

192. *Id.* at 55.

193. Hardesty et al., *Coparenting Relationships After Divorce*, *supra* note 147, at 485–86.

194. Fernanda S. Rossi et al., *Intimate Partner Violence and Child Custody*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 346–73, 354 (Leslie Drozd et al. eds., 2d ed. 2016) (acknowledging that there is only limited research

typology research literature on the harmful effects of domestic violence on children.¹⁹⁵ However, it is not at all clear why research which did not differentiate between degrees of control can legitimately be cited to support the typology. Some authors have nonetheless asserted outright that “children exposed to coercive controlling violence also appear to have an elevated risk for poor emotional, cognitive, and social adaptation as well as exposure to violence after separation . . . and they are at greater risk of direct child abuse *than are children exposed to situational couple violence*.”¹⁹⁶ While these authors appear correct that coercive controlling violence is more psychologically damaging to children than mere intermittent violence, and that IT/CCV is correlated with greater post-separation abuse and intrusion on the mother and children, the final phrase’s leap from the harms of coercive controlling violence to a relative *lack* of post-separation risk from past SCV is problematic. As the foregoing discussions demonstrate, the dangerousness signified by coercive control does not demonstrate a basis for assuming that SCV perpetrators are *not—or are less—* dangerous to their children after separation, especially without identifying the “situational” triggers. There is simply no empirical basis for such a presumption. On the contrary, a significant proportion of SCV has been found to involve post-separation harassment, fear, cruelty, viciousness, and high levels of violence. In one study, Nielsen and her co-authors described some SCV as so “frequent and severe [that it] resembled coercive controlling violence in its consequences.”¹⁹⁷ In

comparing impacts of different types on postseparation co-parenting, while suggesting it is “likely” that coercive controlling violence requires more protective measures); Kelly & Johnson, *supra* note 60, at 493–95 (encouraging family courts to apply the typology similarly).

195. Hardesty et al., *Domestic Violence and Custody*, *supra* note 60, at 446–51 (summarizing the pre-typology research which shows emotional and behavioral, cognitive and developmental harms from exposure to IPV, as well as direct child abuse). Some authors link this research to coercive control in circular fashion, simply assuming that the pertinent data came from IT/CCV cases and not SCV cases. *Id.* at 449 (assuming agency and other severe cases are IT/CCV, and concluding that “children are at greater risk of child abuse in cases of coercive controlling violence than they are in cases of situational couple violence”); Kelly & Johnson, *supra* note 60, at 493 (“What is generally unstated in the arguments about the link between intimate partner violence and child abuse is that authors are generally referring to Coercive Controlling Violence, not Situational Couple Violence, without so specifying.”).

196. Jason D. Hans et al., *The Effects of Domestic Violence Allegations on Custody Evaluators’ Recommendations*, 28 J. FAM. PSYCHOL. 957, 958 (2014) (emphasis added).

197. Nielsen et al., *supra* note 91, at 218. The authors also found “no differences in depression and PTSD symptoms regardless of the presence or type of IPV.” *Id.* at 220; see also Beckerman, *supra* note 93, at 75–81; O’Neal et al., *supra* note 99, at 297 (finding that

short, there appears to be no empirical support for the widespread assumption that SCV means less danger or harm to children post-separation.¹⁹⁸

ii. Triggers for Situational Violence

At least as important, yet ignored in the literature, is the core question that the SCV label compels: *What is the trigger for the "situational" violence in any given case?* In one case with which I am familiar, the abuser was triggered to violence toward his wife by, among other things, the baby's crying. While his abuse was explicitly found to have been "mere" SCV, this trigger should have been recognized as an obvious red flag of risk to the *baby* in her father's care. Yet it was not—the GAL and court simply used the SCV label to reject the mother's claims he was not safe. A parallel misuse of the SCV label occurred in a D.C. case, where the evaluators and court agreed that the father had extreme explosive rage, but after labelling his violence SCV, rejected the possibility of danger to the children from that explosive rage.¹⁹⁹ These real-life examples make clear that the presence of a controlling perpetrator is only one criterion that may determine dangerousness of a parent to his children, particularly after the parents' separation.

And yet, my research has not revealed a single case—or article—in which the SCV label engendered attention to the triggers for "situational" violence. Rather, the SCV label has been used simply to infer that there is no coercive control, and therefore, that the violence is not dangerous. In this regard, the obvious logic of the typology—or the SCV type—has been entirely ignored, and the typology reduced to merely a "dangerous/not dangerous" dualism.

The absence of research examining the dangerousness to children from SCV, or exploring triggers for SCV which might signal

"situational" sexual assaults were nonetheless violent and terrifying and did not fit the SCV paradigm of lesser violence).

198. A research review by Hardesty et al. mentions a single study that *may* have captured SCV in a community sample. Hardesty et al., *Domestic Violence and Custody*, *supra* note 60, at 450. In this study, one-time or intermittent exposure to DV did not produce the same level of problems for young children as children subjected to "constant exposure" to intimate partner violence. *Id.* Since there was no analysis of control or particular "types" in this study, it cannot be known whether the single or intermittent violence families were experiencing was SCV or IT/CCV. Indeed, violence within a pattern of coercive control is often quite infrequent. STARK, COERCIVE CONTROL, *supra* note 39, at 12–13. Thus, this study proves only the unsurprising point that less frequent violence is less harmful to children than more constant violence.

199. *Jordan v. Jordan*, 14 A.3d 1136, 1142 (D.C. 2011).

dangerousness, provides a powerful example of the difference between social science research and legal decision-making. As a matter of social science research, it may be reasonable to infer from the evidence that coercive control is high-risk, and that “situational” abuse is, as a broad category, low-risk (with the caveat that some SCV is extremely violent and fear-inducing). It is also understandable that social science on the typology does not explore specific triggers for “situational” violence. But, as a matter of *legal* decision-making, given the wide range of violence and dangerousness within the broad category of SCV, it is entirely inappropriate, and indeed dangerous, for family courts to treat abuse labeled “SCV” as *per se* any less dangerous to children post-separation. This is especially true if the past violence was severe, persistent, or if a court has not specifically analyzed what the triggers for the “situational” violence in the relationship were and whether they (or similar triggers) are likely to arise when the children and violent parent are alone together.

In short, while the research into the harms to children from exposure to *undifferentiated* intimate partner violence is extensive, there does not appear to be any empirical research demonstrating a difference in physical risks to children—either before or after separation—from the typology’s constructs of IT/CCV vs. SCV. Use of the typology to triage risks to children, i.e., as it is used in custody litigation, is thus not empirically supported.

C. As a Practical Matter, Can We “Type” Cases?

1. In Research

A significant danger of using a typology in court is, perhaps, obvious: How accurate can we expect courts and court personnel to be in categorizing different abusers or histories of abuse? To answer this question, we must first step back from the legal context to look at the question in the social science context, because, even there, accurate categorizing appears elusive.

To a surprising degree, the research into Johnson’s typology contains myriad variations and contradictions in how coercive control is defined and measured. These differences include confusion over how IT/CCV is supposed to be defined, differing “cut-points” or line-drawing between data points representing numbers of controlling behaviors, and altogether differing approaches to measuring control. While such variations and debate are neither surprising nor inappropriate in the discipline of social science, they are entirely unknown and unrecognized

in the legal field, and indicate the unsuitability of trying to apply such debatable and evolving research findings to legal decision making.

First, the research exhibits a fair degree of confusion in understandings of the typology.²⁰⁰ Perhaps understandably, several researchers appear to erroneously equate IT/CCV with severity or fear rather than control. For instance, Sillito defines SCV as “low-level violence” and IT/CCV as “severe violence.”²⁰¹ Rosen and her co-authors state, regarding their replication study, that “[i]f there was a clear sense of fear . . . we did not classify the couple as CCV [(or “common couple violence”)] because terror or fear is a sign of IT.”²⁰² In testing a screening instrument, Friend and his co-authors described Johnson’s IT/CCV category as “characterological . . . IPV in which the perpetrator uses severe violence” and SCV as “mutual, low-level violence.”²⁰³ While this shorthand—treating IT/CCV as the severe and dangerous form of domestic violence—is understandable, these analyses run directly counter to Johnson’s pointed emphasis that it is control, not level of violence, that distinguishes the types, as well as his reminders that SCV can involve severe violence.²⁰⁴ Indeed, rather than validating the idea that there are two types of partner violence distinguished by their control context, such analyses simply treat the typology as no different from traditional thinking about domestic violence: *Of course* some relationships involve more violence and fear than others.

200. See Leone, *supra* note 148, at 2586–87. Janel Leone, one of Johnson’s earliest co-researchers, commented that some of the cases in her study of suicidal behavior which were denominated SCV were probably IT. *Id.* at 2587; see also Pauline Gulliver & Janet L. Fanslow, *The Johnson Typologies of Intimate Partner Violence: An Investigation of Their Representation in a General Population of New Zealand Women*, 12 J. CHILD CUSTODY 25, 40 (2015) (discussing how further internal and external validation is needed before it is known whether we can accurately distinguish types and determine their implications for prevention and intervention).

201. Carrie Sillito, *Gendered Physical and Emotional Health Consequences of Situational Couple Violence for Heterosexual Married and Cohabiting Couples*, 7 FEMINIST CRIMINOLOGY 255, 256 (2012).

202. Karen H. Rosen et al., *A Qualitative Investigation of Johnson’s Typology*, 20 VIOLENCE & VICTIMS 319, 325 (2005); see also *id.* at 330–33 (noting substantial variance in findings about common couple violence among replication studies).

203. Daniel Joseph Friend et al., *Typologies of Intimate Partner Violence: Evaluation of a Screening Instrument for Differentiation*, 26 J. FAM. VIOLENCE 551, 551 (2011); see also Lorelei E. Simpson et al., *Relationship Violence Among Couples Seeking Therapy: Common Couple Violence or Battering?*, 33 J. MARITAL & FAM. THERAPY 270, 280 (2007) (describing common couple violence as less violent, and battering as moderate to severe partner violence).

204. See JOHNSON, *supra* note 10, at 91.

Second, there has been substantial debate over how best to identify and measure coercive control in research studies. Johnson and his co-authors have acknowledged that coercive control may be better measured by assessing the *frequency* of control behaviors, rather than his original reliance on the number of different *types* of control behaviors.²⁰⁵ Other researchers have pointed out that counting specific “control behaviors” (whether frequency or number of types) likely tells us little about actual control in a relationship.²⁰⁶ United Kingdom researcher Andy Myhill convincingly argues that using a list of behaviors and acts to represent control lacks the crucial context and *impact* of the behaviors and acts—which are likely quite different for men and women.²⁰⁷ Rather, as Jasinski and her co-authors argue, “[t]he crucial element to consider is how much power does each partner bring to the relationship to turn those acts from annoyances into actual coercion? In other words, which partner is actually able to maintain and enforce her or his control?”²⁰⁸ In short, it is not at all clear that quantitative research is yet capable of accurately capturing coercive control, rendering most of the research’s empirical claims far less reliable than courts and the public generally assume.²⁰⁹

Third, even using Johnson’s way of measuring control (identifying groups that cluster around different numbers of types of controlling behavior), researchers differ regarding that the number of control behaviors—or the “cut point”—required to indicate a coercive control relationship. Where Johnson characterized as SCV cases with three or fewer control behaviors,²¹⁰ several researchers have treated the

205. Hardesty et al., *Toward a Standard Approach*, *supra* note 60, at 840 (concluding control should be measured by frequency rather than variety of behavioral tactics).

206. Vangie A. Foshee et al., *Typologies of Adolescent Dating Violence: Identifying Typologies of Adolescent Dating Violence Perpetration*, 22 J. INTERPERSONAL VIOLENCE 498, 514 (2007) (discussing how an “acts scale” does not accurately capture the abusive dynamic); *see also* WANGMANN, *EXPLORATION OF THE LITERATURE*, *supra* note 46, at 13 (arguing that a woman’s threat to leave her partner if he does not stop abusing her could also conceivably, and problematically, be treated as a “control item”).

207. Myhill, *supra* note 149, at 369 (“[N]ot recognizing the ongoing nature of abuse risks classifying people erroneously as having experienced coercive control by summing individual controlling acts.”) (emphasis added).

208. Jana Jasinski et. al., *Testing Johnson’s Typology: Is There Gender Symmetry in Intimate Terrorism?*, 29 VIOLENCE & VICTIMS 73, 85 (2014) (citation omitted).

209. For this reason, qualitative research of the sort produced by Hardesty and others may be, contrary to typical scientific tenets, more reliable and informative than most quantitative studies to date.

210. *See* Meier, *Johnson’s Differentiation Theory*, *supra* note 63, at 18. Recall that Johnson was using data from prior studies that were not aimed at measuring control, so

presence of *any* control behaviors as indicative of coercive control. Indeed, Frye and her co-authors pointed out that even a single control behavior may be sufficient to exert coercive control.²¹¹ Similarly, in a study of divorcing couples going through court-ordered mediation, leading researcher Connie Beck identified five different classes of intimate partner violence, all of which entailed varying degrees of control.²¹² She concluded that there was no SCV in this population.²¹³ And a recent population study of partner violence in New Zealand also found no SCV, after defining it as requiring no controlling behaviors, threats or intimidation (emotional abuse).²¹⁴ The authors assert that equating emotional abuse with control is consistent with the only study (to date) seeking to operationalize the concept of coercive control.²¹⁵ They also found that the majority of the low violence group lacked "situational triggers" for the violence they experienced.²¹⁶ In short, researchers (understandably) differ in their ways of measuring control—and from a *legal* standpoint, there is no single objectively correct means of resolving these differences.

For this and other reasons, a growing number of social scientists have questioned the fundamental enterprise of characterizing IPV as falling into distinct types. Rather, several have suggested that their "findings lend support to a continuum of violence experience, more than

he used various behaviors as proxies for control, and was unable to measure known controlling behaviors. *Id.*

211. Frye et al., *supra* note 68, at 1299–1300. Ironically, Johnson himself has moved in the opposite direction, most recently arguing that an even *higher* "cut-point" should be used to distinguish between IT/CCV and SCV in population surveys. Johnson et al., *Intimate Terrorism*, *supra* note 50, at 186, 188–189 (asserting that a cut-point of five, not three, is required, and that IT/CCV can only reliably be measured in population surveys when asking about previous relationships rather than current ones). This revision in his approach aimed in part at reconciling his earlier finding that thirty-five percent of a survey population was IT/CCV, and his concern that under his original approach several replication studies have identified substantial populations of female "intimate terrorists." *Id.* at 188–89.

212. Beck et al., *Patterns*, *supra* note 91, at 747–48.

213. *Id.* at 750. Beck has recently acknowledged that she may have confused situational couple violence with mutual violence. In my view, this confusion from a leading researcher is widely shared, and a function of the ambiguities embedded in the typology and discussions thereof.

214. Gulliver & Fanslow, *supra* note 200, at 38–39.

215. *Id.* at 39.

216. *Id.*; see also Beckerman, *supra* note 93, at 75–76 (discussing Johnson's typology in light of a book about intimate partner abuse among Black women, and noting that description of IPV in study of African-American community population does not fit the SCV type).

a distinct typology.”²¹⁷ This diversity of social science perspectives reinforces doubts about the accuracy or utility of sorting or adjudicating legal cases based on control level alone.

2. In Specific Cases

Of course, even if researchers could adequately define and validate the types and their attributes at a population level, use of the typology in specific cases in court requires a different kind of sorting. And error in this context poses far greater risks.

First, there is ample reason to question the practicality of expecting professionals in the court setting to gain sufficient in-depth information about individual cases to accurately sort them into the different types.²¹⁸ Family courts are notoriously loathe to spend sufficient time on abuse evidence in custody or visitation cases.²¹⁹ Custody evaluators often lack domestic violence expertise and fail to examine patterns of abuse or coercive control.²²⁰ Even without thorough investigation of abuse, such evaluations can be quite expensive; they sometimes bankrupt the litigants.²²¹ Requiring them to be more in-depth would subject litigants to even greater expense.

More generally, fundamental questions persist about how accurate any outside observer can be in determining the particular qualities of a history of partner violence, particularly within legal processes which often lack adequate evidence about such abuse.²²² Indeed, as the leading

217. Gulliver & Fanslow, *supra* note 200, at 40 (citation omitted) (“[A]lthough typologies may be helpful for matching effective treatment methods to sub-types of batterers, they should not be used as a stand-alone measure of risk.”); Frye et al., *supra* note 68, at 1303 (discussing how IPV may be better represented by a spectrum of control than by distinct types). See also Beck et al., *Patterns*, *supra* note 91, at 750 (noting that some relationships may escalate from SCV to IT).

218. See sources cited *supra* note 217.

219. See, e.g., AC v. AC, 339 P.3d 719, 747–48 (Haw. 2014) (reversing trial court for refusal to allow sufficient time to hear domestic violence evidence in custody case); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between ‘The Truly National and the Truly Local’*, 42 B.C. L. REV. 1081, 1111–18 (2001) (describing typically brief hearings for such cases as allotting “two minutes and fifteen seconds [to] five minutes and forty-five seconds” per case) (footnotes omitted).

220. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 22, at 4.

221. H.R. Con. Res. 72, 115th Cong. (2017).

222. One Australian study found allegations of intimate partner violence lacked any corroborating evidence 71.3% to 81.7% of the time. Jane Wangmann, *Different Types of Intimate Partner Violence? A Comment on the Australian Institute of Family Studies Report Examining Allegations of Family Violence in Child Proceedings under the Family Law Act*, 22 AUSTL. J. FAM. L. 123, 130 (2008) (noting a “paucity of information, details and evidence” supporting abuse allegations). When evidence was provided, final orders

expert on coercive control, Evan Stark, has argued, the legal system's focus on individual incidents of violence obscures many subtle and ongoing non-violent means of exerting coercive control.²²³ The legal system also regularly discounts incidents that are years past, even though terror inflicted years prior can continue to activate a victim's fear and subordination well into the future.²²⁴

Second, there exists no research testing courts' capacity to consistently or objectively apply the typology to specific IPV cases. A number of commentators have noted, however, that even psychologists' ability to apply the typology to sort cases is limited.

There are two published empirical tests of professionals' ability to "type" different cases of IPV. In one qualitative study, the researchers

asked seven PhD-level clinicians with expertise in domestic violence to sort [thirty-six] domestic violence profiles into the offender categories identified through an empirically based domestic violence typology. While sorting accuracy among the cohort was quite high overall, there were numerous inconsistencies between respondents in terms of how they categorized specific offenders.²²⁵

Another study found that "sorting accuracy was very low among a sample of PhD clinical psychology students (approximately [sixty-four percent])."²²⁶

3. Case Examples

Courts' challenges in typing cases are evident in some of the cases already discussed.

did not appear to address it. *Id.* See generally Ver Steegh & Dalton, *supra* note 33, at 456–59 (2008) (discussing concerns about accurately applying typology in family court); WANGMANN, EXPLORATION OF THE LITERATURE, *supra* note 46, at 77.

223. STARK, COERCIVE CONTROL, *supra* note 39, at 11.

224. Beck & Raghavan, *supra* note 152, at 562 ("[O]nce the perpetrator has established that he is a legitimate source of threat, he is unlikely to need to use high levels of physical abuse to induce compliance.").

225. Hayley Boxall, Lisa Rosevear & Jason Payne, *Domestic Violence Typologies: What Value to Practice?*, TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE (Austl. Inst. of Criminology), Mar. 2015, at 4 (citation omitted).

226. *Id.*

a. False Negatives—Questionable SCV Labelling

In Johnson's typology, legal help-seeking is indicative of intimate terrorism and not situational couple violence—because SCV is considered the kind of violence which does not engender serious fear or cause a victim to seek legal assistance or shelter.²²⁷ Yet, as is described below, in each one of the cases described in Section III.B.1 above, the mothers sought or received protective legal measures, including protective orders and arrests. It is therefore likely that these cases were incorrectly labeled SCV, especially given that there was no apparent effort to assess for coercive control.

Thus, in *C.A. v. J.B.*, the mother had received an *ex parte* protection order against the father, and the father had also been criminally convicted of battery and disorderly conduct for his violence when the mother moved out.²²⁸ The mother also has been previously convicted of battery in another relationship.²²⁹ Yet the court of appeals affirmed the trial court's finding that the father's abuse of the mother was "an incident of Situational Couple Violence . . . rather than the Coercive Controlling Violence which would give the court great concern."²³⁰ The appeals court rejected the mother's appellate challenge to the court's application of this label without expert testimony, holding: "Regardless of the labels used by the trial court, it is clear from the order that the trial court believed that the battery was an isolated incident rather than a pattern of controlling abuse that would have a negative impact on A.L.A."²³¹

As noted above, there is no empirical basis for the assumption that controlling abuse would be more dangerous for the child; and in fact, the assault for which the father was convicted appears to have been a separation assault—itself an indication of coercive control.²³² However, the trial court interpreted the assault as "Separation Instigated Violence,"²³³ the new "sub-type" proposed by Joan Kelly and endorsed by Michael Johnson, despite its virtually complete lack of empirical basis.²³⁴

227. See, e.g., JOHNSON, *supra* note 10, at 69.

228. *C.A. v. J.B.*, No. 55A04-1011-JP-723, 2011 WL 2847432, at *1–2, *6 n.2 (Ind. Ct. App. July 19, 2011).

229. *Id.* at *1.

230. *Id.* at *6.

231. *Id.* at *6.

232. See *id.* at *1.

233. See *id.* at *6.

234. See *supra* notes 107, 181 (regarding separation-instigated assault).

Numerous other courts have similarly applied the label “situational violence” where there were past restraining orders and arrests. In *In re Morrison & Zacharia*, the California Court of Appeals affirmed a trial court’s treatment of a physical altercation as merely situational couple violence, despite the entry of a prior restraining order.²³⁵ In *In re Marriage of Burton*, the expert and court concluded that both parties were engaged in situational couple violence, despite the father’s having been arrested, and past mutual restraining orders.²³⁶ In *Stephanie F. v. George C.*, the court labelled two acts of violence preceding the parties’ separation “situational,” despite entry of a long-term protection order.²³⁷ In *In re Marriage of Lin*, another California appellate court reversed a three-year restraining order entered to restrain the father’s hitting of the children, on grounds it could not be reconciled with the court’s award of unsupervised visitation.²³⁸ The expert witness deemed the mother’s restraining order, and asserted past mutual aggression, consistent with “situational couple violence.”²³⁹

b. Courts’ Resistance to Coercive Control

Perhaps the most engaged judicial discussion of the typology appears in the Alaska appellate decision in *McGrady v. McGrady*.²⁴⁰ Here, the unrepresented immigrant mother retained an expert witness who, after reviewing the parties’ depositions, testified that the father engaged in emotional and economic abuse, “demonstrated a ‘sense of entitlement,’ ‘vindictiveness,’ and ‘a lack of empathy.’”²⁴¹ Based on his expertise in battering, he characterized the father as a batterer.²⁴² However, while the mother alleged the father had committed lesser physical acts and had threatened to kill her, the father had also reported a number of violent acts by the mother (including a punch in

235. No. A117627, 2009 WL 1163832, at *1, *5 (Cal. Ct. App. Apr. 30, 2009).

236. No. 43997-2-II, 2014 WL 465849, at *1, *4–6 (Wash. Ct. App. Feb. 4, 2014).

237. 270 P.3d 737, 739–40, 744 (Alaska 2012).

238. *In re Lin*, No. G049307, slip op. at 15 (Cal. Ct. App. filed May 22, 2015), <http://www.courts.ca.gov/opinions/nonpub/G049307.PDF>; see also *In re Lin*, 225 Cal. Rptr. 3d 34 (2014); Brief for Respondent at *8, *46, *In re Lin*, 225 Cal. Rptr. 3d 34 (2014) (No. G049307), 2014 WL 5081060, at *8, *46. But see Reply Brief for Appellant, *supra* note 127.

239. Reply Brief for Appellant, *supra* note 127, at *5.

240. *McGrady v. McGrady*, Nos. S-14577 & S-14617, 2013 WL 1188943 (Alaska Mar. 20, 2013).

241. *Id.* at *2.

242. *Id.*

the face).²⁴³ The trial court chose to disbelieve the mother's testimony about her ex-husband's abusive conduct and his coercive control,²⁴⁴ and entirely rejected the expert's explanation for the mother's violence as a form of "violent resistance" to "intimate terrorism" by the husband.²⁴⁵

Similarly, a federal court adjudicating a Hague Convention on International Child Abduction petition for return of a child, expressed a comparable skepticism toward application of the coercive control label.²⁴⁶ While crediting some of the father's violent acts (and some of the mother's), the district court rejected expert testimony that the father's coercive controlling violence posed an "extreme danger" to the mother, exacerbated by her flight from him.²⁴⁷ The court somewhat flippantly stated that "the evidence does not support any conclusion that petitioner is an obsessed or jilted lover who seeks to be reunited with respondent or prevent others from being with her."²⁴⁸ Since there had been no claim that only "jilted lover[s]" were dangerous coercive controllers, on appeal the Second Circuit rejected this statement, but it upheld the lower court's finding that there was not sufficient evidence of "grave risk" to the child—as opposed to the mother.²⁴⁹ It also accepted the court's rejection of the coercive control label, based on the lower court's claim that the "survey" completed by the mother as part of the coercive control assessment contained "inaccuracies."²⁵⁰

4. Helpful Applications of IT/CCV

In contrast to the above decisions, two state court opinions appear to have conscientiously utilized the IT/CCV type when wrestling with claims of mutual violence. In *Goude v. Goude*, the Court of Appeals of Washington accepted the trial court's finding that both parents had committed domestic violence and that the mother had pulled her

243. *Id.*

244. *Id.* at *3 (describing mother's testimony characterizing ex-husband's conduct "as a form of non-physical domestic violence").

245. *Id.* at *3–4. The trial court found the husband credible and the wife not credible, particularly with regard to her emotionality about the husband's behavior. *Id.* It also rejected the expert's reliance on a deposition for its characterization. *Id.* The court therefore did not credit the expert's opinion, which explained the wife's violence in light of her husband's coercive control. *Id.*

246. See *Souratgar v. Fair*, No. 12 Civ. 7797(PKC), 2012 WL 6700214, at *1, *7 (S.D.N.Y. Dec. 26, 2012).

247. *Id.* at *10–11.

248. *Id.* at *10.

249. *Souratgar v. Lee*, 720 F.3d 96, 105–06 & 105 n.6 (2d Cir. 2013).

250. *Id.* at 105.

daughter's hair.²⁵¹ Despite five distinct incidents (over fourteen years) of the mother's violence, including breaking a dish and breaking a bathroom door, the trial court found that the husband was the "aggressor," that he, and not she, caused injury, and that her violent behaviors were *de minimis* and isolated (statutory terms).²⁵² Of particular interest here, the court found:

Heidi's behavior was not domestic violence, but rather was rooted in response to Michael's physical violence towards her and "a pattern of emotional abuse and . . . tactics of power and control over [her]. This included keeping her from accessing money and finances, asking her parents to keep money from her, and threats to take the children."²⁵³

It is impossible to know whether the trial court was correct in minimizing the mother's violence in comparison to her husband's. But the trial and appeals' courts' careful analysis suggests that coercive control can be particularly useful when courts seek to distinguish reactive violence from violence which portends future risk.

Likewise, in *Dennis Q. v. Monika M.*, the Alaska Supreme Court affirmed a similarly nuanced and thoughtful analysis of mutual violence.²⁵⁴ Here, the trial court found that both parties had committed "assault" against each other, but that the husband's assault had been more violent and caused the wife fear.²⁵⁵ The court further found that:

Monika "did not use violence in this relationship as a means of gaining control or power or as a tool of manipulation" but rather "the violence was more likely than not situational to the relationship and circumstances." By contrast, the superior court found that "[Dennis's] violence is typical of the violence seen where a person is using force to exert power and control over

251. See *Goude v. Goude*, No. 71240-3-I, 2014 WL 7340375, at *2-3 (Wash. Ct. App. Dec. 22, 2014).

252. *Id.* at *2-4; Brief for Appellant at 26-27, *Goude v. Goude*, 2014 WL 7340375 (No. 71240-3-I).

253. *Goude*, 2014 WL 7340375, at *5 (alteration in original) (quoting trial court's opinion).

254. See *Dennis Q. v. Monika M.*, No. S-15084, 2014 WL 1888270, at *1 (Alaska May 7, 2014).

255. *Id.* at *1-2.

another, to manipulate their future actions and to control future behavior through fear.”²⁵⁶

These two cases hold promise for the use of coercive control and violent resistance to examine mutual violence with a more discerning eye.

D. Using the Typology to Negate Law

In addition to using the SCV label to minimize domestic violence, some courts have applied it in a manner that goes so far as to essentially negate the protective provisions of applicable statutes, specifically the presumption against joint custody.

Thus, in *Stephanie F. v. George C.*, the Alaska appeals court upheld the trial court’s ruling that the fact that the adjudicated domestic violence was merely “situational” sufficed to rebut the statutory presumption against joint custody to a perpetrator of “domestic violence.”²⁵⁷ The statute itself contained no exception for “situational” domestic violence; yet both the trial and appellate courts appear to have inferred that situational violence is essentially *not* “domestic violence.”²⁵⁸ A similar situation arose in *C.A. v. J.B.*, where the Indiana appeals court affirmed a trial court award of custody to a father convicted of battery.²⁵⁹ The court labelled the violence mere SCV or separation-instigated violence, and the appeals court affirmed the trial court’s finding that the label significantly reduced the weight of the statute’s domestic violence factor.²⁶⁰

Similarly, in the D.C. appeal described at the opening of Section I.A., the evaluators characterized the father’s past violence as “violence

256. *Id.* at *7 (alteration in original). One other decision using coercive control to produce a protective decision is found in *N.J. Div. of Youth and Family Servs. v. I.H.C.*, 2 A.3d 1138, 1145–46 (N.J. Super. Ct. App. Div. 2010). In this child neglect case, the appeals court reversed a trial court’s finding of insufficient evidence of domestic violence and child abuse or neglect, and imposed a finding of neglect and removal of the children. *Id.* at 1141. In an in-depth and sophisticated opinion, the court acknowledged that “domestic violence” goes beyond specific criminal acts, and that controlling and intimidating behavior is relevant to assessing danger to children. *Id.* at 1152–53, 1155–56 (emphasizing that assessment of “risk” to children goes beyond determination of specific acts of domestic violence). However, the analysis of coercive control makes no reference to Johnson’s typology, merely explaining coercive control as a longstanding construct in the domestic violence field. *See id.* at 1145–46.

257. *Stephanie F. v. George C.*, 270 P.3d 737, 739 (Alaska 2012).

258. *Id.*

259. No. 55A04-1011-JP-723, 2011 WL 2847432, at *1 (Ind. Ct. App. July 19, 2011).

260. *Id.* at *6–7.

with a small v,” i.e., essentially not domestic violence.²⁶¹ This allowed the court to essentially turn the statute’s presumption against joint custody to a perpetrator of violence on its head—and to treat the children’s possible “alienation” from their father as reason for rebutting the presumption, despite the obvious possibility that it may have been that very violence (or explosive temper) which could have caused their ambivalence.²⁶²

While these two courts of appeal affirmed the decisions as within the trial courts’ discretion to weigh domestic violence and rebut a presumption against joint custody, it can also be argued that the courts used the SCV label to essentially re-write the statutes. As was argued in one appeal,²⁶³ these statutes did not specify “situational” violence as grounds for rebutting the presumption, nor did they suggest that different kinds of domestic violence could receive different legal weight.²⁶⁴ It certainly warrants asking whether reliance on a vague social science construct to negate domestic violence legal protections is unlawful. Unlawful or not, these rulings show more clearly than most that the SCV label facilitates courts’ minimizing and ignoring of domestic violence.²⁶⁵

E. Overview—Application of Typology in Family Court

The above analysis makes clear that the typology’s application in family courts has been more problematic than beneficial. First, as we have seen, some family court commentators and professionals, as well as some criminal prosecutors, have leaped to the assumption that SCV (or “common couple violence”) is the type of domestic violence they most commonly see in court.²⁶⁶ The dubiousness of this assumption is

261. *Jordan v. Jordan*, 14 A.3d 1136, 1142, 1144 (D.C. 2011).

262. *Id.* at 1149–51; Brief for Appellant at 39–54, *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011) (Nos. 09-FM-1152, 09-FM-1337, 10-FM-375).

263. Brief for Appellant at 40–43, *supra* note 262.

264. D.C. CODE ANN. § 16-914 (West 2017); IND. CODE ANN. § 31-14-13-2 (West 2017).

265. See Wangmann, *What Do Family Law Decisions Reveal?*, *supra* note 14, at 111 (finding that SCV label appears to function in Australian family courts no differently than past adjudications which used findings of “messy,” “difficult,” and “contextual” abuse histories to minimize the significance of abuse).

266. See Stark, *Rethinking*, *supra* note 19, at 307; Zibell, *supra* note 78, at 462; Johnston & Ver Steegh, *supra* note 30, at 66–67; Edna Erez & Tammy A. King, *Patriarchal Terrorism or Common Couple Violence: Attorneys’ Views of Prosecuting and Defending Woman Batterers*, 7 INT’L REV. VICTIMOLOGY 207, 224 (2000) (“[Criminal] attorneys’ discourse of woman battering reflects batterers’ accounts of battering . . . as common couple violence.”). To their credit, Johnson and his co-authors have stated that more research is needed to determine whether SCV, IT, or another type is most common

confirmed by the studies of divorcing couples which found that in this population, coercive controlling violence was either dominant, or the only type identified.²⁶⁷

Relatedly, appellate opinions exemplify a pattern of false negatives. As demonstrated in the cases discussed above, SCV is wont to automatically confer a badge of relative safety on a perpetrator in family court.²⁶⁸ Not only is the SCV perpetrator deemed less violent and less serious, he or she is deemed safe for children post-separation, even though, as discussed above, there is no research to indicate this, and the SCV type is not defined that way. Moreover, courts often misapply this “badge of safety” to cases that the typology suggests should be IT/CCV, or which contain indicia of dangerousness.²⁶⁹ As a result, the SCV type is being used in family courts to compound the minimization and denial of domestic violence. While some of these applications may be erroneous, such errors are hard to avoid in the resource-thin, high-docket and insensitive environment of family courts.

Finally, these predictable but unsupported assumptions about SCV are all too consistent with the history of the legal system’s minimization of domestic violence as merely “domestic disputes.”²⁷⁰ Thus, it may not be surprising that advocates and domestic violence professionals raised early alarms about the typology. For instance, Pence and DasGupta, early leaders in the battered women’s movement, warned of the risks of “battering” being mischaracterized as “situational violence” given the way that many practitioners, particularly those working in the legal system, emphasize discrete incidents rather than ongoing coercion.²⁷¹ And Clare Dalton, a rare academic with expertise in domestic violence who is respected by family court professionals, in commenting on a

in family court. See Kelly & Johnson, *supra* note 60, at 477; see generally Hardesty et al., *Domestic Violence and Child Custody*, *supra* note 60, (discussing different types of domestic violence and the impact on child custody issues, as well as parental planning).

267. Beck et al., *Patterns*, *supra* note 91, at 750 (finding that among a divorcing population “there was no Situational Couple Violence class as previously found in national representative samples”); Nielsen et al., *supra* note 92, at 217 (noting that in the study, the “distribution of types of IPV” were “[twenty-one percent] situational couple violence and [seventy-eight percent] coercive controlling violence”). Johnson himself may be beginning to adopt the view that more IT/CCV appears in divorce court, because that is consistent with his finding that IT/CCV is more prevalent in past relationships than current ones, and that IT/CCV triggers a greater rate of break-ups. Johnson et al., *Intimate Terrorism*, *supra* note 50, at 196.

268. See discussion of cases *supra* Section III.B.1.

269. See discussion of cases *supra* Section III.B.1.

270. See Meier, *Domestic Violence*, *supra* note 19, at 667–68; Tuerkheimer, *Recognizing and Remedying the Harm of Battering*, *supra* note 55, at 961.

271. PENCE & DASGUPTA, *supra* note 46, at 11.

different but related typology, stated that “[t]he chief concern . . . is that Johnston’s typology will encourage serious underestimation of the number of abusive relationships and the dangers they pose to abused partners and children.”²⁷²

This concern that virtually any typology facilitates courts in treating domestic violence as trivial is reinforced by research showing that, even among *prosecutors*, whose cases Johnson’s typology would presume are intimate terrorism, the discourse of domestic violence is trivializing. A study of prosecutors’ and defense lawyers’ discourse found that even in the criminal justice system, “attorneys’ discourse of woman battering reflects batterers’ accounts of battering, and portrays intimate violence that reaches the court, by and large, as common couple violence. Victims’ battering experiences . . . are denied, minimized, or at best referred to as a few ‘true’ or ‘real’ cases of domestic violence.”²⁷³ In other words, trivializing of domestic violence has long been endemic throughout our court system.

Of particular concern with regard to the safety of children, the SCV paradigm has been adopted by many of the most powerful professionals in a custody case—the custody evaluators—many of whom have already been found to respond to abuse allegations through the lens of parental alienation or other skeptical beliefs.²⁷⁴ In short, the notion of a lesser or minor type of intimate partner violence converges all too easily with other common family court theories which minimize or disbelieve the dangerousness and consequences of domestic violence.

The bright spot in this picture, as indicated by the cases discussed in Section III.B.1, is the potential for the coercive control paradigm to improve custody courts’ assessments of the implications of domestic violence for custody, particularly in cases of mutual violence. Of course, the concept of coercive control (or “power and control”) vastly pre-dates the typology, dating from the invention of the power and control wheel in Duluth, Minnesota, in the 1980s.²⁷⁵ The domestic violence field has long

272. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 279 (1999); Dalton, *supra* note 260, at 279; see also Ver Steegh & Dalton, *supra* note 33, at 459 (calling for consideration of the “unanticipated negative consequences” that could result from simplistic application of the types, and for further research).

273. Erez & King, *supra* note 266, at 224.

274. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS, *supra* note 22, at 6 (finding that many custody evaluators discount and disbelieve domestic violence and child abuse). See also Stark, *Rethinking* *supra* note 19, at 307 (2009) (quoting a leading custody evaluator who claims that most child custody abuse histories lack power and control dynamics and are situational to the divorce and separation).

275. *Power & Control Wheel*, *supra* note 55.

urged that coercive control is an essential element of the harm of battering and a red flag for future risk.²⁷⁶ Unfortunately, though, a genuine assessment of coercive control requires a close and detailed examination of a particular relationship on many levels; it cannot be discerned from violence alone.²⁷⁷ With rare exceptions, most family courts in the U.S. do not (yet) take the time to hear evidence of this sort: Like criminal courts, they focus on individual incidents of violence instead.²⁷⁸ If the typology can boost courts' focus on coercive control, it will have engendered a significant and necessary step forward.

IV. BEYOND JOHNSON'S TYPOLOGY

The domestic violence field's experience with parental alienation offers a cautionary tale about the uses of social science theories about domestic violence in family courts. Even though Johnson's typology, unlike parental alienation, was not intended to rebut or minimize allegations of abuse, it—at least the SCV type—nonetheless feeds the family court culture and widely held misconceptions that domestic violence by men is generally over-stated and not a major concern.²⁷⁹

This is true for reasons that are both generally found in the intersection of social science and law, and particular to this typology. First, broadly speaking, "law's reductionist approach to social science"²⁸⁰ is inherent in the differences between the disciplines. Where social

276. See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 55, at 966–67; see also STARK, COERCIVE CONTROL, *supra* note 39, at 11–14; Clare Murphy, *Three Things You Need to Understand to Keep You and Your Children Safe When You're Thinking of Leaving*, SPEAKOUTLOUD, <http://speakoutloud.net/intimate-partner-abuse/coercive-control-can-lead-to-murder> (last visited Mar. 28, 2018) (describing how Jacquelyn Campbell's Danger Assessment captures many factors, most of which are indicators of coercive control).

277. *Power & Control Wheel*, *supra* note 55.

278. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 55, at 959–60. The Battered Women's Justice Project's work with family court professionals aims to deepen and make more sophisticated their identification of coercive control and its impact on families. See Loretta Frederick & Nancy Ver Steegh, *Making the Case for Coercive Control*, BATTERED WOMEN'S JUST. PROJECT (June 2016), <http://www.bwjp.org/resource-center/resource-results/case-for-coercive-control.html> (webinar recording and other resources available on webpage).

279. WANGMANN, EXPLORATION OF THE LITERATURE, *supra* note 46, at 17 ("[T]ypologies may reinforce already '... stereotyped notions of what it means to be a batterer or a victim[]' ... [including] popular notions that violence is a relationship issue, that men and women are equally violent, that much violence is sourced in particular incidents and conflicts ...") (quoting Dalton, *supra* note 272, at 282)).

280. Wangmann, *Gender, Intimate Partner Violence*, *supra* note 60, at 88 (footnote omitted); see also Rathus, *Shifting Language*, *supra* note 6, at 359, 389.

science research involves nuances, evolution, and ambiguities, in individual cases law necessarily must "reduce" such ambiguities to a single answer. Moreover, legal professionals must translate social science constructs into terms which fit legal paradigms; this sometimes distorts the true intent or meaning of the theory.²⁸¹ This is of particular concern when the individual applying the theory is not an expert in domestic violence or abuse, an all too common reality in family courts.²⁸²

The slippage between social science and law is even more predictable when it comes to typologies. Application of a typology in court can have only one purpose: to simplify and expedite determination of the nature of the case and the implications that should flow from the particular type, providing a short-cut for a more resource-intensive and detailed examination of the dynamics of an individual case and development of a nuanced remedy or response. It is inherent in any typology that treats one type of violence as less extreme than another that courts will use it to sort between more and less serious cases—often ignoring the particulars of the cases or variations within the types.²⁸³

A striking example of this phenomenon emerged in one case described in the literature, in which the court sought to apply a different typology of batterers. This typology distinguished between perpetrators of "family-only" violence and individuals who are violent elsewhere. Remarkably, the court applied the typology to assure a battered woman that she could safely return to her husband, *because the perpetrator was "a FO [family-only] man."*²⁸⁴ That a court could deem a "family-only" perpetrator to be safe for *his wife*, is a powerful indication of how seductive it is for courts to treat a typology as simply distinguishing between "bad" and "not bad" without regard to the actual defining characteristics of the types.

281. Wangmann, *What Do Family Law Decisions Reveal?*, *supra* note 14, at 82–83. (describing Australian Family Court's "Best Practice Principles" references to Johnson's typology distorting his definition of violent resistance and treating it as equivalent to self-defense).

282. See *supra* text accompanying note 28, and note 34.

283. Rathus, *Shifting Language*, *supra* note 6, at 381 ("[A]lthough the typology scholars themselves may say that all the kinds of violence can be serious and cause injury or other trauma, there is a perception in the family law community in Australia that coercive and controlling violence is at the top of a scale."). Yet situational couple violence "can be very serious." *Id.*

284. Holtzworth-Munroe & Meehan, *supra* note 46, at 1378 (discussing this scenario) (emphasis added).

CONCLUSION

Both the empirical and legal evidence reviewed above indicate that there are significant problems arising from the use of Johnson's typology in family courts. And, while feedback as to how the children in the cases described above are doing is unavailable, independent research indicates that when courts fail to recognize abuse and its implications in custody litigation, children suffer, sometimes fatally.²⁸⁵

If these problems were only a product of courts' confusion or misapplications of the typology, this critique would be limited to the legal system. However, review of the research, while validating to some extent the idea that there are different degrees of control in abusive relationships, also demonstrates a complexity to the research which casts doubt on key aspects of the two types important to family courts. Of particular salience is the contradictory evidence regarding whether control alone—or severity of violence, or specific triggers—predicts dangerousness and harm to the family. More fundamentally, a substantial number of scholars and professionals have reasonably suggested that rather than falling into distinct types, abusive relationships may well fall along a spectrum of control.²⁸⁶

In social science, ambiguities about the nuances and dimensions of the different types are appropriately subject to continued examination and research, subjecting the typology to exploration, modification, and continued evolution. In law, these ambiguities are, predictably, the very source of miscarriages of justice. In the dire setting of U.S. family courts, which are already problematic in abuse cases, the typology (i.e.,

285. The severity of the risks of unsafe custody and visitation awards is underlined by the growing number of cases in which children have been killed by a parent who was given unfettered access after the other parent sought restrictions for safety and the family court denied them. *U.S. Divorce Child Murder Data: U.S. Child Murder & Divorce: A Snapshot*, CTR. FOR JUD. EXCELLENCE, <http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/> (last visited Mar. 28, 2018) (follow "master database" hyperlink). While this database is not yet thoroughly analyzed, and there is no evidence that the typology was used in any of these cases, the risks of error in family court decisions cannot be overstated. See also JOYANNA SILBERG ET AL., CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES 52, 58–59 (2013), <https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/crisis-fam-court-lessons-turned-around-cases.pdf> (analyzing a set of cases in which the first family court rejected abuse allegations, and a second one reversed the custody award and returned the child to the protective parent; and finding significant harm to children in the interim).

286. See Gulliver & Fanslow, *supra* note 200, at 29; Frye et al., *supra* note 68, at 1303, 1308 (finding that the IT/CCV population consisted of older women and SCV consisted of younger women, lending support for the possibility that SCV becomes, over time, more controlling IT/CCV); Beck et al., *Patterns*, *supra* note 91, at 750.

SCV) is reinforcing the problem more than it is contributing to the solution.²⁸⁷

This examination provides a case study in the dangers of applying an ambiguous, evolving, and nuance-dependent social science typology in family courts, where such ambiguities are translated and applied to create definitive facts and specific outcomes for children. It is hoped that this analysis will encourage more legal and psychological professionals in family law to consider the bigger picture, recognize that the only elements that make the typology relevant to family courts are empirically debatable and complex, and expand the small chorus of dissenters on application of the typology in family courts.

287. In contrast to U.S. family courts, it appears that Australian family courts, which have adopted the typology with alacrity, may be utilizing it in a more balanced way than U.S. state courts. See generally Wangmann, *What Do Family Law Decisions Reveal?*, *supra* note 14. Wangmann found that they were applying coercive control roughly as often as they applied the SCV label. *Id.* at 85–86 (describing a sample of forty-eight decisions in which four or more found coercive control, four found SCV, and two “separation-instigated” violence).