REMOVING VIOLENT PARENTS FROM THE HOME:

A TEST CASE FOR THE PUBLIC HEALTH APPROACH

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I. INTRODUCTION

Every once in a while, a ground shaking, paradigm-shifting idea is advanced that seems, after the fact, obvious. It is perhaps the obviousness of the idea that explains both why it escaped notice for so long and why it holds the promise for lasting, meaningful reform. Professor Marsha Garrison advances just such an idea: that child maltreatment, like any serious public health problem, "demand[s] a medical, not an ideological, response" and should emphasize "prevention, the key to most successful public health campaigns."[1] Marshalling damning evidence that "after more than twenty years of state and federal initiatives aimed at bettering the prospects of abused and neglected children"[2] with few gains and little progress, Professor Garrison goes back to the beginning to discern how the child protection services ("CPS") system managed to get so far off track. She lays blame at the feet of reformers, who relied not on evidence but on a "simplistic, antiauthoritarian ideology that cast the state child welfare system as villain and the families served by that system as victims."[3] These reformers neglected to see how limited the treatment options they could offer families were, or the "lack of hard data" about their efficacy.[4]

As Professor Garrison documents, many of the formative decisions giving us the modern CPS system were not sufficiently fleshed out at the time they were made. Making decisions with

[1] Marsha Garrison, Toward a Medical Model of Child Maltreatment, __ VA. J. LAW & SOC. POL'Y. __, *4 (2005).
[2] Garrison, at *4.
[3] Garrison, at *4.
[4] Garrison, at *4.

imperfect information is, sadly, the context in which regulators always operate.[5] There is, of course, nothing malign about making decisions with limited information if the decisions represent honest suppositions that just did not pan out. However, once the decisions are made, Professor Garrison makes clear, the child welfare system never manages to go back and assess the decisions anew, with better and more information in hand.[6] She argues that the CPS system should evaluate its efforts in light of new evidence, as any medical system would.[7] This call for a searching self-examination based on hard evidence, at once obvious and overlooked, may be the most significant point Professor Garrison makes.

The reasons why regulators should pay attention to Professor Garrison's reframing go much deeper, however. Professor Garrison's public health lens can do useful work at the micro level, evaluating and fine tuning day-in-and-day-out decisions, just as on a macro level it can guide the structure of the CPS system. Day-in and day-out decisions, like the structural decisions Professor Garrison unclothes, have deep value choices embedded within them that sometimes turn out with scrutiny to be mere wishful thinking or groundless supposition.

This Comment will use the public health lens Professor Garrison has developed so richly to look at one of the most critical questions CPS caseworkers and other decision makers face

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[5] See Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, __ SAN DIEGO L. REV. __ (2005)(forthcoming) (noting that social science evidence can predict certain results, "but it cannot answer the tough value choices that have to be made at the limits of our knowledge"); David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, unpublished manuscript, 51 (on file with author) (discussing the role of "personal preference when a claim [is] not supported by data").

[6] Garrison, at *4.

[7] *Id.*

thousands of times a day: whether to remove a child who is a possible victim of abuse or neglect from his or her home. Removal, as Professor Garrison observes, is the reflexive, instantaneous default at the inception of most CPS investigations.[8] Yet, it need not be if the question of initial response was analyzed with the evidence-based approach Professor Garrison advocates.

Like the myths that shaped the CPS system into one that sometimes ill-serves the interests of children, a cluster of wrong-headed beliefs and misunderstandings drive the decision to remove a child, often needlessly, from his or her home. Few decisions are as determinative of a child's well being and long-term prospects as the decision to remove or not. As Professor Garrison observes, a child who is removed is "at serious risk" of being stranded in "unstable, impermanent placements … until adulthood."[9] A removed child may lose all contact with his or her family for long stretches of time,[10] may "develop feelings of guilt or unworthiness, especially if [he or she] was the one to disclose the abuse,"[11] and may experience serious psychological damage or physical abuse while placed outside the home.[12] Sometimes removal "places a child in a more detrimental situation than he would be in without intervention."[13]

Yet, CPS caseworkers often see no other recourse when a parent or other adult in the child's

[8] Garrison, supra note __ at *1 ("While child protection services were theoretically tailored to each family's needs, out-of-home placement was virtually the only alternative actually offered….").
[9] Garrison, supra note __ at ___.
[10] Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L. Q, 383, 386 (1989). See also Garrison, supra note __ at *1 (noting the possibility of a rift in relationships with the child's biological family).
[11] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 125 (Dean D. Kundsen and JoAnn L. Miller eds., 1991).
[12] See Part __ infra.
[13] Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-94 (1975).

home is accused of abuse.[14] Many believe, wrongly, that a non-abusing parent who fails once to protect the child from the abusing parent will do so again and again.[15] Many caseworkers also believe, wrongly, that excluding alleged offenders from the home is legally impermissible; consequently they believe there is no safe choice but to remove the child.[16] Ironically, many caseworkers and other decision makers falsely believe that only the child-victim is at risk from the alleged offender, and therefore remove only that child. Yet, in cases of intra-familial sexual abuse, perpetrators rarely stop with the first victim. In one study of perpetrators, four-fifths of biological father offenders abused more than one child in the household by their own account.[17] In a second study of father-daughter incest, biological fathers molested 82% of all daughters available to them, while stepfather-offenders molested 70% of all daughters.[18] This Comment argues that the child protection system legally can, and should, remove the alleged offender from the home rather than removing the child-victim. Removing an alleged offender makes the home safer not only for the child-victim, but for every child living there.

Using Professor Garrison's evidence-based approach, this Comment demonstrates that we have come a long way since Florence Rush asked in 1974, "[h]as anyone thought of the fantastic

[14] See Part __ infra (describing empirical factors motivating the decision to remove a child).
[15] See Part __ infra (summarizing studies showing that most caseworkers fiercely believe that non-offending parents share blame for the victim's abuse).
[16] See Part __ infra (documenting CPS caseworkers' misapprehensions about the legality of removing alleged offenders from the home).
[17] Kathleen Coulborn Faller, Sexual Abuse by Paternal Caretakers: A Comparison of Abusers Who Are Biological Fathers in Intact Families, Stepfathers, and Noncustodial Fathers, in The Incest Perpetrator: A Family Member No One Wants To Treat 65, 67-68 (Anne L. Horton et al. eds., 1990).
[18] Patricia Phelan, *The Process of Incest: Biologic Father and Stepfather Families*, 10 CHILD ABUSE & NEGLECT, 531, ___ (1986).

notion of getting rid of the [accused] father?"[19] Part II dissects the empirical factors driving the decision to remove children from their home. It examines how judges and legislators in nine states have laid the groundwork for excluding the alleged offender pending a full investigation so that this response is no longer unthinkable, unachievable, or fraught with enormous legal risk. Part III illustrates that baseless suppositions of "maternal culpability"[20] have led caseworkers reflexively to remove the victim, rather than pursuing the more direct and meaningful remedy of removing the threat to the child's safety. Part IV argues that a shift in CPS' default remedy protects not only the victim, but his or her siblings who, left within the alleged offender's immediate grasp, would likely become the next victim. Finally, Part V considers and ultimately rejects several possible limitations of accepting as the default remedy in cases of alleged child abuse, the exclusion of the alleged offender from the home.

II. UNDERSTANDING THE DECISION TO REMOVE CHILDREN

Traditionally, ensuring an alleged victim's safety meant removing the child from the home and evaluating the merits of the allegations later. In cases of sexual abuse, that approach lead to an abysmal reality. Ninety-three percent of all offenders remain within the child's environment or return home in the first year.[21] Less than 2% of all suspected offenders are convicted, while only 7% of offenders whose abuse is substantiated are jailed for more than a year.[22]

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[19] Florence Rush, *The Sexual Abuse of Children: A Feminist Point of View in* RAPE: THE FIRST SOURCEBOOK FOR WOMEN 71 (1974).
[20] REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 193 (Kluwer Academic 2001).
[21] Rebecca M. Bolen, *Non-offending Mothers of Sexually Abused Children: A Case of Institutionalized Sexism?,* 9 VIOLENCE AGAINST WOMEN 1336 (2003).
[22] *Id.*

In a study of factors influencing the state's decision to remove a child from her home, Theodore Cross and colleagues found that "the decision not to prosecute was the strongest predictor of child placement" outside the home.[23] The prosecution decision matters because "[i]f cases are not accepted for prosecution… the child's removal from the home … may be the only way to protect the child."[24] In this instance, child placement is seen "as the lesser of the two evils."[25]

This Hobson's choice grows out of a deep misconception that CPS cannot legally exclude offenders from their homes absent prosecution—despite the fact that states can, and do, remove children from their homes everyday.[26] Rebecca Bolen, a child abuse researcher, observes that "removing the alleged offender instead of the victim from the child's environment … may be one of the most difficult policy changes because it conflicts with society's presumption that the accused is innocent until proven guilty."[27] Christopher Bagley and Kathleen King have also argued that "[a] proper legal framework which would enable the child to remain with her mother while the alleged offender is removed, still has to be established."[28]

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[23] Theodore P. Cross, et al., *The Criminal Justice System and Child Placement in Child Sexual Abuse Cases*, 4 CHILD MALTREATMENT 32, 41 (1999).
[24] *Id.*
[25] *Id.* at 42.
[26] AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 279 (Sage Publications 2002).
[27] Rebecca M. Bolen, *Non-offending Mothers of Sexually Abused Children: A Case of Institutionalized Sexism?,* 9 VIOLENCE AGAINST WOMEN 1336, 1358 (2003).
[28] CHRISTOPHER BAGELY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 101 (1991).

Child abuse researchers are not alone in believing that the exclusion of offenders from their homes is legally risky. Law professor Katherine Pearson notes that "so-called voluntary agreements" in which CPS workers negotiate a parent's exit rather than removing the child, open "the door to recovery of damages from the social worker because of violations of the parents' rights to substantive and procedural due process under the Fourteenth Amendment."[29] Given these views, it is hardly surprising that over 90% of offenders "are allowed to stay within the child's environment, whereas the majority of children are removed from their homes."[30]

In contrast to the United States, ultimatums to parents to exit the home are customary in other countries. In Great Britain the accused parent can be ordered "to leave a dwelling-house in which he is living with the child."[31] This is the "preferred course of action" when a child is at risk from someone living in their home.[32]

The United States actually shares more common ground with Great Britain than scholars and caseworkers realize. Nine jurisdictions in the United States explicitly authorize state judges to issue, and CPS agencies to seek, protective orders directing an alleged offender to vacate the

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[29] Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and A Proposal for Change*, 65 TENN. L. REV. 835, 837 (1998).
[30] Rebecca M. Bolen, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 257 (Kluwer Academic, 2001).
[31] Child Protection and Court Procedures, Care Act, s.2(5) CA (1989) § 38A (3).
[32] RANDALL EASTON WICKHAM AND JANET WEST, THERAPEUTIC WORK WITH SEXUALLY ABUSED CHILDREN 153 (Sage, 2002). In New South Wales, Australia, legal reforms have recommended that the Parliament amend its existing statutes to require the alleged perpetrator to leave the home before removing the child. Correspondence from Patrick Parkinson, Professor of Law, University of Sydney, to Robin Fretwell Wilson, Associate Professor of Law, University of Maryland School of Law (Dec. 6, 2004) (on file with author).

home.[33] Absent egregious conduct, courts routinely insulate caseworkers from liability when they give alleged offenders ultimatums to leave their homes.[34]

A. Absolute and Qualified Immunity for CPS Workers

Some courts give CPS caseworkers absolute immunity like that given to judges for the performance of certain duties, largely so that they are "free to exercise their discretion without fear of personal consequences."[35] Without such insulation, "[i]ndividual caseworkers and supervisors facing the possibility of losing their life savings in a law suit might allow fear to

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[33] These jurisdictions include Hawaii, Kentucky, Maine, New York, Pennsylvania, Tennessee, Texas, Washington, and Guam. HAW REV. STAT. ANN. § 587-53(f) (2004) (providing that before placing the child in foster care, the court first consider the removal or continued removal of the alleged perpetrator from the child's family home); Ky. R. Jefferson Fam. Ct. 67 (establishing that at the adjudication hearing the judge may "order the alleged perpetrator to stay out of the family home"); ME REV. STAT. ANN. Tit. 22 § 4036(1)(F-1) (2004) (In a protection order, the court may consider removing the perpetrator from the child's home); 19 GUAM CODE ANN. § 13316 (xxxx) (providing that before placing the child in foster care, the court first consider the removal or continued removal of the alleged perpetrator from the child's family home); N.Y. Fam. Ct. Act. § 842 (xxxx) (In any order of protection issued pursuant to this section can require the parent "to stay away from the home" of the child); 23 PA. CONS. STAT. ANN. § 6108 (2001) (authorizing protective orders to direct the removal of the perpetrator from the home); TENN. CODE ANN. § 37-1-152 (xxxx) (that on application of the department or the children protection team, the court may order the removal of a suspected perpetrator of child sexual abuse from the home where the child resides); V.T.C.A., Family Code § 262.1015 (2004) (if the government determines "that child abuse has occurred and that the child would be protected in the child's home by the removal of the alleged perpetrator of the abuse," the government "shall file a petition for the removal of the alleged perpetrator from the residence of the child rather than attempt to remove the child from the residence."); WASH. REV. CODE ANN. § 26.44.063 (1997) (declaring that "it is the intent of the legislature to minimize trauma to a child involved in an allegation of sexual or physical abuse. The legislature declares that removing the child from the home often has the further effect of further traumatizing the child. It is therefore, the legislature's intent that the alleged offender, rather than the child, shall be removed from the home" at the earliest possible point of intervention).

It is possible that other jurisdictions would permit judges to exclude alleged offenders from the home on the basis of case law or the general powers granted to courts over children in need of assistance. For instance, in Maryland, a court on its own motion can issue an order "directing, restraining, or otherwise controlling the conduct of a person who is properly before the court [like a parent], if the court finds that the conduct (1) is or may be detrimental or harmful to a child over whm the court has jurisdiction; …or (3) … is necessary for the welfare of the child." Md. Code, Courts and Jud. Proceedings, § 3-821.

[34] See Part __ infra (discussing immunity afforded to CPS works when directing the father to leave the child's home).

[35] Caroline Turner English, *Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 GEO. WASH. L. REV. 759, 768 (1995).

influence their decisions, intentionally or otherwise."[36]

Thus, the United States Court of Appeals for the Ninth Circuit extends absolute immunity to state CPS workers when investigating child abuse allegations, performing placement services, or placing a child in a foster home.[37] The United States Court of Appeals for the Third Circuit confers absolute immunity on guardians *ad litem* who represent the child's interests when "testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court."[38] The United States Court of Appeals for the Sixth Circuit has also extended absolute immunity to CPS workers, a psychologist, and two psychiatrists in suits terminating parental rights.[39]

Other courts provide a more limited form of qualified immunity where state officials still enjoy broad protection from civil liability under qualified immunity. As the Third Circuit explained in *Croft v. Westmoreland County Children and Youth Services*,

> [t]he Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process.... In determining

[36] Gottlieb v. County of Orange 871 F.Supp 625, 629 (S.D.N.Y., 1994).
[37] *See, e.g.,* Mabe v. San Bernardino County, Dept. of Soc. Serv., 237 F.3d 1101, 1108 (9th Cir. 2001); Babcock v. Tyler, 884 F.2d 497, 501 (9th Cir.1989); Miller v. Gammie, 292 F.3d 982, 989-90 (9th Cir. 2002).
[38] Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir.1984).
[39] *See, e.g.,* Gardner v. Parson, 874 F.2d 131, 146 (3rd Cir. 1989). Dependency and termination proceedings are distinct. The decision to take protective steps on behalf of a child is made in a dependency proceeding, which is initiated by CPS. Id. Once the court finds a child dependent, the state may take a number of different remedial steps. Generally, these steps include placing the child with a relative or in foster care, leaving the child in the home under CPS' protective supervision, or requiring the abusive parent to participate in treatment. See, e.g., Fla. Stat. Ann. § 39.52(1)(b) (West Supp. 2001). In contrast, when the state initiates a proceeding to terminate parental rights,

> whether [a parent's] constitutionally protected interests were violated, we must balance the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse.[40]

Although fundamental, the rights of parents in their children are not unlimited. Instead they are:

> limited by the compelling governmental interests in the protection of children—particularly where the children need to be protected from their own parents.... The right to familial integrity, in other words, does not include a right to remain free from child abuse investigations.... Whatever disruption or disintegration of family life [a parent] may have suffered as a result of [a] child abuse investigation does not, in and of itself, constitute a constitutional deprivation....[41]

Under this calculus, a social worker receives qualified immunity where he or she acts on the basis of "some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse"[42] or, in the words of another court, upon "an objectively reasonable suspicion of abuse."[43] If such a basis exists, CPS will be justified in removing either a child or a parent from the home, "even where later investigation proves no abuse occurred."[44]

The Third Circuit Court of Appeals appears to ratchet up the level of protection for

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it seeks to sever the parent-child relationship permanently. Santosky v. Kramer, 455 U.S. 745, 759 (1982)(explaining that the state must show grounds to terminate parental rights by clear and convincing evidence).

[40] Croft v. Westmoreland County Children and Youth Services, 103 F.3d 1123, 1125-26 (3d Cir. 1997).

[41] *Id.*

[42] Croft v. Westmoreland County Children and Youth Services, 103 F.3d at 1126.

[43] Puricelli et al. v. Houston et al., 2000 WL 760522, *8 (E.D. Pa. 2000).

caseworkers even further. It has said that,

> a social worker acting to separate parent and child [will] rarely will have the luxury of proceeding in a deliberate fashion, as prison medical officials can. As a result, in order for liability to attach, a social worker need not have acted with the "purpose to cause harm," but the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed "shocks the conscience." [45]

Importantly, in analyzing claims of due process violations by "excluded" parents, courts apply precisely the same test they apply when considering whether children should have been removed.[46] They have *not* crafted more exacting tests, as one would expect, if a parent's interests in not being excluded from the home are so much greater than the child's interests in not being removed.[47]

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[44] Croft v. Westmoreland County Children and Youth Services, 103 F.3d at 1126.

[45] Miller v. City of Philadelphia, 174 F.3d 368, 375-76 (3d Cir.1999); *See also* Doman v. City of Philadelphia, 2000 WL 1224906, *2 (E.D.Pa.2000) "The Third Circuit [in Miller] has made it clear that when it comes to a social worker's interference with the parent-child relationship, only conduct that is so arbitrary as to shock the conscience may be considered violative of a parent's substantive due process rights."

[46] See, e.g., Gottlieb v. County of Orange, 871 F. Supp 625, 629 (S.D.N.Y. 1994) (noting that "[h]asty and poorly made decisions to remove children from their homes violate the constitutional rights of both parents and children," and applying the same test to parental exclusion as it applied to child removal).

[47] Excluded parents have framed their deprivation in terms of rights of association with the child, the same interest aaserted by children who have been improperly removed. See id. Both parents and children have an interest in maintaining family ties. As a consequence, the judicial analysis for exclusion of a parent and removal of the child have been identical. It is conceivable, however, that parents might bring suits for the deprivation of other constitutional rights—such as a suit alleging a taking of private property. In this instance, the character of the constitutional deprivation would be grounded in an interest that is not shared by the child—ownership of private property—and so may not evoke an equivalency with the child's interests.

B. CPS Workers and Agencies Are Given Wide Latitude in Acting

Of course, tests like these are abstractions. It is their application to specific facts that reveals the vast latitude courts have given caseworkers. *Gottlieb v. County of Orange*, a case in which an excluded father ultimately failed to recover against anyone after appealing to the Second Circuit Court of Appeals several times, is a good example of the great latitude given to caseworkers.[48] CPS caseworkers directed Gottlieb to either leave his home based on his alleged abuse of his daughter, or face her removal.[49] The father exited for a month and later sued, alleging violations of his civil rights.[50] The Court found that the caseworkers had an objectively reasonable basis for acting and were therefore immune from suit, even though they never investigated the anonymous informant's background or motives, failed to question the daughter in a neutral, nondirective manner, and asked "neither the daughter's teacher nor the school nurse, if the child exhibited any behavioral oddities."[51] The Court refused to fault the caseworkers because they had not been trained in more sophisticated and less suggestive means of interviewing.[52]

The father in the case also sued the County and its Department of Social Services ("Department").[53] While the lower court initially denied requests to have the claim dismissed, the court ultimately granted summary judgment to the County in a later round of litigation based

[48] Gottlieb v County of Orange, 84 F.3d 511, 513(2d Cir. 1996).
[49] Gottlieb v County of Orange, 871 F Supp 625, 629, (S.D.N.Y 1994).
[50] *Id.*at 628-29.

[51] *Id.* at 630.
[52] *Id.*
[53] *Id.* at 627.

on undisputed evidence that the County adequately trained its caseworkers.[54] The Department also acted reasonably, the Court found, in issuing an ultimatum to exit without "pausing to obtain a court order" since their source reported ongoing abuse, the daughter herself described repeated molestations at her father's hands, said that her father did not like tattletales, and said that she expected to be punished for talking about it outside of the home.[55] In the final analysis, the father prevailed against no defendant.[56]

Consider also the Third Circuit's decision in *Miller v. City of Philadelphia*, which involved the temporary removal of three children from their mother based on a sloppy investigation.[57] A CPS investigator asked the children leading questions, requested that the mother produce all three children for a physical exam even though the abuse allegation pertained to only one child, met secretly with a hospital social worker, excluded the mother's attorney from the waiting area outside the examination room, and was advised by a doctor that it was not clear whether the child's bruises were accidental or the result of physical abuse.[58] Not surprisingly, the caseworker received employment reviews that he did not always follow proper procedures.[59] Still, the Court concluded that "[e]ven if all of the facts alleged … were true, [the investigator] did not act in a way that shocks the conscience."[60] Clearly, *Miller* sets a high bar for actionable conduct.

[54] Gottlieb v County of Orange, 882 F.Supp. 71, 73 (S.D.N.Y. 1994).
[55] Gottlieb v County of Orange, 84 F.3d 511, 520 (2d Cir. 1996).
[56] Gottlieb v County of Orange, 84 F.3d 511, 520 (2d Cir. 1996).
[57] Miller v. City of Philadelphia, 174 F.3d 368, 375-76 (3d Cir.1999).
[58] *Id.*at 371.
[59] *Id.*
[60] *Id.* at 377.

Similarly, in *In re A.H.*,[61] the court considered a father's complaint about his removal from the home. Although the father alleged a number of due process violations, the court could not "find fault in the [lower] court's decision to remove Father from the home" since the daughter was abused by him and qualified as a child in need of supervision.[62]

The same treatment extends to physical abuse cases. For instance, in *Patterson v. Armstrong County Children and Youth Services*, county officials were found to have acted reasonably when they temporarily removed a 15-year old daughter based on the fact that her mother pulled the child from their car by her hair, wrestled her to the ground and pushed her face in a gravel driveway.[63] This caused minor bruises, cuts and scrapes, and the child arrived at school visibly distressed.[64]

As this review of the cases makes apparent, the courts afford wide latitude to caseworkers in their decisions to remove either the children or the abusing parents from the home in a number of contexts, despite due process challenges that excluded parents often raise.

C. Courts Will Overlook CPS Misdeeds When Others Could Correct Them

Even particularly egregious acts may be insulated from liability where a wronged parent cannot connect the act to the alleged constitutional violation. In *Miller v. City of Philadelphia*, a

[61] In re A.H., 751 N.E.2d 690 (Ind. App. 2001).
[62] *Id.* at 700 (noting that the due process issue was unremarkable).
[63] Patterson v. Armstrong County Children and Youth Services, 141 F. Supp. 2d 512, 522, 523 (W.D. Pa. 2001).

mother who temporarily lost custody of her three children alleged that a child welfare worker attempted to induce the examining hospital to falsify records and misrepresent the physician's medical report to the judge who issued the temporary child custody order.[65] The trial court found that the caseworker was not entitled to qualified immunity.[66] After several rounds of appeals, the Third Circuit Court of Appeals concluded that "even if [the caseworker] did misrepresent the doctor's report to [the prosecutor, the mother] failed to establish a causal connection between the alleged misrepresentation and the Judge's decision to grant a separation order."[67] Although she had ample opportunity, the mother chose not to depose the physician or prosecutor, "both of whom would have had direct knowledge of [the caseworker's] misstatements or misdeeds."[68] Moreover, the prosecutor "spoke independently with [the physician] to ascertain his opinion," which "should have served to expose any lies."[69] Consequently, "any subsequent misstatements by [the prosecutor] to the Judge during their telephone hearing would not have been caused by" the caseworker.[70] Even these questionable tactics by a CPS agency failed to trigger findings of Due Process violations.

Similarly, the U.S. Court of Appeals for the Seventh Circuit tossed out a jury verdict in favor of an excluded father where he failed to avail himself of opportunities to clarify how long he needed to stay away.[71] In *Terry v. Richardson*, a three-year old girl, Jaidah, returned from visits

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[64] *Id.*
[65] Miller v. City of Philadelphia, 174 F.3d 368, 371 (3d Cir. 1999).
[66] Miller v. City of Philadelphia, 954 F. Supp. 1056, 1059 (D. Pa., 1997).
[67] Miller v. City of Philadelphia, 174 F.3d 368, 374 (3d Cir., 1999).
[68] *Id.*at 373.
[69] *Id.*
[70] *Id.* at 374.
[71] Terry v. Richardson, 346 F.3d 781, 787 (7th Cir., 2003).

at her father's house withdrawn and afraid of other men.[72] When asked by her mother whether she and her father had any "secrets," Jaidah said yes—at which time her mother, Richelle, contacted Cheryl Richardson, a caseworker.[73] Richardson left Jaidah's father, John Terry, a message the next morning informing him that he should not see or contact Jaidah.[74] John Terry called back and seemed to understand the reasoning.[75] Two physicians corroborated the existence of sexual abuse, and for the next month and a half Jaidah continued to implicate her father when questioned about the abuse.[76] During this time, Jaidah missed one scheduled visit with Terry because of illness.[77]

Richardson interviewed Terry 15 days into the investigation and again advised him not to contact Jaidah until the investigation was complete.[78] On the 48th day, she called Terry to inform him that her investigation was complete and that Jaidah's accusations seemed valid.[79] Terry denied ever having received the message. Richelle then obtained an order prohibiting Terry's visitation with Jaidah.[80] Subsequently, a dependency court[81] found that Jaidah had been abused, but not by Terry.[82] Terry brought suit against Richardson and a jury awarded him $2,062 and Jaidah $7,210.[83]

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[72] *Id.* at 782.
[73] *Id.*
[74] *Id.* at 783.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 784.
[79] *Id.*
[80] *Id.*
[81] See supra note ___ (explaining the purpose of a dependency proceeding).
[82] Terry v. Richardson, 346 F.3d 781, 784 (7th Cir., 2003).

The United States Court of Appeals for the Seventh Circuit reversed the verdict, finding no constitutional rights had been infringed.[84] The court reasoned that, first, Terry had ample opportunity to ask Richardson about the extent of her authority; and second, any incursion on Terry's rights was minor—at most, Richardson prevented Terry from seeing Jaidah for one day.[85] While the court noted that "arbitrary abuses of government power are checked by requiring objective justification for steps taken during the investigation," it found such justification here.[86]

D. Caseworkers Stepping Over The Line

Although courts accord caseworkers significant protection, caseworkers can nonetheless exceed even the wide latitude given them. Suborning perjury, inducing medical providers to falsify records, or misrepresenting a medical report to the presiding judge, as alleged in *Miller*, all may jeopardize the immunity courts are prepared to confer.[87]

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[83] *Id.*
[84] *Id.*at 788.
[85] *Id.*
[86] *Id.* at 787. Like the actions of caseworkers, court orders also enjoy significant deference. Protective orders on behalf of sexually abused children have been upheld in numerous cases, even where the order impacts the offending parent's access to the residence he shared with the child. See Campbell v. Campbell, 584 So.2d 125, 126 (Fla. Dist. Ct. App. 1991) (affirming visitation to father who committed sexual battery upon the parties' three-year daughter); Keneker v. Keneker, 579 So.2d 1083, 1085 (La. Ct. App. 1991) (finding petition for final protective order was viable where father was temporarily restrained from custody and visitation with his daughter with whom he "engaged in inappropriate sexual behavior); Cooke v. Naylor, 573 A.2d 376, 379 (Me, 1990) (affirming protective order suspending father's right of contact with a child for 1 year, where father sexually abused child). As Besharov explains, "orders of protection are rarely struck down as 'unreasonable.' Few are appealed, and, when they are, appellate courts tend to rely on the expertise" of the lower court. Douglas J. Besharov, Practice Commentary: McKinney's Consolidated Laws of New York Annotated § 842 (2004).
[87] Miller v. City of Philadelphia, 954 F. Supp. at 1066.

In addition to the above, reckless disregard for the facts is also not prudent. In *Croft v. Westmoreland County Chilfren & Youth Services*, the court found that a caseworker lacked "objectively reasonable grounds" when she threatened a father that she would remove his child if he did not exit the home.[88] The caseworker's threat was based on an anonymous tip passed along a chain of four persons and lacked corroboration.[89] The caseworker acknowledged that she renewed her ultimatum to the father even after her interviews with the informing parties left her with no "opinion one way or the other" that the father was sexually abusing his son.[90]

Furthermore, where an objectively reasonable basis does not clearly support a caseworker's actions, courts will allow litigation to proceed beyond the summary judgment stage. In *Puricelli et al. v. Houston et al.,* a social worker allegedly issued an ultimatum to a father suspected of abuse to leave his home based on an anonymous and uncorroborated reports of abuse.[91] By allowing the father's lawsuit to proceed to trial, the court permitted a jury to decide whether the social worker had a reasonable basis for issuing the ultimatum.[92]

E. What's So Radical About Excluding Accused Offenders?

Although caseworkers can issue ultimatums to alleged abusers to exit their homes without risking a lawsuit, a stronger case needs to be made for excluding alleged offenders and leaving the children in place. There are compelling reasons for taking this approach.

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[88] Croft v. Westmoreland County Children & Youth Servs., 103 F.3d at 1127.
[89] *Id.*
[90] *Id.* (reversing the trial court's grant of summary judgment to the social worker).

A child who has endured abuse at the hands of an adult should not then be subjected to the "double victimization" of "system-induced trauma" that force children to leave familiar surroundings and the comfort of their mothers and siblings.[93] This trauma can be considerable.

A removed child is often cut off from all contact with the non-abusing parent for extended periods of time.[94] The removed child may "develop feelings of guilt or unworthiness, especially if [he or she] was the one to disclose the abuse."[95] While not every removed child is fostered, those who are placed in foster care may experience serious psychological damage.[96]

Sometimes removal "places a child in a more detrimental situation than he would be in without intervention."[97] A 1999 study found that foster care was a significant risk factor for sexual abuse and that foster parents were the perpetrator in nearly one third of the cases studied.[98] In another study, foster fathers and other foster family members were the perpetrators

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[91] Puricelli et al. v. Houston et al., 2000 WL 760522, *8 (E.D. Pa. 2000).
[92] *Id.* at *13.
[93] CHRISTOPHER BAGELY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 101 (1990); Kee MacFarlane, & Josephine Bulkley, *Treating Child Sexual Abuse: An Overview of Current Program Models*, 1 J. SOC. WORK AND HUMAN SEXUALITY 71, 72(1982).
[94] Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L. Q. 383, 386 (1989).
[95] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 125 (Dean D. Kundsen and JoAnn L. Miller eds., 1991).
[96] Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-94 (1975).
[97] *Id.*
[98] Georgina F. Hobbs et al., *Abuse of Children in Foster and Residential Care*, 23 CHILD ABUSE & NEGLECT 1239, 1243. (1999).

of abuse in over two-thirds of the substantiated cases.[99]

In many instances, the child's abuse at the hands of a foster parent is no surprise to the State. James Rosenthal and colleagues found in 1991 that reports of child sexual abuse while in out-of-home placements—defined to include family foster care, group homes, residential treatment, and institutions—were the most likely to be confirmed.[100] Moreover, Rosenthal and colleagues found that in 27% of all maltreatment reports, prior allegations against the perpetrator were present.[101] As Richard Gelles notes, "in some cases, foster parents are actually more dangerous to the child than the biological parents are."[102]

Excluding the alleged perpetrator makes the home a safer environment not only for the victim, but also for every child in the house, as Part IV documents more fully.[103] Exclusion also offers benefits in addition to safety. The support a child receives from her non-offending parent moderates the long-term effects of the abuse.[104]

Even where a child is not directly victimized, removal can be a bad idea. Separation

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[99] Mary I. Benedict & Susan Zurvain, *The Reported Health and Functioning of Children Maltreated While in Family Foster Care*, 20 CHILD ABUSE & NEGLECT 563 (1996).
[100] James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249, 253 (1991).
[101] *Id*.
[102] RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 162 (Perseus 1996).
[103] Theodore P. Cross, et al., *The Criminal Justice System and Child Placement in Child Sexual Abuse Cases*, 4 CHILD MALTREATMENT, 32, 41 (1999); *See generally* Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By A Sexually Predatory Parent to A Victim's Siblings*, 51 EMORY L.J. 241 (2002).
[104] *See, e.g.,* Jon R. Conte & John R. Schuerman, *Factors Associated With an Increased Impact of Child Sexual Abuse*, 11 CHILD ABUSE & NEGLECT 201 (1987); Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*. 59 AM. J. ORTHOPSYHCIATRY 197 (1989).

frustrates the "laborious task of putting lives back together,"[105] since the "essential nucleus" of the healing process is the mother-child relationship.[106] Removal also exposes the child to a litany of ills caused by "foster care drift."[107] The extent of this dislocation cannot be understated. In one study, 13% of sexually abused children placed in foster care experienced six or more different displacements.[108]

Disrupting the parent's life, rather than the child's, is preferable where the allegations initially appear true or, worse, are ultimately founded. As one court noted in a domestic violence case, "[a] victim of … outrageous and life-threatening sort of abuse … cannot be held hostage to the potential homelessness of her abuser, who created the intolerable situation in the first instance."[109] Exclusion seems especially compelling where "the father ... is responsible for the choice to eroticize [his] relationship with [his child]."[110] He should "bear the consequences of that choice even when he is not prosecuted."[111] Otherwise, offenders are externalizing the cost of their behavior to their victims who, ironically, are removed for their own safety.

Guam and Hawaii essentially take this approach. In Guam, the court must first give "due consideration to ordering the removal … of the alleged perpetrator from the child's family

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[105] JUDITH HERMAN & LISA HIRSCHMAN, FATHER-DAUGHTER INCEST 144 (Harvard University Press, 1981).
[106] *Id.*
[107] ROBERT D. GOLDSTEIN , CHILD ABUSE AND NEGLECT: CASES AND MATERIALS 714 (West Group 1999).
[108] REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 229 (Kluwer Academic 2001).
[109] V.C. v. H.C., 689 N.Y.S.2d 447, 453 (N.Y. App. Div. 1999).
[110] Anna C. Salter, TREATING CHILD SEX OFFENDERS AND VICTIMS 42 (1988) (quoting Roland Summit and JoAnn Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHOPSYCHIATRY 237 (1978).
[111] Anna C. Salter, TREATING CHILD SEX OFFENDERS AND VICTIMS 42 (1988) (quoting Roland Summit and JoAnn Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHOPSYCHIATRY 237 (1978).

home" before removing the child.[112] In Guam and Hawaii, the child's family bears the "burden of establishing that it is not in the best interests of the child that the alleged perpetrator be removed from the family's home."[113]

Texas errs on the side of the child even more forcefully. If the state CPS agency determines "the child would be protected in the child's home by the removal of the alleged perpetrator," the agency "must file a petition" to exclude the alleged offender.[114] The court must exclude the parent from the home where it finds that the child has been sexually abused and "there is substantial risk" that he or she will be abused again if the parent remains in the residence.[115]

The radicalness of this approach is more apparent than real. Domestic violence protective orders are issued countless times a day.[116] Obviously, the key remedy is the court's order to the batterer to "stay away."[117] States do not consider this radical jurisprudence.[118] Excluding an accused parent also mirrors actions taken in divorce disputes between adults. Courts routinely

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[112] GUAM CODE. ANN. § 13316 (2004).
[113] GUAM CODE ANN. § 13316 (2004); *See* HAW. REV. STAT. ANN. 31 § 587-53(f) (2004).
[114] V.T.C.A., Family Code § 262.1015 (2004).
[115] *Id.* More specifically, a temporary restraining order will be issued by the court if it satisfies these conditions:
Immediate danger to the child of harm if a victim of sexual abuse
There is no time for an adversary hearing
The other parent will not abuse the child
The removal of the perpetrator is best for the child
The temporary restraining order must expire by the 14th day after issuing it. Then the court may then continue the order if the child is not in danger from the other parent and is a victim of sex abuse who faces risk if the alleged offender stays in the house.
[116] CLARE DALTON & ELIZABETH SCHNEIDER, BATTERED WOMEN AND THE LAW 498 (2001).
[117] N.Y. Fam. Ct. Act § 842 (2004).
[118] CLARE DALTON & ELIZABETH SCHNEIDER, BATTERED WOMEN AND THE LAW 498 (2001).

direct one spouse to leave the home.[119] Finally, children are removed every day without even a passing reference to the considerable power being wielded by the State.[120]

The government routinely acts preemptively before criminal adjudications. Bond hearings commonly "place restrictions on …. place of abode of the person during the period of release" when that person poses an "unreasonable danger to the community."[121] All jurisdictions in the United States take such a concern into consideration.[122] Literally thousands of times each day, judges place restrictions on persons presumed innocent. Concededly, a bond follows arrest but, as with allegations of abuse, there has been no hearing on the merits or conviction.

Moreover, viewing this remedy through a public health lens, as Professor Garrison does, highlights the considerable power we have given the state to contain threats to the public welfare. Every state is authorized to contain the risk of infectious disease with means that override the narrow autonomy interests of individual persons posing a threat. Professor Gostin observes that "[t]hrough the exercise of compulsory powers, public health officials can require that people who pose a threat to public health submit to medical examination, testing, immunization, treatment, counseling, detention, isolation or quarantine. Such restrictions may infringe an individual's right to travel, secure privacy, maintain autonomy or associate."[123] As Part IV illustrates in great detail, parents who offend against children in their care engage in foreseeable patterns of

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[119] *See, e.g.,* Jetter v. Jetter, 323 N.Y.S.2d 305, 306 (1971).
[120] AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 279 (2002).
[121] S.C. CODE ANN. § 17-15-10 (2004); 18 U.S.C. § 3142(c).
[122] 52 AM. JUR. , 2d *Bail and Recognizance*, § 34 (2004).
[123] Lawrence Gostin et al., The Law and the Public Health: A Study of Infectious Disease Law in the United States, 99 Colum. L. Rev. 59, 113 (1999).

predation, moving from one child to the next. Their exclusion from the home is necessary to contain the risk they pose to not only the victim, but other children in the household.

F. *Due Process Concerns*

Ultimatums raise significant and legitimate due process concerns. Caseworkers may be tempted to use "voluntary" agreements as a means of short-circuiting the normal protections built into the CPS system. Pearson notes that "authorities sometimes employ coercive tactics … as an avoidance of procedural safeguards for the handling of child abuse investigations."[124] This short-circuiting of the normal procedural protections simply cannot be condoned.

Forbidding exclusion is not the solution to such over-reaching, however. Instead, we should institutionalize and heavily regulate this remedy, as several states do. Maine extends the same process protections to parents who are asked to exit the home as it does when pursuing the equally drastic remedy of removing the child.[125] These protections include providing legal counsel for the parent, a guardian *ad litem* for the child, notice and opportunity to participate in a hearing and, where the order was issued on an emergency basis, a preliminary hearing within fourteen days.[126]

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[124] Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and A Proposal for Change*, 65 TENN. L. REV. 835, 842-43 (1998).

Texas requires notice, a fourteen-day limit for any temporary restraining order, and the satisfaction of a four-part test before a temporary restraining order may issue.[127] The state must show that there "is no time, consistent with the physical health or safety of the child, for an adversary hearing."[128] Kentucky courts instruct judges who issue orders to alleged perpetrators to "stay out of the family home" to do so with great specificity – defining the specific distance that the person should stay away.[129] Protective orders in New York must be for a specified time period, initially not to exceed a year, unless certain aggravating circumstances exist.[130]

Importantly, these statutes do not simply duplicate the protection already available under domestic violence statutes – although many of the latter would also be available to protect children.[131] Domestic violence statutes are

> intended "[t]o allow family and household members who are victims of domestic abuse to obtain effective, *short-term* protection against further abuse...." 19 M.R.S.A. § 761(1) (emphasis added). Any protective order issued under [such a statute] is granted for a limited time only, not to exceed one year, and is subject to interim review at either party's request.[132]

The Maine court cautioned counsel that protective orders are "not the most efficient use of

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[125] ME. REV. STAT. ANN. tit. 22 § 4036(1)(F-1) (2004).
[126] ME. REV. STAT. ANN. tit. 22 §§ 4005, 4033, 4034 (2004).
[127] V.T.C.A., Family Code § 262.1015 (2004).
[128] *Id.*
[129] Kentucky Rules of Practice of the Jefferson Family Courts Appendix B Ann.
[130] N.Y. Fam. Ct. Act. § 842 (2004).
[131] Catherine F. Klien & OLeslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 820 (1993).
[132] ME. REV. STAT. ANN. tit. 19 §§ 761(1), 766(2) (2004).

litigation resources for the final resolution of the controversy" over access to the child.[133] As the Court explained, "once a temporary order safeguard[s] the child from immediate harm," proceedings to assure the child's safety permanently – as CPS proceedings do – should have followed.[134]

In contrast to domestic violence statutes, which generally require someone to declare "protect me,"[135] exclusion statutes do not rely on a household member (like the child or mother) to ask for assistance. Instead, they permit judges and caseworkers unilaterally to remove the offender.[136] Maine's Department of Human Services can petition for a protective order on behalf of a child who has been abused by a family member and Maine law allows the court temporarily to enjoin the abuser *ex parte* from "[e]ntering the family residence."[137] After a hearing, this order may be made permanent for up to 2 years.[138] Tennessee authorizes its CPS agency to apply for a "no contact order" removing the alleged perpetrator from the child's home if there is probable cause that the adult sexually abused the child.[139] Other states also authorize state agencies to take such steps.[140]

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[133] *Id.* at 379.
[134] *Id.*
[135] Catherine F. Klien & OLeslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (noting the paucity of statutes permitting government attorneys to seek protective orders on behalf of a victim of domestic violence or permitting one adult to seek this on behalf of another); KY REV. STAT. § 403.725 (Michie 2003 Supp.); W. VA. CODE ANN. §§ 48-27-305 , 48-27-204 (Michie 2003 Supp.).
[136] *See* In re A.H., 751 N.E.2d 690, 700 (Ind. App. 2001) (upholding the removal of perpetrators not only against due process claims, but also against claims that the exclusion of perpetrators is inconsistent with controlling statutes. *Id.* at 700.
[137] ME. REV. STAT. ANN. tit. 19-A §§ 4005(1), 4006(5) (2004).
[138] ME. REV. STAT. ANN. tit. 19-A §§ 4005(1), 4007 (2004).
[139] TEN. CODE ANN. § 37-1-152 (2004).
[140] HAW. REV. STAT. ANN. § 586-3(b)(2) (Michie 2003); V.T.C.A., Family Code § 262.1015 (2004) (authorizing the Texas Department of Protective and Regulatory Services to file a petition). Even in jurisdictions where there is no

III. DISTRUST OF THE NON-OFFENDING PARENT

Numerous studies show that most caseworkers fiercely believe mothers share the blame for abuse. In the 1990s, a series of studies showed that 70 to 86% of all CPS professionals placed some blame on mothers, both for father-daughter incest and for extra-familial sexual abuse.[141] Some studies asked caseworkers to assign relative responsibility for the abuse. In these, the fractional share of responsibility attributed to mothers for the abuse ranged from 11 to 21%.[142] In Australia, Jan Breckenridge and Eileen Baldry found that 61% of child protection workers felt that some mothers knew of the abuse, while one in ten believed that *most* mothers actually knew about the abuse.[143] In the United States, Patricia Ryan and colleagues found that in 82.3% of the case reports from five state, county, and private welfare agencies, caseworkers believed the mothers knew about the abuse before it was reported.[144]

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statutory provision which explicitly provides for the removal of perpetrators, courts have held that the perpetrator can be removed from the family home. *See, e.g.,* In re Macomber, 461 N.W.2d 671, 673-74 (Mich. 1990).

[141] Pauline Johnson et al., *Professionals Attributions of Censure in Father-Daughter Incest*, 14 CHILD ABUSE & NEGLECT 419 (1990); S.J. Kelly, *Responsibility and Management Strategies in Child Sexual Abuse: A Comparison of Child Protective Workers, Nurses, and Police Officers*, 69 CHILD WELFARE 43 (1990).

[142] Seth C. Kalichman et al.,. *Professionals' Adherence to Mandatory Child Abuse Reporting Laws: Effects of Responsibility Attribution, Confidence Ratings, and Situational Factors*, 14 CHILD ABUSE & NEGLECT 69 n1 (1990); S.J. Kelly, *Responsibility and Management Strategies in Child Sexual Abuse: A Comparison of Child Protective Workers, Nurses, and Police Officers*, 69 CHILD WELFARE 43 (1990).

[143] Jan Breckenridge & Eileen Baldry, *Workers Dealing With Mother Blame in Child Sexual Assault Cases,* 6 J. CHILD SEXUAL ABUSE 65 (1997).

[144] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE (Dean D. Kundsen and JoAnn L. Miller eds., 1991).

These suppositions of "maternal culpability" drive the choice to remove the child.[145] Assessments of "mother's ability and willingness to protect her child (1) before and (2) after the report of abuse … best explain[ed] the pattern of removal."[146] 82% of the case files indicated that mothers knew of the abuse.[147]

There is little support for this belief, however. As Ryan and colleagues flatly observe, "[a]lthough the myth has been widely held that [the non-abusing mother] is usually aware of the abuse and may contrive in setting it up, this is infrequently the case."[148] In a study of 65 cases of paternal incest, Kathleen Faller found that a mere 5% of mothers knew about the daughter's abuse but "felt powerless to stop it."[149] A study of grandfather incest found that 87% of mothers never knew.[150] In 1985, M.H. Myer found that at least 75% of mothers were unaware of their partner's abuse.[151] As Rebecca Bolen notes, across these studies, "75% to 95% of mothers do not know about the ongoing abuse."[152]

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[145] REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 193 (2001).
[146] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 132 (Dean D. Kundsen and JoAnn L. Miller eds., 1991).
[147] *Id.*
[148] *Id.* at 124. *See also*, Rebecca M. Bolen & J. Leah Lamb, *Ambivalence of Nonoffending Guardians After Child Sexual Abuse Disclosure*, 19 J. INTERPERSONAL VIOLENCE 185,186 (2004) (that the ambivalence of a nonoffending parent to the disclosure of suspected child abuse is not a midpoint on a linear scale capturing negative to optimal levels of guardian support, but represents two competing valences – between both the child and the perpetrator – that are triggered by allegations of abuse, necessitating a more complex conceptualization of responses to abuse allegations.
[149] Kathleen C. Faller, *Sexual Abuse by Paternal Caretakers: A Comparison of Abusers Who Are Biological Fathers in Intact Families, Stepfathers and Noncustodial Fathers*, *in* THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT 67 (Anne. L. Horton et al. eds., 1990).
[150] Leslie Margolin, *Beyond Maternal Blame: Physical Child Abuse as a Phenomenon of Gender*, 3 JOURNAL OF FAMILY ISSUES 410 (1992).
[151] M.H. Myer, *A New Look at Mothers of Incest Victims*, 3 J. SOC. WORK & HUMAN SEXUALITY 47 (1985).
[152] REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 230 (2001).

This is not surprising. Often, child victims never speak of their abuse. Marcellina Mian and colleagues found that the rate of purposeful (as opposed to unintentional) disclosure by the child decreased significantly when the perpetrator was intra-familial.[153] While a child's disclosure may not be the only clue, other cues are also frequently absent.

Sexual abuse is difficult to detect by non-offending mothers because one third of sexually abused children have no apparent symptoms.[154] Roughly half fail to display the classic, most characteristic symptom of child sexual abuse: "sexualized" behavior.[155] And as disquieting as it is, "the more severe cases [are] the ones most likely to remain secret."[156] Diana Russell reports that in 72% of the cases where mothers were unaware of the abuse, more severe abuse had occurred.[157] All of this makes one wonder precisely how mothers should have ferreted out their children's abuse. Clearly, "[m]others cannot report what they do not know."[158]

Of course, mothers can be complicit in a child's abuse. For instance, in *People v. T.G.,* a mother knew that her husband – the children's stepfather – was sexually abusing his

[153] Marcellina Mian et al., Review of 125 Children 6 Years of Age and Under Who Were Sexually Abused, 10 Child Abuse & Neglect 223, 226 tbl.5 (1986). In fact, a greater proportion of children victimized by family never tell (17.7%), than occurs with children who are the victims of extrafamilial abuse (10.9%). Donald G. Fischer & Wendy L. McDonald, *Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse*, 22 CHILD ABUSE & NEGLECT 915, 926 (1998).
[154] Kathleen Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review & Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 57, 57 (1993).
[155] *Id.*
[156] DIANA E. H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 373 (1986).
[157] *Id.* at 372.
[158] REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 190 (2001).

stepdaughters, but she concealed it.[159] Nonetheless, absent unambiguous indications of a mother's complicity, caseworkers should assume that mothers did not simply go along.

Nor is there any reason to believe that non-abusing mothers are not protective *after* the abuse comes to light. Most are "very" or "mostly" protective once they find out. A 1990 study found that 74% of non-abusing mothers "either totally or largely believed the child's account of abuse," while 67% of mothers were rated by the caseworkers as having average or better compliance with the caseworker's recommended treatment plan.[160] A1991 study by Ryan and colleagues, in which caseworkers harshly assessed mothers' knowledge of their child's abuse, found that over half the mothers (50.8%) acted "mostly" or "very" protective following the report.[161] Importantly, most mothers believed the disclosure. Elizabeth Sirles and Pamela Franke discovered that 78% of mother's believe the child's report of alleged abuse.[162] Although some studies show that only a quarter of non-offending mothers were "very supportive,"[163] such

[159] People ex rel. v. T.G., 578 N.W.2d 921, 922 (S.D., 1998).
[160] Alicia Pellegrin & William G. Wagner, *Child Sexual Abuse: Factors Affecting Victims Removal From Home,* 14 CHILD ABUSE AND NEGLECT 53, 57 (1990).
[161] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE tbl.2 (Dean D. Kundsen and JoAnn L. Miller eds., 1991).
[162] Elizabeth A. Sirles & Pamela J. Franke, *Factors Influencing Mothers' Reactions to Intrafamily Sexual Abuse*, 13 CHILD ABUSE & NEGLECT 131 (1989).
[163] Christine Adams-Tucker, *Proximate Effects of Sexual Abuse in Childhood: A Report on 28 Children*, 139 AM. J. PSYCHIATRY 1252(1982).

studies are a distinct minority.[164] One meta-analysis concluded that "75% of nonoffending guardians are partially or fully supportive after disclosure [of sexual abuse]."[165]

In any event, if an unspoken concern that a "mother who failed once will fail again" is forcing CPS's decision to remove kids from the home, caseworkers should assess the likelihood of a failure *prospectively*, with validated assessment tools, rather than based only on the fact of the child's past abuse. Such tools exist in various jurisdictions inside and outside the US and are used for precisely this purpose.[166] For instance, New Zealand utilizes a Risk Estimation System to evaluate a number of risk factors in child abuse and neglect proceedings, including a mother's proptective abilities.[167] Illinois assesses a mother's protective capacities when deciding to remove an alleged offender from the home, although Illinois' methodology has not been validated.[168] Rebecca Bolen has laid the theoretical groundwork to assess the protective capacities of non-offending mothers and has validated one instrument to do so.[169]

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[164] Rebecca Bolen, *Guardian Support of Sexually Abused Children: A Definition of a Construct*, 3(1) TRAUMA, VIOLENCE, & ABUSE 40 (2002) finding in a meta-analysis that most studies examining supportiveness of non-offending mothers " clustered around 75%," regardless of whether the study used "child protective services, medical, or treatment samples").

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[165] Rebecca M. Bolen, *Guardian Support of Sexually Abused Children: A Definition of a Construct*, 3 TRAUMA, VIOLENCE & ABUSE 40 (2002); *See also,* Rebecca M. Bolen & J. Leah Lamb, *Ambivalence of Nonoffending Guardians After Child Sexual Abuse Disclosure*, 19 J. INTERPERSONAL VIOLENCE 185,186 (2004) (finding that even ambivalence can mean support, as the nonoffending parent is in conflict between supporting the child while experiencing some allegiance toward the perpetrator).

[166] Rebecca Bolen, *Guardian Support of Sexually Abused Children: A Definition of a Construct*, 3 TRAUMA, VIOLENCE, & ABUSE 40 (2002); NEW ZEALAND CHILD YOUTH & FAMILY SERVICES, RESEARCH DEVELOPMENT UNIT, RISK ESTIMATION SYSTEM: REFERENCE MANUAL (2004).

[167] NEW ZEALAND CHILD YOUTH & FAMILY SERVICES, RESEARCH DEVELOPMENT UNIT, RISK ESTIMATION SYSTEM: REFERENCE MANUAL (2004).

[168] Personal Communication, Mark Testa, October 29, 2004.

[169] Rebecca Bolen, *Guardian Support of Sexually Abused Children: A Definition of a Construct*, 3 TRAUMA, VIOLENCE, & ABUSE 40 (2002).

A non-offending mother's protectiveness should not, however, serve as a reason to allow an alleged offender to remain in the home during the investigation. The role of secrecy in sexual abuse is well established; offenders

IV. REMOVAL OF THE ALLEGED OFFENDER PROTECTS NOT JUST THE VICTIM BUT ALSO THE OTHER CHILDREN IN THE HOME

Ironically, a default remedy that removes the child from the home, rather than removing the alleged offender pending a full investigation, sometimes leaves other children in the home at risk of abuse from the same individual. The risk of substituting child victims is perhaps easiest to see with claims of child sexual abuse.[170]

When a male parent sexually engages a child in his care, a question frequently arises about the safety of other children in the household. For a state to intervene to protect these children, the state must show that the sibling more probably than not faces substantial risk of imminent harm from the alleged offender.[171] Once proven, it may remove the child, supervise the family, or mandate "voluntary" treatment for the perpetrator.[172]

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predictably exploit occasions on which a child's mother is not present. See, e.g., Robin Fretwell Wilson, Children at Risk: The Sexual Exploitation of Female Children After Divorce, 86 Cornell L. Rev. 251, 307 (2001). A mother's protectiveness does bear on whether she will surreptiously permit the father to re-enter the house after being exluded and, for this reason, is properly examined with the tools described above.

[170] It is common in cases of child physical abuse also to have multiple victims in the same household. Alan Susman & Martin Guggenheim, The Rights of Parents 73 (1980) ("The theory behind [a presumption of risk to siblings] is that evidence of abuse or neglect of one child may indicate that other children in the same family are in extreme danger of harm, and that it is not necessary for parents to maltreat each child in succession for a court to intervene."); Karen S. Kassebaum, The Siblings of Abused Children: Must They Suffer Harm Before Removal from the Home?, 29 Creighton L. Rev. 1547 (1996) (charting the relationship between physical abuse of one child and abuse of another).

[171] FL. STAT. ANN. § 39.52(1)(b) (2001).

For a number of reasons, judges reach wildly different judgments regarding the risk to children left in the perpetrator's care.[173] Courts in the United States generally react in one of the three following ways.

A. No Clear Risk

Some courts see no clear risk to the victim's siblings. In *In re Cindy B,* the New York Family Court refused to protect the siblings of an incest victim, finding that the State produced no evidence "that the physical . . . condition of any [sibling] . . . is in imminent danger of becoming impaired" despite the fact that the father admitted sexual intercourse with his oldest daughter, Cindy.[174] Fifteen years later, the New York Court of Appeals validated this approach in *In Re Starr H,* where a mother's live-in boyfriend inserted his finger into the vagina of the mother's twelve-year old daughter, Starr, while he "instructed her to lick his penis 'like an ice cream cone.'"[175] The state CPS agency petitioned the court to protect Starr and her siblings. Although the Court of Appeals found that Starr was an abused child, her sexual abuse – standing alone – was insufficient to find substantial risk to her siblings.[176] Similarly, Texas courts have refused to see risk to a victim's siblings in proceedings to terminate parental rights.[177] In sum, these courts courts consider sex with one child as an isolated act – a fluke – rather than as critical evidence of a foreseeable pattern of predation.

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[172] ROBERT D. GOLDSTEIN , CHILD ABUSE AND NEGLECT: CASES AND MATERIALS ___ (1999)
[173] *See* Robin F. Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By A Sexually Predatory Parent to A Victim's Siblings*, 51 EMORY L.J. 241 (2002).
[174] In re Cindy B., 471 N.Y.S.2d 193, 195 (Fam. Ct. 1983).
[175] In re Starr H., 550 N.Y.S.2d 766, 767 (App. Div. 1998).
[176] *Id*. at

B. Obvious Risk to the Victim's Siblings

In contrast to the "no-risk" view, the Ohio Court of Appeals in *In re Burchfield* viewed the risk to a victim's siblings as self-evident.[178] It held that "a child should not have to endure the inevitable to its great detriment and harm in order to give the [parent] an opportunity to prove [his] suitability."[179] The father digitally penetrated his five-year-old daughter on two separate occasions. The court concluded "in light of [the daughter's sexual abuse], it follows that so long as the father was in the home with [her siblings] the environment of these children was such as to warrant the state to assume guardianship."[180] Very simply, "the law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm."[181] Courts in Arizona, California, New York, Oregon, Rhode Island, Nebraska, Washington, Pennsylvania, and South Dakota also see this risk as a "no-brainer."[182]

C. Prior Victimization is One Factor

In 2000, the Florida Supreme Court announced that a victim's violation is relevant, but not

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[177] *See, e.g.,* Lane v. Jefferson Cty Child Welfare Unit. 564 S.W.2d 130, 132 (Tx. Ct. App. 1978).
[178] In re Burchfield, 555 N.E.2d 325, 333 (Ohio App. 1988).
[179] *Id*.
[180] *Id*. at
[181] *Id.*
[182] In re Appeal in Pima County Juvenile Dependency Action No. 118537, 912 P.2d 1306, 1308 (Ariz. Ct. App. 1995); In re Dorothy I., 209 Cal. Rptr. 5, 9 (Ct. App. 1984); In re Rhianna R.., 684 N.Y.S. 2d 389, 390 (App. Div. 1998); State ex. Rel. Juvenile Dept. v. Smith, 853 P.2d 282, 285 (Or. 1993); In re Daniel B., 642 A.2d 672, 673 (R.I. 1994); In re J.A.H., 502 N.W.2d 120, 124 (S.D. 1993); In re M.B., 480 NW.2d 160,162 (Neb. 1992); Tyner v. State Dep't of Social and Health Services, 963 P.2d 215, 220 (Wash. App. Div. 1998); Viruet ex rel v. Cancel, 727 A.2d 591, 596 (Pa. Super. Ct. 1999).

dispositive, in determining the risk to a victim's siblings. In *In re MF*, a father had "union" with the vagina of his stepchild, who was under the age of 12.[183] Following his incarceration, the state CPS agency filed suit to remove the father's two biological children from their mother's care based in part on the possibility of future abuse by the father. In a sharply divided per curiam opinion, the Florida Supreme Court held that a parent's commission of a sex act with one child was, by itself, insufficient to support a ruling of dependency as to the victim's siblings.

Even when judges agree about the risk to the victim's siblings, however, they often differ sharply about the impact of a sibling's gender, age, ordinal position, and genetic relatedness on the magnitude of the sibling's risk.[184] Despite these splits, courts can call on considerable social science data to better protect the victim's siblings, as the next sub-Part makes clear.

D. Unmistakable Evidence of the Risk to Other Children

The evidence of serial offending is overwhelming and chilling. Vincent De Francis studied 250 sexual abuse cases and found that 22% of perpetrators victimized between two and five children.[185] Kathleen Faller studied 196 paternal caretakers whom she classified in two ways: biological father-offenders and father-substitutes, including stepfathers, mother's cohabitants,

[183] In re M.F., 770 So. 2d 1189, 1191 (Fla. 2000).
[184] *See* Robin F. Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By A Sexually Predatory Parent to A Victim's Siblings*, 51 EMORY L.J. 241 (2002).
[185] Vincent De Francis, *Protecting the Child Victim of Sex Crimes Committed By Adults: Final Report*. AM. HUMANE ASS'N, CHILD. DIV. ___ (1969).

and mother's boyfriends.[186] Faller found that four out of every five biological fathers abused more than one child in the household, as did two out of three of the father substitutes.[187] In many cases, *every* child in the household was a victim of incest.[188] Patricia Phelan found similar results in a study of 102 cases of father-daughter incest. There, biological fathers molested 85% of all daughters available to them, while stepfathers molested 70% of all available daughters.[189]

The pattern is repeated again and again. Judith Herman and Lisa Hirschman studied forty families in which there were allegations of father-daughter incest.[190] Victims in 53% of the families reported another victim or that they "strongly suspected" incest with a sibling had taken place.[191] In 47% of the cases, the victims said there was no indication of other victims; however, there were no other possible victims in the household in one-third of these families.[192] Similarly, in Diana Russell's landmark study of 930 women in San Francisco, one half of the children abused by a stepfather reported at least one other sibling as a victim, while one-third of the victims abused by a father reported other sibling-victims.[193] Edward Farber studied the medical records of 162 molestation cases, which yielded a smaller percentage of cases of repeat incest with another child (28%).[194] However, while 72% of the records Farber examined gave no

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[186] Kathleen Coulborn Faller, Sexual Abuse by Paternal Caretakers: A Comparison of Abusers Who Are Biological Fathers in Intact Families, Stepfathers, and Noncustodial Fathers, in The Incest Perpetrator: A Family Member No One Wants To Treat 65, 67-68 (Anne L. Horton et al. eds., 1990

[187] *Id.*

[188] *Id.*

[189] Patricia Phelan, *The Process of Incest: Biologic Father and Stepfather Families*, 10 CHILD ABUSE & NEGLECT, 531, ___ (1986).

[190] JUDITH HERMAN AND LISA HIRSCHMAN, FATHER-DAUGHTER INCEST 94, tbl. 5.4 (1981).

[191] *Id.*

[192] *Id*.

[193] DIANA E.H. RUSSEL, THE SECRET TRAUMA 242 (Basic Books 1986).

[194] Edward D. Farber, at al., *The Sexual Abuse of Children: A Comparison of Male and Female Victims*, 13 J. CLINICAL CHILD PSYCHOL. 294 ___ (1984).

indication of additional incest, in 41% of those cases, no one inquired whether there were other victims.[195]

These figures may actually underestimate the incidence of serial predation given the intense secrecy surrounding incest and the common belief by victims that they alone are being molested.[196]

Other studies of incest perpetrators themselves also confirm that perpetrators frequently access several children in their care. In a study of 373 incest offenders, David Ballard and colleagues constructed a profile of perpetrators that included abuse history.[197] They found that 33.9% had at least one additional incestuous relationship after the first.[198] Although frightening on its face, perhaps more terrifying is how this number breaks down. As one might expect, the largest subgroup, 12.8%, had one additional incestuous relationship.[199] The second largest category, 8.4%, represented perpetrators who admitted five or more additional incestuous relationships.[200] Not surprisingly, Ballard concluded that incest offenders "often have histories of large numbers of victims."[201]

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[195] *Id*.
[196] Russell, supra note __, at 242; W.D. Erickson et al., Behavior Patterns of Child Molesters, 17 Archives of Sexual Behav. 77, 85 (1988) ("Even in families where there are multiple perpetrators and victims, sexual contacts tend to be furtive, concealed from other family members, and involve only one child per contact.").
[197] David T. Ballard et al., *A Comparative Profile of the Incest Perpetrator: Background, Characteristics, Abuse History, and Use of Social Skills, in* THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT 43, 46 tbl. 3.2 (Anne L. Horton et. al., eds., 1990).
[198] *Id*.
[199] *Id.*
[200] *Id.*
[201] *Id.*

Although the risk to siblings is clear, not all children are equally at risk. The gender of the victim and siblings, as well as the age at which the victim's abuse began, all affect the magnitude of a sibling's risk.[202] Certain children face only a slim chance of becoming victims. For instance, a son is at minimal risk following father-daughter incest that begins in the daughter's teenage years.[203] Absent other indicators of risk, the male child in this household is not likely to be victimized.[204]

Given these damning studies of serial victimization, the risk to siblings seems obvious. Nonetheless, some early studies of recidivism among incest offenders suggested that an offender – once caught – would just stop. These studies projected that only 4 to 10% of incest offenders would be recidivists.[205] New, and better constructed studies now suggest that incest offenders remain a continuing threat.[206] Yet, before assessing this new research, it is important to review the early studies as they offer significant insights into the risk to siblings that have been overlooked thus far.

In the early studies, incest offenders seemed much less threatening than offenders who strike outside the home. Vikkie Sturgeon and John Taylor's 1980 study of 260 mentally-disoriented sex offenders compared the reconviction rates of heterosexual pedophiles, homosexual

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[202] Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By A Sexually Predatory Parent to A Victim's Siblings*, 51 EMORY L.J. 241, 246 (2002).
[203] *Id.*
[204] *Id.*
[205] David Finkelhor, *Abusers: Special topics, in* A SOURCEBOOK ON CHILD SEXUAL ABUSE. (David Finkelhor et al., eds., 1986); Vernon L Quinsey et al., *Predicting Sexual Offenses, in* ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 125 (Jacquelyn C. Campbell ed.,1995).

pedophiles, and incestuous offenders (whether heterosexual or homosexual), and found that reconvictions for sexual crimes were 20% for heterosexual pedophiles compared to 15% for homosexual pedophiles and 5% for incest offenders.[207] Thus, incest offenders initially presented only modest risks of re-offending.[208] However, other evidence in the same study undercuts the incest perpetrator's image of relative safety. Looking at prior convictions for sexual crimes within each group, the researchers found that 19% of incest offenders had prior convictions.[209] Although this percentage fell significantly short of the percentages for heterosexual pedophiles (43%) and homosexual pedophiles (53%), the findings nonetheless confirm that significant numbers of child incest perpetrators – one in five – do indeed engage in a pattern of repeat offenses.[210]

In short order, researchers began faulting the early studies. The Packard Foundation's Center for the Future of Children noted that recidivism is "extremely difficult to measure because many sex crimes may not result in arrest or conviction [and because] . . . official data are often inaccurate or outdated."[211] Recidivism studies yield misleading appraisals of risk as they largely follow incarcerated offenders, which is not the typical sentence for incest.[212] Finally, the early

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[206] See Infra notes __ - __ and accompanying text (discussing studies by Lea Studer, Ian Barsetti, Philip Firestone and others).
[207] Vikki Henlie Sturgeon and John Taylor, *Report of a Five-year Follow-up Study of Mentally Disordered Sex Offenders Released from Atascadero State Hospital in 1973*, 4 CRIM. JUST. J. 31, 57-58 tbl.x (1980).
[208] *Id.*
[209] *Id.*
[210] *Id*.
[211] Center for the Future of Children, The David and Lucile Packard Foundation*, Sexual Abuse of Children: Recommendations and Analysis*, THE FUTURE OF CHILDREN, Summer/Fall 1994, at 10.
[212] David Finkelhor, *Abusers: Special topics, in* A SOURCEBOOK ON CHILD SEXUAL ABUSE. (David Finkelhor et al., eds., 1986); Rebecca M. Bolen, *Non-offending Mothers of Sexually Abused Children: A Case of Institutionalized Sexism?,* 9 VIOLENCE AGAINST WOMEN 1336, 1350 (2003) (noting that "the legal system incarcerates only a small percentage of [incest]

studies simply missed recidivism that occurred many years later, a frequent occurrence with child molesters.[213]

Recent studies also take issue with the provincial belief that incest offenders will not re-offend. In the most prominent of these, Lea Studer and colleagues grouped 220 patients who participated in an Alberta, Canada treatment program for sex offenders into offenders whose index victims were related to them (incestuous offenders) and those who were caught with an unrelated child (extra-familial abusers).[214] They compared the rates at which each reported offending against other children within and outside the home. Contrary to conventional wisdom, "22% of the incestuous group had prior offenses against a related child," suggesting that "repeat offenses may not be so rare." [215] Significantly, only 12% of offenders who victimized an unrelated child reported violations against related children, making incest offenders statistically nearly twice as likely to report other related victims.[216] As Dr. Studer notes:

> [I]f the 'dogma' [of the incest offender's low propensity to re-offend] were theoretically and clinically sound (incest offenders being an entirely separate and discrete group), the [reported rate of other related victims among incest offenders] should approach 0% . . . . The fact that [0%] is so far from [the reported value] says as much as any real differences [between incest offenders and non-

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offenders").

[213] *See L*. C. Meyer & J. Romero, *Ten year follow-up of sex offender recidivism*, JOSEPH J. PETERS INSTITUTE 1980.

[214] Lea H. Studer et al., Rethinking Risk Assessment for Incest Offenders, 23 Int'l J. L. Psychiatry 15, 15 (2000)

[215] *Id.* at 18.

[216] *Id.*

incestuous ones].[217]

The early distinction between incest offenders and other child molesters falls apart for other reasons too.[218] Incest offenders and child molesters who strike outside the family have "very similar arousal patterns," indistinguishable erotic preferences, and "disturbingly high" deviant sexual arousal to children.[219] Many child abuse researchers now question the extent to which "different categories of offenders, particularly intra-familial and extra-familial, are different from each other."[220] Indeed, the classification of sex offenders into two groups, incest offenders and pedophiles, was "prematurely disseminated as [it does] not appear to be valid."[221] Clearly, the older view that incest offenders are a special category who will not re-offend is invalid and must be discarded.

Although these studies alone justify a presumption that a perpetrator who strikes once within the family will strike again,[222] there are a number of sound public policy reasons for presuming

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[217] Letter from Lea Studer, M.D., F.R.C.P.C., Psychiatrist, Phoenix Program, Alberta Hospital Edmondton, Albera, Canada, to Prof. Robin Fretwell Wilson (Feb. 13, 2002) (on file with author).

[218] *E.g.,* Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, 13 J. INTERPERSONAL VIOLENCE, 275 (1998); Philip Firestone et al., *Prediction of Recidivism in Incest Offenders*, 14 J. INTERPERSONAL VIOLENCE, 512 (1999); Lea H. Studer et al., *Primary Erotic Preference in a Group of Child Molesters*, 25 INT'L J. L. & PSYCHIATRY 173 (2002).

[219] Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, 13 J. INTERPERSONAL VIOLENCE, 275, 283 (1998); Leah H. Studer et al., *Primary Erotic Preference in a Group of Child Molesters*, 25 INT'L J. L. & PSYCHIATRY173 (2002); Philip Firestone et al., *Prediction of Recidivism in Incest Offenders*, 14 J. INTERPERSONAL VIOLENCE, 512, 512-513 (1999).

[220] Anna C. Salter, Treating Child Sex Offenders and Victims 49 (1988) (quoting Roland Summit and JoAnn Kryso, Sexual Abuse of Children: A Clinical Spectrum, 48, 49 AM. J. ORTHOPSYCHIATRY 237 (1978).

[221] Jon R. Conte, The Nature of Sexual Offenses Against Children, in CLINICAL APPROACHES TO SEX OFFENDERS AND THEIR VICTIMS 11, 25 (C.R. Hollins & K. Howells, eds. 1999).

[222] Removal of the alleged offender may offer some protection to non-offending mothers as well. A number of studies have suggested that households in which child abuse occurs are at increased risk for domestic violence as well.

risk to other kids in the family. First, a presumption of risk assists CPS caseworkers who, without clear guidelines, may be slow to react or may not act at all. Additionally, a presumption fairly places the burden on the offender to prove the child's safety and errs on the side of additional protection for other children. After all, the offender is the primary determinant of repeat performances. Finally, presuming risk gives courts judicial discretion to act protectively if they sense risk to the siblings rather than requiring harm before acting.

Although this snapshot of serial predation warrants reforms I have outlined elsewhere — to place the burden of proving the sibling's safety on offenders, and to improve judicial predictions of risk[223]—we should embrace fundamental change. The offender should be removed from the home – pending a full investigation – rather than the victim. Part V explores a number of possible limitations to excluding alleged offenders form the home, but argues that these are easily overcome.

V. LIMITATIONS OF REMOVING ALLEGED OFFENDERS FROM THE HOME

Exclusion of alleged offenders is not without some potential problems. Just as a child who is removed from his home may experience guilt, so may a child whose parent is ejected, especially

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See Tom Lyon and Mindy Mechanic, Domestic violence and child protection: Confronting the dilemmas in moving from family court to dependency court, in N. Dowd, D. Singer, & R.F. Wilson (Eds.), Handbook on children, culture, and violence *35 (2006)(forthcoming) (discussing the overlap between spousal abuse and child sexual abuse).

[223] *See* Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By A Sexually Predatory Parent to A Victim's Siblings*, 51 EMORY L.J. 241 (2002).

when the "family suffers economically."[224] In addition, like the decision to remove a child, the decision to exclude an alleged offender is made "against a background of urgency and inadequate information" and will sometimes be unwarranted.[225] However, the fact an allegation may later prove unfounded should not, by itself, dissuade us from using this remedy. These error costs are no greater than those that occur when the state removes a child who is later found not to have been abused.

The real "difficulty with restraining orders is that they are hard to enforce and, in the case of child sexual assault, depend upon the presence of an adult ally for the child to monitor the situation and to report any violation of the restraining order."[226] Clearly, it is essential that the non-abusing parent is alert. For example, British authorities will not exclude an accused parent during an investigation if another adult in the home is not willing to care for the child[227] or does not consent to the exclusion.[228] To secure a restraining order in Texas, the court must find that the child "is not in danger of abuse from a parent ... with whom the child will continue to reside."[229] The remaining parent must "make a reasonable effort to monitor the residence" and agree to report any attempts by the excluded parent to return home.[230] The failure to do these

[224] Patricia Ryan et al., *Removal of the Perpetrator versus Removal of the Victim in Cases of Intrafamilial Child Sexual Abuse, in* ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 125(Dean D. Kundsen and JoAnn L. Miller eds., 1991).
[225] John Pickett & Andy Maton, *Protective Casework and Child Abuse: Practice and Problems, in* THE CHALLENGE OF CHILD ABUSE 56 (Alfred White Franklin, ed., 1977).
[226] PATRICIA A. GRAVES & SUZANNE M. SGROI, *Law Enforcement and Child Sexual Abuse in* HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 328 (Suzanne M. Sgroi, ed., Lexington Books 1982).
[227] Children Act 1989, c. 41 § 38A.
[228] Children Act 1989, c. 41 § 38A(3).
[229] V.T.C.A., Family Code § 262.1015 (2004).
[230] *Id.*

things is a misdemeanor, as is the perpetrator's return to the residence.[231] Although blanket suppositions of a non-offending parent's complicity in a child's abuse are generally not warranted, as discussed above, without the non-offending parent's assistance and consent, exclusion of the alleged offender is not an option.

It is possible that there are a set of women, especially those who are the victims of domestic violence, who will not be sufficiently protective of their children after an allegation of child abuse by their partner. Given the overwhelming evidence that non-offending mothers are supportive, however, the remedy to prevent such a failure would be a screen for domestic violence, and more specifically, the failure of a battered spouse to fail to protect prospectively, rather than than reflexive assumptions of such a failure by caseworkers.

A more intractable problem is the need to replace the income that the alleged offender provides to the home during his absence. For biological fathers, paternity imposes a duty of support and provides one means of dealing with the economic hardship that may result.[232] Further, many states provide for child support on a temporary basis; such emergency maintenance, in fact, is often received by battered spouses whose partners have been excluded from the home.[233] Any reform of state law to permit an alleged offender's removal should provide explicitly for emergency maintenance, just as legislatures have done in cases of domestic violence. Removal and placement of a child in

[231] *Id.* If the perpetrator has been convicted of returning, recidivism constitutes a felony.

[232] See, e.g., Unif. Marriage & Divorce Act § 309, 9A U.L.A. 282 (1998).

[233] Catherine F. Klien & OLeslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 886 (1993)(discussing the effect of restraining orders on a later proceeding ordering child support).

foster care is horribly expensive, as Professor Garrison explains.[234] Legislatures should also consider directing some of these savings into support of the household that remains behind. More fundamentally, however, the possibility of financial hardship should not persuade us from removing alleged offenders from the home, opting instead for removal of the child. Financial hardships do not restrain society from incarcerating or otherwise criminally penalizing offenders. Some costs are simply unavoidable.

VI. CONCLUSION

It is clear that [w]e need to develop alternatives to prosecution that can increase children's safety without making them leave their homes."[235] The easiest, most direct route to this is to take the alleged offender out of the home, rather than the children. As the Washington state legislature has declared, "removing the child from the home often has the effect of further traumatizing the child. It is, therefore, the legislature's intent that the alleged offender, rather than the child, shall be removed from the home and that this should be done at the earliest possible point of intervention."[236]

Although the perceived "inability to remove the offender" remains strong, Professor Garrison's public health model not only highlights the risks that wanton removal of child victims poses for the child victim – and sometimes for the children left behind – but more importantly, it

[234] Garrison, UVA, *14 (noting that "**Error! Main Document Only.**The cost of a year's placement in foster care may be as high as $50,000").
[235] Theodore P. Cross, et al., *The Criminal Justice System and Child Placement in Child Sexual Abuse Cases*, 4 CHILD MALTREATMENT 33, 43 (1999).
[236] WASH. REV. CODE ANN. § 26.44.063 (1997).

can guide us in constructing a safer path forward. Like the systemic issues she confronts, Professor Garrison's medical model can improve the crucial early decisions that put into motion everything else. If we candidly embrace this powerful analytical tool, fewer children will needlessly endure the trauma of being taken from the felt security of their home.[237]

[237] Professor Garrison's foundational reorientation would make even Judge Posner proud. *See* Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make the Wrong Topics Worse*, Legal Affairs Nov./Dec. 2004 (arguing that the scholarship offered by law professors tends to be narrowly doctrinal, having departed from the previous model of legal scholarship that offered a valuable service to the judiciary through its insightful analysis).