



VIVID

**Voices, Idea, Views, Insights and Dialogues for
Professionals working with Families in Transition**

SPRING 2005

THE NEW YORK CHAPTER OF AFCC-NY MISSION STATEMENT

The well-being of children and families is a fundamental goal of our society and its legal system. The New York State Chapter of the Association of Family and Conciliation Courts is dedicated to using the experience, knowledge, and resources of judges, mental health professionals, attorneys, law guardians, mediators, and other professionals, to improve that well-being through cooperative efforts that seek new, less adversarial approaches to the resolution of child centered legal matters.

CO-PRESIDENT'S MESSAGE

by Steven Demby, Ph.D. and Leonard Florescue, Esq.

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We have had a busy few months and we are continuing to make AFCC-NY a presence in our State by spreading our beliefs on how to reach optimal results for children and their parents who become involved with our legal system. To that end, our chapter co-presidents, Steve Demby and Lennie Florescue, both testified before the Miller Commission on February 17, 2005. [The Miller Commission was appointed by New York's Chief Judge Judith Kaye to investigate and consider our entire judicial system as it relates to all matrimonial matters, including custody and child support, with a view to making suggestions to improve it.] Steve spoke about the important role of the forensic evaluator in providing the Court with a whole picture of the family system, including the children. Lennie explained who we are and what we do and emphasized our eager willingness to make AFCC's great experiences and resources available. He emphasized that whatever the Commission considered, AFCC had "been there, done that" all over the country and indeed the world. Already, we have responded to a number of requests from the Commission for information. For more information on the Co-Presidents' testimony, see page 3.

AFCC-NY also is going to be presenting regular programs to help our matrimonial judges in New York State learn more about

the areas of our expertise. The first session will be a primer on the various psychological tests that are performed during matrimonial actions, and the second probably will involve parent coordinators.

On March 9, 2005, we presented a seminar at which Elizabeth S. Thayer, PhD and Jeffrey Zimmerman, PhD presented their findings on the effects of divorce on children. Their findings are based upon their informal interviews with adults whose parents had divorced when they were children. The audience included approximately 60 mediators, forensic evaluators, therapist, lawyers, parent coordinators, etc. After restating the adage: conflict, not divorce is the problem; Doctors Thayer and Zimmerman explored more subtle concepts. They described the characteristics which exemplify good and bad divorces, explaining how the characteristics of a bad divorce compromise a parent's ability to parent and create loyalty conflicts for children. They explained the effect of loyalty conflicts on children and the further effects upon these children's relationships with peers, parents and their own children when they became adults. Many of the people interviewed were into and past middle age. Particularly interesting was the life long effect on many of the adults who had lived through their parent's divorces when they were children. They often found themselves unable to form trusting adult relationships (when their parents' divorces had been "bad") or repeated the same

mistakes in their own married lives and divorces. These facts, obviously, are of great importance to the members of AFCC and the professions to which our members belong. Drs. Thayer and Zimmerman reflected upon the issues and opportunities that divorce professionals face, gently challenging the audience to help our clients reconfigure their relationships in appreciation of the reality that a divorce ends a marriage, not a family. We understand that the two psychologists have developed a course of training for other mental health professionals to guide parents through these minefields, and among those trained by them is our own former co-president, Dr. Lauren Behrman. A number of us have decided to attempt to have our clients and their spouses referred for such co-parenting counseling early on in our professional contact with them.

We are also well into planning for our annual, large November program. Our working title is "What about the best interests of the child's family?: interdisciplinary approaches to reducing family conflict." The conference is scheduled for December 2nd. Please save the date.

As you can see, we have been hard at work and, like Uncle Sam, we need you! Please become involved with us in this exciting process. There is much that you can help with and we look forward to working with you to accomplish great things for the children of New York State.

MEMBER PROFILE:

**Hon. Evelyn Frazee, Supreme Court Justice,
Seventh Judicial District**

By Tracy M. Hamilton, Esq.



Hon. Evelyn Frazee has been a New York State Supreme Court Justice since 1993. Prior to her election to Supreme Court, Justice Frazee was a confidential law clerk to a Supreme Court Justice and before that she was in private practice. Justice Frazee graduated from Rutgers University School of Law, where she was editor-in-chief of the Rutgers-Camden Law Journal.

Justice Frazee's professional affiliations are too numerous to mention here, but suffice it to say that her resume lists over 35 professional affiliations and activities, ranging from chairmanships and memberships in New York State and Monroe County Bar Associations and in New York State and Seventh Judicial District Supreme Court Associations to various court system task forces and advisory committees. She is a founding member and immediate past co-president of AFCC-New York Chapter. Throughout her judicial career, Justice Frazee has received a number of awards for her dedication, integrity and commitment to justice. Finally, Justice Frazee is very active in her local community, serving on numerous civic boards and committees.

One of Justice Frazee's passions is parent education programs in the context of child custody and visitation disputes. Parent education programs provide separating and divorcing parents with information about the impact of their breakup on their children and teach parents how to address the transition created by the family reorganization. The primary goal of parent education is to teach parents methods to reduce the stress of family change and to protect their children from the negative effects of parental conflict.

Justice Frazee is co-founder and co-chair of the Monroe County A.C.T.- For the Children (Assisting Children through Transition) Parent Education Program. In 2001, Court of Appeals Chief Judge Judith Kaye appointed her Chair of the New York State Parent Advisory Board. In October of 2003, the Advisory Board issued a comprehensive Report, which contains recommendations for proposed statewide guidelines, standards and requirements for parent education programs.

Justice Frazee updates us on the implementation of the Parent Education Board's report:

- 1) **Certification** - The Board is in the process of reviewing 29 applications for certification from existing parent education providers. Parent education programs must be certified to receive referrals of parents from courts. A list of all certified programs to which referrals may be made will be available soon on the NYS court website (<http://www.courts.state.ny.us>), and in courthouses. The list will be distributed to parents at the

first court conference, together with the parent's brochure (see 4 below).

- 2) **A Parent's Handbook** has been developed to be used by all parent education providers throughout New York State. It is in the final stages of preparation and printing.

The Handbook will be distributed to parent education class attendees and to parents who opt not to attend parent education because of domestic violence concerns or because they are deemed ineligible for other reasons (e.g. language barrier—the Handbook will be translated into Spanish).

- 3) **District Parent Education Liaisons** have been designated in each of the New York State judicial districts. The liaisons are judges or justices, judicial officers (JHOs or support magistrates) or chief clerks, who will serve as a local resource for parent education providers; keep the Board apprised of local developments, problems, customs, etc.; and provide a means for the Board to disseminate information locally.

- 4) **A brochure for parents** is in the final stages of production. This brochure will be distributed to parents at their first court appearance and will be available in the courthouse and on the NYS court website.

- 5) **A Memo to judges and justices** concerning the Parent Education and Awareness Program and the new rules and referral guidelines will be distributed by the end of May 2005. Additionally, the Board is developing awareness and training sessions for judges.

- 6) **Evaluation Survey** - All attendees at parent education programs will be required to complete an evaluation survey. The survey has been drafted and is in production. The completed surveys will be submitted to the Board after each class for tabulation and analysis and will enable the Board to evaluate the effectiveness of the parent education program on a consistent statewide basis.

Finally, believe it or not, Justice Frazee has time for a life outside her work. She and her husband, Hon. Thomas Klonick, have two children.....she answered three questions about her personal life as follows:

- 1) Proudest Personal Achievement – Besides having two terrific children, being elected a Supreme Court Justice.
- 2) Favorite Book – *Celestine Prophecy* by James Redfield
- 3) Career other than my own that I would like to do – Teaching, which, actually, was my career before attending law school.

AFCC-NY CONFERENCE

by Lauren Behrman, Ph.D. and Elayne Greenberg, Esq.

The New York Chapter's third annual conference held on November 19, 2004 at the Bar Association of the City of New York was a tremendous success. The conference, entitled "Understanding Children's Communications in Custody Conflicts: Lincoln Hearings and Beyond" was attended by a record number of professionals. The program consisted of a panel of judges, including the Hon. Sondra Miller, Hon. Judith Gishe and the Hon. Tandra Dawson, who is a member of our AFCC-NY Board. The judges presented their experiences conducting in-camera hearings with children. Next, a panel of psychologists spoke about interpreting children's communications. On the panel was our AFCC-NY co-president, Steve Demby, Ph.D., along with Ava Siegler, Ph.D., director of the Institute for Child, Adolescent and Family Studies. During an interlude for lunch, AFCC-NY was presented with our Chapter Charter by Leslye Hunter, current president of AFCC National. Following this, a panel of law guardians, including Pamela Sloan, Esq. and Carol Sherman, Esq., spoke about the way they approach interviewing children.

In the latter part of the afternoon, case scenarios with fact patterns were distributed and we broke out into multidisciplinary groups to discuss the case from each of our professional perspectives. Each group was charged with the task of coming up with an interview protocol for an in-camera hearing, taking into account the fact pattern in the case. When the larger group reconvened, all of the groups reported on their interview strategies. An interdisciplinary panel of judges, mental health personnel and law guardians, along with Liza Thayer, Ph.D., a parenting coordinator from Connecticut, addressed the questions raised by the groups. Jeff Zimmerman, Ph.D. moderated the final panel.

We are all energized by the enthusiastic response to our third annual conference and the potential of a strong Chapter of AFCC in New York State.

AFCC-NY TESTIFIES BEFORE THE MILLER COMMISSION

by Steven Demby, Ph.D. and Leonard Florescue, Esq.

Our chapter co-presidents, Steve Demby and Lennie Florescue, both testified before the Miller Commission on February 17, 2005. Steve spoke about the important role of the forensic evaluator in providing the Court with a whole picture of the family system, including the children. The forensic evaluation can aid the trier of fact to consider more than the partial views portrayed by the litigants.

Steve also spoke about the evaluator's role in focusing on the child's developmental needs. He also noted that many parents do not seem to have a realistic idea of what a forensic evaluation entails. For this reason, he suggested that before a forensic is assigned, the parents be given information about forensic evaluations if a forensic is even being considered. Finally, he addressed the value of the forensic report in proposing interventions aimed at containing or reducing the inter-parent conflict.

Lennie first told the Commission who we were and pointed out that AFCC already has a presence on the Commission from Chief Matrimonial Judge Justice Sibermann, to Justice Dawson (who is both a Commission member and one of our directors). He emphasized that, in considering issues under investigation by the Commission, AFCC had "been there, done that", all over the country and indeed the world. He told the Commission that, whatever decisions they make or avenues they explore, AFCC could put them in contact with people who had experience and information about that approach and knew its ups and downs. He said that we would provide the Commission with whatever it needed on terms of such support. [In fact, that very day, Lennie received a request for information about parenting plan forms in other states, and responded by forwarding to the commission a disc with the information. He has since been asked by the commission for information on forensic standards and other issues.] Lennie also suggested that early psychological or forensic intervention should be used in cases where conflict seemed to be inevitable. Justice Miller asked him how we could recognize those cases and he replied that any experienced judge or matrimonial lawyer "knew them when they saw them."

“WHY DOESN’T SHE LEAVE?”

What would Davy Crockett, Muhammad Ali, and Mother Jones say to Victims of Domestic Violence?



W. DENNIS DUGGAN, F.C.J.

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In 1849, eighty-nine thousand healthy, resourceful, determined young men heeded a call to “go west young man,” to make their fortune in gold. Six months later, twenty thousand of these men were dead! How could that happen? We’ll get back to that later.

The New York State Court of Appeals has recently issued a decision which illustrates why we need a new paradigm to describe victims of domestic violence. It’s time to bury the myth that these victims are weak, timid, foolish, stupid, reckless or worse. If we had the chance to ask Davy Crockett, Muhammad Ali or Mother Jones, they would tell us that victims of domestic violence are brave, courageous, resourceful, determined, selfless and undaunted. Instead of asking, “Why doesn’t she leave?”, we should be asking: “Why should she have to?”

The first problem we have when talking about domestic violence is the term itself. It is all encompassing, even though the phenomenon it describes spans the full spectrum of bad conduct. For example, there is the episodic domestic violence that may occur when one spouse discovers that another has been unfaithful. This may involve the use of profanities, the breaking of objects and physical force that stops short of injury, such as a slap or a push. This could be termed Domestic Violence in the Third Degree. Then there is the domestic violence that has a recurring pattern and which involves more serious uses of force and controlling behavior and may involve physical injury. This could be termed Domestic Violence in the Second Degree. Finally, there is the type of physical force that can be permanently debilitating or even lethal. It is most often accompanied by a pattern of verbal abuse, emotional assaults, threats and despotic controlling behavior. This would constitute Domestic Violence in the First Degree.¹

In *Nicholson v. Scopetta* (3 NY 3rd 357, 2004 Lexis 3490, October 26, 2004), the Second Circuit asked the New York Court of Appeals whether, under New York law, a mother neglects her children when she becomes the victim of domestic violence that is witnessed by her children. This ques-

tion arose out of a federal class action law suit against the New York City Administration for Children’s Services (ACS). It was ACS policy to remove children, without court order, from mothers who “engaged in domestic violence” by being victims. The Federal District Court determined that ACS routinely and unnecessarily charged mothers with neglect and removed children where the mothers—who had engaged in no violence themselves—had been the victims of domestic violence.

To most who reflect on this question for just a moment, the answer is a no-brainer. However, it was anything but to ACS or to much of the Child Protective industry throughout New York State. These “failure to protect” neglect cases against mothers have been sending New York Family Court Judges through the roofs of their courthouses for over a decade. The neglect petition would allege that “the mother was involved in a domestic violence relationship.” Excuse me, being assaulted does not mean that you have a “relationship” with the batterer. This “relationship” locution was worthy of George Orwell and Lewis Carroll cubed. How did it get that way?

One reason was the “not on my watch” mind set. ACS had been the subject of excoriating articles in the media where they had stumbled badly by leaving children in horrible situations that resulted in stomach turning abuse (and deaths) of children. Better to “err on the side of caution” than to find your face on the cover of the New York Post. Of course, no judge wants to be on the cover of the New York Post either and many of us succumbed to the “safer course” syndrome.

Another reason was the feeling on the part of the Child Protective Services (CPS) that the mother could not protect her children from the perpetrator. This is a common reaction in our criminal/family justice system. If you are assaulted by a stranger, the entire system gears up to protect you. If you are assaulted by a “loved one,” the response is: “Lady, go to Family Court.”

This policy also developed and became entrenched be-

cause the victims were poor and the poor are different. They are weaker, they have fewer resources with which to fight back and fewer people who will fight for them. And, they don't vote. The victims of domestic violence were twice victimized; first by their abuser and then by the agencies charged to protect their children. Their primary method of protection was to separate mother and child. It also cannot be ignored that the child protective industry is primarily white and the targets of ACS's removal practices were primarily black—black women, the most unempowered members of our society—next to children. New York City ACS may have been particularly egregious in executing their removal policies but they are not alone. The same phenomenon exists all over New York State.

The Court took the Second Circuit's invitation to explain exactly what is needed to find a victim of domestic violence (or any parent, for that matter) guilty of neglect. First, the statute was not meant to allow CPS or the Courts to second guess reasonable parental decisions. Rather, a parent is guilty of neglect only when he or she fails to exercise a "minimum degree of care" measured by what a reasonably prudent parent would have done under similar circumstances. No ground is being broken here because the language of the statute and case law had long established this standard.

For CPS to remove a child without a court order, the Court held: "While we cannot say, for all future time, that the possibility can never exist, in the case of emotional injury—or even more remotely, the risk of emotional injury—caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted." (Lexis, *38)

What is the Family Court's job in these emergency removal cases? As with any case it must determine what is in the child's best interest under the circumstances. In a removal situation, the Court must balance the imminent risk of harm that would exist after reasonable mitigation efforts (such as an order of protection removing the batterer) with the harm that removal might bring. "...[The Court] must determine factually which course is in the child's best interest."²

So now that New York's Court of Appeals has decreed the obvious and we have unburdened victims of domestic violence in removal cases, it's time to go further and remove their badge of helplessness.³ Three metaphors will help illustrate the issue.⁴

It was early March 1836. One hundred and eighty-nine Americans, under the leadership of Colonel William B. Travis, Davy Crockett and Jim Bowie, held off four thousand Mexican soldiers under the leadership of General Santa Anna. After six days of fierce battle, every American perished. These valiant men are in the American Heros Hall of Fame. We remember the Alamo because we honor their courage and sacrifice. However, we know that they were doomed—it was a suicide mission to be sure. **So, why didn't they leave?** They didn't leave because they were willing to die for their families, their freedom and their fortunes. They stayed to protect their way of life, what they believed in. It seems to me that victims of domestic violence are involved in a similar struggle—a fight to save their children, their home, their family. So why don't we consider them heros? If a soldier falls on a grenade to save his brothers, we will award him the Congressional Medal of Honor. If a mother takes the blows of domestic violence to save her children, we take her children away. When we think about domestic violence, I say we should remember the Alamo!⁵

And, what about Muhammad Ali? During Ali's later fights he would adopt the rope-a-dope strategy. He would stand against the ropes and cover up, taking his opponents body blows, absorbing them with his arms and shoulders. Finally, when his opponent became exhausted, Ali would strike, putting his opponent on the canvas. This is a strategy often used by victims of domestic violence, but sometimes with heart rending outcomes. Victims of domestic violence will often endure years of abuse under circumstances seemingly inexplicable to those of us who live in loving families. However, while they have the motive to leave, they often lack the means and opportunity to do so. These victims might not have realized they were doing this, but by using Muhammad Ali's rope-a-dope strategy, they were able to bide their time until they had sufficient means to leave and could seize the opportunity when it presented itself. Unfortunately, in some case, that opportunity never arrives until the circumstances become lethal. At that point, a victim who has suffered years of abuse reaches the breaking point where she finally lashes out and kills her abuser. The battered woman's syndrome is frequently used to explain this delayed self-defense and provide justification for the victim's actions. But, DV victims should not have to float like a butterfly so they can much later sting like a bee. It should not have to get that bad for victims, but it does because help was not on the way.⁶

On the issue of the counter-intuitiveness of women staying with their abuser, consider no less an authority on the human condition than Thomas Jefferson. In the Declaration of Independence, Jefferson wrote: "...all experience hath shown, that mankind are more disposed to suffer while evils are sufferable than to right them selves by abolishing the forms to which they have become accustomed." He then went on to specify a twenty-seven count indictment of abuse of the Colonies by the King of England. So why didn't the Colonies rebel after, say, the abuse described in the first fourteen counts? Well, Jefferson just told us and that is the same reason why victims of domestic violence don't leave.

There is a common perception that mediation for victims of domestic violence is not appropriate. The reason most often given is that the victim (usually the woman) will be victimized again by putting her at the same table with her abuser. There is also the fear (well founded) that only the most skilled mediators are able to accurately screen for domestic violence and then ameliorate its scale tipping effects. Cases involving First Degree Domestic Violence, as defined above, are not appropriate for mediation. It is the criminal justice system that should deal with these most serious domestic violence cases. Mediation, as a remedy, also becomes less compelling when the victim and the abuser are not married or have no children together. In those cases, strategies and resources permitting the victim to permanently and safely separate from the abuser produce longer term benefits. However, where the victim and abuser share children, absent circumstances that would justify the termination of parental rights, we must expect continued contact between the victim and the abuser during the children's minority. For these cases, I believe that mediation is essential and I think Mother Jones would agree with me.

So, who is Mother Jones and what did she ever say about domestic violence? I don't know if she ever said anything specifically about domestic violence but she did have a lot to say about women. Here is one of her provocations: "No Nation can ever grow greater than its women. None ever has; none ever will. It is the women who decide the fate of a nation, and that

has always been so, as history proves.⁷ If you were to rank the top five or six American women who advanced the cause of women in America, you would probably include Eleanor Roosevelt, Sojourner Truth, Susan B. Anthony, Elizabeth Cady Stanton, Harriet Tubman and—Mother Jones.

Mother Jones was one of the great leaders of the American labor movement. Born in Cork, Ireland in 1830, she died in Silver Springs, Maryland one hundred years later. In between, she traveled the nation organizing for the United Mine Workers. She was also a strong advocate for the elimination of child labor. In her day, corporate America first opposed the union movement with violence—severe violence. When violence did not work, they had other tools. The black list, the lockout, the yellow dog contract, right to work laws, company shops and the injunction, which our courts handed out to business like candy. These were all tools used to beat down unions, literally and figuratively. Management as Patriarch prevailed. And Labor—well, they looked a lot like the victims of domestic violence. Our answer to this social imbalance was to give Labor an even playing field. Workers were given the right to organize and to bargain collectively over their terms and conditions of employment. Management abuses were outlawed as unfair labor practices and effective means of redress were available. All of this brought Management to the bargaining table where they had to negotiate and mediate with Labor as equals. We leveled the playing field for workers. We can do the same for victims of domestic violence. Protective Mediation can do this.

What would protective mediation look like? It would have, at a minimum, these elements. 1. A safe setting, preferably the courthouse, with police security present. 2. Mediators trained to screen for domestic violence. 3. The availability of DV counselors or attorneys to assist victims. 4. Facilities to permit the separation of the parents. Mediation does not have to be face to face. 5. The ability to drug test participants. 6. The ability to refer, schedule and monitor attendance at parenting classes, substance abuse treatment programs and batterers programs. 7. Parent coordinators to implement mediation agreements and court orders.

The reason that protective mediation is needed for victims of domestic violence is—what's the alternative? That we give them a piece of paper with a judge's signature on it and then send them out to deal with their abuser on their own until their children turn eighteen? That's a recipe for disaster. The abuser, undeterred and unreformed, will win that war of attrition. However, if the abuser knows there is a forum available to the victim, where he must deal with her on equal terms in a civil and courteous fashion, backed up by court enforcement, he will be forced to reconsider his calculations. Protective mediation is also the most efficient place to locate and implement the principles of restorative justice.

One thing we know about male violence is that men who are disconnected from the civilizing influence of a family, children, and community are dangerous.⁸ Statistically, American men are the most dangerous males on the planet.⁹ Only about 20% of prison inmates are married. There are thirteen men in prison for every woman. In the early 1960's, the percentage of men living alone in America was at the lowest point in history and the percentage of children living with two parents was the highest. Twenty-five years later, the percentage of men living alone was at its highest and the percentage of children living with mother-headed households more than

doubled. In that twenty-five year period, America saw the greatest increase in violent crime in its history. With no residential fathers to guide young men, juvenile crime increased more than fivefold during that time. The title of a recent book is a metaphor for this phenomenon: **Men Are Not Cost Effective.**¹⁰

It won't help much just to give victims of domestic violence a new paradigm. What can be done "on the ground" (as everyone is so apt to say these days) to help them.¹¹ Several things, I think. **First**, every state should have a procedure, as in Arizona, where police can call a judge to get approval for a crime scene order of protection, good for, say, forty-eight hours. This will allow the victim time to get to court or to cover when the courts are closed. **Second**, batterer and drug treatment programs must be free. The most violent batterers are usually unemployed, uninsured and cannot afford these treatments. **Third**, every community needs a DV Mobile Rescue Team similar to those used for mental health crises interventions. For some victims, an order of protection, the help of family and the advice of a Domestic Violence Counselor are not enough to protect a victim from a determined abuser. **Fourth**, DV victims need a cell phone and a car. Both items are cheaper than sheltering them and with these two simple tools, DV victims can maintain their autonomy and freedom (and their jobs). I challenge any reader to negotiate their daily life, with three small children, using public transportation and pay phones! **Fifth**, all DV injuries and crime scenes should be photographed. In this age of digital cameras, and photos that can be emailed to courts, there is no excuse not to preserve this compelling evidence. **Sixth**, the legal definition of domestic violence should include the infliction or attempted infliction

of emotional harm. This would collect up those cases that involve a pattern of emotional abuse that stops short of violence but which is just as harmful. This behavior includes, for example, taping phone calls, hiding car keys, taking license plates, turning on the stereo late at night, destroying property, and canceling credit cards or utilities. We must remember that emotional harm that destabilizes a child's caretaker also harms the child. **Seventh**, as mentioned above, DV victims need protective mediation with highly trained mediators. The criminal justice system provides only transitory protection. When the victim and the batterer share children, that victim and those children need ongoing proactive protection. The Family Court is well suited to locate protective mediation services. Both the American Bar Association and the National Council of Juvenile and Family Court Judges have model programs for mediation when domestic violence is present. The above list of needs for victims of family violence is far from exhaustive, but you get the point.¹²

And, so what of the ninety thousand healthy, energetic, innovative and resourceful young men who went to California and the twenty thousand of them who died within six months? They died because there were no women there. The ratio of men to women was 30–1 (And many of those were prostitutes). The men succumbed to alcohol, poor diet, self neglect, hooliganism and straight out violence. It was a true life **Lord of the Flies** setting on a massive scale. Here is what Seth Smith wrote in 1851: "**As for California...I believe it is the finest country in the world. Women is all that is wanted to make it habitable.**"¹³

1. This is not meant to be a detailed blueprint but rather a descriptive scheme. For an overview of the development of family law in America, see **Governing The Hearth: Law And The Family In Nineteenth-Century America**, Michael Grossberg, (U. of North Carolina Press, Chapel Hill, 1985.) See also, **Man & Wife in America, a History**, Hendrick Hartog, (Harvard University Press, Cambridge, 2000.)

2. For example, Elizabeth Janeway, in **Powers of the Weak** (Knopf, New York, 1980.) describes how women victims of domestic violence use passive resistance as a protective strategy. This metaphor, "the powers of the weak," is very useful in weighing the relative risks mentioned by the court. Other accounts of passive resistance as a successful strategy to violence, aside from the familiar ones of Martin Luther King and Mahatma Gandhi, include the following: James Scott, **Weapon's of the Weak: Everyday Forms of Peasant Resistance**, (Yale University Press, New Haven, 1986.) For a survey of slave resistance see, Eugene D. Genovese, **Roll Jordan Roll, The World The Slaves Made** (Vintage Books, New York, 1976). To read about Labor's resistance see, Thomas R. Brooks, **Toil and Trouble: A History of American Labor** (Delta Books, New York, 1965). To examine the resistance of Native Americans see; James Wilson, **The Earth Shall Weep, A History of Native America** (Grove Press, New York, 1998.) or Ward Churchill, **Struggle For The Land, Native North American Resistance To Genocide, Eco-cide And Colonization** (City Lights Books, San Francisco, 2002).

3. In the child removal situations, we are primarily talking about Domestic Violence in the First Degree and maybe half of that of the Second Degree type. This violence is primarily male and tracks the ratio of male-female violent criminal conduct in our society, i.e. 85% male–15% female. It is in this category where children and mothers are exposed to life threatening danger. Not all domestic violence is male but male violence appears so pervasive because it can be easily measured at our trouble points: courts, emergency rooms and DV shelters. However, as Phyllis Chesler points out, women can be quite abusive in other, more subtle ways. See, **Woman's Inhumanity to Woman**, (Thunder Month Press, New York, 2001.) In the same vein, see **Who Stole Feminism: How Women Have Betrayed Women**, Christina Hoff Sommers, (Touchstone Books, New York, 1994.) Domestic violence by women usually falls into the Third Degree category.

4. In support of these metaphors, see, for example; Linda Gordon, **Heros Of Their Own Lives: The Politics And History Of Family Violence, Boston 1880–1960**, (Penguin Books, New York, 1988) "It is not a denial of their victimization to notice also their bravery, resilience, and ingenuity, often with very limited resources, in trying to protect and nurture themselves and their children." (Ch. 8, "The Powers Of The Weak"; Wife-Beating And Battered Women's Resistance," p. 251.)

5. Davy Crockett, probably America's first celebrity, is also the source of other metaphors. See, for example, Carroll Smith-Rosenberg, **Disorderly Conduct, Visions of Gender in Victorian America** (Oxford University Press, New York, 1985) "Davy Crockett as Trickster," pp. 90-108.

6. There is a prominent paradigm that marriage, being a patriarchal power conserving institution, places women in the occasion of domestic violence. There is some truth to this in the sense that, for example, people with more money can control people with less money. However, the generalized patriarchal control of women within marriage, to the extent that it exists, cannot be fairly described as domestic violence. Otherwise, domestic violence means, at once, every interaction between spouses and then it would have no meaning at all. Even accounting for the under reporting of domestic violence within marriage, the statistics support a theory that marriage, on balance, provides a safe haven for women. For example, the Department of Justice's National Crime Victimization Survey, for the high crime years of 1979–1987 showed that married women were four times less likely to be the victim of a violent crime compared with unmarried women. Of crimes committed against women by intimates, 88% were committed by boy friends or ex-husbands and only 12% by live-in husbands. (See, David Blankenhorn, **Fatherless America**, Basic Books, New York, 1995, pp.35-36. See also David Popenoe, **Life Without Father**, Free Press, New York, 1996, and Barbara DaFoe Whitehead, "Women and the Future of Fatherhood," **Wilson Quarterly**, Spring, 1996, pp 30-34.)

7. **Miners Magazine**, April 1, 1915, pp1,3. Quoted in **Mother Jones Speaks: Speeches and Writings Of A Working-Class Fighter**, Philip S. Foner, ed. (Pathfinder Books, New York, 1993.)

8. For a penetrating examination of how our entire society has become disconnected from each other see, **Bowling Alone, The Collapse and Revival of American Community**, by Robert D. Putnam, (Simon and Schuster, New York, 2000.)

9. The nature-nurture origins of male violence have always been hotly debated. However, one can not ignore the significant, though often indecipherable, effects of evolution. See, for example, **Demonic Males: Apes and the Origins of Human Violence**, Dale Peterson and Richard Wrangham, (Houghton Mifflin, Boston, 1996.) For a look at domestic violence from the ground up, see **When Men Batter Women; New Insights into Ending Abusive Relationships** Neil Jacobson and John Gottman, (Simon and Schuster, New York, 1998.)

10. June Stephenson, **Men Are Not Cost Effective: Male Crime In America**, (Harper Collins Books, New York, 1995.) For a view contrary to Susan Brownmiller's expressed in **Against Our Will: Men, Women, and Rape** (The Free Press, New York, 1993.) as to whether rape is primarily an act of sex or violence see: **Rape, A Natural History: A Biological Basis of Sexual Coercion**, Randy Thornhill and Craig T. Palmer, (MIT Press, Cambridge, 2000) and **The Dark Side of Man: Tracing the Origins of Male Violence**, Michael P. Ghiglieri, (Helix Books, Reading MA, 1999.)

11. I am sensitive to the continued use of the term "victim" instead of something more neutral such as "alleged victim" or "complainant." For example, in the Kobe Bryant case, the judge issued a ruling prohibiting the attorneys from referring to the complainant as "the victim." This is similar to the use of a phrase that we hear everyday in Family Court that goes, "Judge, there is a history of domestic violence in this case," when, in reality, there is a history of allegations of domestic violence, none of which have ever been judicially determined. The answer to this nomenclature problem, that can sometimes disguise bias, is to hold expeditious hearings to determine the facts.

12. For an exhaustive survey of the social and legal literature on domestic violence see: **Battered Women And The Law** by Clare Dalton and Elizabeth M. Schneider. (Foundation Press, New York, 2001.)

13. David T. Courtwright, **Violent Land, Single Men and Social Disorder from the Frontier to the Inner City** (Harvard University Press, Cambridge, MA, 1996) pp.67-68. For further readings on the history of the relations between the sexes and the family consider the following: 1. Antonia Fraser, **The Weaker Vessel**, (Vintage Books, New York, 1985.) 2. Sarah Blaffer Hrdy, **Mother Nature: A History of Mothers, Infants and Natural Selection**, (Pantheon Books, New York, 1999.) 3. Steven Mintz and Susan Kellogg, **Domestic Revolutions: A Social History Of American Family Life**, (The Free Press, New York, 1988.) 4. Mary Beth Norton, **Founding Mothers and Fathers, Gendered Power And The Forming Of American Society**, (Vintage Books, New York, 1997.) 5. Marilyn Yalom, **A History of the Wife**, (Perennial Books, New York, 2001.) 6. E. Anthony Rotundo, **American Manhood: Transformations in Masculinity from the Revolution to the Modern Era**, (Basic Books, New York, 1993.)