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CRYING WOLF: THE USE OF FALSE ACCUSATIONS OF ABUSE TO INFLUENCE
CHILD CUSTODIANSHIP AND A PROPOSAL TO PROTECT THE INNOCENT

ROBERT W. KERNS JR.*

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* Assistant University Librarian and Assistant Director of the George R. Farmer West Virginia College of Law Library; Doctor of Jurisprudence, West Virginia University College of Law, 2011; Master of Library and Information Science, University of Tennessee, 2011; Master of Science in Psychology, Nova Southeastern University, 2004; Master of Business Administration, Frostburg State University, 1997; Bachelor of Arts in Economics, University of Louisville, 1995. I would like to thank Whitney Kerns, Esq., for her support on this paper and throughout my career. I would also like to thank the editors of the South Texas College of Law's Law Review who worked diligently to edit this Article.

ABSTRACT

A false accusation of child abuse is one of the gravest offenses one can allege against a parent. In our society there is a bright line standard that if a child is abused, the law steps in to shield the child from the attacker, but what happens when our legal system is manipulated so as to trick a court into protecting a child from an innocent parent? The welfare of a child cannot be recognized when he or she is fractioned from a qualified parent because an opposing parent cried wolf and knowingly made false accusations against the other of abuse to gain custody of the child, and the shadow of the allegation of one of the most heinous crimes known to man hovers over the wrongly accused parent for the rest of his or her life. This Article presents the problems associated with the use of false claims of abuse to sway determinations of child custody in a societal climate where the occurrence of such an ill act may become more prevalent. It then examines the state of the laws aimed at preventing this malfeasance¹ and proposes elements that a law should have in order to better deter and redress the making of false accusations of abuse in child custody battles.

I. INTRODUCTION

Within the realm of family law, society's judicial tenement is in the best interests of the child.² A problem arises, however, when false allegations of child abuse enter proceedings to influence custodianship of the child that hinders the recognition of the best interests of the child. In these instances, false accusations deteriorate a child's relationship with a capable and competent parent. Some researchers suggest that major changes in attitudes and laws concerning divorce and custody over the past several years have created an environment that might make the use of abuse allegations to influence child custody more likely, pointing to the following factors:³ divorces have increased in all age groups; several states have enacted no-fault divorce laws; mothers are no longer presumed the primary custodian of a child; there exists a movement towards joint custody; and "with the trend toward no-fault divorce and community property laws,

1. This Article is limited to the laws as they exist within the United States.

2. All states, along with the District of Columbia, have statutes requiring that the child's best interests be considered whenever certain decisions are made regarding a child's custody, placement, or other critical life issues. See Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP'T HEALTH & HUM. RES., CHILDREN'S BUREAU (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

3. Hollida Wakefield & Ralph Underwager, *Sexual Abuse Allegations in Divorce and Custody Disputes*, 9 BEHAV. SCI. & L. 451, 452 (1991).

many angry and hostile couples have nothing left to fight over except the children.”⁴ Once joint custody is established, one of the fail-safe ways to break the arrangement is via an accusation of abuse.⁵ These trends lend to increases in the number of disputes over custody, and in a frantic situation in which a mother or father does not want to lose custody, time and control of one’s child to another qualified parent, there exists the ever-present, devil on the shoulder, option: claim abuse to sway the court’s decision.⁶ The result of such an act is not only interference with recognizing the child’s best interests, but also the creation of a second victim, the wrongly accused parent, who may well be forced into a battle of guilty until proven innocent.⁷

Statistics are relatively inconclusive on the prevalence of false accusations of abuse in divorce or custody proceedings, but some studies suggest the incidence of false accusation of abuse is growing, or could likely increase in occurrence particularly in child custody disputes.⁸ This Article suggests that current laws as they exist to date are not prepared to handle this issue. While slightly more than half of the states have some law addressing this precarious scenario, the remaining have no law on the books that directly addresses this occurrence. This leaves the door open to abuse the principle of recognizing the best interests of the child. Furthermore, this Article suggests, states that currently codify penalties for making false accusations in order to influence custody are insufficient in addressing this perpetration. First, these laws do not effectively deter the act. Second, they do not provide for a means to redress the harm caused when the act of false accusations of child abuse in the context of custody proceedings occurs.

4. *Id.* (citing Robert Geffner & Mildred Daley Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151, 152 (1990)).

5. Joint custody is a difficult arrangement to break, when it is believed that the best interests of a child are served by contact with both parents. Consider, for example, California’s public policy under which “children must have frequent and continuing contact with both parents” with one exception being that “when allegations of abuse or neglect are made by one parent . . . and those allegations are found to be true by a preponderance of the evidence.” B. Robert Farzad, *Falsely Accused of Child Abuse in a Divorce? Then Read This Immediately*, FARZAD FAM. L. (Oct. 2, 2012), <http://farzadlaw.com/orange-county-child-custody-attorneys/falsely-accused-child-abuse-divorce>.

6. See Wakefield & Underwager, *supra* note 3, at 452.

7. As one researcher found, in a typical family court proceeding, an allegation is brought by a custodial parent against a non-custodial parent following a period of visitation. In most cases, the initial and immediate response of the judicial system is to suspend any visitation between the accused parent and the child, frequently accomplished without any formal judicial process or opportunity for the accused parent to refute the charges. See Corey L. Gordon, *False Allegations of Abuse in Child Custody Disputes*, 135 NEW L.J. 687, 688 (1985). The wrongly accused parent suffers the penalty of the alleged crime, loss of visitation with the child, before his guilt or innocence is even determined. See *id.*

8. See *infra* Part II.

The intent of this Article is not to underplay the importance of protecting an abused child. Rather, the purpose of this Article is to consider the climate of the laws addressing this act and propose a model for a law that would more effectively deter and redress false accusations of child abuse in divorce and custody proceedings. The aim of such a law would be to protect both the wrongly accused parent and the best interests of the children involved.

The Article begins with a presentation of the prevalence of knowingly false accusations introduced into child custody proceedings and a look at the consequences associated with this act. It then turns to an evaluation of the current laws, both indirect and direct, that might help those falsely accused and that target the prohibition of making false accusations. This Article includes therein a consideration of the facets of the laws that hinder them from preventing or redressing this act. Finally, this Article proposes that to be effective at battling the making of knowingly false accusations in child custody proceedings, a statutory law must include: (1) a strong deterrent effect realized through penalties proportionate to the act, that still fits within the constraints of constitutional due process; (2) a designation within civil code that lessens the burden of persuasion required to obtain redress, thereby weakening the inherent difficulty in proving that an accusation was both false *and* known to be false; and (3) recovery of actual damages and mandatory counseling requirements of which the accuser bears the burden of expense, to compensate the wrongly accused and restore his or her relationship with the involved child.⁹ As this Article suggests, each piece of the above-stated proposal strengthens the plight of the falsely accused, but it is only when all elements are combined that true effectiveness is realized.

II. STATISTICAL DATA ON THE FREQUENCY OF FALSE ACCUSATIONS ENTERED IN CUSTODY PROCEEDINGS

There are two camps with regards to the prevalence of false accusations of child abuse in divorce and custody proceedings. On one side are those who suggest instances of false allegations of abuse in custody matters are growing, perhaps rising to the level of an epidemic. On the other are those who find concern over the existence of false allegations of abuse in custody proceedings to be unfounded.

Some “[m]ental health professionals and attorneys report seeing more accusations during marital conflict in the past few years,” possibly sharing a relationship with the increase in sexual abuse allegations generally over the

9. See *infra* Part V.

past ten to fifteen years.¹⁰ One report in 2012 indicated that “40% of cases involving sexual abuse accusations were divorce and custody cases, and in *three-fourths* of these cases, there was *no* determination of abuse by the legal system.”¹¹

Another study “attempted to determine the incidence and validity of sexual abuse allegations” in custody proceedings and otherwise, “through telephone interviews and mail surveys [to] 290 court administrators, judges, custody mediators, and child protection workers throughout the United States.”¹² The researchers “then conducted 70 in-depth interviews at five sites, and then finally tracked cases of sexual abuse allegations over a 6-month period from eleven court systems.”¹³ “This . . . yielded a pool of 160 cases of sexual abuse allegations” with estimates on the occurrence of false accusations ranging from 20% to 80%.¹⁴

Other studies report far less occurrences of allegations of abuse in child custody proceedings. One study indicated that “fourteen percent of child abuse accusations in family law cases were possibly deliberate false reports.”¹⁵ Still, another found even less instances of false allegations of abuse entering the courtroom in custody proceedings.¹⁶ As reported by the American Prosecutors Research Institute, a 1990 study of 9,000 divorce

10. See Wakefield & Underwager, *supra* note 3, at 451.

11. *Sexual Abuse Allegations in the Context of High Conflict Divorce*, TECHNICAL ADVISORY SERV. FOR ATT'YS, <http://www.tasanet.com/knowledgeCenterDetails.aspx?docTypeID=1&docCatID=15&docID=403> (last visited Apr. 8, 2015) (first emphasis added).

12. Wakefield & Underwager, *supra* note 3, at 452 (citing Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL* 1–21 (E. Bruce Nicholson & Josephine Bulkley eds., 1988); Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 *CHILD ABUSE & NEGLECT* 151, 152–54 (1990)).

13. Wakefield & Underwager, *supra* note 3, at 452 (citing Thoennes & Pearson, *supra* note 12, at 1–36; Thoennes & Tjaden, *supra* note 12, at 152–54).

14. *Id.* at 452–53 (citing Thoennes & Pearson, *supra* note 12, at 1–36; Thoennes & Tjaden, *supra* note 12, at 152–54).

15. Douglas J. Loewy, Comment, *Shadows and Fog: Is California Civil Code Section 4611 an Effective Deterrent Against False Accusations of Child Abuse During Custody Proceedings?*, 26 *LOY. L.A. L. REV.* 881, 886 & n.38 (1993) (internal quotation marks omitted) (“A 1988 study conducted by the Association of Family and Conciliation Courts, and reported by the California Assembly Committee on the Judiciary, ‘indicated that, of the family law cases in which both sexual abuse allegedly occurred and the child protective service worker or court worker expressed an opinion regarding the good faith nature of the report, 14 percent were viewed as possibly a deliberate false report.’” (quoting CAL. ASSEMB. COMM. ON JUDICIARY REP. ON AB 3546, 2 (1990))).

16. See *Fact Sheet: Child Sexual Abuse Allegations in Custody and Visitation Disputes*, AM. PROSECUTORS RES. INST. 1(2005), https://www.missouristate.edu/assets/swk/Module-12_Handout_2_Fact_Sheet_Divorce_and_Allegations.pdf [hereinafter *Fact Sheet*].

cases in twelve states found that abuse allegations were made in less than 2% of contested divorces in which child custody was at issue.¹⁷ However, while allegations of abuse were reported in only a small percentage of divorce cases involving child custody, it was further found that of that 2%, an estimated 33% of the sexual abuse allegations were thought to be false, suggesting that while the occurrence of abuse allegations entering custody proceedings is relatively low, the rate of falsity is relatively *high* once abuse allegations come into a custody proceeding.¹⁸

Further, studies citing high incidences of false allegations of child abuse are not without critics. One critique suggests that statistics reporting occurrences of false allegations of abuse in divorce or custody proceedings may be too high, even unreliable, “because they are derived from relatively small, non-random samples, and [conclusions] are not based on sound research principles.”¹⁹ Further, while researchers may be able to quantify the occurrence of abuse allegations in custody disputes, quantifying the occurrence of *false* allegations proves more challenging.²⁰ Part of the problem in doing so centers on definitional dilemmas.²¹ Quite simply, an unsubstantiated, or unprovable, claim of abuse is not ipso facto a false claim of abuse. But, what is meant by the term “false allegation” differs across studies.²² In some studies, this term references all cases in which abuse cannot be proven, or substantiated.²³ In others, this term is limited to describing cases where the accuser is purposefully deceiving with regards to an accusation of abuse.²⁴ Moreover, as will be discussed later in this Article, establishing that a claim of child abuse is in fact false is a difficult task to prove, which may limit the frequency of findings in studies on the subject.²⁵ Ultimately, it appears that what one can glean from existing studies on the occurrence of false accusations of abuse in custody disputes and critiques

17. *Id.*

18. See Marilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 CT. REV. 12, 12–13 (1998) (citing Thoennes & Tjaden, *supra* note 12, at 153–54).

19. Patricia L. Martin, *The Sacrifice of a Parent: An Analysis of Parental Rights Related to False Allegations of Child Sexual Abuse*, 7 T. M. COOLEY J. PRAC. & CLINICAL L. 251, 254 (2005) (citing McDonald, *supra* note 18, at 13). Marilyn McDonald is particularly critiquing the study conducted by the Association of Family and Conciliation Courts Research in Denver, Colorado, which examined 9,000 families involved in custody disputes, finding that in less than 2% was sexual abuse an issue, but of that 2%, an estimated 33% of the sexual abuse allegations were thought to be false. See McDonald, *supra* note 18, at 13.

20. Wakefield & Underwager, *supra* note 3, at 454.

21. *Id.*; see also *Fact Sheet*, *supra* note 16, at 1.

22. Wakefield & Underwager, *supra* note 3, at 454–55.

23. *Id.* at 455.

24. *Id.*

25. See *infra* Part IV.C.2.a.

thereof, is that if a study on false allegations excludes just unsubstantiated cases and includes only cases in which allegations of abuse are deliberately fabricated, there is likely to be a smaller proportion of incidences.²⁶

However, while the current research on the prevalence of false allegations of abuse in divorce or custody matters implies that better research methods need to be developed to study the issue more empirically and effectively, reports of low statistical frequency and critical analyses of studies finding high rates of occurrence do not immediately mean the issue of false allegations in custody battles is moot. Rather, as this Article will suggest, the laws as they exist today do not adequately address the problem. In fact, they leave the door open for the prevalence of the use of false accusations of abuse to influence custodianship to rise within our evolving state of child custody.²⁷

III. THE CONSEQUENCES OF CRYING WOLF

A. *The Fractioning of the Child from the Accused Parent*

The relationship between a parent and child is indescribably precious. One of the most detrimental consequences of false allegations of abuse is the severe impairment of that precious relationship that results. The welfare of the child is harmed because the child likely loses contact with the falsely accused parent, who is otherwise fit and deserving of visitation. Further, not only does the child suffer lost time with the accused, he or she may be submitted to pervasive investigations that negatively influence the child's

26. See David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 30, 38–39 (1987). Jones and McGraw reported that only 8% of all sexual abuse allegations, not just those made in divorce and custody proceedings, were false. *Id.* at 31, 38; see also *Fact Sheet*, *supra* note 16, at 1 (“The incidence of intentionally false reports [of abuse] generally appears to be 5% to 8% of all cases.”).

27. As set forth in the beginning of this Article, certain factors lead to an increase in the commonness of custody battles between two parents when divorce or other separation occurs: divorce has increased in all age groups; many states have enacted no-divorce laws; and with trends towards no-fault divorces and community property laws, there is little left to fight over except custody of shared children. See Wakefield & Underwager, *supra* note 3, at 452. Moreover, there exists a movement towards joint custody, rather than automatic primary custodianship with the mother. *Id.* Taken in sum, these factors together suggest an environment in which the likelihood of using false accusations of abuse to influence custody awards could likely rise, indicating a potential problem, regardless of difficulties in quantifying the occurrence. See also Daniel Pollack, *Penalties for Falsely Reporting Child Abuse*, MARSH LAW FIRM'S CHILD LAW BLOG (Mar. 8, 2013), http://www.childlaw.us/penalties_for_falsely_reportin_1 (noting the pervasiveness of false allegations of child abuse and the difficulties they create in custody battles).

image of the accused, regardless of veracity,²⁸ further hindering the relationship with the accused parent.

While variation exists in degree, states have generally “established powerful systems to intervene, almost immediately, to sever contact between” a child and an adult of whom suspicions of suspected abuse have been raised.²⁹ The following exemplifies such. Under Virginia law, certain qualified individuals may remove a child from custody for up to seventy-two hours without the approval of the parent or guardian following a complaint of abuse or neglect.³⁰ In Minnesota, the state legislature provides that if a report alleges sexual abuse by a parent, an immediate assessment will be made by child protective services that could result in removal of the child.³¹ West Virginia permits a court to order that a child alleged to be abused or neglected be delivered into the custody of the state department or a responsible party found fit and proper by the court, for up to ten days, pending a preliminary hearing, if said court finds “imminent danger to the physical well-being of the child.”³² These laws project the heavy weight the need to protect a child carries, as it should. The problem lies in the lack of protection in place when the allegations of abuse are untrue, and the impact of false accusations of abuse on the parent-child relationship can be quite severe.³³

Generally speaking, once an allegation of abuse enters child custody litigation, some form of a similar process occurs. Which could include “[a] Protective Services investigation tak[ing] place, [possibly] including an interview with the child” if they are at an age capable of interviewing.³⁴ There exists the possibility that the child could be removed from the care of the accused parent or time with the accused parent is limited or supervised, pending a determination of the factuality of the allegation.³⁵ The child may be referred to a further, more intrusive evaluation.³⁶ Police reports will be made, and the accused parent likely must retain counsel, not only for

28. After repeated questioning by a therapist or parent, a child may agree that an event happened, and even testify to such, even though the molestation or abuse never occurred. See Frances Sink, *Studies of True and False Allegations: A Critical Review*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL* 37, 43 (E. Bruce Nicholson & Josephine Bulkley eds., 1988).

29. Martin, *supra* note 19, at 251.

30. VA. CODE ANN. § 63.2-1517(A) (2012).

31. MINN. STAT. ANN. § 626.556(10a)(a) (West 2009 & Supp. 2013).

32. W. VA. CODE § 49-6-3(a) (LexisNexis 2009 & Supp. 2012).

33. See Deborah H. Patterson, Note, *The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case*, 30 J. FAM. L. 919, 925 (1992).

34. Michael G. Brock, *False Allegations of Sexual Abuse: What Can Be Done*, TRUTH IN JUSTICE, <http://truthinjustice.org/false-allegations.htm> (last visited Apr. 8, 2015).

35. See *id.*

36. See *Id.*

representation in custody proceedings, but also in defense of prosecution.³⁷ A judge may tend to err on the side of caution, possibly suspending visitation, allowing for further alienation of the child from the accused parent.³⁸

However a court chooses to react in a scenario in which allegations of child abuse are made against an opposing parent, “the parental rights of the accused will diminish during the [forthcoming] proceeding[s].”³⁹ Accordingly, “[s]ome judges will ‘play it safe,’ at least initially, and temporarily stop visitation between the child and the accused . . . parent.”⁴⁰ “If and when contact is reinstated, it is usually under supervision until the court resolves the issue of abuse.”⁴¹ Regardless, the result “is a strained relationship between the child and the accused parent.”⁴²

One researcher describes a “parental alienation syndrome” that occurs when accusations of abuse enter the custody realm, noting that, such accusations are a powerful weapon in divorce and custody disputes.⁴³ The vengeful parent may exaggerate a nonexistent abusive contact and build up a case for abuse or neglect; the child, in order to ingratiate himself or herself with the accusing parent, may cooperate and elaborate such.⁴⁴ Then ensues the concept of parental alienation; the child identifies with the vilifying parent and communicates absolute hatred toward the other parent, further exacerbating the effects of the false accusations of abuse.⁴⁵

Furthermore, while investigators should assume neither guilt nor innocence of the accused, falsely accused parties have stated that they are made to feel guilty, often having to explain every touch or contact they have had with their own child.⁴⁶ In fact, while an investigation following an accusation of abuse is intended as a safeguard to the child, “the process of evaluating an accusation may result in more damage to the interests of the child and to the child’s primary relationships than the [false] act in question.”⁴⁷

37. *See id.*

38. *Id.*

39. Patterson, *supra* note 33, at 925.

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE 86, 90 (Creative Therapeutics 1987) [hereinafter THE PARENTAL ALIENATION SYNDROME].

44. *See id.* at 67–68.

45. *Id.* at 70.

46. *See* Alan Abrahamson, *False Charges of Child Abuse Dog Custody Battles*, L.A. TIMES, Oct. 21, 1990, http://articles.latimes.com/1990-10-21/local/me-4164_1_false-charge.

47. Wakefield & Underwager, *supra* note 3, at 451.

For example, one study followed a family of four for two years, after a false allegation of sexual abuse was made against the father, and found that the experience destroyed the family, with all members suffering “depression, stress, rage, distress, hurt, . . . and alienation.”⁴⁸ During the investigatory stage, the father was separated from his family for approximately three months before the claims of abuse were determined to be accurate.⁴⁹ His children were relating terrible things about their father, including unsubstantiated claims of incest with his sister, promulgating the image in the children’s minds that their father was an abusive caregiver.⁵⁰ The study concluded that the effects on the relationship between the children and the wrongly accused parent were long-lasting and nearly irreversible.⁵¹

To put it quite simply, it appears undeniable that after a false allegation of abuse is made against an otherwise qualified parent, the effects upon the relationship between the child and accused parent are significant and severe.⁵² If the claim ends up being unsubstantiated, the accuser has lost out on little, while the child and accused parent have suffered intrusive investigations and a deteriorated connection.⁵³ Both the child and the falsely accused parent lose precious time with each other, and the image of the accused parent may become tainted in an impressionable child’s mind.⁵⁴ The accused faces the penalty of the alleged crime before any determination of guilt or innocence has even been made. Within the atmosphere of a custody battle in which a false allegation of abuse has been entered to influence the proceedings, neither the welfare of the child, nor the innocence of the accused, can be realized.⁵⁵

48. Darrell W. Richardson, *The Effects of a False Allegation of Child Sexual Abuse on an Intact Middle Class Family*, INST. PSYCHOL. THERAPIES (1990), http://www.ipt-forensics.com/journal/volume2/j2_4_7.htm. While in this case study allegations of abuse were promulgated by a child rather than an opposing parent, the effects parallel what happens within the context of a parent accusing an opposing parent in child custody litigation.

49. *See id.* at 18.

50. *See id.* at 20.

51. *See id.*

52. *See id.* at 8–9.

53. *See* Patterson, *supra* note 33, at 925.

54. *See* Richardson, *supra* note 48, at 18, 20 (discussing a situation where a child lost months of time with the falsely accused parent, told terrible things about the parent, was coerced into falsely accusing the parent, and became suicidal and required psychiatric care as a result of the ordeal).

55. *See* Patterson, *supra* note 33, at 925–26.

B. Further Implications for the Innocent Parent

Coupled with the loss of the child, an innocent parent wrongly accused of the horrific crime of abuse also faces heavy financial burdens and loss of reputation.⁵⁶ The accused must cover the costs of retaining representation for both custody litigation and possibly criminal prosecution.⁵⁷ And, even once he or she has fought to clear his or her name of the allegation, the accused remains inflicted with “[t]he social stigma that attaches to a mere accusation of child . . . abuse [that] lingers long after . . . a finding of innocence.”⁵⁸ For within our current society, there exists “a climate wherein allegations alone are quickly raised to the status of evidence signifying abuse.”⁵⁹ A New York family court iterated the plight of the wrongly accused when it chastised a mother for lodging a false allegation of sexual abuse against her child’s father, stating: “Karen B. has sought to destroy the reputation of her former friend and lover by accusing him of one of the most heinous crimes known to man. The aura of the allegation, irrespective of its falsehood, may stand over him and affect him for the rest of his life.”⁶⁰

Such costs have been documented by those who have suffered them. One mother, wrongfully accused of child abuse, estimated that the costs of recovering her children, clearing her name, and paying all medical bills associated with the incident exceeded \$15,000.00.⁶¹ And this report of \$15,000.00 in financial costs is on the low end of the spectrum. ABC World News Tonight once reported the story of a father who spent upwards of \$40,000.00 to clear his name after false allegations of sexual abuse of a child were brought against him.⁶² Further, one woman’s false accusation that her ex-husband molested their daughter cost the estranged husband

56. See Richardson, *supra* note 48, at 20.

57. Patterson, *supra* note 33, at 926; see also Richardson, *supra* note 48, at 13.

58. Patterson, *supra* note 33, at 926.

59. Heather J. Rhoades, Note, Zamstein v. Marvasti: *Is a Duty Owed to Alleged Child Sexual Abusers?* 30 CONN. L. REV. 1411, 1437 (1998) (quoting Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made*, 25 FAM. L. Q. 381, 387 (1991)) (internal quotation marks omitted).

60. Karen B. v. Clyde M., 574 N.Y.S.2d 267, 272 (Fam. Ct. 1991).

61. See Steven R. Churm, *Abused: Mother Whose Children Were Taken from Her Says Her Family Is a Victim of ‘the Red Scare of the ‘80’s’*, L.A. TIMES, Sept. 22, 1985, http://articles.latimes.com/1985-09-22/news/hl-18485_1_child-abuse-laws.

62. Loewy, *supra* note 15, at 894 n.125 (citing *ABC World News Tonight: American Agenda* (ABC television broadcast, May 9, 1991)).

\$100,000.00 in lost wages and legal fees.⁶³ Another falsely accused, a clinical psychologist, reported spending \$50,000.00 defending a bogus claim of child abuse, while losing his practice in the process.⁶⁴ Another clinical psychologist spent \$35,000.00 in his defense, and criminal charges were never even filed.⁶⁵ One more sufferer, Jacob Zamstein, faced a public arrest and was forced to defend himself in a *three-month-long trial* after his wife, sometime after initiating divorce proceedings, made knowingly false accusations that he sexually abused the couple's two children.⁶⁶

These reports of expenses, incurred in defending oneself against a false claim of child abuse, provide concrete evidence that the burden on the accused is severe, whether found guilty or not. Any law that hopes to deter the costs of false allegations of abuse in custody disputes must counter the financial weight felt by the accused, by giving the knowingly deceitful accuser a steep financial burden of his or her own.

IV. THE STATE OF THE LAW IN COMBATTING FALSE ALLEGATIONS OF ABUSE IN CHILD CUSTODY DISPUTES

A. *Indirect Safeguards for the Accused*

1. *Broadening the Duty of Care*

Some states, under their common law, have broadened the duty of care a physician or counselor owes to their patient, in this case an allegedly abused child, to reach the accused parent.⁶⁷ While this extension of the duty of care does not directly address the act of promulgating false accusations of abuse to influence custody, it does provide some protection to the falsely accused parent. By expanding the duty of care, a physician or other qualified individual examining a supposedly abused child also owes a duty to exercise due care to the accused parent.⁶⁸ Some courts are recognizing the large consequences a falsely accused parent can face and, to some measure, are looking out for the interests of the falsely accused.⁶⁹

63. *Id.* (citing Elizabeth Hartigan, *Falsely Accused of Child Abuse, Victims Demand Legal Reform*, CHI. TRIB., Jan. 23, 1987, http://articles.chicagotribune.com/1987-01-23/features/8701060528_1_child-abuse-sexual-abuse-child-abuse-laws).

64. Richardson, *supra* note 48, at 1.

65. *Id.*

66. *See* Zamstein v. Marvasti, 692 A.2d 781, 791 (Conn. 1997).

67. In this context, the duty of care refers to a duty to refrain from "taking actions . . . that may foreseeably result in injury to another." Montoya v. Bebensee, 761 P.2d 285, 288 (Colo. App. 1988).

68. *See id.* at 288–89.

69. *See id.*

In the Colorado case, *Montoya v. Bebensee*, a father sued for damages after the defendant psychologist attempted to revoke the father's visitation rights to his minor children.⁷⁰ After the dissolution of their marriage, the mother alleged that the father sexually molested their child, seemingly in an attempt to affect his visitation rights with regards to the children.⁷¹ The mother enlisted the defendant to counsel the child and render an opinion as to whether she had been sexually abused by her father.⁷² Despite there being serious doubts concerning the legitimacy of the child's recount of abuse from both the social worker and alternate psychologist—compounded with the fact that the child did not appear to be sexually molested—the defendant nevertheless reported to county officials that one of the children claimed the father sexually abused them, advised the mother to restrict the father's right of visitation with the two children, and later testified as an expert witness on the mother's behalf in a hearing considering the father's visitation rights.⁷³ The Court of Appeals weighed the risk, foreseeability, and likelihood of harm and determined that there is a severe risk of harm to a parent who is falsely accused of abuse.⁷⁴ In turn, the court held that a psychologist who evaluates and treats a child for suspected child abuse owes the accused parent a duty to exercise due care.⁷⁵

New York applied similar reasoning in broadening the scope of duty of care to reach persons falsely accused of child abuse. In *Caryl S. v. Child & Adolescent Treatment Services, Inc.*, a New York court was asked to consider this issue of first impression in the state: does a psychiatrist or other counselor examining a child for alleged abuse owe a duty of care to the accused party?⁷⁶ The court reasoned that the law should fix the orbit of duty in an effort to limit faulty investigations and, in so doing, acknowledged the severe legal ramifications associated with a mistaken opinion.⁷⁷ The potential harm caused by a professional misdiagnosis of abuse is equally as great for the child as it is for the alleged abuser.⁷⁸ Indeed, being labeled a child abuser is “one of the most loathsome labels in society,” to which stark physical and psychological ramifications attach in

70. *Id.* at 286.

71. *See id.*

72. *Id.* at 287.

73. *Id.* at 286–87.

74. *See id.* at 288–89.

75. *Id.* at 289.

76. *Caryl S. v. Child & Adolescent Treatment Servs., Inc.*, 614 N.Y.S.2d 661, 664, 666 (Sup. Ct. 1994), *aff'd*, 661 N.Y.S.2d 168 (App. Div. 1997).

77. *Id.* at 665 (citing *Tobin v. Grossman*, 24 N.Y.2d 609, 619 (1969)).

78. *Id.* at 666.

defending and dealing with such accusations.⁷⁹ Once made, “such charges are difficult to escape,” even if proven innocent.⁸⁰ “[B]randing [one] as a child abuser . . . certainly calls into question one’s good name, reputation, honor or integrity.”⁸¹ Thus, the court held that when the determination of sexual abuse is made by a professional treating a child and subsequent actions are taken in response to that determination—such as to shape the conduct and well-being of the child, the conduct of the suspected abuser, or the relationship between the two—a duty of care is owed not only to the child but also to the alleged abuser.⁸²

In Pennsylvania, a district court extended the scope of duty of care, holding that a therapist owes a duty of care to parents accused of child abuse, but such expansion was conditional upon a four-step test.⁸³ The court held that a duty of care was owed if: “(1) the therapist specifically undertook to treat the child for the parents; (2) the parents relied upon the therapist; (3) the therapist was aware of the parents’ reliance; and (4) it was reasonably foreseeable that the parents would be harmed by the therapist’s conduct.”⁸⁴

Thus, some courts have implemented a common law protection to parents wrongly accused of child abuse.⁸⁵ In doing so, these courts have recognized and acknowledged the severe negative impact a false allegation of abuse can have on both the child involved and the accused parent.⁸⁶ The child loses time with the accused parent and suffers from the traumas involved in the investigation of abuse claims, while the innocent parent is branded a child abuser—an ugly and low form of criminal—just by the mere accusations. The foreseeable harms dictated by these courts warrant reform of the statutory laws to strengthen the deterrence of making false allegations of child abuse.⁸⁷

79. *Id.* (quoting *Rossignol v. Silvernail*, 586 N.Y.S.2d 343, 345 (App. Div. 1992)) (internal quotation marks omitted).

80. *Id.* (quoting *Rossignol*, 586 N.Y.S.2d at 345) (internal quotation marks omitted).

81. *Id.* at 667 (second alteration in original) (quoting *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994)) (internal quotation marks omitted).

82. *Id.*

83. *Tuman v. Genesis Assocs.*, 894 F. Supp. 183, 188 (E.D. Pa. 1995).

84. *Id.*

85. *See, e.g., Montoya v. Bebensee*, 761 P.2d 285, 288–89 (Colo. App. 1988).

86. *Id.*

87. Courts are not unanimous in finding that a therapist, psychologist, or other professional owes a duty of care to the abused parent in cases of alleged child abuse. For many states, this remains an issue of first impression yet to be determined. For instance, the Arkansas Supreme Court explicitly denied this extension of due care in a case in which a father filed a malpractice suit against a psychologist for misdiagnosing his child as abused. *Chatman v. Millis*, 517 S.W.2d 504, 506 (Ark. 1975). In this case, the Court’s holding was based on the lack of a physician-patient relationship between the father and the psychologist. *Id.* The Connecticut Supreme Court

2. *Investigatory Protections*⁸⁸

After a false allegation of abuse is made, one particular problem area for the accused parent lies at the investigatory stage, where as advocated by one researcher, investigations are performed on the presumption that abuse has occurred.⁸⁹ As witnessed by Michael G. Brock, author and certified social worker, this can lead those involved in evaluating an allegedly abused child to believe and act as if they are “part of the prosecution’s team” against the accused.⁹⁰ The bleak plight of the accused at this stage is further compounded by a system that lacks consistent protocol for interviewing victims across private and public sectors.⁹¹

The expansion of duty of care, discussed *prior*, provides some protection at the investigatory stage, because it protects the accused parent from negligence, or even malfeasance, on the part of those evaluating a child for abuse. However, some states have also enacted codified provisions that direct how an investigation proceeds following allegations of child abuse.⁹² Such provisions establish procedural protections for the accused parent once an investigation of abuse is set in motion.⁹³

For example, to assist in handling false reports, the Florida Legislature amended section 39.205 to permit investigators to discontinue the

also rejected such an extension of due care. *See Zamstein v. Marvasti*, 692 A.2d 781, 787 (Conn. 1997). While the court recognized the detriment to a falsely accused parent that could result from negligent review or diagnosis of the involved child, the court reasoned that the interest of protecting a potentially abused child outweighed the interests of the falsely charged person. *Id.* at 789.

88. As was true with regards to the broadening of the duty of care to reach parents accused of child abuse, the law discussed herein with regards to investigatory protections provided a parent accused of child abuse is not true of all states. It is the intent of this Article to simply point to some of those states which have enacted certain procedural protections and provide examples of the existing laws that in effect help or protect a falsely accused parent.

89. *See Brock, supra* note 34. Brock is an author and also a certified social worker. *Id.* Seventeen states, and the District of Columbia, have in fact enacted *statutory* presumptions that reports of child abuse are made in good faith. *See Mandatory Reporting of Child Abuse and Neglect State Statute Overview*, NAT’L CONF. STATE LEGISLATURES (Dec. 9, 2011), <http://www.ncsl.org/research/human-services/child-abuse-and-neglect-reporting-statutes.aspx>; *see also, e.g.*, IND. CODE ANN. 31-33-6-3 (West 2008) (“A person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this article is presumed to have acted in good faith.”).

90. *See Brock, supra* note 34. The opinion expressed by Brock regarding investigators and their tendency to behave as part of the prosecution’s team was based upon his own experience as a social worker and statements made by personnel involved in the investigatory stage that indicated they considered themselves to be a part of the prosecution. *See id.*

91. *See id.*

92. *See id.*

93. *Id.*

investigation after determining it resulted from a false report.⁹⁴ The law in fact went so far as to require authorized personnel, when investigating claims of child abuse, to report findings of false reports to local law enforcement agencies for prosecution, with the alleged perpetrator's consent.⁹⁵

Other laws impart time requirements on initial reports, which could shorten the time both the child and accused are subjected to the intrusion of an investigation, if no indication of abuse is found during the initial reporting phase. For instance, Indiana requires an initial report be filed within forty-eight hours from when the child abuse was first reported.⁹⁶ Or consider Virginia law, which requires authorized investigators to determine within forty-five days, or sixty days where an extension is warranted, "if a report of abuse or neglect is founded or unfounded and transmit a report" to the state department and the person under investigation.⁹⁷

Still other states provide procedural protection to the accused, via requirements of notification or judicial review, before an allegedly abused child is removed from the care of the accused. For example, Washington law provides additional protection to the rights of the parents:

If a child is taken into custody . . . the child protective services worker shall take reasonable steps to advise the parents immediately, regardless of the time of day, that the child has been taken into custody, the reasons why the child was taken into custody, and general information about the child's placement.⁹⁸

Similarly, the New Hampshire legislature requires a Child Protective Services worker to contact a judge or the clerk before a child is removed.⁹⁹

Laws like these alleviate some of the problems noted by Brock in the investigations of child abuse that could negatively impact a wrongly accused parent. They provide at least some protocol on which an accused parent may rely. Moreover, they ensure the affected parent is made aware of what is happening, thereby allowing him or her to seek necessary counsel or take necessary action to protect oneself and his or her child. They might

94. See FLA. STAT. ANN. § 39.205(8) (West Supp. 2015); see also *False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement*, ANNUAL REPORT TO THE LEGISLATURE (2012–2013), http://www.dcf.state.fl.us/programs/childwelfare/docs/2014LMRs/AnnualReportFalseReports_FY2012-2013.pdf.

95. FLA. STAT. ANN. § 39.205(8).

96. IND. CODE ANN. 31-33-7-4(a) (West 2008).

97. VA. CODE ANN. § 63.2-1505(B)(5) (2012).

98. WASH. REV. CODE ANN. § 26.44.115 (West 2005); see also Martin, *supra* note 19, at 268.

99. N.H. REV. STAT. ANN. § 169-C:6(V) (LexisNexis 2010); see also Martin, *supra* note 19, at 267.

also combat any bias on the part of the investigator that the abuse has occurred by introducing judicial review into the investigation before immediate action is taken. Thus, while such laws do not directly criminalize the act of falsely accusing an opposing parent of child abuse, they do create safeguards for the accused once an investigation has been initiated by a false accusation.

B. Direct Sanctions Against False Accusations of Child Abuse

To date, approximately twenty-nine states carry penalties, either civil or criminal, in their statutory child protection laws for persons who willfully or intentionally make a report of child abuse that is known to be false.¹⁰⁰ This means that almost half of the states do not explicitly penalize the act of knowingly falsely accusing another of child abuse at all.¹⁰¹ Further, of those jurisdictions that do impart penalties, the strength of such laws varies greatly.

Among the states that do statutorily penalize false accusations of child abuse, there is great disparity in the consequences faced. Nineteen states impart misdemeanor penalties.¹⁰² Generally speaking, misdemeanor penalties carry smaller fines of typically no more than \$2,500.00, and jail time, if any, of not more than a year.¹⁰³ Classifying the act of falsely

100. Child Welfare Information Gateway, *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, U.S. DEP'T HEALTH & HUM. RES., CHILDREN'S BUREAU 2 (2014), <https://www.childwelfare.gov/pubPDFs/report.pdf>. These states include "Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wyoming." *Id.* While not all laws penalizing the act of falsely accusing another of child abuse specify the perpetration of such act in the context of child custody disputes, these laws would still encompass false allegations of child abuse made within custody proceedings.

101. In those states without laws directly sanctioning false reports of child abuse, damages could still be recovered by the falsely accused under alternate theories like malicious prosecution or slander. Further, false accusations of abuse in child custody proceedings could be sanctioned as perjury.

102. *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, *supra* note 102, at 2. These states include "Arizona, Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Virginia, Washington, and Wyoming." *Id.*

103. *See, e.g.*, COLO. REV. STAT. ANN. §§ 19-3-304(3.5), (4)(a), 18-1.3-501(1)(a) (West 2013) (Any person who "knowingly makes a false report of abuse or neglect to a . . . law enforcement agency . . . [c]ommits a Class 3 misdemeanor," punishable by up to 6 months in jail, a fine of up to \$750, or both.); KAN. STAT. ANN. §§ 38-2223(e)(3), 21-6602(a)(2), 21-6611(b)(2) (West Supp. 2012) ("Any person who willfully and knowingly makes a false report . . . or makes a report that such person knows lacks factual foundation is guilty of a Class B misdemeanor," punishable by up to six months in jail and a fine of up to \$1,000.); MO. ANN. STAT. §§ 210.165.2, 556.016.3, 560.016.1(1) (West 2012) ("Any person who intentionally files a false report of child

accusing an opposing parent of child abuse as a misdemeanor ranks the act with lesser crimes such as underage drinking or possession of marijuana or drug paraphernalia.¹⁰⁴

Florida, Tennessee, and Texas, however, deem false reporting a felony,¹⁰⁵ and in Arkansas, Illinois, Indiana, Missouri, and Virginia, second or subsequent offenses can be upgraded to a felony.¹⁰⁶ Florida is most severe in its criminal penalty: “In addition to a court sentence of 5 years and [up to] \$5,000, the Department of Children and Family Services may fine the reporter up to \$10,000.”¹⁰⁷ A felony designation seems far more appropriate for the act of falsely accusing another of child abuse when the harm stemming from the act can be so severe, yet few states impart such a designation.

Other states do not classify the act of falsely reporting child abuse, but rather specify the penalty to be suffered. These states essentially place a cap on the monetary sanction or other penalty the accuser may face. For example, Massachusetts’s law directs that:

[w]hoever knowingly and willfully files a frivolous report of child abuse or neglect . . . shall be punished by: (i) a fine of not more than \$2,000 for the first offense; (ii) imprisonment . . . for not more than 6 months and a fine of not more than \$2,000 for the second offense; and (iii) imprisonment . . . for not more than 2 ½ years and a fine of not more than \$2,000 for the third and subsequent offenses.¹⁰⁸

Or, in Oklahoma,

[i]f a court determines that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose a fine, not to exceed [\$5,000.00] and reasonable attorney[‘s] fees incurred in

abuse . . . shall be guilty of a class A misdemeanor,” punishable by up to one year in jail, or a fine of \$1,000, or both.).

104. See Student Legal Servs., *Surviving a Misdemeanor Charge*, U. ARIZ., <http://legal.asua.arizona.edu/misdemeanor.html> (last visited Apr. 8, 2015).

105. *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, *supra* note 102, at 2; see also FLA. STAT. ANN. § 39.205(9) (West Supp. 2015); TENN. CODE ANN. § 37-1-413 (2010); TEX. FAM. CODE ANN. § 261.107(a) (West 2014).

106. *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, *supra* note 102, at 2; see also ARK. CODE ANN. § 12-18-203(b)(2) (2009); 325 ILL. COMP. STAT. ANN. 5/4 (West 2008 & Supp. 2014); IND. CODE ANN. § 31-33-22-3(a) (West 2008); MO. ANN. STAT. § 210.165.3 (West 2012); VA. CODE ANN. § 63.2-1513(A) (2012).

107. *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, *supra* note 102, at 2; see also FLA. STAT. ANN. §§ 39.205(9), 39.206(1), 775.082(3)(d), 775.083(1)(c) (West 2010 & Supp. 2015).

108. MASS. GEN. LAWS ANN. ch.119, § 51A(c) (West Supp. 2013).

recovering the sanctions, against the person making the accusation.¹⁰⁹

Other states inflict civil sanctions upon the perpetrator proportionate to the monetary costs incurred by the accused party, without designating the maximum amount that may be recovered against the accuser. California and West Virginia provide prime examples of laws in which false accusations of abuse within child custody disputes are directly targeted and punishable by an award of money damages equal to the costs incurred by the accused parent in defending against the wrongful claim. Under California Family Code section 3027.1:

If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purposes of this section, "person" includes a witness, a party, or a party's attorney.¹¹⁰

Similarly, West Virginia's pertinent statute reads:

If the court determines, based on the investigation described in part three . . . of this article or other evidence presented to it, that an accusation of child abuse or neglect, or domestic violence made during a child custody proceeding is false and the parent making the accusation knew it to be false at the time the accusation was made, the court may order reimbursement to be paid by the person making the accusations of costs resulting from defending against the accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the accused party as a result of defending against the accusation and reasonable attorney's fees incurred.¹¹¹

Laws, such as those found in California and West Virginia, allow sanctions to be adjusted for each accuser depending on the specifics of the crime committed. Essentially, the greater the financial harm suffered by the wrongly accused, the greater the penalty will be. However, to date, there has been no judicial interpretation of the California and West Virginia laws as to the scope of costs that fall under the umbrella of "reasonable costs"

109. OKLA. STAT. ANN. tit. 10A, § 1-2-101(D)(2) (West 2009 & Supp. 2015).

110. CAL. FAM. CODE § 3027.1(a) (West 2004).

111. W. VA. CODE ANN. § 48-9-209(d) (LexisNexis 2009) (citation omitted).

incurred in defending the accusation. Therefore, it is unclear how broad the scope of “reasonable costs” might be, i.e., whether this might include things like lost wages, loss of reputation, or even pain and suffering.

It should be further noted that while the classification of the act and degree of penalty may differ amongst existing laws that penalize the act of falsely accusing another of child abuse, all such laws require proof of the element of intent *before* sanctions may be imposed, whether criminal or civil. Generally speaking, to constitute a violation of law, a false accusation of child abuse must be made knowingly, willfully, or intentionally.¹¹²

C. *Evaluating the Effectiveness of Existing Law*

1. *Evaluating Effectiveness with Regards to Indirect Safeguards*

As discussed, by broadening the duty of care, a qualified individual evaluating a child for indications of abuse owes a duty of care to the accused parent.¹¹³ This provides the accused with some means of protection against negligence or malfeasance should a claim of abuse arise.¹¹⁴ Imposing this additional duty of care upon those evaluating children in possible abuse situations provides the accused with a safeguard. That is, he or she is provided some assurance that evaluations will be proper and unbiased. In such a context, the truth should be discovered and the wrongly accused’s innocence would prevail.

Likewise, procedural directives geared toward standardizing and strengthening the effectiveness of investigations of child abuse should assure that false accusations of abuse would be distinguished from cases where a child is truly in danger. Guaranteeing notification, requiring judicial review before action is taken, and timeliness requirements aimed at squashing unfounded investigations, all help the falsely accused parent’s predicament once abuse investigations are instituted.¹¹⁵ These safeguards might help an accused parent reunite with a child who has been temporarily taken due to an accusation of abuse, or, for non-custodial parents, aid the accused parent in regaining visitation with the child. By limiting the length of an investigation, the safeguards might limit the intrusiveness of such.

112. See CAL. FAM. CODE § 3027.1(a); W. VA. CODE ANN. § 48-9-209(d); see also *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, *supra* note 102, at 2.

113. See *supra* Part IV.A.1; see also, e.g., *Caryl S. v. Child & Adolescent Treatment Servs., Inc.*, 614 N.Y.S.2d 661, 667 (Sup. Ct. 1994).

114. See *supra* Part IV.A.1.

115. See *supra* Part IV.A.2.

And, by requiring notification to the accused parent, the safeguards could alleviate some stress and emotional turmoil of the accused.

The problem with these indirect safeguards is that they do not effectively prevent the harms caused by making false accusations of abuse to influence child custody, because they do not stop the commission of the act. These protections are implemented *after* the accusation has been made, and once a false accusation of abuse is made, the damage is done.¹¹⁶ Following the accusation, for the protection of the child, at least a minimal form of an investigation must ensue.¹¹⁷ Despite the length, both the child and accused parent are submitted to the embarrassment and intrusiveness associated with the investigation, and even a brief investigation may alienate the child from the parent.¹¹⁸ Moreover, the accused must still deal with the label of “child abuser” that stems from the accusation alone.¹¹⁹ And, once alleged, false accusations are difficult to decipher from legitimate claims, which “can lead to protracted and difficult legal battles.”¹²⁰ While the indirect safeguards discussed herein may help the wrongly accused parent get out of the nightmare of being falsely accused, they do not prevent the swarm of devastation that can attach to a false accusation of abuse.

2. *Evaluating Effectiveness with Regards to Existing Direct Laws*

a. The Barrier of Intent

The element of intent, found in all existing laws combatting false accusations of child abuse, stands as a barrier to recognizing the effectiveness of such laws. This is true whether the act is penalized through civil sanctions or criminal punishments. The inherent challenge of proving intent, in any matter, coupled with the fact that the alleged victim is a child, can inhibit the effectiveness of laws sanctioning the act of falsely accusing a parent of child abuse. Further, requiring a showing of intent hinders the law from preventing the harms caused by the accusation, because making a case of intent lends to an investigation of abuse which, as discussed earlier,¹²¹

116. *See supra* Part III.A.

117. *See* Pollack, *supra* note 27.

118. *See supra* Part III.A.

119. To reiterate, one New York court recognized that being labeled a child abuser is “one of the most loathsome labels in society,” to which stark physical and psychological ramifications attach to defending and dealing with such accusations. *Rossignol v. Silvernail*, 586 N.Y.S.2d 343, 345 (App. Div. 1992).

120. Pollack, *supra* note 27.

121. *See supra* Part III.A.

strains the relationship between the child and the accused parent. However, for the general welfare of children, the element of intent is necessary.

Intent is an element that is difficult to establish in any act. In the context of false accusations of abuse, this hardship is compounded by a touchy area, in which courts may be likely to err on the side of caution for the protection of the child. With the exception of rare instances in which an accuser admits that an accusation is deliberately fictitious, courts are unlikely to find both that an accusation of abuse was false *and* that the accuser knew it was false.¹²² Even if a false accusation occurs, “court[s] may be reluctant to conclude that an allegation was both false and known by the accuser to be false, because there are so many uncertainties in child [abuse] cases.”¹²³ The lines of evidence available to prove intent in this context are, quite simply, very limited.

One limitation with regards to establishing that an accuser knew of the falsity of an allegation of abuse lies in the fact that the alleged victim of abuse is a child, and testimony from a child can be problematic. “Several researchers have concluded that children are good observers,” particularly for simple events; however, researchers have also discovered that many factors may influence a child’s ability to remember observations “including age, race, environment, sex, and familiarity.”¹²⁴ A younger child may lack the ability to process multiple stimuli, which may inhibit his or her “ability to recall an event accurately.”¹²⁵ “Fantasy is another source of mistaken impression [for a child].”¹²⁶ “Preschool children engage in magical thinking and have a limited concept of cause and effect” leading to disclosures of “memories that appear incongruent and impossible.”¹²⁷ Moreover, children

122. See Loewy, *supra* note 15, at 898.

123. *Id.* at 899 (footnote omitted) (citing *In re Marriage of Lewin*, 231 Cal. Rptr. 433, 436 n.4, 437 (Ct. App. 1986)). The court found the trial court’s conclusions justified, including where the trial court found the accusations “unfounded” and “outrageous.” *In re Marriage of Lewin*, 231 Cal. Rptr. at 436 n.4, 437.

124. Sherry Rozell, Note, *Are Children Competent Witnesses?: A Psychological Perspective*, 63 WASH. U. L. Q. 815, 820–21 & n.36 (1985) (footnotes omitted) (citing Susan Carey, Rhea Diamond & Bryan Woods, *Development of Face Recognition: A Maturational Component?* 16 DEVELOPMENTAL PSYCHOL. 257, 257–69 (1980); Hadyn Ellis, John Shepherd & Andrew Bruce, *The Effects of Age and Sex upon Adolescents’ Recognition of Faces*, 123 J. GENETIC PSYCHOL. 173, 173–74 (1973); Saul Feinman & Doris R. Entwisle, *Children’s Ability to Recognize Other Children’s Faces*, 47 CHILD DEV. 506, 506–10 (1976)).

125. *Id.* at 822.

126. *Id.* (citing Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: The Reliability of Children’s Memory*, 40 J. SOC. ISSUES 33, 38 (1984)).

127. *Sexual Abuse Evaluations in Young Children: Why it Takes an Expert to Determine if Children Are Telling the Truth or Fabricating Allegations of Sexual Abuse*, TECHNICAL ADVISORY SERV. FOR ATT’YS, <http://www.tasanet.com/knowledgeCenterDetails.aspx?docTypeID=1&docCatID=15&docID=426> (last visited Apr. 8, 2015).

are susceptible to coaching. There are situations in which the child, after repeated questioning by a therapist or parent, agrees that an event happened and will further testify to that effect even though the molestation or abuse never occurred, in an effort to gain closure or please the accusing parent or otherwise.¹²⁸ Thus, although a child's testimony is a source of evidence, and quite possibly a prime source of evidence, it complicates a case of intent. In fact, a child's testimony might work against establishing a case of intent for the accused if the child tends toward inaccurate recollections of abuse.¹²⁹

One Florida study depicts the effect that the challenges of proving intent can have on the effectiveness of laws penalizing false accusations of abuse.¹³⁰ As previously mentioned, in Florida it is a criminal act to knowingly and willfully make a false report of child abuse, punishable by a court sentence of 5 years, and up to \$5,000.00.¹³¹ Of the study's 108 investigations that initially identified suspected false reports of child abuse, "only two (one pending in [the Sixth Circuit] and one in [the Seventh Circuit]) actually resulted in" charges against the individual for filing a false report.¹³² This result is attributed in significant part to the barrier of intent, which "applies to both law enforcement's criminal investigation and the likelihood of a subsequent, successful prosecution by the state attorney's office."¹³³

Yet, despite the inherent challenges associated with the element of intent in a law penalizing false accusations of child abuse, whether it be "knowingly," "willfully," "intentionally," or otherwise, the element is necessary for the law to serve the child's interests. If the requirement of intent was eliminated, such that a court could sanction or penalize a person for making a claim of abuse that proved untrue or unsubstantiated, this elimination could effectively quash good-faith claims of abuse. For example, if a parent truly believes his or her child is or has been enduring abuse by the other parent, but has no proof, he or she would likely be deterred from bringing the claim for fear that the lack of proof would net him or her a criminal record or monetary fines. Thus, deterrence of good-

128. See Sink, *supra* note 28, at 43.

129. The problems associated with child testimony, however, may decrease in severity with increases in the child's age. As one study found, children from ages six to twelve are no more likely than adults to confuse what they had imagined with what they had perceived. See Johnson & Foley, *supra* note 126, at 41–42.

130. *False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement*, *supra* note 94.

131. See *supra* note 107 and accompanying text.

132. *False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement*, *supra* note 94.

133. *Id.*

faith claims may keep the potentially abused child victim in harm's way. This consideration would likely outweigh the burden of establishing intent.

Moreover, though difficult, intent is *not impossible* to prove. In fact, there is a growing body of literature that members of the justice and legal system can reference in proceedings against false accusations, which might aid in building a case that establishes the accusation was knowingly false. While allegations can occur at any stage in a divorce, they are especially common after a divorce is granted, specifically if it was centered around issues of child custody and visitation.¹³⁴ “If it can be determined that the divorce occurs as a result of the abuse disclosures, the alleged abuse is more likely to be true.”¹³⁵ As one researcher notes, “in real abuse, the accusing parent is upset, secretive and embarrassed, whereas in false cases, he or she has the need to tell everyone and expresses no shame.”¹³⁶ Further, it has been noted that “in cases involving false allegations of sexual abuse, the allegations are usually vague and not easily amenable to being verified or refuted.”¹³⁷ While these considerations may lean on the side of circumstantial evidence,¹³⁸ they can provide a foundation for both recognizing false claims from true or good-faith ones, and discovering more direct evidence of known falsity.¹³⁹

134. Wakefield & Underwager, *supra* note 3, at 461 (citing Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145, 147 (Diane H. Schetky & Elissa P. Benedek eds., 1985)).

135. *Id.* at 462. “Approximately half (48%) of the 128 families of intrafamilial sexual abuse cases ended in separation and/or divorce” Elizabeth A. Sirles & Colleen E. Lofberg, *Factors Associated with Divorce in Intrafamily Child Sexual Abuse Cases*, 14 CHILD ABUSE & NEGLECT 165, 168 (1990).

136. Wakefield & Underwager, *supra* note 3, at 462 (citing RICHARD A. GARDNER, *The Sex Abuse Legitimacy Scale*, in THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE 299, 304–05 (Creative Therapeutics ed., 1987) [hereinafter *Sex Abuse Legitimacy Scale*]).

137. *Id.* at 463 (citing MILTON SCHAEFER & MELVIN GUYER, ALLEGATIONS OF SEXUAL ABUSE IN CUSTODY AND VISITATION DISPUTES: A LEGAL AND CLINICAL CHALLENGE (1988)).

138. Circumstantial evidence is generally “testimony of witnesses as to the existence of certain facts, or evidence by exhibits as to certain facts, or the happening of other events, from which [a] jury . . . may logically conclude that the event in question did happen.” 5 DAVID M. BORDEN ET AL., CONN. PRAC., CRIMINAL JURY INSTRUCTIONS § 3.1 (4th ed. 2014), available at Westlaw (database updated Nov. 2014). It requires the drawing of an inference. *Id.*

139. The American Prosecutors Research Institute has set forth guidelines parallel to those which have been discussed with regard to the characteristics of non-fabricating accusers versus suspect accusers. See *Fact Sheet*, *supra* note 16, at 3–4. The identified characteristics of a suspect accuser include: “Express[ing] little or no remorse for [the] child only vindictiveness towards [the] ex-spouse”; an “[u]nwilling[ness] to consider any other explanation of [a] child’s statements, behavior, or symptoms”; prompting the child when he or she is questioned about the abuse; and an unwillingness to let go of the investigatory process despite finding of no abuse. *Id.*

Thus, establishing that one parent accused an opposing parent of child abuse knowing such accusation to be untrue is clearly not an easy task. But the fact that proving intent is *not impossible*, combined with the deterrence of good faith claims that would result from its elimination as a legal requirement, lends to the conclusion that intent is a necessary element of laws penalizing false claims of child abuse.¹⁴⁰

b. Capping the Deterrent Effect

Of those states with existing laws sanctioning false reports of child abuse, the strongest are those that do not limit the penalty, particularly the monetary fine, which will burden the accuser.¹⁴¹ By designating a maximum amount that may be recovered, either through criminal sanctions or civil damages, the law effectively limits the deterrent effect it might have.¹⁴² This is particularly true for those states that designate intentional false reports of child abuse as a misdemeanor, thereby limiting the penalty to brief jail time or a minimal monetary recoveries.¹⁴³

Falsely accusing a parent of child abuse is a highly damaging act that harms both the accused parent and the involved child. The weight of the harm should be reflected in the penalty recognized by the law. Those laws which reduce the penalty to a small monetary fine provide the false accuser with a mere slap on the wrist.¹⁴⁴ When combined with the unlikelihood of establishing intent or proving that the accusation of child abuse was made with known falsity, such light penalties create little to no deterrence of the act. Laws carrying light sanctions effectively tell a parent that he or she can take the risk of accusing the opposing parent of child abuse in order to sway a custody determination because the odds are in the accuser's favor. It would be difficult to prove the allegation was false, and even if you could,

140. See *supra* notes 130–36 and accompanying text.

141. See *supra* note 112 and accompanying text.

142. See *supra* notes 108–09 and accompanying text.

143. See, e.g., ARIZ. REV. STAT. §§ 13-3620.01(A), 13-707(A)(1), 13-802(A) (2010) (“A person . . . who knowingly and intentionally makes a false report of child abuse or neglect . . . is guilty of a class 1 misdemeanor,” punishable by up to 6 months in jail and a fine of up to \$2,500.00.); COLO. REV. STAT. ANN. §§ 19-3-304(3.5), (4)(a), 18-1.3-501(1)(a) (West 2013) (Any person who “knowingly make[s] a false report of abuse or neglect to a . . . law enforcement agency . . . [c]ommits a class 3 misdemeanor,” punishable by up to 6 months in jail, a fine of up to \$750, or both.); KAN. STAT. ANN. §§ 38-2223(e)(3), 21-6602(a)(2), 21-6611(b)(2) (West Supp. 2012) (“Any person who willfully and knowingly makes a false report . . . or makes a report that such person knows lacks factual foundation is guilty of a class B misdemeanor,” punishable by up to six months in jail and a fine of up to \$1,000.00.); MO. ANN. STAT. §§ 210.165.2, 556.016.3, 560.016.1(1) (West 2012) (“Any person who intentionally files a false report of child abuse or neglect shall be guilty of a class A misdemeanor,” punishable by up to one year in jail or a fine of up to \$1,000.00 or both.).

144. See *supra* notes 103–04 and accompanying text.

the penalty is not too severe, but the reward is great when the outcome could be that the accuser gets primary or full custodianship of the child over an otherwise qualified parent.

V. WHAT IS NECESSARY TO COMBAT FALSE ACCUSATIONS OF CHILD ABUSE IN CUSTODY DISPUTES?

While the laws as they exist have some strengths, they remain plagued by deficiencies that limit or prevent their effectiveness. Indirect safeguards aid the wrongly accused parent in his or her uphill battle defending against a false allegation of abuse, but they do not prevent or cure the greater damages caused by the accusation itself and subsequent investigations.¹⁴⁵ Direct laws sanctioning false reports of child abuse provide some deterrence to prevent false accusations from occurring by criminalizing or otherwise penalizing the act, but the level of deterrence varies, with most states enforcing only weak monetary fines that provide little threat to the false accuser.¹⁴⁶ Furthermore, all direct laws require some showing of intent, i.e., that the report was made knowingly false.¹⁴⁷ Such a provision is necessary to ensure the courthouse doors are left open to good-faith claims. Yet, this necessary element of intent also deteriorates the deterrent effect of existing laws because of the inherent difficulty, and even unlikelihood, of proving the accuser *knew* of the falsity of an allegation of abuse, especially beyond a reasonable doubt.¹⁴⁸ Thus, as they stand to date, the laws are ill-prepared to battle false accusations of child abuse in a legal arena wherein false accusations of abuse may become more common to sway child custody decisions.¹⁴⁹

No one addition or deletion from the existing laws will resolve the statutory weaknesses in addressing this problem. Rather, what is required is a multifaceted statutory approach that deters a parent from entering outrageous, false accusations against another to begin with, aids the predicament of the accused in establishing intent if a false allegation gets through, and redresses the harms suffered by the child and the accused once the falsity of the claim is resolved. This Article proposes that a prime law for striking down false allegations of child abuse, made to influence custodianship, will include the following elements: (1) a strong, deterrent effect recognized through penalties proportionate to the damages caused by the accusation; (2) an allowance for recovery of damages under a lessened

145. See *supra* Part IV.C.1.

146. See *supra* Part IV.B.

147. See *supra* Part IV.C.2.a.

148. See *supra* Part IV.C.2.a.

149. See Wakefield & Underwager, *supra* note 3, at 456.

standard of proof to reduce the burden in establishing intent; (3) a requirement that indications in investigations of false accusations be reported to law enforcement to preserve evidence; and (4) a remedy for the alienation between the child and accused parent that can result from the making of false allegations.

A. *Strengthening the Deterrent Effect*

1. *Upping the Threat to Fit the Perpetration*

One of the key pitfalls in direct laws against false reports of child abuse is that the penalties are not conformed to the crime. Therefore, the act is not deterred. Deterrence is particularly important in the context of false allegations of child abuse in custody disputes because of the immense harm that is created just from the accusation alone.¹⁵⁰ The innocent accused feels the effects of the perpetration almost immediately.¹⁵¹ As illustrated prior, penalties for falsely reporting child abuse range from light monetary sanctions and brief jail time as a misdemeanor crime, to slightly greater fines and imprisonment with felony designations or otherwise.¹⁵² Of the states that designate a maximum penalty, Florida is the most severe, threatening up to five years imprisonment and a \$5,000.00 fine, with the additional potential for a \$10,000.00 fine from the Department of Children and Family Services.¹⁵³ Yes, \$5,000.00 is a lot of money, for some, and five years in prison is a lot of time, for most; but when coupled with the high improbability of establishing intent, is that enough? Probably not.

The model law to battle false accusations of child abuse to influence custodianship is one which deters through the threat of taking away the one thing the false accuser wishes to gain: primary custodianship of the child. Tackling false accusations of child abuse in custody disputes cannot be recognized through laws against false reports of child abuse generally. Rather, this requires inclusion of specific components in civil child protection or family laws that designate the making of false accusations of child abuse to be a determining factor when awarding primary custody. Essentially, a state should codify an authorization for the family court stating that the making of a false accusation of abuse is a strike against the accuser. However, this authorization must be tempered by considerations of due process, and as such, the law should not automatically remove a child from the accuser on the basis of the accusation alone.

150. See *supra* Part III.A–B.

151. See *supra* Part III.A.

152. See *supra* Part IV.B.

153. See *supra* note 107 and accompanying text.

Automatic removal of a child from the knowingly false accuser, because of the false accusation of abuse alone, would crumble under the weight of due process. The government interest in protecting the child from the false accuser, who is an otherwise qualified parent, would simply not outweigh that parent's right to the child. Parents have an established fundamental liberty to raise their child. As stated by the United States Supreme Court in *Santosky v. Kramer*, there exists a "fundamental liberty interest of natural parents in the care, custody, and management of their child [that] does not evaporate simply because they have not been model parents."¹⁵⁴ "This interest, however, is not absolute."¹⁵⁵ It is "limited by the compelling governmental interest in the protection of children — particularly where the children need to be protected from their own parents."¹⁵⁶

A state's action in removing a child from the custody of the natural parent is measured against the standard of whether or not the deprivation of the parent's right "shocks the conscience."¹⁵⁷ One particular federal court case sets forth an analysis when considering the removal of a child under due process. In *In re Scott County Master Docket*, children were removed to the state from the custody of their parents, who were placed under arrest during investigations involving a Minnesota sex-ring.¹⁵⁸ The parents filed suit, alleging the state violated their due process rights.¹⁵⁹ The court held that while "the actions taken by [the] social workers [to remove the children], although inarguably disruptive to the family units of the various plaintiffs, were motivated by compassion for the children and are in no way indicative of an 'abuse of official power which shocks the conscience,'" and thus, did not rise to the level of a violation of substantive due process.¹⁶⁰ Additionally, the court held that in the context of loss of child custody, a parent's procedural due process rights are recognized so long as the aggrieved parent is provided "with an opportunity to be heard at a meaningful time and in a meaningful manner."¹⁶¹ Thus, to survive

154. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

155. *Gedrich v. Fairfax Cnty. Dep't of Family Servs.*, 282 F. Supp. 2d 439, 460 (E.D. Va. 2003).

156. *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997).

157. *Gedrich*, 282 F. Supp. 2d at 460 (quoting *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999)) (internal quotation marks omitted).

158. *See In re Scott Cnty. Master Docket*, 672 F. Supp. 1152, 1175–76, 1183 (D. Minn. 1987).

159. *Id.* at 1165.

160. *Id.* at 1166–67.

161. *Id.* at 1169 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Rivera v. Marcus*, 696 F.2d 1016, 1027 (2d Cir. 1982)). An evaluation of due process begs the question of were the

complaints of due process, a law reaching one's custody over a child must not rise to a level where the outcome would "shock the conscience," and must provide the parent with an outlet to be heard before the parent's right to the child is infringed upon.¹⁶²

Infringement of the due process rights of the accuser, in removing a child because of the false accusation, would be an issue of first impression for the courts. In light of the analysis in *In re Scott*, it seems likely that the need to protect a child would not be so great as to warrant removal of the child on the basis that a parent made a false accusation of abuse alone. Such automatic removal would likely "shock the conscience," because, clearly, falsely accusing an opposing parent of abuse does not explicitly place the child in immediate harm's way. Still, when a parent alleges a false accusation of abuse against another, he or she does threaten, to some extent, the child's well-being. The child suffers the effects of subsequent investigations and loss of relationship with the accused parent that stems from the false accusation. This potential harm warrants a law that designates the making of a false accusation as a consideration when awarding custody, so long as the law does not automatically remove the child from the accuser on this consideration alone. Moreover, the custody proceedings themselves would provide the accuser with an outlet in which to be heard before any determination of custody was made.

The model law would exist alongside existing and applicable criminal sanctions.¹⁶³ It would put the accuser on notice that if one makes a false allegation of abuse to sway a custody determination it is likely that the wrongly accused, if he or she be an otherwise equally qualified and capable parent, will get primary custody.¹⁶⁴ The accuser will not lose all rights to the

"violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* at 1166 (alteration in original) (quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir.1980)) (internal quotation marks omitted).

162. See *supra* notes 160–61 and accompanying text.

163. See *infra* note 166.

164. New Hampshire House Bill 506 provides a model for the proposition herein that the ideal law threatens loss of custody to the accused parent, in addition to applicable criminal prosecution, to deter false accusations of abuse in custody proceedings. Said bill proposed the following:

If the court finds by a preponderance of the evidence that a parent has knowingly made false statements of child abuse . . . against the other parent to the department of health and human services, to the court, to any law enforcement agency . . . then the accusing parent shall not be awarded primary residential custody of the children. This provision shall apply so long as the accused parent:

- (a) [h]as never been convicted of any crime perpetrated against a child;
- (b) [h]as no criminal convictions in the past 5 years for either alcohol abuse or the abuse of a controlled substance; and

child, but will effectively lose primary custodianship. Explicitly threatening the loss of the one thing motivating the making of a false accusation in a custody proceeding, to take custody of the child over an opposing parent, is the strongest deterrent to the false accusations in this context that the law can provide.¹⁶⁵

2. *Imposing a Lessened Burden of Persuasion*

As mentioned, one of the facets limiting the deterrent effect of existing laws is the intent requirement.¹⁶⁶ An accuser is not afraid of the law because they are not likely to face the consequence of the law where the intent element is so difficult to prove. But, because the element of intent is necessary,¹⁶⁷ a model law shaped to combat false allegations of child abuse in custody disputes must counteract the difficulties in establishing intent rather than eliminate this requirement altogether.¹⁶⁸

Reducing the difficulty of proving intent can be realized by lessening the burden of persuasion placed upon the accused parent to establish that the false accusation was made knowingly. This is effectuated by bringing recovery for the accused into civil child and family laws that address divorce and custody.¹⁶⁹ Criminal sanctions for falsely reporting child abuse generally could and should still exist, but bringing provisions that address false accusations of abuse in custody disputes—particularly within the civil realm—lowers the standard of proof that must be satisfied for the accuser to face the consequences of his or her false accusation.¹⁷⁰

Criminal penalties generally carry with them an inherent requirement that the criminal act be proven beyond a reasonable doubt before

(c) [h]as no criminal convictions for the trafficking of a controlled substance.
H.B. 506-FN, Gen. Ct., 2011 Sess. (N.H. 2011).

Furthermore, though not a pertinent argument to this article, which is examining the strength of the deterrence effect of the law more so than financial feasibility, it should be noted that adding this element to civil codes relating to determinations of custody and/or parental rights would not detrimentally increase court costs and efficiency. *See id.* (Fiscal Note) (It would not likely “increase the number of cases in the courts, but [rather only] add contentious issues to existing cases,” which might only increase hearing times.).

165. *See supra* Part V.A.1.

166. *See supra* Part IV.C.2.a.

167. As discussed in Part IV.C.2.a, any law penalizing false reports of child abuse in custody proceedings must require that the accuser knew the accusation was false at the time it was made. Otherwise, a good-faith claim of abuse will be deterred out of fear that penalties will result if no evidence is found to support the claim, even though it is true or believed to be true.

168. *See supra* Part IV.C.2.a.

169. *See* David H. Kaye, *Statistical Significance and the Burden of Persuasion*, 46 *LAW & CONTEMP. PROBS.* 13, 15–16 (1983).

170. *See id.*

conviction.¹⁷¹ However, the standard “in most civil litigation [is] a mere preponderance of the evidence,” or, at most, a standard of “clear, convincing, and unequivocal proof.”¹⁷² As such, criminal laws sanctioning false allegations of abuse in custody disputes impose a heightened burden of persuasion.¹⁷³ This limits the deterrent effect because, in regards to establishing that a parent *knew* an accusation of abuse was false when made, the standard is unlikely, if not impossible, to be met.¹⁷⁴ For this reason, penalties for entering false allegations of child abuse in custody disputes would be stronger provisions if they were in place in the civil code, wherein a reduced standard of proof would apply, in addition to criminal code sanctions.¹⁷⁵ While intent would remain difficult to prove, the probability of proof might be greater under a lessened burden of persuasion, thereby strengthening the effect of the law in preventing false accusations of child abuse in custody disputes before they are made.

Thus, the ultimate deterrent effect with regards to preventing false accusations of child abuse in custody proceedings is recognized by a law enacted in *civil* code that, in addition to criminal prosecution, authorizes a court to use the making of a false accusation as a determinant in awarding custody.¹⁷⁶ The threat of loss of primary custodianship, coupled with the increased likelihood that the burden of establishing malice can be satisfied, might expectantly stop a parent from falsely accusing another of child abuse in divorce and custody disputes more readily than existing laws that criminalize or otherwise sanction false reports of child abuse.

B. Redressing the Harm

Any law fit to address false allegations of abuse in custody disputes should allow for some cure of the harm inflicted by the accusation, including harms suffered despite discovery that the allegation is false. Additionally, a law that provides for a cure of the harms caused by false

171. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the “reasonable doubt” standard is an implicit component of due process, required to be applied by fact-finders in criminal cases in both federal and state courts).

172. *Kaye*, *supra* note 169, at 15 (internal quotation marks omitted). The more stringent standard of “clear, convincing, and unequivocal proof” is applied in some “quasi-criminal” matters. *Id.* Quasi-criminal matters are those like fraud in which the “interests at stake . . . are deemed to be more substantial than mere loss of money.” *Addington v. Texas*, 441 U.S. 418, 424 (1979).

173. See *In re Winship*, 397 U.S. at 364 (requiring proof beyond a reasonable doubt in all criminal cases).

174. See *supra* Part IV.C.2.a.

175. See *supra* notes 169–72 and accompanying text.

176. See *supra* note 164 for an exemplar of the model statute proposed herein.

allegations of abuse also secondarily increases the deterrent effect of said law.

To effectively redress the harm, the model law should direct that if it be established that an accusation of abuse is found to be both false and known to be false, in addition to a loss of custodianship, the accused may recover all *actual damages* from the accuser.¹⁷⁷ This would encompass any loss suffered by the accused including a monetary value for loss of reputation suffered as a consequence of the accusation. It is important here that the damage award not be capped, but rather the limit remain open so as to fully recognize the harm suffered by the accused, which can be great.¹⁷⁸ Moreover, recovery of all actual damages rather than a pre-designated fine more accurately redresses the harm because one cannot predict the detriment the accused will suffer.¹⁷⁹ The loss here depends on factors such as the accused's occupation, which can vary his or her loss.¹⁸⁰

Redressing the harm also means curing the relationship defects between the accused parent and involved child caused by promulgation of the false accusation of abuse. This can be realized through counseling by a court-approved individual or agency.¹⁸¹ Thus, the model law would direct that once the accusation of abuse is proven to be made knowingly false, all involved parties must complete counseling at the expense of the accuser. Here too, the accuser must bear the burden of *all* costs related to said counseling, including any lost wages the accused might encounter as a result of this requirement.¹⁸²

177. Actual damages constitute the sum of money that will fairly and justly compensate the accused for any injury he or she "actually sustained as a direct consequence of the conduct of the [accuser]." See THOMAS B. MERRITT, 30 N.Y. PRAC. SERIES: NEW YORK ELEMENTS OF AN ACTION § 14:14, ¶¶ 56-59 (2014), available at Westlaw (database updated Nov. 2014). West Virginia and California laws provide examples of statutes allowing for recovery of damages that are not capped at a pre-determined amount. California provides that the court may impose "reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions." CAL. FAM. CODE § 3027.1(a) (West 2004). West Virginia allows for reimbursement of costs incurred by the accused party as a result of defending the accusation and reasonable attorney's fees incurred. W. VA. CODE ANN. § 48-9-209(d) (LexisNexis 2009). However, because these laws have not been judicially interpreted, it is unclear what damages would fall within the scope of recovery, and, therefore, the effectiveness of these laws remains in question, should a court limit recovery thereby limiting deterrence.

178. See *supra* Part III.B.

179. See *supra* Part III.B.

180. For instance, if an accused loses wages because of the accusation and defending the accusation, his or her damages with regards to lost wages might be greater if his or her occupation was a doctor versus an elementary school teacher.

181. See *supra* Part III.A.

182. The cost of necessary therapy qualifies as actual damages. See MERRITT, *supra* note 177, at Part III.A.

Not only do the above-stated cures mend the injuries inflicted upon the accused as well as the child, the model law also increases the deterrent effect on alleging a false accusation. In addition to losing primary custody over the child, the accuser now stands to be liable for money damages that could be immense.¹⁸³ Such a combination would arguably quash even thoughts of entering a false allegation into a dispute to influence child custody.

VI. CONCLUSION

Once a person alleges a false accusation of child abuse against another to influence a custody determination, the damage is done. The mere accusation in and of itself has the capability to destroy the relationship between the child and accused parent. It elicits an investigation that intrudes upon both the accused and the child, and even where no abuse occurred, the investigation alone can bring on embarrassment and shame. It sends detrimental thoughts into the mind of the impressionable child, and it shatters the life of the accused who is sent into a tailspin of defending against an allegation of bringing harm to one's own child. The welfare of the child can be lost in the battle. Not to mention, the burden of defending against the untrue contention can dissipate the accused's finances. And because the veracity of an abuse allegation is difficult to disprove, the shadow of the allegation, which may be deemed "unsubstantiated" but not necessarily "untrue," will lurk behind the accused even if he or she is not charged or found guilty of the fallacious claim.

These harms ensue immediately upon the making of the false accusation, which warrants a law that can bite back. When such is at stake, the law must deter the damage before it is brought upon the accused and the involved child. It must challenge the false accuser with penalties great enough to stop them from promulgating the false accusation in the first place, and temper the destruction when the false accusations still slip through. The model law should threaten an eye for an eye, but do so within the bounds of our constitutional rights to parent our children. It should direct the applicable court to consider the propagation of a false accusation of abuse when making a determination of custody, for all intents and purposes notifying parents that a false allegation of abuse could cost them primary custody of their children. Legislatures should bring this direction into *civil* child and family codes pertaining to custody and divorce, thereby allowing a lessened burden of persuasion than that applied to criminal laws to be the gatekeeper to enforcement. And should a false accusation of abuse

183. See *supra* notes 178–82 and accompanying text.

still creep into a child custody dispute, the law should allow recovery of all actual damages suffered by the accused and mandate counseling at the expense of the accuser, in order to subdue the financial and emotional hurt imposed on the accused, and the child. When woven together, these provisions might provide a preemptive attack on the occurrence of false accusations of child abuse in custody disputes, and signal false accusers to stop crying wolf.