

Interprovincial Forum on Judicial Treatment of Domestic Violence

Intersection of Family, Criminal & Child Protection: Exploring Problems and Solutions

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Orientation

Law Practitioner (10 years) turned Academic

Strong bias in favor of research informing practice

&

Old enough to be tired of problems: Its time for solutions

***Domestic Violence and Family Law in Canada:
A Handbook for Judges (2009, 2011)***



Renamed Electronic Title:
Domestic Violence (3rd ed., 2015)

(Ottawa: National Judicial Institute)

*Enhancing Safety: When Domestic Violence Cases
are in
Multiple Legal Systems*

2012 version: U Western

2013 version English & French

Ottawa: Dept. of Justice

Not Possible to Discuss all Intersection Issues In 30 Minutes

Concentrate on Three:

- ▶ Definition Problems
- ▶ Risk and Danger
- ▶ Victim Recant



Two of Our Collective Challenges

Cost - Limited Resources

Legal System Fragmentation & Complexity

Cost

Please visit the National Scientific Council *on the Developing Child*, Harvard U

<http://developingchild.harvard.edu/activities/council/>

Read Working Papers & View Images of the
**Effects of Toxic Stress & Persistent Fear
on Child Development**



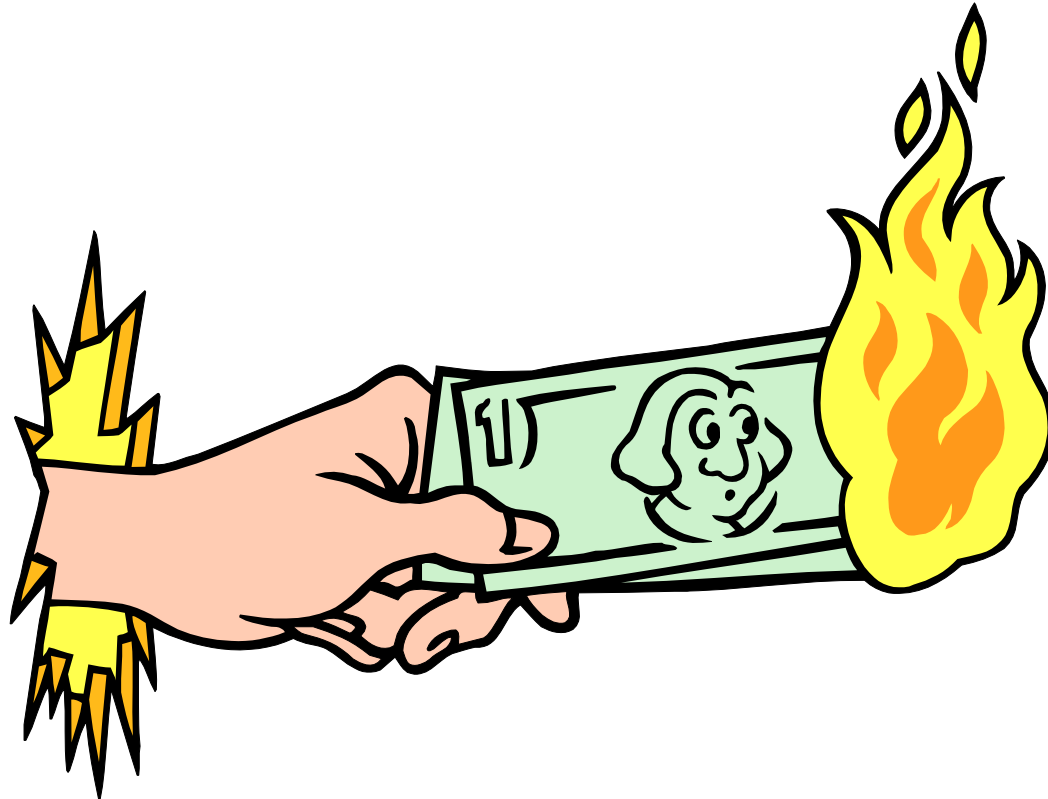
Every Time We Get it Wrong

We Construct Child Developmental Failure

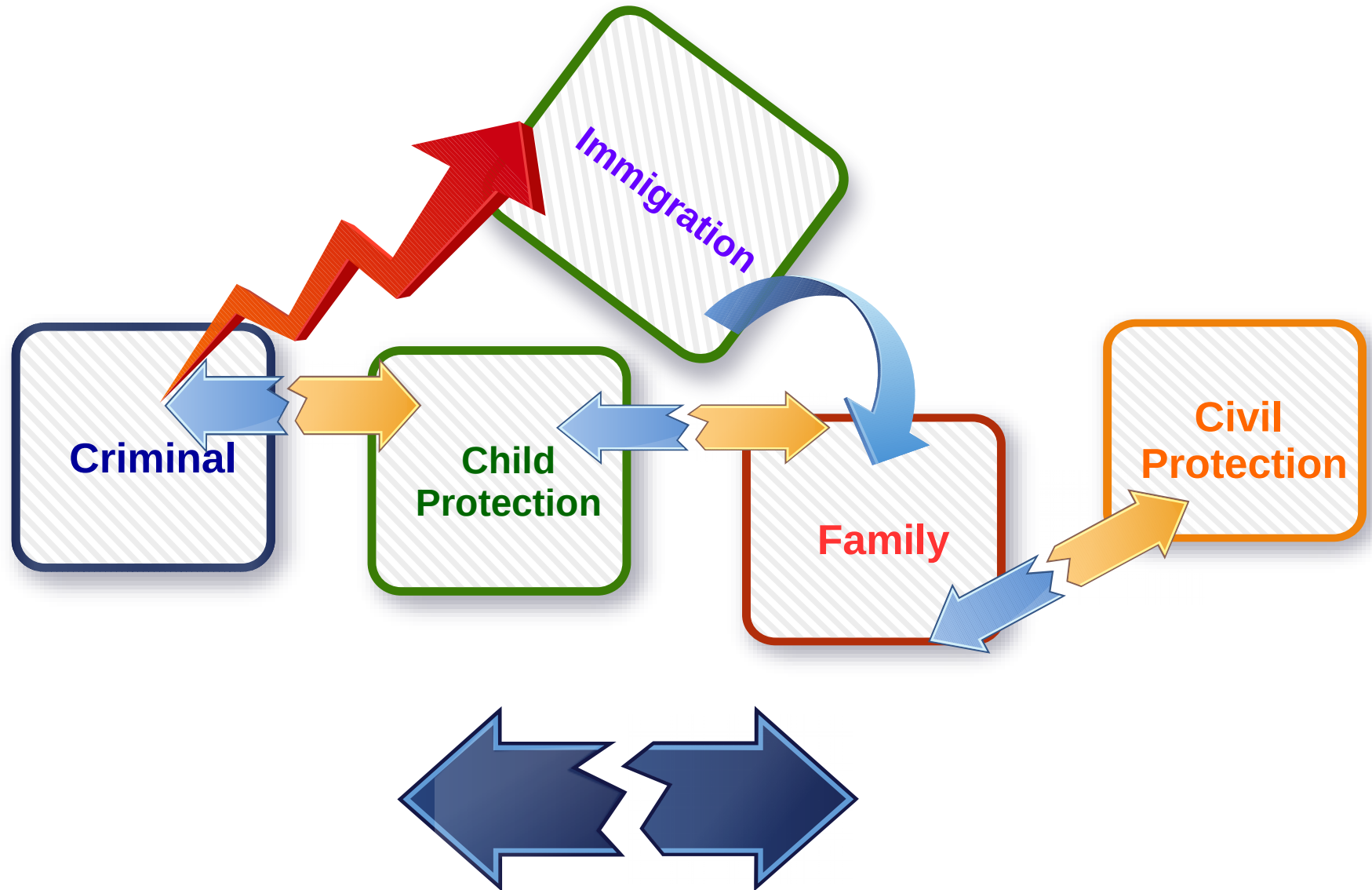
Source of Image: Dr. Jean Clinton, Power Point Teaching Slides; Drs. Jean Clinton & Linda C. Neilson “Assessing Alienation in Context of Domestic Violence & Child Brain Development” Plenary, AFCC Conference, Denver, 2009.

Cost?

**Can we afford NOT to allocate
Resources?**



Legal System Fragmentation



Leaving the Women and Children Spinning



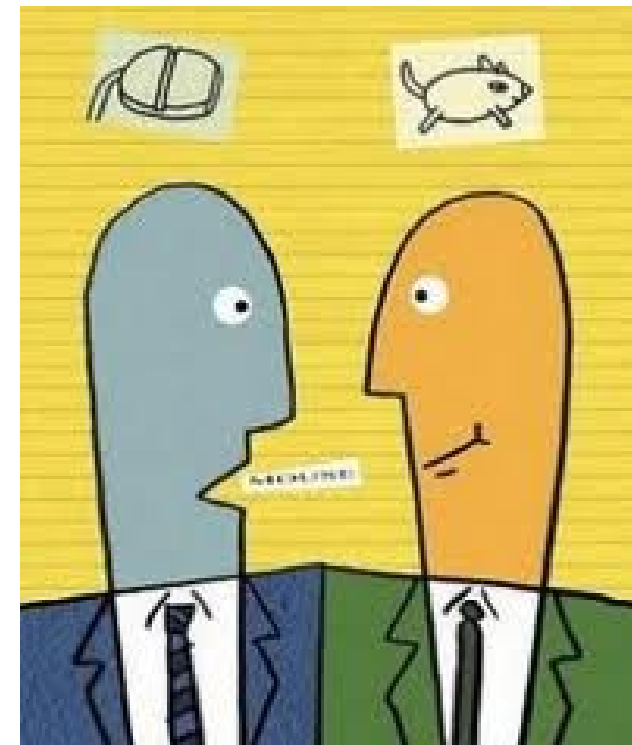
#1 Definition Problem



We wade through DV & legal system research

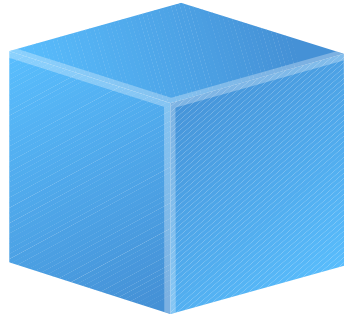
We transform knowledge to make it useful in legal systems

But systems do not speak same language



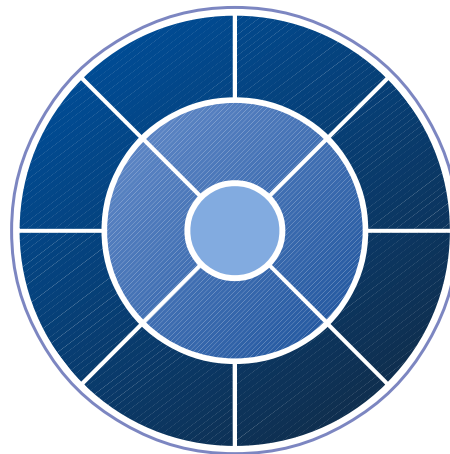
**Source of Image: Change Leadership Network,
University of Michigan**

Criminal System: Prohibits Incidents / Acts



Yet

IPV research: Pattern & Context



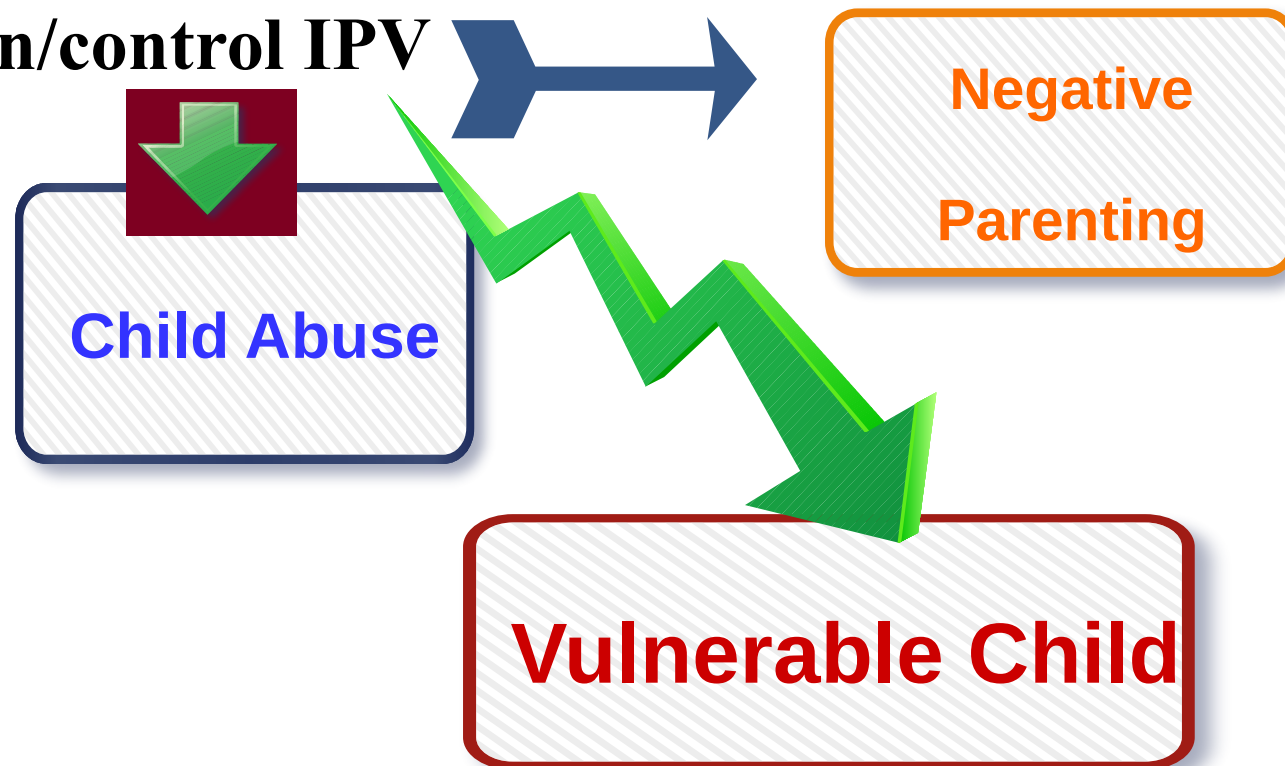
Intersection Implications

DV Informed: Pattern & Type

Minor, Isolated

Resistance Violence

Coercion/control IPV



There is only one way to distinguish IPV Type & perpetrator from target

Detailed scrutiny of patterns of behavior over time through a lens of coercion-control-context-effect

Matters more than type of incident or physical violence

Ontario Court of Appeal:

R. v. Craig, 2011 ONCA 143, at 59

R. v. Craig

Sentence (victim charged with murder)



Where the abuse leaves the abused individual feeling utterly trapped .. and mentally unable to escape from the relationship, the moral culpability .. substantially reduced

It may be easier to reach the conclusion that the abuse had had a serious impact on the person abused where it includes a significant physical component. However, as the evidence in this case makes clear psychological, verbal and emotional abuse combined with intimidation and realistic fear of physical violence can have an overwhelming impact on the abused individual.

**Our Image of DV Changes Dramatically The
More Deeply We Look**

Simple Example

Criminal Family Law System

Primary Targeted / Controlled Parent:

- Criminal Conviction for DV – no contact
- Coercion – Control Parent de facto custody of children
- *Status Quo* custody / access

Absent IPV Analysis by type in Criminal System:

- Failed to respond in accordance with Type IPV
- Criminalized Victim parent for resisting IPV
- Reduced child resilience by removing connection to parent
- Control to coercive-control parent

Unravel in the Family System



Yes Maybe IF

Family Law & Child Protection Systems:

Probably cannot rebut responsibility for the Criminal act of physical violence

(Rules against re-litigation)

BUT the Criminal System has only decided criminal act; NO determination of pattern of coercion/control, context, or effect

Evidence of pattern, context, & effect surrounding the criminal act can still be admitted because the legal context is different.

IF her lawyer understands IPV by type & context

IF her lawyer knows where to look for evidence

IF her lawyer understands IPV child connections

IF her lawyer understands BOTH the criminal

AND family law systems

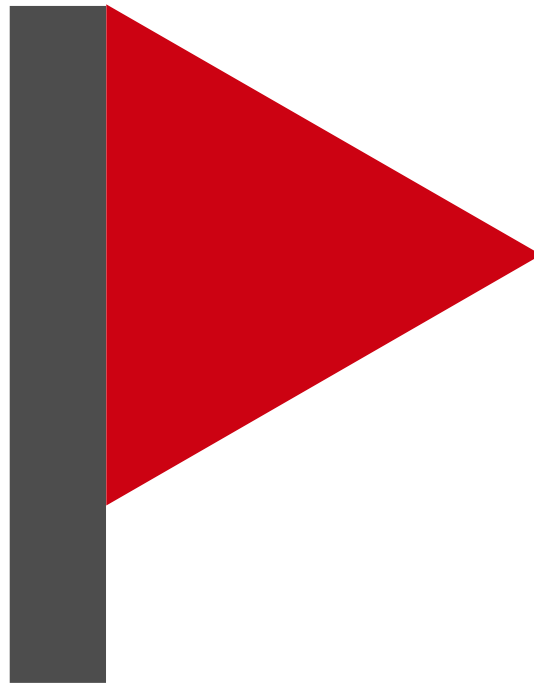
IF her lawyer knows how to obtain, interpret & use evidence derived from one legal system in another

AND

IF the judge takes into account criminal & family legal system contexts

AND IF the judge is receptive

#2 Risk / Danger



TERMINOLOGY

- **Screening** & **Assessment** not the same thing
- **Screening tools** - detect presence, patterns & types; assess applicability of legal processes (eg mediation or judicial dispute resolution)
- **Risk Assessment** - empirically verified tools to assess future risk.
 - Focus is very narrow: **physical violence**
 - Only facts empirically validated to predict violent action

**FAR MORE INFORMATION ABOUT
IPV HISTORY, PATTERN, TYPE,
CONTEXT & EFFECT**

**FROM SCREENING TOOLS THAN
FROM RISK ASSESSMENT**





IPV varies in pattern, type & effect

Type of physical violence does **not** determine type or effect of IPV

Context, psychological dynamics & effects matter

**EXTREMELY COMPLEX
OFTEN NOT ONE-DIRECTIONAL
REQUIRES HIGH LEVEL EXPERTISE**

Only way to assess type: Detailed Scrutiny of Patterns in context over time

Distinguish (5.2 – 5.6, footnote 38 of *Enhancing Safety*):

- **minor, isolated**
- **victim resistance**
- **coercive-control violence**

Type of IPV depends on coercion-control-context-effect - more than physical violence

Type has significant implications re appropriate remedies in every legal system:

Eg.: *R. v. Craig*, 2011 ONCA 143 at 59)

Failure to Distinguish Type:

Havoc Across Legal Systems

Over reaction: Minor, Isolated or Separation only violence (men & women)

Over criminalization Victim Resistance violence

Under reaction to coercion & control violence

Serious implications all legal systems

Connect to Children



Image from Dr. Jeffrey Eddleson files, permission granted to Linda Neilson to use for education purposes

We know child recovery and resilience are promoted by safety & strong, stable bonds with non abusive parent (or parents).

When legal systems sever the child from:

- ❑ Primary parent - resistance violence
- ❑ Involved parent - minor isolated (no coercion/control)

❑ **THE SYSTEM CAN CAUSE CHILD HARM**

When legal systems fail to protect from coercion/control parent

THE SYSTEM FAILS TO PROTECT WOMEN AND CHILDREN FROM HARM



Require Early Screening



Match Type of IPV to Legal process & response

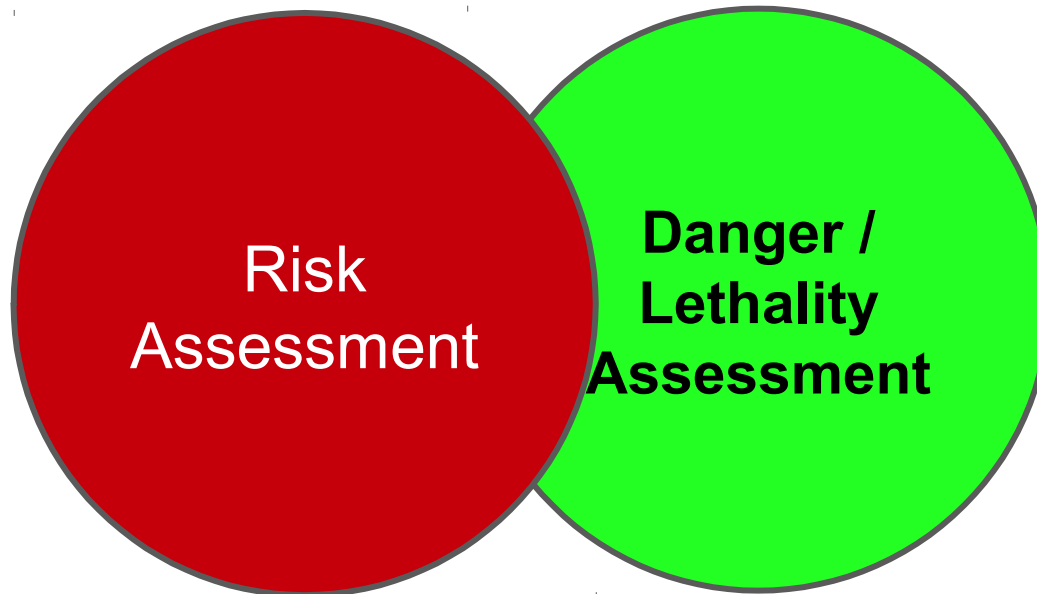
Implement screening early in Family & Child Protection. Share Information with Criminal System?

Challenges: Criminal disclosure; Protect confidential info victims & children; potential retaliation; pressure to recant.

WE DO NEED RISK & LETHALITY ASSESSMENTS

To ensure physical safety

Overlap, not the same



Murder Suicide Cases Distinct Profile:

- Only 39 % known history of violence with Police (Statistics Canada, 2013)

Important because family members & children die

Children: Another reason to Assess Both (Risk & Danger)



- ✓ Ontario Coroner's Report
- ✓ Peter Jaffe's homicide child research
- ✓ Child death reviews
- ✓ Research in the US



When Parents are in grave danger, children are in danger too

**Mechanisms to identify, share, respond
to risk & danger across legal systems
while protect confidential victim/child**

*Image from Dr. Jeffrey Eddleson files, permission
granted to Linda Neilson to use for education
purposes*

ESSENTIAL YES; SUFFICIENT NO

Risk assessments depend on police data and on information from parents who grossly under report child exposure to DV

Assess for adult physical risk



No validated tools that measure risk to children

Most Important: risk of physical is a TINY piece of the child & family safety / welfare puzzle

AVOID OVER-RELIANCE ON PHYSICAL RISK
ASSESSMENT TOOLS



AVOID MISUSE
ASSUMPTIONS RE CHILD WELFARE/SAFETY

HERE IS WHY

NOT ABOUT BROKEN BONES

COERCIVE DV



TOXIC STRESS

PARENTING PRACTICES

EMOTIONAL TRAUMA

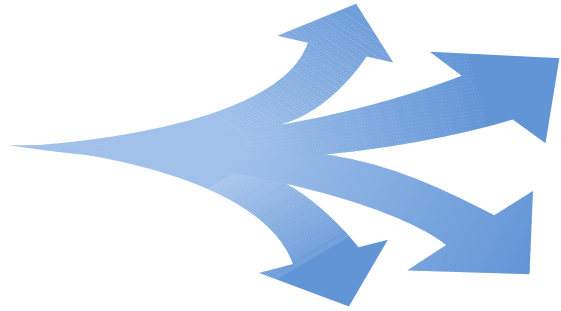
HEALING & PROMOTING CHILD RESILIENCE

One of my biggest fears is that we will begin to see risk assessments designed for criminal contexts



Used to Triage cases in family and child protection systems into high, moderate and low risk processes

Judges Can Only Make Decisions on Basis of Evidence

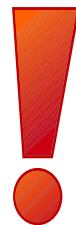


Lawyers
Litigants

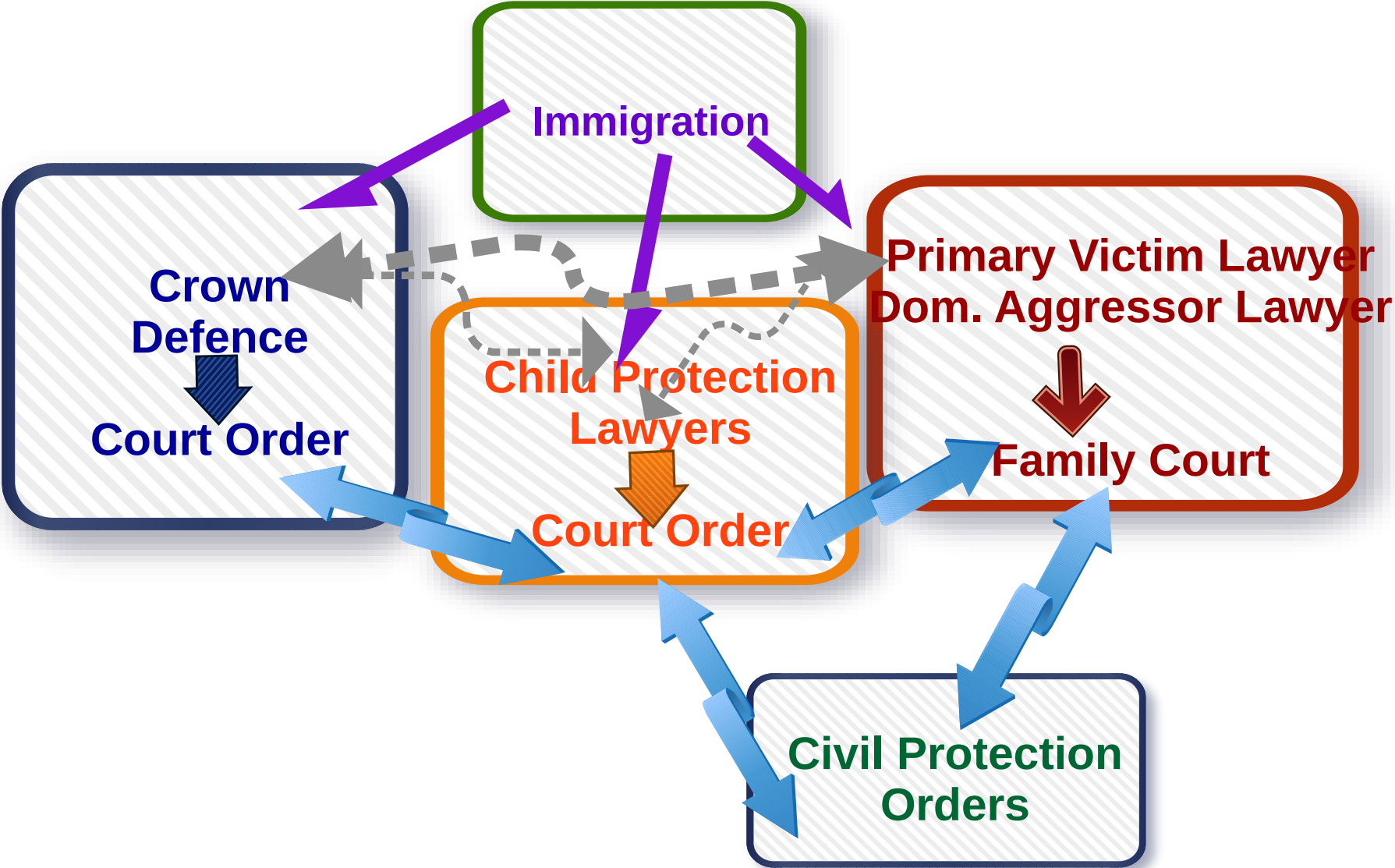


Courts

So how do we ensure Crown, lawyers & litigants
(self rep?) have knowledge & access to risk &
danger evidence to present to courts?



Add over the Top
(Ran out of Space)



Court To Court

Exchange orders

Judges can communicate across systems – Donna Martinson & Margaret Jackson

Courts can obtain and consider evidence & findings of fact from other proceedings involving the same parties (eg criminal to family and child protection)

- *British Columbia (Attorney General) v. Malik*, 2011 SCC 18
- *Belong v. Her Majesty the Queen in Right of the Attorney General of Canada and Timothy Quigley*, 2013 NBCA 68, leave to appeal SCC dismissed with costs
- *J.F. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2013 NLCA 27
- *BL v. Saskatchewan (Social Services)*, 2012 SKCA 38
- *Delichte v. Rogers*, 2011 MBCA 50.

Constructing Information Flow In Support of Court Decisions

Complicated

Some considerations:

- Obtain consent & protect Confidential info that can increase risk
- Disclose only that necessary (Privacy – perpetrator, victim, child)
- Avoid high potential for misuse of information gathered for one purpose in one legal system in the other legal systems
- Anticipate and respond to disclosure requirements across systems – eg will the abuser be able to use broad disclosure requirements in the fam/cp system to gain access to information shielded in the criminal system – and vice versa.
- **FRAUGHT WITH DANGER & LEGAL COMPLEXITY**

#3 Recant Problem



Victim Recant (criminal system): I Lied; I Did This Myself

Sources of Images: Cassey Gwinn, teaching slides, permission granted to Linda Neilson to use for educational purposes



Emerging Recant Research : 4 Studies

(In addition to a series of academic DV papers)

Small – need more research – BUT consistent

Two US

- one felony jail study (Vera Institute)
- one misdemeanor (Bonomi)

Crown UK (Crown Prosecution Service)

One pilot Canada (Konarski, RCMP)

Citations

US: Amy Bonomi et al., *Meet Me At the Hill Where We Used to Park: Interpersonal Processes Associated With Victim Recantation* 2011 *Social Sciences & Medicine* 1054-61

England: Crown Prosecution Service (UK) (2013) *Domestic Violence, non-engagement or withdrawal of victims*

Canada: Inspector Richard Konarski (2011) *Negotiating Domestic Violence: An Exploratory Study*

US: Vera Institute (2004) *Prosecuting Witness Tampering, Bail Jumping, and Battering Behind Bars*

Increasingly apparent: recants are often products of manipulation/intimidation of victim-witnesses

Many

Recants are false

Let's Work Together to Fix This

Meanwhile on the other side: Where are all the
Obstruction of Justice Charges?

Section 139 *Criminal Code* for Witness Tampering?



Image: *Witness Silence*, Edmonton Police Service Website

Results

DOUBLE BIND for victim

NO Accountability for Offender

Offender has beaten legal system

Most serious cases least protected

Children and 'victims' have no protection from the legal system

Intersection of Legal Systems

- Victim now has **Serious Credibility Problems**
- **Family Law & Child Protection Systems**
DOUBLE BIND:
 - NOW in order to lead DV evidence in family & child protection, she has to acknowledge lying under oath in the criminal court
 - Worse: Section 136 *Criminal Code: witness who subsequently gives evidence contrary to prior testimony is guilty of indictable offence – **whether or not prior or later evidence is true.***
 - So what does her lawyer do now? Put her on the stand to commit a criminal act ??? !!!!

Preventative Solutions

(in addition to 139 charges)

Lots of system support before the abuser gets her(him)

Teach how to record and report breaches of no contact & efforts to dissuade from testifying

Collect Evidence in anticipation of recant

Additional methods to respond to Victim Recant

- Call expert evidence on recant & reasons for repetitive reconciliation: *R. v. Smith* 2007 ONCA 260
- KGBs
- Expanded in *R. v. Ord*, 2012 NSCA 115, leave to appeal dismissed by SCC
- Out of court statements, principled approach
– *R. Khelawon* 2006 SCC 57; *R. v. Starr*, 2000 SCC 40 (*CanLII*)

Court Responses

- Compare physical evidence & statements made to police with particulars of recant testimony.
- Which statement is consistent with physical evidence?
- Case law list at 9.5.1 of *Enhancing Safety*, note particularly *R. v. Ord*, 2012 NSCA 115
- Explore circumstances surrounding recant – consider during comparison
- Avoid erroneous assumptions that recant = false claim

We Need to Work Together to Fix This

