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Recommended Citation

Leah A. Hill, *Do You See What I See - Reflections on How Bias Infiltrates the New York City Family Court - The Case of the Court Ordered Investigation*, 40 Colum. J.L. & Soc. Probs. 527 (2006-2007)

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Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court — the Case of the Court Ordered Investigation

LEAH A. HILL*

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids — and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination — indeed, everything and anything except me.

— Ralph Ellison¹

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1. RALPH ELLISON, *THE INVISIBLE MAN* 3 (Vintage Books 1995) (1952).

I. INTRODUCTION

Nearly twenty-five years after I first encountered the day-to-day world inside the New York City Family Court, I can still vividly recall the experience. Like the protagonist in Ralph Ellison's powerful classic, not only did I feel invisible, I felt that no one else in the courthouse could see what I was seeing. If they could, surely they would feel the same need to scream, to call for protests, to alert the media, to file a class action lawsuit, for this could not be legal — this could not be justice. It was the summer of 1983 and I was an intern at the Legal Aid Society's Juvenile Rights Division (JRD). I was an enthusiastic and eager law student, fresh out of my first year of law school.

I spent the first few days of my internship in the office law library reading through a variety of materials about practice in Family Court. I read pages and pages of eloquently written statutes and commentary, case law and treatises, filled with references to the "rights" of parties in family court proceedings — the right to due process, the right to legal representation — references to protecting family integrity and children's best interests. I remember being impressed by the themes of rights and values that weaved their way through the materials. The JRD trial office complex was housed on several floors within the same building as the Manhattan Family Court. I worked in an office that was adjacent to the court waiting areas. I would pass through the court waiting area each morning on my way into the office, during lunch, and on my way home. The orange plastic seats were barely filled during these times. After spending my first week alone with words and fantasies, it came as a great shock to witness the courthouse in full swing the first time I spent a full day in Family Court.

I was assigned to "shadow" a JRD staff attorney as he went about his daily routine. I followed him around as he shuffled from courtroom to courtroom to appear for his many cases. As we moved through the courthouse I was jolted by the way in which the previously serene building came to life. The waiting rooms were filled — standing room only — with mostly black and brown people, the majority of them women, waiting for their cases to be called. Lawyers talked with clients in the hallways and on stair-

cases, court officers yelled the names of litigants into the waiting room, and many people walked about looking lost.

Once inside the courtrooms, my head snapped back and forth as I watched the judges and lawyers proceed at break-neck speed. Off-the-record discussions about litigants during breaks in the proceedings were common. Judges, lawyers, court officers, and clerks commented on the litigants and the most intimate details of cases that had just concluded. Impatience seemed the order of the day. For judges, lawyers, and courthouse staff, indifference seemed to be a job requirement. I ached for the litigants who were often visibly upset and crying as they were ordered out of the courtroom at the conclusion of their cases. Many of them seemed dazed and confused as they left, usually with nothing but a yellow two-by-four slip of paper indicating the next adjournment date — the only evidence that they had been inside a courtroom. Proceedings involving child abuse, juvenile delinquency, and termination of parental rights all progressed at the same dizzying pace. When I left the Court that day, I could not get the images out of my head: waiting rooms overcrowded with people of color that reminded me of segregation; confused and quick proceedings that didn't match the visions of due process I had conjured up in my first year of law school; and judges and court personnel who were rude, impatient, and insensitive to the litigants. I remember thinking in my grandiose, youthful innocence, *this has got to change*.

It has been over twenty-three years since I first encountered the New York City Family Court. During this period there have been countless reports, critiques, and reform efforts instituted by those inside and outside of the system.² And yet the Family

2. See, e.g., Hon. Judith Kaye and Hon. Jonathan Lippman, *New York State Unified Court System Family Justice Program*, 36 FAM. CT. REV. 144 (1998). The authors, Chief Judge of the Court of Appeals and Chief Administrative Judge of the State of New York, respectively, identify vast problems in the functioning of New York's family courts and set forth a comprehensive long-term strategic plan for reform which was launched in 1997. The centerpiece of the plan, "a proposal for a constitutional amendment that will fundamentally restructure the trial court system in New York and create a Unified Family Division," has yet to move forward. *Id.* at 145. See also SPECIAL CHILD WELFARE ADVISORY PANEL, ANNE E. CASEY FOUNDATION, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 44–52 (2000) [hereinafter SPECIAL REPORT ON FAMILY COURT]; JULIA VITULLO-MARTIN & BRIAN MAXEY, VERA INST. OF JUSTICE, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES (2000), available at http://www.vera.org/publication_pdf/nyfamilcourt.pdf (reporting results of a survey designed to identify and

Court continues to be a world of overcrowded waiting rooms and long waits,³ where most litigants are poor people of color,⁴ where most proceedings conclude in ten minutes or less, and where waiting rooms often double as law offices.⁵ It is a world where patience is sometimes in short supply and where litigants are often invisible in the ways described in Ralph Ellison's opening passage. Since my first exposure to the world of Family Court in 1983, I have developed a greater understanding about the inner workings of the court and the nature of the day-to-day work done there. I have served on committees and task forces devoted to examining and improving various aspects of the Court. I have represented hundreds of clients in Family Court proceedings in four New York City counties — Manhattan, Brooklyn, the Bronx, and Queens. As a Family Court observer I have witnessed compassion and patience in some courtrooms and I have seen due process at work every now and then. Yet I have not forgotten the jolt I experienced when I first entered the world that is family court, and I feel that jolt each time I enter and witness scenes not unlike those I first encountered over two decades ago. At best, the Court is an institution that is ill-equipped to deal with the complexities⁶ of family life for the hundreds of thousands of liti-

provide feedback to the Court on the problems facing professional and non-professional court users with the ultimate goal of improving the experience of Family Court); LIBERTY ALDRICH ET AL., CTR. FOR CT. INNOVATION, BLUEPRINT FOR CHANGE EXECUTIVE SUMMARY 3 (2002) (Announcing a reform agenda that resulted from "a year-long study designed to take stock of the permanency planning process from top to bottom," the Blueprint "offer[s] a coordinated plan for improving the processing of abuse and neglect matters in the Family Court.").

3. See SPECIAL REPORT ON FAMILY COURT, *supra* note 2, at 44–45.

4. While there are no reliable data on the demographics of Family Court users, an informal survey of self-represented Family Court litigants in all five boroughs provides a powerful depiction: of the 1857 respondents surveyed, 48% identified themselves as African-American, 4% Asian, 31% Hispanic, and as or Native American or Other. OFF. OF THE DEPUTY CHIEF ADM'R FOR JUSTICE INITIATIVES, SELF REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (Dec. 2005), available at http://nycourts.gov/reports/AJJI_SelfRep06.pdf. Significantly, none of the users identified themselves as White. *Id.* The income information reported by participants was equally telling: 83% reported household incomes under \$30,000 annually and over 57% reported annual incomes under \$20,000. *Id.* at 4–5.

5. See SPECIAL REPORT ON FAMILY COURT, *supra* note 1, at 46; see also, John Sullivan, *Chief Judge Announces Plan To Streamline Family Court*, N.Y. TIMES, Feb. 25, 1998, at B7 (noting that in 1997, the average New York Family Court case received "slightly over four minutes before a judge on the first appearance, and a little more than 11 minutes on subsequent appearances") (internal quotations omitted).

6. See N.Y. FAM. CT. ACT § 141 (McKinney 2006).

gants who seek justice there. At worst, it is an institution that by default obliquely perpetuates bias.⁷

That the Family Court is ill-equipped to address the needs of the hundreds of thousands of cases handled therein is not news.⁸ Exploding caseloads, complex problems, and minimal resources are just a few of the ingredients that combine to undermine the Court's ability to fulfill its promise.⁹ What has been given less attention until very recently is the extent to which the Family Court's failures disproportionately impact low-income families of color.¹⁰ Any analysis of the Court's impact or efficacy must con-

7. Most commentators identifying bias in Family Court in New York and throughout the country focus on the role that courts play in perpetuating practices by child welfare authorities that have a disparate impact on racial minorities. The child welfare system in New York City, in which Family Court is a key player, was described by Martin Guggenheim in 2000 as "a system that a veritable Martian couldn't help but recognize to be apartheid." Martin Guggenheim, Symposium, *The Rights of Parents With Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 72-73 (2003). Guggenheim went on to predict, quite eerily, "there will be no change in the complexion of people who come to family court tomorrow or next year." *Id.* at 73. Dorothy E. Roberts and Susan L. Brooks focus broadly on how family courts throughout the country perpetuate race and class bias in dealing with child welfare cases and identify "the fundamental problem with family courts is that they treat family problems according to a family's race and class status." Dorothy E. Roberts & Susan L. Brooks, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002). The authors propose, inter alia, reforms of family courts that address institutional bias. *Id.* at 456-56.

8. See SPECIAL REPORT ON FAMILY COURT, *supra* note 1. The full panel report focuses on child protective matters in New York City but the discussion of Family Court is a system-wide indictment of the Court. Further, the report cites the nearly unanimous opinion of judges interviewed in Queens and the Bronx that the system does not work; those same judges lacked any optimism about changing the system. *Id.* at 48.

9. See, e.g., Susan R. Larabee, *Providing Resources To Family Courts*, N.Y.L.J., Jan. 24, 2003 (supporting Chief Judge Kaye's decision to temporarily transfer judges to the city's family courts to help handle the overwhelming case load, which is exacerbated by lower salaries for court attorneys, clerks, and court staff, fewer 18b panel attorneys, and additional requirements that increase the number and complexity of hearings for each child).

10. Across the country the impact of racial disproportionality in juvenile and family courts is beginning to spur the interests of researchers and practitioners. See, e.g., Lori Guevara et al., *Gender and Juvenile Justice Decision Making: What Role Does Race Play?* 1 FEMINIST CRIMINOLOGY 258 (2006) (analyzing the effects of race and gender on pre-adjudication detentions and final dispositions in two Midwestern juvenile courts between 1990 and 1994). The issue was examined locally on September 18, 2006 when the New York State Family Court Judges Association held a conference dedicated to looking at the issue of disproportionality in Family Court. This historic conference, entitled *The Disproportionate Number of Minority Youth in the Family and Criminal Court Systems*, was held at the Judicial Institute in White Plains, New York, and was organized by two prominent African-American women, Hon. Gayle P. Roberts, President of the N.Y. State Judges Association and Hon. Cheryl Chambers, Justice of the Criminal Court, Kings County.

sider the context I have described in my observations of the Court — the images of black and brown litigants hurrying through courtrooms where they are often disrespected. These images raise questions about the role of bias in the Court and the extent to which the Court's failings disproportionately impact people of color.

The historic failure to consider the disproportionate impact of Family Court's ills upon black and brown litigants may have set the groundwork for practices that unwittingly perpetuate bias. In the midst of the hurried pace, huge caseloads, and inadequate resources that define Family Court, a number of quick fixes and shortcut practices have emerged.¹¹ These practices include officially sanctioned shortcuts like the ever-expanding use of court attorney referees to preside over cases,¹² and unofficially sanctioned practices like *ex parte* communications between certain judges and some institutional providers.¹³

While the failures of Family Court create myriad problems for parties who seek justice there, I limit my focus here to examining the officially sanctioned practice of using New York City Administration for Children's Services (ACS) caseworkers to conduct court-ordered investigations in private child custody proceedings¹⁴ as one example of how a seemingly innocuous practice might countenance bias. In many ways, a telling representation of how the norms of practice in Family Court deviate from ac-

11. The New York City Family court is a unique breeding ground for informal practices that perpetuate the appearance of impropriety and undermine litigants' faith in the court. In addition to the frenzied pace and unimaginable caseloads, the casual familiarity that inevitably develops among institutional players and the legacy of closed proceedings, have shaped the court into a world unlike any other. *See, e.g.*, SPECIAL REPORT ON FAMILY COURT, *supra* note 2; *see also* Andrew White et al., *A matter of Judgment: Deciding the Future of Family Court in NYC*, CHILD WELFARE WATCH (Ctr. for an Urban Future, New York, N.Y.), Mar. 2006 (special issue highlighting the crisis facing the New York City Family Court).

12. The use of court-attorney referees to address exploding caseloads is not unique to the New York City Family Court. In part because of the legislature's failure to authorize additional judges, family courts throughout the state have relied on these non-judicial employees. *See* Merrill Sobie, N.Y. FAM. CT. ACT § 121 practice comment (McKinney 2006).

13. While there is no official account of this rule relaxing practice, in over twenty years of practice I have personally observed *ex parte* communications between judges and practitioners on countless occasions and I have engaged in an equal number of discussions about this practice with frustrated colleagues throughout the city.

14. Custody proceedings between parents are often referred to as "private" custody proceedings to distinguish them from proceedings where the state is seeking custody of children from their parents.

cepted norms of practice and how that deviation is not just tolerated, but embraced. The standard explanations advanced to justify these deviations focus on the nature of the cases and the enormity of the docket in Family Court — the cases do not lend themselves to traditional adversarial processing; the dockets are crushing and these practices are stop gap measures. I posit an additional explanation: these deviations represent a not-so-subtle case of the kind of differential treatment that gets institutionalized when the consumer is poor and of color, and, as a consequence, disenfranchised.¹⁵

Part II focuses on the context, history, and current practice of using court-ordered investigations to assist decision-making in private child custody matters. The section begins with background information on how child custody matters are handled and decided. I then look more specifically at the evolution of court-ordered investigations in custody matters, both in terms of the differing models for investigation and in terms of the common law procedural due process rights historically accorded parents subject to investigations. Part III focuses on a New York Trial Court Rule governing what the rule refers to as “neutral” investigations in Family Court custody matters, and how that rule has been manipulated in New York City to allow private custody investigations to be conducted by the local child protective service. Part III focuses on how bias is manifested through the court ordered investigation process specifically and more generally on how the conditions in Family Court set the stage for biased practices. I start by examining the troubling bias inherent in investigations done by the local child protective agency, New York City Administration for Children’s Services (ACS), and how ACS’s documented history of disproportionate intervention in African American and Latino families further undermines the integrity of those investigations. In conclusion I suggest two alternatives to the current model that I believe address the concerns about bias demonstrated not just by ACS, but by the Family Court system.

15. See also Guggenheim, *supra* note 7, at 73–74 (arguing that low-income, African-American parents of children in foster care in New York City are considered irrelevant because they lack political power.).

II. COURT ORDERED INVESTIGATIONS: CONTEXT, HISTORY, AND CURRENT PRACTICE

A. CONTEXT: THE CHALLENGE OF DECISION-MAKING IN PRIVATE CUSTODY PROCEEDINGS

Private custody cases, in which parents are competing for custody of their children, represent one of the Family Court's most challenging proceedings.¹⁶ Litigants vying for custody tend to be particularly acrimonious and often resist negotiated resolutions.¹⁷ The steady increase in custody filings in recent years in New York's family courts¹⁸ further intensifies the challenge facing courts charged with deciding what is best for children using the best interest of the child test.¹⁹ These challenges are compounded by the fact that judicial decision-making in these cases is viewed as extremely difficult, because of the indeterminacy of best interest of the child test.²⁰ The test provides judges with nearly unbridled discretion to decide custody matters based upon what they determine is best for the child at the center of the dispute. On the one hand, the best interest test is recognized as justly fo-

16. See, e.g., REPORT OF THE ADVISORY COMMITTEE ADVISORY AND RULES COMMITTEE TO THE CHIEF JUDGE OF THE COURTS OF THE STATE OF NEW YORK 170 (2006) (noting that custody and visitation cases are "sensitive, often volatile" and "raise some of the most difficult issues before the courts").

17. See generally Robert E. Emory, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation*, 10 VA. J. SOC. POL'Y & L. 164 (2002) (discussing difficulties in negotiating with parents seeking custody).

18. Of the twenty-three different case types heard in Family Court, custody proceedings account for 24–25% of the petitions filed each year for the last eight years. Except for a slight decrease in the number of custody filings in 2003 and 2004, custody filings have steadily increased since 1997. N.Y. STATE OFFICE OF COURT ADMIN., REPORT OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS (1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005).

19. The best interest of the child test is the long-established standard for determining custody of children. It is often described as requiring a judge to act as *parens patrie* or take over the role of the parent to do what is best for children. See, e.g., Merril Sobie, N.Y. FAM. CT. PRACTICE § 10:8 (McKinney 2006); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 43 (2006).

20. For a critique of the best interest test, see generally Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (analyzing the challenges of decision-making in child custody proceedings and critiquing the "best-interest-of-the-child principle") (1975); See also, American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2:02 [hereinafter ALI Principles] ("... the best interests of the child test ... has long been criticized for its indeterminacy ...").

cused on protecting the rights of vulnerable children who are often caught between warring parents.²¹ On the other hand, the test has long been criticized as an amorphous standard that gives judges unrestrained discretion to trample upon parents' rights.²² Of particular concern is how broad discretion is exercised in a manner that permits decision-making based upon value judgments and bias.²³ The risk of biased decision-making is exacerbated by the challenge of getting complete information during the fact-finding process because of the adversarial nature of these proceedings.²⁴

Like many other states, New York's courts and, in one instance, its legislature, have made multiple attempts to rein in the amorphous best interest test by identifying specific factors courts must consider when deciding custody matters.²⁵ The factor analysis is thought to limit discretion by narrowing the universe of values judges might consider when deciding best interests. Another attempt at facilitating decision-making using the best interest analysis involves providing judges with the power to order an investigation by a disinterested person who can ostensibly provide the judge with more complete information than might otherwise be available from the parties.²⁶

21. A.L.I. Principles, *supra* note 20, at § 2:02, Comment b.

22. *Id.*

23. *Id.* at § 2.02, Comment c ("To apply the [best interest] test courts must often choose between specific values and views about child rearing.")

24. See, e.g., MATRIMONIAL COMMISSION REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 77 (Feb. 2006) [hereinafter MATRIMONIAL COMMISSION REPORT].

25. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (Ct. App. 1982) (holding that the ultimate test to be applied in determining custody of children, whether in a *de novo* dispute or a subsequent request for modification, remains the best interests of the child test. This test permits courts to examine a number of non-binding factors, including the stability of the current custodial arrangement, the child's wishes, the relative fitness of the parents and the length of time the current arrangement has existed.); *Esbach v. Esbach*, 56 N.Y.2d 167 (Ct. App. 1982) (reiterating the best interests test outlined in *Friederwitzer* and articulating four additional factors courts may consider when determining the child's best interests: (1) the quality of the environment and the parental guidance the custodial parent provides; (2) the existence of sibling relationships; (3) the financial ability of the each parent; and (4) the ability of the parents to provide for the child's emotional and intellectual development); see also N.Y. DOM. REL. Law § 240 (McKinney 2003) (requiring courts to consider allegations of domestic violence when making child custody decisions).

26. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 213 (2003).

B. A BRIEF HISTORY: INVESTIGATION BY A DISINTERESTED PERSON

The court-ordered investigation model predates the creation of the current Family Court in New York. As early as 1944, courts in New York endorsed the use of neutral investigators to gather information from the parties, their children, and collateral sources through a series of interviews, as a means of providing the court with comprehensive information.²⁷ An additional impetus for this model was the belief that the investigation would serve to counter the impulse of parties entangled in the adversarial process to distort and withhold information during a trial in order to increase their chances of winning.²⁸ Thus, the neutral investigation model has the potential to supplant the traditional adversarial model, which provides parties with control over the evidence the court receives, with a model of evidence presentation in which the parties potentially lose that control.²⁹ This anti-adversarial, investigation model of fact finding carries with it the risk that the right to a full and fair trial might be compromised.

The leading case on the use of investigators in New York, *Kessler v. Kessler*,³⁰ addressed the due process questions head on. *Kessler* involved a protracted dispute over the sole child born during the parties' marriage.³¹ The parents filed multiple proceedings and appeals, including the instant appeal to the state's highest court.³² The intensity of the dispute seemed to frustrate the lower court and it ultimately ordered an investigation by a court-employed family counselor, upon the consent of the par-

27. See, e.g., *In re Jiranek*, 47 N.Y.S.2d 625 (A.D.N.Y. 1944).

28. See, e.g., Robert J. Levy, *Custody Investigations As Evidence In Divorce Cases*, 21 FAM. L.Q. 149, 151-52 (1987) (In a scathing critique of the growing use of court-ordered investigations in private child custody cases throughout the country, the author argues that judges rely on these investigations to counter the litigants' "uncontrolled discretion" to control the information available to judges who must decide what is best for children.).

29. *Id.*

30. *Kessler v. Kessler*, 10 N.Y.2d 445, 455, 458 (Ct. App. 1962) (holding that Special Term erred in keeping confidential the reports of a psychiatrist and psychologist and considering them in awarding custody, because parents had refused to stipulate to their use rendering them inadmissible hearsay. The court also noted that if the Trial Justice had ordered psychological or psychiatric inquiries without stipulation, either party could have called the experts as expert witnesses and the opposite side would have had an opportunity to cross-examine.).

31. *Id.* at 448.

32. *Id.*

ties.³³ *Kessler* set the standard for the use of investigators in custody matters. Based on the presumption that the investigator was a neutral information gatherer, the court expressed a preference for confidential reports to the court in the effort to protect the children in the dispute.³⁴ The court also made clear that in utilizing these reports, courts must protect the parents' fundamental right to a fair trial by barring the use of investigation reports by the court absent the consent of the parties.³⁵

The investigation model continued to develop post-*Kessler*, but at its core was a model of information gathering by a so-called "neutral" investigator who would prepare a report to be used by the court to help it reach a decision in the best interests of children in custody cases.³⁶ Early decisions also recognized that such investigations might negatively impact parents' rights, and imposed strict requirements upon the investigation process.³⁷ Courts held that while the court could order investigations without parental consent, the use of an investigator's report at trial required parental consent.³⁸ Investigations were inadmissible unless made available to counsel in advance of trial,³⁹ one of the parties called the investigator as a witness, and cross examination was permitted.⁴⁰

Over the past forty years, many investigatory models have emerged in New York and throughout the country.⁴¹ Courts have used independent mental health professionals including social workers, psychologists, and psychiatrists, as well as probation officers, court liaisons, and other investigators.⁴² Each of these models posited a disinterested, expert investigator who would

33. *Id.* at 449.

34. *Id.* at 458 (finding that where the parties stipulated that the family counselor could present his report directly to the court determining custody of a child, the court could consider the report confidential).

35. *Id.*

36. *Id.* at 449.

37. *See, e.g.,* *Borkowski v. Borkowski*, 90 MISC.2D 957 (Sup. Ct. 1977).

38. *Kessler*, 10 N.Y.2d 445.

39. *Id.* at 456.

40. *Id.* at 453.

41. C.T. Drecshler, Annotation, *Consideration Of Investigation By Welfare Agency Or The Like In Making Or Modifying Award As Between Parents Of Custody Of Children*, 35 A.L.R.2d 629 (1954).

42. *Kessler*, 10 N.Y.2d 445.

gather facts and be available as a witness to be called by either party or the Court.

All of these models involved an appointment of a person designated by the Court to conduct a comprehensive investigation into the facts and circumstances deemed relevant to deciding best interests. The common thread in the investigatory models is the appointment of a neutral fact investigator, who would prepare a detailed report that would then be submitted as evidence at a traditional trial in which the common law rules of evidence would apply.

C. TWENTY FIRST CENTURY COURT-ORDERED INVESTIGATIONS IN FAMILY COURT: THE NEW YORK CITY MODEL — A THROWBACK

The law governing the use of neutral investigators in custody cases in New York has evolved since the *Kessler* court issued its seminal decision.⁴³ Investigations by mental health professionals, by far the most common model used in New York, are now more often referred to as forensic evaluations and there are dozens of court decisions governing their use.⁴⁴ There is also considerable debate about the extent to which courts should rely upon recommendations proffered by the mental health professionals who conduct such evaluations in custody proceedings.⁴⁵ In this Essay my comments are confined to the practice of ordering investigations in child custody disputes pursuant to a Family Court rule

43. Westlaw's KeyCite service indicates 150 citing references for the *Kessler*.

44. See *John A. v. Bridget M.*, 791 N.Y.S.2d 421(N.Y. App. Div. 2005) (reversing a lower court custody award that was predicated upon the recommendation of an expert witness who had conducted a forensic evaluation in the case). Compare *Rentschler v. Rentschler*, 611 N.Y.S.2d 523 (N.Y. App. Div. 1994) (reversing a lower court grant of custody to the mother because of support in the record for the opinion of the court-appointed psychiatrist that the father should have custody).

45. Not only has there been a flurry of cases on the issue of the use of forensic evaluations in child custody proceedings over the last eight years, but a raging debate has continued among practitioners in New York led by Timothy Tippins, a frequent contributor to the *New York Law Journal*. Tippins has written a series of articles for the journal over the past three years on the use of forensic evaluations in custody cases. See, e.g., Mark Fass, *Custody Ruling Addresses Reliance On Expert Opinions Judges Enter Debate Over Determining Children's Best Interest*, N.Y.L.J., Apr. 4, 2005, at 1.

enacted in 1986, Investigation by Disinterested Person; Custody; Guardianship,⁴⁶ which provides that,

(a) The probation service or an authorized agency or disinterested person is authorized to, and at the request of the court, shall interview such persons and obtain such data as will aid the court in:

(1) determining custody in a proceeding under section 467 or 651 of the Family Court Act. . . .

(b) The written report . . . shall be submitted to the court within 30 days from the date on which it was ordered

The broad and ambiguous language here can be read as providing an end run around many of the due process protections historically afforded parents subject to court-ordered investigations.⁴⁷ The rule is silent regarding the common law requirement that parents consent to the use of the investigation by the Court. While the failure to address the parent's due process rights is a violation in and of itself, the fact that the rule requires submission of the report to the Court opens the door to further abuse. The issue of just how the data will be used to "aid" the court is conspicuously vague.⁴⁸

More often than not, the practice in the New York City Family Court is to utilize this section governing investigations by disinterested persons to order investigations by city's child protection agency, the New York City Administration for Children's Services (ACS).⁴⁹ Once the investigation is completed, the reports prepared by ACS are delivered to the presiding judge and are made a part of the court file before a hearing is held on the merits of the

46. N.Y. COMP. CODE R. & REG., tit. 22, § 205.56(a)(1) (2006).

47. See *Kessler v. Kessler*, 10 N.Y.2d 445 (Ct. App. 1962); *DiStefano v. DiStefano*, 51 A.D.2d 885 (N.Y. App. Div. 1976); *Krebs v. Krebs*, 443 N.Y.S.2d 530 (N.Y. App. Div. 1981).

48. While the right to consent to an investigation is no longer as absolute as it once seemed, the right to explain and challenge evidence contained in a report remains in tact. See, e.g., *Sauer v. Sauer*, 415 N.Y.S.2d 129 (N.Y. App. Div. 1979).

49. Commonly referred to as the "COI," these custody investigations are so common that most courts throughout the city utilize an ACS liaison within the courthouse to arrange investigations before the parties leave the courthouse.

case.⁵⁰ This practice is problematic on a number of fronts. Providing the Court with seemingly unchecked power to order investigations on its own motion, and without parental consent, seriously undermines the established due process rights of parents.⁵¹ Beyond the obvious due process problems, ACS, as a child protective agency, is far from neutral and disinterested. Furthermore, the practice of ordering investigations by ACS in New York City is unlikely to provide the Court with the kind of expansive information that could help it reach a determination on best interests.

III. A LOOK AT HOW BIAS INVADES THE FAMILY COURT

A. INVESTIGATIONS BY ACS ARE INHERENTLY BIASED

ACS has a legally mandated, targeted mission that spells out its very purposeful bias.⁵² Its overriding mission is the protection of children from child abuse and neglect.⁵³ While investigating families is a routine function of ACS, its investigations focus almost exclusively on identifying whether child abuse and/or ne-

50. Documents in the file are available for the presiding judge to review at her whim each time the case is before her, regardless of whether or not an evidentiary hearing is held.

51. See *Kessler*, 10 N.Y.2d 445; *DiStefano*, 51 A.D.2d 885. The *DiStefano* court held that the trial court erred in keeping confidential the results of an investigation by the Probation Division of Family Court and the psychiatric evaluations of the parties by the Family Court Clinic without a stipulation to that effect by the parties. The court remitted the matter to allow the parties to review the reports, cross-examine those involved in making them, and present other evidence in contravention thereof. The court distinguished between consent for the investigation to be undertaken, and consent to the reports' confidential use. *Id.* In *Krebs*, the court held that the husband's consent to the investigation in connection with a child custody issue could not be construed as consent to confidential use by trial court of investigative reports. The judge found that the child's best interests required that the court establish the accuracy of those reports and offer the parties' an opportunity to explain or rebut material contained therein. The husband was entitled to review results of investigation, to cross-examine everyone involved in making the reports, and to present testimony or other evidence in contravention thereof. 443 N.Y.S.2d 530.

52. ACS is the sole public organizational entity responsible for "receiving and investigating . . . all reports of child abuse or maltreatment made pursuant to [title 6 of article 6 of the New York Social Services Law]." ACS has a duty to "coordinate, provide or arrange for and monitor the provision of those services necessary to safeguard and ensure the child's well-being and development and to preserve and stabilize family life wherever appropriate." N.Y. SOC. SERV. LAW § 423.1(e). I use the term "bias" to refer to the inclination to seek evidence of abuse or neglect created by ACS's mission.

53. See ACS, Mission and Organization, <http://nyc.gov/html/acs/html/about/mission.shtml>.

glect is occurring, identifying children at risk of child abuse or neglect for the purpose of offering preventive services, and assuring the safety of children who are abused and/or neglected. As the local child protective agency, ACS also has tremendous power to intervene in family life where there is reason to believe that child abuse or neglect is occurring or about to occur.⁵⁴

By routinely ordering ACS to conduct its investigations in private custody matters, the Family Court is undermining one of the primary purposes of these investigations — curtailing the amorphous best interest standard. At first blush, what appears to be a routine practice, born out of expediency and convenience in an overburdened Court, is upon closer examination, a not-so-nuanced expression of a very real value judgment about litigants who appear in New York City family courts — that they are likely to neglect or abuse their children or at least need to be cleared of that suspicion. While the value judgments about litigants often begin with ACS, those judgments are extended in family courts' sanctioning of ACS decisions. To be sure, this atmosphere of suspicion is not lost on Family Court litigants who understand all too well the power of ACS to disrupt family life.⁵⁵

Yet ACS's mission is not the only cause for concern when evaluating the Family Court's practice of routinely seeking inves-

54. See N.Y. FAM. CT. ACT, art. 10 (McKinney 2006). Removal is the most extreme intervention available to ACS when there is evidence of imminent risk to the health or safety of the child. *Id.* §§ 1022, 1024, 1027. Cf. *Nicholson v. Scopetta*, 787 N.Y.S.2d 196 (N.Y. Ct. App. 2004) (limiting the practice of emergency removal without a court order).

55. See, e.g., *People United for Children et al. v. The City of New York et al.*, 214 F.R.D. 252 (S.D.N.Y. 2003). *People United for Children* involved a non-profit organization and a group of affiliated African-American parents seeking class certification in a civil rights action against the City. In describing the class, the plaintiffs identified an atmosphere of suspicion that pervades the child welfare system. They alleged that ACS had a policy of resolving “[a]ny ambiguity regarding the safety of a child . . . in favor of removing the child from harm’s way,” and returning children “[o]nly when families demonstrate to the satisfaction of ACS that their homes are safe and secure.” *Id.* at 255 (quoting plaintiffs’ Amended Complaint).

Professor Lyn Slater of Fordham University’s Graduate School of Social Services and Violet Rittenhour, parent organizer with the Child Welfare Organizing Project, made similar comments at the 2006 *Conference on the Racial Geography of the Child Welfare System* at Fordham Law School. Slater used the story of one client to illustrate her theory that a “child welfare mentality” invades neighborhoods plagued by high involvement of child welfare authorities. Ms. Rittenhour used her personal story of involvement with ACS to describe the challenges one faces when the task is disproving an assumption that children are being abused. *THE RACIAL GEOGRAPHY OF THE CHILD WELFARE SYSTEM: COMMUNITY IMPACT AND RESPONSE* 7–12, 27–30 (Dorothy Roberts, Leah Hill & Erik Pitchal eds., 2006) available at <http://law.fordham.edu/documents/int-2RacialGeography.pdf>.

tigations and reports from ACS in private custody matters. ACS is an agency that has consistently had its own set of struggles in attempting to fulfill its mandate to protect children. Most recently, the death of four children in a ten week period in early 2006 highlighted the tremendous challenge faced by an agency with limited resources and Herculean responsibilities.⁵⁶ I am more concerned, however, with the agency's struggle with disproportionate placement of African American and Latino children in the foster care system. A 1998 report on the over-representation of minority children in New York City's child welfare system revealed the alarming statistics that confirmed what many had suspected for years — that the child welfare system was far more likely to intervene in the lives of children of color than their white counterparts.⁵⁷ The statistics were overwhelming in the case of African-American children, who "child welfare authorities were more than twice as likely to remove from their families as they were to remove white children, once a report of abuse or neglect has been confirmed."⁵⁸ The statistics revealed further that the population of children in the foster care system in New York City was overwhelmingly African-American — "about one of every 22 black children [was] in foster care, compared with one in every 59 Latino children — and only one in every 385 white children."⁵⁹ And African-American children were likely to remain in foster care longer than their white counterparts — one in four African-American foster children remains in foster care five years or more, while only one in ten white children remains in the system as long.⁶⁰ More recent statistics demonstrate that overrepresentation of African-American children in the foster care system is not limited to New York City — it is a nationwide phenomenon.⁶¹

When the agency's history of disproportionality is considered, the use of ACS caseworkers to conduct private custody investiga-

56. See, e.g., Leslie Kaufman, Mike McIntire & Fernanda Santos, *Child Welfare Offices That Couldn't Be Fixed Fast Enough*, N.Y. TIMES, Jan. 20, 2006, at B1.

57. Andrew White, John Courtney & Adam Fifield, *The Race Factor In Child Welfare*, CHILD WELFARE WATCH (Ctr. for an Urban Future, New York, N.Y.), Jun. 1998, at 1, 4–5.

58. *Id.* at 4.

59. *Id.*

60. *Id.* at 1.

61. See generally ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (2006).

tions becomes all the more suspect, and the possibility of bias all the more real.

My goal is not to indict ACS and excuse the Family Court. While the discourse on disproportionality in child welfare has been mostly confined to examining the practices of child protective agencies, as the final arbiter of child welfare disputes, Family Court should not be let off the hook. In the case of private custody disputes, given the potential that ACS bias could be imported into the court process via the court-ordered investigation, it is the Court, not ACS, that must take lead.⁶²

B. SILENCE ISN'T GOLDEN: HOW THE FAMILY COURT PERPETUATES BIAS

The Family Court's continued use of ACS to conduct court-ordered investigations undermines the Court's goal of obtaining complete, unbiased information to facilitate decision-making. While some might view this practice as yet another attempt to fill the gap between increasing caseloads and dwindling resources, the Court's use of ACS investigators likely has a more dubious purpose. As a group, Family Court judges have an inside view of the deficiencies at ACS and many have voiced their frustration with the agency's sometimes inept handling of cases in Family Court.⁶³ Hence, their reliance on the agency to conduct investigations is puzzling. If ACS is known throughout the court system for struggling to handle its primary responsibility in managing child protective cases, why would judges trust it to gather data in private custody proceedings? Put another way, why burden an agency already struggling to meet its mandate? The standard answer has been that the Court's excessive caseload motivates it to find shortcuts such as this.

62. A glimmer of hope came with the February 2006 Matrimonial Commission Report in the form of specific recommendations concerning diversity, including "that the OCA aggressively pursue a program of training and education regarding diversity issues, and, that an inter-disciplinary Diversity Task Force be convened to research and make recommendations regarding the development of professional skills, evaluation of existing rules and regulations to eliminate subtle, inherent biases and to account for the "realities" of practice in the state's Courts. . . ." MATRIMONIAL COMMISSION REPORT, *supra* note 24, at xii.

63. See, e.g., SPECIAL REPORT ON FAMILY COURT, *supra* note 2, at 48.

While Family Court judges must carry out their responsibilities in extreme conditions,⁶⁴ more troubling motives for this shortcut exist. A cloud of fear permeates the work of the Family Court — no judge, lawyer, or case worker wants to be on the front cover of New York City's dailies, being held responsible for the abuse or death of a child.⁶⁵ And yet the fear of public infamy does not fully explain the Court's decision to rely on ACS to obtain comprehensive information in custody cases. If we couple the image of the courthouse filled with mostly poor, black and brown litigants with what we know about racial disproportionality and ACS, we see another possible explanation: in the minds of some decision makers, the poor families of color whose lives are impacted by these decisions do not warrant the kind of principled risk-taking necessary to defeat the officials' fear of bad publicity.

IV. SIMPLE SOLUTIONS: FOLLOW A CONSISTENT MODEL AND GET BACK TO BASICS

Conventional wisdom suggests that the way to solve this dilemma is to provide diversity and sensitivity training for judges and court personnel.⁶⁶ While I fully endorse calls for such training, a simpler solution would be to eliminate the ACS investigation model and ensure that the Court accords all litigants full due process protection.

The investigation model used in Family Court is in many ways outdated. There is a lingering idea that the family investigator, at the behest of a judge, informally gathers information from the parties and collateral sources. This notion was born in an era in which caseloads were low and technology was far less advanced

64. Family Court caseloads are growing faster than caseloads of other courts; caseloads tripled between 1980 and 2000. Somini Sengupta, *Brooklyn Journal; In Court, Families Sit Waiting on the Law*, N.Y. TIMES, Aug. 20, 2000, at 36. The New York City Family Court caseload was 240,480 cases in 1999, which represented a 40 percent increase in one decade. Eric Lipton, *Halls of Justice Going Up All Over; New York City Nears a Peak In Its Courthouse Building Boom*, N.Y. TIMES, Dec. 5, 2000, at B1. In Family Court, the growing docket combined with a 15 percent decrease in the number of 18-B lawyers available to represent the poor has resulted in repeated adjournments and judges using their own court officers to search the building for a lawyer who may be available. Somini Sengupta, *Lack of Lawyers Crippling Family Court, Report Says*, N.Y. TIMES, May 14, 2000, at 35.

65. SPECIAL REPORT ON FAMILY COURT, *supra* note 2, at 46.

66. See MATRIMONIAL COMMISSION REPORT, *supra* note 24, at 58–59.

than it is now. One of the first cases in New York to discuss court-initiated investigations in custody matters was a 1944 case, *In re Jiraneck*, in which a Referee hearing a custody matter met informally and separately with the parties and their children, in an apparent attempt to become intimately familiar with the facts of the case in a way that is not possible in a typical adversarial proceeding.⁶⁷ In order to protect the fundamental rights of the parties, the court obtained each party's consent before using these informal processes.⁶⁸ *Jiraneck* evokes the image of a small town judge who becomes intimately familiar with a family in order to reach a fair decision about what is best for the children involved in the case.

Fast forward to the *Kessler* decision, where due process is still a paramount concern, but a new model begins to emerge. In *Kessler*, the appellate court found that the lower court's use of psychiatric and psychological reports obtained during the family counselor's investigation was a due process violation because the parties did not consent to the confidential use of those reports.⁶⁹ The appellate court in effect confirmed that a party in a custody proceeding is entitled to a full and fair opportunity to be heard, to call and confront witnesses, and to receive a determination based upon the entire record before the court. *Kessler* also suggests that the Court can rely on the expertise of mental health professionals, such as psychologists, social workers, and psychiatrists.⁷⁰ This mental health investigation model has taken off since *Kessler* and now acts as a significant check on the unbridled discretion of the best interests test.⁷¹

67. *In re Jiraneck*, 47 N.Y.S.2d 625 (A.D.N.Y. 1944).

68. In *Jiraneck*, the parties' consent was detailed and specific. They consented to the Referee meeting with the children informally and outside of the presence of the parties and their attorneys; they consented to the Referee meeting with the parties separate from the children and attorneys, and; they consented to the Referee meeting with the attorneys separate from the parties and children. The appellate court, however, found fault with the Referee issuing a decision on the ultimate issue of custody based on this informal process because the parties' consent was made in the context of a visitation proceeding only. *Id.* at 627.

69. *Kessler v. Kessler*, 10 N.Y.2d 445 (N.Y. Ct. App. 1962).

70. *Id.* at 452.

71. The mental health investigation, more commonly known as the forensic evaluation, is not without flaws, however. See, e.g., MATRIMONIAL COMMISSION REPORT, *supra* note 24, at 47-55.

The emergence of this model is significant in many respects, but most particularly because it is the predominant investigatory model used in custody matters filed in New York State Supreme Court in connection with matrimonial cases.⁷² Supreme court is a higher status court than Family Court, and supreme court litigants tend to be better-off financially and more likely to be represented by counsel.⁷³ Even more striking, ACS is almost non-existent in supreme court. While supreme court judges undoubtedly have the power to order ACS investigations in custody matters where abuse or neglect is suspected, there isn't a supreme court rule that parallels the Family Court rule governing court-ordered investigations.⁷⁴ Hence, the only comparable process is the forensic evaluation process. This two-tier system begs the question, why do we need non-expert investigations in Family Court?

The idea of a court employee gathering factual information from parties, their children, and other collateral sources and providing a report to the court is archaic. The sheer number of custody cases filed in Family Court⁷⁵ makes this practice unworkable even for a fraction of the cases. Fact gathering investigations made sense for some cases in a world where caseloads were low, family mobility was limited, and research in the field of family dynamics was not as extensive as it is today.

Furthermore, if supreme court looks solely to mental health experts to help facilitate decision-making in custody matters, why does Family Court need additional "neutral" investigators? Family Court judges can and do appoint forensic evaluators in custody cases, and their appointment should be enough to address the investigatory concerns in those truly contested cases that will require court decision making. This is not an endorsement of the

72. See generally N.Y. COMP. CODES R. & REGS. tit. 22, § 202.18 (authorizing, *inter alia*, the appointment of a psychiatrist, psychologist or social worker or other appropriate expert to give testimony with respect to custody or visitation filed in supreme court matrimonial actions).

73. There are litigants in supreme court who have limited means and must pursue their claims without counsel. Their predicament is as dire as those who litigate in Family Court. See MATRIMONIAL COMMISSION REPORT, *supra* note 24, at 57.

74. In the seventy-page *Matrimonial Commission Report*, which examines "every facet of the divorce and custody determination process," there is not a single mention of neutral investigations except for forensic evaluations conducted by "experts." MATRIMONIAL COMMISSION REPORT, *supra* note 24, at 46.

75. Annual Report the Chief Judge 1997-2005, *supra* note 18.

use of forensic evaluators per se; there is now a fierce and, in my opinion, healthy debate on the extent to which due process is compromised by judicial reliance upon the opinions of evaluators in custody matters.⁷⁶ What I endorse is a consistent process of handling private child custody matters across supreme and family courts. Without consistency, we are left with a two-tiered system in which the cases of moneyed litigants are investigated by experts while the less well-off black and brown litigants are investigated by a public agency whose limited objective is to protect children from abuse. The obvious disparity is self-evident.

Beyond correcting the two-tiered system, courts must recommit to ensuring fundamental fairness. The due process protections recognized in the early investigation cases — the right to decline confidential investigations, confront witnesses, and challenge reports at a full fact-finding proceeding — must not be compromised. The Family Court rule governing investigations by disinterested parties is conveniently silent on these issues.⁷⁷

Some might argue that the use of a neutral investigator to gather information on disputed factual assertions by parties provides a necessary triage tool in an overwhelmed Court. That the child custody investigations conducted by ACS help to weed out the truly contested matters by clarifying disputed facts, i.e., where a child resides or attends school, is debatable. While these facts are more often than not, easily obtainable and can be presented to the Court at a trial, I am sympathetic to the need to eliminate those cases where, for example, one party can easily show that a child attends school regularly in the face of allegations to the contrary. I reject the presumption that ACS is in the best position to obtain these kinds of objective facts. It appears that the use of ACS is more a matter of convenience; ACS has an institutional presence in the Court and that gives Family Court judges easy access to its personnel. If judges must use ACS to conduct investigations for the sake of triage and convenience, they should limit the scope of the investigation to obtaining basic objective information, like verification of the parents' home ad-

76. See, e.g., MATRIMONIAL COMMISSION REPORT, note 24, at 51–54.

77. N.Y. COMP. CODES R. & REGS. tit. 22, § 205.56 (authorizing investigation by disinterested person who *shall* report to the court). The parallel rule in supreme court provides for the appointment of “experts” to conduct investigations and “give testimony.” *Id.* § 202.18.

dress and size, or clarification of the school that the child attends. Obviously, investigations would only be necessary where these facts are in dispute. Interviews with collateral resources should be kept at a minimum to avoid double and triple hearsay.

Most importantly, investigations by ACS should not be presumed accurate unless and until there has been an opportunity to hear from the witness who prepared the report in open court, on the record, with full opportunity for cross examination. Finally, courts must make clear that these are not child protective investigations.⁷⁸ If, during the course of a proceeding the judge obtains information that abuse or neglect of a child might be occurring, she can exercise her power under New York Family Court Act section 1034 and order a child protective investigation.⁷⁹ These basic protections serve at least three functions: they limit the burden on ACS so that the task of conducting investigations becomes more manageable; they reduce the risk of bias by clarifying that the court-ordered investigation is not a child protective investigation; and they insure due process by following the traditional and accepted norms of fundamental fairness.

V. CONCLUSION

We are fortunate to be at a crossroads in opening up the discourse on disproportionality in our court system. It has become impossible to ignore the sea of black and brown faces flowing in and out of the New York City Family Court. The discussion, however, must not end with numbers and cries for sensitivity training. We must expose and address the slights, tolerated shortcuts, and invisibility that characterize the delivery of justice to the disenfranchised, and we must correct the imbalance that exists between the family and supreme courts. The court-ordered investigation is just one example of how sub-optimal practice can be institutionalized when the consumer is devalued, not just by

78. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2 (b)(3) (outlining the procedure local child protective agencies must follow when conducting child abuse/maltreatment investigations following complaints to the State Central Registry for Child Abuse); *see also* N.Y. FAM. CT. ACT § 1034.1(a) (McKinney 2006) (authorizing Family Court judges to order a child protective investigation).

79. N.Y. FAM. CT. ACT § 1034.1(a) (McKinney 2006), *but cf.* Merrill Sobie, N.Y. Fam. Ct. Act § 121 practice comment (McKinney 2006) (suggesting that the Court must engage in an analytical process and “conclude” that a child protective investigation is necessary).

the court system, but by all of society. The good news is that the fix might be easier than we imagine. Simple, longstanding principles of fairness can go a long way. In the end, I am less grandiose, less naïve than I was at the outset of my legal career, but I remain hopeful.

