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### The Unexamined Life: A Framework to Address Judicial Bias in Custody Determinations and Beyond

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# ARTICLES

## THE UNEXAMINED LIFE: A FRAMEWORK TO ADDRESS JUDICIAL BIAS IN CUSTODY DETERMINATIONS AND BEYOND

CLAIRE P. DONOHUE\*

### ABSTRACT

*Scholars and litigators alike have long wondered about what is on the minds of judges. Kahan et al. have studied how judges' political commitments influence their perception of legally consequential facts. Sheri Johnson et al. confirmed the presence of implicit bias among a sample of judges and analyzed the relationship between that bias and the judges' decision-making. In a seminal piece and subsequent work, Guthrie et al. attempted to identify archetypes of judicial bias and opined about how we might debias judicial determinations. This project both contributes to and redirects these conversations in several important ways. First, the piece takes the conversation about judging into a court that daily touches the intimate affairs of litigants—namely family courts. In so doing, the project attempts to bring the same rigor of discussion about judicial bias, and imagination about corrective action, into one of the lower courts where litigants are routinely poor, disenfranchised, or unrepresented. Second, the project specifically sees connections between judicial bias and the orientation to fact finding that judges are invited to take—namely that the judge is the only fact finder (there are no juries) and judges are invited to place their own worldview and experiences at the epicenter of the scene playing out before them, an invitation that is inapposite to unbiased, rational consideration of the lives of others. In focusing specifically on how judicial bias thwarts expansive views of mothers and mothering in the twenty-first century, the piece aims to highlight the ways in which courts are in (imperfect and controlling) conversation with societal norms, norms that silence non-dominant narratives. Lastly, the project notices how the law's circumscribed examination of litigants' lives and the blindness to the ways that judges' lives constrict their world views stand in marked contrast to the orientation of therapists, where controlling for one's self and attention to a nuanced sense of other is the foundation from which therapists listen to, and learn about, people. Therefore, the project engages interdisciplinary scholarship not just to discuss what bias and stereotyping are, but also to excavate the ways in which the schooling and support in counseling*

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*professions aim to abate the gravitational pull toward bias. From this scaffolding, the piece closes with concrete, actionable steps for the bench and bar to resist bias and invite reform.*

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#### INTRODUCTION

*Paulette*<sup>1</sup> is a mother of two children and married to a white man ten years her senior. Paulette is the breadwinner in the family, though her unemployed husband's trust fund provides a certain scaffolding of comfort for the family. She is bright and determined. She emigrated to the United States from Uganda with her mother, in order to attend university, eventually completing her graduate studies in the States as well. She speaks eight languages and works in public health.

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1. Names and certain details of the litigants and their stories in relation to "Paulette" and "Norman" have been changed, and indication of the jurisdiction in which their cases was heard has intentionally been withheld to preserve client confidentiality. Both cases were adjudicated in the very recent past, but the dates too have been withheld.

Paulette took time off work when her second daughter was born; she struggled to find steady work to return to, because most of her employment was grant-based or on a contract basis. As the family began to stumble financially, other fault lines in the marriage emerged. Paulette and her husband began to argue constantly and bitterly. Paulette's husband wanted her to leave the marital home. He filed for custody of their children—but not before filing for an Abuse Protection Order.

Paulette glows when she describes her daughters. She speaks of their intelligence, their talents, their humor, and their beauty. She holds her children in very high regard and has exacting expectations for their behavior. Her ex-husband is a doting and permissive parent with strong ties to a wealthy local family. A white female judge credited disputed testimony that Paulette had smacked her eleven-year-old's mouth at the dinner table and deemed this an assault constituting an intrafamily offense. Without taking the matter under advisement, the judge placed an Abuse Protection Order against Paulette and imposed no-contact relief, barring Paulette from any physical contact with either of her children—not only her eleven-year-old, but also her two-year-old, regarding whom no allegations of any physical discipline had been made.

*Norman* is a black man, a first-generation immigrant of Jamaican descent who is very bonded to his family. He had recently stepped down from full-time employment to care for an ailing parent, who then passed away. Norman and his ten-year-old daughter enjoy cooking together and visiting with his large extended family. Norman has bought his daughter a dog, and they have plans to launch her slime “business,” a business that, to his daughter's delight, involves glue, glitter, and mess. Norman's ex-wife is Latina. She is a loving mother who works full time and attends school at night. Most evenings, a maternal aunt collects Norman's daughter from aftercare and brings her home for dinner and bed; her mother returns home after she is asleep. Norman and his then-wife were already behind on mortgage payments when, upon leaving the marital home, his wife ceased contributing to payments on it. Norman subsequently struggled to make payments on his salary alone, and the house fell into foreclosure. The marital home, where Norman currently still lives, is within walking distance of his daughter's school, so Norman has been actively seeking apartments that will allow him to stay within a close distance of the school when the foreclosure goes through.

Norman does not work full time. He works from 10 a.m. until approximately 3 p.m. He does not want to change these hours, because he seeks a custody arrangement whereby he would see his daughter every day before and after school while his ex-wife works, as well as every other weekend. After one day of testimony and without taking the matter under advisement, a white female judge adjusted the custody arrangement farther away from the 50/50 arrangement the couple was temporarily navigating and imposed an every-other-weekend custody schedule for Norman. She also ordered Norman to pay more child support to account for his having less custody of his child and for the childcare costs for before- and aftercare.

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Stock-story narratives about the world thunder loudly in our subconscious, complete with scripts and schemas for human behavior. The persons and positions of these two litigants do not comport to stock stories of mothering, which likely caused a dissonance in the judges' ears. One cannot help but notice how, and in whose favor, the judges resolved each dissonance.<sup>2</sup> This phenomenon is not unique to the litigants above. When a speaker is one who is routinely silenced by society, or when the choices and preferences of the speaker fall outside that which is presubscribed by dominant society, there is a heightened risk that the listener fails to notice the unanticipated narrative, problematizes the "other," or replaces the narrative with something less counter to his or her own assumptions.<sup>3</sup> The human tendency toward bias of this kind is particularly worrisome in the context of courts, and particularly family courts, where the decisions of a few (judges) are governing the solution set for the diverse masses—and where the decisions of a single fact finder govern the nature and quality of the interaction between children and their caregivers.

As a prophylactic against such bias, this Article embraces the notion that fact finders should examine their lives and the lives of those around them. Philosophers have argued that examining our lives is what separates us from beasts—a level of knowing, intentionality, and reflection is what makes us fully human.<sup>4</sup> Socrates even declared that the unexamined life was not worth living.<sup>5</sup> This insistence did not go well for Socrates: he stood trial for corruption of youth and was sentenced to death thereafter. Nonetheless, this Article adds that examining lives—ours and others'—is what helps us see and value the many and varied ways we all are human. In courtrooms, this is essential work: courtrooms are all about lives even as they are not about them at all. Litigants are forced to invite fact finders into their lives, but the consideration of those lives is narrow and circumscribed by the legal machine.<sup>6</sup> The system pretends that litigants' lives are the only lives at issue when, in reality, the narrative arcs of many lives are colliding in courtrooms. The collision of judges' and litigants' lives is of particular

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2. When a person or scenario does not comport with a schema, we attribute it to something internally wrong with the person, not something wrong—or narrow or rigid—about our schema. See Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 251 (1994).

3. *Id.*

4. See Julian Baggini, *Wisdom's Folly*, THE GUARDIAN (May 12, 2005, 10:53 AM), <https://www.theguardian.com/theguardian/2005/may/12/features11.g24>; see also Lori Grueni, *The Moral Status of Animals*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 1, 2003), <https://plato.stanford.edu/archives/fall2017/entries/moral-animal/> (discussing Kant and Korsgaard).

5. Baggini, *supra* note 4.

6. Let us return briefly to the philosophers to wonder with them whether "stories are recounted and not lived; life is lived and not recounted"—a premise that, if true, makes the work of litigating lives very complicated. See PAUL RICOEUR, ON PAUL RICOEUR: NARRATIVE AND INTERPRETATION 20 (David Wood ed., 2002); Thomas Gutheil et al., *Preventing "Critogenic" Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 11 (2000).

consequence for a litigant: if the litigant's choices and preferences are dissimilar to the experiences of the judge, or counter to the dominant society's stock stories, the courtroom is a breeding ground for bias.<sup>7</sup>

This Article focuses on family court and custody proceedings to explore the fact finders' very human tendency to favor people and narratives that seem familiar and to fail to hear, disregard, or discredit those that do not. Thus, the Article starts with a premise that many in family law practice already know: judges' rulings often do not track with the enlarged potential of critical legal thinking but rather reflect narrow views of "mothering."<sup>8</sup> Moreover, notions of judicial neutrality create, or at least hide, all manner of sins when they convince fact finders that they are unbiased. Rather, "judges participate in the creation of meaning as well as in its discovery, and . . . our understanding of meaning may change."<sup>9</sup> This Article will argue that several psychological principles relied on by those in counseling professions can inform efforts to mitigate the destructive subconscious tendencies of fact finders, tendencies that, in family court, otherwise thwart efforts to expand how mothers and mothering are viewed in the twenty-first century.<sup>10</sup>

The first two Sections situate family court judges in the jurisprudence of "mother" and "mothering," which has typically ignored nuanced or broad notions of parenting generally and mothering specifically. Section One will begin with a thumbnail overview of the law surrounding and defining "mothers." This brief discussion will focus on the "good mother" archetype in family law. While this section will highlight certain enlargements and advances in the jurisprudence of "mothering," references to scholarship and current studies will demonstrate that family court judges still show remarkable intractability in their decision making.

Section Two further problematizes the landscape by considering the subjective nature of the "Best Interest of the Child" (BIC) calculus for custodial

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7. See *infra* Section Three, Subsection A. *Branding Mothers*, for a discussion of prevailing stock stories of mothering; see also Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) for a discussion of stereotypes and bias.

8. Lynne Marie Kohm, *Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337, 337 (2008) ("The dearth of scholarship, however, on the foundations of this 'best interests' standard for children in American family law jurisprudence does not make the judge's job any easier. The best interest standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out." (citing MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 40 (2005)).

9. See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Wrestling with Unconscious Racism*, 39 STAN. L. REV. 317, 385 (1987) (further stating that the values expressed in the law are not culture free, and judicial interpretation of those laws is "rooted" in their own culture).

10. The second reason for the family law context and mothering focus is to follow the ambition of Adrien Katherine King and Laura Weselmann, who, in 1999 "employ[ed] the critical race feminist notion of praxis to create goals [for how we view mothers and who we view as mothers] for the twenty-first century." Adrien K. King & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258-59 (1999).

arrangements. A judge's application of the BIC standard all too easily "rests on the judge's personal observations and values."<sup>11</sup> In pondering the subjectivity and vulnerability of this standard, this section layers on what narrative theory—and life itself—tells us: stories are remembered and conflicts are understood based on what was *heard*, not merely on what was *said*. This section also begins to incorporate an interdisciplinary perspective by discussing what social psychologists call the "observer perspective," or the divide between what is happening and what observers notice. This section argues that the issue is not necessarily the state of the law but rather how the facts of each case are credited and applied by the judge in each case.

In hypothesizing about judges' most likely observations and values around "mothers" and "mothering," Section Three leaves the courtroom to consider what, beyond legal training or experience, might inform judges' beliefs. Drawing upon contemporary and historical depictions of "mothering" in a social-cultural context, this section explores which stories of mothering resound, informing the stock stories of mothering and crowding out the less familiar narratives of some litigants. This section concludes by returning to Paulette's and Norman's cases to demonstrate how they align with the less visible or less favorable views of "mothering"—despite their acts and instincts of "mothering" being consistent with theories of positive and capable parenting.

Section Four continues to layer on an interdisciplinary perspective by moving between therapists'<sup>12</sup> couches and judges' courtrooms in search of a solution to the judicial bias manifest in custody determinations. First, this section will describe therapists' training and professional orientation, which promote their ability to listen properly and to investigate with curiosity and openness.<sup>13</sup> It then juxtaposes therapists' professional practice with the practices and procedures of the courtroom to highlight how difficult it is to control bias and infuse cultural humility into fact-finder decision making, particularly judges' decision making. This section concludes with prescriptions for judicial training, rule reform, and litigation strategies that are inspired by therapists' training and orientation to their work. Controlling for one's self with attention to a nuanced sense of the other is the foundation from which therapists listen to, and learn about, people. This controlled and careful listening is, in turn, the precursor to proposing any intervention in peoples' lives. This all stands in stark contrast to a legal fact finder.<sup>14</sup> Judges are not called upon to isolate and control for the ways in which their lived experiences and assumptions affect what they hear; rather, fact finders are *invited* to

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11. See *infra* note 57.

12. I am using the term "therapist" to refer generally to psychologists and social workers and those in emerging, similar fields. The piece may also refer to counseling or counselors in referencing these same individuals.

13. Therapists continually revisit their training, often in conversation with one another, and surface occasions when any issues rear their head in working with clients.

14. See also, e.g., Dan M. Kahan et al., "They Saw a Protest": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 889 (2012).



draw on their own “common sense and experience of life” when “deciding whether to believe a witness and how much importance to give a witness’s testimony.”<sup>15</sup> The recommendations in this section create opportunities for judges to slow down, to notice their biases and reactions, and to be as deliberate and thoughtful as possible before arbitrating litigants’ family lives.

### I. MOTHERS AND THE LAW: A THUMBNAIL SKETCH

If one intends to critique fact finders about their application of fact to law, one must start with a brief description of that law. To understand the legal landscape of “mothering,” one must consider not just family court holdings but also cases that comment on men’s and women’s roles and functions in our society. Until very recently, and with few exceptions, the law endorsed the view that women ought to be mothers.

#### A. WOMAN AS MOTHER

The law assumes a default position for women as mothers. Let us begin nowhere near the beginning of the story but at a time where resistance and change were becoming quite visible: the late 1800s in the fight for women’s suffrage. During this time, a woman’s attempts to enter professional, public spheres were counter to her “paramount destiny and mission” to “fulfil the noble and benign offices of wife and mother.”<sup>16</sup> In *Bradwell v. Illinois*, the Supreme Court affirmed

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15. See MASS. SUP. CT. CIV. PRACTICE JURY INSTRUCTIONS § 1.11.1(a) (revised 2018). Compare CRIM. MODEL JURY INSTRUCTIONS FOR USE IN THE DIST. CT. INSTRUCTION 2.260 (Admin. Office of the Dist. Ct., Commw. of Mass. 2009) (stating “it will be your duty to decide any disputed questions of fact. You will have to determine which witnesses to believe, and how much weight to give their testimony. You should give the testimony of each witness whatever degree of belief and importance that you judge it is fairly entitled to receive. You are the sole judges of the credibility of the witnesses, and if there are any conflicts in the testimony, it is your function to resolve those conflicts and to determine where the truth lies. . . . In deciding whether to believe a witness and how much importance to give a witness’s testimony, you must look at all the evidence, drawing on your own common sense and experience of life.”) with CRIM. MODEL JURY INSTRUCTIONS FOR USE IN THE DIST. CT. INSTRUCTION 2.120 (Admin. Office of the Dist. Ct., Commw. of Mass. 2009) (stating “[y]our function as the jury is to determine the facts of this case. You alone determine what evidence you believe, how important any evidence is that you do believe, and what conclusions to draw from that evidence. In making these determinations, you are to use all of your common sense, life experience, and good judgment.”).

16. In 1873, Ms. Myra Bradwell applied for admission to the Illinois Attorney’s Bar. Despite the efforts and inroads of suffrage, she was denied admission because she was a woman. See *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872). Ms. Bradwell insisted that under the Privileges and Immunities Clause of the 14<sup>th</sup> Amendment of the Constitution of the United States, a state may prescribe qualifications for applying for admission to a bar, but it may not exclude an entire class of citizens from the privilege of membership. *Id.* at 135. On appeal to the Supreme Court, the Court affirmed the Supreme Court of Illinois’ holding and adopted their mirage of legal neutrality, disposing of the case based on application of the Privileges and Immunities Clause. *Id.* at 138. The Court held that the right to admission to practice in courts of a state is not one of the “privileges and immunities belonging to citizens of the United States” that a state is “forbidden to abridge.” *Id.* at 139. Justice Bradley, in his concurring opinion, was more inclined to call a gendered duck a duck in ratifying the state’s decision to exclude women from bar membership. See *id.* at 141–42. Bradley declared, “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.” *Id.*



the Illinois Supreme Court's denial of Ms. Myra Bradwell's application to the Illinois Attorney Bar, on the basis of her being a married woman.<sup>17</sup> What is striking in this case is that Myra Bradwell's application for admission to the bar did not include reference to the fact that she was a married woman.<sup>18</sup> This fact was read into her application by the Illinois Supreme Court.<sup>19</sup>

Despite holding thusly, the lower court insisted that its decision was *avoiding* the question of whether it would "promote the proper administration of justice, and the general well-being of society" to license women as attorneys.<sup>20</sup> Of course, in denying Bradwell's application, the court was *answering* the question resoundingly in favor of the societal norms of woman's connection to man through marriage and her subservience to him and a family there.<sup>21</sup> The outcome of the case thus reflected the Court's deeply held assumptions about women: their singular purpose was to marry and tend to their Plural women vs singular husband. The law did not—and should not—recognize women as capable of holding professional roles in society.<sup>22</sup>

In other legal discourse at this time, women's "noble and benign" roles were juxtaposed against portrayals of women running alone and lustful in and out of marriages. Those resisting passage of the Married Women's Property Act (1848), for example, insisted that laws ending coverture<sup>23</sup> would result in women divorcing their husbands or engaging in adultery.<sup>24</sup> Women who had children out of wedlock at this time were deemed unfit parents, and they risked losing custody of their children to the state.<sup>25</sup> The law expected women to be mothers, but it only recognized and protected their rights as mothers if they were married—kept and faithful.

Despite the advocacy of the women's suffrage movement to change societal views of womanhood and the ultimate wind-down of coverture in the early 1900s, the all-male Court's position remained that women would, naturally,

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17. *Id.* at 139.

18. *Id.* at 131. After the lower court's initial decision, Ms. Bradwell did confirm that she was married.

19. "As a married woman . . . she would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." *Id.* at 132-33 (concurring opinion affirms the logic of assuming a woman will be married, stating that unmarried women are "exceptions to the general rule").

20. *Id.* at 132. The Illinois Superior Court reasoned that when the legislature conferred upon the court the right to grant law licenses, "it was not with the slightest expectation that this privilege would be extended to women." *Id.* at 132-33.

21. This assumed fact of marital status opened the door to the Court's imagining and crediting the many problems that might flow from a scenario where a husband would not have supported his professional wife's instinct in contracts, while forestalling their consideration of the many scenarios in which a woman would be free to operate effectively. *Id.* at 136-37 (citing her counsel's argument).

22. *See id.* at 141-42.

23. Coverture was a legal doctrine under which a man and woman entering a marriage were merged and treated as one male-dominated legal entity. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (citing BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765)).

24. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 13-14 (2008).

25. *See, e.g., Moore v. Dozier*, 57 S.E. 110 (1907).

obviously, primordially, be mothers. In a case concerning work-hour limits for women, for example, the Court reasoned that women's bodies must be protected for the inevitable work of bearing children: "as healthy mothers are essential to rigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."<sup>26</sup>

The presumption that women would—and should—be mothers carried into laws concerning contraception, as did the continual concern for chastity.<sup>27</sup> When women indicated they would rather not be mothers or sought to control the number and timing of children they had,<sup>28</sup> the men writing the laws or presiding in the courts interpreting those laws insisted that contraception "turn[ed] loose" passions and led to "demoralization."<sup>29</sup> Public officials, predominantly male of course, declared women "selfish" in their campaign for control over reproduction, insisting that "[women] ought to devote more time to childbirth than equal suffrage."<sup>30</sup>

So strong was the presumption that women should be mothers that 1900s Comstock-era laws defined contraceptives as obscene and made it a federal offense to disseminate contraceptives over state lines or via the mail.<sup>31</sup> The stories of the first women who resisted made headlines.<sup>32</sup> It would nonetheless remain illegal to discuss or distribute contraceptive devices or even educational material

26. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

27. See Maria T. Vullo, *People v. Sanger and the Birth of Family Planning Clinics in America*, HISTORICAL SOCIETY OF THE NEW YORK COURTS 43, 51 (2013), <https://www.nycourts.gov/history/programs-events/images/Judicial-Notice-09.pdf> (citing, for example, Margaret Sanger's appeal of her conviction under obscenity laws for disseminating information about birth control, which argued that birth control information was not indecent if it was "chaste, instructive, and creative.").

28. See Gloria Feldt, *Margaret Sanger's Obscenity*, N.Y. TIMES (Oct. 15, 2006), <https://www.nytimes.com/2006/10/15/opinion/nyregionopinions/15CFeldt.html> ("Sadie Sachs, a mother of three, had been warned that another pregnancy would kill her. When Sadie asked her doctor how to prevent pregnancy, he told her to tell her husband to sleep on the roof.").

29. See Mary Alden Hopkins, *Birth Control and Public Morals: An Interview with Anthony Comstock*, HARPER'S WKLY. (May 22, 1945). See also Lawrence, *supra* note 9, at 385 (further stating that the values expressed in the law are not culture-free and judicial interpretation of those laws is "rooted" in their own culture). See Vullo, *supra* note 27, at 45 ("Comstock, [a U.S. postal inspector and politician] assembled a vice squad that assumed quasi-governmental functions, performing arrests and seizing evidence for use in criminal prosecutions, all in order to protect Comstock's self-proclaimed code of morality. Contributions from wealthy New Yorkers—including mining millionaire William E. Dodge, Jr., financier J.P. Morgan and industrialist Samuel Colgate—funded Comstock's salary and expenses").

30. See Vullo, *supra* note 27, at 48–49.

31. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, § 2, 17 Stat. 599 (1873).

32. In 1916, Margaret Sanger, mother of the Planned Parenthood movement, was charged in a two-count indictment for "exhibiting and offering to sell 'instruments, articles, recipes, drugs and medicines for the prevention of conception' and 'instruments of indecent and immoral use.'" Vullo, *supra* note 27, at 47. See also *Information, People v. Sanger*, No. 28, 735 (N.Y. Ct. Spec. Sess. Nov. 13, 1916). In 1914, an arrest warrant had been issued for her. See Feldt, *supra* note 28. The charge was based on violations of the Comstock law. *Id.* The Comstock Act specifically defined contraceptives as obscene and then made it a federal offense to disseminate contraceptives over state lines or via the mails. See An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch.

about family planning until the Contraception cases in the 1960s.<sup>33</sup> And in 1965, the Court in *Griswold v. Connecticut* only invalidated prohibitions on dissemination of contraceptives to married people; it would be another decade before the Court refined its position to articulate that contraception concerned fundamentally a woman's right to be free of intrusion when deciding "whether to bear or beget a child."<sup>34</sup>

Despite the emerging notion that one might rather not "beget" a child, the notion of woman-as-mother remained an available default position for understanding women as an entire class of people. In *Hoyt v. Florida*, for example, the Supreme Court credited Florida's policy of exempting women from juries as one promoting the "general welfare."<sup>35</sup> The Court reasoned the exemption would allow women uninterrupted repose at the "center of home and family life."<sup>36</sup> In contrast, there was no default exemption for men to be free and clear to be at the center of their home and family life.<sup>37</sup> The *Hoyt* court stopped short of declaring a

258, § 2. Ms. Sanger, a nurse, had been publishing a column called *What Every Girl Should Know* in *The Call*, a socialist newspaper. See Feldt, *supra* note 28. The column discussed sex education. *Id.* Anthony Comstock was so incensed that, as postal inspector, he banned the publication from the mail. *Id.* Ms. Sanger responded by publishing and disseminating a newsletter, *The Woman Rebel*, through the mail. *Id.* Ms. Sanger had previously fled to Europe to avoid the ensuing federal prosecution. *Id.* When she returned to the States, she opened a clinic in Brooklyn. The clinic was only open for ten days before she was arrested, tried, and ultimately found guilty. See Vullo, *supra* note 27, at 47–49. A woman who we would today call an activist, she was described at the time as being a "good-looking woman" and a "lawbreaker." See *id.* at 49 (citing *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial*, N.Y. TRIB. (Jan. 5, 1917), at 5). But see Mike Sosteric, *Margaret Sanger's Message to the Poor*, SOCJOURN (Feb. 28, 2018), <https://www.sociology.org/who-was-margaret-sanger/> (citing criticism of Sanger that would resist labeling her as an activist who was concerned with the choices and autonomy of all women, and describing Sanger instead as a eugenicist who was seeking to control the population of a poor, "inferior" class).

33. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY* 360 (2017).

34. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); see also STONE, *supra* note 33, at 366. But even in *Eisenstadt*, the Court stopped short of deciding the case based on a due-process, liberty-interest analysis; rather, it decided the case on equal-protection grounds, finding that the Massachusetts contraception at issue simply did not serve an interest that legitimized treating married and unmarried persons differently. See 405 U.S. at 453. It is further worth noting that the right to decide whether to "bear or beget a child" remains attenuated for those who our sovereignty deems outsiders. See, e.g., *Garza v. Hargan*, 304 F. Supp. 3d 145 (2018). In 2017, the Office of Refugee Resettlement (ORR) which is responsible for the care, protection, and placement of unaccompanied migrant children, who are in federal custody due to their immigration status, issued instructions to its employees that limited their facilitating any abortion without direct approval and compliance with administrative hurdles. See 6 U.S.C. § 279(b)(1)(A); *Garza*, 304 F. Supp. 3d at 145. A class of Jane Does has been certified and there is a preliminary injunction in place, but the final analysis has yet to come. *Id.* And of course, countless states still have abortion restrictions that disproportionately affect the young and the poor. See Susan Milligan, *A Guide to Abortion Laws by State*, U.S. NEWS (July 27, 2019, 12:09 PM), <https://www.usnews.com/news/best-states/articles/2019-06-27/a-guide-to-abortion-laws-by-state>.

35. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

36. *Id.*

37. *Id.*

woman's place in the home as inevitable as the state of Florida had; it did, however, state that a woman had "her own special responsibilities" in the home.<sup>38</sup> Relatedly, the Social Security Act's original provision for survivor's benefits only extended to women, so that widows could *remain* home and care for their children (their default position); it did not anticipate that a man might have similarly had his place at the home's center.<sup>39</sup> The provision reflected the reasoning of legislators from 1939, but it would remain in effect until 1975.<sup>40</sup> Given the predilection of legislatures and courts to favor, or at least anticipate, scenarios where women remained in the home to care for children, it is confusing to consider that a woman's need for assistance in supporting them there has always been conditional.

Until *King v. Smith*, states such as Alabama conditioned eligibility for Aid to Families with Dependent Children (AFDC, child-welfare benefits) on perceptions about the immorality of a mother cohabitating with a non-custodial person.<sup>41</sup> To this day, states can—and many do—set eligibility requirements on Temporary Assistance to Needy Families (TANF), the program that replaced AFDC, that go beyond income eligibility calculations or design diversion programs to woo families away from seeking the benefit.<sup>42</sup>

Nonetheless, the prevailing position that women's primary responsibilities were in the home had broader implications for women's financial independence and supported the notion that men should earn more than women for work outside of the home.<sup>43</sup> Until 1963, it was perfectly lawful for an employer to pay women less for doing the same jobs as men, and despite legal reforms,<sup>44</sup> the gender wage gap stubbornly persists today with enormous discrepancies along gender and racial fault lines.<sup>45</sup> For example, women of color are paid, on average, approximately 50% less than white men.<sup>46</sup> White women are paid approximately 75%, and Asian women approximately 80%, compared to white men.<sup>47</sup> These statistics perpetuate a self-fulfilling cycle that any family wishing to maximize their

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38. *Id.*

39. The legislative history for the clause remained in effect until 1975, when the Supreme Court affirmed a New Jersey federal district court, holding that the provision unjustifiably discriminated against female workers. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 649 (1975); POLIKOFF, *supra* note 24, at 24.

40. *See* 420 U.S. at 648–49.

41. *See King v. Smith*, 392 U.S. 309, 320 (1968).

42. *See* MEGAN THOMPSON ET AL., STATE TANF POLICIES: A GRAPHICAL OVERVIEW OF STATE TANF POLICIES AS OF JULY 2016 2 (May 2018), [https://www.acf.hhs.gov/sites/default/files/opre/wrd\\_2016\\_databook\\_companion\\_piece\\_05\\_15\\_18\\_508.pdf](https://www.acf.hhs.gov/sites/default/files/opre/wrd_2016_databook_companion_piece_05_15_18_508.pdf).

43. POLIKOFF, *supra* note 24, at 14–15.

44. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (Westlaw through P.L. 116-91).

45. *See* AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7-9 (Fall 2018), <https://www.aauw.org/resources/research/simple-truth/> [hereinafter THE SIMPLE TRUTH]; *see also* POLIKOFF, *supra* note 24, at 15.

46. THE SIMPLE TRUTH, *supra* note 45, at 7-9.

47. *Id.*

bottom line would send the man, not the woman, into the workforce, reinforcing the default that makes men at home an uncommon phenomenon.<sup>48</sup>

Of course, history is shaped differently for black and brown women, who suffer most acutely under the wage gap despite having always been expected to work outside of the home and whose roles as mothers have been pathologized.<sup>49</sup> For black women, the roots of their default position as laborers date back to their bondage into slave labor.<sup>50</sup> For Latinas, the sentiment may well trace to anti-immigrant rhetoric about Hispanic and Latino immigrants swarming the border.<sup>51</sup> This trope is unfortunately a familiar one. Contemporary reports of the “surge” of immigrants from Central America were just as prevalent in the United States during the 1920s, when the first limits in United States history were placed on the numbers of immigrants allowed in the country (1921) and when Congress passed legislation authorizing a “Border Patrol” (1924).<sup>52</sup> As discussed in more detail below, the state was—and is—uninterested in shaping policies so that black and brown women could assist in preserving “the vigor and strength of the race.”<sup>53</sup> Indeed, despite the blanket assumption that a woman’s value was as bearer of children and keeper of the hearth, in the operation of family law, only a small slice of women, namely white, kept, manifestly chaste, heterosexual women, are empowered or credited as “good mothers.” In contrast, white fathers, black and brown mothers and fathers, and LGBTQ mothers and fathers are ignored, subordinated, or vilified.

#### B. FAMILY LAW’S “GOOD MOTHER”

Family law jurisprudence tracked the principle message that women ought to be mothers, and, if they dared be other things as well, mothering would

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48. *See id.*

49. *See infra* Section Three, Subsection B. *Caustic Narratives and Missing Mothers.*

50. *See* Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, in *FAMILY MATTERS: READINGS OF FAMILY LIVES AND THE LAW*, 147, 151-53 (discussing the identity of slave women as property and laborer and the brutal consequences in the lived experience of slave women and also the lasting experience of black women and families at law: “[t]he needs of slavery have corroded both our legal legacy and our collective family experience. A careful analysis of the contribution of the slave experience to the current vicissitudes of the African-American family must take account of the failure of courts to exercise moral and legal authority and the consequent quasi-lawmaking role of the slavemaster.” *Id.* at 156).

51. Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, *THE INTERCEPT* (Jan. 12, 2019, 9:00 AM), <https://theintercept.com/2019/01/12/border-patrol-history/> (citing the “broad, generalized racism” against Mexicans in the 18<sup>th</sup> century that “concentrated along an ever-more focused line: the border” and is the origin story of brutal and dehumanizing practices such as the use of migrant children as “bait” and pushing “illegals off cliffs.”). *See also* Philip Bump, *The Surge in Migrants Seeking Asylum, Explained*, *WASH POST* (April 9, 2019, 12:42 PM), <https://www.washingtonpost.com/politics/2019/04/09/surge-migrants-seeking-asylum-explained/>; Cedar Attanasio & Astrid Galvan, *US Expands ‘Catch and Release’ Amid Surge in Migrants*, *ASSOCIATED PRESS* (April 2, 2019), <https://apnews.com/ed3d75ce348d4be3bc7fdf02bc43e1d6>.

52. *See Border Patrol History*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/history> (last updated Oct. 5, 2018).

53. *Mueller v. Oregon*, 208 U.S. 412, 421 (1908); *ADRIENNE RICH, OF WOMAN BORN* 44 (1976).

nonetheless be their primary responsibility. Even though this notion is constricting for women, the default at least protected the interest of women if, and when, they did wish to mother. Troublingly, however, the protections of family law are best available for archetypal “good” mothers: white mothers, economically advantaged mothers, heterosexual mothers, and cis mothers. Non-conforming “mothers,” including fathers, continue to struggle for full recognition under the law as capable mothers.

At its earliest inception, the laws of marriage and family gave the rights of organizing family affairs to the husband, including but not limited to earning power, owning property, and contracting.<sup>54</sup> By extension, husbands had rights to the custody of the children in the event of separation, in order to secure for themselves the earning potential and labor of their children.<sup>55</sup> But, by the end of the nineteenth century, men were leaving farms and farming for industry in city centers. As a consequence, there was less focus on retaining family laborers (children) to work the land, and a new norm emerged: mother as caretaker and father as unfettered employee. The British Parliament codified this norm when it declared the Tender Years Doctrine, which presumed that mothers were the best custodians of children in their early years.<sup>56</sup> The majority of states in the United States would soon follow suit.<sup>57</sup>

The trend of mothers securing custody over their children in the event of marital separation was abated somewhat by the still-prevailing sense that it was ruinous for women to look outside of marriage or choose for herself to exit marriage. In the early 1900s in Maryland family court, for example, the court could retain jurisdiction over a child and grant custody to the child’s father in cases of adultery by the mother.<sup>58</sup> Moreover, a woman failing to follow her husband should he decide to move, could be construed as her deserting him and therefore the basis for a divorce deemed her fault.<sup>59</sup> Nonetheless, as the cultural revolution of the 1960s normalized divorce, ushering in the transition to “no fault” divorces, there was renewed interest in deciding which parent is best situated to care for children.<sup>60</sup> A powerful wave of feminism helped here.<sup>61</sup> Feminists were outspoken in naming the privilege and subordination of varying public and private roles (e.g. privileged public role of man as employee versus subordinated private role of

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54. Originally, the father was the custodian because children were property. POLIKOFF, *supra* note 24, at 12.

55. *Id.*

56. See Martha J. Bailey, *England’s First Custody of Infants Act*, 20 QUEEN’S L.J. 391, 410 (1995) (discussing the history and passage of the Custody of Infants Act of 1839).

57. Kohm, *supra* note 8, at 367.

58. *Pangle v. Pangle*, 134 Md. 166, 170 (1919).

59. POLIKOFF, *supra* note 24, at 14.

60. *Id.* at 22. *But see* ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* 112–13 (2006).

61. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 17–32 (3d ed. 2013).



woman as caretaker).<sup>62</sup> They mounted a resistance to the subordination of private roles and to a woman's default position in them, while also articulating that any one woman's desires may change or that hers may differ from another woman's, such that women should be empowered to move between roles.<sup>63</sup>

In response, courts began moving away from the gendered assumptions underlying the Tender Years Doctrine by stepping down consideration of tender years to that of a presumption or absorbing it into the more elusive "Best Interest of the Child" (BIC) calculus.<sup>64</sup> The BIC standard requires balancing the abilities and constraints of each potential custodian against the needs of the child and the context of the family to determine how best to meet the needs of the child within the context of her or his family. In some jurisdictions, BIC statutes propose consideration of certain factors, such as: the wishes of the child, the wishes of the parent, the child's and parents' mental and physical health, and the child's adjustment and connection to school, home, and community.<sup>65</sup> In other jurisdictions, the

62. Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in THE MORAL FOUNDATION OF CIVIL RIGHTS 144, 148 (Robert K. Fullinwider & Claudia Mills eds., 1986).

63. *Id.* at 149-50; MARTHA CHAMALLAS, ASPEN TREATISE FOR INTRODUCTION TO FEMINIST LEGAL THEORY (2012) (stating that feminists debated how women's "different voice"—with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could find greater expression in law.”).

64. Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403 (2018); *see, e.g.*, Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639-40 (Pa. 1977) (“We also question the legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature; or merely as a makeshift where the scales are relatively balanced; such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction.” (citations omitted)); *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981) (“Unconstitutional gender-based classification discriminating between men and women”). It is worth noting, however, that the Tender Years Doctrine is by no means an extinct doctrine, and indeed it rears its head to support shocking conclusions. *See e.g.*, *Mercier v. Mercier*, 717 So. 2d 304, 307 (Miss. 1998) (“[A] child is no longer of tender years when that child can be equally cared for by persons other than the mother.”); *see also* *Gilliland v. Gilliland*, 969 So. 2d 56, 66-67 (Miss. 2007). In 1979, California passed the first joint custody statute, articulating the option of shared custodial arrangements. *See* Caulley, *id.* Less than twenty years later, forty of the states had joint custody statutes that declared joint custody an option, if not a preference. *Id.*

65. *See, e.g.*, D.C. CODE ANN. § 16-914 (West 2003). In determining the care and custody of a child, the best interest of the child shall be the primary consideration. To determine the best interest of the child, the court shall consider all relevant factors, including, but not limited to:

- (A) the wishes of the child as to his or her custodian, where practicable;
- (B) the wishes of the child's parent or parents as to the child's custody;
- (C) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest;
- (D) the child's adjustment to his or her home, school, and community;
- (E) the mental and physical health of all individuals involved;
- (F) evidence of an intrafamily offense as defined in section 16-1001(5) [now § 16-1001(8)];
- (G) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare;
- (H) the willingness of the parents to share custody;



standard is stated more generically as a totality of the circumstances test.<sup>66</sup> As is the case with any balancing test, the BIC standard is indeterminate and ripe for insertion of subjective opinions.<sup>67</sup>

Despite the bias vulnerabilities of the BIC calculus, there is evidence of progress toward a more inclusive and progressive view of motherhood, and parenthood more broadly, stemming from the recent legalization of same-sex marriage, the widespread adoption of “no-fault” divorce laws, and the embrace of social science literature into family court deliberations. As a result, social realities concerning whether couples with children marry, or remain couples at all, mean custody disputes are playing out in increasingly varied family constellations.<sup>68</sup> Such developments provide some hope that the BIC standard can accommodate a wider view of who can “mother” and what it means to “mother.”

From *Loving v. Virginia* to *Obergefell v. Hodges*, high-profile cases securing the rights of diverse populations to marry have also introduced judicial eyes to varied primary caregiving arrangements for children.<sup>69</sup> Justice Kennedy’s

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- (I) the prior involvement of each parent in the child’s life;
  - (J) the potential disruption of the child’s social and school life;
  - (K) the geographic proximity of the parental homes as this relates to the practical considerations of the child’s residential schedule;
  - (L) the demands of parental employment;
  - (M) the age and number of children;
  - (N) the sincerity of each parent’s request;
  - (O) the parent’s ability to financially support a joint custody arrangement;
  - (P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment, and Responsibilities, and medical assistance; and
  - (Q) the benefit to the parents.

*Id.*

66. MASS. GEN. LAWS ch. 208 § 31 (1975) (“In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child’s present or past living conditions adversely affect his physical, mental, moral or emotional health.”).

67. Kohm, *supra* note 8, at 373.

68. Between 2005 and 2015, the rate of marriage declined while cohabitation rates increased. See LYDIA ANDERSON, SOCIAL, ECON. & HOUSING STATISTIC DIV., U.S. DEPT. OF COMMERCE, FAMILY AND HOUSEHOLD COMPOSITION AFTER THE GREAT RECESSION: VARIABILITY BY ECONOMIC INDICATORS IN METROPOLITAN STATISTICAL AREAS (2018), <https://www.census.gov/content/dam/Census/library/working-papers/2018/demo/SEHSD-WP2018-10.pdf>. A recent study showed that half of people ages 26-31 are having their children outside of marriage. See Alexia Fernandez Campbell, *Why Are So Many Millennials Having Children Out of Wedlock?*, THE ATLANTIC (Jul. 18, 2016), <https://www.theatlantic.com/business/archive/2016/07/why-are-so-many-millennials-having-children-out-of-wedlock/491753/> (discussing Andrew J. Cherlin et al., *Changing Fertility Regimes and the Transition to Adulthood: Evidence from a Recent Cohort* (unpublished thesis, Johns Hopkins University) (on file with the Johns Hopkins University Library system)). Surveys suggest that in 2017, approximately 40 percent of births across the U.S. were to single women. See JOYCE A. MARTIN ET AL., CTNS. FOR DISEASE CONT. & PREVENTION, BIRTHS: FINAL DATA FOR 2017 (Nov. 7, 2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_08-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf). Lastly, there are more single white mothers than black mothers. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 63 (2002).

69. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state prohibitions against inter-race marriages); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (invalidating state prohibitions against

opinion in *Obergefell* and his subsequent discussions revealed that the outcome was in part motivated by attention to children of same-sex couples and their relationship with their parents, even while the holding itself stood for the fundamental right of two adults to marry.<sup>70</sup> Kennedy reasoned beyond his privately held beliefs opposing same-sex marriage and toward a more inclusive posture.<sup>71</sup> He based this departure on his sincere belief that the children of same-sex families should not be made to feel as “others,” or less than the children of straight, married parents. This perspective opened the door to understanding that a paradigm that makes children feel that way is not just unkind, but also unwarranted under the law.<sup>72</sup>

As previously noted, for families wishing to end their marriages, a majority of states have abandoned the fault requirement for divorce, recognizing a “no fault” basis, which then tamped down rhetoric of “fault” in custody determinations.<sup>73</sup> Parents no longer need to vilify one another through use of tropes—such as a cheating wife or deadbeat father, and instead, divorce proceedings can focus on shoring up both parents’ personhood and commitment as parents.<sup>74</sup> Lastly, legislation in the care and neglect realm, which has long had a trickle-down effect into family law, has begun to cite and credit social science literature calling for prioritizing reunification of families and a more careful, accepting consideration of cultural differences in parenting.<sup>75</sup>

Despite these improvements in the law, the opinions regarding best interest of the child unavoidably were—and still are—mirrors for a judge’s opinions about the parent.<sup>76</sup> While it is logical to some degree for a judge to consider the fitness of a parent when considering how best a child can be nurtured and supported, the need to do so throws open the doors for judges to curate a legal standard for the

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same-sex marriage). See also BRITTANY RICO ET AL., SOCIAL, ECON. & STATISTICS DIV., U.S. CENSUS BUREAU, EXAMINING CHANGE IN THE PERCENT OF MARRIED-COUPLE HOUSEHOLDS THAT ARE INTERRACIAL AND INTERETHNIC: 2000 TO 2012-2016 (2018), <https://www.census.gov/content/dam/Census/library/working-papers/2018/demo/SEHSD-WP2018-11.pdf>.

70. See 135 S. Ct at 2590 (stating that “the marriage laws at issue thus harm and humiliate the children of same-sex couples”); Bill Browning, *Anthony Kennedy Says He ‘Struggled’ with Marriage Equality Ruling*, LGBTQ NATION (Nov. 29, 2018), <https://www.lgbtqnation.com/2018/11/anthony-kennedy-says-struggled-marriage-equality-ruling/> (“As we thought about this and I thought about it more and more, it just seemed to me, you know, wrong under the Constitution to say that over 100,000 adopted children of gay parents couldn’t have their parents married. I just thought that this was wrong.”).

71. *Id.*

72. *Id.*

73. Of course, this is not to say vitriol will not still be present. See POLIKOFF, *supra* note 24, at 32.

74. *Id.*

75. Judith C. Scott & Jessica A. K. Matthews, *Youth of Color in Care: Intersecting Identities and Vulnerabilities*, in HANDBOOK OF CHILDREN AND PREJUDICE 353-73 (Hiram E. Fitzgerald et al., eds., 2019).

76. *Id.* (discussing book that revolutionized the best interest of the child standard). But see POLIKOFF, *supra* note 24, at 32 (discussing how even as fault divorces are receding, there can be consideration of fault in a custody dispute, provided the “fault” at issue has affected the child).

“good mother.”<sup>77</sup> The “good mother” standard risks riding the tidal wave of American jurisprudence regarding biased notions of motherhood, notably: women’s “paramount destiny” and “special responsibilities” as mothers; racialized and heteronormative notions of mothers; and silence as to fathers’ possible—let alone competent and nurturing—place at the “center of home and family life.”<sup>78</sup> In 1999, family law scholars Adrien Katherine King and Laura Weselmann employed critical feminist and race theory to create goals for transcending traditional notions of mothering.<sup>79</sup> Sitting at the intersection of scholarship and practice, and reflecting on cases litigated in 2017, this Article asks: have we succeeded? And if not, why not?

## II. BEST INTEREST OF THE CHILD AND JUDGE’S PERSONAL OBSERVATIONS: AN OBVIOUS AND INTRACTABLE PROBLEM

Nothing in the BIC standard explicitly precluded Norman, for example, from working “mommy hours” and providing stay-at-home care for his child. Similarly, the law no longer explicitly denies Paulette the opportunity to be her multiplicitous self: a mother who is the primary breadwinner, the more authoritarian disciplinarian compared to her male spouse, and someone committed to, and capable of, nurturing her children. Yet, despite the best efforts of advocates to change legal standards and shift cultural views of motherhood, or parenthood more broadly, the trajectory and the lack of inclusivity in the jurisprudence of “mothering” persists and remains foreboding for “mothers” like Paulette and Norman. Indeed, despite evolving views in contemporary culture and within the academic community, other judicial decisions reminiscent of the limited view of who ought to “mother” and how “mothering” can be done persist. This Article argues that the issue is not necessarily the state of the law, but rather, how the facts of each case are credited and applied by the judge in each case.<sup>80</sup>

Family law practitioners and scholars have noted that “[t]he greatest concern with the use of BIC today is that application of the doctrine rests on the judge’s personal observations and values.”<sup>81</sup> Where a judge relies on extrajudicial personal knowledge of a litigant or an event to support a conclusion of law, there is a

77. Caulley, *supra* note 64, at 405.

78. See *Bradwell*, 83 U.S. at 141-42; *Hoyt*, 368 U.S. at 62.

79. King & Weselmann, *supra* note 10, at 258-59.

80. Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 901 (“The problem is that not all positioned perspectives are equally valued, equally heard, or equally included. From the perspective of critical race theory, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of this, not accidentally”). For many, particularly those with subordinated identities, rights are unstable and indeterminate. See generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984); see also Lawrence, *supra* note 9, at 385 (further stating that the values expressed in the law are not culture free and judicial interpretation of those laws is “rooted” in their own culture).

81. Kohm, *supra* note 8, at 353. See also *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (stating that the “best interests of the child standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.”).

case for reversal.<sup>82</sup> However, the situation is much murkier when one considers instances where a judge's extrajudicial life experiences create blind spots for some facts, hypervigilance around others, and dictate a rigid set of meanings and values for given observations. Thus, it would be fair to say here, in the context of family court, that:

In effect the trial judge, as a basis for [his] findings, made of himself a witness, and in making [these findings] availed himself of his personal knowledge; he became an unsworn witness to material facts without the [parties] having any opportunity to cross-examine, to offer countervailing evidence or to know upon what evidence the decision would be made.<sup>83</sup>

In some respects, judges resolving issues of BIC according to their general, personal observations and values is more problematic than a judge relying on specific, extrajudicial personal knowledge of a litigant or an event.<sup>84</sup> A presumption of judicial neutrality is at the core of our judicial system.<sup>85</sup> However, latent bias—such as racism or sexism—may well be undetectable not only to the judge herself, but also the litigants before her.<sup>86</sup>

Further, where a judge imports values and biased perspectives, the risk is both more subtle and more consequential in the aftermath. A judge importing facts should at least catalogue the importation into the finding of fact,<sup>87</sup> unlike importation of values, which may be unconscious. If found to be present, the effect of a judge importing such personal bias is highly consequential. Determining whether a judge has imported personal observations and values requires looking beneath

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82. See, e.g., *Kovacs v. Szentcs*, 33 A.2d 124 (1943); *Siebert v. Siebert*, 200 A.2d 258 (1964).

83. *Kohm*, *supra* note 8, at 353 (citing *Kovacs*, 33 A.2d at 126).

84. *Papa v. New Haven Federation of Teachers*, 444 A.2d 196 (1982) (determining that trial court's findings were "not based on any evidence, are obviously improper" and were based on the judges' personal knowledge and a level of being "personally involved. . . thus, in effect, becoming an unsworn witness, without allowing the defendants any opportunity to cross-examine or to offer countervailing evidence.").

85. See, e.g., Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW AND PHILOSOPHY 217 (2003).

86. *Lawrence*, *supra* note 9, at 322 ("Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes. Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions."); see also, e.g., *Browning*, *supra* note 70 ("The nature of injustice is that you can't see it in your time.").

87. *Papa*, 444 A.2d at 209 (where no evidence of an interview was introduced at trial, yet in the court's findings of fact there were four pages of findings concerning the interview).

and between the articulated findings.<sup>88</sup> One must consider what facts are missing or present in the findings of facts and what facts are or are not credited; from here, one must analyze whether there is any pattern of disdain or disregard in the ignored and discredited facts or any pattern of biased positive regard in the facts the judge does cite and credit.<sup>89</sup> Lastly, even if the threat of latent bias were known and articulable ahead of time, there are no procedural safeguards against the threat that are akin to a motion for recusal in an instance of judicial impartiality.<sup>90</sup> While the prejudiced attention to facts and the cloistered reasoning about those facts is influential on the judge's ruling, these determinations are nearly immune from review in the context of family law where the standards for permissible consideration of race and gender are still unclear.<sup>91</sup> Put plainly, barring blatant, explicitly impermissible consideration of a litigant's identity, it is difficult to pierce the holding.

This means that judges have to "get it." If judges are going to promote an expansive and inclusive trajectory of mothering, they must make nuanced and informed applications of fact to law. In order to apply facts to law, the fact finder has to hear the facts and credit them. But fact finders, like all people, have subconscious tendencies to favor litigants and narratives that seem familiar. Narrative scholars have long since noted that sitting on the other side of a

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88. See Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1041 (2002).

89. *Id.* Consider, for example, certain findings of facts and credibility determinations in the case of Paulette: Paulette's husband describes her as being 5'8 but subsequent evidence confirmed that she was barely 5'1 tall. See Transcript of Record, Day 2, p.109 (confidential source on file with author). The evidence of their relative size was arguably probative of the issue of who was a primary aggressor in an altercation. In her findings, the judge stated, "I think he misspoke or was confused, but it was not an intentional attempt to deceive." *Id.* In the same proceedings, Paulette's husband, the petitioner, had testified that she bodily intimidated him. On cross, he testified to being 6'0 and about 200 pounds. *Id.* It was subsequently established that Paulette is 5'1, and indeed notably petite, both short and lightweight. *Id.* During her findings on credibility, the judge shored up the petitioner's credibility by saying, "The only problem I had with Mr. Mahoney's testimony was when he described his wife as being 5'8, and she is only 5'1, and I think he misspoke or was confused, but it was not an intentional attempt to deceive." *Id.* Later, the judge had an opportunity to consider if Paulette's use of measurement was accurate or inaccurate and whether any inaccuracy was a mistake or confusion and not an attempt to deceive. *Id.* One sees that the judge did not resolve any ambiguity in Paulette's favor. *Id.* Here, Paulette had testified that she would often use a technique of clapping her hands loudly three or four times and then saying, "come on, come one," when she was urging the children to get ready to leave the house for school. *Id.* She acknowledged raising her voice on these occasions and acting impatiently. *Id.* Recalling this information, the judge said, "Your testimony about how you would clap your hands together to get her to comply. . . when you say you never clapped your hands when you were closer than twenty feet away, I think that's just so unbelievable. . . parents often clap their hands and they're not twenty feet away. . . I think it was your way of distancing yourself from what you were doing." *Id.* The author's own analysis of this distinction is based on subtleties and subjective opinion. One wonders, even where the author can find other, similar patterns, whether they would be sufficient to prove impartiality.

90. 28 U.S.C. § 455(a) (1990).

91. See Kohm, *supra* note 8, at 346 (discussing the abolished tender years doctrine and the legacy of gender in a best interest analysis); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 61-62 (1991) (explaining that it still unclear how race factors into custody modifications).

presentation is an audience, and audiences are “unequivocally contextualized.”<sup>92</sup> An audience’s interpretation will not always coincide with what the author intended if the audience does not have the knowledge or experience that the author is relying on.<sup>93</sup> In these cases, the audience not only misses content, but more fundamentally does not “come to an adequate understanding of” the *norms* the author was relying on or attempting to communicate.<sup>94</sup> In other words and for our purposes: a judge’s ruling does not follow *what was said* but instead reflects back *what was heard*. These are distinct.

Narrative scholars are not alone in considering the divide between what is happening (or intended by an author) and what is noticed by an observer (or audience). Social psychologists point out that when observers look at people and try to make sense of their behavior, “the actor dominates [the observer’s] literal and mental visual field, which makes the circumstances [the actor is responding to] less visible.”<sup>95</sup>

Consider, for example, the protests following recent police shootings of unarmed black Americans. Whether one chooses to call the aftermath a “protest” or a “riot” may well turn on the force an “observer perspective” has in view.<sup>96</sup> Actions such as property damage, gun fire, and shouting may dominate one’s visual field. A mental view of fire and damage might lead one to conclude that this is a riot. Searching for a cause of a riot, one might conclude it is due to lawlessness and aggression. Because our analysis flows from the initial visual field, it deemphasizes other causes of the behavior and other ways to understand what we are seeing, “namely[,] the circumstances to which [the actor] is adapting.”<sup>97</sup>

Taking a wider view to consider unseen circumstances at play in the lives of the black protesters, one sees rampant systemic injustice: wage gaps, disproportionate mortality rates, educational disparities, a skewed and brutalizing criminal justice system, and the attendant anger, yes, but also fatigue, grief, and righteous

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92. Dan Shen, *Implied Author, Authorial Audience, and Context: Form and History in Neo-Aristotelian Rhetorical Theory*, 21 *NARRATIVE* 140, 151 (2013).

93. “[T]he author of a novel designs his work rhetorically for a specific hypothetical audience. Like a philosopher, historian, or journalist, he cannot write without making certain assumptions about his readers’ beliefs, knowledge, and familiarity with conventions. His artistic choices are based upon these assumptions, conscious or unconscious, and to a certain extent, his artistic success will depend on their accuracy.” See Peter J. Rabinowitz, *Truth in Fiction: A Reexamination of Audiences*, 4 *CRITICAL INQUIRY* 121, 126 (1977). Perhaps this is why narrative is imported into trial advocacy with a focus on case theory and appeal to the audience, the trier of fact. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 *MICH. L. REV.* 485, 487 (1994) (“Case theory—or theory of the case—can be seen as an explanatory statement linking the ‘case’ to the client’s experience of the world. It serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other parties in the way that can best achieve the client’s goals. *The relevant reality combines the perspectives of the lawyer and the client with an eye toward the ultimate audience—the trier of fact.*”) (emphasis added).

94. Shen, *supra* note 92, at 153.

95. CLAUDE STEELE, WHISTLING VIVALDI, HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 18 (2010).

96. *Id.*

97. *Id.*



indignation.<sup>98</sup> Within this framing, the behavior itself looks different.<sup>99</sup> Observers looking at a person or group will “tend to stress internal, dispositional causes of their behavior,” whereas observers who are able to take the perspective of the actor and reckon with the circumstances the actors face will “stress more situational causes.”<sup>100</sup> And here’s the rub: just as an observer who is unfamiliar with the narratives and experiences of a black protester may struggle to connect with the identity and circumstances of that person, so too might a judge unfamiliar with “mothers” who defy race, gender, and heteronormative norms be unable to make fair sense of their behavior.

So how familiar are Norman’s and Paulette’s stories to those anointed by a system—the legal system—that favors the dominant society’s view of reality? This next section considers the prevailing notions of mothering in our contemporary culture outside the courtroom such that we can then consider its influence on judges’ perspective as observers in the courtroom.

### III. THE VISUAL FIELD OF “MOTHER”

Judges, just like the rest of us, are steeped in society’s expressions of mothering and normative claims about mothering. “Mothering,” or at least certain versions of it, are evident in our books, media, advertising, and other prevalent mediums helping to shape our culture. Early understandings of “mothers” and “mothering” are often formed by those first moments with children’s books.<sup>101</sup> Mothering is in the news and on the movie screens.<sup>102</sup> Mothering is alive in one’s

98. William J. Barber, II, *Editorial: Charlotte is Drowning in Systematic Injustice*, NBC NEWS (Sep. 22, 2016), [https://www.nbcnews.com/news/nbcblk/editorial-charlotte-drowning-systematic-injustice-n652541?fbclid=IwAR1Y9s6nno2iYxTiGZK5YR1bgkQIrYbiaVNNqyxbBF\\_ceRIOftvV5KsH5JY](https://www.nbcnews.com/news/nbcblk/editorial-charlotte-drowning-systematic-injustice-n652541?fbclid=IwAR1Y9s6nno2iYxTiGZK5YR1bgkQIrYbiaVNNqyxbBF_ceRIOftvV5KsH5JY).

99. As one commentator put it: “I am a pastor. I will not condemn grief. But I was trained as a lifeguard, and I learned a long time ago that when people are drowning, their instincts can kill them and anyone who tries to help them. If a lifeguard can get to a drowning person, the first thing the lifeguard says is, “Stop struggling. Let me hold you up in this water, and we can get to the shore together. The riots in Charlotte are the predictable response of human beings who are drowning in systemic injustice. We must all pray that no one else gets hurt. But we must understand why this is happening.” *Id.* The ability to understand the experience of another is known as empathy. Research has identified four components or areas of empathy: first, emotional empathy, which involves sharing the feelings of another; then cognitive empathy, which speaks to the ability to comprehend the feelings of the other; third is moral empathy which refers to the motivation to understand and relate to the other; lastly, there is behavioral empathy which involves being able to communicate your understanding of the other. *See* Jane Stein-Parbury, *PATIENT AND PERSON: INTERPERSONAL SKILLS IN NURSING* 146 (5th ed. 2014).

100. Claude M. Steele, *A Threat in the Air*, 52 AM. PSYCHOLOGIST 613, 627 (1997); E. E. Jones & R. E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79–94 (E. E. Jones et al., eds., 1972). This is also the key to empathy. *See* CARL R. ROGERS, *A WAY OF BEING* 140 (1980).

101. David A. Anderson & Mykol Hamilton, *Gender Role Stereotyping of Parents in Children’s Picture Books: The Invisible Father*, 52 SEX ROLES 145, 145 (2005).

102. *See, e.g.*, Joelle Goldstein, *Mother Admits She Once Judged Stay-at-Home Moms—But Tearfully Reveals, ‘I Get It Now’*, YAHOO (Feb. 12, 2020), <https://www.yahoo.com/entertainment/mother-admits-she-once-judged-210143746.html>; Hayley Wielgus, *Remarkable Women: Manchester Mother’s Mission to Raise Awareness for Son’s Rare Disorder*, WKRN (last updated Feb 13, 2020), <https://www.wkrn.com/community/remarkable-women/remarkable-women-manchester-mothers-mission->



own lived experiences of being a child and possibly a parent. Judges, therefore, do not preside over a custody matter in a vacuum; they sit in the white noise of their lived experiences and societal messaging—while often being unaware of all that they have not lived or seen or known. It is worth taking a moment, therefore, to consider what judges who are raised and socialized by dominant culture would readily see in terms of “mother” and “mothering,” and what may very well be lost to them.

#### A. BRANDING THE “GOOD MOTHER”

According to statistical studies, we have made steady progress away from an antiquated ideal of a two- (hetero) parent household in which mom stays at home and dad provides financial support for the family.<sup>103</sup> This is not to say, however, that men and women entering the workforce, or entering relationships in different combinations and with varying frequency, has opened the door to a revolution in terms of who can mother and what mothering looks like. Consider that many courts use a primary caregiver heuristic in their BIC calculus, which, while “gender neutral [on its face] . . . essentially serves as a proxy for motherhood since most primary caregivers are women.”<sup>104</sup> California, for example, was the first state to pass a joint-custody statute in 1979; yet a 1990s study showed that 70% of California custody awards were made to mothers.<sup>105</sup> In another study, researchers found that the majority of judges in Indiana still used the abolished Tender Years Doctrine, and, where the doctrine was employed, mothers were awarded custody 91.7% of the time.<sup>106</sup> As recently as 2019, a study concluded that judges awarded mothers half (.5) a day more time on average than they awarded fathers, a decision that would, over the course of a year, give the mother about a month more custodial time than the father. Using the same fact patterns, lay subjects only awarded mothers .15 more days.<sup>107</sup>

Common perceptions of “mothers” and “mothering” remain captive to how they are depicted and portrayed by the media. The campaign to name and frame

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to-raise-awareness-for-sons-rare-disorder/; Lena Wilson, *When Moms Attack*, NY TIMES (Feb. 12, 2020), <https://www.nytimes.com/2020/02/12/movies/the-lodge-bad-mothers.html>.

103. “The 1950s model of a two-parent household in which only one parent worked outside the home has long faded into obscurity. Today a child raised in such a household is in a distinct minority. In March 2002, only 23.7% of all children in the United States lived with two parents and had only one parent in the labor force.” Martin H. Malin & Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. PA J. BUS. L. 175, 190 (2008); see also Sean G. Massey et al., *Modern Prejudice and Same-Sex Parenting: Shifting Judgments in Positive and Negative Parenting Situations*, 9 J. GLBT FAM. STUD. 129, 130 (2013) (“The number of same-sex headed households in the United States has grown steadily over the past 20 years. The 2010 U.S. Census puts the number of same-sex couples who are living together at 646,464 (131,729 same-sex married couple households and 514,735 same-sex unmarried couple households.)”); Bartlett, *infra* note 114, at 884.

104. Caulley, *supra* note 64, at 416.

105. *Id.* at 417.

106. *Id.* at 418.

107. Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, 10 SOC. PSYCHOL. AND PERSONALITY SCI. 227, 231 (2019).

“good mothers” began in the 1980s in an effort to “re-domesticate” the mother after the waves of feminism had encouraged record numbers of women to the shores of higher education and the workplace.<sup>108</sup> As one author put it:

Women demanded equal access to employment and pay, divorce had lost its stigma, and the cult of motherhood and domestic bliss had begun to lose its sheen. By the 1980s, however, with Ronald Reagan in the office and evangelical Christianity at the height of its political influence, conservatives were mounting efforts to roll back these changes and shore up the old domestic order.<sup>109</sup>

Moreover, a dramatic increase in books on mothering invited women to consider that returning to domestic life would be to return to an “unselfish, loving” space free of “consumerist mentalities.”<sup>110</sup> Between 1970 and 1980, only twenty-seven books were published on mothering; yet between 1980 and 2000, 773 books were published, an average of 386 books a year.<sup>111</sup> These books and countless other campaigns and marketing strategies set about constructing a new “momism” by advising, flattering, warning, and selling things to women.<sup>112</sup> At the same time, if wooing mothers softly and incessantly did not work, then scaring them might. There was also a boom in prosecutions of daycare providers, many of which “drew on long-standing [utterly uninformed] anxieties about homosexuals’ [allegedly having] a predisposition to pedophilia.”<sup>113</sup>

In concert with the fashioning of mothers and the hysteria around the dangers of making a parenting mistake, courts were removing children from their mothers’ custody for perceived missteps from this child-focused, homemaker ideal. Cases well into the 1980s and 1990s removed children from their mothers’ custody because courts questioned their “judgment” or “priorities” in light of their engagement in extramarital affairs, their desire for social lives and sex lives, and/or their pursuit of a career.<sup>114</sup>

108. SUSAN DOUGLAS & MEREDITH MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* 9 (2004).

109. RICHARD BECK, *WE BELIEVE THE CHILDREN*, xxiv (2015).

110. See Susanna Martinez Guillem & Lisa A. Flores, *Maternal Transgressions, Racial Regression: How Whiteness Mediates the (Worst) White Moms*, in *MEDIATED MOMS: CONTEMPORARY CHALLENGES TO THE MOTHERHOOD MYTH* 80 (Heather L. Hundley & Sarah E. Hayden eds., 2016).

111. DOUGLAS & MICHAELS, *supra* note 108, at 8–9.

112. *Id.* at 8, 240–42; Claire Cain Miller, *The Relentlessness of Modern Parenting*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/upshot/the-relentlessness-of-modern-parenting.html>.

113. BECK, *supra* note 109, at xxiv, 139; see also Bernard Baran, *Mass Exoneration* (Nov. 18, 2018), <https://www.massexoneration.com/bernie.html> (describing the wrongful conviction of “Bernie” for child sexual assault in a Massachusetts daycare).

114. See generally Katharine T. Bartlett, *Comparing Race and Sex Discrimination In Custody Cases*, 28 HOFSTRA L. REV. 877, 884, n.35 (considering how the intersection of race and gender informed court decisions); D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark’s Double Bind*, 6 HASTINGS WOMEN’S L.J. 295, 302–04 (1995) (discussing several cases of divorced lawyer-mothers, an “endangered species”).

In recent years, the energy and commitment to the mythical mommy has not abated, just changed form. In today's media market, mothers are assaulted with literacy campaigns that assure them that their child's outcomes exist in a binary, and what stands between the child's "success" and a future of digging ditches is mothers and their selfless availability for hours of phonics and reading.<sup>115</sup> Bloggers aim to help mothers with these and myriad other useful tips; so many tips that an estimated 4.4 million bloggers are busy.<sup>116</sup> And "[w]hile this kind of intensive parenting—constantly teaching and monitoring children—has been the norm for upper-middle-class parents since the 1990s, new research shows that people across class divides now consider it the best way to raise children, even if they don't have the resources to enact it."<sup>117</sup>

One observes an unattainable portrayal of mothering for any parent. The ideal of a "doting, self-sacrificing mother" is not behind us even as working mothers are wooed and fashioned by a burgeoning labor market, and even as there persists a high intolerance for welfare assistance for stay-at-home mothers.<sup>118</sup> Mothers are stylized and advertised as the primary "socializers" of their children, a concept that depicts "mother" as an amalgamation of child psychologist, occupational therapist, linguist, and ever-patient playmate.<sup>119</sup> While the "mommy myth" creates an existential trap for many parents, there are undeniable privileges for those who appear to conform—or aspire to conform—to its standards.<sup>120</sup> But

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115. See Suzanne Smythe, *The Good Mother: A Critical Discourse Analysis of Literacy Advice to Mothers in the 20th Century* 4 (May 2006) (unpublished Ph.D. thesis, University of British Columbia), available at <http://dx.doi.org/10.14288/1.0105017> ("[This mothering] is characterized by the increased pressure and expectations for mothers to raise literate, 'successful' children, hold down productive jobs, support their communities, manage a clean and a spacious home in a 'good' neighbourhood close to good schools, and not feel stressed while doing it 'because stress is bad for your baby'" (citations omitted)).

116. Neil Patel, *9 Things We Can Learn from the Mom Blog Industry*, FORBES (Nov. 13, 2016), <https://www.forbes.com/sites/neilpatel/2016/11/03/9-things-we-can-learn-from-the-mom-blog-industry/#56287a9d2181>.

117. Cain Miller, *supra* note 112.

118. DOUGLAS & MICHAELS, *supra* note 108, at 6, 10-11. See also, *Your New Bicycle*, MOMISM (Mar. 16, 2019), <https://momism.substack.com/p/your-new-bicycle>.

119. DOUGLAS & MICHAELS, *supra* note 108, at 10; see also Smythe, *supra* note 115 (describing a project out of McGill University, where Suzanne Smythe examined childhood literacy campaigns alongside notions of hyper-mothering and concluded "that contemporary literacy advice to parents is deeply rooted in the cultural ideal of the 'good mother.' Discourses of domestic pedagogy, intensive mothering, and the 'normal' family normalize middle class domesticity and the ideal of the good mother as essential to children's literacy acquisition and academic success. The findings suggest that reliance upon women's domestic literacy work to promote children's academic success not only reproduces gender inequalities, but has implications for equity in literacy learning opportunities among diversely situated children and families").

120. See, e.g., Smythe, *supra* note 115, at 13 (saying "[t]his good mother is found in the powerful cultural image of the smiling, calm, patient, attentive, and sympathetic caregiver. She is 'involved,' always teaching, guiding, helping out at the school or play group. She is an ideal against which tired and cranky mothers like myself measure ourselves, and forever find ourselves lacking." The portrayal "grounded in assumptions that mothering is both natural, a divinely ordained and biological calling, and inherently insufficient, always in need of expert guidance, the ideology of intensive mothering perpetuates the tension between best and worst"). See also Guillem & Flores, *supra* note 110, at 81.

invitation into the segregated club of the “good mother” and enjoyment of its privileges are nearly impossible for anyone not anticipated by the frame, namely anyone who is not a white, heterosexual, socioeconomically advantaged woman.<sup>121</sup>

## B. CAUSTIC NARRATIVES AND MISSING MOTHERS

The narrative of the “good mother” is defined and reinforced in contrast to caustic counter narratives of “bad” mothers. Such a counter narrative is also a helpful distraction to prevent mothers from seriously evaluating the impossibility of the standards before them, or critiquing the inadequate systems in place to support them, such as affordable daycare or equitable and appropriate leave.<sup>122</sup> The media provides just such a foil in its vivid and consistent portrayal of a false binary between effective mother and drain-on-society mother, which is ripe with gender and racial stereotyping.<sup>123</sup> Moreover, the narrative of “good mother” thunders so loudly it drowns out the voice and view of “other” mothers. This section takes up consideration of “mothers” that are ignored or subordinated, namely black and brown mothers, non-heteronormative mothers, and fathers.

### 1. Black and Brown Mothers

The “welfare mother” is portrayed consistently as a woman of color, despite the inaccuracy of that portrayal as a matter of statistics.<sup>124</sup> She is presented as participating in an endless state of inaction and complacency, a conclusion that also defies the data.<sup>125</sup> The “welfare mom” is treated as an “object of journalistic scrutiny” and the “exemplar of a trend.”<sup>126</sup> As someone else’s descriptive object, she is not the subject of her own life, an individual with a distinct and necessary narrative; rather, the stereotyped version of her is the perfect entity against which the glossy mommy myth can be juxtaposed.<sup>127</sup>

121. DOUGLAS & MICHAELS, *supra* note 108, at 21-22.

122. *Id.* at 177.

123. *Id.*; see also Guillem & Flores, *supra* note 110, at 80.

124. DOUGLAS & MICHAELS, *supra* note 108, at 176, 180. Conservative presidents find the image irresistible. See Ryan Sit, *Trump Thinks Only Black People Are On Welfare, But Really, White Americans Receive Most Benefits*, NEWSWEEK (Jan. 12, 2018), <https://www.newsweek.com/donald-trump-welfare-black-white-780252>; Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen,”* ALL THINGS CONSIDERED (Dec. 20, 2013), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen>.

125. These images and accounts are offered as the picture of why there is welfare and welfare is a problem: welfare is the cause of their poverty; never mind that receipt of welfare is the effect of poverty. See DOUGLAS & MICHAELS, *supra* note 108, at 187.

126. *Id.* at 180, 182.

127. *Id.*; Christopher Karen, *African Americans’ and Latinas’ Mothering Scripts: An Intersectional Analysis*, 17 ADVANCES IN GENDER RES. 187, 208 (2013) (“While rich theoretical and empirical works explore women of color and their family lives, few to none ask mothers themselves to talk about their actual and ideal experiences of motherhood”). Consider, for example, the double standard of marriage as something that is necessary or ideal for mothering. A white celebrity in all her staged glory and living in an environment where she is buttressed by endless support and resources, can tell a story of her personal redemption and strength in her decision to be a single mother. The racialized object of “welfare mom,”

Other than for use in depicting “welfare mom,” mothers of color are noticeably absent from the portrayal of mothering:

In ways that are remarkably parallel to the silences and absences surrounding race, class, and privileges [in early accounts of feminism], the popular literature on and the mediated accounts of intensive mothering today rarely account for the deep investments in race and class privilege that surround both ideals of maternal perfection and the specific manifestation of intensive mothering and attachment parenting.<sup>128</sup>

Meanwhile, mothers of color face unique challenges in terms of parenting children in a racist society, and black children displaced from their homes or parented by white families face distinct vulnerabilities.<sup>129</sup> Yet these necessary and complex conversations are rarely given voice as they are concerns not anticipated by, or taken on, in the white-centric view of mothering that predominates contemporary culture and the legal system.<sup>130</sup> Quite the opposite—a systemic preference for white parenting was perpetuated by a surge in states’ removal of black children from their black parents.<sup>131</sup> Black children comprise nearly half of the foster-care system today despite comprising one-fifth of the population of children.<sup>132</sup> Many children were taken from their home by a system that unequivocally anticipates and privileges well-resourced parenting, Anglo family constellations, and modes of discipline that are not universally used or favored by all cultures.<sup>133</sup> Black and brown families are denied a presumption of “parental fitness and valuable family ties” by the racist history of our child welfare system and systemic forces such as disproportionate poverty in black communities, the “retraction of public

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however, is scrutinized as having subjected herself, her children, and society at large to her irresponsible decision to mother a child alone. See DOUGLAS & MICHAELS, *supra* note 108, at 182; see also Serial, Season 3, Episode 2, *You’ve Got Some Gauls*, at 5:36, <https://serialpodcast.org/season-three/2/youve-got-some-gauls> (judge threatening young, black, male defendant that having any more children will be a violation of his probation).

128. Guillem & Flores, *supra* note 110. But see Cain Miller, *supra* note 112.

129. Azar & Benjet, *supra* note 2, at 249-68; Cain Miller, *supra* note 112 (citing Dawn Dow, a sociologist at the University of Maryland and her book, *MOTHERING WHILE BLACK: BOUNDARIES AND BURDENS OF MIDDLE-CLASS PARENTHOOD*); Ellen E. Pinderhughes et al., *Youth of Color in Care: Intersecting Identities and Vulnerabilities*, *HANDBOOK OF CHILDREN AND PREJUDICE*, 353-373 (2019); Rochau Meadows-Fernandez, *The Stress of Parenting While Black Can Take a Toll on Mental Health*, *THE ROOT* (Mar. 15, 2018), <https://www.theroot.com/the-stress-of-parenting-while-black-can-take-a-toll-on-1823734422>.

130. Azar & Benjet, *supra* note 2, at 249-68; Cain Miller, *supra* note 112; Pinderhughes et al., *supra* note 129; Meadows-Fernandez, *supra* note 129.

131. See ROBERTS, *supra* note 68, at ix.

132. ROBERTS, *supra* note 68, at vi.

133. See generally Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 *YALE J.L. & FEMINISM* 317 (2014); Pinderhughes et al., *supra* note 129, at 353-373; Azar & Benjet, *supra* note 2, at 249-68; ROBERTS, *supra* note 68, at ix. There are inescapable connections between this trend and the outcome for Paulette. See *infra* note 198.

assistance,” the school-to-prison pipeline, and the new Jim Crow.<sup>134</sup> The effect of these forces has wreaked havoc on black families.

Black and brown families are so often denied the presumption of basic fitness that courts find it a near impossible leap to credit access to black parenting as an affirmative plus in the BIC calculation.<sup>135</sup> Not until 1984, when a white woman lost custody of her children because she married a black man, did the Court in *Palmore v. Sidoti* condemn “race-matching” in custodial decision making.<sup>136</sup> Prior to this decision, it was not at all uncommon for white women to lose custody of their white children when they married black men.<sup>137</sup> While *Palmore* represented an important step for the courts in outlawing overt racist stereotyping of a black man or the white woman who would choose to be with him, it would be a mistake to interpret the rejection of “race-matching” for the proposition that courts cannot—or should not—see color. Such a basic analysis would forestall careful and nuanced consideration of how assuring a child access to the parent of the same race may be important for their physical and psychological care.<sup>138</sup> Denial of these arguments have routinely subordinated the efforts of black and brown parents to raise their children.<sup>139</sup>

## 2. Non-Heteronormative “Mothers”<sup>140</sup>

Mothers of color are not the only faces missing or mischaracterized in the portrayal of ideal mothers. While there has been slow progress toward the acceptance

134. ROBERTS, *supra* note 68, at vii, 67; Perry, *supra* note 91, at 52-53.

135. See, e.g., Adoption of Azziza, 82 Mass. App. Ct. 1106 (2012) (noting that “[t]he father is not a proxy for the tribe; there is no evidence in the record that contact with the father would result in a greater sense of cultural or racial identity”); Adoption of Isadore, 84 Mass. App. Ct. 1133 (2014) (finding unpersuasive the father’s claim “that the judge erred by not considering his racial heritage” because he failed to show that “he would be the only connection the children have to their African-American heritage or that his relationship with them had a significant effect on the development of their racial identity”).

136. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

137. See, e.g., Perry, *supra* note 91, at 60-61, n.32.

138. *Position Paper on Trans-Racial Adoptions*, NAT’L ASS’N OF BLACK SOC. WORKERS (Sep. 1972) [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW\\_Trans-Racial\\_Adoption\\_1972\\_Position\\_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf).

139. See, e.g., Adoption of Persephone, 84 Mass. App. Ct. 1114 at \*2 (2013) (holding that without evidence of race of foster parents or evidence that they would be unable to meet the needs of the children to connect, the judge could not evaluate whether lower court properly considered “their need for connection to their racial and cultural heritage” on visitation order); Adoption of Eaton, 2016 Mass. App. Unpub. LEXIS 914 (affirming termination of parental rights despite mother’s argument that the “judge failed to consider evidence that the [white] potential adoptive mother. . .experienced difficulty with managing the texture of Eaton’s hair”); Adoption of Ynez, 2009 Mass. App. Unpub. LEXIS 1158, n.4, \*2 (noting that “Ynez’s mother is Caucasian and her father is African-American” and “[t]he experts agreed that the [impliedly white] foster family is actively engaged in meeting Ynez’s needs and supports her connection to her biracial heritage,” despite father’s assertion of gender discrimination and claims that the judge failed to consider possible kinship care with Ynez’s paternal [black] aunt).

140. With thanks to research assistant Monica Allard for her specific and wise contributions on queer theory and mothering in these and other sections of the Article.



of homosexuality and transgender people generally, these lived experiences are still nearly absent in consideration of mothering.<sup>141</sup> The subordinate position of these “mothers” is the result of historical perceptions of illegitimacy: homosexuals do not participate in legitimate relationships, and transgender persons do not express their gender in a legitimate way.<sup>142</sup> These perceptions of illegitimacy then crowded into the view of homosexuals or transgender persons as parents.<sup>143</sup> The inadequate regard of homosexual and transgender parents silences those parents: “[a]n erasure need not take place for us to be silenced. Tokenistic, objectifying voyeuristic inclusion is at least as damaging as exclusion. We are as silenced when we appear in the margins as we are when we fail to appear at all.”<sup>144</sup>

Correspondingly, courts continue to demonstrate a preference for heterosexuality in the application of the BIC standard and the timeless insistence on a narrow definition of sexual propriety and legitimate identity.<sup>145</sup> LGBTQ parents suffer from the notion that their parenting is either less beneficial than that of heteronormative mothers, or worse, that it is affirmatively damaging. Courts, influenced by stereotypes (conscious or subconscious) that a trans person transitioning or that a lesbian or gay relationship will confuse or distress a child, can all too easily convert the *perceived risk* of confusing or distressing a child into the *actual harm* of the distress and confusion caused by a child being alienated or removed from their parent.<sup>146</sup>

Specifically, for a child of a trans parent who is in the process of transitioning after their child’s birth, depending on the child’s age, the child may of course need time to process this transition. However, the child is arguably better situated

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141. Massey et al., *supra* note 103, at 280 (discussing how rate of approval for same-sex parenting appears to track with growth in the number—ergo visibility—of same-sex households); Rebecca L. Stotzer et al., *Transgender Parenting: A Review of Existing Research*, UCLA: THE WILLIAMS INST. 16 (2014), <https://escholarship.org/uc/item/3rp0v7qv> (highlighting areas for needed research).

142. Michelle Bograd, *Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation, and Gender*, 25 J. OF MARITAL AND FAM. THERAPY 275, 280 (2007).

143. Massey et al., *supra* note 103, at 130; Stotzer et al., *supra* note 141, at 16. Consider, for example, that in both a 2007 study and a 2010 study, only 12% of Americans surveyed thought gay and lesbian couples raising children was a good thing. In the 2007 study, 52% affirmatively felt the trend was a bad thing—in 2010, those holding this negative view only fell to 42%. See Massey et al., *supra* note 103, at 131. In contrast, several 2011 studies suggest attitudes toward gays and lesbians have been improving and, perhaps relatedly, so have attitudes toward parenting by homosexuals. See *id.*

144. See Bograd, *supra* note 142, at 275 (citing Kimberlee Crenshaw, *Race, Gender, and Violence Against Women*, in *FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW*, at 116 (Martha Minow ed., 1993)); see also Lorelei Carpenter & Helena Austin, *Silenced, Silent, Silent: Motherhood in the Margins*, 13 QUALITATIVE INQUIRY 660, 662 (2007) (describing how the notion of “so much more to say” acts as “a means for silencing mothers;” certain things “remain[] unsaid” or are “drowned out by what is being said”).

145. Beth A. Haines et al., *Making Trans Parents Visible: Intersectionality of Trans and Parenting Identities*, 24 FEMINISM & PSYCHOL. 238, 238-39, 244 (2014), <https://doi.org/10.1177/0959353514526219>.

146. *Id.* at 243 (“For example, parents reported that their trans identity was used against them in conflicts over visitation or custody. Fear of or experienced discrimination in family court is a major stressor that can interfere with trans parents’ ability to parent.”).



to make observations, ask questions, and reconcile the changes if the child is with the transitioning parent.<sup>147</sup> Further, for a child who themselves identifies as LGBTQ+, family engagement with the queer community may actively benefit the child; while it is possible for a cisgender and heterosexual parent to be “supportive” of a child’s emerging gender identity and sexuality, they may not be in the best position to do so.<sup>148</sup> Meanwhile, there are measured, higher rates of abuse and family rejection of LGBTQ+ youth tied to their gender identity and sexuality. These youth are overrepresented in the foster-care system, experience more movement between foster-care placements, and are more likely to be relegated to a group-home setting.<sup>149</sup>

The rhetoric of lesbian and gay parenting as damaging stoked the arguments against same-sex marriage.<sup>150</sup> Throughout the twentieth and into the twenty-first century, courts have denied custody or visitation to lesbian women.<sup>151</sup> Prior to *Obergefell v. Hodges*, thirteen states did not allow LGBTQ+ families to adopt through the state foster-care system; still today, LGBTQ+ men and women are barred from adoption in Mississippi, and several states allow private adoption agencies to decline service to any person or couple whose lifestyle conflicts with “sincerely held religious beliefs.”<sup>152</sup>

Meanwhile, transgender parents often suffer from brutal recriminations and discrimination.<sup>153</sup> Currently, there are only six states that expressly prohibit discrimination against transgender parents, making trans rights unstable in most states.<sup>154</sup> LGBTQ+ parents provoke an ire that is related to—though more seismic than—the beliefs that fuel the doubt or denial of fathers’ capacity to mother.

147. *Id.* at 244 (quoting a 2006 study finding that children need to “‘transition’ as well; they need time to process their own feelings and comprehend the loss of a parent’s previous gendered identity.”).

148. Sabra L. Katz-Wise, *Lesbian, Gay, Bisexual, and Transgender Youth and Family Acceptance*, 63 PEDIATRIC CLINICS OF NORTH AMERICA, 1011, 1014 (2016) (discussing the importance of parent-child attachment and youth dependence on adults, “especially parents,” both to assist them with meeting developmental demands and to guide their personal experiences in various domains and settings.”).

149. Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, THE WILLIAMS INST. (August 2014), [https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf).

150. Glenn Stanton, *Key Findings of Mark Regnerus’ New Family Structure Study*, FOCUS ON THE FAMILY (Oct. 6, 2012), <https://www.focusonthefamily.com/faith/key-findings-of-mark-regnerus-new-family-structure-study/> (providing favorable commentary about the controversial Regnerus study that purported to conclude that, as compared to “off-spring from married, intact mother/father homes, children raised in same-sex homes are markedly more likely to” have negative social and educational outcomes).

151. *See, e.g.*, *Burns v. Burns*, 560 S.E.2d 47 (2002); *Bezio v. Patenaude*, 410 N.E.2d 1207 (1980); *see also Teegarden v. Teegarden*, 642 N.E.2d 1007 (1994) (striking down trial court conditions and declaring homosexuality as insufficient basis for establishing parental unfitness, but noting that “flagrant” homosexuality might be a problem and affirming practice of scrutinizing the matter).

152. Rebecca Beitsch, *Many States Still Prohibit Gay Adoption*, GOVERNING (Aug. 19, 2015), <https://www.governing.com/topics/politics/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-in-some-states.html>.

153. Stotzer et al., *supra* note 141, at 16 (referencing *Daly v. Daly*, 715 P.2d 56 (1986); *Magnusun v. Magnuson*, 170 P.3d 65 (Wash. Ct. App. 2015)).

154. *Id.* at 4 (CA, CT, NJ, NM, NY, and RI).

LGBTQ+ families, which include families where there are two mothers, or a mother who was or “should have been” a father (trans woman), a father who was or “should have been” a mother (trans man), or two fathers and no mothers, are cast aside as “pseudo families.” These families defy the dominant narrative that there must be a mother and that she will be a cis heterosexual, a known and static commodity.<sup>155</sup>

### 3. Fathers as “Mothers”

Meanwhile, in all the discussions of what children need and how those needs must be attended to—from children’s books to popular media to “what to expect when you’re expecting”<sup>156</sup>—there is little to no discussion of the role of fathers.<sup>157</sup> Consider a popular pastime: judging other people’s parenting. This activity offers a ripe opportunity to crucify fathers right along with mothers, yet popular media reactions and even prosecutions often home in entirely on the mother’s role in the perceived transgression. From reactions to reality television stars, like “Mama June” and the various “Real Housewives,”<sup>158</sup> to cases of prosecution for reckless parenting and the media coverage that follows, one has to look hard to find mention of the fathers of these children, if there is any mention at all.<sup>159</sup> While the focus on mothers smacks of the larger epidemic of finger-pointing at failed mothering as a warning to all mothers who may falter, the exclusive focus on mothers hurts fathers, too.

When fathers are excluded from the description of caring for children, even the *critique* of a parenting choice, the default position that anticipates their absence is reinforced. A likely source of this default position is the statistical reality that one-third of children in the United States do not live with their biological fathers,<sup>160</sup> and studies have consistently shown that there is marked inequity between the involvement of mothers and fathers in the one-on-one interactions

155. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2331 (2017), <https://www.yalelawjournal.org/article/the-nature-of-parenthood>; Ramona Faith Oswald et al., *Decentering Heteronormativity: A Model for Family Studies*, SOURCEBOOK OF FAMILY THEORY AND RESEARCH 144–46 (2005) (discussing the “gender binary” and “sexuality binary” of heteronormativity).

156. Now in its fifth edition and still featuring a picture of a coiffed white woman on the cover.

157. See e.g., Anderson & Hamilton, *supra* note 101 (studying the portrayal of fathers in children’s books to explore stereotypes of fathers as absent or inept).

158. See, e.g., Jaclyn Hendricks, *Teresa Giudice Slammed Over 9-year-old’s Birthday Outfit*, PAGE SIX (Sep. 19, 2018), <https://pagesix.com/2018/09/19/teresa-giudice-slammed-over-9-year-olds-birthday-outfit/>. See also Sharon Mazarella, “It is What It Is”: Here Comes Honey Boo Boo’s “Mama” June Shannon as Unruly Mother, in MEDIATED MOMS: CONTEMPORARY CHALLENGES TO THE MOTHERHOOD MYTH 125 (Heather L. Hundley & Sarah E. Hayden eds., 2016).

159. See e.g., Kari E. Hong & Philip L. Torrey, *What Matter of Soram Got Wrong: “Child Abuse” Crimes that May Trigger Deportation Are Constantly Evolving and Even Target Good Parents*, HARVARD CIV. RTS.-CIV. LIB. L. REV. 54, 64 (2019) (discussing cases in Montana and Florida where mothers were arrested and criminally charged for leaving their children at malls and parks unsupervised).

160. Saijun Zhang & Tamara Fuller, *Neighborhood Disorder and Paternal Involvement of Nonresident and Resident Fathers*, 61 FAM. RELATIONS 501, 501 (2012).

with their children.<sup>161</sup> However, the problem is that these truths are cast as inevitable, elemental, and irreversible. Even in situations where men are poised and asking to take full and complete responsibility, there is a gravitational pull, as we will see in Norman's case, to ask: yes, but where is the child's mother?<sup>162</sup>

Black men are particularly vulnerable to gendered stereotyping as they swim upstream against legalized disenfranchisement: disproportionate incarceration rates,<sup>163</sup> loss of right to vote due to felony convictions,<sup>164</sup> high rates of unemployment,<sup>165</sup> and pay inequity.<sup>166</sup> These inequities often leave black fathers on their back foot in the eyes of the court and create the perception that they are not capable caregivers.<sup>167</sup> This notion is insensitive and myopic when applied to fathers besieged by such challenges; it transcends to levels of repugnancy when it is applied to all black men in a stereotypical way regardless of their current circumstances. The notion of physical and emotional distance between fathers and their children, or of their lack of prowess or interest in "mothering," is unfortunate given the numerous studies—not to mention personal narratives of children and fathers—that link father-child closeness and fathers' assumption of parenting responsibilities with children's social, psychological, cognitive, and behavioral well-being.<sup>168</sup>

The power of these narratives has had tangible, real-world effects on case outcomes where the dominant culture may conflict with, or presuppose, a litigant's lived experiences. If we recognize that judges—our fact finders—are sitting in the world described above, we can anticipate how this worldview may guide what they will see and hear and credit, and by extension, how they will apply the BIC standard.<sup>169</sup>

161. *Id.* at 502–03.

162. *See* In the Interest of M.M.M and S.H.M, 428 S.W.3d 389 (Tex. Ct. App. 2014). The father of twins sought declaratory judgement that the gestational surrogate did not have a parental relationship with the children, nor standing to pursue rights to the children. *Id.* Yet, the court ruled in favor of the gestational mother's motion for summary judgement, thus adjudicating her as mother. *Id.*

163. *Criminal Justice Fact Sheet*, NAACP (Accessed Feb. 13, 2020), <https://www.naacp.org/criminal-justice-fact-sheet/>.

164. Jennifer Rae Taylor, *Jim Crow's Lasting Legacy at the Ballot Box*, THE MARSHALL PROJECT (Aug. 20, 2018, 10:00 P.M.), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box>.

165. *Labor Force Characteristics by Race and Ethnicity, 2018*, U.S. BUREAU OF LABOR STATISTICS (October 2019), <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm>.

166. *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity*, INST. FOR WOMEN'S POL'Y RESEARCH (March 2019), [https://iwpr.org/wp-content/uploads/2019/03/C478\\_Gender-Wage-Gap-in-2018.pdf](https://iwpr.org/wp-content/uploads/2019/03/C478_Gender-Wage-Gap-in-2018.pdf).

167. ROBERTS, *supra* note 68, at 264.

168. *Id.*

169. Critical theorists have been noticing for years that certain needs are normed and therefore anticipated and privileged, while others are unaccounted for or expressly disadvantaged. *See* Bell, *Who's Afraid of Critical Race Theory?*, *supra* note 80, at 899–900 (citing Stanley Fish in stating, "critical legal studies' view of legal precedent is not a formal mechanism for determining outcomes in a neutral fashion—as traditional legal scholars maintain—but is rather a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading

## C. NORMAN AND PAULETTE AS “MOTHER”

Let us consider Norman’s and Paulette’s cases. While race, gender, and heteronormativity cannot be dispositive factors in a custody determination, such criteria remain deeply imbedded in the BIC analysis.<sup>170</sup> Permissible consideration of race and its role in family identity and a child’s upbringing is risky, as being intentional and respectfully curious about race is very complicated.<sup>171</sup> The far greater risk, however, is the importation of unconscious assumptions and biases concerning race as it relates to the care and control of children.<sup>172</sup> Layered on top of this worry are those biases related to gender and the associated expectations for role within the family unit.

## 1. Norman

In Norman’s case, there was testimony that he felt deeply connected to his Jamaican roots and wished for his daughter to know that connection as well. Norman testified to his pleasure and sense of duty in taking care of his ailing parents, his closeness with his family, and his desire for his daughter to know her family and her heritage. He spoke of his and his daughter’s mutual love for Jamaican cuisine, including their practice of learning to cook dishes together. In support of his stated desire to parent more, Norman described how he and his daughter spent time together, how they cooked, walked their dog, and were day-dreaming about growing her “slime” business (a “business” that at this stage sweetly consisted of her making a mess and passing the treasured slime off to her friends at recess). He explained that he enjoyed working fewer hours and felt he could get by on the reduced salary, since more equal custodial control of his daughter eliminated the need to pay for childcare, resulting in a downward adjustment in child support. Norman testified that he did not plan to try to work more

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tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law.”).

170. See *Jones v. Jones*, 542 N.W.2d 119, 123–24 (S.D. 1996) (allowing consideration of race as it relates to a child’s ethnic heritage and the parent’s ability to expose the child to it); see also *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (N.Y. App. Div. 1997) (allowing that race is a factor to be considered along with other considerations of family life); Perry, *supra* note 91, at 55.

171. Consider the National Association of Black Social Workers (NABSW) which, in a 1972 position statement, offered a collective opinion that white homes were not suitable for black children, but moreover unnecessary if the child welfare system were to prioritize reunification or failing that family placements and acceptance of black adoptive families. See *Position Paper on Trans-Racial Adoptions*, NAT’L ASS’N OF BLACK SOCIAL WORKERS (Sept. 1972), [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW\\_Trans-Racial\\_Adoption\\_1972\\_Position\\_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf). As recently as 2014, leadership in the NABSW clarified or expanded their position to state that “families considering interracial adoption should be prepared by their agencies to understand the pervasive impact of race on achievement, self-esteem, self-concept and mental health. Adoptive parents of black children should recognize and combat the pervasiveness of institutional and individual racism. They should ensure that black children are connected to appropriate black role models, and are not racially isolated.” See J. Toni Oliver, *Adoptions Should Consider Black Children and Black Families*, N.Y. TIMES OPINION (2014).

172. Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 WIS. L. REV. 489, 521 (2007); Perry, *supra* note 91, at 57.

hours or find another job if instead, he could spend time with his daughter, as was his express desire. Even still, the judge made no findings of facts concerning any of this testimony so it is unclear if she noted it at all.

Here, the narrative of Norman's lived experience with his daughter, a narrative that was undisputed at trial, is entirely consistent with a 2013 study from the Centers for Disease Control and Prevention concerning the role of fathers in the lives of their children. Black fathers living with children were likely to have bathed, dressed, diapered, and helped young children with the bathroom; shared meals with their children; played with their children; transported their children to activities; assisted with homework and discussed the day's events.<sup>173</sup> They out-ranked white and Hispanic fathers in all these regards.<sup>174</sup> Of black fathers not living with their children, approximately 50% spoke to their children about their day several times a week.<sup>175</sup> They also helped children with homework at levels that outpaced white and Hispanic fathers.<sup>176</sup>

Nonetheless, Norman's testimony, even as it is situated in a statistical reality, paled in comparison to the constant messaging—the dominant narrative—about what it means to be a good father (a provider) and what it means to be a black father (absent, criminal, or ineffective).<sup>177</sup> The opposing party knew this drumbeat and beat it well, implying on cross examination that Norman was only seeking more custody to avoid child support and that his “mommy” hours were the product of a lack of productivity or drive, not the feature of a parent making a choice about use of time. Norman's choice “queered” his family because it moved them away from traditional gender roles and toward more egalitarian parenting.<sup>178</sup> A judge conscious of queer theory might see Norman's decision to spend more time in a caregiving role differently and indeed as an affirmative benefit.<sup>179</sup> For example, Norman's child will receive ample gender-role messaging from our patriarchal and sexist society, but Norman's modeling offers her an alternate model to consider as she begins to discover her own gender identity and role in the world.<sup>180</sup>

Unfortunately, these nuanced benefits of Norman's parenting style were seemingly lost on the judge. Who is to say precisely what was going through the mind of the judge in Norman's case; indeed, she herself may not have even been able

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173. Jo Jones & William Mosher, NAT'L HEALTH STATISTIC REPORT: FATHERS' INVOLVEMENT WITH THEIR CHILDREN 13-20 (2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf>.

174. *Id.*

175. *Id.* at 19.

176. *Id.* at 20.

177. See ROBERTS, *supra* note 68, at 66; see also *Serial*, *supra* note 127 (beginning 5:36, depicting a sentencing hearing illustrating the racist and gendered themes readily employed by this and many judges).

178. Oswald et al., *supra* note 155, at 148 (discussing couples who “partially queer their families” through “steadfast commitment to “mutual control over the family economy, and equal responsibility for childcare. . . gender difference no longer figures in how a family gets done.”).

179. *Id.*

180. *Id.* at 144-45, 152.

to say, because “[perceptions of African Americans as ‘dangerous, different, or subordinate . . . are lessons learned and internalized [often]<sup>181</sup> outside of our awareness.”<sup>182</sup> Norman’s case presents a strong example of how difficult it is to know with certainty if bias informed a judge’s determination. The judge did not make any antagonistic findings about Norman; rather, she made very few findings about him at all. Instead, she emphasized only the mother’s capacity and her affection, reduced Norman’s custodial time, and wrapped it all up with a bow by declaring it was in the child’s best interest. Whatever she was thinking was likely mediated through the constant messaging about black men as unreliable fathers. How else would the persuasive testimony—the heartfelt descriptions—of Norman’s role in his daughter’s life be so easily dismissed? With the rigid framing of the black father already presupposed, how easy, therefore, it might have been to deem Norman an unreliable narrator, and how easy to ignore the voice of a father if one was only listening or framing the proceedings as being about mothering.<sup>183</sup>

## 2. Paulette

Paulette’s case was also ripe for application of race and gender stereotypes. Paulette offered a clear explanation for her choices as a parent:

They cry a little bit, oh, Daddy, and he does anything they want and I have no problem saying no because I believe loving, saying no, is also part of loving and caring and protecting. I want them to be ready to the outside world (sic) and they’re going to be hearing a lot of no’s, like I have been. You know? I just got another no today on a job application. What do I do? Cry? Run to mommy? I can’t do that. I want my girls, female, like women in the world, in this United States of America, you have to be strong and I want to help prepare them for that too. Because I always tell them, you’re already very smart and you’re very pretty . . . if you are not polite. . . [and] you don’t respect Mommy and Daddy or people around you . . . that is no good.<sup>184</sup>

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181. ROBERTS, *supra* note 68, at 66. The quote is actually “completely outside of our awareness.” I do not think all of our socialization to racism is quite as invisible. I believe, rather, if we are honest, the white supremacist culture is supported by both spoken and unspoken mores. *Id.*

182. *Id.* (citing *United States v. Clary*, 846 F. Supp. 768, 780–81 (E.D. Mo. 1994) (acknowledging the racism inherent in Congress’ sentencing scheme that “gave (Black) crack offenders longer sentences than (white) cocaine offenders”).

183. See Carla Adkison-Bradley, *Seeing African Americans as Competent Parents: Implications for Family Counselors*, 19(3) *THE FAM. J.* 307, 308-09 (2011); ROBERTS, *supra* note 68, at 66; see also Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *CONN. L. REV.* 1, 24 (2000) (discussing how physical expressions are particular to different cultures due to, among other things, “display rules” that “govern the management of facial behavior in particular social settings.” “Display rules” have been shown to impede cross-cultural lie detection.).

184. Transcript of Record, Day 1, p. 123-24 (confidential source on file with author).



Her framework for discipline was one that had everything to do with her socialization as a black woman<sup>185</sup> and, specifically, her sense of raising black girls.<sup>186</sup> Where the judge was seemingly unmoved by this account,<sup>187</sup> social science researchers would not be so dismissive of Paulette. Indeed, Paulette's logic tracks with a known theme in studies of parenting by black parents.<sup>188</sup> Many black parents believe that their children have "little room for error."<sup>189</sup> This phenomenon is more pronounced for adolescents, as black adolescents are at increased risk of hostile harassment and stereotyping; meanwhile, adolescence for any child is a period of development marked by a need for, and claims at, autonomy.<sup>190</sup> The combination of these forces can provoke some black parents to use pronounced discipline with their children. Absent an understanding of this context, the choices and motivations of some black parents as they navigate a combustible period in their child's life may be foreign to a white person—especially a white judge.

In Paulette's case, however, she not only offered the context clearly to explain her exacting standards, but she also consistently and emphatically denied any corporal punishment. Surely this is the best of both worlds: an explanation of something unfamiliar with an assurance that no harm was done. Yet the judge did not hear or credit the testimony. Or, perhaps she did hear it, but made sense of it as providing an unsympathetic motive, a motive that plays into a racial stereotype that black families are "hard" on their children and always resort to physical discipline.<sup>191</sup> While this is a widely held belief, it is untrue.<sup>192</sup> Multiple studies have

185. See Shona Smith, *Acclaimed Relationship Expert Kenneth V. Hardy Leads Workshop Series on Race for BCSSW Faculty, Staff, and Students*, BCSSW NEWS (June 3, 2019), <https://www.bc.edu/content/bc-web/schools/ssw/bcssw-news/2019/kenneth-v-hardy-leads-workshop-series.html> (quoting Professor Hardy as saying "[p]eople of color have reported an explicit awareness of their race as early as age three, while white people report that awareness as occurring implicitly, and as late as in their 20s and early 30s.").

186. See Carla Adkison-Bradley et al., *Child Discipline in African American Families: A Study of Patterns and Context*, 22 THE FAM. J. 198, 203-04 (2014).

187. The judge being unpersuaded may have been the product of her being a white woman, and therefore someone less likely to know, adopt, or endorse Paulette's framework for discipline. But it is important to note that both difference and sameness in terms of identity can frustrate one's connection to the other. Not every connection between similarly raced people, for example, will be one of empathy or understanding. See JAMES FORMAN, *LOCKING UP OUR OWN* 8-9 (2017) (describing the complicated and sometimes overlapping mix of impulses black officials, including judges, displayed in the face of a surge of black criminal defendants; thus providing a thoughtful, critical reminder to resist essentialism—there is no such thing as one black experience or one judicial response). Offering another explanation, Domingo Martinez states, "[t]here is nothing more potentially hostile than the indigenous ego interpreting the laws of his conqueror upon his own people." See *Take Your Kid to Work Day*, THIS AMERICAN LIFE (Oct. 19, 2012), <https://www.thisamericanlife.org/477/getting-away-with-it/act-one-4>; DOMINGO MARTINEZ, *THE BOY KINGS OF TEXAS* (2012).

188. See Adkison-Bradley et al., *supra* note 186, at 203.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* (concluding that "[t]his finding concurs with previous research on African American disciplinary practices that show that African American parents often discuss matters with children and reserve physical discipline for more severe contextual situations").

shown that black parents often discuss matters with children and reserve physical discipline for more severe contextual situations.<sup>193</sup> Further, studies have also confirmed that, while black parents do employ an authoritarian parenting style more often than white parents, researchers have long and consistently found that, for children in black families, this parenting style is not linked with adverse behavior outcomes.<sup>194</sup> On the contrary, more authoritarian parenting may have psychologically protective aspects leading to positive developmental outcomes.<sup>195</sup>

There was plenty of evidence that suggested Paulette's telling of the facts, and supported by the research literature, held true in this case. There was undisputed evidence, cited by the judge in fact, that the children were flourishing in school, involved in loving relationships with extended family, sociable and happy in extracurricular activities, and—critically—bonded to both their parents. Yet the judge placed no value on these facts and went on to place extraordinarily punitive relief into effect. Ultimately, the judge's finding of facts provided only a tapestry of irreconcilable stereotypes of black women and girls that punished Paulette.

The judge did not credit Paulette's testimony that her husband was controlling about finances and decision making; for example, Paulette testified that he insisted on reviewing receipts from the grocery store and sent her back if she bought the wrong thing. In response, the judge stated, "I discredit your testimony where you testified that [Petitioner] was overbearing and didn't let you get a word in. You're an educated woman, you have your own bank account, indeed, you were the primary person bringing income into the family, so I don't think he overpowered you."<sup>196</sup> With these words, the judge summoned up the racist schema of black women as hard women.<sup>197</sup> Meanwhile, even while naming Paulette's education, independence, and professional presence, she did not credit these traits as important or commutable to her children. When Paulette insisted that her disciplinary strategy was focused on making the girls strong and capable of living as black girls in America, the judge could only label her discipline as cruel.<sup>198</sup> The judge's remedy for this perceived cruelty was, predictably, a script

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193. *Id.*

194. Kristin Valentino et al., *Intergenerational Continuity of Child Abuse Among Adolescent Mothers: Authoritarian Parenting, Community Violence, and Race*, 17 *CHILD MALTREATMENT* 172, 174 (2012).

195. *Id.*

196. Transcript of Record, Day 2, p. 112 (confidential source on file with author).

197. See ROBERTS, *supra* note 68, at 60-67 (offering overview of the caricatures of black mothers, from the incapable slave mother to the dysfunctional matriarch of the Moynihan report, to the addled "crack mom," to the welfare queen). Indeed, in Paulette's case, the judge even extended her critiques to Paulette's own mother: "she believes how her mother raised her was the right way because she [Paulette] has done so well. . . her job is to prepare her children for life, just the way she learned from her mother. . . but I think she went beyond any appropriate discipline." Transcript of Record, Day 2, p. 114 (confidential source on file with author).

198. In Paulette's case, the judge relied on double hearsay testimony to justify her conclusion that Paulette was a battering mother. After providing her findings of facts and conclusion of law from the bench, the judge left the parties to navigate some logistics. When she returned, she stated: "And I'm not sure whether I thought this or mentioned this during my findings of fact, I thought it was very probative

of “white supervision.”<sup>199</sup> Indeed the judge went on to say “I know that [you love your girls], and I hope that in the future, you will have a healthy, loving relationship with your children and I think that you, (sic) maybe these parenting classes and the family violence classes will get you there sooner.”<sup>200</sup>

Lived experiences, in concert with jurisprudential and societal messaging, create certain world views and orientations toward cases and clients, but many judges are blind to this reality.<sup>201</sup> When advocates argue for new ways to parent in the twenty-first century, or when they advocate for people whose identities or actions do not fit into an archetypical mold, they must inspire judges to take a wider view of themselves and of people, places, and things.<sup>202</sup> Consideration of the training and professional development of therapists surfaces concepts that can recalibrate the judiciary toward less biased, more rational, but also empathic analysis.

#### IV. COURTROOMS AND COUCHES

A trial puts the fact finder into a relationship with a litigant, and in the context of family law, this relationship is marked by a contrived intimacy with the litigant. The judge is learning about private family matters while also ostensibly acting with neutrality and objectivity. While a judge’s role and function are, of

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that [the Petitioner’s] father reported that [eldest child] reported physical discipline or physical, I don’t want to call it discipline, but reported to the grandmother that her mother was hitting her. . . that was very probative.” See Transcript of Record, Day 2, p. 116 (confidential source on file with the author). Leaving aside the double hearsay issue, closer inspection of the testimony indicates that it is not even clear what discipline or level of contact the child was describing: “Q: In [child’s] conversation, do you know if she was speaking about spanking or about some other form of physical discipline? A: We don’t know. . . Q: And. . . did you ever notice any abnormal bumps, bruises, scratches or welts on them? A: No. . . Q: and have you ever seen [Paulette] discipline the children? A: Yes. . . she basically was criticized as she uses a very harsh tone. . .” See *id.*

199. See ROBERTS, *supra* note 68, at ix (stating argument that racial inequities in the child welfare system cause “serious group-based harms by reinforcing disparaging stereotypes about Black families’ unfitnes and the need for white supervision, by destroying a sense of family autonomy and self-determination among many Black Americans, and by weakening Black Americans’ collective ability to overcome institutionalized discrimination.”).

200. The judge linked Paulette’s desires to parent with a primal urge, rather than something about which Paulette may have intentionally reasoned. She went on to juxtapose that primal urge with the ability to do so well. When after hearing an oral accounting of the judge’s findings of facts and rulings of law, Paulette spontaneously said, “I just want to be with my children.” The court replied: “I know you want to be with your children, ma’am, I think there’s probably no greater primal desire than to want to be with your children, I know that and I hope that in the future, you will have a healthy, loving relationship with your children, and I think that you, maybe with these parenting classes and the family violence classes will get there sooner. Yes?” Transcript of Record, Day 2, p. 121-22 (confidential source on file with author). This conjures up post-Emancipation sentiments: “White lamented the loss of the moral guidance that slavery provided Black mothers . . . Their purely animal passions toward their children [ ] led to horrible abuses: ‘When they are little, she indulges them blindly when she is in good humor, and beats them cruelly when she is angry.’” See ROBERTS, *supra* note 68, at 62; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

201. STEELE, *supra* note 95, at 14 (stating that “our understandings and views of the world are partial and reflect the circumstances of our particular lives”); see also Lawrence, *supra* note 9, at 380.

202. King & Weselmann, *supra* note 10, at 269.

course, quite different than a therapist,<sup>203</sup> the space judges occupy shares a feature of intimacy present in the therapeutic relationship, too. This is undeniably true in a family court, where the material discussed is of a deeply personal nature. Moreover, the context is familiar: someone is speaking, someone is listening. In listening, a therapist or judge endeavors to listen-to-learn, and specifically, to learn something about who the speaker is and the speaker's observations of the world around them. In speaking, both the therapy client and the litigant are expecting to be heard and validated.<sup>204</sup>

Those in the listening professions, such as therapists or social workers, do many things as part of their schooling and ongoing professional development to prepare to enter intimate spaces with clients. For example, therapists make decided efforts to examine their own lives in order to know themselves and critique the ways in which a sense of self may inform, but also distort, one's sense of other.<sup>205</sup> Social workers are additionally attuned to person-in-environment: the notion that one should approach examination of another person's life with a sense of humility and respectful curiosity, understanding that how people define problems, communicate, and make choices is a function of their distinct experiences, culture, and identity.<sup>206</sup> This section will lay out several principles that therapists are trained in to promote their ability to listen properly, and to investigate with curiosity and openness.

#### A. COUCHES

Therapists, in their formal training, learn about countertransference, bias, and stereotyping, all of which acknowledge the importance of self-awareness in order to gain control over one's reactions and cognition as one attends to the story of another. Those in social science also learn about "myside" bias, a worrisome bias that can distort hypotheses, what evidence is gathered, and how gathered evidence is perceived. Relatedly, therapists learn about cognitive dissonance and

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203. A judge is not someone a litigant seeks out for one-on-one conversation toward self-actualization or improved mental health and functionality. Moreover, a litigant cannot ask for referrals for a judge as they would for a therapist. They cannot go for an initial visit with a judge to see if they feel a sense of safety or rapport before committing to the judge; they simply hope for these things.

204. If a case has reached trial, it is a safe assumption that it did so because the disputes of fact prevented disposing of the case as a matter of law, so one can assume the facts are nuanced or complicated. *See, e.g.*, FED. R. CIV. P. 12(b)(6). Disputes of fact, in turn, are resolved by the fact finder making a credibility determination regarding the legitimacy of differing accounts. CRIM. MODEL JURY INSTRUCTIONS FOR USE IN THE DIST. CT. INSTRUCTION 2.120 (Admin. Office of the Dist. Ct., Commw. of Mass. 2009); MASS. SUP. CT. CIV. PRACTICE JURY INSTRUCTIONS § 1.11.1(a) (revised 2018) (discussing reality of dispute of fact in a trial and fact finders' duties therein).

205. *See* Rene T. Chapman, *Internalized Racism of the Clinician and the Treatment Dynamic*, 6:2-3 J. OF EMOTIONAL ABUSE 219, 228 (2006); Joseph Walsh, *Supervising the Countertransference Reactions of Case Managers*, 21(2) THE CLINICAL SUPERVISOR 129-30 (2002).

206. CODE OF ETHICS OF THE NAT'L ASS'N OF SOCIAL WORKERS (stating "Social workers treat each person in a caring and respectful fashion, mindful of individual differences and cultural and ethnic diversity. Social workers promote clients' socially responsible self-determination. Social workers seek to enhance clients' capacity and opportunity to change and to address their own needs.").

defense mechanisms, concepts explaining perceptions of, and reactions to, narratives and observations that conflict with one's own cognition. These frames of reference are relevant to a judicial fact-finder, who must similarly listen carefully, endeavoring not to prejudge a matter prematurely, but, eventually, to propose an intervention or offer an analysis of a situation.

### 1. Countertransference, Stereotyping, and Bias

Paradoxically, one of the keys in taking a wider view of people and their predicaments is to first take a narrow view of oneself, specifically to notice and name one's own reactions vis-a-vis another person.<sup>207</sup> Those around us "evoke a range of conscious and unconscious reactions in us."<sup>208</sup> Therapists, like all people, have their own personal histories or tendencies that may be stirred up by their work with clients.<sup>209</sup> The result for any one therapist is a flood of conscious and unconscious reactions, needs, and wishes for herself or her clients.<sup>210</sup> The field of psychology calls these reactions countertransferences.<sup>211</sup> Countertransferences will manifest as a range of reactions: affection, infatuation, hostility, ambivalence, dissociation, anxiety, etc.. A therapist's education and experience prepares them with the knowledge that their attitude toward a client can affect the alliance with a client, and in turn, the treatment outcome.<sup>212</sup> It is relatively easy, therefore, to see how negative countertransferences can become problematic.<sup>213</sup>

However, it is also easy to overlook how a positive countertransference to a client can become problematic if that countertransference goes unnoticed and unchecked.<sup>214</sup> Perceiving sameness with a client can make it easy to feel a

207. "Being a clinician on any level requires courage in managing the emotional land-mines that can develop when there is a parallel between internalized views, which are so intricately intertwined. As we unravel the tapestry of our patients' lives, we must simultaneously unravel the tapestries of our own, mending as we go along to assure that our clients are best served by whole people, willing to be real in the process, and willing to take the risk to walk with them through their experiences." See Chapman, *supra* note 205, at 227.

208. A clinician's needs and wishes may be informed by one's own personal history, or by one's understanding of their client, or general tendencies that an advocate has about a range of clients (i.e., being drawn to, or repelled by a certain client base). See Walsh, *supra* note 205, at 129–30.

209. *Id.*

210. *Id.* at 130–33; see also MICHAEL J. TANSEY & WALTER F. BURKE, UNDERSTANDING COUNTERTRANSFERENCE: FROM PROJECTIVE IDENTIFICATION TO EMPATHY 10 (1989).

211. Walsh, *supra* note 205, at 131. To understand countertransferences, one must first understand the concept of transferences. Transferences refer generally to a client's reactions to a therapeutic "other." Transferences were originally defined as "a client's projection of feelings, thoughts, and wishes onto the therapist, who comes to represent a person from the client's past." Countertransferences, in turn, originally described a therapist's conscious and unconscious reactions to a transference (a reaction to a reaction, if you will). *Id.* at 130.

212. Rebecca Linn-Walton & Manoj Pardasani, *Dislikable Clients or Countertransference: A Clinician's Perspective*, 33(1) CLINIC SUPERVISION 100, 101 (2014).

213. Perhaps you find the client tedious or provoking. It is difficult to lean into the relationship and establish a therapeutic alliance in that case. This lack of alliance, in turn, makes it hard to learn about the client.

214. See *Substance Abuse Treatment for Persons with Child Abuse and Neglect Issues, Treatment Improvement Protocol (TIP) Series, No. 36.*, CTR. FOR SUBSTANCE ABUSE TREATMENT (last visited May

connection to the client.<sup>215</sup> The easy or pleasant feelings that flow from the perceived connection carry a risk that the counselor over-identifies with the client. A counselor may assume her own assessment of a given situation is naturally the same as the client's, which in turn, forecloses curiosity about the client's own assessment and observations.<sup>216</sup> A focus on sameness wrongly denies the reality that "culture is enough of an abstraction that people can be part of the same culture, yet make different decisions in the particular."<sup>217</sup> Where the therapist feels similar to her client, or bonded to her client, there is a risk that if the client acts in a way that is discordant with the assumed course of conduct, the client violates some protocol they did not even know they were subject to. They may step out of the role of similarity with the therapist by acting very differently than her, or they may suddenly act out of character for someone who the therapist has type-cast.<sup>218</sup>

When a client acts in a way that is unfamiliar to their therapist or the therapist perceives difference between themselves and the client, other countertransference risks are present. Where counselors perceive themselves as different from their client, there is an increased risk that they will be blind to certain aspects of the client's story or identity, or that they will interpret something in a manner consistent with a patent or latent bias against the perceived difference.<sup>219</sup> There is also a tendency to juxtapose differences against one's own experiences in a way that favors one's own self as having the correct or natural orientation.<sup>220</sup> The other identities or behaviors become just that: the *other*, or a deviation. And unsurprisingly, judgement is often quickly on the heels of noticing otherness.<sup>221</sup>

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15, 2019), <https://www.ncbi.nlm.nih.gov/books/NBK64902> (stating counselor "loses her objectivity and becomes overwhelmed, angry, or bereft when hearing a client's story.").

215. See Linn-Walton & Pardasani, *supra* note 212, at 101. See also EXAMINED LIFE, at 24:30 (Zeitgeist Films 2010) (Kwame Anthony Appiah, a philosopher, discusses the challenge of connecting to and caring for other people: "yeah, we love everyone, but we want them to become like us to love them properly.").

216. See CTR. FOR SUBSTANCE ABUSE TREATMENT, *supra* note 214 (discussing "many counselors' earnest desire to help, there is a danger of over interpreting nonspecific sequelae").

217. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 41 (2001). Another source of affinity with a client is the tendency to become aligned with a client's cause. While this buy-in can be positive for rapport building and stamina within a difficult case, it sometimes creates a trap for a therapist. "My poor client!" can turn into "my victimized/helpless/blameless client," who the counselor feels emotionally bonded to in some way. See Batt-Rawden et al., *infra* note 281, at 1171 (arguing that an important aspect of empathy is "'detached concern,' or the ability of one individual to understand the experiences of another without invoking a personal emotional response").

218. Laurence Bennett Green, *The Value of Hate in the Countertransference*, 34(2) CLINICAL SOC. WORK J. 187, 190 (2006).

219. See Bryant, *supra* note 217, at 68.

220. See Green, *supra* note 218, at 197; STEELE, *supra* note 95; Meytal Nasie et al., *Overcoming the Barrier of Narrative Adherence in Conflicts Through Awareness of the Psychological Bias of Naïve Realism*, 40 (11) PERSONALITY AND SOC. PSYCHOL. BULL. 1543 (2014).

221. See e.g., Sidney Coren, *Mr. Trump: How I Learned to Stop Worrying and Love the Patient-Aggressor*, 74 J. CLIN. PSYCHOL. 734, 735 (2018) (reconciling difference in opinion on Trump); ELLIOT ARONSON & CAROL TAVRIS, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* 124 (2007).



Therapists have long noted that their “countertransference[s] may coincide with [racial] stereotypes that delay the analysis [of the client’s needs].”<sup>222</sup> Similarly, the profession has wrangled with countertransferences based on a client’s racist transferences, acknowledging how fraught they are and how threatening to a therapeutic alliance.<sup>223</sup> For decades, therapists have acknowledged the therapeutic value in exploring racial tensions and the attendant transferences and countertransferences.<sup>224</sup> This is in contrast to the ways in which other professions seem to insist on colorblindness as the gold standard of interacting with others. During law school, when students are taught to “think like *a* lawyer” (because of course there is only one type of lawyer to be and he thinks one way), seminal cases in constitutional law, tort, civil procedure, and property are trotted out in case books with little to no discussion of the race or gender of the litigant most affected by the case.<sup>225</sup> The law, its doctrine, and its practice are often presented as colorblind or raceless.<sup>226</sup>

Bound up in the discussion of how our minds make sense of others are the topics of unconscious biases generally and stereotypes specifically. Bias and stereotypes can be understood as “cognitive shortcuts.”<sup>227</sup> Our minds create categories and classifications to make sense of the enormous amount and variation of data before it.<sup>228</sup> Stereotyping involves ascribing characteristics and behaviors to

222. See Judith C. White, *The Impact of Race and Ethnicity on Transference and Countertransference in Combined Individual/Group Therapy*, 18 GROUP 89, 97 (1994) (offering the following example: “[a white Jewish client] denying prejudicial feelings toward the therapist corresponded to the therapist’s wish to perceive her as good and accepting of the therapist’s blackness [counter-transference]. The ethnic stereotype of Jews as being more accepting of blacks fostered a sense of false closeness with the therapist and interfered with [the therapist’s] analysis of [the client’s] need to be accepting [as it played into the client’s presenting problem, namely her unwillingness to assert her own needs, “her passivity and her masochism”] . . .”).

223. Chapman, *supra* note 205, at 226 (stating “[m]y thoughts were of controlling my own rage. [The client] conveyed a feeling . . . of my incompetence, and his being unsure of my efficacy, all hanging on my being Black. It hit too close to home. . . I did not want to treat him. I was tired. I wanted to withdraw and I was relieved when the session ended.”).

224. See, e.g., Janice E. Ruffin, *RACISM as Countertransference in Psychotherapy Groups*, 11 PERSP. IN PSYCHIATRIC CARE 172, 178 (1973).

225. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Taught as a seminal case for school equality and for consideration of the Equal Protection Clause, classes do not necessarily go on to consider how implementation came at great risk to black communities, nor how the decision resulted in the dismissal or forced resignation of legions of black teachers and administrators. See Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 471 (1976) (discussing civil rights lawyers’ determination to implement *Brown* with school desegregation via busing and other dislocating methods despite “[t]his stance involv[ing] great risk for clients whose educational interest may no longer accord with the integration ideals of their attorneys.”); Madeline Will, *65 Years After “Brown v. Board,” Where are All the Black Educators?*, ED. WEEK (Apr. 9, 2020), <https://www.edweek.org/ew/articles/2019/05/14/65-years-after-brown-v-board-where.html>.

226. Margaret M. Russell, *Beyond “Sellouts” and “Race Cards:” Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 768 (1997).

227. Malin & Biernat, *supra* note 103, at 176.

228. *Id.*; ARONSON & TAVRIS, *supra* note 221.

members of a given classification category.<sup>229</sup> The problem is that stereotypes “bias[] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.”<sup>230</sup>

So, we can just be good people and not stereotype, right? Unfortunately, stereotyping is not just a habit of people with known prejudice: it is often subconscious.<sup>231</sup> Stereotypes are “cognitive rather than motivational.”<sup>232</sup> Many biases, particularly those based on race, class, or gender, are likely to be “the implicit, unconscious ways in which our own cultural heritages . . . influence our world view and our deep-seated assumptions about how the world works.”<sup>233</sup> Understanding the role that their own attitudes, opinions, and beliefs have on them helps therapists listen as closely as possible to their client, as opposed to listening through a filter of a “person prototype” or “social schema[.]”<sup>234</sup> Professional training for therapists is designed to make the unconscious conscious, particularly around issues of diversity and identity. These concepts seem particularly important for judges who will wrangle with the notion of “mothers” and “mothering”. Mothers, after all, have a strong public prototype and yet are acutely personal and contextual to one’s own experience with mothers and cultural notions of mothering.<sup>235</sup>

## 2. Myside Bias and Cognitive Dissonance

Bias is not just an issue of first impression—such as perceiving people initially vis a vis a prototype or opinion.<sup>236</sup> Instead, it infects ongoing considerations of people and analysis problems due to a phenomenon called “myside bias.” Therapists’ attention to their own attitudes, opinions, and beliefs is also helpful,

229. Malin & Biernat, *supra* note 103, at 176.

230. *See* Krieger, *supra* note 7, at 1188.

231. *Id.* at 1161; Malin & Biernat, *supra* note 103, at 177.

232. Krieger, *supra* note 7, at 1194.

233. Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL* 51 (Marjorie A. Silver ed., 2007).

234. *See* Krieger, *supra* note 7, at 1202–04; *see also* Chapman, *supra* note 205, at 222–23 (attention to countertransferences asks therapists to notice what impressions their clients make on them and what are the varied explanations for their reactions to their clients.) “It is through transference that we learn the most about the unconscious processes of our patients and their needs. They enter the treatment room, a special and private space, and fill it with their lives. The family and social dramas emerge in that room, that space. But the therapist is there as well, providing a screen for the viewing of this live production. One aspect of this screening is the content of the material itself; the other is the nature of the screen and the ability to show what is projected. Ideally, the screen displays without distortion. Unlike the screening room, however, there is a dynamic between the production and screen that bears on the treatment. Being human, both the producer of the material and the screen have distortions. The working-through process of these distortions is what leads to the change. The distortions in content we call transference, and in the screen the countertransference.” *See id.* at 226.

235. *See* Carpenter & Austin, *supra* note 144, at 661 (“In contrast to the motherhood myth that asserts its own naturalness, we recognize motherhood as a culturally and historically specific set of discursive practices, a lived normativity, shot through with the discourses of child development, psychology, education, religion and spirituality, and medicine.”).

236. Krieger, *supra* note 7, at 1188–91.

indeed critical, in making sure that therapists are thinking rationally as they undertake ongoing evaluation of issues, quandaries, or crises before them.<sup>237</sup> The studies that identified and named myside bias found that people not only evaluate evidence, but also generate subsequent evidence and test hypotheses “in a manner biased toward their own prior beliefs, opinions, and attitudes.”<sup>238</sup> Myside bias, then, is a cognitive deficit to rational thinking, because “critical thinkers should be able to decouple their prior beliefs and opinions from the evaluation of evidence and arguments.”<sup>239</sup>

A related concept is cognitive dissonance. Our cognitions are our thoughts, which are basically a bundle of our attitudes, opinions, and beliefs. Cognitive dissonance, in simplest terms, refers to the tension someone experiences when two cognitions are in competition with one another.<sup>240</sup> During their practice and research, therapists are likely to hear a great many narratives and make a great number of observations that do not align with their understanding of the world or their expectations. Therapists are taught to consider that their reactions to narratives and observations may well have to do with the cognitive dissonance they are experiencing and the symphony of defense mechanisms and confirmation biases that may follow.<sup>241</sup>

The central premise of cognitive dissonance is that humans crave consistency and have internalized this longing.<sup>242</sup> When a need for consistency is thwarted by a “clash” between two cognitions, or between cognition and action, one looks for ways to reduce the discomfort being experienced.<sup>243</sup> The mental gymnastics required to restore a sense of psychic order is done reflectively and is not necessarily grounded in logical thinking.<sup>244</sup> Cognitive dissonance often invites the person experiencing it to look around for other explanations that will reduce the tension between the two competing cognitions. One approach is to recruit another belief, or, alternatively, to try to talk oneself out of, or soften, one of the competing positions.<sup>245</sup>

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237. Keith E. Stanovich et al., *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 259, 263 (2013) (juxtaposing rational thinking with intelligent thinking).

238. See *id.* at 259; see also Transcript of Record, Day 2, *supra* note 89, at 109.

239. Stanovich et al., *supra* note 237, at 259.

240. ARONSON & TAVRIS, *supra* note 221, at 13.

241. See, e.g., Paula J. Britton, *Teaching Tip Sheet: Counselor Attitude Bias*, APA (accessed Feb. 13, 2020), <https://www.apa.org/pi/aids/resources/education/counselor-bias> (discussing lessons from the HIV/AIDS crisis about counselor bias toward patients).

242. Ronald L. Jackson, *Cognitive Dissonance Theory*, in ENCYCLOPEDIA OF IDENTITY, SAGE PUBLICATIONS (2010), [https://proxy.library.georgetown.edu/login?url=https://search.credoreference.com/content/entry/sageidentity/cognitive\\_dissonance\\_theory/0?institutionId=702](https://proxy.library.georgetown.edu/login?url=https://search.credoreference.com/content/entry/sageidentity/cognitive_dissonance_theory/0?institutionId=702).

243. See *id.*

244. See *id.*

245. See generally Avidit Acharya et al., *Explaining Attitudes from Behavior: A Cognitive Dissonance Approach*, 80 J. OF POL. 400, 411 (2018). A classic example is the smoker who knows smoking is harmful (first cognition), but likes to smoke (competing cognition). The smoker could apply logic to the topic of smoking: note her ambivalence on the subject and admit plainly to be acting in a manner inconsistent with her belief. Alternatively, one approach is to recruit another belief: if I try to

Confirmation biases—such as myside bias—can be seen as an elaborate and often subconscious attempt to avoid cognitive dissonance.<sup>246</sup> With confirmation bias, an individual does not perceive or engage with conflicting information and instead only takes on information that conforms with existing beliefs.<sup>247</sup> In so doing, one can avoid any dissonance that new and conflicting observations or knowledge might possibly create.<sup>248</sup> In contrast to tenets of critical thinking, myside bias directs researchers' curiosity in the first instance, and subsequently, their perception as they proceed in a manner that leads them to facts that support, rather than challenge, an assumed position. As such, psychosocial science literature is replete with studies and analysis of bias. Such research alongside the curricular commitment to diversity and inclusion offerings reflect the notion that:

This is where science comes in. It doesn't purge us of bias. But it extends what we can see and understand, while constraining bias. . . The constant back and forth between ideas and research results hammers away at bias, and just as important often reveals aspects of reality that surpass our original ideas and insights.<sup>249</sup>

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quit smoking, I will gain weight. Or, the smoker can try to talk herself out of, or soften, one of the competing positions: the risks of smoking are overstated. *See id.*

246. ARONSON & TAVRIS, *supra* note 221.

247. Acharya et al., *supra* note 245, at 409.

248. Defense mechanisms are another concept used to understand how people manage the anxiety prompted by beliefs or experiences. *See* Jesse A. Metzger, *Adaptive Defense Mechanisms: Function and Transcendence*, 70 J. OF CLINICAL PSYCHOL. 478, 488 (2014). Defense mechanisms are common—indeed, sometimes psychically useful—when one is confronted with stressful or confusing stimuli. *Id.* These include “disavowal” or “distortion/misattribution” defense mechanisms. *Id.* Maladaptive defense mechanisms, however, “deny or distort sources of conflict.” *Id.* Constant use of maladaptive defense mechanisms could become pathological; for example, somebody continually projecting their feelings of upset onto someone else, denying the true nature of the stressful stimulus, or rationalizing away poor choices. *See* Faramarzi et al., *The Role of Psychiatric Symptoms, Alexithymia, and Maladaptive Defenses in Patients with Functional Dyspepsia*, 66 INDIAN J. OF MED. SCI. 40 (2012). When maladaptive defense mechanisms turn into closely held, self-affirming beliefs or practices, one is then primed to confirm them via confirmation biases. *See* Geoffrey D. Munro & Jessica A. Stanbury, *The Dark Side of Self-Affirmation: Confirmation Bias and Illusory Correlation in Response to Threatening Information*, 35(9) PERS. AND SOC. PSYCHOL. BULL. 1143, 1144, 1153 (2009). Consider another example: an individual addicted to painkillers finds herself in a romantic relationship that is suffering under the attendant consequences of addiction, *e.g.* the weight of lies, increased frequency of careless oversights, redirection of time and resources to support the addiction. To internalize the reality of the hardship would be to admit painful truths: loss of control over the addiction, blame, shame, etc. *Id.* To avoid the ego-threatening nature of these truths, and to deal with the mounting anxiety that they bring, our subject begins to project her feelings or impulses onto her romantic other. *Id.* Her partner is unreliable; her partner is lying; her partner is not invested in the relationship. Having projected her insecurities about her own reliability, honesty, and control onto her partner, she now sees evidence of her belief everywhere—in an unreturned email, a late night at work, a careless comment, etc. *Id.* Disbelieving a threatening health report because of minor spelling errors or completely discrediting a disliked politician's argument because of a mispronounced word are examples of unfair analyses that could result in poor judgments. In these examples, a person who was not motivated to discredit the information would likely forgive these minor mistakes and evaluate the information more objectively. *Id.*

249. STEELE, *supra* note 95.

Therapists' initial schooling, in conjunction with continuing education initiatives and in-service trainings during their work life, as well as the use of supervision and peer participation in case work (discussed in more detail below), offer routine opportunities for therapists to unearth personal beliefs and attitudes towards others and to confront both personal and studied biases. Developing control over one's self, and attention to a nuanced sense of other, is the foundation from which therapists listen to, and learn about, their clients. This controlled and careful listening is, in turn, the precursor to proposing any intervention in the clients' lives. This all stands in stark contrast to a legal fact finder being *invited* to draw on their own "common sense and experience of life" when deciding whether or how strongly to credit evidence.<sup>250</sup>

### B. COURTROOMS

In contrast to the practices and research surrounding counseling fields, the practices and procedures in litigation, particularly family law litigation in front of a judicial fact finder, are a breeding ground for inaccurate understandings and misattributions.<sup>251</sup> A brief comparison of jury and bench trials demonstrates how judicial decisions pose a distinct risk. But first, one should note that in any trial—whether a jury or a bench trial—litigants must lay out the narratives of their lives. Yet in courtrooms, those narratives are constrained by the anxiety of court and rules of procedure and evidence.<sup>252</sup> Context and backstory can be difficult to explore while attending to rules of evidence.<sup>253</sup> Moreover, the vast majority of litigants in family court are unable to afford legal representation and must proceed *pro se*. The lack of legal training often further muddies the presentation of evidence and leads to a more active role of the judicial official to determine how and what facts are introduced; meanwhile, important arguments at law can go unraised.<sup>254</sup>

Jury trials, at least, are often choreographed with some precision and attention to time management. Litigators also probe jurors in *voir dire* concerning their

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250. See CRIM. MODEL JURY INSTRUCTIONS, *supra* note 15.

251. See Kahan et al., *supra* note 14, at 900; see, e.g., INSTRUCTION 2.120, CREDIBILITY OF A WITNESS, MASS. MODEL CRIM. JURY INSTRUCTIONS, (9th ed. March 2019).

252. Gutheil et al., *supra* note 6, at 11.

253. Compare *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964) with *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) and *Tolliver v. United States*, 468 A.2d 958, 960 (D.C. 1983) (establishing the prior bad act rule in the District of Columbia in which evidence of prior crimes is inadmissible to show "propensity" but admissible if the evidence of the other crime is "direct and substantial" proof of the current crime).

254. Brief for Respondent at 41, *Lassiter v. Dep't of Soc. Servs.*, 1980 WL 340034, \*41-42 (stating "one final point needs to be made with regard to Petitioner's claim that because of her lack of representation, improper, incompetent and inadmissible evidence was elicited against her, and that defenses available to her went unnoticed. . . As with the refusal of the judge to grant a delay . . . she could have preserved many of her exceptions to these alleged errors in the hearing in her Record on Appeal, and assigned them as error to the North Carolina Court of Appeals. Her failure to do so constituted an abandonment of these claims under the North Carolina Rules of Appellate Procedure.").

experiences and impressions, all meant to unearth bias.<sup>255</sup> Rules of evidence are designed to keep distracting evidence away from the fact finder; and arguments about, for example, admissibility or relevance are conducted out of the jury's hearing.<sup>256</sup> And while juries may place their own worldview and experiences at the epicenter of the scene playing out before them,<sup>257</sup> jury instructions instruct jurors to set aside personal sympathies.<sup>258</sup> Finally, while a juror will separate truth from fiction by juxtaposing what they are observing (in their mind's eye after a witness' telling) with their own lived experience, the hope bound up in the model of group deliberation is that multiple members will recall more facts than any one individual and that multiple members will bring additional lived experiences into the consideration of those facts.<sup>259</sup> Collectively, these rules aim to function as guardrails to dilute the power of any one juror's bias, bolstering more empathetic understanding of the litigant and thus, a more just and balanced outcome.

In contrast, custody cases are handled by judges. In a bench trial, there is no mechanism akin to *voir dire* to correct for or measure the potential bias of a judicial official. Moreover, the trial is often presented in the time crunch of busy courts or trotted out over a series of disjointed hearing dates.<sup>260</sup> Procedures around raising and arguing evidentiary issues outside of the fact finder's hearing are impossible, as the fact finder and decider of issues of law are one in the same.<sup>261</sup> The observer-judge *alone* is left to recall facts and scrutinize them based on her own individual worldview; her doing so is not mitigated or interrogated by other fact finders. In this troubling context, having arrived at her *individual* sense of fact and truth, the observer-judge *alone* then attaches value judgements to the facts.

Given this context of judicial decision making, it is particularly troubling that caution against bias generally, and myside bias specifically, is markedly wanting

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255. See, e.g., William S. Friedlander & Alexandra Rudolph, *The Bias Beneath: Uncovering Juror Bias in Sexual Assault Cases*, THE PLAINTIFF MAGAZINE (June 2010), <https://www.plaintiffmagazine.com/recent-issues/item/the-bias-beneath-uncovering-juror-bias-in-sexual-assault-cases> (offering "trade magazine"-style tips for prosecutors for jury voir dire in sexual assault cases).

256. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780–81 n.12–16, 827 (2001) (citing studies in tort law, for example, which suggest that jurors' cognitive shortcuts may lead them to incoherent or illogical conclusions).

257. See Kahan et al., *supra* note 14, at 900.

258. See, e.g., INSTRUCTION 2.120, n.3, FUNCTION OF THE JURY: SYMPATHY, MASS. MODEL CRIM. JURY INSTRUCTIONS, 10th ed. (revised March 2019) ("In many criminal cases there is an element of sympathy which surrounds the trial. You may not permit sympathy to affect your verdict(s).").

259. Guthrie et al., *supra* note 256, at 827. There is notable systemic racism present in decisions about who is able to process facts in an unbiased way through the lens of their lived experiences and what lived experiences matter. See, e.g., Maria Cramer, *Man Appeals Conviction After Dismissal of Potential Juror Who Said System is Rigged Against Black Men*, BOSTON GLOBE (Sept. 20, 2018), <https://www.bostonglobe.com/metro/2018/09/19/man-appeals-conviction-after-dismissal-potential-juror-who-said-system-rigged-against-black-men/wozpUS1g6f4L5dYDbQBRII/story.html>.

260. Larissa MacFarquhar, *When Should a Child Be Taken from His Parents? In Family Court, Judges Must Decide Whether the Risks at Home Outweigh the Risks of Separating a Family*, THE NEW YORKER (July 31, 2017), at 13.

261. Guthrie et al., *supra* note 256, at 780–81, 827.



in legal literature and andragogy.<sup>262</sup> Some might even argue that the law itself is committed to confirming the opinions and beliefs of a privileged set:

The problem is that not all positioned perspectives are equally valued, equally heard, or equally included. From the perspective of critical race theory, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of this, not accidentally.<sup>263</sup>

Certainly, those centered at the intersection of family law and critical legal theory would not argue with this premise. Consider, for example, that there is no “lack of cases involving race matters,” and yet the courts seemingly insist on a single notion of the “institution of the family,” and do so through demonstrable “reluctance or unwillingness to acknowledge the impact that racial bias or inequality played in a particular family-related case.”<sup>264</sup>

Without some insight into their own biases, judges are likely to engage in myside bias thinking as they listen to evidence in the first instance and then endeavor to make sense of that evidence in the next. Reform, therefore, should not only include introducing self-identity work and cultural humility into judicial training, but also opportunities and support for judges to engage in a reflective process as they carry out their work.<sup>265</sup> Changes to legal rules to introduce and enforce procedural slow-downs will create greater opportunities to raise judicial consciousness, a necessary trade-off for trial expediency. Lastly, litigators must intentionally consider bias when fashioning their case theories and presenting evidence and argument.

### 1. Training and Support

Studies confirming judicial bias abound, and there has been some limited momentum in criminal courts to engage with that research and require the judiciary

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262. See, e.g., Lorenzo Bowman et al., *The Exclusion of Race from Mandated Continuing Legal Education*, 8 SEATTLE J. FOR SOC. JUST. 229 (arguing it should be part of continuing education); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 BERK. LA RAZA L. J 137 (calling for critical theory education and defining critical theory as “at bottom, the effort to pierce conventional wisdom through an interrogation of normalized notions, and to arrive at a transcendental understanding of social constructions and realities—a more accurate understanding of how and why something is the way it is in ways that transcend the premises, imperatives and limitations of conventional explanations about dominant social arrangements. Critical theory is the project that enables substantive analysis of the personal and particular at structural and systemic levels. It is the process that makes patterns out of particularities.”).

263. Bell, *Who’s Afraid of Critical Race Theory?*, *supra* note 80, at 901.

264. R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2093 (2017) (“Not insignificantly, this sidelining of race in family law scholarship just described relates to a pervasive ‘normative ideology of racial nonrecognition’ more often associated with judicial cases outside of family law.”).

265. See Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 THE JUDGES’ JOURNAL 21 (2015).

to attend to the realities of their bias.<sup>266</sup> It is time that other judges receive this education as well and that the education be specific to the subject matter over which they are presiding. Family courts should know, for example, about the recent study of family court judges that found that judges were more influenced by gender in custody cases than lay people were.<sup>267</sup> Not surprisingly, the tendency to discriminate in favor of mothers and against fathers in custody arrangements tracked with judges' responses to questions about gender-role ideologies: "[t]he more they supported traditional gender roles for men and women, the more parenting time they gave to the mother in the case."<sup>268</sup>

Judicial training cannot assume a judge knows her own preferences and predictions; rather, there must be intentional efforts to excavate that sense of self from the subconscious. Self-identity work is critical, foundational work to unearthing how judges feel *vis a vis* the identity of another; for example, what meaning do they attribute to the sameness or difference between themselves and litigants?<sup>269</sup> Judges need to name who they believe themselves to be and what meanings they attribute to that identity. In social work and psychology settings, this is done at the curricular level during schooling. It is reinforced in training of junior clinicians and in supervision of clinicians throughout their careers. Because we cannot wait for an overhaul of the American legal education system, one can look instead to trainings within the field, such as those endorsed by the Anti-Defamation League, to inspire judicial reform.<sup>270</sup>

Understanding one's own self is critical for stopping the riptide effect that one's emotional reaction to another can inspire. The notion of "us" is a "fundamental social category in the brain's organizing system."<sup>271</sup> It is not difficult to appreciate how "us" would be a favored category, but two social scientists put it this way: "[w]ithout feeling attached to groups that give our lives meaning, identity and purpose, we would suffer the intolerable sensation that we are loose marbles floating in a random universe."<sup>272</sup> When our sense of identity is not threatened, we can maintain our bond to our own social group while maintaining tolerance for other categories of people—the "them" of the "us and them"

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266. See e.g., Kahan et al., *supra* note 14, at 853 n.5; Chris Guthrie et al., *supra* note 256, at 780–81 n.12–16, 827. Indeed, part of a 2016 proposal by Massachusetts courts to combat bias included a proposal to open six legal help centers. See Shira Schoenberg, *Massachusetts Courts to Examine Racial Disparities in Imprisonment Rates*, MASSLIVE (Oct. 20, 2016), [https://www.masslive.com/politics/2016/10/mass\\_courts\\_to\\_examine\\_dispari.html](https://www.masslive.com/politics/2016/10/mass_courts_to_examine_dispari.html).

267. See Miller, *supra* note 107 (describing study in which judges awarded mothers half (.5) a day more time on average than they awarded fathers, whereas using the same fact patterns, lay subjects only awarded mothers .15 more days).

268. *Id.*

269. ARONSON & TAVRIS, *supra* note 221, at 58–60.

270. See ADL Applauds Department of Justice Commitment to Implicit Bias Training, ANTI-DEFAMATION LEAGUE (June 27, 2016), <https://www.adl.org/news/press-releases/adl-applauds-department-of-justice-commitment-to-implicit-bias-training>.

271. ARONSON & TAVRIS, *supra* note 221, at 58.

272. *Id.*

dichotomy.<sup>273</sup> In socially, emotionally fraught environments, it feels particularly intolerable to be disoriented from a sense of a connected, grounded self, and so our brains activate the biased reasoning that is hanging out in our blind spots.<sup>274</sup> We move away from curiosity about the behaviors and choices of other people, and rely instead on a knee-jerk, gut sense that “we have the human qualities of intelligence and deep emotions. . . They don’t know the meaning of love, shame, grief, or remorse.”<sup>275</sup> By examining their own lives and selves, judges will be better situated to examine the lives of others in a less biased way.<sup>276</sup>

Judges must comb through a litany of strife, anger, and sadness for facts. Worryingly, people who are in crisis or otherwise experiencing heightened interpersonal or emotional circumstances, provoke more acute reactions in those who work with them.<sup>277</sup> Those representing themselves *pro se*, like many family court litigants, do not have someone who can shield them from the intensity of the other party or the court experience, or help them curate and moderate a message for the judge. This makes it more likely that the judge receives uncensored, emotive material from a *pro se* litigant which, in turn, provokes a bigger reaction in the judge.<sup>278</sup> Therefore, beyond engaging in foundational self-identity work, judges should be trained about the reality of their emotional reactions to litigants.

Judges, whether they are tuned into it or not, react to litigants: they have sympathy or fondness for some, they feel angry or annoyed by others. It can be a challenging or unfamiliar notion to ask professionals outside of counseling fields to notice, let alone credit, emotional content.<sup>279</sup> However, it is important that judges gain the insight to notice their reactions in the first instance, and then have the courage and curiosity to reflect on it thereafter.<sup>280</sup> Emotional intelligence is learned; it is not an innate skill.<sup>281</sup> Judges can be taught to notice when they have

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273. *Id.* at 59.

274. *Id.*; see also Peggy C. Davis, *Law as Microaggression*, 98 *Yale L.J.* 1559, 1560 (1989) (describing “incessant, often gratuitous and subtle offenses,” which can be seen as a manifestation of the bias that exists in “blind spots”).

275. ARONSON & TAVRIS, *supra* note 221, at 59.

276. *Id.*

277. See Linn-Walton & Pardasani, *supra* note 212; Walsh, *supra* note 205, at 130; TANSEY & BURKE, *supra* note 210, at 77.

278. See Terry A. Maroney, *Angry Judges*, 65 *VAND. L. REV.* 1205 (2012) (discussing lawyer and litigant behaviors that are commonly met with judicial anger, including perceived lies, perceived defiance of judicial authority, perceived insults, and perceived incompetence).

279. See Joan Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295, 1355 (1993); Marjorie Silver, *Love, Hate, and Other Emotional Interferences in the Lawyer/Client Relationship*, 6 *CLINICAL L. REV.* 259, 278-79 (1999).

280. Psychoanalyst Sigmund Freud initially referred to countertransferences as “blind spots.” See Joseph Sandler, *Countertransference and Role-Responsiveness*, 3 *INT’L REV. OF PSYCHO-ANALYSIS* 43, 43 (1976).

281. See Samantha A. Batt-Rawden et al., *Teaching Empathy to Medical Students: An Updated, Systemic Review*, 88 *ACAD. MED.* 1171, 1173 (2013); Denise Panosky & Desiree Diaz, *Teaching Caring and Empathy Through Simulation*, 13 *INT’L J. FOR HUM. CARING* 44, 44 (2009).

an affinity or aversion toward litigants.<sup>282</sup> From this starting point, they can learn to be critical about the meaning they ascribe to their observations and feelings and think critically about any action they take.<sup>283</sup>

Self-identity work and unearthing bias is work that inescapably leaves one feeling disoriented and vulnerable,<sup>284</sup> but an element of humility is a good thing. Studies show that the more confidence one has, the less likely one is to admit mistakes.<sup>285</sup> Judges are often told they deserve to judge because their success or importance secured them the opportunity. Depending on the jurisdiction, judges are voted into the position or hand selected and groomed for their appointments. This sense of deserving or accomplishment can all too readily be conflated into a belief that they are good at the job of judging.<sup>286</sup> Maladaptive defense mechanisms are often right on the heels of such conviction—for example, a judge rationalizing a prior holding on a motion to reconsider, as opposed to endeavoring to critically rethink their ruling, or a judge dissociating from the stress of the position or the emotionally combustible case before them and rushing to a mechanical, cookie-cutter decision.<sup>287</sup> There is room in the way we train and support judges' work to inspire humility and some healthy uncertainty in order to thwart bias.<sup>288</sup>

While the feelings of vulnerability are key to bias training and professional growth, it can make for tough work. When we acknowledge and wrangle with our own racism, bias around gender, or heteronormativity, our defense mechanisms kick in to protect us from uncomfortable worry that we are not as good and decent a person as we believed ourselves to be.<sup>289</sup> To offset the difficulties in

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282. Indeed, it is worth asking judges to explore their bias during the recruitment and screening of judges in jurisdictions where judges are vetted by a committee. One could see using any of the instruments described in the studies cited here, or others that could be coded and analyzed by an interdisciplinary team. Or, perhaps social workers and psychologists could propose screening questions for interviews or participate on selection committees.

283. We do this with legal training in clinics. See Bryant, *supra* note 217, at 43–44; White, *supra* note 222; Silver, *supra* note 279, at 260 (“In order to do our work well, we must be in touch with what we are feeling—and why”); Chapman, *supra* note 205. Relatedly, this noticing of self and comparing oneself to the other also serves a final prophylactic purpose: it can help clinicians connect meaningfully to all clients and help them weather difficult connections with tough clients. See Stein-Parbury discussion of empathy, *supra* note 99. See also Linn-Walton & Pardasani, *supra* note 212 (“[o]ne of the recurring themes that encapsulated positive coping skills employed by clinicians when working with ‘dislikable’ clients was the utilization of empathy.”).

284. See generally ROBIN DIANGELO, WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

285. ARONSON & TAVRIS, *supra* note 221, at 30.

286. Guthrie et al., *supra* note 256, at 814 (discussing the presence of egocentric bias in judges); but see Miller, *supra* note 107 (finding judges are more influenced by gender in custody cases than lay people).

287. Guthrie et al., *supra* note 256, at 814; see also Munro & Stanbury, *supra* note 248, at 1144, 1153.

288. ARONSON & TAVRIS, *supra* note 221, at 22; Kahan et al., *supra* note 14, at 898 (“[O]ur recommendation here is that [Supreme Court] judges throttle back. In place of the muscular self-confidence that now dominates opinion writing, we propose an idiom of aporia in which judges acknowledge the difficulty of the controversies before them.”).

289. Lawrence, *supra* note 9 (“Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with

clinical settings, therapists routinely meet in groups, called group supervision, to support one another's work on self and on behalf of clients. Peer groups create an opportunity to expose and explore dilemmas in a contained environment.<sup>290</sup> The sense of containment is fostered by the guiding principles to assume good intentions of participants and to maintain one another's confidentiality. The nature of group work creates a shared experience and can highlight the universality of certain experiences, which in turn, helps combat a sense of isolation or desperation that can accompany sitting with difficult feelings about difficult clients or scenarios.<sup>291</sup> Peer work could play a compelling role in judicial training; as shall be discussed in more detail below, it is also an important part of making unbiased decisions.

## 2. Procedural Slow Down

In addition to working with difficult content, family court judges work in a fast-paced, pressured environment: court calendars; various litigants and counsel streaming in and out of courtrooms all day; matters heard one after the other with parties stepping back and then forward again in a disjointed way—over the course of the weeks, months, or even years the case may take to play out. Stress distracts the brain and invites cognitive shortcuts that in turn provoke biased responses.<sup>292</sup> It is critical, therefore, to introduce procedures that invite deliberate consideration of evidence and directly engage with the concept of bias, so as to make the subconscious conscious.

One modest proposal is that family court judges be required to take matters under advisement. It would be logical in the face of controversy, particularly a controversy into which the judge has been newly invited, for the judge to be tentative and cautious in rendering an opinion. Yet, studies demonstrate remarkable counterfactuals: As markers of the irrevocability or costliness of a decision increase, decision makers show an irrational spike in certainty, rather than remaining logically tentative.<sup>293</sup> These studies are consistent with the judicial audacity to believe that they can arbitrate a controversy from the bench, despite that controversy having paralyzed the most invested people and having been active for months or years in the lives of those interested parties prior to judicial involvement.<sup>294</sup> A social psychologist might consider a rush to judgment a feature of “naïve realism,” or the “inescapable conviction that we perceive objects and events clearly.”<sup>295</sup> The theory of naïve realism posits that humans assume that

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what the individual has learned is good or right.”); *see generally* DIANGELO, *supra* note 284, at Ch. 5 (discussing the “good/bad binary” as “the most effective adaptation of racism”).

290. Nava Arkin et al., *A Group Supervision Model for Broadening Multi-Method Skills of Social Work Students*, 18 SOC. WORK EDUC. 49, 50 (1999).

291. *Id.*

292. *See* ARONSON & TAVRIS, *supra* note 221; Seamone, *supra* note 88, at 1027.

293. ARONSON & TAVRIS, *supra* note 221, at 22.

294. *See* Kahan et al., *supra* note 14, at 898.

295. ARONSON & TAVRIS, *supra* note 221, at 42.

reasonable people will agree with a reasonable opinion; and further, that any opinion we hold is reasonable.<sup>296</sup> When one's own opinion reflects adherence to an in-group's collective narrative, one is more susceptible to naïve realism.<sup>297</sup> This speed and reflexiveness also helps the judge avoid the cognitive dissonance that might arise if they allowed competing cognitions to percolate. Rather than wrestle with the tensions between "I believe myself to be fair" and "I am about to upset a litigant," or "I believe I must act" and "There is no clear answer here," a knee-jerk fact finder can dispose of the issue quickly, recruiting whatever facts best serve her answer, or ignoring facts that would call her decision into question.<sup>298</sup> Faced with a difficult decision about how to apportion custodial time between two parents, it is psychologically more comfortable for a judge to state her opinion quickly and resolutely in keeping with dominant narratives and to dismiss counterfactuals as irrational and self-interested.<sup>299</sup>

While taking matters under advisement might slow litigation and issuance of opinions, a requirement to take a matter under advisement would signal that a good decision is not one rendered quickly or absent consideration—and reconsideration—of the facts and arguments offered by the parties. This logic fuels arguments for access to counsel as well. Cases with attorneys tend to be litigated more robustly.<sup>300</sup> Leaving aside the reality that cases with attorneys are more likely to be negotiated or mediated outside of court, even *in court* they are more likely to include motion practice, discovery, and other pretrial steps that slow the pace of the case and put the matter before the court on multiple occasions and in varying postures.<sup>301</sup> The procedural slowdown of taking a matter under advisement would not mimic these repeated appearances, but it would allow judges the opportunity to sit with a custodial matter on multiple and varying occasions. While there is always pressure for expedited process to settle uncertainty in custodial arrangements, a decision more thoughtfully rendered after it has been taken under advisement may well inspire a sense of procedural justice that would encourage acceptance and compliance, rather than the knee-jerk motions to modify and motions for contempt that are routinely filed following custody order.<sup>302</sup>

Another powerful tool in making fact finders' subconscious conscious would be a rule requiring judges to use an inventory of judicial bias in rendering their findings of facts and conclusions of law. In 2016, the Massachusetts judiciary launched an effort to understand why rates of imprisonment for black and Latino defendants was disproportionately higher than for white defendants.<sup>303</sup> A key

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296. Nasie et al., *supra* note 220, at 1544.

297. *Id.*

298. See ARONSON & TAVRIS, *supra* note 221; Acharya et al., *supra* note 245, at 409.

299. See Nasie et al., *supra* note 220; ARONSON & TAVRIS, *supra* note 221.

300. Indeed, part of the 2016 proposal by Massachusetts courts to combat bias included a proposal to open six legal help centers. See Schoenberg, *supra* note 266.

301. *Id.*

302. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 27 (1988).

303. *Id.*



outcome of the study was the adoption in Step One, Chapter One, of the Massachusetts Sentencing Guidelines a Bias Check—Stop and Review Ten Best Practices. Accordingly, judges are asked to consider the following:

Are there areas or decision points in which bias may be present?

Should you allow more time because bias may be a concern?

Have you avoided decisions under rushed, stressed, distracted, or pressured circumstances?

Have you taken special care when you must respond quickly to avoid making snap decisions?

Have you critically reviewed your decision-making process before committing to a decision?

Have you considered what evidence supports the conclusions you have drawn and how you should challenge unsupported assumptions?

Ask yourself if your opinion of the defendant(s), victim(s), witness(es) or case would be different if the people belonged to different racial, ethnic, gender identity, sexual orientation or age groups?

Have you taken notes on your decision-making process?

Have you tracked your decision in this case in relation to other cases and examined your decisions for patterns of bias?

Have you taken into account that in minority and poor neighborhoods deep police penetration may result in disproportionately high prosecution for certain offenses?<sup>304</sup>

The use of inventories such as these invite a fact finder to take into account how they notice a litigant, or notice and articulate their own countertransference.<sup>305</sup> These inventories are also an intervention to stereotyping and myside bias. In prior studies, researchers have asked subjects to attempt an “executive override” of their prior-held beliefs and to “decouple” those beliefs from consideration of presented facts and arguments.<sup>306</sup> These studies concluded that when you instruct people that there is a bias to avoid and suggest cognitive exercises to help avoid employing the bias, intelligent people are able to engage in rational—

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304. MASSACHUSETTS SENTENCING GUIDELINES, <https://www.mass.gov/info-details/sentencing-guidelines-step-1-chapter-1>.

305. See *supra* Section IV A (1).

306. Pat Croskerry et al., *Cognitive Debiasing: Origins of Bias and Theory of Debiasing*, 22 *BMJ QUALITY & SAFETY* 55 (2013), [https://qualitysafety.bmj.com/content/22/Suppl\\_2/ii58](https://qualitysafety.bmj.com/content/22/Suppl_2/ii58).

as opposed to biased—thinking.<sup>307</sup> However, without this advance warning of bias and instructions to decouple the bias, even highly intelligent people are prone to engage in myside bias thinking, which is to say, “evaluate evidence, generate evidence, and test hypotheses in a manner biased toward their own prior opinions and attitudes.”<sup>308</sup> These proposals should sound familiar, as we prime jurors in this way. Litigators engage through *voir dire* at jury selection, and warn jurors through instructions at trial on the issue of prejudice, biases, sympathies, etc. Time and time again, judges and attorneys name fear, prejudice, bias, and sympathy as inapposite with a just verdict. These cautions should be embedded into practice with judges, too.

Procedural slowdowns also provide the opportunity for judges to employ the group supervision or peer rounds discussed earlier. Group supervision or rounds share a motivation and theoretical approach with other proposals to debias judges. After their research confirmed implicit bias on the bench, Sheri Johnson et al. proposed that courts audit judicial decisions to analyze the influence of bias on decision making and suggested favoring multi-judge panels.<sup>309</sup> Both of these proposed reforms aim to invite colleagues into a judge’s decision making, either during the course of rendering a decision or at least after the fact, as a tool for honest reflection.<sup>310</sup>

Johnson’s proposals, as well as the model of peer-to-peer supervision, are essentially attempts to approximate group deliberation. A group will discover and later recall more and different facts than a single person; and moreover a group of people, embodying a host of lived experiences, will make sense of the facts differently than an individual deliberating alone.<sup>311</sup> The benefits of group deliberation as a debiasing mechanism are enhanced when there is diversity in the group; which in turn, speaks to the need to recruit and promote a diverse bench.<sup>312</sup>

Similarly, judges could benefit from the peer-review system as found in the medical profession. Doctors engage their peers when they “round” on a case each day or when they perform morbidity and mortality assessments.<sup>313</sup> In morbidity and mortality reviews, for example, the goal is to revisit errors to gain insight

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307. *Id.*

308. Stanovich et al., *supra* note 237, at 559; Keith Stanovich & Richard West, *On the Relative Independence of Thinking Biases and Cognitive Ability*, 94 J. PERS. & SOC. PSYCHOL. 672, 690 (2008).

309. Sheri Johnson et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1231 (2009) (discussing the imperative of having a diverse panel of judges).

310. See Croskerry et al., *supra* note 306, at 55; Stanovich et al., *supra* note 237, at 559; Stanovich & West, *supra* note 308, at 690.

311. See Guthrie, *supra* note 256, at 827; Johnson et al., *supra* note 309, at 1231.

312. Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 600-01 (2006).

313. Eric Howell et al., *Morbidity and Mortality Conference, Grand Rounds, and the ACGME’s Core Competencies*, 21 J. GEN. INTERNAL MED. 1192 (2006); Sally Quilligan, *Learning Clinical Communication on Ward-Rounds: An Ethnographic Study*, 37 MED. TEACHER 168, 168 (2015) (describing rounds as a “key event” within a doctor’s routine, a site of important informal and interprofessional communication, and “par excellence a site for learning.”).

without blame or derision, and rounds generally aim to improve collaboration and input on a plan of care.<sup>314</sup> Reflection on past decisions can help make sure that judges do not simply keep rolling forward with the same “type” of flawed decision making.<sup>315</sup> There is even room within judicial ethics in certain jurisdictions to have consultation with fellow judges during the trial judge’s decision making.<sup>316</sup> So while training and support structures are foundational, changes in the procedure or process of adjudicating can help judges deploy the skills that the training and support instill in them.

### 3. Litigation Strategy

Beyond curating procedures or rules that name bias or attempt to interrupt it, litigators must keep the reality of bias front and center in their minds during case preparation and execution. Litigators know that judges have predilections and mannerisms best suited to certain cases and litigants. This is why litigators forum shop whenever possible, and it is also why, in courts with set judge assignments, litigators hold their breath to see who will be assigned to the courtrooms in which they most often appear. Certainly, one cannot declare in a closing statement: “Hey judge, I know you are hostile toward young unemployed black men, but . . .” One can, however, name a given bias: “We are invited to assume, your honor, that [Norman] is avoiding work because he does not want to provide financially for his child, but this conclusion tracks with an offensive stereotype that distracts from careful consideration of the evidence.”<sup>317</sup>

Moreover, if a litigator takes the threat of bias seriously, they are not waiting until closing statements to rage against it. They curate a direct examination that belies it. In Norman’s case, for example, might he have been asked if he was avoiding more hours so as to avoid child support or, better yet, asked how he would feel if someone assumed that he was? In some cases, client voice may not be enough, and the use of an expert witness may be necessary for a case theory. In a parental discipline case such as Paulette’s, for example, an expert could have assisted by disputing the misconceptions and dismantling the prejudice around Paulette’s culturally more authoritarian parenting.<sup>318</sup> Strategies such as these alert

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314. See, e.g., Kevin J. O’Leary et al., *Structured Interdisciplinary Rounds in a Medical Teaching Unit, Health Care Reform*, 171 ARCHIVES OF INTERNAL MED. 678, 679 (2011).

315. Isabelle Brocassa & Juan D. Carrillo, *The Neurobiology of Opinions: Can Judges and Juries Be Impartial?*, 86 S. CAL. L. REV. 421, 423 (2013) (“decisionmakers will tend to form posteriors that confirm their priors and that are affected by the magnitude of their payoffs or preferences. . . these constraints make the order in which evidence is received critical. . . it is not the same to be exposed first to strong evidence a crime has been committed as it is to listen first to the childhood story of the criminal.”).

316. See MODEL CODE OF JUDICIAL CONDUCT § 2.9 cmt. 5.

317. See DIANGELO, *supra* note 287, at 19-22 (demonstrating the importance of, and techniques for, calling out attitudes of prejudice and discriminatory actions, and situating us all in the reality of our racial socializations).

318. Valentino et al., *supra* note 194, at 173-74.

the judge that there is a bias to avoid.<sup>319</sup> In her closing, the attorney can remind the judge again, nudging her to decouple bias, and marshaling evidence and argument that support a different, unbiased cognition.<sup>320</sup>

Of course, “[s]urmounting these challenges is undoubtedly difficult. After all, judges have the most intractable bias of all: the bias of believing they are without bias.”<sup>321</sup> While no litigator alive likely shares the impression that judges are without, they commonly underestimate the depth and impact of judicial bias or they think their abundance of facts and law will be sufficient to push through the barrier of bias.<sup>322</sup> But studies are clear that naming bias, asking that it be decoupled from the cognitive task, and then offering unbiased scripts, is the best formula for unbiased reasoning.<sup>323</sup>

Unfortunately, these proposals are in tension with the reality in family court that many litigants are *pro se*, so the litigation strategies just described are not likely to be helpful to those litigants in combating bias and promoting cultural humility and positive regard. Nevertheless, there are other possible strategies. For example, the bar can help by making consistent and clear cases against racist, gendered, and heteronormative thinking that raises judicial consciousness, and by advocating for reforms as will be described below. Further, on a point that returns us to the topic of judicial training, judges themselves can take another lesson from therapists’ playbooks to learn how to better engage with *pro se* litigants. Family systems therapists and theorists have long studied the fact that the therapist is not just learning about the family interactions and dynamics during a session, but is also shaping them, too. When a therapist decides whom to provoke, whom to privilege, or whom to protect in each session, she is participating in the family dynamic.<sup>324</sup> Talented therapists do this with intentionality to model different choices in reactions, relationship alignments, or modalities of communication for the family to consider, but, as they do, they must be mindful to police and balance their choices so as to not distort or take over.<sup>325</sup> Understanding this, a judge should understand that a family they see in the courtroom is not the very same family that exists outside of the courtroom; rather the family’s behavior in the courtroom and the choices they are making there are a reflection of, or dictated by, the nature of the proceedings and the judge’s role in administering those proceedings.

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319. See Croskerry et al., *supra* note 306, at 55; Stanovich et al., *supra* note 237, at 559; Stanovich & West, *supra* note 308, at 690.

320. See Croskerry et al., *supra* note 306, at 55.

321. KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* (2001).

322. Nasie et al., *supra* note 220, at 1544.

323. Croskerry et al., *supra* note 306, at 62-63.

324. LYNN HOFFMAN, *FOUNDATIONS OF FAMILY THERAPY* (1981) (discussing the wisdom of Bateson, a forefather of family therapy, and his caution to “always keep in mind the entity whose stability is in question.”).

325. *Id.* at 309 (discussing how to effect change in a family system through various therapeutic techniques which involves consideration of the “outrageous position that the therapist takes.”).

In addition to strengthening the litigation playbook inside the courtroom, advocates might consider how to inspire reform outside of the context of an individual trial. In the criminal courts, where admittedly the progress is slow moving and still insufficient, there has at least been some change to better account for judicial bias. For example, impacted communities started organizing, and their advocacy campaigns garnered significant wins such as the adoption of court-watch programs and heightened public accounting and transparency about rates of disparity.<sup>326</sup> Practitioners in immigration courts have also begun to ask questions about judicial bias.<sup>327</sup> These inquiries are particularly apt to the family law setting because immigration proceedings, like family court proceedings, are presided over by a single adjudicator and are based on a highly discretionary standard.<sup>328</sup> Similar oversight and analysis of family court would be illuminating and powerful.

### CONCLUSION

Paulette and Norman had equal access to their children before entering a courtroom. At the conclusion of a two-day and one-day trial, respectively, and without their matters—that is their lives and those of their children—having been taken under advisement, their access to those they loved was diminished considerably, most notably for Paulette. To be clear, their own decisions before, during, and after the trial, both in terms of their parenting and their plans for the litigation, played a part in the outcome. So too, of course, did the decisions of their counsel, one of whom authors this piece. But Paulette, Norman, their ex-spouses, and their counsel, were not alone in the room. Our decisions intersected with those of the bench, which is to say that our histories, stories, and beliefs collided with those of the bench. The consequences of the collision of lives lived—and the impressions those lives created—were most acutely felt by Paulette and Norman, and unfortunately, are long lasting.

In most courts, and certainly family courts, judges should strive to adjudicate in such a way that is mindful of their temporary role in a family. Their job is to collaborate with the parties to “bind up the social fabric” of the family that is in front of them, not fray the edges or create seams.<sup>329</sup> Judges can better apply themselves to creating meaning and opportunity through law for varied people and families if they can hear the narrative of varied lives and can find value in the

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326. See, e.g., COURT WATCH MA, <https://www.courtwatchma.org/> (stating its mission as a community project dedicated to shifting the power dynamics in courtrooms by exposing the decisions judges and prosecutors make about neighbors every day).

327. Andrew I. Schoenholtz et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301-03 (2007). Interestingly and relatedly, there is a “clear bias” standard of review. See, e.g., *Molina v. Whitaker*, 910 F.3d 1056, 1061 (2018) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

328. See *I.N.S. v. Orlando Ventura*, 537 U.S. 12 (2002).

329. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 27 (1988).

lives described.<sup>330</sup> In turn, judges will be better able to work with respectful curiosity and cultural humility, as well as to know and control their bias, if the training and support they receive, the procedures they are beholden to, and the litigators before them remind them that bias is there, and join them in an interest in controlling it.<sup>331</sup> Failing that, there is a risk that fact finders will not hear unexpected voices, spurn the “other,” or replace foreign narratives with something less dissonant to their own assumptions.<sup>332</sup> When this happens, judges are likely to discount the effort and love of those who mother at the margins of the dominant frame, with detrimental outcomes for the litigants seeking their help.

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330. Lawrence, *supra* note 9, at 385 (further stating that the values expressed in the law are not culture free and judicial interpretation of those laws is “rooted” in their own culture.).

331. See Croskerry et al., *supra* note 306, at 55; Stanovich et al., *supra* note 237, at 559.

332. Azar & Benjet, *supra* note 2, at 251.