BIAS IN THE FAMILY: RACE, ETHNICITY, AND CULTURE IN CUSTODY DISPUTES

Solangel Maldonado*

This essay examines the role of racial, ethnic, and cultural bias in custody cases. It analyzes cases where the court explicitly considered the parents' racial, ethnic, or cultural background and cases where the court did not acknowledge these factors but where it is clear from the court's opinion that biases influenced its decision. It then briefly describes the literature on implicit bias to demonstrate how biases may influence the assessments of custody evaluators, lawyers, and judges despite best efforts to make fair and impartial decisions. Drawing on studies suggesting that individuals can reduce their implicit biases and their effects on decision making, the essay explores individual strategies and institutional reforms to address bias in custody disputes.

Key Points for the Family Court Community:

- Custody evaluators, lawyers, and judges are influenced by the racial, ethnic, and cultural backgrounds of the parents and the child in custody disputes.
- Implicit biases may influence how custody evaluators, lawyers, and judges interpret parents' behaviors and testimony.
- Preferences for parenting styles favored by middle-class families disproportionately disadvantage racial and ethnic minorities and low-income families.
- The best interests of the child standard increases the risk of intuitive and biased assessments.
- Acknowledgement of racial, ethnic, and cultural differences is necessary to reduce bias.
- Individual strategies and institutional reforms may help reduce bias and its effect on assessments and decision making in custody cases.

Keywords: *Best Interests of the Child; Cultural Bias; Custody Disputes; Ethnicity; Implicit Bias; Interracial; Multiracial; and Race.*

INTRODUCTION

In the vast majority of cases, divorcing or separating parents come to an agreement on their children's custodial arrangements.[1] However, parents who cannot agree rely on judges to make those decisions for them based on the best interests of the child.[2] When making child custody determinations, courts look to their state's statutory best interest factors which may include, among other factors, the child's preference if s/he is old enough to express one, which parent has been the primary caregiver, the emotional bond between each parent and the child, the mental and physical health of the parents and the child, the parents' employment responsibilities, any history of domestic violence, and each parent's willingness to encourage a close relationship between the child and the other parent.[3] Custody statutes generally do not expressly authorize courts to consider the parents' racial, ethnic, or cultural background. Furthermore, although the statutory best interest factors are nonexhaustive and the court can consider "any other factors it finds relevant,"[4] most legal commentators agree that courts should focus on the child's best interests without regard for the parents' racial or cultural background. The American Law Institute's (ALI) Principles of the Law of Family Dissolution reflect this position and prohibit consideration of the race or ethnicity of the parents or the child.[5] The American Psychological Association's (APA) Guidelines for Child Custody Evaluations

Correspondence: solangel.maldonado@shu.edu

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in Family Law Proceedings advise psychologists (who often make custody recommendations to the court) to be "aware of their own biases, and those of others, regarding age, gender, gender identity, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status."[6] The Guidelines further caution that "[b]iases and an attendant lack of culturally competent insight are likely to interfere with data collection and interpretation and thus with the development of valid opinions and recommendations."[7]

The ALI Principles and APA Guidelines do not always reflect what takes place in courtrooms. In custody disputes involving interracial or interethnic couples, some judges explicitly consider the parents' racial, ethnic, and cultural backgrounds.[8] Judges also consider a parent's language ability or immigrant status—factors that are often proxies for race, ethnicity, or culture. These considerations may be appropriate in certain scenarios, such as when interpreting personality tests and other assessment tools that may favor the cultural norms of the majority or when assessing the home environment or how a parent plans to address the child's multiracial identity.[9] However, there is a risk that judges, custody evaluators, and practitioners will assess parenting attitudes and behaviors in accordance with dominant, predominantly White middle-class norms. There is also the risk that judges and custody evaluators will place inordinate weight on the racial, ethnic, or cultural background of the parents. Such focus may not necessarily further the child's best interests.[10]

Despite evidence that custody decisions are influenced by the racial and cultural backgrounds of the parents and the child, many judges do not believe that they or their colleagues are influenced by these considerations. As shown below, appellate courts are often reassured by the trial judge's assertion that race, ethnicity, or cultural background played no role in the custody determination. However, studies have shown that implicit biases—biases that individuals are not consciously aware of—may affect outcomes in employment, criminal, immigration, bankruptcy, environmental, and personal injury cases, among others.[11] While few scholars have examined the role of implicit bias in family law decisions,[12] unconscious biases may influence a judge's or custody evaluator's perception of a parent's behavior as defensive, passive, or impulsive based on racial or cultural stereotypes.[13] Because these biases are often the result of deeply rooted stereotypes learned at a young age, judges and custody evaluators may not recognize their biases despite genuine efforts to be impartial and fair.[14] Implicit biases are especially difficult to detect because individuals unconsciously attempt to reconcile their explicit and implicit beliefs. Judges, like all human beings, are likely to search for and process information that is consistent with their preferences.[15] Thus, a judge or custody evaluator assessing two parents may find nondiscriminatory reasons to justify a preference for one parent even though his/her evaluation was influenced by race, ethnicity, culture, or one of their proxies. The amorphous best interests standard further increases the risk that the implicit biases that influence custody disputes will go unnoticed.[16]

This essay exposes the role that race, ethnicity, and culture play in custody disputes.[17] While it recognizes the risks created by courts' consideration of the racial, ethnic, and cultural backgrounds of the parties, it concludes that, in at least some cases, it is foolhardy to make custody decisions without explicit regard for these considerations. First, as demonstrated by the cases below, judges and evaluators are influenced by these factors even when they claim (and genuinely believe) otherwise. Implicit biases influence custody evaluators' and judges' interpretation of parents' behaviors and testimony, and denying the existence of implicit preferences does not eliminate their influence. In fact, studies suggest that a colorblind approach, whereby racial, ethnic, or cultural differences are not acknowledged, is *more* likely to result in biased decisions.[18] Second, in some cases the parents' racial, ethnic, or cultural background is relevant to the child's well-being and its consideration would further the child's best interests.[19] The challenge, of course, is determining when these factors are relevant. How can legal actors distinguish between appropriate and inappropriate considerations of race and culture? How do we determine how much weight these considerations should be accorded? How do we ensure that judges and evaluators recognize their implicit biases and minimize their effect on their decision making?

This essay proceeds as follows. The first part analyzes cases in which the court *explicitly* considered the parents' racial, ethnic, or cultural background and the circumstances that warrant

consideration of these factors. The next part examines cases in which the court never expressly considered the parents' ethnic or cultural background, but it is clear from the opinion that the court's biases against certain cultures and its preference for dominant, middle-class norms most prevalent in White families significantly influenced the court's decision. The following part engages with the implicit bias literature to demonstrate how legal actors in family law cases are likely to be influenced by unconscious biases even as they attempt to make fair and impartial decisions that will further the best interests of the child. Relying on encouraging research suggesting that individuals can reduce or override their implicit biases, the essay then explores potential solutions and best practices for addressing bias in custody disputes.

EXPLICITLY CONSIDERING RACE, ETHNICITY, AND CULTURE

Prior to 1984, many courts considered race when deciding a custody dispute between parents of different races. The weight that courts accorded to race, however, varied widely. For example, in *Ward v. Ward*,[20] a case decided in 1950, the Supreme Court of Washington awarded custody of the children of a White mother and a Black father to the father, reasoning that the children were "colored" and would "have a much better opportunity to take their rightful place in society if they [were] brought up among their own people."[21] In contrast, in a case decided six years later, the Illinois Appellate Division held that race cannot "outweigh all other considerations" relevant to a best interests determination.[22] Similarly, in a case decided twenty years later, the Nevada Supreme Court reversed the lower court's custody award of a biracial (Black/White) child to the Black father because the trial court had erroneously focused primarily on the child's physical appearance.[23] A New York trial court similarly held that race was "simply one of many factors which may be considered in a contest between biological parents for custody of an interracial child."[24]

Since the U.S. Supreme Court's 1984 decision in *Palmore v. Sidoti,* some courts have been reluctant to consider race as part of the best interests analysis.[25] In *Palmore*, a Caucasian couple divorced and the mother was awarded custody of their daughter. When the mother began cohabitating with (and later married) an African American man, the father sought custody, arguing that the child was likely to experience discrimination as a result of her mother's interracial relationship. The Florida Supreme Court agreed and awarded the father custody, reasoning that a child raised by a White mother and an African American stepfather would "suffer from the social stigmatization that is sure to come" from her classmates.[26] The U.S. Supreme Court reversed. Although it found that the state's goal of awarding custody based on the best interests of the child was a "substantial governmental interest," it concluded that under the Equal Protection Clause, "private biases and the possible injury they might inflict" are "impermissible considerations" in custody disputes.[27]

While some courts have concluded that *Palmore* prohibits judges from considering race when determining custody,[28] others continue to explicitly consider race, ethnicity, or culture (which may be a proxy for race) when determining the child's best interests.[29] Some statutes clearly authorize courts to do so. For example, Connecticut's custody statute allows courts to consider the "child's cultural background"[30] and the District of Columbia allows courts to consider race so long as it is not a "conclusive consideration."[31] Some commentators who oppose consideration of race or ethnicity would allow courts to consider a parent's ability to expose a child to his racial, cultural, or ethnic heritage.[32] Until 2015, Minnesota's child custody statute explicitly reflected this approach. It stated that, in determining the best interests of the child, the court should consider "the child's cultural background" and "the capacity and disposition of the parties to . . . continue educating and raising the child in the child's culture and religion or creed, if any."[33] The ALI has adopted a similar approach.[34]

Some appellate courts have expressly held that post-*Palmore*, courts can consider each parent's ability to expose the child to his racial or ethnic heritage. In *Jones v. Jones*,[35] the mother (who was White) scored higher than the father (who was Native American) on several custody assessment tests,[36] clinical interviews, and observations. In addition, the father had a "proclivity toward physical

abuse," "rebelliousness or a kind of tendency to feel angry inside," and was in the "early stages of recovery from [alcoholism]."[37] Based on these factors, the custody evaluator recommended that the mother be awarded custody. However, the trial court awarded custody to the father, reasoning that, as the Native American parent, he would be better able than the White mother to help the children, who "although . . . biracial . . . have Native American features," cope with racial and ethnic discrimination.[38] The mother appealed, arguing that the trial court considered race in violation of the Fourteenth Amendment's Equal Protection Clause and the Supreme Court's decision in *Palmore v. Sidoti*.

The Supreme Court of South Dakota rejected the mother's argument, holding that "it is proper for a trial court . . . to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it."[39] The court reasoned that "[a]ll of us form our own personal identities, based in part, on our religious, racial and cultural backgrounds [and] [t]o say . . . that a court should never consider whether a parent is willing and able to expose to and educate children on their heritage, is to say that society is not interested in whether children ever learn who they are."[40] Other courts have similarly held that "a parent's sensitivity to a child's ethnic heritage may be a factor" in the best interests determination.[41]

Studies have shown that multiracial individuals experience unique challenges not experienced by monoracial individuals.[42] For example, multiracial children are more likely to experience social exclusion, disapproval from extended family members, and questions about their racial background such as "what are you?" They may experience something akin to an "identity crisis" when forced to identify with one racial group. Further, some multiracial individuals are phenotypically racially ambiguous, which increases their identity confusion. Although researchers have found that multiracial individuals who identify as multiracial experience greater psychological well-being, higher self-esteem, and social engagement than those who identify with only one racial group, these positive outcomes disappear if they perceive their multiple identities to be in conflict.[43] Thus, having to choose one identity over another may increase the risk of negative psychological outcomes. Because a multiracial child's home environment may influence his/her racial identity,[44] courts should consider how parents would address the child's multiracial identity when making a custody determination.

In distinguishing *Palmore*, the court in *Jones* made a distinction between (1) considerations of a parent's racial, ethnic, or cultural background per se and (2) a parent's ability to expose the child to her heritage and provide for her emotional needs, including development of a positive identity. In theory, the latter approach is race neutral. Yet, it is only race neutral so long as courts make no assumptions about the parents' abilities based on their race or ethnicity. As Professor Bartlett has argued, "nothing should be presumed about a parent's ability based on his or her race or sex."[45] However, as shown below, courts sometimes make these assumptions.[46] Further, courts may place undue weight on a parent's presumed ability to expose a child to his culture. For example, given that Mr. Jones was "a recovering alcoholic who, while drinking, [had] exhibited a behavior of violence towards" his wife and "a somewhat casual indifference to the children,"[47] the *Jones* court may arguably have placed *too* much weight on his ability to expose the children to their heritage and help them cope with discrimination to the exclusion of other factors.

While the *Jones* court may have focused too heavily on the father's ethnic and cultural background, disregarding these factors when determining custody may not be in a child's best interests either as it could hinder the ability of custody evaluators and judges to effectively assess the parents' attitudes and skills. Further, implicit preferences for parenting styles prevalent in White, middle-class families might influence these assessments even when the evaluator attempts to disregard the parents' race and cultural background. *In re Marriage of Gambla and Woodson*[48] illustrates the importance of considering the parties' racial and cultural backgrounds when interpreting psychological tests and other assessment tools relied upon in custody disputes.

In *Gambla,* the two custody evaluators recommended awarding custody of a biracial child to the White father based, in part, on the African American mother's results on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test which is designed to measure emotional and personality functioning.[49] The mother showed significant elevation on the scale indicating "impulsiveness, difficulty

with authority, and limited frustration tolerance."[50] The mother's experts challenged the validity of the test on racial and cultural grounds.[51] One expert testified:

> [M]any African[]American women find comfort in spontaneity and freedom of expression. This may be seen negatively within the larger community, as it is often mistaken for impulsivity or recklessness. African[]American women generally face a stereotype of being dominant, rebellious, aggressive, rude, loud, and even sexually promiscuous. Consequently, expressions of anger in African[]American women are often seen as more intense or threatening than they actually are. African[]American women typically cope with this by repressing feelings.[52]

While not all (or most) African American women express themselves in this manner and the expert's generalization arguably reinforces stereotypes about African American women, without this testimony the court would have been ill equipped to fairly weigh the personality test. The mother's second expert witness, another psychologist, similarly testified that, given the historical and current racial and power dynamics in the United States, the mother's elevation on the MMPI-2 was not unusual for African Americans and did not suggest impulsivity or lack of self-control but "could actually be an indication of strength, not weakness."[53] Again, without this historical and social context, the court might have lacked the necessary information to determine whether the mother was actually impulsive and had low tolerance for frustration. After the mother's experts pressed the court to consider cultural variables when interpreting the test scores, the custody evaluators acknowledged that "cultural differences need to be considered in interpreting the MMPI-2's results" and noted that studies have found racial differences on certain scales and that "African[]American women have a slight tendency to score higher in scales that measure defensiveness."[54]

Gambla illustrates the challenges raised when courts consider a parent's racial, ethnic, or cultural background in a custody dispute. The court could not have fairly assessed the results of the personality tests without the benefit of expert testimony on African American women's style of self-expression, stereotypes about African American women's personalities, and the effects of historical and current racial dynamics on their test results. Consequently, as the custody evaluators acknowledged, cultural differences *should* be considered when interpreting personality tests that will be used in custody disputes. However, the trial court did not only consider race to aid in its interpretation of the personality tests, it also used race as a tiebreaker when making the custody determination. After applying each of the statutory best interests factors,[55] the trial court determined that the parents were equally qualified to care for the child and, as such, it could use race as the tiebreaker. It awarded the mother primary custody because it concluded that, as an African American woman, she would be better able to provide the child with the support she would need to cope with societal hostility toward biracial persons.[56] The White father appealed, arguing that the trial court violated the Fourteenth Amendment's Equal Protection Clause when it considered race. The Illinois Court of Appeals rejected his argument, holding that "so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration."[57]

The use of race as a tiebreaker in a custody dispute between two parents is troubling. As David Meyer has argued, the *Gambla* court's determination that race can always be considered so long as it is not the sole factor "would categorially open the door to free-wheeling considerations of race."[58] Racial and cultural considerations are appropriate when necessary to enable the court to make an informed decision. For example, they were necessary to the court's interpretation of the mother's psychological tests. They are *not* appropriate when used to give one parent preference without proof that the parent's racial or cultural background makes him/her a more competent parent or better able to further the child's best interests.[59] The court in *Gambla* found that, as an African American woman, the mother would be able to provide the child "with a breadth of cultural knowledge and experience" that the White father could not and thus would be better able to provide for the child's "emotional needs."[60] However, the law should not presume that, by virtue of her race or culture, one parent would automatically be better able than the other parent to meet the child's emotional needs.[61] First, no one can define what constitutes a proper racial identity for another individual. The African

American or Native American experience, for example, may mean different things to individual members of those groups and it would be inappropriate for a court to consider whether a parent is sufficiently immersed in Black culture or maintains "a significant social, cultural, or political relationship with an Indian community" as some courts have done in the context of adoption.[62]

Second, as Katharine Bartlett has pointed out, even if we could predict the ideal racial identity for a particular child, "it cannot be reliably assumed that a parent of the same sex and race as the child will be better able to model that identity than the other parent."[63] One cannot categorically assume that a White parent is not knowledgeable about African American culture or is less able to meet his child's needs, especially when he married an African American woman and planned to raise a child together.

In the context of transracial adoption, courts have found that Caucasian adoptive parents can meet the "cultural, racial, and ethnic" needs of a biracial child as effectively as African American adoptive parents. To illustrate, in *In re M.F.*,[64] a Caucasian couple and an African American aunt filed competing petitions to adopt a biracial (African American and Caucasian) child. The Caucasian couple was raising a biracial child they had adopted seven years prior,[65] resided in a racially diverse community, and had African American friends who spent time with the children. They had also enrolled both children in a multicultural day care center[66]; hired African American babysitters; and had multicultural art, books, and toys in their home. In addition, the Caucasian prospective adoptive mother was a psychologist who evaluated cultural diversity training packages as part of her work. Although the child's aunt testified that, as an African American woman, she was personally familiar with the challenges that a biracial child would face and would not need to go out and learn about these challenges as the Caucasian petitioners would, the court concluded that both families were similarly capable of meeting the child's needs with regard to her cultural, ethnic, and racial background.[67] If Caucasian adoptive parents can meet the needs of a biracial child as effectively as African American adoptive parents, there is no reason to presume that a Caucasian birthparent is not as capable of the same.

Admittedly, the African American mother in *Gambla* testified that she planned to teach her biracial daughter about African American culture, expressions, celebrations, and family relationships and help her "learn to cope with being a woman of color."[68] In contrast, the White father did not address whether and how he would do the same. Thus, based on the mother's testimony, the court had reason to conclude that she was more likely than the father to expose the child to African American culture and help her maneuver the challenges she would face growing up as a woman of color in a race-conscious society. However, it is important to clarify that the issue is not whether a parent's racial, ethnic, or cultural background renders him/her better able to meet the emotional needs of a biracial child, but whether a parent is willing and able to expose a child to his/her heritage and culture and ensure that the child learns the skills s/he will need as a racial minority. Race should not be a proxy for parenting ability. Unfortunately, this distinction is easily understood in theory but may be difficult to apply in practice. For example, the trial court in *Gambla* awarded the mother custody "based on her slightly better ability to provide for the emotional needs of the child which may be occasioned by her special circumstances"—"her ability to provide a breadth of cultural knowledge and experience to help [the child] learn to exist as a biracial individual."[69] As the dissent noted, these words suggest that the trial court awarded the mother custody because, as an African American woman, she would be able to provide the child with "cultural knowledge and experience that [the White father] could not, due to his race."[70]

Given the mother's unrefuted testimony, the *Gambla* court's use of race as a tiebreaker might arguably have been proper. In *In re Marriage of Kleist*,[71] however, there was no legitimate reason for the court's consideration of the mother's Latino culture. In *Kleist*, the mother was born and lived in Cuba until she immigrated to the United States with her family at the age of ten. At the time of the divorce, she had lived in the United States for thirty-four years. In the custody dispute over their three-year-old daughter, the White father and his witnesses described the mother as volatile and erratic and expressed concern about her violent tendencies. In response, the mother argued that "[b]ehavior considered abusive in [the United States]. . .is socially acceptable in Hispanic culture as a means

to air grievances and channel pent-up anger."[72] She also asserted that, based on her Latino culture, she could not fulfill her role as a mother unless she had primary physical custody. According to the court, the mother's "strong link to her Hispanic heritage also carries with it a belief that young children, especially girls, should be the primary responsibility of their mother."[73] The trial court awarded her primary physical custody and the father appealed. The Iowa Court of Appeals reversed on the ground that the trial court had placed undue weight on the mother's cultural beliefs. On appeal, the Iowa Supreme Court reversed the Court of Appeals noting that "the fighting issue [was] the extent to which [the mother's] Hispanic heritage should be permitted, if at all, to impact the custody decision."[74] It held that, while the court could not allow "a person's cultural beliefs [to] put him or her in a *superior position* when we assess the custody issue," it should not ignore how a person's background shapes her attitude toward parenting.[75] The majority affirmed the trial court's award of physical custody to the mother, noting that her beliefs had shaped her parenting style and that it would be difficult for her to adapt to a noncustodial role.

The majority in *Kleist* concluded that it would not be in the child's best interests to force the mother to "adjust her parenting style to accommodate a noncustodial role" given her strong cultural belief that young children should live with their mother, not their father. The court's accommodation of the mother's parenting style is troubling. At the time the case was decided, the majority of courts had rejected the tender-years presumption that had granted mothers preference in custody disputes involving young children as a violation of equal protection. However, as the dissenting opinion asserted, by honoring the mother's "ethnic belief," the majority "improperly reintroduce[d] the 'tender years' presumption through cultural rationalizations."[76] We should heed dissenting Chief Justice McGiverin's warning that awarding custody based in part on a parent's "cultural disposition sets bad precedent with untold, unfortunate ramifications."[77]

By honoring the mother's cultural belief that young children should live with their mothers, the court in *Kleist* accommodated private biases that *Palmore* held are "impermissible considerations" in custody disputes.[78] Yet, the court never addressed *Palmore,* possibly because *Palmore* dealt with racial biases while *Kleist* dealt with preferences based on cultural beliefs. Nevertheless, *Kleist*, along with *Jones* and *Gambla*, illustrate how courts explicitly but sometimes improperly consider race, ethnicity, and culture in custody disputes. Interestingly, none of these courts engaged in any constitutional analysis. For example, the majority in *Gambla* did not address the applicable standard that applies—rational basis or heightened scrutiny—when considering race in a custody dispute. Instead, the court, in conclusory fashion, held that so long as race is not the sole factor, consideration of race is constitutional. As Katie Eyer has noted, "courts addressing post-*Palmore*, race-based family law practices typically found them to be categorically constitutional (i.e., requiring no constitutional scrutiny of any kind) where race was the not the exclusive factor considered as part of the best interest of the child assessment."[79]

So far, we have examined custody disputes in which the court explicitly considered the racial, ethnic, or cultural background of the parties. The next part examines cases where the court did not acknowledge these factors but it is evident from the opinion that they influenced the court's decision.

IMPLICITLY CONSIDERING RACE, ETHNICITY, AND CULTURE

As conceded by the custody evaluators in *Gambla*, the court's consideration of the mother's African American heritage when interpreting her psychological test scores was appropriate. It was also in accordance with the APA Guidelines' admonition that "lack of culturally competent insight [is] likely to interfere with data collection and interpretation and thus with the development of valid opinions and recommendations."[80] There is a risk, however, that when evaluating parents, custody evaluators and judges will be influenced by explicit or implicit biases against minority groups or assess parental behaviors and attitudes from the perspective of the majority.[81] For example, although the mother in *Gambla* scored higher than average on the Adult-Adolescent Parent Inventory scales that measure "empathy, disciplinary style, and maintaining an appropriate parental role," the custody evaluator

concluded that she had answered the questions defensively, thereby compromising the validity of the results.[82] The mother's expert noted that the father had also exhibited some guardedness or defensiveness when taking the same psychological tests, but the custody evaluators had been "far more forgiving" of his guardedness.[83] It is possible that implicit biases against African American women, especially given the stereotype of African American women as aggressive, angry, and threatening,[84] influenced the evaluator's harsher stance with regard to the mother.

In some cases, a judge's biases are clearly evident from the opinion. For example, in 1995, a Texas judge warned a Latina mother that she would lose custody of her five-year-old daughter if she continued to speak to her in Spanish. The judge stated that it was not in the child's "best interest to be ignorant," she should "hear only English" and added that, by speaking to her in Spanish, the mother was "relegating her to the position of a housemaid."[85]

Similarly, in 2003, a Nebraska trial judge threatened to curtail a Latino noncustodial father's visitation if he did not stop speaking to his daughter in Spanish.[86] The child's custodial mother (who was White) claimed that the child identified as Polish and did not wish to be exposed to her Latino father's culture. The judge revealed his ignorance when he stated that the only unresolved issue was whether the father would be allowed to "speak Hispanic" during visitation.[87] In these cases, the ban on Spanish reflects biases against persons of Latino descent and the judges' association of Latinos with domestic work and lack of formal education.

Judges' biases against interracial families are also evident. In *Tipton v. Aaron*,[88] a case with facts similar to those in *Palmore*, the parents, both of whom were White, sought custody of their nonmarital son Colton. The father argued that he was better suited to be the custodial parent because the mother had married a biracial man, had a biracial child, and would be bringing Colton (a White child) into an interracial family. The trial judge, ruling from the bench, stated that the mother's interracial home should have no bearing on his decision, but that he "believe[d] that it will create problems for [Colton] in the future."[89] The trial judge also allowed the father's attorney to repeatedly elicit testimony from the father and his witnesses in an effort to show that Colton would experience problems if raised in an interracial home. For example, the trial judge (as factfinder) allowed the father's testimony that "he did not believe in the interracial thing and the mixing," that "some people accept it, but it's not right," that the mother "gave Colton a black sister by one man and turned around and married another black man," and that he did not "want his son living in a home with a black stepfather." The trial court also admitted testimony from four of the father's witnesses, each of whom stated that a White child should not be raised in an interracial home and allowed the father's attorney to ask the mother whether she would encourage Colton to enter interracial relationships. The trial judge never indicated that this line of questioning was problematic. On appeal, the court reversed the grant of custody to the father. The concurring opinion noted that the trial court not only admitted testimony that demonstrated the witnesses' racial biases, but also based its decision on these racial biases.[90]

Biases against Middle Eastern and Asian cultures are also apparent from the cases. In *Schultz v. Elremmash*,[91] the Louisiana Court of Appeals rejected the father's argument that the trial court's cultural biases influenced its decision to award the mother sole custody of their daughter. However, the appellate court's opinion suggests that its assessment of the trial court's decision may have been influenced by implicit biases against Middle Eastern culture and the Muslim religion. The appellate court concluded, without explanation, that the mother, a U.S. citizen who wanted to raise the child Catholic, was more likely than the father, a Libyan citizen and a Muslim, to allow the child to explore her heritage. Noting that the father was not a U.S. citizen, the court remarked, disapprovingly, that he "appears to be extremely critical of American ways"[92] and implied that his refusal to allow the child to participate in the recitation of the Pledge of Allegiance and the portion of the school's Christmas pageant that included a Nativity scene was "inappropriate."[93] It concluded that the mother had "the child's best interest at heart" because she wanted her daughter "to experience life in a carefree manner," whereas the father wanted her "to be raised in a very restricted manner."[94]

Biases against Middle Eastern culture may have similarly influenced the outcome in *Shady v. Shady*.[95] In *Shady*, the Indiana Court of Appeals upheld the trial court's determination that the father,

a naturalized U.S. citizen who was born and raised in Egypt, was likely to abduct the parties' U.S.-born child and abscond to Egypt. The parents met when the mother, a U.S. citizen, traveled to Egypt as a college student. The parties married in Egypt and moved to Indiana the following year. The father became a U.S. citizen and had resided in the U.S. for ten years at the time of the trial. In assessing the risk of abduction, the court looked at the American Bar Association's risk factors for international child abduction, which list as a factor that "one or both parents are foreigners ending a mixed-culture marriage."[96] The court denied the father unsupervised visitation based on this "risk factor"; the fact that he had mentioned that he would like to take the child "overseas"; had extended family in Egypt (his parents were deceased); and shared a close relationship with his brother, an Egyptian national living in the United States. The court further noted that it would be devastating for the child to live in Egypt because the "legal rights and cultural expectations for women" differ markedly from those in the United States.[97]

The *Shady* court also relied heavily on an international parental child abduction expert's testimony. The expert concluded that, although the father had lived in Indiana for ten years, he lacked community ties or permanency in the United States because he did not attend school in the United States or own real estate or a business here.[98] The court noted:

> Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks . . . Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to [his] family of origin. This is a way of insisting that [his] cultural identity b[e] given preeminent status in the child's upbringing.[99]

In re Adoption of A.M.H,[100] a case that has been described as a "struggle over cultural values" and "the perceived superiority of American culture,"[101] illustrates how cultural assumptions may affect custody decisions. *A.M.H*., known to many as the *Anna Mae* case, did not involve a custody dispute between two parents, but rather a seven-year custody battle between Chinese parents who placed their daughter in temporary foster care and the White foster parents who refused to return her to them. The case, however, illustrates how biases against Chinese culture deprived two fit parents of their daughter for seven years.

Mr. He, a tenured college professor in China, came to the United States on a student visa. His wife joined him in the United States a few years later.[102] They had a baby, Anna Mae, but due to their financial circumstances, they decided to place her in foster care for three months with the Bakers, a White couple. They visited Anna Mae weekly, but when their financial situation had not improved after three months, they granted the Bakers temporary custody of Anna Mae, so they could obtain health insurance for her.[103] After the Hes signed the consent order transferring custody to the Bakers, Mrs. Baker began keeping notes of the Hes' visits with their daughter. In these notes, she expressed her desire to decrease the frequency of the visits and to "wean away" the Hes despite Mrs. He "wanting to come [over] more." The notes also characterized Mr. He as "pushy" and "overbearing" and Mrs. He as emotional.[104]

When Anna Mae was ten months old, Mr. He asked Mr. Baker to return their daughter, but Mr. Baker insisted that he not mention it to Mrs. Baker because she was pregnant, and he was concerned about upsetting her and causing a miscarriage.[105] The Hes waited until the Bakers' child was born, but soon after, when Anna Mae was fifteen months old, they filed a petition to regain custody. After learning that the Hes were planning to send Anna Mae to live with relatives in China, the referee denied their petition for custody but granted them visitation. Notwithstanding the visitation order, the Bakers refused to allow the Hes to take Anna Mae out for a family portrait on her second birthday and called the police when the Hes refused to leave. The officers told the Hes they would be arrested if they returned to the Bakers' home. Fearing arrest, the Hes did not return to the Bakers' home but filed another petition to regain custody, stating that they planned to return to China with their family. However, four months and five days after the police were called, the Bakers filed a petition to

terminate the Hes' parental rights on the ground that they had abandoned Anna Mae by willfully failing to visit her for four consecutive months. Under Tennessee law, a parent's willful failure to visit his/her child for four consecutive months can constitute "abandonment"—a ground for termination of parental rights.[106]

The trial court terminated the Hes' parental rights and the Tennessee Court of Appeals affirmed. The Hes' seven-year battle to regain custody of their daughter came to an end when the Tennessee Supreme Court held that they had been misled as to the consequences of transferring custody to the Bakers, and as such, the transfer of custody was never voluntary.[107] However, but for the biases against Chinese culture, the Hes might have regained custody of Anna Mae seven years earlier. For example, the guardian ad litem opposed the Hes' custody petition because they planned to return to China, and based on a book she had read "about Chinese girls being placed in orphanages," she worried about the "kind of life" Anna Mae would have in China.[108] The Bakers' attorney similarly asked "what kind of quality of life is the child going to have in China?" and Mrs. Baker asserted that "life in China . . . would be a hardship."[109] She added that if Mrs. He "truly loved her daughter, she would leave her with [the Bakers]."[110]

In their efforts to terminate the Hes' parental rights, the Bakers depicted Mr. He as "untrustworthy" and Mrs. He as "prone to hysterics."[111] The trial court seemed to agree. It concluded that the Hes were "manipulative and dishonest people who appeared to have no intent to raise [Anna Mae] but have used the child from birth for financial gain and to avoid deportation."[112] However, there was absolutely no evidence that the Hes used Anna Mae to avoid deportation. Indeed, they had always planned to return to China with Anna Mae and their other two children who were born in the United States during the seven-year litigation.[113] The trial court further described Mr. He as having "an aggressive personality and show[ing] no propensity to be deterred or intimidated" and as having engaged "in a pattern of conduct marked by deceitfulness and dishonesty, without remorse, repentance or conscience."[114] It described Mrs. He as "an impetuous person not subject to being intimidated or deterred in achieving whatever she sets as her goal . . . calculating . . . dishonest and manipulative [with] . . . a history of acting in an unstable manner when it serves her own self-interest."[115] In contrast, the trial court found that the Bakers were "sincere, honest, credible" witnesses who have a "great deal of love, care, and concern for children in general . . . and for Anna Mae."[116]

The trial judge rejected the testimony of the Hes' Chinese culture expert, finding it of no assistance, yet the judge's statements reveal negative and erroneous assumptions about China. For example, the trial judge stated that the mortality rate for infant girls in China is fifty percent, a blatantly erroneous assumption. It also found that, under China's One Child Policy, the Hes would be denied valuable government benefits because they had more than one child.[117] There are many exceptions to the One Child Policy, which the trial court never investigated, but more importantly, as the Tennessee Supreme Court stated, "the general conditions in China [are] not relevant" in a termination of parental rights proceeding.[118] In addition, the trial judge assumed that good parents do not send their children to live with relatives in their country of origin. However, this is not rare in some immigrant communities and is understood as necessary for the child's well-being.[119]

The trial judge also excluded the testimony of Dr. Chang, the psychologist who performed an evaluation of the Hes based on Chinese cultural norms.[120] The trial court concluded that the facts Dr. Chang relied upon in forming her opinion of the Hes' mental health "indicated a lack of trustworthiness."[121] In contrast, it found that the psychologist the guardian ad litem had retained was "highly qualified, highly respected . . . very knowledgeable, honest and a forthright witness."[122] This psychologist, however, never evaluated Anna Mae or the Hes and simply "assume[d] that there was very little attachment" between them even though he had never seen them together.[123]

Although the trial court never acknowledged that its assumptions about Chinese culture influenced its assessment of the Hes and its decision to deny them custody of their daughter, based on the facts discussed above, it is not surprising that many commentators attacked the trial court's decision as "culturally and ethnically biased."[124]

The U.S. Supreme Court's decision in *Adoptive Couple v. Baby Girl*[125] illustrates the intersection of multiple biases based on (1) erroneous assumptions about Native American culture, (2)

disapproval of the Indian Child Welfare Act's (ICWA) mandate that tribal children remain with their birth families or other tribal families whenever possible, (3) disapproval of tribes' criteria for membership, and (4) preferences for upper middle-class adoptive parents over less economically stable unmarried birthparents. In *Adoptive Couple*, an unmarried Native American (Cherokee) father challenged termination of his parental rights to his daughter and her adoption by a non–Native American family. In a 5–4 opinion, Justice Alito, writing for the majority, accused the father of playing the "ICWA trump card"[126]—an accusation eerily similar to that made against minorities who claim race discrimination and are accused of playing the "race card." The majority also made "repeated, analytically unnecessary"[127] assertions that, but for the child's 3/256th Cherokee blood, the father would not have any rights to oppose the adoption.[128] As Bethany Berger has argued, this statement is incorrect as the child's "quantum of Cherokee blood was irrelevant to . . . citizenship in the Cherokee Nation" and "not the reason her father had rights" to challenge the adoption.[129] However, the majority's focus on biological notions of race and allusions that the child was not sufficiently Cherokee illustrates its assumptions about what it means to be Native American. Although the father was culturally Cherokee,[130] the majority ignored this evidence and, as Justice Sotomayor noted in her dissent, created instead "a lingering mood of disapprobation of the criteria for membership adopted by the Cherokee Nation. . ."[131] The majority never addressed the child's cultural (as opposed to racial) background and the importance of exposing her to her Cherokee heritage even though studies suggest that it may be important to her development of a healthy identity.[132] The preference for upper middle-class marital families is reflected in the South Carolina Supreme Court's reference to the adoptive couple as "ideal parents" and the guardian ad litem's focus on their high level of education, "beautiful home," and ability to send the child to private school.[133]

One commentator has noted that "when one parent intends to raise the child outside of the United States, courts often embark upon an effort to compare the relative advantages of the different cultures, sometimes explicitly valuing 'American culture' as presumptively in the best interests of a child born in America."[134] However, biases are not always so easily discernable. Biases are often hard to detect, especially when courts consider factors that appear to be racially and culturally neutral, but which disproportionately disadvantage parents of certain racial, ethnic, or cultural backgrounds. *Rico v. Rodriguez*[135] illustrates how a seemingly race-neutral factor, in this case immigration status, impacts Latino parents. In *Rico*, a Mexican woman traveled to Nevada with her two children illegally. Once there, the children's nonmarital father, a legal permanent resident living in Washington with his wife, filed for custody. The court granted the father primary physical custody based, in part, on the mother's immigration status.[136] The mother appealed, arguing that the court's consideration of her immigration status violated her right to equal protection and due process under the Fourteenth Amendment of the U.S. Constitution. The Nevada Supreme Court rejected both arguments, holding that there was no evidence that the child custody statute was "designed to purposefully discriminate against parents based on their immigration status."[137]

It is impossible to know whether the trial court considered the mother's immigration status because it believed that, as an undocumented person who crossed the border illegally, the mother should not have custody of her children or whether the court was solely concerned with the best interests of the children. As Kerry Abrams has noted, "[g]iven the prejudice against immigrants—especially against 'illegal aliens'—in our society, it is very difficult to ever be certain that a judge who considers immigration status fair game in a best interests analysis is not doing it to punish the undocumented parent, or out of a prejudice against undocumented people."[138]

Irrespective of whether the court was biased against the mother based on her immigration status, cultural assumptions influenced the court's decision. The *Rico* court had ordered independent studies of each parent's living conditions and relationship with the children before the evidentiary hearing. A court-appointed social worker learned that the children had lived primarily with their maternal grandmother while in Mexico. The social worker expressed concern that, as a result of this living arrangement, the older child, who was eleven years old when the custody petition was filed, had been required to assume a parental role toward her younger brother. She also expressed serious

concerns about the lack of medical attention for the nine-year-old child's "speech impediment, lack of formal education, and inability even to say the alphabet."[139]

Another social worker similarly found that the mother had placed significant parenting responsibilities on the older child such as "dressing, feeding, and looking out for [her younger brother]" and was not able to provide medical care to correct her son's speech impediment. She further noted that eight people, including the mother and the two children, were living in a three-bedroom mobile home owned by the mother's boyfriend.

Relying on the social workers' reports, the trial court considered, in addition to the mother's immigration status, the youngest child's medical and speech difficulties, the older daughter's responsibility for her younger brother, the fact that the children had lived primarily with their maternal grandmother while in Mexico, the father's superior living conditions, and his ability to provide medical insurance and stable schooling for the children. Based on these factors, it awarded the father primary physical custody. The court's decision reflects dominant, White, middle-class norms that have a disparate effect on racial and ethnic minorities who are less likely to conform to these norms. For example, in Asia and Latin America, older children routinely shoulder significant responsibilities for their younger siblings' care. Older children are expected to feed, dress, and care for their younger siblings (without pay) and are often granted authority to discipline the younger children. Indeed, younger siblings often acknowledge their older siblings' significant role in their upbringing.

The court and social workers in *Rico* expressed concern that the children had resided with their maternal grandmother for the last six or seven years rather than with their mother after the parents separated.[140] However, the expectation that children will be raised by their parents, not extended relatives, is a "cultural middle-class norm" and does not apply globally.[141] In Latin America, it is quite common for grandparents to raise grandchildren, especially when the nuclear family is disrupted.[142] Indeed, in the United States, African American, Latino/a, and Native American grandparents often play a quasi-parental role as opposed to the companionate role played by most White, middle-class grandparents.[143]

The court and social workers also seemed concerned with the mother's living arrangements—specifically, that eight people were living in a three-bedroom mobile home.[144] The court's decision to grant the father custody in part because of the mother's living accommodations reflects a middle-class norm where privacy is valued, children do not share rooms with more than one or two people, and families do not share homes with other families.[145] This is not the norm for poor and minority families.[146]

Finally, the court and the social workers in *Rico* expressed concern that the mother had not addressed her son's birth defect and speech impediment or provided him with a formal education. The court and the social workers apparently did not inquire about the children's living conditions in Mexico and whether the mother had access to medical care for the children or could have provided the son with a formal education given his speech impediment. In the United States, speech impairments are taken seriously, but in countries with limited resources, less serious birth defects and speech impediments are often left untreated. The opinion does not provide information about the mother's financial situation in Mexico, but her willingness to cross the border illegally with her children suggests that her economic situation in Mexico was rather dire.[147]

The racial, ethnic, and cultural biases of judges, custody evaluators, guardians ad litem, and lawyers representing the parties and children have the potential to influence custody decisions. As Katharine Bartlett has argued, "the open-ended best interests test" is "an empty vessel, to be filled by the subjective views of judges about what is good for children, including views about race and sex" and "invites bias of all types."[148] Evaluation of the best interests factors will be influenced by middle-class values and norms of the majority and will likely reflect the dominant majority's assumptions about the way parents should behave, the attitudes they should adopt, and even how they should communicate with and discipline their children.[149] The risk that biases might influence custody determinations might be greater when judges and other legal actors purport to weigh only facially neutral best interests factors and do not explicitly address race or cultural background.[150] For example, in *Farmer v Farmer,* the court awarded the mother custody, in part because she was "more stable economically" and could better provide the child with "appropriate educational opportunity."[151] Although considerations of economic stability and ability to provide educational opportunities may

appear racially and culturally neutral, they reflect a middle-class norm that values educational opportunities of the individual above family unity and the well-being and success of the collective. These norms often disadvantage minorities as they are less likely than Whites to attain and maintain middle-class status. They may also discriminate against a less educated parent or one who is not fluent in the English language, parents who are often racial or ethnic minorities.

Researchers studying low-income families have noted that class "[b]ias may . . . appear in social workers, lawyers, therapists, and parenting experts' assessments of parenting and their expectations of how parents will relate to and discipline children."[152] Cultural differences are apparent in childrearing norms. Studies have found differences between the communication and childrearing styles of professional, predominantly White parents and that of low-income, Black and Latino parents. Middle-class White parents tend to engage their children in conversation as equals, encourage them to ask questions, challenge assumptions, and negotiate rules and punishments.[153] They also enroll their children in numerous activities to enhance their development such as trips to museums, music lessons, and countless extracurricular programs.[154] Their children grow up expecting adults to take their opinions and concerns seriously and, as a result, exhibit more confidence and success in school.

Low-income, Black, and Latino parents raise their children differently.[155] Unlike college-educated and wealthier parents, low-income parents do not enroll their children in many extracurricular activities or otherwise manage their leisure time. They do not treat their children as equals or encourage them to challenge assumptions or negotiate the rules.[156] They are less likely to praise their children[157] or engage them in conversation[158] and expect them to do as they are told and not ask questions.[159] Indeed, low-income and minority parents often subscribe to the idea that "children should be seen, not heard" or, as many Spanish-speaking parents tell their children, "*Los niños hablan cuando las gallinas mean* [Children may speak when hens pee]," which, apparently, is never.[160]

Some studies suggest that the childrearing styles practiced by middle-class families benefit children.[161] Researchers have found that the frequency and nature of parents' daily communications with their children directly impact the size of their child's vocabulary and ultimately, their IQ score.[162] Specifically, these studies have found a correlation between parents' infrequent and discouraging statements and lower IQ scores in children. Conversely, frequent parental communication, words of praise, and complex sentences were correlated with higher intellectual development in children.[163] These findings might influence judges and custody evaluators to scrutinize parent-child communications and to favor the parent whose communication style closely mirrors their own.

These apparently superior childrearing styles reflect culturally biased assumptions about the best way to raise a child.[164] As Annette Lareau has argued, middle-class parents' childrearing style places "intense labor demands on busy parents, exhausts children, and emphasizes the development of individualism . . . at the expense of the development of the notion of the family group."[165] They may also encourage argumentative children who "complain about their parents' incompetence and disparage parents' decisions."[166] For these reasons, among others, many low-income and minority parents reject this approach to childrearing even if studies suggest that it might help children succeed academically. They prefer to raise children who, as Lareau found, are more respectful, polite, nicer to their siblings, and enjoy a more relaxed childhood,[167] even if they do not grow up with the confidence that may benefit middle-class White children, but which has not been shown to benefit minority children.[168] As scholars have argued, the "parenting styles and values that are perceived as functional for Caucasian, middle-income families may be inappropriate in other cultural contexts."[169] Minority parents may need to focus on teaching their children how to deal with racial or ethnic discrimination rather than encouraging them to challenge authority.[170]

There is no clear definition of culture. It can encompass race, ethnicity, religion, values, and norms.[171] Education and socioeconomic status may also be a component of culture and often overlap with race or ethnicity. The cultural norms of low-income Latinos may be different from those of their college-educated counterparts. As such, it is impossible to craft bright-line rules to guide decision makers in custody disputes involving parents with different cultural backgrounds. That said, the cases examined in this section suggest that cultural biases disproportionately impact racial and ethnic minorities. Although racial or ethnic minorities seem to benefit from their minority status in some cases, such

as *Jones, Gambla*, and *Kleist*, one should not overlook the role that gender bias (against mothers or fathers) may have played in those cases. The next section briefly summarizes the research on implicit bias to demonstrate how legal actors are likely to be influenced by racial, ethnic, and cultural biases even as they intend to make impartial decisions that will further the best interests of the child.

HOW OUR BRAINS WORK: IMPLICIT SOCIAL COGNITION THEORY

Judges, like most Americans, subscribe to an antidiscrimination norm.[172] They have also sworn to apply the law in an impartial manner. So how do we explain the influence of racial, ethnic, and cultural biases in the cases we examined? The answer requires that we understand how our brains work.

In order to process the vast amounts of information and stimuli we encounter daily, our brains sort information, including people, into categories. We categorize by age, sex, race, color, body type, and role. Notably, despite a norm of colorblindness in the United States,[173] individuals are not colorblind. "In fact, of all the dimensions on which people categorize others, race is among the quickest and most automatic."[174] We also create associations between certain traits and groups—stereotypes—that affect how we process information when we encounter members of these groups.[175] For example, many Americans implicitly associate African Americans with athletic ability and Asian Americans with mathematical ability. Although we recognize that not all Asian Americans are good in math and that many African Americans have no special athletic ability, our unconscious minds automatically make these associations without our awareness or control. Stereotypes can be positive or negative but they influence our implicit attitudes[176] toward different groups even when they conflict with our explicitly egalitarian principles and attitudes.[177]

Studies have repeatedly shown that the majority of Americans have implicit biases[178] against African Americans.[179] The Implicit Association Test (IAT) has shown that the majority of Whites associate positive words with Whites and negative words with Blacks, which demonstrates implicit preferences for Whites relative to Blacks.[180] Asian Americans and Latinos also have implicit, albeit weaker, preferences for Whites.[181] Many Americans also hold implicit biases against Latinos, Asian Americans, and persons of Middle Eastern descent.[182] These implicit biases affect our behavior and sometimes lead us to treat these groups less favorably.[183] For example, studies have shown that implicit biases can affect employment decisions,[184] medical treatment,[185] prosecutorial discretion,[186] and jurors' evaluation of evidence.[187] Individuals who demonstrate stronger biases on the IAT are generally more likely to engage in discriminatory behavior.[188]

Researchers have found that trial court judges have the same implicit biases as the rest of us, at least with regard to race. One study of 133 trial judges from three jurisdictions found that 87% of White judges have implicit preferences for Whites. The majority of Black judges, "by contrast, demonstrated no clear preference overall," although 44% of Black judges had weak implicit preferences for Whites.[189] Studies have also found that these biases can affect judges' decisions in criminal, immigration, bankruptcy, environmental, and personal injury cases.[190] Another study of more than 1800 state and federal trial judges found that "judges' feelings about litigants influence their judgments" and that the race and gender of the litigants, among other factors, can trigger emotional responses that influence their decisions.[191] Psychologists have long known that

> [p]eople treat others whom they like more leniently and make more forgiving judgments about their character; give greater weight to evidence that supports their preference than to evidence that undercuts it; believe that people whom they like bear less responsibility for negative outcomes than people whom they dislike; remember facts about conduct differently for people whom they like than for people whom they dislike; and are more inclined to conclude that those whom they dislike had the ability to control consequences and intended them to occur when those consequences are negative.[192]

Judges are subject to similar cognitive biases. Their emotions can influence how they perceive a litigant, the information they remember about the parties and witnesses before them, and how they

process that information.[193] Emotional responses may also lead judges to see positive traits in litigants they like and negative traits in those they dislike.[194]

Although there is a positive correlation between implicit biases and discriminatory behavior, individuals can compensate for the effects of their implicit biases if they are sufficiently motivated and the context (such as race) is made salient such that they are aware that biases may influence their behavior.[195] For example, one study found that physicians with implicit biases for Whites, as shown by their IAT scores, were more likely to offer the appropriate medical treatment to White patients than to Black patients.[196] However, physicians who were at least vaguely aware of the purpose of the study were more likely to offer the treatment to Black patients. They were able to compensate for their implicit biases. Another study found that while participants with implicit biases for Whites (as shown by their IAT scores) were more likely to shoot at a Black target than a White target regardless of whether the target pulled out a gun or harmless object, individuals who were highly motivated not to discriminate against Blacks were able to avoid shooting.[197]

The study of 133 trial judges discussed above similarly found that judges can override their implicit biases when made "aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias."[198] Studies of the influence of emotion on judges' decisions also found that while judges often make intuitive decisions, they "sometimes override their intuition with deliberation."[199] While we should be encouraged by these studies demonstrating that judges can override their biases and intuitive judgments, the researchers noted that, given full caseloads, judges may not always have the time needed to actively and consciously control their implicit biases.[200] They also found that judges tend to be overly confident in their abilities to "avoid racial prejudice in decision-making" and may not do the necessary work to correct their biases.[201] In addition, because individuals seek consistency between their judgments and emotions, even deliberative reasoning may be influenced by intuitive, emotional reactions.[202] Intuitive and emotional reactions might be more prevalent in custody cases as compared to other types of disputes as individuals have strong intuitive opinions when an innocent child's future well-being is at stake.

While researchers have not yet studied the implicit biases of custody evaluators or family court judges, there is no reason to expect that they do not hold the same biases as the majority of White judges (and the majority of White Americans). As noted above, even Black judges have implicit preferences for Whites even though those preferences are much weaker than the preferences of White judges.[203] In fact, the emotional nature of custody cases and the discretion accorded by the best interests standard may render actors in these cases *more* susceptible to intuitive and biased decision making.[204] As Andrew Wistrich and his colleagues have noted:

> Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike, but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants. This may occur without their conscious awareness and despite their best efforts to resist it.[205]

The facts in custody cases are often disputed and the best interests standard grants judges wide discretion so these decisions may be particularly susceptible to judges' feelings about the litigants. As illustrated by the cases discussed above, custody evaluators, guardians ad litem, and judges make assumptions about parents based on race, ethnicity, and culture. Implicit biases may influence perception of a parent's behavior and attitude based on stereotypes about the parent's race, ethnicity, or culture. Thus, legal actors must take steps to minimize the influence of implicit biases in their assessments and decisions. The next section explores strategies to reduce bias in custody cases.

REDUCING BIAS: STRATEGIES

Researchers have explored various approaches to help decision makers make deliberative and unbiased decisions. For example, scholars have urged judges not to attempt to repress their emotions

but to confront them head-on[206] and have recommended that judges analyze their feelings, apply a multifactor test, explain the basis for their decision in a written opinion, and "allow the force of affective responses to dissipate with the passage of time."[207] Some of these practices are already in effect in some jurisdictions. The best interests standard in many jurisdictions requires judges to analyze a dozen or more factors and explain in which parent's favor each factor weighed. Thus, many judges deciding custody cases already apply a multifactor test and explain the basis for their decision in a detailed written opinion.

While these safeguards facilitate detection of bias and should be adopted by all jurisdictions, they are not sufficient to eliminate it. Judges, guardians ad litem, custody evaluators, and practitioners will have to work much harder to check what commentators have referred to as "the bigot in the brain."[208] Although researchers have tested different approaches to reduce implicit biases, they all agree that the first step requires individuals to uncover and acknowledge their implicit biases. Individuals who think that they are objective are "*more* susceptible to biases" so anyone seeking to reduce their biases must learn to question their objectivity.[209] Second, individuals must be motivated to be impartial.[210] Judges and custody evaluators can assess their objectivity and increase their motivation to be fair by taking the IAT (and taking it repeatedly).[211] As researchers have noted, taking the IAT might help decision makers "understand the extent to which they have implicit biases and alert them to the need to correct for those biases on the job."[212] Judges and custody evaluators are required to be impartial, so they have a responsibility to address both explicit and implicit biases that may impair their ability to fairly assess the parties and witnesses before them.[213]

Social scientists are still testing strategies for reducing implicit biases and their effect on decision making, but some are quite encouraging. For example, Patricia Devine and her colleagues at the University of Wisconsin developed a prejudice habit-breaking intervention that successfully reduced implicit racial biases in the study participants. The intervention requires that individuals (1) acknowledge their biases and be motivated to change them, (2) pay attention when their brains activate a stereotypical response, and (3) practice strategies to disrupt implicit associations based on stereotypes.[214] Two of these strategies—stereotype replacement and counterstereotypic imaging—might be particularly useful for judges, guardians ad litem, custody evaluators, and practitioners. Stereotype replacement requires that the individual (1) recognize that her response to a person or situation is based on a stereotype, (2) reflect on the reasons for the stereotypic response, and (3) reflect on what she can do to avoid such a response in the future. An individual is unlikely to recognize that her reaction is based on a stereotype unless she has been trained to recognize such responses as stereotypic. Fortunately, such opportunities are increasingly available as anyone can access the rich literature on stereotypes and implicit biases online[215] and organizations, such as The National Center for State Courts, have made their implicit bias training program materials available online.[216]

Stereotype replacement also requires that the evaluator replace the stereotypical response with an unbiased response. Counterstereotypic imaging involves thinking of examples that demonstrate that the stereotype is inaccurate.[217] For example, if a judge, custody evaluator, practitioner, or guardian ad litem discovers that her reaction to an African American father seeking custody is based on the stereotype of African American fathers as absent and irresponsible, she should reflect on the reasons for her reaction and how she can avoid such a response in the future. She should also replace her stereotypical response with a nonbiased response by focusing on this particular father's traits and behaviors. She should also think of examples of counterstereotypical African American fathers—either those that she knows personally or celebrities and public figures, such as President Obama and Denzel Washington, who are recognized as good fathers.[218] She might also recall and reflect on studies demonstrating that African American fathers are *more* involved with their children than are fathers of other races.[219]

Legal actors could also adopt two other strategies—individuation and perspective taking—that Devine and her colleagues found helpful to reduce implicit bias.[220] Arguably, the law already requires judges to engage in individuation, which involves obtaining specific information about a litigant (or child in a custody dispute) so that the judge can evaluate the person based on his/her individual attributes, not group-based attributes or assumptions. For example, instead of assuming that a

Caucasian father will be unable to teach his biracial child how to cope with racial prejudice as effectively as the African American mother, the judge, evaluator, guardian ad litem, or practitioner should consider what each parent has done thus far, and plans to do in the future, to ensure that the child acquires the necessary coping skills. It requires considering evidence, for example, that this particular father lives in a diverse neighborhood, is a guidance counselor in a predominantly African American school, and has surrounded himself with friends and family members who will help him teach his child the necessary skills even though he has never experienced racial discrimination himself. It means that in a custody dispute between a Latino parent, who would not raise the child in accordance with middle-class norms,[221] and a Caucasian parent, who would, the court considers how each parent's childrearing approach has affected and is likely to affect the particular child, not children in general. The APA Guidelines similarly instruct custody evaluators to focus on the individual parent's attributes and how they affect the particular child.[222]

Perspective taking involves assuming the perspective of a member of the stereotyped group, which decreases the likelihood of evaluations based on stereotypes. To illustrate, the judge, custody evaluator, practitioner, or guardian ad litem who discovers that her reaction to the African American father in the example above is based on stereotypes would take the perspective of an African American father who is repeatedly assumed to be absent and irresponsible because of stereotypes about Black fathers.[223] Taking such a perspective allows her to better understand the unfair hurdles that the father faces as he attempts to overcome the negative assumptions based on his membership in a particular racial or socioeconomic group and decreases the likelihood that she will evaluate the father based on his group membership.

Although Devine's intervention led to a significant decrease in implicit racial bias for at least eight weeks, other studies suggest that the effects of strategies to reduce bias may be limited.[224] However, the strategies for preventing discriminatory *behavior* (as opposed to biased thoughts) are promising. We may not be able to prevent our brains from automatically activating implicit associations, but we may be able to control our behavior in response to those associations if we are sufficiently motivated to act in an unbiased manner. As we saw above, physicians with implicit biases were able to avoid acting on those biases and the participants in the shooter study above, who were highly motivated to control their biases, were able to resist shooting unarmed Black targets.[225] Another study found that individuals who held implicit biases against gay individuals (but who were motivated to be egalitarian) did not act in accordance with those biases.[226]

These studies suggest that judges and other legal actors can take actions to prevent their biases from influencing their assessments even when they are unable to significantly reduce their implicit biases. An individual cannot prevent bias from influencing her decisions if she is not aware of the potential for bias. Thus, rather than attempt to ignore the parties' race, ethnicity, or culture, a technique that might actually exacerbate implicit biases[227] and certainly increases the perception of bias,[228] legal actors should acknowledge these differences and be alert to the risk that biases may influence their judgment.[229] Implicit biases and emotions affect what we remember, so judges can minimize the risk of biased recollection by taking notes as the case progresses and carefully reviewing the transcripts before making decisions. Evaluators and practitioners can also minimize the risk of biased assessments by taking careful notes (or recording the meetings if consent is granted) when they meet with the parents, potential witnesses, and the child and reviewing, or recording, those notes before making their assessments.

Judges should also consider appointing cultural experts when necessary to bridge the gap between their perceptions and interpretations and that of parties or witnesses of different backgrounds. We saw the value of cultural experts in the *Gambla* case and the risks of rejecting their testimony in the *Anna Mae* case. Although judges sometimes reject the cultural expert's testimony, as one commentator has noted, the information that such experts provide may help expose the influence of cultural bias and leads to a fair outcome on appeal, as illustrated by the *Anna Mae* case.[230] By making bias "more readily reviewable," cultural expert testimony "may actually begin to reduce [bias'] effect on judicial decision making."[231]

Judges and evaluators can also guard against implicit biases by asking themselves whether they would make the same decision or recommendation if the parent or parents were of a different race, ethnicity, or culture. Judges should ask this question for each of the statutory best interest factors or any other factor they find relevant. While judges and evaluators should ask themselves these questions *before* they make an assessment, recommendation, or final decision, there is great value in also asking these questions *after* the case is decided to reflect on how to make better decisions in the next case. Clinical faculty at law schools across the country require students to engage in self-reflection and debriefing after each case because it will make them better advocates for the next case. The same exercise is likely to make lawyers more effective advocates and judges and evaluators better decision makers in the next case.[232]

All of these strategies require, first and foremost, awareness that we all hold implicit biases of some sort and a commitment to reduce them and limit their ability to influence our judgments. They also require slow and deliberate assessments, as these are more likely than intuitive judgments to be fair and unbiased.[233] They further require that decision makers eliminate (or reduce) distractions, including stress and negative emotions, that have been shown to intensify implicit biases against stigmatized groups and interfere with the cognitive resources necessary to make unbiased decisions.[234] Although each individual may have his/her own preferred method to reduce distractions, researchers have found that mindfulness meditation may reduce implicit bias and facilitate impartial decisions.[235]

CONCLUSION

The strategies discussed above focus on what individual custody evaluators and judges can do to reduce their own biases and the effects thereof on their decisions. There are also measures that other legal actors can take to reduce bias in custody decisions. Most, if not all, judges want to make impartial decisions but advocates can help reduce the risk of bias by activating antidiscrimination norms—the norms that judges, like most Americans, subscribe to. Specifically, advocates should raise the "specific potential stereotypes at work in the case," which would alert the judge, evaluator, or guardian ad litem to the potential for biased decision making.[236] While these actors can engage in counterstereotypic imaging to reduce their own biases, advocates can help by providing them with counterstereotypic images to counteract the negative stereotypes associated with members of their client's racial, ethnic, or cultural group.[237]

Appellate judges should become familiar with the implicit bias literature thereby increasing their sensitivity to bias and the likelihood that they will detect the influence of racial, ethnic, or cultural bias in a trial judge's decision. Legislators should examine how the best interest of the child standard facilitates bias in custody cases and consider alternative approaches that do not rely on subjective assessments such as the approximation standard proposed by Professor Elizabeth Scott and adopted by the ALI.[238] They might also explore requiring trial court judges to explicitly address the role of race, ethnicity, and culture in custody disputes involving parents of different backgrounds and to explain in their written opinions why these factors were relevant or not relevant to the court's decision. While it may appear risky to require trial judges to address factors that in many, if not most, cases have no relevance to the child's best interests, the cases demonstrate that courts are considering these factors even when unwarranted. By expressly acknowledging the presence and influence of these factors in writing, trial courts might be better able to address their effect on custody cases and appellate courts might be better able to determine whether such considerations were necessary and received appropriate weight.

Lawmakers should also explore institutional reforms to incentivize trial court judges, who most likely believe that they are impartial, to uncover their biases and provide tools to facilitate elimination of bias in decisions. These might include judicial training,[239] lighter dockets that would grant judges the time they need to engage in deliberative decision making,[240] and judicial evaluations that take a judge's bias into account as some states already do.[241] As Stacey Platt has suggested,

lawmakers might also explore whether we can minimize the risk of bias in custody proceedings by creating best interests determination (BID) panels with individuals from multiple disciplines and racially and culturally diverse backgrounds that would attempt to reach consensus and make custody recommendations.[242]

All of these interventions take time and effort and some would require a significant investment of resources. Encouragingly, cultural competency and attention to implicit bias is increasingly addressed in law schools, especially in clinical education, and in the child welfare system.[243] These strategies would not only reduce biased decisions, but as researchers have noted, they are likely to "increase the appearance of fairness"[244] in the courts, which is crucial to our legal system's legitimacy.

NOTES

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1. *See* Andrew I. Schepard, Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families 31–32 (2004) (citing studies finding that only five to ten percent of divorces result in custody litigation); Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 Fam. & Conciliation Cts. Rev. 393, 396 (1997).

2. *See, e.g., Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985) (noting that "[t]he guiding principle in all custody cases is the best interests of the child."). There are approximately 100,000 custody disputes in the United States each year. *See* Ira Daniel Turkat, *On the Limitations of Child Custody Evaluations*, 42 Fam. Ct. Rev. 8, 8 (2005).

3. *See, e.g.,* N.J. Stat. Ann. § 9:2-4(c) (1997) ("In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children."); 750 Ill. Comp. Stat. § 5.602(a) (2015) ("The court shall consider all relevant factors, including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interests; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing or repeated abuse . . . ; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; and (9) whether one of the parents is a sex offender").

4. Cal. Fam. Code § 3011 (West 2013); Ga. Code Ann., § 19-9-3 (West 2013) ("In determining the best interests of the child, the judge may consider any relevant factor"); La. Civ. Code Ann. art 134 (West 2016) ("The court shall consider all relevant factors").

5. *See* Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.12(1) (ALI 2002) [hereinafter ALI Principles] ("the court should not consider . . . the race or ethnicity of the child, a parent, or other members of the household"); *see also,* § 2.12 cmt. b ("this section states the principle that race has no appropriate part to play in resolving disputes between the parents of a biracial child.").

6. APA, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychologist 863, 865–66 (2010).

7. *Id*.

8. *See infra* Parts I & II. Culture is sometimes used as a proxy for race. *See* Cynthia R. Mabry, *A MEPA-IEP Review from Adoption Attorneys' Perspectives: Continuing to Make Permissible Assessments Based on Race for the Best Interests of Children of Color*, 38 Cap. U.L. Rev. 319, 335 & n.142 (2009) (quoting U.S. Dep't of Health & Human Services Questions and Answerers Regarding the Multiethnic Placement Act of 1994 prohibiting the use of "cultural considerations as a proxy for race" when placing a child for adoption).

9. *See infra* notes 20–79 and accompanying text.

10. *Id*.

11. *See* Mahzarin R. Banaji & Anthony G. Greenwald, Blindspot: Hidden Biases of Good People (2013); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology,* 49 UCLA L. Rev. 1241 (2002); Jerry Kang,

Trojan Horses of Race, 118 Harv. L. Rev. 1489 (2005); Linda Hamilton Krieger, The *Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 Stan. L. Rev. 1161 (1995); Charles R. Lawrence III, The *Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 Stan. L. Rev. 317 (1987); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009); Andrew J. Wistrich et al., *Heart versus Head: Do Judges Follow the Law or Their Feelings?*, 93 Tex. L. Rev. 855 (2015).

12. *But see* Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. Rev. L. & Soc. Change 555 (2012); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. Pa. L. Rev. 537 (2014); Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 Clev. St. L. Rev. 913 (2013); Cynthia Godsoe, *Parsing Parenthood*, 17 Lewis & Clark L. Rev. 113 (2013) (discussing implicit biases in the child welfare system).

13. *See, e.g.,* Kang, *supra* note 11, at 1515 n.117 (describing study showing that a person's behavior is more likely to be perceived as hostile or aggressive when the actor is African American as compared to White).

14. See generally Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 Group Dynamics 101, 105 (2002) (reporting results from approximately 600,000 tests finding much larger implicit preferences among whites for whites than their explicit preferences); Rachlinski et al., *supra* note 11.

15. Edward Sampson, Dealing With Differences: An Introduction to the Social Psychology of Prejudice 121–22 (1999) (citing studies showing that individuals search for information that confirms their hypotheses); Kang, *supra* note 11, at 1515 (noting that humans "interpret data consistent with our biases").

16. *See* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases,* 28 Hofstra L. Rev. 877, 883 (2000) (arguing that the best interests standard "invites bias of all types"); Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents of Biracial Children*, 23 N.Y.U. Rev. L. & Soc. Change 603, 612 (1997) (noting that the best interests standard grants judges "ample opportunity to overlook, under-consider, or affirmatively hide the role of race in their custody disputes"); *id*. (noting that the "lack of structure in custody cases allows for judge's personal or unconscious biases to play a role in their decision-making.").

17. A number of legal scholars have written about the role of race in foster and adoptive placements. *See, e.g.*, Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Production (1999); Elizabeth Bartholet, Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative (1999); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L.J. 875 (1998); Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 Yale L.J. 2351 (1998); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163 (1991); Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1 (2008); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. Davis L. Rev. 1415 (2006); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 Yale J.L. & Feminism 101 (1998); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. Rev. L. & Soc. Change 33 (1993–94); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. Fam. L. 51 (1990–91). These scholars have focused on the role of race in adoptive placements of children whose birth parents have voluntarily placed them for adoption or whose parental rights have been terminated. In contrast, this essay focuses on custody disputes between two legal parents (such as two birth parents or two adoptive parents) or between a legal parent and a third party who is seeking to adopt the child. Although there are similarities between the role of race in adoptive placements and the role of race, ethnicity, and culture in custody disputes, in this essay I focus on the latter for several reasons. First, in the typical custody dispute, the parties are the child's biological or adoptive parents and thus have a legal relationship that is protected by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). In the adoption context, in contrast, prospective adoptive parents do not have a legally recognized relationship with the child—they are trying to create such a relationship—and thus, their objections to the use of race are arguably weaker. Second, Congress has enacted laws regulating the use of race in the adoption context, and federal agencies have issued regulations and held hearings to determine the proper use of race in adoption. Third, researchers have conducted extensive studies of the effects and outcomes of transracial adoptions. Jaiya John, Black Baby White Hands: A View From the Crib (2002); Rita J. Simon & Howard Altstein, Adoption, Race and Identity: From Infancy to Young Adulthood (2nd ed. 2002); Rita Simon et al., The Case for Transracial Adoption (1994); Jane Jeong Trenka, Outsiders Within: Writing on Transracial Adoption (2006); M. Devon Brooks, *A Study of the Experiences and Psychosocial Developmental Outcomes of African American Adult Transracial Adoptees*, 62 Dissertation Abstracts Int'l 327 (2001); The Evan B. Donaldson Adoption Inst., *Finding Families for African American Children: The Role of Race and Law in Adoption from Foster Care* (May 2008), http://adoptioninstitute.org/old/publications/MEPApaper20080527.pdf; Madelyn Freundlich & Joy Kim Lieberthal, *The Gathering of the First Generation of Adult Korean Adoptees: Adoptees' Perceptions of International Adoption* (June 2000), http://adoptioninstitute.org/publications/the-gathering-of-the-first-generation-of-adult-korean-adoptees-adoptees-perceptions-of-international-adoption/. Thus, there is law and social science to guide courts in adoptive placements. In contrast, courts are deciding the role of race and culture in custody disputes on what appears to be a case-by-case basis which increases the risk of biased decision making.

18. *See infra* Parts III & IV.

19. *See* Cynthia R. Mabry, *The Browning of America-Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes*, 16 Wash. & Lee J. Civ. Rts. & Soc. Just. 413, 435 (2010) (arguing that courts should consider culture as a best interests factor).

20. *Ward v. Ward*, 216 P.2d 755 (Wash. 1950).
21. *Ward*, 216 P.2d at 755–56.
22. *Fountaine v. Fountaine*, 133 N.E.2d 532, 535 (Ill. App. Ct. 1956).
23. *Beazley v. Davis*, 545 P.2d 206, 208 (Nev. 1976).
24. *Farmer v. Farmer*, 439 N.Y.S.2d 584, 589 (N.Y. Sup. Ct. 1981).
25. *Palmore v. Sidoti*, 466 U.S. 429 (1984).
26. *Id*. at 431.
27. *Id*. at 433.
28. *See, e.g*., *In re Marriage of Brown*, 480 N.E.2d 246, 248 (Ind. Ct. App. 1985) (rejecting argument that biracial children's best interests "would be served by rearing them in a black home in an integrated community" and holding that Palmore precludes consideration of race when determining custody); *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987) (holding that, under Palmore, courts can not consider race when determining custody); *Parker v. Parker*, 986 S.W.2d 557, 562 (Tenn. 1999) (holding that, under *Palmore*, the "court may not consider the effects or alleged effects of racial prejudice"); see also Wis. Stat. Ann. § 767.41(5) (West 2016) ("The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian.").
29. *See, e.g., Tallman v. Tabor*, 859 F. Supp. 1078, 1086 (E.D. Mich. 1994) (courts may consider race in determining custody so long as race is not the sole consideration); *Rooney v. Rooney*, 914 P.2d 212, 218 (Alaska 1996) (noting that "the court must consider the child's cultural needs as one factor in the overall context of his best interests" and upholding the trial court's custody award to the White father which ordered him to address the Tlingit and White child's cultural needs); *In re Marriage of Gambla & Woodson*, 853 N.E.2d 847, 869 (Ill. App. Ct. 2006) (upholding the use of race as a factor in a custody determination and noting that the custody award in *Palmore* was unconstitutional, not because the trial court considered race, but because it considered *solely* race), *appeal denied*, 222 Ill.2d 571 (2006), *cert. denied*, 552 U.S. 810 (2007), *reh'g denied*, 552 U.S. 810 (2007); *Ebirim v. Ebirim*, 620 N.W.2d 117, 121–22 (Neb. Ct. App. 2000) (considering the child's biracial heritage among other factors); *Brown v. Brown*, 621 N.W.2d 70, 83 (Neb. 2000) ("a child's racial identity is one factor among several that may be considered in making custody determinations."); *Savage v. Cota*, 885 N.Y.S.2d 798, 799 (4th Dep't. 2009) (rejecting argument that trial court "relied too heavily on the child's race in determining . . . custody"); *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (3rd Dep't. 1997) (noting that race "is not a dominant, controlling or crucial factor" in a custody dispute but must be "weighed along with all other material elements of the lives of [the] family") (quoting *Farmer v. Farmer*, 109 Misc. 2d 137, 147 (N.Y. Sup. 1981)); Eyer, *supra* note 12, at 582 (noting that post-*Palmore* courts "continued to regularly affirm the legal validity on the use of race to determine a child's best interests in interracial custody disputes.").
30. Conn. Gen. Stat. Ann. § 46(b)–56(c)(13) (West 2014). Even when the custody statute does not expressly mention the child's cultural needs, some courts have interpreted the child's "cultural/heritage needs" as relevant to the statutory factor requiring the court to consider "the physical, emotional, mental, religious, and social needs of the child [and] the capacity and desire of each parent to meet these needs." *See, e.g., Rooney*, 914 P.2d at 218 & n.12 (quoting Alaska's child custody statute).
31. D.C. Code Ann. § 16-914(a)(1)(A) (West 2013) (stating that race, color, or national origin "shall not be a conclusive consideration" in custody and visitation matters). Courts' confusion as to the proper role of race post-*Palmore* may be a result of the Supreme Court's failure to apply both prongs of the strict scrutiny test. As David Meyer has noted, after stating that protecting the child's welfare was a "duty of the highest order," the Court never addressed whether the trial court's race-based decision was narrowly tailored to further the state's compelling interest in protecting the child. David Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. Fla. J.L. & Pub. Pol'y 183, 190 (2007). Instead, the Court suggested that the issue was irrelevant since, regardless of the problems the child would experience as a result of societal biases, the court could not take these considerations into account. *Id*.
32. *See* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 Hofstra L. Rev. 877, 892 (2000).
33. Minn. Stat. Ann. § 518.17 subdiv. 1(a)(10)-(11) (West 2014) (repealed 2015). As of August 2015, Minnesota's child custody statute no longer expressly authorizes courts to consider the child's "creed." It now provides that in determining the child's best interests in a custody dispute, the court must consider "(1) a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development . . . (7) the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs." Minn. Stat. Ann. § 518.17 1(a)(1), (7) (West 2015).
34. *See* ALI Principles, *supra* note 5, § 2.12(2) ("nothing in this section should preclude the court's consideration of a parent's ability to care for the child, including meeting the child's needs for a positive self-image."); *see also id*. § 2.12 cmt. a ("A child's needs may include such factors as positive self-esteem and a healthy sense of identity, which may sometimes relate to the child's race, ethnicity, sex, religion, or sexual orientation. In cases in which matters of this sort would otherwise be relevant . . . Paragraph (2) [quoted supra] clarifies that the section does not preclude their consideration."). According to Professor Bartlett, a Reporter of the Principles of Family Dissolution:

> The ALI principles prohibit consideration of the race, ethnicity, or sex of the parent or the child. . .. It does not mean that a child's need for a healthy self-image, whether it relates to sex or race, cannot be considered. A parent's ability to meet a child's needs for a positive self-image should be relevant to the same extent as other parental abilities. However, nothing should be presumed about a parent's ability based on his or her race or sex.

Bartlett, *supra* note 32, at 892.

35. *Jones v. Jones*, 542 N.W.2d 119, 123–24 (S.D. 1996).

36. According to the custody evaluator, the mother's higher score on the Custody Quotient, the Minnesota Multiphasic Personality Inventory, and the Millon Clinical Multiphasic Inventory-II tests suggested that she had fewer psychological difficulties than the father. *Id*. at 122. Other tests such as the Bricklin Perceptual Scales: Child's Perception of Parent, Child Access to Parental Strength Questionnaire and the Access to Adult Strength: Parental Self-Report Data also favored the mother. *Id*.

37. *Id*. at 124–25 (Sabers, J., dissenting).

38. *Id*. at 122.

39. *Id*. at 123–24.

40. *Id*. at 123. Custody decisions are affected by implicit biases of all types—race, gender, religion, education, and sexual orientation, to name a few. It is impossible to isolate the role that a particular type of bias, if any, played in a custody determination. Thus, it is possible that the court's decision in *Jones* was influenced by implicit gender bias and specifically, bias against women who allege domestic violence, and not just its view of which parent would be better able to expose the children to Native American culture and to teach them how to cope with discrimination. *Cf.* Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 15 (W. Va. 1993) (Workman, C.J., dissenting) (noting that by affirming the trial court's award of custody to the father who physically abused the mother and the children, "the majority implicitly places its stamp of approval on physical and emotional spousal abuse"); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 686–90 (2003) (discussing bias against battered women in custody disputes).

41. Henggeler v. Hanson, 510 S.E.2d 722, 725 (S.C. Ct. App. 1998) (affirming custody award to the mother who "displayed sensitivity to the children's need to develop an understanding of their Korean heritage and sought to provide a culturally diverse environment for them."). The *Henggeler* court expressly distinguished *Palmore* noting that "this is distinguishable from a case where the court's decision to change custody from the mother to the father was based solely on the mother's decision to marry an African-American man."; *see also* Lee v. Halayko, 590 N.Y.S.2d 647, 648 (N.Y. App. Div. 1992) (affirming custody of multiracial children to mother who planned to build a Chinese cultural center and ensure the children learned Chinese).

42. *See* Sarah E. Gaither, "*Mixed" Results: Multiracial Research and Identity Explorations*, 24 Current Directions in Psychol. Sci. 114 (2015) (summarizing studies); *see also* Pollack, *supra* note 16, at 619–22 (discussing literature establishing the importance of exposing biracial children to their multiracial heritage).

43. Kevin R. Binning et al., *The Interpretation of Multiracial Status and Its Relation to Social Engagement and Psychological Well-Being*, 65 J. Soc. Issues 35 (2009); Chi-Ying Cheng & Fiona Lee, *Multiracial Identity Integration: Perceptions of Conflict and Distance among Multiracial Individuals*, 65 J. Soc. Issues 51 (2009); Kerry Ann Rockquemore et al., *Racing to Theory or Retheorizing Race? Understanding the Struggle to Build a Multiracial Identity Theory*, 65 J. Soc. Issues 13 (2009).

44. Gaither, *supra* note 42, at 115; *see also* Kerry Ann Rockquemore & David L. Brunsma, *Socially Embedded Identities: Theories, Typologies, and Processes of Racial Identity Among Black/White Biracials*, 43 Soc. Q. 335 (2002); Kristen A. Renn, *Patterns of Situational Identity Among Biracial and Multiracial College Students*, 23 Rev. Higher Educ. 399 (2000).

45. Bartlett, *supra* note 32, at 892.

46. *See In re* Marriage of Gambla & Woodson, 853 N.E.2d 847, 869 (Ill. App. Ct. 2006).

47. *Jones*, 542 N.W.2d at 120.

48. 853 N.E.2d 847.

49. *See* Raney v. Wren, 722 So. 2d 54, 61 n.7 (La. Ct. App. 1998) ("The MMPI-2 test is an objective personality test often administered in child custody cases to evaluate whether the party/parties seeking custody have the stability and character to perform in that capacity."). The experts also noted that the father was more likely to encourage contact with the other parent—a statutory best interest factor.

50. *In re* Marriage of Gambla & Woodson, 367 Ill. App. 3d 441, 444–45 (2006). She also had a "history of physical aggression in intimate relationships."

51. One of the experts had never met the mother and neither had met the child or the father.

52. *Gambla*, 367 Ill. App. 3d at 453. These perceptions might help explain why battered African American women who kill their abusers have been less successful than White women when asserting the Battered Women's Syndrome defense. The stereotype of the strong and aggressive Black woman conflicts with the stereotype of the helpless battered woman. *See* Elizabeth Schneider et al., Domestic Violence and the Law: Theory and Practice 218 n.6 (3rd ed. 2012); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1070–78.

53. *Gambla*, 367 Ill. App. 3d at 455.

54. *Id*. at 456–57.

55. *See supra* note 3 (listing Illinois' best interests factors).

56. *Gambla*, 367 Ill. App.3d at 459. One of the mother's experts testified that a biracial child should "be socialized in the African-American culture [and that] [l]ess attention needs to be paid to the socialization of [the child's] Caucasian identity, since mainstream culture reflects Caucasian values." *Id*. at 454.

57. *Id*. at 467.

58. Meyer, *supra* note 31, at 186–87.

59. As Twila Perry has argued, "[t]o deprive a parent of custody based on a racial difference between the parent and his or her own child's race would penalize the parent for having chosen to enter into a marriage to a person of a different race." Perry, *supra* note 17, at 87. Although Perry would not allow courts to consider race in custody disputes between two parents, she

would consider race when placing a child for adoption and would give preferences to African American families when placing a child with an African American birth parent for adoption. She would also evaluate families seeking to adopt a biracial child to assess their ability to meet the child's needs with respect to racial identity. *See* Twila Perry, *Race, Color, and the Adoption of Biracial Children*, 17 J. Gender, Race, & Just. 73, 76 (2014).

60. *Gambla*, 367 Ill. App. 3d at 465–66.

61. *Cf.* Perry*, supra* note 59, at 103. Perry argues that "the mere fact that an individual is biracial or is a partner in an interracial marriage does not guarantee the person has the sensitivities and skills to handle the issues a biracial adopted child might face." Following this reasoning, I argue that the fact that a person is a racial minority or a partner in an interracial marriage does not ensure that s/he has the sensitivity or skills to address the issues his/her biracial child might experience.

62. In re Santos Y., 112 Cal. Rptr. 2d 692, 719 (Cal. Ct. App. 2002); *See also* In re Bridget R., 49 Cal. Rptr. 2d 507, 531 (Cal. Ct. App. 1996) (examining whether a Native American parent "observed tribal customs . . . participated in tribal community affairs, voted in tribal elections . . . contributed to tribal or Indian charities, subscribed to . . . periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events . . . or maintained social contacts with other members of the Tribe").

63. Bartlett, *supra* note 31, at 890–91.

64. Re *M.F. v. D.A.H.*, 1 S.W.3d 524 (Mo. Ct. App. 1999).

65. *Id*. at 528. They had adopted a child with African American and Native American birth parents.

66. The child's biological mother had consented to the child's adoption with the Caucasian couple and the child had lived with them since birth pending the adoption.

67. *In re* M.F., 1 S.W.3d at 534–35.

68. *In re* Marriage of Gambla & Woodson, 367 Ill. App.3d 441, 451 (2006).

69. *Id*. at 476 (McLaren, J., dissenting).

70. *Id*. Although published custody opinions involving multiracial children constitute a small percentage of all custody cases, their share of courts' custody dockets is likely to increase in the coming years as the multiracial child population grows. *See* Pew Research Center, *Multiracial in America: Proud, Diverse and Growing in Numbers* 6 (June 11, 2015) (reporting that "[t]he share of multiracial babies has risen from 1% in 1970 to 10% in 2013. And with interracial marriages also on the rise, demographers expect this rapid growth to continue, if not quicken, in the decades to come.").

71. 538 N.W.2d 273 (Iowa 1995).

72. *Id*. at 281 (McGiverin, C.J., dissenting).

73. *Id*. at 275.

74. *Id*. at 277.

75. *Id*.

76. *Id*. at 276, 279 (McGiverin, C.J., dissenting).

77. *Id*. at 280 (McGiverin, C.J., dissenting).

78. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

79. Eyer, *supra* note 12, at 575. Eyer's research demonstrates that *Palmore* was narrowly written precisely because Chief Justice Burger wanted to leave open the possibility that race could continue to be a factor in family law cases. *Id*. at 576 n.186. However, Congress has severely limited the use of race in foster care and adoption. Federal law prohibits agencies that receive federal funding from delaying or denying "the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)). The U.S. Department of Health and Human Services has interpreted this law to mean that state agencies may not consider race or even the ability of the prospective adoptive parent to expose the child to his/her racial heritage absent exceptional circumstances. *See* Meyer, *supra* note 31, at 195–99 (discussing the law and the agency's interpretation and enforcement efforts). For example, in 2003, it found that the State of Ohio had violated federal law by requiring individuals seeking to adopt a child of a different race to prepare a plan describing how they planned to address the child's cultural identity and also evaluated the racial composition of their neighborhood. It assessed a fine of $1.8 million for the violation. Two years later, South Carolina also paid a fine after it was discovered that its child welfare agency had considered race when placing children in adoptive homes. *See* Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 Cap. U. L. Rev. 321, 341–45 (2008) (discussing cases).

80. APA Comm. on Prof'l. Practice & Standards, *Guidelines for Child Custody Evaluations in Family Law Proceedings* (2010), *available at* https://www.apa.org/practice/guidelines/child-custody.pdf.

81. *See* Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review with Implications for Child Welfare Practice*, 54 Fam. Ct. Rev. 221, 223 (2016) (noting that "[r]esearch has found much variation in parenting across class, racial, and ethnic lines that evaluations often neglect to consider.") (internal citations omitted).

82. *In re* Marriage of Gambla & Woodson, 367 Ill. App.3d 441, 445 (2006).

83. *Id*. at 455.

84. *Id*. at 453 (discussing stereotypes of AfricanmAmerican women).

85. Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish,* N.Y. Times, Aug. 30, 1995. The father had complained to the judge that the child did not speak English, the father's first language. *Id. See also* Jo Ann Zuniga, *Red Flags Raised Over Judge's Ban on Spanish*, Hous. Chron., Aug. 19, 2000 (discussing another Texas judge, Lisa Millard, who in 2000 ordered the parents in a custody dispute to refrain from speaking to their six-year-old daughter in Spanish). Although

Judge Millard cited the child's poor performance in kindergarten, the mother's attorneys filed a successful recusal motion on the ground that Judge Millard's ruling suggested that her impartiality was questionable or that she might be biased against the mother. *See* Bill Murphy, *Judge Who Forbade Parents From Using Spanish is Recused*, HOUS. CHRON., Aug. 25, 2000.

86. *Judge Tells Dad to Stop Speaking Spanish*, HOUS. CHRON., Oct. 15, 2003.

87. *Id*.

88. *Tipton v. Aaron*, 185 S.W.3d 142 (Ark. Ct. App. 2004).

89. *Id*. at 144.

90. *Id*. at 248, (Griffen, J., concurring).

91. *Schultz v. Elremmash*, 615 So.2d 396 (La. Ct. App. 1993).

92. *Id*. at 400.

93. *Id*. at 399.

94. *Id*. at 400.

95. *Shady v. Shady*, 858 N.E.2d 128 (Ind. Ct. App. 2007).

96. *Id*. at 136 (quoting *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*).

97. *Id*. at 137.

98. *Shady*, 858 N.E.2d at 135.

99. *Id*. at 136.

100. Re Adoption of A.M.H., 215 S.W.3d 793 (Tenn. 2007).

101. Rashmi Goel, From Tainted To Sainted: The View of Interracial Relations as Cultural Evangelism, 2007 WIS. L. REV. 489, 528 (arguing that the trial court's statements "strongly suggest that the court felt it was better for Anna Mae to be American than to be Chinese."); Andrew Jacobs, *Chinese and American Cultures Clash in Custody Battle for Girl*, N.Y. TIMES, Mar. 4, 2004, at 5 (describing custody battle as a case that "exposed a chasm between American and Chinese cultures.").

102. *A.M.H*., 215 S.W.3d at 797.

103. *Id*. at 812 ("This evidence overwhelmingly shows that the parents' voluntary relinquishment of custody was entered as a temporary measure to provide health insurance for [Anna Mae] with the full intent that custody would be returned.").

104. *Id*. at 799–800.

105. *Id*. at 800.

106. *See* TENN. CODE ANN. §§ 36-1-113(g)(1) –-36-1-102(1) (2010).

107. *A.M.H*., 215 S.W.3d at 811–12.

108. *Id*. at 803–04.

109. Jacobs, *supra* note 101.

110. *Id*.

111. *Id*.

112. *A.M.H*., 215 S.W.3d at 806.

113. *See* Baker v. He (*In re* A.M.H.), 2005 Tenn. App. LEXIS 736, 261 (Tenn. Ct. App. 2005) (Kirby, J., concurring in part and dissenting in part).

114. *Id*. at 86.

115. *Id*. at 87.

116. *Id*. at 84.

117. *Id*. at 262–63.

118. *In re* Adoption of A.M.H., 215 S.W.3d 793, 813 (Tenn. 2007) ("[f]inancial advantage and affluent surroundings simply may not be a consideration in determining a custody dispute between a parent and a non-parent.").

119. For example, parents of Dominican heritage often send their children, including those born in the United States, to live with grandparents and other extended family in the Dominican Republic while the parents work long hours in the United States and send money to support the entire family in the Dominican Republic, which they could not do if their children remained with them in the United States.

120. Studies have shown that, as a result of cultural differences, Chinese Americans' scores on assessment tools used in custody disputes indicate higher rates of conditions such as depression and schizophrenia in these communities. As a result, an MMPI that takes cultural background into account has been created. *See* Fanny M. Cheung et al., *An Infrequency Scale for the Chinese MMPI*, 3.4 PSYCHOL. ASSESSMENT: J. CONSULTING & CLINICAL PSYCHOL. 648 (1991); Kwong-Liem Karl Kwan, *MMPI and MMPI-2 Performance of the Chinese: Cross-Cultural Applicability*, 30.3 PROF. PSYCHOL.: RES. & PRAC. 260 (1999).

121. *A.M.H*., 215 S.W.3d at 806.

122. *Id*. at 805.

123. *Id*.

124. *See* Brief for Greater Seattle Chapter of the Organization of Chinese Americans, Inc. as Amici Curiae Supporting Appellants, In re Adoption of A.M.H., (No. CH-01-1302-III), 2005 WL 3132353, at *29 (Tenn. App. Nov. 23, 2005) (arguing that the trial court erroneously failed to consider evidence of Asian culture and the importance of ethnic heritage to a child's upbringing); Associated Press, *Custody Resolved, A Move Looms*, N.Y. TIMES, Dec. 30, 2007, at 12; The Chinese embassy sent a representative to the trial and Chinese nationals and Chinese Americans rallied outside the court demanding that the Hes be reunited with their daughter. Shirley Downing, Childers Ruling Insensitive to China Culture, Group Says, Com. Appeal

(Memphis), May 25, 2004, at B6; Jacobs, *supra* note 101; Wendi C. Thomas, Anna Mae Decision Botched by Judge, Com. Appeal (Memphis), May 20, 2004, at B1.

125. 133 S. Ct. 2552 (2013).

126. *Id*. at 2565.

127. *Id*. at 2584 (Sotomayor, J., dissenting).

128. *Id*. at 2559 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."); *id*. at 2566 (Thomas, J., concurring).

129. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 Fla. L. Rev. 295, 329 (2015).

130. *Id*. at 333–34 (describing the father's ties to the Cherokee community, participation in Cherokee elections, preparation of Indian foods, and observance of Cherokee holidays).

131. *Adoptive Couple*, 133 S. Ct. at 2585 (Sotomayor, J., dissenting).

132. *See* Rita J. Simon & Sarah Hernandez, Native American Transracial Adoptees Tell Their Stories (2008); *USA/ Indigenous Peoples: UN Expert Urges Respect for the Rights of Cherokee Child in Custody Dispute*, United Nations Human Rights Office of the High Commissioner (Sept. 10, 2013), http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13695&LangID=E (the UN Rapporteur on the Rights of Indigenous Peoples expressed concern about the denial of the child's cultural identity).; *see also* Kristen A. Carpenter & Lorie Graham, *Human Rights to Culture, Family, & Self-Determination: The Case of Adoptive Couple v. Baby Girl*, *in* Indigenous People and Human Rights (Stefan Kirchner & Joan Policastri eds., 2015).

133. Brief for Resp't Birth Father, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) (No. 12-399), 2013 WL 1191183; *see also* Berger, *supra* note 129, at 357–60 (describing how class divided the birth parents and the adoptive parents).

134. Linda K. Thomas, *Child Custody, Community and Autonomy: The Ties That Bind?*, 6 S. Cal. Rev. L. & Women's Stud. 645, 657 (1997).

135. *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005).

136. The court erroneously concluded that, as a legal permanent resident, the father could help the children become U.S. citizens. The court's interpretation of federal immigration law was incorrect—only a U.S. citizen (which the father was not) could help another person become a U.S. citizen. *Id*. (noting the trial court's error).

137. *Id*. at 817–18 (Although the court acknowledged the trial court's incorrect interpretation of federal immigration law, it held that it was harmless error.).

138. Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 Va. J. Soc. Pol'y & L. 87, 97 (2006). *But see id*. (citing In re M.M., 587 S.E. 2d 825, 831 (Ga. App. 2003) ("[a]s an example of a transparent desire to punish" where the judge in a foster case "told a father that he 'had a problem with his INS situation' and that the father would have to 'resolve' the issue before he could have custody of his child.").

139. *Rico*,120 P.3d at 815.

140. *Id*.

141. *See* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DePaul L. Rev. 817, 822 (2000) (noting that "[c]ultural middle-class norms expect all women to be primarily responsible for their children.").

142. My own maternal grandmother in the Dominican Republic raised three grandchildren ranging in ages from eight months to five years of age until adulthood after my aunt immigrated to the United States seeking employment opportunities after she divorced the children's father My own father was not raised by his mother, but by his paternal grandparents, although he saw his mother regularly.

143. *See generally* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 Iowa L. Rev. 865, 899–905 (2003).

144. *Rico*,120 P.3d at 815.

145. The opinion does not provide the identity of the other four individuals living in the mobile home apart from the mother, her boyfriend, and her two children.

146. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood,* 34 U. Mich. J.L. Reform 683, 750–51 n.287 (2001) (noting that the "White, heterosexual, middle-class norm" of the family does not apply to many families of color or poor families" and many minority families live in "extensive kin and fictive kin networks").

147. *Rico,* 120 P.3d at 816 (The court added that it would award the father custody, in part, because of his ability to provide the children with medical insurance which the mother could not do but if the court was concerned with the children's lack of access to medical care, it could have awarded the mother custody but required the father to add them to his medical insurance policy as noncustodial parents often do).

148. Bartlett, *supra* note 32, at 883–84.

149. *See* Teresa Julian et al., *Cultural Variations in Parenting: Perceptions of Caucasian, African-American, Hispanics, and Asian American Parents*, 43 Fam. Relations 30, 31 (1994) (noting that the "parenting styles of Caucasian, middle-class parents are . . . used as the benchmark against which other groups are compared, with an assumption of Caucasian superiority"); Maldonado, *supra* note 143, at 898 (arguing that "[a]lthough scholars have argued that the law must consider cultural traditions when resolving intra-family disputes, judges presiding over visitation disputes still proceed from a White, middle-class perspective that ignores the experiences of children in certain communities and the experiences of the adults who rear them"—one cannot ignore the fact that the role of gender is shaping parenting norms); *see* Breger, *supra* note 12 (discussing biases in family court and the role of race, class, and sexual orientation in shaping societal expectations of mothers).

150. *Cf*., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (arguing that jurors can override their biases but they must first acknowledge and examine their ingrained stereotypes).

151. Farmer v. Farmer, 439 N.Y.S.2d 584, 590 (N.Y. Sup. Ct. 1981); *see also* Krebsbach v. Gallagher, 587 N.Y.S.2d 346, 347 (N.Y. App. Div. 1992) (considering each parent's ability to provide for the child's intellectual development).

152. Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review with Implications for Child Welfare Practice*, 54 FAM. CT. REV. 221, 222 (2016).

153. Annette Lareau, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE (U. of Cal. Press, 1st ed. 2003).

154. *Id*. at 1–3, 38–39 (Lareau labels this parenting style "concerted cultivation.").

155. *Id*. at 3; *cf*. Sandra Hofferth, *Race/Ethnic Differences in Father Involvement in Two-Parent Families: Culture, Context, or Economy?*, 24 J. FAM. ISSUES. 185, 189 (2003) (noting that "differences in educational levels between Blacks, Hispanics, and Whites may help to explain differences in parenting practices").

156. Lareau, *supra* note 153, at 3 (finding that low-income parents "see a clear boundary between adults and children," they do not elicit "their children's feelings, opinions, and thoughts," and "they tell their children what to do rather than persuading them with reasoning"); *see also* Julian et al., *supra* note 149, at 36 (noting that African American and Latino parents placed greater importance on obedience, self-control, and getting along with others than Caucasian parents).

157. Julian et al., *supra* note 149, at 33 (finding that Latino parents praise their children less than Caucasian parents).

158. BETTY HART & TODD R. RISLEY, MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCE OF YOUNG AMERICAN CHILDREN (1995); BETTY HART & TODD R. RISLEY, THE SOCIAL WORLD OF CHILDREN LEARNING TO TALK (1999); Paul Tough, *What It Takes to Make a Student*, N.Y. TIMES, Nov. 26, 2006, at 644 (A study found that professional parents made approximately 487 utterances to their children per hour as compared to 178 utterances made by parents receiving public assistance and by age three, the average child of professional parents has heard approximately 500,000 encouragements (words of praise and approval) and 80,000 discouragements (prohibitions and disapproval). The reverse was true for children receiving public assistance. They had heard, on average, about 75,000 encouragements and 200,000 discouragements.). *See* Carla Adkinson-Johnson et al., *African-American Child Discipline: Differences Between Mothers and Fathers*, 54 FAM. CT. REV. 203 (2016) (discussing studies and finding that African American mothers are more likely than African American fathers to use physical discipline and studies have found that African American parents are more likely than White parents to physically discipline their children but that physical discipline does not appear to cause negative behavior among African American children as it does among White children).

159. Lareau, *supra* note 153, at 3, 147 (noting that, in poor families, children's "silent obedience is typical"); Julian et al., *supra* note 149, at 33 (finding that "Hispanic and African-American fathers placed greater importance on the child doing what he or she was asked than Caucasian fathers").

160. *See* LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 90 (2005). I heard this expression many times as a child without fully understanding it. When I was eight or nine years old, I innocently asked my mother exactly when hens pee because I wanted to know when I could speak in the company of adults. She replied, "Never." I still remember being very confused as it dawned on me that I should never speak to an adult unless spoken to first. *See also* LAREAU, *supra* note 153, at 154 (noting that in poor and working-class families, "the adult talks [and] the child listens").

161. Lareau, *supra* note 153.

162. Hart & Risley, *supra* note 158 (finding that, by age three, a child of professional parents knew about 1,100 words, but a child receiving public assistance (children who are disproportionately Black or Latino) knew only 525 words); *see* Tough, *supra* note 158 (stating that children with larger vocabularies also tend to have higher IQs than those on public assistance, 117 to 79, respectively).

163. Hart & Risley, *supra* note 158 (finding a positive correlation between the number of words a child hears and the complexity of their language ability); *see also* LAREAU, *supra* note 153, at 5, 154.

164. Zilberstein, *supra* note 152, at 225 (noting that "different racial, cultural, or [socioeconomic status] groups may not completely share [Western childrearing] values or attributes or have the resources to enact them.").

165. Lareau, *supra* note 153, at 13.

166. *Id*.

167. *Id*. at 159–60.

168. Julian et al., *supra* note 149, at 36 (finding that Latino, African American, and Asian American parents are stricter than Caucasian parents—"placing greater demands of their children because of the difficulty they perceive their children to face," but that "the ethnic community perceives these styles as desirable and necessary"); *id*. at 31 (noting that African American parents emphasize respect for authority figures); *cf*. Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009) (finding that the benefits to children of particular family arrangements vary by race).

169. Julian et al., *supra* note 149, at 31; Hofferth, *supra* note 155, at 6 (noting that "parents may parent their children differently in an ethnically homogenous community than one in which they are a minority of the population").

170. *See* Hofferth, *supra* note 155, at 3 (finding that Black parents may exhibit more control and less warmth than White parents as a reaction to a more hostile environment); Julian et al., *supra* note 149, at 31 ("A stricter parenting style, across social class lines is thought necessary to develop effective coping abilities in the face of the harsh realities of racism and discrimination"). These differences in parenting styles may be present in interracial families as each parent's own upbringing may influence his/her childrearing approach.

171. *See, e.g.,* Andres Pumariega et al., *Practice Parameter for Cultural Competence in Child and Adolescent Psychiatric Practice*, 52 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1101, 1102 (2013) (defining culture as an "[i]ntegrated pattern of

human behaviors including thoughts, communication, actions, customs, beliefs, values, and institutions of a racial, ethnic, religious, or social nature"); Culture Definition, DICTIONARY.CAMBRIDGE.ORG, http://dictionary.cambridge.org/us/dictionary/english/culture (last visited Feb. 24, 2017) (defining culture as, "The way of life of a particular people, especially as shown in their ordinary behavior and habits; their attitudes towards each other, and their moral and religious beliefs"); Culture Definition, WORDCENTRAL.COM, http://www.wordcentral.com/cgi-in/student?book=Student&va=Culture (last visited Feb. 24, 2017) (defining culture as "the beliefs, social practices, and characteristics of a racial, religious, or social group" or "the characteristic features of everyday life shared by people in a particular place or time"); Press Release, Merriam-Webster, Merriam-Webster Announces "Culture" as 2014 Word of the Year (Sept. 15, 2014), http://www.merriam-webster.com/press-release/2014-word-of-the-year (Merriam-Webster named "culture" the 2014 Word of the Year as it had the greatest increase in searches from the prior year).

172. *See* Christian S. Crandall et al., *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. PERSONALITY & SOC. PSYCHOL. 359 (2002); Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811 (1998).

173. *See generally* Janet Ward Schofield, *The Colorblind Perspective in School: Causes and Consequences, in* MULTICULTURAL EDUCATION. ISSUES & PERSPECTIVES 247, 262 (James A. Banks & Cherry A. McGee Banks eds., 2001) (illustrating how the norm of colorblindness is so entrenched in the United States that a White student in one school did not know that Martin Luther King, Jr. was African American even after learning about his leadership of the civil rights movement).

174. Even P. Apfelbaum et al., *Seeing Race and Seeing Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

175. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949 (2006).

176. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995) (implicit attitudes are "introspectively unidentified (or inaccurately identified) traces of past experiences that mediate favorable or unfavorable feeling, thought, or action toward social objects").

177. Greenwald & Krieger, *supra* note 175, at 949 (our implicit attitudes often conflict with our explicit attitudes (our conscious beliefs and principles) especially with regard to racial and ethnic minorities, the elderly, and gays and lesbians).

178. Rachlinski et al., *supra* note 11, at 1196 (implicit biases are "stereotypical associations so subtle that people who hold them might not even be aware of them.").

179. *Id*.

180. Greenwald & Krieger, *supra* note 175, at 952–53 (the IAT, which has been taken by millions of people, shows that over seventy-five percent of Whites have implicit preferences for Whites as do the majority of Asian Americans and Latinos, a slight majority of African Americans also have implicit preferences for Whites even though they have strong explicit preferences for Blacks, and as of 2009, more than four and half million people had taken the IAT); Rachlinski et al., *supra* note 11, at 1198.

181. Rachlinski et al., *supra* note 11, at 1199–1200; *see* Greenwald & Krieger, *supra* note 175 (noting that one third of African Americans also have implicit preferences for Whites).

182. *See* PROJECT IMPLICIT, https://www.projectimplicit.net/about.html (last visited Feb. 24, 2017).

183. Greenwald & Krieger, *supra* note 175, at 962 (noting that the "evidence that implicit attitudes produce discriminatory behavior is already substantial").

184. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); *see also* Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring*, 17 LAB. ECON. 523 (2010) (in one study, candidates with more "White-sounding" names received fifty percent more callbacks for jobs than those with "African-American sounding" names even when the resumes were otherwise nearly identical and having a White-sounding name yielded as many callbacks as having an additional eight years of work experience on one's resume); *see* Arin N. Reeves, *Written in Black & White Exploring Confirmation Bias in Radicalized Perceptions of Writing Skills,* NEXTIONS (2014), *available at* http://www.nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf (study shows law firm partners evaluated identical work product more harshly when they believed the work was completed by an African American associate as compared to a White associate).

185. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

186. Robert Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

187. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309–10 (2010).

188. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action,* 94 CAL. L. REV. 1063, 1073 (2006).

189. Rachlinski et al., *supra* note 11, at 1208–10 (This study "found no differences between the judges on the basis of the gender, political affiliation, or experience" and the study also did not separately assess the biases of Latino or Asian American judges. Based on prior research finding that "Latinos score somewhat closer to black Americans on the IAT," the researchers "combined the few Latino judges with the black judges for these analyses" and "the Asian American judges with the white judges").

190. *Id*. at 1199; Kang, *supra* note 11; Blasi, *supra* note 11.

191. Wistrich et al., *supra* note 12, at 862.

192. *Id*. at 871–72.

193. *Id*. at 869.

194. *Id*.

195. Rachlinski et al., *supra* note 11, at 1204.

196. Green et al., *supra* note 182.

197. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. Experimental Soc. Psychol. 164, 164–65, 170–71 (2008); *see also* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007) (finding that despite their implicit biases trained police officers were able to overcome a tendency to shoot too quickly at African American suspects); Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 Psychol. Sci. 180 (2005).

198. Rachlinski et al., *supra* note 11, at 1225.

199. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 3 (2008).

200. Rachlinski et al., *supra* note 11, at 1225.

201. *Id*. at 1225–26.

202. Wistrich et al., *supra* note 11, at 869.

203. Rachlinski et al., *supra* note 11, at 1210. For example, "white judges performed the stereotype-congruent trial (white/good and black/bad) 216 milliseconds faster than the stereotype-incongruent trial (Black/good and White/bad)" but the 44.2 of Black judges who "showed a [W]hite preference. . .performed the stereotype-congruent trial (white/good and black/bad) a mere twenty-six milliseconds faster than the stereotype-incongruent trial ([B]lack/good and [W]hite/bad)." These findings are in accordance with the IAT results of millions of adults who took the test on the Internet which show that many African Americans and Latinos have implicit preferences for Whites.

204. *See* Bartlett, *supra* note 16, at 883–84; *see also* Rico v. Rodriguez, 120 P.3d 812, 818 (Nev. 2005); Breger, *supra* note 149 (discussing how the best interests standard increase potential for biased decisions); Julian et al., *supra* note 149, at 31; Pollack, *supra* note 16.

205. Wistrich et al., *supra* note 11, at 911.

206. *Id*. at 910. Studies show that attempting to repress one's emotions is ineffective and may interfere with the ability to make deliberate decisions. *Id*. (citing Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 Cal. L. Rev. 1485, 1511 (2011) (noting that attempting to regulate one's emotions "consumes cognitive resources and leaves a person with fewer resources with which to perform other tasks").

207. *Id*. at 910.

208. Rachlinski et al., *supra* note 11, at 1221 (citing Siri Carpenter, *Buried Prejudice: The* Bigot *in Your* Brain, Sci. Am. Mind, May 2008, at 32, 32).

209. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1173 (2012) (emphasis added).

210. *Id*. at 1174.

211. Taking the IAT repeatedly reminds the test taker of his/her biases and the need to continue working to reduce them and prevent them from affecting their assessments and decisions.

212. Rachlinski et al., *supra* note 11, at 1228.

213. Although judges and evaluators should take the IAT, they should not be required to do so. The strategies for reducing bias are unlikely to be effective if the individual is resistant to learning about implicit bias or lacks the motivation to address his/her biases. In the worst-case scenario, they might create a backlash and lead to an increase in bias.

214. Patricia G. Devine et al., *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-breaking Intervention*, 48 J. Experimental Soc. Psychol. 1267 (2012).

215. *See Project Implicit Publications*, Project Implicit, https://www.projectimplicit.net/papers.html (last visited Nov. 10, 2016); *see also Perception Institute Publications*, Perception Institute, http://perception.org/publications/ (last visited Nov. 10, 2016).

216. *See Helping Courts Address Implicit Bias: Resources for Education*, Nat'l Ctr. for St. Cts., http://www.ncsc.org/ibeducation (last visited Nov. 10, 2016). Public and private institutions and organizations increasingly host live trainings on implicit bias for judges and others. *See, e.g., Perception Institute Publications*, *supra* note 215 (listing dozens of organizations that have hosted implicit bias trainings for judges, public defenders, prosecutors, journalists, community organizers, and child welfare professionals).

217. Devine et al., *supra* note 214*; see also* Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. Personality & Soc. Psychol. 828 (2001); Nilanjana Dasgupta & Anthony Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. Personality & Soc. Psychol. 800 (2001) (finding that individuals' negative implicit attitudes toward African Americans, as measured by the IAT, decreased when exposed to images of famous well-regarded African Americans and images of infamous and despised Whites).

218. Devine et al., *supra* note 214.

219. *See* Jo Jones & William Mosher, *Fathers Involvement with their Children: United States 2006-2010*, 71 Nat' l Health Stat. Rep. 1 (2013).

220. Devine et al., *supra* note 214; Adam Galinsky & Gordon Moskowitz, *Perspective-taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. Personality & Soc. Psychol. 708 (2000).

221. *See supra* notes 153–170 and accompanying text (discussing childrearing styles and norms).

222. *See* APA Guidelines, *supra* note 6, at 864 ¶ 3 ("The most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child's psychological needs. Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context.").

223. Devine et al., *supra* note 214 (Devine and her colleagues also recommend that individuals seeking to break the prejudice habit seek out opportunities for contact with members of stereotyped groups, but this might be challenging for some individuals depending on their employment and demographics of their town). To illustrate, a judge in Vermont may have limited opportunities for contact with African Americans because there are few African Americans in Vermont. *Quickfacts: Vermont*, U.S. Census Bureau, https://www.census.gov/quickfacts/table/PST045215/50 (last visited Nov. 10, 2016) (reporting that African Americans comprise 1.3% of Vermont's population in 2015).

224. Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 Soc. Psychol. 137 (2010).

225. Glaser & Knowles, *supra* note 197.

226. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. Personality & Soc. Psychol. 268, 270 (2006).

227. Jennifer Richeson & Richard Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. Experimental Psychol. 417 (2004) (finding that colorblindness resulted in greater implicit race bias than a multicultural perspective).

228. Apfelbaum et al., *supra* note 174, at 923 (noting that attempts not to "mention of race, particularly when race is perceptually salient and practically useful, is cognitively demanding [and] can result in the depletion of executive attentional resources, especially when such efforts are geared toward avoiding the appearance of bias."); *id*. at 929 (finding that Blacks interpreted "Whites' avoidance of race during interracial interactions" as "indicative of greater racial prejudice.").

229. Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C.J.L. & Soc. Just. 229, 253 (2015) (urging judges to "always be aware of their inherent cultural bias--their subconscious or common sense ingrained by their native cultures.").

230. Sagiv, *supra* note 229, at 253.

231. *Id*. at 255. Admittedly, reducing cultural biases will likely be quite challenging especially when the actor honestly believes that dominant middle-class values and norms benefit children.

232. I am indebted to Professor Stacey Platt for this suggestion.

233. Guthrie et al., *supra* note 199, at 5; Kang, et al., *supra* note 209, at 1177. Researchers have also suggested that decision makers give their intuitive responses time to dissipate. *See* Wistrich et al., *supra* note 11, at 910. Although intuitive judgments benefit from the passage of time and deliberation, delay in custody decisions may be harmful to children and families. A child has to live with *someone* during the pendency of the custody dispute and it is much more difficult to remove the child from that home months later when the court determines that it is not in the child's best interests. However, intuitive responses can dissipate even after a short period of time especially if legal actors also engage other techniques to help them make deliberative decisions.

234. Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 Emotion 585 (2009); David DeSteno et al., *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 Psychol. Sci. 319 (2004); Kang & Banaji, *supra* note 188, at 1094; *see also* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. Personality & Soc. Psychol. 621 (1994).

235. *See* Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automacity of Responding*, 6 Soc. Psychol. & Pers. Sci. 284 (2015); Rhonda V. Magee, *If You Plant Corn, You Get Corn": On Mindfulness and Racial Justice in Florida and Beyond*, Fla. B.J., April 2016, at 36 (contending that "practicing mindfulness meditation and compassion practices lead, over time and with commitment and an attitude grounded in love, to a lessening of bias. They assist us in overcoming our tendencies to turn away from the evidence of bias in our midst, a practice we've been roundly encouraged to embrace as "colorblindness," and instead, to develop a deeper understanding of how bias works in our lives. . .").

236. Blasi, *supra* note 11, at 1276.

237. *Id*.

238. *See supra* notes 16, 148–49, 204–05 and accompanying text (discussing how best interests standard increases potential for bias in custody disputes). Scholars have proposed alternatives to the best interests standard and the ALI's Principles of Family Dissolution allocate custodial responsibility based on the "proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation" or the filing of a custody petition. Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.08(1) (2002); *see also* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Cal. L. Rev. 615 (1992) (rejecting best interests standard and proposing approximation standard); ALI, *Principles of the Law of Family Dissolution Analysis and Recommendations,* 8 Duke J. Gender L. & Pol'y 1, 2-8 (2002). While the approximation standard would likely reduce bias in at least some custody decisions only one state—West Virginia (West 2016), *See* W. Va. Code Ann. § 48-9-206, has adopted it.

239. The National Center for State Courts developed educational implicit bias pilot programs in California, Minnesota, and South Dakota. *See* Nat'l Ctr. for St. Cts., *supra* note 216.

240. *See* Guthrie et al., *supra* note 199, at 35.

241. For example, judges in New Jersey are eligible for tenure after seven years on the bench and are evaluated on a number of metrics, including bias, as part of the tenure determination. I recognize that judicial evaluations themselves may be biased against women and minorities. *See* Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 Law & Soc'y Rev. 731 (2011); Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 Just. Sys. J. 271 (2014).

242. Stacey Platt, Address at AFCC Conf.: Bias in the Family: The Role of Race and Culture in Custody Disputes, (Jun. 2, 2016). BID panels are currently used in proceedings involving unaccompanied immigrant children. *See* UNHCR, The UN Refugee Agency, *UNHCR Guidelines on Determining the Best Interests of the Child* (May 2008), http://www.unhcr.org/4566b16b2.pdf.

243. As noted above, public and private institutions and organizations increasingly host trainings on implicit bias for family court judges and practitioners. *See* Shawn Marsh, *Racial Disparities and Implicit Bias*, National Council of Juvenile and Family Court Judges (Apr. 6, 2016), http://www.ncjfcj.org/racial-disparities-and-implicit-bias; Solangel Maldonado, *Fairness for Families: Confronting Implicit Bias, Racial Anxiety and Stereotype Threat* (Nov. 14, 2015) (presentation in Albany, NY for family court judges and child welfare professionals); *see also supra* note 216.

244. Kang et al., *supra* note 209, at 1169. The perception of bias in the courts is significant. A study by the National Center for State Courts found that "47% of Americans did not believe that African Americans and Latinos receive equal treatment in America's state courts and 55% did not believe that non-English speaking persons receive equal treatment." Pamela Casey et al., *Helping Courts Address Implicit Bias: Resources for Education*, Nat'l Ctr. for St. Cts. 1, 1 (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx. (reporting that "more than two-thirds of African Americans thought that African Americans received worse treatment than others in court.").

Solangel Maldonado is the Joseph M. Lynch Professor of Law at Seton Hall Law. Her research and teaching interests include family law, estates and trusts, torts, gender and the law, and race and the law. Her scholarship focuses on the intersection of race and family law and the law's regulation of children's relationships with parental figures. She is currently working on a book that explores how the law shapes individuals' preferences for romantic partners of certain races and is one of the coauthors of Family Law in the World Community (Carolina Academic Press, 3rd ed., 2015). She is an elected member of the American Law Institute (ALI) and an associate reporter of the ALI's Restatement of the Law, Children and the Law (in progress). Prior to joining the Seton Hall Law faculty, she was a litigation associate with Kaye, Scholer, Fierman, Hays & Handler, LLP and with Sidley, Austin, Brown & Wood in New York. She also clerked for then U.S. District Court Judge Joseph A. Greenaway, Jr., now on the U.S. Court of Appeals for the Third Circuit. She received her B.A. from Columbia College and her J.D. from Columbia Law School, where she was a Harlan Fiske Stone Scholar and managing editor of the Columbia Journal of Gender and Law.