THE (IN)VISIBILITY OF MOTHERHOOD IN FAMILY COURT PROCEEDINGS

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ABSTRACT

Issues of bias in Family Court in the context of race and overrepresentation of people of poverty have been extensively explored in academic literature. There is arguably a parallel overrepresentation of women, and particularly mothers, in our Family Courts. I question whether the Family Court would function as it currently does without mothers as its core litigants. Specifically, I delve into the implicit gender biases inherent in societal expectations of mothers as all-knowing, ever-nurturing, and ever-protective of their children—expectations that often ignore the complexities and nuances of motherhood. To illustrate my thesis, I focus on a case that I was involved in over a decade ago, which was subsequently featured in Professor Dorothy Roberts' book: Shattered Bonds: The Color of the Child Welfare System. *Through this narrative, the Article raises critical questions regarding the influence of implicit gender bias and the construct of motherhood in Family Court proceedings. As a result of its predominance, has the gender of Family Court litigants become virtually invisible? How might we identify, confront, and address this (in)visibility in our family justice system?*

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This piece is especially dedicated to my own family, particularly my mother, my husband, and my daughter, who have taught me about motherhood. I also dedicate this piece to all of those men and women who fought for gender equality in the days when judges and lawyers could say, "What do you mean by gender bias?," which then became, "We don't have any gender bias in the courts anymore because we have a few women lawyers." Let us work toward the day when our children and grandchildren will ask: "Gender bias? Whatever in the world is that?" But this time let us actually mean it.

I.
INTRODUCTION: ON THE ROAD TO VISIBILITY

Mothers in Family Court are so ubiquitous that they essentially become invisible.[1] The concomitant visibility and invisibility of mothers often leads players in the Family Court system to rely upon gendered norms and roles in making critical and enduring decisions. In other words, because the role of mother is virtually universal to the main subjects of Family Court proceedings, and yet is invisible in its universality, it is much easier for the key players in the system to resort to heuristics, stereotypes, ideals, schemas, and biases about mothers than to perceive each litigant-mother as an individual person.[2]

Thus, the predominance of women as the persons charged with child abuse and neglect in Family Courts is often overlooked because we have become so accustomed to seeing the faces of women in our courtrooms. By failing to notice women's predominance, we conveniently essentialize the "bad mother" as the person who is brought into Family Court on child protection charges, and compare her to the mythical "ideal mother," who would never be charged with any kind of child abuse or neglect.

The data about Family Court child welfare proceedings across the United States demonstrates that the majority of parents charged with child abuse or neglect are indeed mothers.[3] Although governmental agencies typically file child

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1. Jerry Kang and Mahzarin Banaji say the same of "implicit bias," which I will be addressing for the balance of this Article. They state that implicit bias is "ubiquitous but invisible." Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1080 (2006).

2. By "invisibility," I mean the phenomenon that allows us to become "adjusted" to the things we see every day without truly recognizing them. I should note that the term "invisibility" has often been linked to motherhood in another distinct context that is not being used in this Article. Specifically, feminists have long addressed the issue that the work of a mother in the household is invisible. *See, e.g.*, KAREN J. SWIFT, MANUFACTURING "BAD MOTHERS": A CRITICAL PERSPECTIVE ON CHILD NEGLECT 104–05 (1995). While this metaphor informs my use of the term "invisibility," in this Article I am referring chiefly to the fact that, specifically, our courts are *so* full of women, primarily those without resources, that we overlook this gendered and socioeconomic reality. Would our Family Courts even function as they do now without women as their predominant litigants?

3. W. Bradford Wilcox & Jeffrey Dew, CENTER FOR MARRIAGE AND FAMILIES AT THE INSTITUTE FOR AMERICAN VALUES, *Protectors or Perpetrators? Fathers, Mothers, and Child Abuse and Neglect*, 2 (2008), http://www.americanvalues.org/pdfs/researchbrief7.pdf (documenting that, based on available federal data, mothers were involved in 64% of child welfare cases, while fathers were involved in 36.7% of such cases); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court - the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 528 (2007) (noting that, in her first full day of family court, most of the litigants she saw were women); Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 155 (2006) (noting that "women of color and poor women" are the primary litigants in family court). *See also* KAREN J. SWIFT, MANUFACTURING "BAD MOTHERS": A CRITICAL PERSPECTIVE ON CHILD NEGLECT 120 (1995) (arguing that mothers are scapegoats because of the structure and priorities of the current child welfare system). The identity of the mother is almost always known, while biological fathers are often missing. Furthermore, the mother is generally the child's primary caretaker and

abuse or neglect cases against both of a child's parents, when the agency proceeds against one parent only, it is too often against the child's female caretaker.[4]

Scholars examining Family Court have long criticized the overrepresentation of low-income litigants of color, characterizing Family Court as "the poor person's court," and have questioned whether the family law system itself is inherently discriminatory toward persons of color.[5] We openly admit and find unacceptable the over-representation of impoverished people, and people of

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more likely to alter her behavior when faced with the threat of termination of parental rights. Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 614–15 (2004–2005). *See* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 708 (1998) ("[M]others overwhelmingly are the custodians and caretakers of children."). *See also* Matthew R. Hall, Book Note, 4 J.L & FAM. STUD. 209 (2002) (reviewing Nancy E. Dowd, REDEFINING FATHERHOOD (2000)) ("Mothers are still overwhelmingly the primary care-taker of children. Fathers are at most secondary parents, and have often abandoned children altogether—physically, economically, and otherwise."); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176 (2004); *infra* notes 4, 9, and 57. Additionally, I base my assertion on my own personal observations of Family Court litigants in all parts of New York, Chicago, and Southeastern Michigan over the past eighteen years.

4. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997) ("[T]he vast majority of the parents involved in the child protective system are mothers. Men are rarely brought into court, held accountable, or viewed as resources for their children. When fathers are involved in the proceedings, they are usually subject to lower expectations and are significantly less likely to be criminally charged with neglect or passive abuse of their children. Women, on the other hand, are more frequently charged under such laws, even when they had nothing to do with the abuse.") (citations omitted); Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others*, 2 U. CHI. ROUNDTABLE 13, 14–15 (1995) ("[C]hild abuse is a difficult topic because gender bias operates on many levels. Because of this bias, mothers are likely to be found liable for abuse and neglect regardless of the identity of the actor. If one looks at who is charged with abuse and neglect in juvenile courts, this worry is verified: it is almost always only the mother, though often the mother is charged with failing to protect and the active abuser was a man."). *See also* DAVID G. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES, 140 (1970) ("Although more mothers than fathers are reported as perpetrators of abuse, the involvement rate in incidents of child abuse is higher for fathers and stepfathers than for mothers. This important relationship is unraveled when account is taken of the fact that nearly 30 percent of reported abuse incidents occur in female-headed households."); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 364–65 (1999) ([I]t is no secret that the people affected by the child welfare system are some of the least powerful members of our society: women, many of whom belong to racial minority groups and virtually all of whom are desperately poor.").

5. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 36–37 (2003) ("'[T]his is a poor people's court,' says Brooklyn Family Court Judge Jody Adams. 'If these people were middle class, they'd be seeing a shrink, not testifying before a judge.'"). Also in some states, like New York, litigants with money have the option of filing their family cases in Supreme Court. *See also* Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007); Sinden, *supra* note 4.

color in the criminal and family courts, as well we should.[6] In the same spirit, we also need to be concerned about the over-representation, prevalence, and implicit blaming of women litigants, particularly mothers.[7] While this bias against motherhood is not unique to any particular courtroom,[8] the motherhood bias is acutely sharp in family law proceedings, particularly child welfare proceedings,[9] because one's parenting is in fact the very issue being litigated before the courts.

This Article will explore implicit expectations, ideals, and biases about mothers and how such stereotypes end up resulting in harm to mothers. One concrete way that such implicit biases harm mother-litigants is that courts too often base their decisions and judgments upon such biases, whether consciously or not.[10] Thus, in order to eradicate detrimental influences and expectations, we first must identify and uncover them.[11] With this Article, I hope to join others in sparking a dialogue in the next wave of feminist jurisprudence addressing the implicit bias against and stereotyping of mothers in the family law system.

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6. *See generally* CHAPIN HALL CENTER FOR CHILDREN, UNDERSTANDING RACIAL AND ETHNIC DISPARITY IN CHILD WELFARE AND JUVENILE JUSTICE (2008), http://cjjr.georgetown.edu/pdfs/cjjr_ch_final.pdf (discussing efforts to alleviate racial and ethnic disparity in child welfare and juvenile justice systems); THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM (2000), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (exploring policy reconsiderations regarding racial, ethnic, and social disparity in criminal courts).

7. For purposes of this Article, I will be referring to mothers as female and fathers as male. I realize this does not account for same-sex parenting, as well as many other types of parenting, but I am trying to more clearly delineate the issues by assigning the gender role of "mother" to women. I am focusing on mother as the birth mother for purposes of clarity, though countless mothers exist in other forms: egg donor, surrogate mother, adoptive mother, foster mother, stepmother, and the like.

8. *See, e.g.*, Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1386 (2008) (discussing bias against motherhood in employment).

9. *See* Becker, *supra* note 4, at 14–15 (citing Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, U. CHI. ROUNDTABLE 1, 7 (1995)) (stating that mothers are more likely to be found liable for abuse or neglect regardless of identity of actor). In this Article, I chose not to focus on child custody and visitation or child support proceedings. Though mothers may file more petitions in such proceedings, the cases by definition involve the other parent. This differs from child protective proceedings, which are public because the State is pursuing the case against the parent(s). I also chose not to focus upon termination of parental rights cases in this Article, but intend to do so in a forthcoming article. Lastly, I chose not to address civil order of protection cases because while the petitioner seeks protection from family or intimate-partner violence, the petitioner is still a private individual, and, thus, the issues are different than cases in which the State is pursuing the non-violent parent in a child neglect proceeding. Furthermore, there are subtler issues of gender bias in Family Court cases where females are not the predominant litigants, such as status offense cases and juvenile delinquency. My thanks to Professor Beth Schwartz for raising that idea to me when I presented this piece in Seattle in June 2011. She noted aptly that even when the (primarily male) children are being charged, judges look to mothers to explain their children's bad behavior, thereby implying bad mothering.

10. Data shows that trial judges with implicit biases do form judgments based upon such biases. Jeffrey J. Rachlinksi, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

11. *See, e.g.*, Benard, Paik & Correll, *supra* note 8, at 1386.

This Article proceeds in six parts. In the next section, I lay the groundwork for this discussion by defining the essential underlying terms for this conversation. Part II(A) defines and distinguishes between explicit and implicit bias, and then introduces the concepts of implicit gender and motherhood bias. Part II(B) describes how gender biases can operate in the courtroom and intersect with the legal system overall. Part II(C) explores implicit motherhood bias in more depth.

In Part III, the Article turns its focus to the harms of implicit motherhood biases within the Family Court. Part III(A) provides an overview of the Family Court system in the United States. Part III(B) then addresses how implicit motherhood biases manifest in Family Court and how they can prove particularly detrimental in that setting.

In Part IV, in order to flesh out the theory of implicit motherhood bias, the Article examines the highly publicized case of "T.C.," which I was professionally involved with over a decade ago.[12]

Part V offers a set of modest proposals that may allow us to identify and address issues of implicit motherhood bias in our family justice system, specifically positing that we educate the players in the court system about the ubiquity of implicit biases. In order to eradicate the pernicious operation of this form of implicit bias, those within the system must learn to recognize and identify the implicit biases that society holds about what it means to be a mother. Rooting out the effects of implicit motherhood bias will positively impact both the mothers that appear before Family Court and the perceived legitimacy of the system as a whole.

Finally, the Conclusion sets forth areas worthy of further exploration and analysis, such as whether the child welfare and Family Court systems (and the larger society) are holding fathers to the same exacting standards that we hold mothers, and how we can look at the issue of implicit gender bias honestly and fully, while acknowledging the role of class and race as inextricably intertwined with gender and motherhood.

12. The case of T.C. was very visible in the newspapers and the press. In fact, the T.C. case was later featured as a case study in Professor Dorothy Roberts' book, *Shattered Bonds: The Color of Child Welfare.* ROBERTS, *supra* note 5. In this Article, I am not revealing anything outside of public records/public accounts, other than a few of my own personal observations. That said, I choose to use only initials in this Article in order to preserve some semblance of privacy and confidentiality for the family. T.C. was a young, breastfeeding woman in Brooklyn who was charged with child neglect and child endangerment in both criminal and family courts because her newborn baby was undernourished and died. While she tried to seek help from multiple sources, she was repeatedly turned away.

II.
THE CONTOURS OF BIAS IN THE COURT SYSTEM

A. Distinguishing Between Implicit and Explicit Bias

Notwithstanding the fact that the phenomenon of bias is multi-faceted, complicated, and somewhat obscure, for purposes of this Article, I will utilize a rather simplistic dual-binary categorization of bias as either "explicit" or "implicit."

Explicit bias is bias that is openly expressed. A now infamous example of such explicit bias can be found in one of the major handbooks for practicing attorneys from the 1970s, which advised: "Women, like children, are prone to exaggeration; they generally have poor memories as to previous fabrications and exaggerations."[13] By contrast, implicit biases are those that are not necessarily openly and explicitly expressed, but are harbored nonetheless.[14]

Most or all people, even those who honestly believe they hold no biases, still maintain implicit biases.[15] Implicit biases are often not conscious, intentional, or maliciously-based.[16] For these reasons and others, implicit biases are often harder to identify and eradicate than explicit biases, which most of contemporary society has worked to specifically reject and disavow.

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13. UNIFIED CT. SYS. OF THE ST. OF N.Y., REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986), *reprinted in* 15 FORDHAM URB. L.J. 11, 151 (1986-87) (citing F.L. BAILEY & H.B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 205, 190-91 (1st ed. 1971)).

14. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

15. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 152 (2010) ("Implicit biases [unlike explicit biases] . . . are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases."). *See also* HARVARD UNIVERSITY, *Project Implicit*, https://implicit.harvard.edu/implicit/ (last visited Sept. 30, 2012) (functioning as a hands-on science museum exhibit, allowing web visitors to experience the manner in which human minds display effects of stereotypic and prejudicial associations acquired from their socio-cultural environment); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 112 (2002) (finding that Implicit Association Test (IAT) research indicates that all social groups hold implicit biases, regardless of age, gender, race, and political views). There are many who feel that IAT is not as accurate at testing implicit biases as it purports to be. *See, e.g.*, Beth Azar, *IAT: Fad or Fabulous?*, 39 MONITOR ON PSYCHOL. 44 (July 2008), *available at* http://www.apa.org/monitor/2008/07-08/psychometric.aspx; John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 17, 2008, at D1.

16. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 5–6 (2010) (explaining the development of implicit bias beginning from childhood and continuing into adulthood, the way these stereotypes remain largely unchanged, and how they eventually become implicit and automatic); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 617–18 (2007) (arguing that implicit gender biases are often built upon group-based stereotyping that begins during childhood).

The theory of implicit bias has been developed and extensively analyzed by social scientists over the past several decades, particularly as it relates to racial bias.[17] Researchers have explained that, unlike explicit biases, implicit biases can form in children as young as three years old, and, then, deepen over the years of development.[18] Specifically, Professor Gary Blasi explains that while explicit biases may be shunned and disapproved of in public, implicit biases only strengthen and "harden[]" over time, becoming part of one's core set of beliefs.[19] Distinct from explicit biases, not all implicit biases take the shape of outward animosity or hatred toward a particular group. One can hold beliefs stemming from seemingly innocuous stereotypes, which then subsequently form cognitive schemas and implicit biases.[20]

Given its nature, the problem of implicit bias is extensive and pervasive, and its effect is substantial. Researchers argue that these implicit biases can predict behavior, impacting both mundane behavior, such as whether someone engages in simple acts of courtesy, and consequential behavior, such as how someone evaluates another person's work quality.[21]

As Professors Kang and Banaji note in their data analysis:

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17. Bennett, *supra* note 15, at 152 ("One scientific explanation suggests that implicit bias is formed by repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger."). *See also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010) (summarizing "the empirical evidence that rejects facile claims of perceptual, cognitive, and behavioral colorblindness" and advocating a "behavioral realist" approach to color and race); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) ("[J]udges and jurors unknowingly misremember case facts in racially biased ways," which "perpetuates racial bias in case outcomes," and needs to be met with "multifaceted responses, including debiasing techniques and cultural change efforts."); Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-05 (2000) (assessing the research on implicit bias and emphasizing that "it seems inevitable that we will make race-based choices, particularly in spontaneous situations, for reasons we are not fully conscious of," yet whether a person's bias will affect her conduct depends on her awareness of the bias, her motivation to correct it, and how much control she can exert over her behavior); Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 987 (1999) ("[S]chemas may cause biases in the ways in which an officer processes information. An officer may misinterpret ambiguous conduct that could be consistent with innocence to coincide with the prevailing schema.").

18. Levinson, *supra* note 17, at 363.

19. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1255–56 (2002).

20. Thompson, *supra* note 17, at 984 ("We cluster information into categories and this leads inevitably to some prejudgment based upon our perceptions of those groupings."); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949–50 (2006). *See generally* Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCHOL. 757 (2001) (introducing articles about implicit bias); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

21. Bennett, *supra* note 15, at 150; Kang & Lane, *supra* note 17, at 473; Levinson, *supra* note 17, at 351-52.

> The science of ISC [implicit social cognition] examines those mental processes that operate without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups . . . . [E]vidence from hundreds of thousands of individuals across the globe shows that (1) the magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias. As disturbing as this evidence is, there is too much of it to be ignored. Moreover, recent discoveries regarding malleability of bias provide the basis to imagine both individual and institutional change.[22]

As mentioned above, the study of implicit bias began with an examination of racial bias; however, academics have begun to look at implicit gender bias more deeply,[23] and implicit gender bias is now becoming a solid body of work

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22. Kang & Banaji, *supra* note 1, at 1064 (internal citations omitted).

23. Academics are beginning to test and write about implicit gender bias in employment law. *See, e.g.*, David Faigman, Nilanjana Dasgupta & Cecelia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008) (describing how scientific research on implicit bias, stereotypes, and discrimination can be used in employment discrimination and Title VII claims, and exploring limitations of studying the subject of implicit bias and using such research in legal cases given evidence rules regarding expert opinion testimony); Catherine Albiston, Kathryn Burkett Dickson, Charlotte Fishman & Leslie F. Levy, *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1298 (2008) (discussing common patterns of gender stereotyping that mothers face in the workplace and how these implicit and explicit stereotypes may affect decision-making long before the "moment of decision"); Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 26 (2007) (mentioning that "second-generation discrimination," resulting in women lagging behind men in areas such as job advancement, pay, and consistent workforce participation, has been attributed to women's disproportionate role in family caregiving, "coupled with a combination of work norms and unconscious gender stereotypes.") (citation omitted); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (addressing the difficulties family caregivers experience at work, like the "glass ceiling" and "maternal wall," due to bias against caregiver status); Nina Victoria Patel, Implicit Bias Against Professional Women (May 2010) (unpublished B.S. thesis, New York University), http://w4.stern.nyu.edu/uc/honorsprogram/2010/Thesis_2010_Nina%20Patel.pdf (exploring implicit attitudes and stereotypes against married women and mothers). *See also* Melinda Cleary, *Mothering Under the Microscope: Gender Bias in Law and Medicine and the Problem of Munchausen Syndrome by Proxy*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 183, 187 (2005) (arguing that "in child abuse and homicide cases where mothers stand accused, circumstantial evidence . . . [is] considered and applied from a position of gender-bias"); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 896 (1998) (examining gender stereotypes and their relation to differences in parental roles for women and men).

as well.[24] In terms of implicit gender bias, there are many ways in which such bias can manifest itself. Some implicit biases in the arena of gender serve as constant reinforcements for a variety of gender norms. For example, many people subscribe to gendered stereotypes that suggest that all women inherently possess particular traits (e.g., passive, gentle, nurturing), while all men possess other inherent traits (e.g., assertive, strong, competent).

As Professor Joan Williams further explains:

> In the last thirty years, empirical social psychology has developed a very different definition of bias. This newer definition points out that much of gender bias is neither self-conscious nor aversive; it is built into unspoken associations or "implicit expectancies" that form unstated and unexamined "cognitive bias" that can skew the way information is:
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> - perceived – what people notice, and what they overlook
> - attributed – the way people interpret causation
> - remembered – the way things are encoded in, and retrieved from, memory, and
> - more generally, the way information is used in a wide range of social judgments.[25]

Implicit gender bias studies have occurred in employment law and criminal law fairly extensively, but data in the context of family law is still evolving.[26]

B. Gender Bias Manifesting Itself in the Courtroom

In the legal arena, gender bias in the courtroom is hardly new and unexamined. Feminist giants and academics have long criticized gender bias in myriad facets of the legal system.[27]

In addition to academia, organizations like state task forces and family law bar associations have worked to gather evidence to support claims of gender

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24. Implicit gender biases manifest at high rates in the context of the legal profession. *See, e.g.*, Levinson & Young, *supra* note 16 (using empirical study to provide statistical overview of gender disparities in legal profession, examining scholarship linking implicit gender stereotypes to gender disparities in legal profession, and providing a roadmap for future research on implicit gender bias in the legal profession).

25. Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287, 293–94 (2003) (citation omitted).

26. Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, 1 (Justin D. Levinson & Robert J. Smith eds., 2012).

27. *See, e.g.*, Catharine A. MacKinnon, SEX EQUALITY (2007); Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900 (1986) (reviewing Lenore J. Weitzman, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985)); PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 30 (1986).

bias.[28]

As one example of a pioneering state task force, in 1986, the New York Task Force on Women in the Courts was formed. The members of the newly formed Task Force effectively recognized, identified, and disapproved of the explicit gender bias that existed in the court systems it studied. In part, some of this explicit bias was reflected in the paucity of women in legal positions in the bar and on the bench.[29] In other ways, the bias was explicit in the use of sexually-charged remarks to female attorneys or gendered language found within the words of the statutes and in the dialogue in the courtrooms.[30] The Task Force sought to identify and expose biased perspectives and the overly male-dominated cultures of the courts.[31]

By task forces and other associations and groups bringing to light explicit gender bias, many of the goals set out by those groups examining explicit gender bias have been achieved or at least partially attained. For example, updated New York Task Force reports indicate that more women judges are on the bench and in high positions of power in the judicial system as clerks, judicial officers, and court administrators.[32] New York, as most states, has more admitted women lawyers today, in 2012, than it did in 1986.

Yet, still fifteen years after the initial New York Task Force was created, while the New York State Judiciary Committee on Women in the Courts heralded the progress that had been made, it recognized that more needed to be accomplished. The Committee Report noted that courts need to be continually cognizant of biases against mothers such as "the ways that dual responsibilities for caring for minor children and for earning a living often place special burdens on women" and of "the ways that sex-based stereotypes lead to the application of higher standards of parenting to mothers than to fathers."[33] Moreover, the report

28. *See, e.g.*, COMMONWEALTH OF MASSACHUSETTS, GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989), *reprinted in* 23 SUFFOLK U. L. REV. 575 (1989); Blake D. Morant, *Introductory Essay: The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073, 1073–75 (2001) (scrutinizing the study on Gender Bias in the Courts of the Commonwealth of Virginia both empirically and theoretically); *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 711 (2001); Linda C. Morrison, *The National Association of Women Judges: Agent of Change*, 17 WIS. WOMEN'S L.J. 291 (2002).

29. UNIFIED CT. SYS. OF THE ST. OF N.Y., *supra* note 13, at 24–25, 153.

30. *Id.* at 131–39.

31. *Id.* at 18 ("The courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency."). *See also* N.Y. ST. JUD. COMM. ON WOMEN IN THE CTS., WOMEN IN THE COURTS: A WORK IN PROGRESS 1 (2002), http://www.nycourts.gov/ip/womeninthecourts/womeninthecourts_report.pdf.

32. N.Y. ST. JUD. COMM. ON WOMEN IN THE CTS., *supra* note 31, at 33, 35. *Cf.* Karen Sloan and Laura Haring, *Parity on the Bench Remains Elusive for Women Judges*, N.Y. L.J. 2 (July 19, 2012), *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202563477436&Parity_on_the_Bench_Remains_Elusive_for_Women_Judges&slreturn=20130015160244.

33. N.Y. ST. JUD. COMM. ON WOMEN IN THE CTS., *supra* note 31, at 3.

emphasized, "some judges appear to give weight to gender-based stereotypes about mothers and fathers that may have little bearing on the child's best interest and that unfairly discriminate against men and women."[34]

This groundbreaking work exposing what was happening inside the courtrooms, not just in New York, but also around the country, was crucial in raising awareness about explicit gender bias. For purposes of this Article, I am referring to this work as the "first wave" of exposing gender bias in the courtroom.[35]

Thus, I posit in this Article that the "second wave" of uncovering gender bias in the courtroom is to look more closely at the implicit biases that players in the court system hold. More specifically, I wish to examine implicit maternal biases in the context of Family Court, in order to address how judges, lawyers, and caseworkers think about families, motherhood, and women.

C. Exploring Implicit Motherhood Bias in Family Courts

As explained in Part IIA, *supra*, when we utilize the term explicit gender bias, we are talking about bias that is out-in-the-open and identifiable, whether intentionally or unintentionally biased. In the context of family law, an example of explicit gender bias could be when a lawyer utters biased comments about women in the courtroom; the speaker is being explicitly biased and typically intends to do so. Another example of explicit, yet arguably unintentional gender bias, might be if a Family Court judge writes a memo to a group of male and female lawyers starting with "Dear Sirs:" This type of gendered language is an example of explicit gender bias in the courtroom setting.

On the other hand, as explained earlier, implicit bias is much more subtle, nuanced, and often undetected. In the context of family law, this is the kind of bias that judges, caseworkers, or lawyers may employ, yet not even be aware that they are doing so. Regardless of intentions, however, this implicit bias in the courtroom can be nonetheless harmful to litigants.[36]

For an example of an implicit motherhood bias being harmful in a Family Court proceeding, imagine that a judge carries stereotypes about a "good' mother being selfless and subjugating her own needs to those of her children, and a "bad" mother as one who is putting some other need before her children's needs. Now, when that judge is presiding over actual cases, she is implicitly seeing a

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34. *Id.* at 23.

35. I thank Professor Annette Appell, as well as my co-presenter Professor Kathleen Kelly Janus (Critical Theory/Family Working Group–Writer's Workshop at N.Y.U. School of Law) for suggesting the framing of this section as the "second wave."

36. Jerry Kang, *Communications Law: Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132, 132 (Justin D. Levinson & Robert J. Smith eds., 2012); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1148 (providing "some suggestive evidence that implicit attitudes may be influencing judges' behavior").

particular litigant as a "bad mother," if, for instance, the litigant uses illegal drugs, or if she is in love with and lives with a batterer, or, perhaps, even if she works the night shift.

Feminist scholars have increasingly studied motherhood bias and the stereotypes of mothering.[37] Motherhood bias is distinct from gender bias,[38] yet interwoven and interrelated. When I talk about implicit motherhood biases, I am referring to the notion that society implicitly defines or envisions mothers as the ideal, perfect, flawless Mother—dreamily content as such. These subtle gendered constructs that we as a society perpetuate about motherhood can be innocently held, yet can prove to be insidious and harmful to mothers as a whole. Because, in essence, if mothers are universally "perfect" in our imagination, how can we reconcile actual mothers who cannot possibly be so "perfect" in reality?

Because of the nature of such a stereotypical notion of motherhood—both its images of angelic motherhood and its implicit embedded nature—it can be that much harder to assess, pinpoint, and eradicate long-term.[39] Illustratively, there are multiple implicit societal expectations of mothers, holding mothers to the highest possible, almost unattainable, standards.[40] Mothers instinctually are

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37. Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, U. CHI. ROUNDTABLE 1, 3–9 (1995) (discussing the misogynistic and "mother blaming" nature of juvenile courts); Kelli Lane, *Grounding Mother and Child in Their Intrinsic Relational Unit: An Analysis of Motherhood and the Parent-Child Relationship Within the Child Welfare System*, 25 WOMEN'S RTS. L. REP. 145 (2004). *See also* PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 95–170 (1987); Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS (Thorne & Yalom eds., 1992); Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900 (1986); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007); Appell, *supra* note 4.

38. *See* Benard, Paik & Correll, *supra* note 8, at 1386 ("[E]ven highly prejudiced people usually know that open displays of [racial or gender] bias are considered unacceptable. It is not clear that such strong social desirability concerns exist for discrimination against mothers.") (citation omitted).

39. Furthermore, it can be difficult for those who hold such biases to imagine how such a "good" bias with favorable connotations can be harmful. Unfortunately, this mentality can be much more insidious and harder to eradicate.

40. *See, e.g.*, Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 224, 231–32 (Martha Albertson Fineman & Isabel Karpin eds., 1995). *See also* Marie Ashe, *"Bad Mothers" and Welfare Reform in Massachusetts: The Case of Claribel Ventura*, *in* FEMINISM, MEDIA, AND THE LAW 203 (Martha A. Fineman & Martha T. McCluskey eds., 1997); Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers"*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 142 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Benard, Paik & Correll, *supra* note 8, at 1367; Ann Shalleck, *Child Custody and Child Neglect: Parenthood in Legal Practice and Culture*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 308 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995). Unrealistic motherhood ideals and expectations are also present in the context of domestic violence. *See* Joan Meier, *Introduction*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 121 (Martha Albertson Fineman, & Roxanne Mykitiuk eds., 1994). *See also* Leigh Goodmark, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2012); Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43 (2001); Appell, *supra* note 4; Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence:*

supposed to know how to raise children and raise them well. Mothers are envisioned as selfless and self-sacrificing.[41] Society envisions mothers as ever-nurturing and ever-protective of their children.[42] All of these expectations become embedded in the notion of a fictional, ideal Mother, and in doing so, such unrealistic expectations ignore the fullness and intricacies of mothers in reality.[43]

By looking at pre-conceived notions about motherhood held by many players in the Family Court system, we can see how such attitudes can be harmful. As one concrete example, if the players in the child welfare system set unattainable goals for women based upon false expectations of motherhood, this can result in children being placed in foster care unnecessarily or for too long of a time. If a judge believes the litigant in the courtroom has not mothered appropriately, it is much easier to agree with the child welfare agency that intervention or continued intervention is necessary.

The difficulty here, though, is that judges, caseworkers, and lawyers are not always aware that they hold these stereotypes or biases about women and mothers. Thus, while most judges are not explicitly biased toward a group or even an individual, the judges might have no idea what implicit biases they hold until they learn about and reflect upon any implicit biases they may harbor. In this way, implicit biases can prove to be even more intransigent and entrenched

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Towards a New Agenda, 4 B.U. PUB. INT. L.J. 339, 350–53 (1995); Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, *in* RETHINKING THE FAMILY 191 (Barrie Thorne & Marilyn Yalom eds., 1992); Goodmark, *supra* note 3; Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709 (2005) [hereinafter Goodmark, *Telling Stories, Saving Lives*]; Ann Shalleck, *Institutions and the Development of Legal Theory: The Significance of the Feminism and Legal Theory Project*, 13 AM. U. J. GENDER SOC. POL'Y & L. 7 (2005); Murphy, *supra* note 3.

41. *See* Spinak, *supra* note 40, at 2075 ("The sacrificing mother is a powerful totem. Deep in Western consciousness lives the Biblical mother—do we even remember her name—who would relinquish her child to another rather than see it killed. This ultimate sacrifice led King Solomon to determine that this mother must be the true mother of the child for only a true mother would make such a sacrifice."); Carol T. Baines, Patricia M. Evans & Sheila M. Neysmith, *Women's Caring: Work Expanding, State Contracting*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 9 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) ("To equate 'caring' with selfless, never-ending, and uncomplaining 'giving' virtually obliterates the constraints, costs, and consequences that fall so heavily on women").

42. "Feminists have argued that societal beliefs contribute to the 'myth of motherhood' that serves to idealize mothers. 'Good' mothers are not only expected to be the primary nurturers and caregivers of their children but also are presumed to possess a maternal instinct that leads them to protect their children with little or no concern for their own safety." Cheryl Terrance, Karyn Plumm & Betsi Little, *Maternal Blame: Battered Women and Abused Children*, 14 VIOLENCE AGAINST WOMEN 870, 873–74 (2008) (citations omitted). *See also* Benard, Paik & Correll, *supra* note 8, at 1367 ("Women are stereotyped as warm, communal, and nurturing.") (citing Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCHOL. 189, 189 (2008)); Chodorow & Contratto, *supra* note 40.

43. Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 66 (1995) ("Today, mothers are similarly charged with raising their children to meet standards that they did not create. National or community ideals now replace the father as the entity to whom mothers must answer.").

than explicit biases. Again, by definition, implicit biases are harder to discern than explicit biases. Implicit biases infiltrate the social constructs from which we base our ideas and sense of parenthood. In the context of motherhood, implicit biases shape the unconscious stereotypes embedded into our psyches—the construct of and prototype of the "ideal mother." We need to be cognizant of how society expects perfection based upon our cognitive schemas of what it means to be a mother. We expect mothers to be the ultimate nurturers and caregivers without ever erring.

Researchers in other areas of law and social science, such as labor and employment law, have explored motherhood biases. In doing so, they have similarly distinguished between explicit and implicit biases against mothers. In some ways, explicit biases about mothers are more socially acceptable than explicit biases about other groups of people. Some theorists have tried to explain why this might be, and show the various types of bias at work, as follows:

> Race and gender bias in the United States are often accompanied by strong social desirability concerns, because even highly prejudiced people usually know that open displays of bias are considered unacceptable. It is not clear that such strong social desirability concerns exist for discrimination against mothers . . . . In the studies we have conducted, participants are sometimes willing to volunteer that they discriminated against the mothers. In fact, in a section of the study in which participants are asked to list pros and cons of prospective applicants for a job, a number of participants noted "children" as a con. In contrast, participants never listed an applicant's race or gender as a con—doing so would be almost unthinkable in today's workplace. This suggests to us that individuals may be less reticent about openly discriminating against mothers than they would be about openly discriminating against members of other groups. Court cases provide further anecdotal evidence that motherhood bias is partially explicit.[44]

Though, to date, many scholars have focused on the operation of gender bias within labor law, I believe we need to examine more specifically implicit motherhood bias in family law, uncover how this bias may be most pernicious to female litigants in the Family Court, and address how this bias may be perceived from the perspective of female litigants in our Family Courts. I will seek to explore these goals in the next section.

44. Benard, Paik & Correll, *supra* note 8, at 1385–86.

III.
THE DANGERS OF IMPLICIT MOTHERHOOD BIAS MANIFESTING IN FAMILY COURTS: WHY MOTHERS CANNOT AFFORD TO FALTER

A. Family Court in General

When I refer to Family Court in this Article, I am referring to the myriad of courts across the nation handling family law and domestic matters. Depending on jurisdiction, these courts handle all or any combination of family law cases, such as custody, visitation, adoption, paternity, child and spousal support, divorce, property division, child welfare (child abuse and neglect), termination of parental rights, delinquency, status offenses, and civil orders of protection. Child welfare proceedings, which are the focus of this Article, are those proceedings where the State or an agency of the State files a petition against the parent(s), caretaker(s), or guardian(s) of the child(ren) for alleged child abuse or child neglect. The term child welfare proceedings, for purposes of this Article, will concentrate only upon child abuse and neglect proceedings, and not termination of parental rights proceedings.[45]

The State has multiple options once a report of child abuse or neglect is called into a state central registry.[46] For example, after an initial investigation by a caseworker, the State can choose to keep the child(ren) in the family home and offer services,[47] or may request removal of the child(ren) from the home.[48] If the

45. Different states utilize different terminology, such as child protective proceedings, child dependency proceedings, shelter hearings, child welfare hearings, and child abuse and neglect proceedings. Unless otherwise stated, the phrases "child welfare proceedings" and "child protective proceedings" will be used interchangeably throughout the remainder of this Article to label the type of proceedings in which a state can intervene in a family to protect a child from alleged abuse and neglect. *See* Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 175, 181 (2010). The actual processes and procedures amongst states differ, but generally the State bears the burden of proving that child abuse or neglect has occurred and that it was perpetrated by the child's parent(s) or caretaker. *See, e.g.*, N.Y. FAM. CT. ACT § 1031 (McKinney 2012); U.S. Dep't of Health and Human Servs., *Proving Child Maltreatment in Court*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/pubs/usermanuals/courts_92/courtsi.cfm (last visited October 6, 2012); Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457 (2003).

46. State central registries are databases that compile reports of child abuse, which allow for easy access of information regarding previous child abuse investigations in order to help with current child abuse investigations. For a more detailed explanation, see U.S. Dep't of Health and Human Servs., *Interim Report to the Congress on the Feasibility of a National Child Abuse Registry* (May 2009), http://aspe.hhs.gov/hsp/09/ChildAbuseRegistryInterimReport/report.pdf.

47. The agency responsible, called Child Protective Services (CPS) in many states, will usually provide two categories of services: preventive services and post-investigation services. Post-investigation services address the safety of the child and are based on factors such as an assessment of the family's strengths, weaknesses, and needs. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2006*, 83 (2006) [hereinafter *Child Maltreatment* 2006], http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf. Examples of post-investigation services include: individual counseling; family-based services, such as family counseling or family support; in-home services; and court-based services. *Id.*; U.S. Dep't of Health & Human Servs.,

State is seeking to remove the child(ren) from the home immediately, the parents have the right to demand the child(ren) be returned home, and the State typically must demonstrate that the removal of the child(ren) is necessary to avoid imminent risk to the child(ren)'s life or health.[49] Following this hearing, the parent has a right to an adjudicative hearing, essentially a fact-finding hearing, in which the State must prove that the parent(s) or caretaker(s) did indeed abuse or neglect the child(ren).

At times, parents may be deemed to have neglected all of the children in their care based upon the alleged abuse or neglect of one particular child. In such cases, the agency files a "derivative neglect" petition to reach those children in the home not directly abused or neglected by the parents.[50] The agency presumes

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National Study of Child Protective Services Systems and Reform Efforts: Review of State CPS Policy (April 2003), http://aspe.hhs.gov/hsp/cps-status03/state-policy03/ [hereinafter *Child Maltreatment 2003*] (explaining that services may be given in the home in order to preserve the family if the safety of the child can be ensured).

48. Children may be removed from their homes during or after an investigation. *Child Maltreatment 2003*, *supra* note 47, at 69. An estimated 312,000 children were removed from their homes as a result of a child maltreatment investigation in 2006. This number decreased in 2008. Approximately sixteen percent of these children suffer from more than one type of maltreatment. *See Child Maltreatment 2006*, *supra* note 48, at 85; U.S. Dep't of Health & Human Servs., *Child Maltreatment 2008,* 79 (2008), http://archive.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf. *Cf.* N.Y. FAM. CT. ACT §§ 1015-a, 1017 (McKinney 2012) (removal of children); Seventh Judicial District Family Courts, *Neglect and Abuse: N Petition*, http://www.nycourts.gov/courts/7jd/courts/family/case_types/neglect_and_abuse.shtml (last visited October 7, 2012) (describing points in child welfare process when children may be removed from respondents' home and various due process hearings afforded during each step).

49. "Imminent risk" is the standard employed by New York's statute. *See* N.Y. FAM. CT. ACT § 1028 (McKinney 2012). N.Y. Fam. Ct. Act § 1012(f)(i) defines "neglected child" as a child less than eighteen years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care." N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2012). As a case proceeds beyond the removal hearing, the parents have the option either to accept the services and conditions of the agency or to contest the allegations of child abuse and neglect. If the parents decide to contest the allegations, the court holds a full evidentiary hearing. *See* N.Y. FAM. CT. ACT § 1046 (McKinney 2012) (describing types of evidence in such hearings). If the trier of fact determines that abuse or neglect has occurred, the case then proceeds to the dispositional stage where the primary purpose of the hearing is to determine whether the child will remain in the home or be moved elsewhere. N.Y. FAM. CT. ACT § 1055 (McKinney 2012). These cases can be the precursors to termination of parental rights petitions, which may result in permanent severing of the parent-child relationship. However, termination petitions can also be filed simultaneously with child abuse petitions in some instances. *See* Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCHOL. REV. 55, 67 (2010). *See also* Seventh Judicial District, *supra* note 48. To examine different state standards at the removal stages, see Chill, *supra* note 45, at 461.

50. *See* N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney 2012) ("[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent . . . ."). *See, e.g.*, *In re* Angel L.H., 924 N.Y.S.2d 888 (N.Y. App. Div. 2011) (holding that mother's neglect of subject-child was sufficiently intertwined with care of another child as to indicate that subject-child was equally at risk, and stating that the "nature, duration, and circumstances surrounding the neglect of the mother's other children can be said to evidence fundamental flaws in the [mother's] understanding of the duties of parenthood.")

that the abuse or neglect of the target child creates a danger or a risk to all other children in the household, regardless of any alleged injury or harm to those other children.[51]

B. The Harm of Implicit Motherhood Biases in Family Court

Why are implicit motherhood biases potentially harmful to litigants in Family Court? Social scientists demonstrate that individuals often rely upon such biases when making decisions and judgments about others.[52] In fact, when faced with information, the brain resorts to mental shortcuts or heuristics such as stereotypes.[53] These influences, whether conscious or not, can then distort judgment about particular individuals.[54] If—in a system largely without juries—Family Court judges are resorting to such biases when making judicial decisions,[55] those jurists are potentially issuing rulings based upon implicit assumptions.[56] When a Family Court litigant is facing the removal of her children from her home, any judicial skewing towards faulty assumptions is dangerous.

As noted earlier, women are and have been the predominant litigants in child welfare proceedings across North America for as long as we have had Juvenile and Family Courts. Although neglect is not by definition a gendered term, "virtually all people actually accused of neglecting their children, both historically and at present, are mothers . . . ."[57]

As Professor Marie Ashe notes:

> Lawyers representing [mothers/women] charged with child abuse are positioned to be keenly aware of the particularly gendered focus of

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(citations omitted) (alteration in original).

51. For further discussion of the topic, see Robert May, *Derivative Neglect in New York State: Vague Standards and Over-Enforcement*, 40 COLUM. J.L. & SOC. PROBS. 605 (2007).

52. Morant, *supra* note 28, at 1079.

53. *Id.* at 1079–80; Breger, *supra* note 49, at 84–85.

54. Morant, *supra* note 28, at 1079–80.

55. Most family court cases—especially child welfare cases—have no juries or panels of judges but a single fact finder. Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence,* 13 MICH. J. GENDER & L. 1, 21 (2006).

56. Morant, *supra* note 28, at 1076.

57. SWIFT, *supra* note 3, at 101; Susan Wells, *What Criteria Are Most Critical to Determine the Urgency of Child Protective Services Response?*, *in* HANDBOOK FOR CHILD PROTECTION PRACTICE 7–9 (Howard Dubowitz & Diane DePanfilis eds., 2000); Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA J. SOC. POL'Y & L. 165, 183, 186 (2000) (analyzing the connection between poverty and maltreatment, the concentration of these issues among single-mother households, and how reported situations of child maltreatment are more prevalent among families headed by teen mothers than families headed by non-teen mothers); William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement*, 38 SUFFOLK U. L. REV. 303, 315 n.67 (2005) (describing how referencing patriarchal prejudice plays out in sexual abuse cases, where courts blame the child-victim and her mother, while exonerating the abusing father).

> child dependency law. The parents from whom children are judicially removed are typically mothers and it is typically a bad mother who is charged with abuse and neglect. The male parents of such children are generally so absent that if they are identifiable at all, they are often in whereabouts unreachable by summons and subpoena. They have almost always already escaped or evaded the jurisdiction as they have escaped or evaded the family and, in particular, any bond to the adult female from whom the child stands to be rescued. In making their escapes male adults avoid both the onus of caregiving responsibility and the stigma of badness that attaches to women who prove inadequate in meeting that responsibility.[58]

The unrealistic expectations that jurists have of mothers can prove to be directly harmful to those mothers who are brought before the court system. If judges (or we as a society) expect perfection from mothers, any particular mother-litigant could never measure up to implicit expectations about what it means to be a mother. This, of course, is especially challenging when you think about the fact that the very reason a particular mother-litigant has been brought to court is based upon another person's assessment that she is not an adequate mother. Compound this with issues of poverty and lack of resources, along with race and age, and now you have a litigant facing a system that expects her to fail before she even walks into the courtroom.

Society's perception of motherhood is usually binary: one is either a good mother or a bad mother.[59] The word "mother" implies a good, caring mother, and thus, as Professor Catherine J. Ross notes, "the adjective need not even be stated."[60] Yet, for any other type of mother, we have many sorts of stock characters—"the poor mother,"[61] "the single mother," "the working mother," "the teen mother," and "the bad mother."[62] Moreover, as Professor Dorothy

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58. Marie Ashe, *"Bad Mothers," "Good Lawyers," and "Legal Ethics"*, 81 Geo. L.J. 2533, 2547 (1993).

59. Neal, *supra* note 43, at 61 ("We expect mothers to provide their children with all the love, caring, nurturing, and emotional fulfillment that we perceive those children need and desire; we expect her to be all things that we want her to be when we need her to be them. A woman who can fulfill the expectations of her children and of her community is viewed as a good mother. If she cannot – or if she does not – she is bad.").

60. Ross, *supra* note 3, at 187. *See also* Janet Mosher, *Caught in Tangled Webs of Care: Women Abused in Intimate Relationships*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 142 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) (explaining that the "anatomical differences between the sexes" has led to a social-historical construction of gender, in which women are presumed to be "nurturant, caring, dependent, emotive, irrational, selfless, submissive, passive, and associated with the roles of wife and mother within the institution of 'the family'. . . .").

61. *See generally* Neal, *supra* note 43, at 65–68 (discussing the poor mother, often subcategorized as the poor, black mother, a member of the "undeserving" poor).

62. *See* SUE MILLER, THE GOOD MOTHERS (1986). *See also* PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 95–170 (1986) (describing five types of classic "bad mothers:" the sexual mother, the uppity mother, the lesbian mother, the poor mother, and the abused mother); Neal, *supra* note 43, at 66 (explaining that mothers who challenge patriarchy and

Roberts states, "motherhood has very different meanings in different contexts of race, class, sexual orientation, and so on. Indeed, it is *in their role as mothers* that women are most differentiated by race, class, and sexual orientation."[63]

These implicit expectations of mothers are distilled in their most pernicious form when women caretakers stand as litigants in child welfare proceedings. Professor Karen Swift examined child neglect files and noted the inherent biases and embedded stereotypes of parenting involved in the proceedings:

> [Child care and household cleanliness are] not men's work, and the fact that [a father] does this – even once – suggests he is helpful, cooperative, and willing to do more than his share. The very fact that he is shown to be doing this work in a case marked as child neglect also reflects badly on the mother, because he appears to be doing *her* work. However, failure to provide care and in fact the complete abandonment of children by their fathers generally produces no comment at all in these files. In cases of neglect, fathers are usually not mentioned if they are not living in the home. If they are living at home, files seldom comment on the quality, quantity, or frequency of their financial input. Clearly, these files are not about fathers, but about mothers and the responsibilities they are supposed to carry out . . . .[64]

While some mothers may strive to fit this idealistic, selfless role, many mothers––particularly those without support or strong resources—cannot ever achieve the perfection this idealistic construct sets out.[65]

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live outside the prescribed code of conduct are labeled as "bad" mothers). In the context of working mothers separating from their children, Carol Sanger emphasizes:

> Today the mother has replaced the married woman as the focus of concern although there is now increasing confusion about exactly what makes her the enemy: is it gainful employment or its absence? . . . ([U]pper) middle-class, married women are often condemned for pursuing careers and separating from children when they do not have to, while poor, single mothers are faulted for their failure to earn incomes for their families.

Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 465 (1996).

63. Dorothy Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 147 (1995) (emphasis added).

64. SWIFT, *supra* note 3, at 104–05. *See also* Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229 (2012) ("The biggest challenge for sex equality in the 21st Century is to dismantle inequality between women and men's family care responsibilities. American law has largely accomplished formal equality in parenting by doing away with explicit gender classifications, along with many of the assumptions that fostered them. In a dramatic change from the mid-20th Century, law relating to family, work, civic participation and their various intersections is now virtually all sex-neutral . . . . But the resultant legal reforms address only formal inequality; the challenge of lived inequality remains. Changes in legal norms must be embraced throughout the culture before their promise will be made real. The most influential and resistant obstacle to actualizing gender equality is the continuing cultural practice of romanticizing the mother as the best possible caretaker."); Karen Swift, *Contradictions in Child Welfare: Neglect and Responsibility*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 166–167 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) ("Although often not explicitly expressed, discussions of neglect always imply that mothers are responsible).

65. JANE SWIGART, THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING 25 (1991) ("Our society expects mothers to love and care for their children in an

One concrete manifestation of implicit motherhood bias inherent in the Family Court system is the practice of initiating cases largely based on information that is gleaned from and about mothers. It is not that someone deliberately decided to bring cases against mothers of children in an explicitly biased way, but rather we do not always know who a child's father is, though we almost always know who the mother is and can find her.[66] Thus, the impact upon women litigants is reflected in the fact that the system is subtly biased toward having an over-representation of female litigants. The practice of having children in foster care listed under the biological mother's name, instead of their own name or their father's name, speaks volumes, and serves as only one of many concrete examples in which motherhood bias drives policy or policy leads to further implicit bias.[67]

In general, mothers are imagined as all-knowing and omnipotent. However, reality dictates that even amongst the most nurturing persons, a steep learning curve is involved in parenting, which is seen, for example, in caring for a firstborn, newborn infant—a Herculean task. This is especially true for young or teenage mothers and for those who are raising their children alone.[68] By holding out such flawlessness—not as the ideal, but as the baseline norm—we set up to fail even those mothers who are "good" mothers.[69] And we most certainly set up to fail those mothers who are deemed "good enough" mothers. In other words, even though the legal standard talks about parents needing to be fit or adequate, not perfect or ideal, the implicit biases we hold mean that, in reality, an "adequate" or "fit" parent is not actually good enough to qualify as a "good"

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unselfish way, yet notions of maternal love and good child-rearing practices often conflict with what is possible for a parent to feel and provide.").

66. While outside the scope of this particular Article, it cannot be ignored that the same society that has overlooked and blamed mothers has also prejudiced fathers, particularly men of color. Arguably, these entrenched biases need to be eradicated at a much deeper level of race and class before we can truly address gender bias. It would also be helpful for the system to hold fathers accountable for their children's welfare in the same way it holds mothers accountable for it. However, a full discussion of this issue is beyond the scope of this Article. Yet to avoid their complete invisibility as well, we also need a system that will view fathers as co-parents in court, not just as peripheral figures.

67. In New York City and Nevada for instance, every child protective case in the system is listed not by the child's name or the father's name, but the mother's name. *See* Goodmark, *supra* note 3, at 614 ("The system is primarily mother-focused, for any number of reasons: because the identity of the mother is always known, because biological fathers are often nowhere to be found, because files are opened in the mother's name . . . .").

68. *See* Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17 HASTINGS WOMEN'S L.J. 187, 225 (2006) (critiquing the Supreme Court's reliance upon "generic assumptions that fail to reflect how complicated an undertaking it is to be a mother in this society, and how much that experience is shaped by all facets of a woman's life, including her age, her class, her race, her marital status and familial resources, and the expectations of others and of herself"); Michelle Oberman, *Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood*, 15 WM. & MARY J. WOMEN & L. 337, 348 (2009) ("The knowledge and skill demanded of mothers is assumed to be latent, ubiquitous, perhaps inborn with the species.").

69. *See generally* Neal, *supra* note 43 (discussing myths about motherhood which result in mothers losing parental rights without proof that their children have been harmed).

parent.

Specifically, our Supreme Court has stated one need not be a model parent to be a fit parent.[70] Yet, women grow up in a society where it is presumed "natural" to care, to nurture, to become a perfect, model mother.[71] Even with laws in place to mute explicit gender and motherhood bias, the air of mother-blaming persists. This is especially apparent when we see trial courts or child welfare agencies blaming the parent who is being domestically abused, rather than the abuser.[72]

A deeper, more nuanced dialogue of litigants' gender in Family Courts is necessary to confront the operation of implicit biases. The dialogue has commenced based upon the work of pioneering critical theorists,[73] and needs to

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70. Santosky v. Kramer, 455 U.S. 745, 753–54 (1982).

71. SWIFT, *supra* note 3, at 101 (1995) (explaining how in the family system, mothers are the parent who do most of the childcare because it is presumed that women have a natural instinct for caregiving); Carol T. Baines, Patricia M. Evans & Sheila M. Neysmith, *Women's Caring: Work Expanding, State Contracting*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 9 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) (explaining how caregiving is not an inherent trait of all women, but has nonetheless been conflated as a part of a woman's identity); JANE SWIGART, THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING 10 (1991) ("Our society assumes that nurturing the young is an easy task that comes naturally to women but not to men. We cling to an image of mothers as born nurturers who do not want for themselves, only for their children.").

72. For example, in a recent Family Court case in New York, the initial trial court ruling and child welfare agency actions were criticized because they placed such unreasonable demands upon a mother facing violence at the hands of the father of her child. *In re* David G. (Blossom B.), 909 N.Y.S.2d 891 (N.Y. Fam. Ct. 2010). The dynamics of domestic and family violence intersect with the topic of gender bias enormously—and the topic, while not the focus of this Article, is rich with further examples of implicit motherhood bias. Illustratively, the landmark New York class action case of *Nicholson v. Scoppetta* called into question the practice of child welfare agency policies, which were explicitly biased against or harmful toward survivors of domestic violence. 820 N.E.2d 840 (N.Y. 2004). This case cast a light on the structural biases within the New York City child welfare agency as it related to mothers, including those mothers who were survivors of domestic violence. *Id.* at 842–43.

Mothers were routinely penalized and charged with child neglect based solely on their status as battered mothers. *Id.* The New York Court of Appeals ultimately held that, while on the rare occasion the emotional injury resulting from witnessing domestic violence can satisfy the definition of "neglected child" and require emergency removal without a court order, the mere witnessing of violence, by itself, does not rise to the level of neglect automatically *per se* necessitating emergency removal. *Id.* at 854–55.

73. *See, e.g.*, Aiken & Murphy, *supra* note 40; Appell, *supra* note 4; Chodorow & Contratto, *supra* note 40, at 192–96 (stating that psychoanalytic theory posits that mothers are all-powerful because of the influence they have over their children and then are appropriately blamed if their children have psychological problems; however, some feminist writers have concluded that women are powerless in raising their children because of the role of patriarchy in governing their lives); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 289–90. ("[M]otherhood has always been, and continues to be, a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology."); Goodmark, *supra* note 3; Goodmark, *Telling Stories, Saving Lives*, *supra* note 40; Murphy, *supra* note 3; Barbara Katz Rothman, *Motherhood: Beyond Patriarchy*, 13 NOVA L. REV. 481 (1989); Shalleck, *supra* note 40; Sinden, *supra* note 4; Spinak, *supra* note 40; Neal, *supra* note 43, at 69 ("We have seen, then, that a mother's being of color,

continue. How women litigants in Family Courts are perceived and what they perceive is a worthy conversation to continue into the next wave. As many have argued, mothers exist in infinite forms and cannot be distilled down to one single model of essential motherhood.[74] There are "diverse, often submerged, constructions of mothering that have coexisted alongside [the] dominant model."[75]

How the court system perceives mothers is critical to understanding how the system treats mothers when handling individual cases. Yet, it is equally important, arguably more important, to think about how litigants perceive the court system. Because if litigants perceive bias in the courtroom—regardless of whether it truly exists—they may very well not access services and resources available through the child welfare and court systems, even when they need them.[76] There are myriad reasons to consider all litigants' perspectives in any courtroom. Yet, the layered obstacles that women and mothers face in Family Court are particularly compelling. For example, as this Article has discussed, there are larger, more global societal biases about women and mothers, and many women face multiple layers of bias because they are not just female, but also poor women or women of color, precisely those mothers who are

being poor, and not abiding by hierarchical precepts of parenting may end her relationship with her child . . . . As a result, the perception that a mother has placed her own needs or desires before those of her child may also place her relationship with her child at risk, even though the child may be at least an indirect beneficiary of the acts.").

74. *See, e.g.*, Ross, *supra* note 3, at 187–88.

75. Evelyn Nakano Glenn, *Social Constructions of Mothering: A Thematic Overview*, *in* MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 1, 3–4 (Evelyn Nakano Glenn, Grace Chang & Linda Rennie Forcey eds., 1994). *See also* Carol T. Baines, Patricia M. Evans & Sheila M. Neysmith, *Women's Caring: Work Expanding, State Contracting*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 16 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) (explaining that the problems of motherhood do not confront all women in the same way, and that it is essential to recognize this diversity in forming solutions to problems).

76. Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 108 (2005) [hereinafter Meares, *Everything Old Is New Again*] (citing Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000) [hereinafter Meares, *Norms, Legitimacy, and Law Enforcement*]). *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) [hereinafter LIND & TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE]; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 140–41 (1992) [hereinafter Tyler & Lind, *A Relational Model of Authority in Groups*]; Breger, *supra* note 55, at 21; COMMONWEALTH OF MASSACHUSETTS, *supra* note 28; JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 150–51 (1999) ("Three dimensions of fear have been presented as important to women's court appearances—fear of the defendant, intimidation produced by the institutional setting, and fear of being treated unjustly by the judge. . . . [I]n some cases judges' responses amounted to a secondary traumatization."). *See also* Nelson Mandela, *Black Man in a White Court: Nelson Mandela's First Court Statement - 1962*, AFRICAN NATIONAL CONGRESS (last visited Nov. 14, 2012), http://www.anc.org.za/show.php?id=3763 ("Finally, I need only to say that the courts have said that the possibility of bias and not actual bias is all that needs be proved to ground an application of this nature. In this application I have merely referred to certain objective facts, from which I submit that the possibility be inferred that I will not receive a fair and proper trial.").

disproportionately brought into the Family Court system.[77] In other words, stereotypes about mothers can be enduring and harmful, yet there are even more stereotypes one can conjure in one's mind when the so-called "adjective" is added before the word mother, such as the "single" mother, the "young" mother, the "Black" mother.[78] These issues will be explored in more depth after the narrative of the T.C. case is addressed.

Furthermore, any gender bias notwithstanding, a particular female litigant may construe bias from a court, child welfare agency, or lawyer, even if it is not consciously intended. This sense that bias exists is especially probable when a female litigant recognizes the power imbalance between herself and those who work in "the system" and are deciding the ultimate fate of her family and whether her family will be able to stay together.[79] Those in power can often seem even more omnipotent when one considers the emblematic disparities in education, socio-economic status, and race between the parties in Family Court and the bench and the bar.[80]

As this author has noted on a related topic:

> At times, a litigant may perceive a disparity or divide between his or her own value system or identity and that of the 'regular players' in the court system: such as the lawyers, the clerks, the judges, the court officers, the caseworkers. Studies in psychology and procedural justice show that a litigant who does not perceive justice in the courtroom may not access the family court system in the future . . . even when she might really need to do so.[81]

Thus, it is crucial in child welfare proceedings to recognize the implicit biases that may be held by the players in the system. For these biases may affect not only the way a caseworker,[82] a lawyer, or a judge perceives a particular

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77. *See generally* Diane L. Redleaf, *Protecting Mothers Against Gender-Plus Bias: Part I*, Child. Rts. Litig. (Oct. 25, 2011), http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-protecting-mothers-gender-plus-bias.html.

78. Ross, *supra* note 3, at 187.

79. For example, a litigant may recognize the power imbalance between herself and judges, lawyers, and agency caseworkers. *See* Breger, *supra* note 55, at 67 (noting that the same institutional players are involved in each stage of child protective cases, often define and establish norms and "insider" rules of courthouse culture, are ultimately responsible for determining the outcome of critical and sensitive family matters and, therefore, wield tremendous power over parents and children brought before court); Murphy, *supra* note 3, at 702 (explaining that trial court decisions requiring mothers to conform to outmoded stereotypes "have an impact on the context in which other mothers in the jurisdiction negotiate and bargain on custody issues."); Santosky, 455 U.S. at 763 (emphasizing that parents subject to termination proceedings are often poor, uneducated, or members of minority groups).

80. Breger, *supra* note 55; Hill, *supra* note 5; Roberts, *supra* note 40; Sinden, *supra* note 4.

81. Breger, *supra* note 55, at 24.

82. Murphy, *supra* note 3, at 706–07 (explaining that case workers in child welfare proceedings often have little or no experience and "make largely discretionary judgments about bad mothering and their underlying assumptions"); Diane L. Redleaf, *Protecting Mothers Against Gender-Plus Bias: Part III*, Child. Rts. Litig. (July 9, 2012), http://apps.americanbar.org/litigation/

parent, but also how that parent perceives those caseworkers, lawyers, and judges who are ultimately deciding her fate. As Professor Blake Morant has stated:

> The public's perception that decision making is biased also looms as a serious challenge for the judiciary. Virginia's study documents several areas of perceived bias or, at the least, a belief that judicial decision makers are insensitive to the issues of gender. Both the manifestation of unconscious or subtle bias and the perception that it exists potentially compromise judicial integrity and undermine public confidence in the judicial system. Few would argue that overtly biased behavior demands affirmative efforts that sanction the perpetrator and discourage future, similar conduct. But if true judicial objectivity remains a universal goal, overt behavior cannot operate as the sole trigger for the implementation of bias reduction measures.[83]

To another degree, as noted above, litigants who perceive bias in the courtroom may not be as likely to seek court protection in the future.[84] In the context of family law, the mother who is charged with child neglect and feels the system is biased against her would likely be hesitant to return to Family Court to request a subsequent order of protection from domestic violence, even in a dire situation.[85] This tension is illustrated in the case study of T.C.: T.C. had previously been investigated by child welfare authorities regarding her son. Perhaps this fact made her less inclined to seek out court or caseworker assistance when she subsequently faced issues with her daughter.[86]

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committees/childrights/content/articles/summer2012-0712-protecting-mothers-gender-plus-bias.html.

83. Morant, *supra* note 28, at 1077–78.

84. Meares, *Everything Old Is New Again*, *supra* note 76 (citing Meares, *Norms, Legitimacy, and Law Enforcement*, *supra* note 76). *See* LIND & TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, *supra* note 76; Tyler & Lind, *A Relational Model of Authority in Groups*, *supra* note 76, at 140–41; Breger, *supra* note 55, at 21; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L. J. 1479, 1505-06 (2004); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113, 131 (2010). *See also* Mandela, *supra* note 76.

85. *See* LIND & TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, *supra* note 76, at 11 (describing that where litigants perceive that a decision is fair, they are more likely to react favorably to it); Tyler & Lind, *A Relational Model of Authority in Groups*, *supra* note 76, at 140–41; Breger, *supra* note 55, at 21.

86. *See* Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L. J. 1479, 1572 (2004) (explaining that where litigants experience a fair proceeding, they are more likely to find the judgment legitimate and abide by it in the context of problem-solving courts); Spinak, *supra* note 84, at 131; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 54 (1990) (describing that gender and racial bias create obstructions that intimidate women and minorities, especially minority women, from fully participating in the justice system); Oberman, *supra* note 68, at 356 (explaining the hesitance of one mother to seek medical attention for her injured daughter due to beliefs, based on experience, that the State would interfere and take her children away).

IV.
IMPLICIT MOTHERHOOD BIAS IN ACTION: THE STORY OF T.C.

One way to demonstrate concretely the concept of implicit gender and motherhood bias in the context of child welfare proceedings is to tell the story of a mother facing such bias. I utilize the narrative of T.C. as a vehicle to delve more deeply into what it means to be a female and a mother in child welfare proceedings in Family Court.[87] At every important juncture in her case, implicit gender bias was at work. T.C.'s story highlights how we blame mothers instead of helping them, hold them to a standard that is greater than what the law requires, do not consider the broader contexts in which women must parent, and fail to consider the impact that this has on female litigants who may ultimately depend upon the family court system in the future. This narrative is not just a story about T.C. and her family, but is also a microcosm of what is being replicated across the nation as we hold mothers to unrealistically high standards of parenting.

In 1998, T.C. was a twenty-one year old, African-American, unmarried woman living in Brooklyn, New York. She was earning public assistance to support her two young children, a son and a newborn daughter. Extended family lived relatively nearby. The father of T.C.'s children had been in and out of jail for numerous drug convictions, and in fact was incarcerated when his daughter was born in February 1998.

A year earlier, when T.C. had left her apartment for ten minutes to buy cigarettes, she left her son home alone. T.C. was reported through a hotline for child abuse and neglect,[88] and Child Protective Services came to investigate. Unfortunately, at that time, T.C. was no stranger to the child welfare system, as she herself had grown up as a foster child in the system.[89] So, when child welfare authorities were called to her home, she knew all too well what the child welfare system entailed and its potential to remove her children and to terminate her parental rights.

This context frames the events that occurred in 1998, when T.C. gave birth to a baby girl. According to news stories and relatives, T.C. was extraordinarily

87. The author was appointed to represent T.C.'s son in the derivative neglect proceedings brought against her. The detail and information contained in this account of the case are based upon the author's experience representing the child. The case file, which is sealed, is on file with the author.

88. Nina Bernstein, *New York Faults Hospital for Denying Checkup to Baby Who Starved*, N.Y. TIMES, Oct. 26, 1998, http://www.nytimes.com/1998/10/26/nyregion/new-york-faults-hospital-for-denying-checkup-to-baby-who-starved.html.

89. T.C. was the eldest of eleven siblings, all of whom were removed from T.C's mother because of her mother's crack addiction. T.C.'s mother ultimately lost her parental rights based upon her addiction. The children grew up in foster homes and relative's homes scattered around New York City. Telephone interview with Karen Burstein, private attorney, former N.Y.C. Family Court judge, and former N.Y. St. Senator (July 21, 2011).

loving and affectionate with her daughter.[90] T.C. began breastfeeding her daughter because the hospital instructed her to do so when the baby refused the bottle.[91] However, when her daughter was not gaining the kind of weight that she remembered her son had been gaining at this age, T.C. became worried. Her relatives also noticed that the baby always seemed hungry and seemed lightweight, but no one ever suspected the baby was starving.[92]

T.C. took her newborn baby to her first scheduled general wellness check-up appointment at Brooklyn Methodist Hospital in February of 1998.[93] The hospital, however, turned T.C. and her daughter away for not having an adequate co-pay of $25 or a proper Medicaid card.[94] Soon thereafter, in March 1998, T.C. awoke on the couch and began shrieking, as she found her baby daughter dead.[95] The baby was less than six weeks old.

Before having time to process or grieve her child's death, T.C. was charged with the manslaughter of her daughter in May 1998.[96] Shortly thereafter, T.C. was additionally charged with the derivative neglect of her older two-year-old son ("D.C.") in Family Court. Presumably, based on this timing, the neglect charges were in response to the criminal charges being filed and not due to any concern for the immediate safety of the child at the time his sister died in March 1998. The derivative neglect petition was brought against only T.C.—and not the father—on behalf of her son.[97]

Based upon the derivative neglect petition, D.C. was removed from his mother's home and placed into New York City's foster care system.[98] He remained in stranger foster care for four months.[99] While T.C.'s son languished in foster care, the state investigated her daughter's death. An autopsy showed the baby girl had some milk in her stomach, but the cause of death was still deemed malnutrition.[100]

T.C. was only allowed to see her son in a supervised agency setting.[101] In fact, T.C. was only permitted to see her son every other week, for one or two hours of visitation at a time, for the full four months.[102] For the other

90. *See, e.g.*, Rachel L. Swarns, *Baby Starves, And Mother Is Accused Of Homicide*, N.Y. TIMES, May 29, 1998, http://www.nytimes.com/1998/05/29/nyregion/baby-starves-and-mother-is-accused-of-homicide.html.

91. Telephone interview with Karen Burstein, private attorney, former N.Y.C. Family Court judge, and former N.Y. St. Senator (July 21, 2011).

92. *See, e.g.*, Swarns, *supra* note 90.

93. *Id.*; Bernstein, *supra* note 88.

94. Bernstein, *supra* note 88.

95. *Id.*

96. *Id.*

97. *See supra* note 87.

98. *Id.*

99. *Id.*

100. Notice of Death, N.Y.C. Med. Exam'r, Report No. 9805951 (on file with author).

101. *See supra* note 87.

102. *Id.*

approximately 668 hours per month from May to September 1998, mother and son were apart.

The papers filed on behalf of T.C. in Family Court detailed the reasons why the Brooklyn District Attorney ultimately failed to prosecute T.C. concurrently in Criminal Court. The grand jury had failed to indict. A medical expert, testifying before the grand jury, had explained that many young mothers are not taught how to breastfeed, and as a result, their babies fail to thrive. When, as here, the weight loss is seven ounces over a period of five to six weeks, the urgency of the problem might not be as clear to a mother. Another reason why the D.A. apparently failed to move forward criminally was that T.C. had sought medical help for her daughter, but was turned away from the hospital for lack of a Medicaid card or the requisite non-Medicaid fee. The Family Court papers clarify that, in fact, T.C. did have a card, but the clinic would not accept it.[103]

After the removal of her son, T.C. moved from home to home, relative to relative, in a quest for stability. When a family member with whom she was staying assaulted her, she went to reside in a confidential domestic violence shelter in New York City. It was then that T.C. met Congresswoman Ronnie Eldridge who later introduced her to her new defense lawyer.[104] Her new lawyer, former Judge Karen Burstein of Manhattan, demanded an immediate hearing for the return of T.C.'s son D.C. in Brooklyn Family Court in September 1998.[105] It was at that point that I was appointed the Attorney for the Child for D.C. [106]

Though the criminal proceedings against T.C. had been dismissed, the civil derivative neglect proceedings continued. As explained above, derivative neglect involves the other children in the home as subjects of child protective proceedings, even when these other children themselves have not been directly harmed or injured.[107] D.C., T.C.'s son, was being removed because of the death of his baby sister under the theory that his sister's death was evidence of T.C.'s fundamental parenting defects. Yet, the child welfare agency offered no services to assist her in counseling or parenting.

T.C.'s Family Court attorney ultimately presented a sympathetic and fuller portrayal of what really happened—how T.C. was turned away from every resource set out to help young, poor mothers, and how the system was set up to have her inevitably fail.[108] It was a system ready to react and respond only *after*

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103. *Id.*

104. *Id.*

105. *Id.*

106. At the time in New York, attorneys for children were named "law guardians," a title which has since been abandoned in favor of the more accurate term "attorney for the child." At that time, lawyers were appointed by the courts for any child in an abuse or neglect case and were serviced through The Legal Aid Society, Juvenile Rights Division. For a detailed discussion of the nomenclature and the spirit of the New York system, as well as best practices nationally and internationally, see Breger, *supra* note 55, at 57.

107. *See* discussion *infra* Part III.A.

108. *See supra* note 87. In fact, T.C. had been deemed an "adolescent' because she was under 21-years-old; however, it is unclear whether an additional social worker was assigned as required.

a parent erred.

We negotiated with the child welfare agency attorney and, in the end, Judge Lee Hand Elkins released the child from foster care and let the child go home to a family member.[109] The child protective derivative neglect case was later dismissed in its entirety—eighteen months later—a result that shows how judges challenging implicit biases about motherhood in a particular case can make a world of difference for a particular family.[110]

Judge Clare T. Pearce presided over the derivative neglect case that was ultimately dismissed. She directly addressed the fact that the agency was under a misconception that it was "natural" for a woman to instinctively know how to breastfeed a baby.[111] Rather, the Judge explained, it is a learned skill that needs to be taught and taught properly. It is also a fairly intensive and complicated process for a mother to know if her baby is nourished enough, requiring frequent doctor's visits, weight checking, and urine testing.[112] Furthermore, as the Judge expounded, in the neighborhood and the world where T.C. lived, breastfeeding was quite uncommon.[113] The Judge argued that the real people to blame here

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Telephone interview with Karen Burstein, private attorney, former N.Y.C. Family Court judge, and former N.Y. St. Senator (July 21, 2011).

109. *See supra* note 87.

110. *See id.*

111. Telephone interview with Karen Burstein, private attorney, former N.Y.C. Family Court judge, and former N.Y. St. Senator (July 21, 2011).

112. As Nina Bernstein explains in another breastfeeding case, "[a]mong the hundreds of letters, postcards and E-mail messages the judge and prosecutors in the case received . . . were many from mothers who said that they, too, had almost let a child starve to death while breast-feeding with the best of intentions. Lactation experts testified at the trial that nursing mothers who see a baby every day may misperceive even extreme weight loss, until a pediatrician weighs the baby." Nina Bernstein, *Mother Convicted in Infant's Starvation Death Gets 5 Years' Probation,* N.Y. TIMES, Sept. 9, 1999, at B3. *See also* Rachel L. Swarns, *Baby Starves, And Mother Is Accused Of Homicide*, N.Y. TIMES, May 29, 1998, http://www.nytimes.com/1998/05/29/nyregion/baby-starves-and-mother-is-accused-of-homicide.html ("Without careful and regular assessments of the weight of their babies, mothers who breast-feed often have trouble determining how much nourishment their infants are getting, said Dr. Elaine Moustafellos, who works in the pediatrics department at New York Hospital-Cornell Medical Center."). *See also Is My Baby Getting Enough Milk?*, LA LECHE LEAGUE INTERNATIONAL, http://www.lalecheleague.org/nb/nbsepoct08p44.html (last visited November 17, 2012) (explaining the complicated process of measuring a baby and its urine to determine breastfeeding nutrition.)

113. T.C. had not breastfed her son. In fact, T.C. did not voluntarily choose to breastfeed, but was advised to do so by the birthing hospital. As lawyer Karen Burstein explains, "T.C. was not a white middle-class mother hailing the virtues of breastfeeding and boycotting Nestle baby formula." Telephone interview with Karen Burstein, private attorney, former N.Y.C. Family Court judge, and former N.Y. St. Senator (July 21, 2011). When speaking about breastfeeding, we need to acknowledge the racial component involved; historically, it was often mostly poor, non-white mothers who served as wet nurses, breastfeeding other people's babies. The effect of this history on the prevalence of breastfeeding in the African American community must be recognized. (I thank my colleague Donna Young for this insight). *See, e.g.*, Barbara L. Philipp & Sheina Jean-Marie, *African American Women and Breastfeeding*, JOINT CTR. FOR POL. AND ECON. STUD. HEALTH POL'Y INST. (2007), http://www.jointcenter.org/hpi/sites/all/files/IM-Breastfeeding.pdf; Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula,* 10 NEV. L.J. 29, 51–61 (2009); Norma Juliet Wikler,

were those from the child protective agency, who never intervened until it was too late, and the hospital itself, which turned T.C. away when she sought out help because she lacked money.[114]

One use of this narrative is to deconstruct the various points of implicit gender and motherhood bias in T.C.'s case. How might this narrative have played out differently if we could reconstruct it in a truly implicit-bias-free world?

In the book, *Shattered Bonds: The Color of Child Welfare*, Professor Dorothy Roberts features the story of T.C. to demonstrate the intersectionality[115] of race, gender, class, and motherhood in the child welfare system.[116] She frames the story as another example of the failure of the child welfare system and how it treats mothers, particularly Black mothers embroiled in "the system." As Roberts so aptly notes, "The only mechanism set up for checking the baby's progress was an accusatory system that, in effect, required [T.C.] to confess to mistreating her child."[117]

The story of T.C. raises myriad issues, most of which cannot possibly be

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Society's Response to the New Reproductive Technologies: The Feminist Perspectives, 59 S. CAL. L. REV. 1043, 1048 (1986) ("In the nineteenth century, poor and mostly non-white women acted as wet nurses, selling their milk to mothers of the upper classes, sometimes depriving their own children in the process."); Kelli Lane, *Grounding Mother and Child in Their Intrinsic Relational Unit: An Analysis of Motherhood and the Parent Child Relationship Within the Child Welfare System*, 25 WOMEN'S RTS. REP. 145, 148 (2004).

114. T.C. ultimately sued the hospital for the wrongful death of her daughter, settling for a monetary judgment of $150,000. Thirteen years later, in 2011, she prevailed in a civil case against the City of New York for wrongful arrest and charging. T.C. was awarded two million dollars in damages. Cara Buckley, *13 Years Later, a $2 Million Award*, N.Y. TIMES, Apr. 23, 2011, http://www.nytimes.com/2011/04/23/nyregion/2-million-for-mother-wrongfully-charged-in-babys-death.html. In some small measure, T.C. witnessed justice in these later lawsuits, arguably empowered and validated by another court system saying that she had been wrongfully treated.

115. Kimberlé Crenshaw used the concept of "intersectionality" to emphasize the various ways in which race and gender interact. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 (1991). She explains "intersectionality" as a "provisional concept linking contemporary politics with postmodern theory." *Id.* at 1244 n.9 (mapping the intersections of race and gender to suggest a methodology to disrupt tendencies to see race and gender as "exclusive" or "separable," and noting that the concept of "intersectionality" can and should be expanded "by factoring in issues such as class, sexual orientation, age, and color"). *See also* Kimberlé Crenshaw, *Race, Gender and Violence Against Women: Convergences, Divergences and Other Black Feminist Conundrums*, *in* FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 230, 230–32 (Martha Minow ed., 1993) (explaining how the intersectionality of race, class, gender, and other social characteristics may particularly constrain poor minority women from seeking help to stop ongoing domestic violence against them).

116. ROBERTS, *supra* note 5 ("Poverty appears to be a causal factor in T.C.'s alleged neglect of her child."). *See also* Dorothy Roberts, *The Ethics of Punishing Indigent Parents*, Northwestern University School of Law Working Paper 2–4 (May 1998), http://www.ipr.northwestern.edu/publications/papers/indigentparents.pdf (asserting "[m]ost of the parents who lose custody of their children in civil child welfare proceedings and who are convicted of criminal child neglect and abuse are poor" and that stereotypes about black mothers make them more likely to be found at fault when harm befalls their children).

117. ROBERTS, *supra* note 5, at 6.

addressed in one article. Indeed, the issues arising in this narrative could fill volumes. In order to deconstruct the narrative in a meaningful way, I focus very specifically on one narrow aspect of this complex and multifaceted story. I focus in on the types of implicit biases that T.C. faced along the journey, including implicit biases about women, mothers, young mothers, single mothers, Black mothers, so-called welfare mothers, and all mothers in between. And when we look at those biases through the lens of motherhood, it offers some insight into how these biases about mothers play out in courtrooms, through governmental agencies, and in larger society.

In examining this story, like so many others, we cannot ignore the reality that gender, class, and race are inextricably linked. While I am attempting to focus on gender and motherhood bias in this particular article, I am mindful that such biases cannot be successfully decontextualized;[118] T.C.'s story is also about the intersectionality of racism, paternalism, and sexism in the context of Black women in America.[119] These biases are too interconnected and subsumed into how we view gender and motherhood to be easily parsed.[120] The topic of these intersections has been masterfully explored in feminist and critical race theory literature.[121]

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118. Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood, in* REPRESENTATIONS OF MOTHERHOOD 56 (Donna Bassin, Margaret Honey & Meryle Mahrer Kaplan eds., 1994) ("For Native American, African-American, Hispanic, and Asian-American women, motherhood cannot be analyzed in isolation from its context."); Spinak, *supra* note 40, at 2074 (citing Roberts, *supra* note 40, at 225) ("Dorothy Roberts has . . . established that issues of motherhood cannot be considered outside the context of racism.").

119. "Intersectionality tells us that racism and sexism are interlocking forms of oppression that work together to reinforce a white patriarchal social order. . . . Black females are constructed as oversexed and overly fertile; Black motherhood is abnormal and blameworthy for social problems such as juvenile delinquency and poverty." Verna L. Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833, 839–40 (2009). Williams argues that Michelle Obama is exemplary for her defiance of racial, gender, and class stereotypes of "black womanhood" and "black motherhood" upon becoming the First Lady. *Id.* at 845. "When we consider the First Lady . . . it becomes clear that this role is heavily gendered and raced . . . it was by definition not open to a Black woman like Michelle Obama." *Id.* at 839. Williams further distinguishes between "white femininity" and "black femininity," the former being a "gold standard that other women must meet." *Id.* at 835.

120. *See* Roberts, *supra* note 63, at 145–46 (explaining that black children are not valued similarly to white children, that such "devaluation of Black-childbearing contrasts sharply with the historic promotion of white motherhood that serves the national good by producing while children," and that although these policies are also patriarchal, they are nonetheless "fundamentally racist").

121. *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Women Syndrome*, 1995 WIS. L. REV 1003, 1049, 1048–56 (describing that "[t]he 'looking glass' experience of black women is one of being trapped between sub- and super-human imagery and expectations"); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991) (explaining that race and gender interact to form unique oppression for Black women); Kimberle' Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152–60 (providing examples of how "theory emanating from a white context obscures the multidimensionality of Black women's lives"); Angela P. Harris, *Race and Essentialism in*

The initial reason why I share the story of T.C. is to focus upon the progress that the bench and the bar made in this particular case, even though there were initially many implicit biases about motherhood at work. Within the legal system, T.C. ultimately saw justice on a number of levels. On the one hand, even though it seems as though stereotypes of motherhood brought T.C. into the child welfare system, we actually were able to see progress in the result of the case, albeit almost two long years later, twice the lifetime of then four-year-old D.C.

The second reason I share the story of T.C. is to demonstrate the need for even more progress in how our child protective system is structured. As Professor Roberts notes, the system operates only when a crisis strikes, instead of offering family support beforehand.[122] While quick to blame a parent when she errs, the agency is often slow to reunite the family. We need to ask how the players in the child welfare system can work to prevent tragedy, instead of punishing a family once it is too late. Perhaps, if we, as a society, took the first step by reshaping our views about motherhood and gender, the system would eventually follow. If we started from the premise that it is incumbent upon the players in the system to project openness and availability for mothers like T.C., so that they will not fear being misjudged, stereotyped, or seen as uncaring, what impact would that have on individual mothers and families? If we, as a society, continue the fight against presumptions about women and girls, about mothers, about how they are seen and perceived, perhaps it would eventually follow that those in the governmental and court systems would see and perceive those women differently. We could then more meaningfully critique why the T.C. case entered the system in the first place, and examine more globally whether we should create a more preventative culture, rather than a punitive one.

The third reason for selecting the T.C. case as an example of implicit gender or motherhood bias stems from the fact that breastfeeding is a uniquely female parenting task at the outset. There are many parenting skills that are gender-neutral, yet society tends to imagine that mothers are to be responsible for carrying them all out; when men help, some view this as an added benefit to the family. Ultimately, however, nourishing and feeding a child is a basic gender-neutral parenting skill, which should involve any or all caretakers, regardless of gender.

Thus, I raise the story of T.C. to note how absent the blaming of the other parent is in the face of the punitive and harsh blaming and demonizing of the

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Feminist Legal Theory, 42 STAN. L. REV. 581, 585 (1990) (demanding that feminist legal theory must account for race differences); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 124–44 (1989) (examining three critiques written by women of color that analyze race essentialism in feminist legal scholarship); Roberts, *supra* note 40; Spinak, *supra* note 40, at 2074.

122. ROBERTS at 5. *See also* Carol T. Baines, Patricia M. Evans & Sheila M. Neysmith, *Women's Caring: Work Expanding, State Contracting*, *in* WOMEN'S CARING: FEMINIST PERSPECTIVES ON SOCIAL WELFARE 14–15 (Carol Baines, Patricia Evans & Sheila Neysmith eds., 1998) ("Child welfare services are focused on women's failure to care rather than the provision of services that enhance the capacity of families to provide care.").

primary-caretaker mother. The father (whom I will refer to as "Mr. T.C." for the sake of clarity and anonymity) was nowhere in the narrative of T.C.'s case. He was never vilified, unlike the mother of the child. It is undisputed that Mr. T.C. was incarcerated both during the birth and the death of his daughter, and thus in this particular case, it is clear why he was not more involved. Yet, I wish to utilize this case as a springboard to talk more about how Mr. T.C. was never charged with neglect nor prosecuted criminally while T.C. was charged in both forums.[123]

In talking about T.C., I reiterate that this narrative is also about patriarchy and racism more broadly—in that both mothers and fathers reflect our patriarchal society by accepting the role of the father as patriarch.[124] T.C.'s story is also not just about poverty, or just about being turned away at the doctor's doors. Her story tells us the story of how we, as a society, see mothers and expect the instinctual, perfect, selfless mother—anything less than this ideal is bad, arguably criminal or neglectful. Why was T.C. so reticent to seek help? Why was our legal system so quick to find T.C. when it was too late? Where was "the system" when T.C. needed help? Was the State thinking about her need for help when it labeled her a "bad mother" without ever questioning the father?

There are boundless implicit biases about fathers as well, and certainly many of those biases and stereotypes played a role in how T.C. was perceived by the court system and the child welfare system. For example, when we think about where the father is in any particular narrative of a young, poor, unmarried mother of color, do these same implicit biases in society assume the father is of course incarcerated or otherwise absent? While this Article cannot adequately address the burdensome stereotypes and biases fathers face, particularly young, incarcerated fathers of color, it is worth noting how the various biases build upon and inform each other. Here, however, I would like to focus upon the biases

123. In theory, the father's presence could have helped to avoid some of the tragedy and alleviate the burden that fell exclusively on T.C.'s shoulders. There are inherent, endemic issues regarding absentee fathers and the court system's treatment of such fathers, yet these issues are outside the scope of this particular Article.

124. Professor Joan Meier addresses Professor Elizabeth Schneider's work by saying: "Noting that 'motherhood is critical to women's subordination,' she points out that mothers are 'likely to be held primarily or even exclusively responsible for any harm [to a child]. . . . Male violence in the family, even when it is extreme and lethal, seems like a natural extension of male patriarchal authority in general; women's failure to mother makes them monsters.'" Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 658 (2003) (alterations in original) (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 149 (2000)). The invisibility in our society of both male violence and women's mothering makes fair judgments about women—and men—as parents difficult at best. While acknowledging that mothers in some cases do deserve to be held responsible for harm to children, Schneider nevertheless concludes: "[i]t is difficult to determine the contours of maternal responsibility in a culture that blames mothers for all problems relating to children, gives mothers so little material and social support, and absolves fathers of all responsibility." SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING, at 178. I thank those of my colleagues who have shared their thoughts with me on this issue, including Professors James Gathii, Jane Spinak, and Rob Heverly.

against T.C. that were heightened by the lack of focus on the father in her cases. It should also be noted that, at times, the lack of a father is also blamed on the mother, either through the single mother's so-called "ineptness" as a mother or woman or through her so-called "vindictiveness" in keeping the father away, as Professor Carol Boyd notes in her aptly named work "*Demonizing Mothers*."[125]

There are many more cases like T.C.'s (in fact one was occurring in the Bronx at the precise time of T.C.'s case)[126] where fathers are not being prosecuted or charged, or in any other way held accountable, while mothers are blamed, vilified, and charged with child abuse, and often criminally prosecuted as well.

V.
REFLECTING ABOUT REFORM: WHERE DO WE VENTURE FROM HERE?

How might we think about reducing the implicit gender biases in the family justice system demonstrated by the T.C. example and others? I offer a couple modest proposals: 1) We need to educate the players in the system (e.g., judges, lawyers, child welfare caseworkers, and mental health professionals) about how we all hold implicit biases, even when we are not aware of them, and how to recognize and identify these biases; 2) From there, those within the system need to challenge themselves to understand how litigants are envisaging those in the child welfare and court systems. While doing so, those in the system (and in larger society) need to acknowledge our own implicit biases about what the law and our society has come to expect of mothers as well as how we judge (or do not judge) mothers. Outside of that, the burden cannot rest solely on the mother's shoulders—blaming and demonizing her if she falters, after we have offered her no institutional support as a society by way of preventative services or meaningful outlets to seek help. We need to discard any unrealistic expectations of mothers, acknowledge our own implicit biases, and recognize the frailties, the fullness, and the complexity of motherhood.

Education and awareness have been touted as potential solutions for implicit biases operating in the courtroom and court decisions. For example, as Professor Blake Morant outlines: "Virginia's study acknowledges education as a critical component of its gender bias reduction strategy, stating that '[t]he most effective means to eliminate gender bias in the court system is continual education of

125. Susan B. Boyd, *Demonizing Mothers: Fathers' Rights Discourses, in Child Custody Law Reform Processes*, 6 J. ASS'N FOR RES. ON MOTHERING 52, 53–59 (2004).

126. *See, e.g.*, Karen Houppert, *Nursed to Death*, SALON, www.salon.com/mwt/feature/1999/05/21/nursing (last viewed Oct. 11, 2012) (Tabitha Walrond's seven-week-old infant died of starvation, around the same time of T.C.'s baby, when Walrond had attempted to breastfeed her baby). This was only a criminal case because there were no other children in the home, and thus a child protective agency would not have a cause of action. *Id.* In the Walrond case, the father raised concerns about the weight of his son, but was never charged criminally. *Id. See also* Collins, *supra* note 118 (daughter died because mother could not afford medical care).

lawyers, judges, and court personnel.'"[127] Fortunately, studies have shown that if the decision-maker is made aware of his or her unconscious behavior or underlying implicit biases, there are ways to remedy or "interfere" with the automatic resort to such biases.[128]

As individuals, sometimes such a cognizance means taking a step backward, reflecting upon the (child welfare) system as a whole, and treating each mother as the individual she is, instead of as conceptualizing some monolithic, one-size-fits-all image of motherhood.[129] At other times, it is to step back and reflect upon our own unrealistic, idealized images of motherhood—what has been coined "the fantasy of the perfect mother."[130] This reflection necessarily includes the image of fatherhood and its expectations as part of the equation. We need to become proactive, meaningfully reflect, and then move towards change and reform in the culture.

As a system, Family Court needs to focus upon the perspectives of the litigants themselves. Whether a litigant perceives bias in the courtroom is often more critical than whether or not such bias actually exists.[131] We need to strive to create a preventative, useful culture within the child welfare system instead of a punitive, unforgiving culture. As addressed earlier, if a mother fears being misjudged, stereotyped, or held to an impossible standard, she may not seek help

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127. Blake D. Morant, *Introductory Essay: The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073, 1081 (2001) (alteration in original). *See also* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 922 (1999) ("To break the bad habit of unconscious negative and automatic discriminatory attitudes, a person must consciously activate unbiased beliefs each time a stereotype is automatically triggered. The more the individual does this, the more accessible the unprejudiced belief becomes, and at some point the egalitarian belief's accessibility will 'rival' the automatic response.") (citations omitted). *See also* Kang, Bennett, Carbado, Casey, Dasgupta, Faigman, Godsil, Greenwald, Levinson, & Mnookin, *Implicit Bias in the Courtroom*, *supra* note 36, at 47-53 (outlining ways to broaden judges' understanding of implicit bias such as doubting one's objectivity, increasing motivation, improving conditions of decision-making, and counting).

128. Morant, *supra* note 127, at 1081 ("Remedies for bias. . . require conscientiousness-raising techniques. . . [which] then prompts possible rejection of bias and thwarts its negative influence on decision making.").

129. *See* SCHNEIDER, *supra* note 124, at 157–68 (arguing that partner's abuse hinders ability of mother to achieve society's unrealistic ideal of the "all responsible" mother); Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 576 (2004) ("Society juxtaposes the image of the victimized, abused mother to that of the 'good mother,' who does and is all for her children. It then reviles the battered women for being unlike the good mother.") (citation omitted); Goodmark, *supra* note 3, at 616–17 (discussing need for "batterer accountability" because child protection system is primarily mother-focused, overlooking victimization of mothers and charging them with failing to protect children from exposure to or abuse by their batterer); Oberman, *supra* note 68, at 349–54 (describing how different situations require different behavior by mothers to be considered "good").

130. Chodorow & Contratto, *supra* note 40, at 191–92.

131. *See* LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 291–313 (2002); JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 55, 150–51 (1999) (debunking the myth that victims try to gain leverage in other cases by asking for orders of protection); Breger, *supra* note 55, at 19.

from those who are there to help her.[132]

The ultimate inquiry becomes whether the Family Court could even be sustained without women/mothers as its core litigants, and whether the gender of our Family Court litigants has become virtually invisible because of its predominance. It is as if the system is custom built for women, specifically mothers, and specifically poor mothers.

Moving forward, the next question that should be studied to aid in eradicating implicit gender bias in Family Court should be whether there is, in fact, an inherent invisibility resulting in unknowing bias against women and mothers precisely because of their core presence in the Family Court?[133] One might question whether we would still have a Family Court as we currently know it without impoverished women as litigants, especially as respondents in child neglect or child abuse cases.[134]

VI.
CONCLUSION: MAKING GENDER VISIBLE

Tremendous progress has been made when addressing issues in the first wave of explicit gender bias in the courtroom. Task forces from various states and bar associations have spearheaded studies and investigations to uncover

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132. Breger, *supra* note 55, at 3 (perception of bias can undermine a litigant's faith in the justice system, the legitimacy of a given decision, and the willingness of that litigant to comply with that decision); Amy Neustein & Michael Lesher, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS—AND WHAT CAN BE DONE ABOUT IT (2005); Jeffrey Fagan, *Introduction to Symposium on Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 126 (2008); Oberman, *supra* note 68, at 354–55 (discussing how a mother was reticent to seek help for her child out of fear that "the State" would see her as a "bad" mother and take away her children).

133. *See, e.g.*, Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. Rev. 577, 587 (1997) (asserting that "the state clearly, and at times explicitly, targets women based on their gender, race and class. . .").

134. *See* Chodorow & Contratto, *supra* note 40, at 192–95 (stating that psychoanalytic theory posits that mothers are all powerful because of the influence they have over their children, and then are appropriately blamed if their children have psychological problems; however, some feminist writers have concluded that women are powerless in raising their children because of role of patriarchy in governing their lives) (citing NANCY FRIDAY, MY MOTHER/MY SELF (1977)); JUDITH ARCANA, OUR MOTHER'S DAUGHTERS (1979); DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976); Jane Flax, *The Conflict between Nurturance and Autonomy in Mother-Daughter Relationships and within Feminism*, 4 FEMINIST STUD. 171 (1978); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976); Fineman, *supra* note 73, at 289–90 ("[M]otherhood has always been, and continues to be, a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology."); Neal, *supra* note 43, at 69 (discussing how bias based on race and class may cause a mother to lose custody of her children); Rothman, *supra* note 73, at 486 (explaining that, even with modern technology, definitions of motherhood are continually defined by the privileges of patriarchy, and advocating that there must be an "explicit recognition of *mother-hood*," separate from notions of patriarchy).

where such explicit biases exist.[135]

The second wave in examining gender bias in the court system should be, in part, to more deeply address the perspectives of the actual litigants in the courtroom and to acknowledge and examine the implicit biases that exist about motherhood. Implicit gender and motherhood bias has been a pervasive and invisible problem in Family Courts, and the legal profession must address it. Specifically, we need to educate Family Court players about the damaging effects that implicit biases about motherhood have on child welfare proceedings. To do so will hopefully move us away from a system in which mothers are held punitively accountable, and move us toward a system that prevents child maltreatment by supporting mothers.

Some areas worthy of further exploration and research include:

- Whether or not child welfare agencies and courts are also pursuing cases against fathers, including absentee fathers, keeping in mind safety issues for mothers and children. In other words, is the system (and the larger society) holding fathers to the same exacting standards that we hold mothers?
- Is societal bias to blame for female and mother over-representation, or is there something specific within the court system that can be remedied? Is it just that biology makes the mothers easier to locate, or is this part of the underlying gender bias?
- What data can we borrow from labor and gender literature and the increasingly growing body of implicit bias literature to help articulate and ultimately lessen the inherent cognitive biases we hold as a society about the role of mothers?
- How can we look at the issue of (implicit) gender bias honestly and fully, while acknowledging the large role of class and race as inextricably intertwined with gender and motherhood?

When we as a society require women to strive to be perfect mothers, we set the bar for respondent mothers unattainably high. It is time we critically examine why women are the predominant litigants in Family Court, specifically as respondent mothers in child protective proceedings. This Article purposefully poses more questions than it answers. It is an express urging to delve deeper into implicit gender bias and re-frame how we view our court system's treatment of women and mothers. The (in)visibility of gender in our courtrooms needs to be examined in the open, stared at front and center. To eradicate gender biases against mothers, we need to acknowledge and face the implicit bias in our

135. *See, e.g.*, COMMONWEALTH OF MASSACHUSETTS, *supra* note 28; Sandy Mastro, *Courtroom Bias: Gender Discrimination Against Pregnant Litigators*, 8 WM. & MARY J. WOMEN & L. 155 (2001) (discussing whether basic biological facts lead to the conclusion that women will necessarily face gender discrimination as long as there are physical differences between the two genders); Morant, *supra* note 127 (examining the task force on courtroom bias in the Commonwealth of Virginia and discussing the implications of its findings, as well as recommendations for preventing such bias).

gendered constructions of parenthood. The dialogue must continue from here.