

# HEURISTICS, COGNITIVE BIASES, AND ACCOUNTABILITY: DECISION-MAKING IN DEPENDENCY COURT

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## ABSTRACT

On tens of thousands of occasions each year, state court judges wrongly separate children from their families and place them in foster care. And while a child is in foster care, judges are called on to render hundreds of decisions affecting every aspect of the child's life. This Article uses insights from social psychology research to analyze the environment of dependency court and to recommend changes that will improve decisions. Research indicates that decision makers aware at the time they make a decision that they will be called upon later to explain it may engage in a systematic, deliberate decision-making process. On the other hand, decision makers given an opportunity to justify a decision after making it reflexively may defend the decision, ignoring or distorting information that would undercut its rationale. This Article argues that decisions in dependency court are harmed by a shortage of pre-decisional accountability and an abundance of post-decisional opportunities to self-defensively bolster decisions previously made. The Article draws from social psychology research to recommend concrete changes to promote effective decision-making processes in dependency court. Recommendations include opening dependency courts, expanding appeal rights, dispersing decision making authority from a single judge to multiple judges, and using "case rounds," drawn from medical school and law school clinical education programs, to provide judges with diverse perspectives on decisions with which they are faced. Finally, I recommend directions for empirical research in the unique environment of dependency court.

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## I. INTRODUCTION

“Whether and when [children] become parents, how far and in what direction they go in school, whether they obey the law, with whom they

associate, and how healthy they will be are only some of the important life outcomes that will be shaped by the decisions made in juvenile court.”<sup>1</sup>

How do dependency judges make these decisions, in the balance of which hang children’s lives?<sup>2</sup> In general, the answer is that dependency<sup>3</sup> judges, like other humans, jump to conclusions, deliberate insufficiently, and ignore or avoid information that would help them reach better outcomes. This article explains that it is not their fault, and that there are solutions.

To understand dependency judges’ decisions, we first must understand our own. Here is a test:

“Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail.”<sup>4</sup>

Is Steve a farmer, salesman, airline pilot, librarian, or physician?<sup>5</sup>

The information provided about Steve is congruent with stereotypical notions about librarians. Steve is “representative”<sup>6</sup> of librarians. As a result, many will assume that Steve is, in fact, a librarian. This assumption, however, ignores facts that make a different conclusion more likely, namely that there are many more farmers than librarians in the population.

“Which is a more likely cause of death in the United States—being killed by falling airplane parts or by a shark?”<sup>7</sup>

As to sharks and airplane parts, well, you are 30 times less likely to die in a shark’s jaws than under the weight of a falling airplane part.<sup>8</sup> If you are like most people, though, you guessed wrong.<sup>9</sup> Shark attacks get much more media attention and come to mind much more easily; shark attacks’ greater cognitive “availability”<sup>10</sup> fooled you into thinking that they are a more common occurrence.

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<sup>1</sup> Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About It*, 6 Nw. J. L. & Soc. POL’Y 318, 321 (2011).

<sup>2</sup> See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) [hereinafter *Blinking on the Bench*] (asking, more generally, “How do judges judge?”).

<sup>3</sup> Proceedings involving children under the supervision of the state because of suspicion of child maltreatment are labeled in various states as “juvenile,” “neglect,” “child in need of assistance,” “child welfare,” child protection,” or “dependency” proceedings. For ease of reference, I refer to the proceedings as dependency proceedings throughout this Article.

<sup>4</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 121 (1993).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Tversky & Kahneman, *supra* note 4, at 1127.

These questions, and the perhaps unexpected complexity of their answers, begin to suggest the complexity of human decision-making processes. This Article explores the factors that sometimes cause decision-makers to ignore relevant information, to prioritize irrelevant information, or to place too much or too little weight on information that is available to them. When do judges and other humans<sup>11</sup> use speedy, intuitive decision-making processes, known as heuristics, to reach conclusions, and when do we use deliberate, effortful, systematic strategies? What do we do when we decide?

Scholars have explored decision-making in a wide range of areas of the law by looking for clues in concrete evidence such as statutes and written judicial opinions.<sup>12</sup> This Article contextualizes decision-making in dependency court. Because of the paucity of written trial court opinions in this field, however, I apply to that under-explored territory a rather more archaeological approach than that used by others in the “behavioral law and economics”<sup>13</sup> literature. Instead of unearthing from judges’ public writings an implicit or express statement about the decision-making process they used to reach a conclusion,<sup>14</sup> I work backwards, or perhaps upwards, by analyzing the decision-making environment of dependency court. I present in detail the context in which judges make decisions, and then apply psychology research to determine whether the conditions present in dependency court are like those found by researchers to encourage use of heuristic or systematic processes. Judges make decisions under the severe time pressures of large caseloads, with a paucity of reliable information, and themselves unavoidably

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<sup>11</sup> JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 410 (1973) (“[W]e must face the fact that judges are human.”); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2001) [hereinafter *Inside the Judicial Mind*] (“Judges, it seems, are human.”) (citing Jerome Frank, *Are Judges Human?* (pts. 1 & 2), 80 U. PA. L. REV. 17, 233 (1931)); see also Chad Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125 (2007).

<sup>12</sup> See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (employment discrimination).

<sup>13</sup> “The task of behavioral law and economics, simply stated, is to explore the implications of actual (not hypothesized) human behavior for the law.” Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998). But see Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L. J. 67, 72 (2002) (“Behavioral law and economics scholars simplify and overgeneralize findings on human cognition and rationality to make these findings seem simultaneously important and simple enough to be incorporated into legal policy.”)

<sup>14</sup> See, e.g., Samuel N. Fraidin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 21 (2004) (“Duty of care jurisprudence appears arbitrary because courts have not used empirical or other evidence to persuade lawyers and corporate directors that duty of care jurisprudence has beneficial effects on director behavior. Judges have not clarified how they identify which behaviors they use as evidence that boards have made decisions carefully. For example, judges have never explained why they have concluded that providing advance notice to directors of the matters to be discussed at their meetings is evidence of careful decision-making. They have done nothing more than state this conclusion.”).

influenced by the pervasive racial and economic disadvantage of the parties who appear before them. I argue that experimental findings suggest that these environmental factors are likely to cause judges to use heuristics to make decisions.

Concluding that judges employ heuristics can not end the inquiry, however. Under a wide range of circumstances, heuristic decision-making can be a better choice than slower, more-methodical systematic processing. For example, speedy, intuitive processing is appropriate for a student when identifying that it is indeed her familiar math teacher who just walked into the classroom. Accuracy of that decision is not lessened by the immediate, virtually unthinking method by which the student arrives at an answer. Nor would the accuracy of that judgment likely improve if the student engaged in a more systematic approach, such as walking nearer to the person who entered the room, closely observing the person's dress and facial features, and subsequently surveying nearby classmates to ascertain their opinions as to the identity of the person.

Are dependency court decisions more like deciding whether Steve is a farmer, or more like deciding whether one's familiar teacher entered a room? Should dependency judges reach decisions quickly and efficiently, or slowly and painstakingly?

This Article marshals evidence from psychology research that suggests that heuristic decision-making in dependency cases is dangerously likely to lead to cognitive biases and systematic decision errors. In the right setting, heuristics are aptly titled "fast-and-frugal;" in some situations, less information can be more. In others, like dependency cases, however, decisions are too hard, and the stakes too important, for judges to leap to conclusions. As Professor Buss points out, "in dependency . . . proceedings, decisions are made that . . . surely will determine young people's life plans."<sup>15</sup>

That analysis of a context-specific decision-making process suggests a useful research methodology in other legal fields is not to suggest that the questions are unimportant with respect to dependency. To the contrary, on tens of thousands of occasions each year, state court judges wrongly approve requests from state government caseworkers to place children in foster care. Why do judges get it wrong so often? And while a child is in foster care, judges are called on to render hundreds of decisions, large and small, affecting every aspect of the child's life. Data and children's stories amply demonstrate the ghastly experience and outcomes of foster care. When a judge must assess whether a child will be safe at home, or whether a child should visit with the siblings from whom she has been separated, or whether a child should be assigned a tutor or a mentor, or undergo psychological testing—what, really, is she doing? Judges probably ought not assume that Steve is a librarian and that sharks are a mortal danger.

What can be done to help judges make better decisions?<sup>16</sup>

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<sup>15</sup> Buss, *supra* note 1, at 321.

<sup>16</sup> A persuasive body of scholarship argues that the absence from dependency cases of traditional components of the American adversarial system deprives those cases of structures fundamental to effective decision-making. *See, e.g.*, Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L. J. 13, 15 (2011) ("The absence of greater procedural protections in hundreds of thousands of abuse and neglect cases . . . leads to poor decisions in abuse and neglect cases . . ."); *see also* Jane Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891 (2010); Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child*

Lawyers have long believed that decision-making may be aided by “Sunlight[,] . . . the best of disinfectants.”<sup>17</sup> The right to trial by jury and public access to courts both embody a belief that transparency aids judicial decision-making. As Donald Langevoort points out, however:

Contemporary legal scholarship has come to recognize that if . . . predictions [about human behavior] are naive and intuitive, without any strong empirical grounding, they are susceptible to error and ideological bias. Something more rigorous is thus expected when normative claims are advanced, and the place of the social sciences has expanded in legal discourse to satisfy this expectation.<sup>18</sup>

This Article infuses with scientific support the long-held, deeply felt beliefs which underlie the hoary, vibrant maxim, “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>19</sup>

Brandeis’ “sunshine” is most nearly akin to a social psychologist’s “accountability,” namely a decision-maker’s expectation that she will have to explain or justify a decision. Indeed, research indicates that accountability can attenuate certain cognitive biases, including those likely present in family court. If a decision-maker knows, prior to making a decision, that she will be accountable for that decision to an audience with unknown views, she is likely to engage in “pre-emptive self-criticism,” slowing down, seeking additional information, integrating opposing viewpoints, and working until she reaches a decision she believes will be defensible from the perspective of the audience. As with respect to heuristics, however, accountability’s effects are context-dependent; a decision-maker asked only after the decision to explain the decision will seek aggressively to “bolster” her position, defending the decision and emphasizing the information that supports it, rather than genuinely reflecting and reexamining the premises of the decision.

Again applying research findings to the context of dependency court, I argue that the structure and culture of the court is devoid of effective pre-decisional accountability, and replete with opportunities for judges to bolster and harden positions previously taken. Under these circumstances, cognitive biases are exacerbated, not attenuated. Accountability structures in dependency court, then, degrade decisions in dependency court. As hard and important as are dependency judges’ decisions, and as vulnerable as they are to inappropriate use of heuristics and

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*Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55 (2009). That this Article argues that there is yet another cause of decision-making flaws in dependency cases diminishes not at all the extent to which I share their concerns. See Matthew I. Fraidin, *Recent Developments in Family Law in the District of Columbia June 2004-June 2005*, 10 UDC/DCSL L. REV. 183 (2007).

<sup>17</sup> LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

<sup>18</sup> Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998).

<sup>19</sup> R v. Sussex Justices *ex parte* McCarthy [1924] 1 K.B. 256 at 259 (Eng.).

cognitive biases, I hope with this Article to begin a problem-solving conversation grounded in social science.

## II. DECISION-MAKING

We have come to understand that under some circumstances, we are deliberate and analytical, that other decisions are made by “simpler strategies,” and still others employ both processes.<sup>20</sup> Systematic processing is deliberate and reflects careful and oft-times lengthy consideration of available information.<sup>21</sup> Heuristic decision-making, like that which led us to incorrect answers about Steve and sharks, above, in contrast, is inductive, speedy, and instinctive, and requires minimal effort.<sup>22</sup> Kahneman describes this as “attribute substitution,” namely making a judgment (“assess[ing] a target attribute”) by assessing a different subject, which is easier to understand or more readily-accessible to the decision-maker, rather than the actual decision at hand.<sup>23</sup> More simply, Korobkin says, “Reliance on a heuristic implies neglect of at least some potentially relevant information.”<sup>24</sup>

Kahneman and Tversky identified common heuristic devices on which we rely to reach decisions. These include the “availability” heuristic and “representativeness” heuristic. Subsequent research has identified other “mental shortcuts” which prompt decisions in a similar manner, such as reliance on the affect, or feelings generated in the decision-maker by the person or argument.<sup>25</sup>

The availability heuristic is a “rule of thumb”<sup>26</sup> which causes decision-makers to “assess the frequency of a class or the probability of an event by the ease with which

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<sup>20</sup> According to Reimer et al., “heuristic processing is particularly likely to take place in situations in which people are not motivated or for other reasons are not able to think thoroughly about the contents of a message . . . . In contrast, systematic processing is likely to occur in situations in which participants are highly motivated and able to scrutinize a message.” Torsten Reimer et al., *On the Interplay Between Heuristic and Systematic Processes in Persuasion*, in PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 1833-34 (B.G. Bara, L. Barsalou & M. Bucciarelli eds., 2005).

<sup>21</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011).

<sup>22</sup> See Seymour Epstein, *Integration of the Cognitive and Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 710 (1994) (contrasting “two fundamentally different ways [of apprehending reality], one variously labeled intuitive, automatic, natural, non-verbal, narrative, and experiential, and the other analytical, deliberative, verbal, and rational.”); see also Reimer et al., *supra* note 20, at 1833 (“Higher-order cognitive processes are often described by dual-process models that distinguish between systematic (deliberate, top-down, explicit, conscious) and heuristic (automatic, bottom-up, implicit, unconscious) processing.”).

<sup>23</sup> Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 53 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

<sup>24</sup> Russell Korobkin, *The Problems with Heuristics for Law*, in HEURISTICS AND THE LAW 47 (G. Gigerenzer & C. Engel eds., 2006).

<sup>25</sup> See, e.g., Galen V. Bodenhausen, Geoffrey P. Kramer & Karin Süsser, *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. OF PERSONALITY & SOC. PSYCHOL. 621, 628 (1994); Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 23, at 397.

<sup>26</sup> PLOUS, *supra* note 7, at 121.

instances or occurrences can be brought to mind.<sup>27</sup> Thus, rather than methodically combing through the information and factors present in an immediate, present problem, a decision-maker employing the availability heuristic reaches a decision by immediate, reflexive reference to a *different* situation that comes readily to mind. Instances come to mind more readily if they are “retrieveable,”<sup>28</sup> salient,<sup>29</sup> vivid,<sup>30</sup> or recent.<sup>31</sup>

The probability of the occurrence of shark attack is vastly overestimated vis-à-vis death due to the impact of a falling airplane because shark attacks receive greater publicity than do deaths from falling airplane pieces, and because death by shark attack is far easier to imagine in vivid detail than death by airplane part. Shark attacks, then, are more readily available in the consciousness of the survey respondents. Similarly, the significantly greater media coverage of homicides and car accidents makes them far more “available” than cancer and diabetes; thus, survey respondents guessed incorrectly that homicides and car accidents kill more Americans than do diabetes and cancer.<sup>32</sup>

The “representativeness” heuristic similarly reflects a decision-maker’s substitution of one item for another. A decision-maker who relies on the representativeness heuristic assesses a probability “by the degree to which A is representative of B, that is, by the degree to which A resembles B.”<sup>33</sup> Thus, we are told that “Steve,” described at the beginning of this Part, possesses specified personal characteristics. Because we associate those traits with librarians, we jump to the conclusion that Steve is a librarian. For many of us, regardless of the fact that there are few librarians, Steve embodies librarian, and we therefore assume that he is more likely to be a librarian than to work in a much more common profession.

“Affect,” or the good or bad feelings generated by a person or event, is another heuristic that sometimes drives decision-making.<sup>34</sup> Compared to systematic,

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<sup>27</sup> Tversky & Kahneman, *supra* note 4, at 1127.

<sup>28</sup> *See id.* (describing experiment in which subjects were given lists of the names of famous men and women, and “asked to judge whether the list contained more names of men than of women;” “subjects erroneously judged that the class (sex) that had the more famous personalities was the more numerous.”).

<sup>29</sup> “[T]he impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.” *Id.*

<sup>30</sup> PLOUS, *supra* note 7, at 125-26 (“Vividness usually refers to how concrete or imaginable something is, although occasionally it can have other meanings. Sometimes vividness refers to how emotionally interesting or exciting something is, or how close something is in space or time. A number of studies have shown that decision makers are affected more strongly by vivid information than by pallid, abstract, or statistical information.”) (citation omitted).

<sup>31</sup> Tversky & Kahneman, *supra* note 4, at 1127; *see also* Jane Kennedy, *Debiasing Audit Judgment with Accountability: A Framework and Experimental Results*, 31 J. OF ACCT. RES. 231 (1993).

<sup>32</sup> PLOUS, *supra* note 7, at 121-22.

<sup>33</sup> Tversky & Kahneman, *supra* note 4, at 1124.

<sup>34</sup> Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 23, at 397 (“As used here, *affect* means the specific quality

analytical processing, “reliance on affect and emotion is a quicker, easier, and more efficient way to navigate in a complex, uncertain, and sometimes dangerous world.”<sup>35</sup> Thus, a choice among options sometimes is rooted in whether one option causes us to feel fear, sadness, or disgust, and another generates in us more welcome emotions, such as happiness, safety, or comfort. As Zajonc wrote:

We sometimes delude ourselves that we proceed in a rational manner and weigh all the pros and cons of the various alternatives. But . . . quite often “I decided in favor of X” is no more than “I liked X.” . . . We buy the cars we like, choose the jobs and houses that we find “attractive,” and then justify these choices by various reasons.<sup>36</sup>

Like “representativeness” and “availability,” affect may cause a decision-maker to forgo “weighing the pros and cons or retrieving from memory many relevant examples, especially when the required judgment or decision is complex or mental resources are limited.”<sup>37</sup>

Notwithstanding the framing in this Part thus far of heuristic thinking as harmful, negative, and inaccurate, heuristic decision-making can be valid and useful if employed in the appropriate context. Indeed, sometimes described as “fast-and-frugal”<sup>38</sup> strategies, heuristics can be more accurate, or simply a better choice than systematic processing, in light of the greater effort it might take to be more systematic, or the necessity of speedy decision-making, or the minimal importance of the outcome.<sup>39</sup> Gerd Gigerenzer, et al., describes a heuristic as “ecologically rational to the degree that it is adapted to the structure of an environment.”<sup>40</sup>

We easily can imagine circumstances in which a decision’s context permits—or even requires—speedy, intuitive decision-making. A baseball outfielder eyeing a fly ball, for example, ought not attempt to catch it by pulling from his pocket a set of opera glasses to make sure he truly has a bead on the thing, and punching buttons on

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of ‘goodness’ or ‘badness’ (1) experienced as a feeling state (with or without consciousness) and (2) demarcating a positive or negative quality of a stimulus.”)

<sup>35</sup> *Id.* at 398.

<sup>36</sup> R. B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 155 (1980).

<sup>37</sup> Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 23, at 400.

<sup>38</sup> GERD GIGERENZER, RATIONALITY FOR MORTALS: HOW PEOPLE COPE WITH UNCERTAINTY 22 (2008) (“A fast and frugal heuristic is a strategy, conscious or unconscious, that searches for minimal information and consists of building blocks that exploit evolved capacities and environmental structures.”).

<sup>39</sup> Peter M. Todd argues that the use of heuristics is determined by evolutionary responses to external stimuli which affect decision-making: “the human mind makes many decisions by drawing on an adaptive toolbox of simple heuristics . . . because these fast and information-frugal heuristics are well matched to the challenges of the (past) environment.” Peter M. Todd, *Fast and Frugal Heuristics for Environmentally Bound Minds*, in BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX 52 (G. Gigerenzer & R. Selten eds., 2001).

<sup>40</sup> GERD GIGERENZER, PETER M. TODD & ABC RESEARCH GRP., SIMPLE HEURISTICS THAT MAKE US SMART 13 (1999).

a satellite reader to ascertain numerically the ball's precise trajectory and speed. Instead, the ballplayer gauges the speed and distance promptly—indeed, immediately—with an experienced, expert eye, and chases after it fast, but not so fast that he'll run too far. Where will the ball land? This is a decision that must be reached quickly.<sup>41</sup> Like the young student faced with the relatively simple, low-import decision about who is entering the classroom, circumstances indicate that some decisions are best made with a minimum of information.<sup>42</sup>

In contrast, however, systematic processing has been shown to be more effective in some circumstances than heuristic thinking. A well-known illustration is the Cognitive Reflection Test,<sup>43</sup> in which three questions are administered to respondents:

1. A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?

Professor Frederick administered the CRT on 35 occasions, to a total of 3,428 subjects. Most respondents answered ten cents to question one, 100 minutes to question two, and answered twenty-four days to question three.<sup>44</sup> Those answers, however, are incorrect. The correct answers are five cents, five minutes, and forty-seven days. In total, seventeen percent of respondents correctly answered all three questions. Thirty-three percent answered all three incorrectly. On average, respondents provided correct answers to 1.24 of the three questions.<sup>45</sup> The nature of the questions and their wording causes many respondents to jump quickly to incorrect answers, and to be unable to adjust to reach the correct answer. These appear to be problems that would benefit from deliberate, analytical analysis.

Judges are not immune to heuristic decision-making, or to the errors that can result. Indeed, empirical evidence confirms that judges demonstrate in experimental settings non-deliberate thinking, in ways that mimic the heuristic processes employed by others. Guthrie, Rachlinski, and Wistrich administered to judges experiments designed to test subjects' decision-making processes. In one study, 252 judges completed the Cognitive Reflection Test. Like most people, "most of the

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<sup>41</sup> See, e.g., Gigerenzer, *supra* note 38, at 21 (citing RICHARD DAWKINS, *THE SELFISH GENE* 96 (2d ed. 1989)).

<sup>42</sup> Gerd Gigerenzer describes this as the "less-is-more" effect, noting that research has shown that in some contexts, "simple heuristics were more accurate than standard statistical methods that have the same or more information. These results became known as less-is-more effects . . . [T]here is a point at which more is not better, but harmful." Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 *ANNU. REV. PSYCHOL.* 451, 453 (2011).

<sup>43</sup> Shane Frederick, *Cognitive Reflection and Decision Making*, *J. ECON. PERSP.*, Fall 2005, at 25, 25-42.

<sup>44</sup> *Id.* at 27.

<sup>45</sup> *Id.* at 29.

judges answered most of the questions wrong . . . . [W]hen the judges erred, they generally chose the intuitive answer.<sup>46</sup> In other experiments, judges were susceptible to cognitive biases such as “anchoring,”<sup>47</sup> overuse of the representativeness heuristic,<sup>48</sup> and “hindsight bias.”<sup>49</sup> The results of the studies indicate that “judges rely heavily on their intuitive faculties . . . when they face the kinds of problems they generally see on the bench.”<sup>50</sup>

In sum, systematic processing of information connotes careful, intentional, deliberative weighing of probative information. Heuristic processing causes a decision-maker to reach a conclusion based on the ease or speed with which a similar event or problem (or one perceived to be similar) is brought to mind, the extent to which a decision-problem resembles another decision-problem, or the affect, or feelings generated in the decision-maker by the person or argument. In some circumstances, the use of heuristics can mislead or distort, as exemplified in the “Steve,” “sharks,” and Cognitive Reflection Test illustrations, above. Appropriateness of the use of systematic or heuristic decision-making can be adjudged only by taking into account the context in which the decision is made, including the importance of the decision and the time available to make the decision.<sup>51</sup> Heuristics inappropriate for the environment can lead to systematic errors, known as cognitive biases, which themselves result in “suboptimal judgments and choices because the [judges] over- or underweight information concerning facts . . . or their subjective preferences relative to that information’s probative value.”<sup>52</sup>

In Part II, I begin the process of assessing decision-making in dependency court. I put dependency court under a magnifying glass, first presenting the many varied decisions dependency judges are called on to make. I then determine whether the conditions under which judges make decisions permit systematic consideration of evidence or are more likely to lead to non-deliberate, heuristic decision-making. Finally, I explore the existence of cognitive biases in dependency court, including the “dispositional bias in attribution,”<sup>53</sup> “primacy effect,”<sup>54</sup> “susceptibility to

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<sup>46</sup> *Blinking on the Bench*, *supra* note 2, at 17-18.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> *Id.* at 22.

<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Id.* at 27.

<sup>51</sup> Guthrie, Rachlinski & Wistrich, *supra* note 2, at 5 (“Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so.”).

<sup>52</sup> Korobkin, *supra* note 24, at 47.

<sup>53</sup> See generally Edward E. Jones, Janet Morgan Riggs, & George Quattrone, *Observer Bias in the Attitude Attribution Paradigm: Effect of Time and Information Order*, 37 J. OF PERSONALITY & SOC. PSYCHOL. 1230 (1979).

<sup>54</sup> See generally Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCHOL. Q. 285 (1983).

groupthink symptoms,”<sup>55</sup> and “influence of incidental affect from one situation on judgments in unrelated situations.”<sup>56</sup>

### III. DECISION-MAKING IN CHILD DEPENDENCY CASES

Dependency judges make a large number and wide range of decisions about every child whose life they oversee. Virtually all of those decisions are tough ones, and most have very high stakes, putting a premium on an effective decision-making process.

Dependency judges first decide a child’s custodial placement just before or just after the child’s emergency removal from his parents or guardian. This decision has significant consequences for a child’s health, safety, and emotional well-being, as well as significant legal import. Nonetheless, a growing body of evidence indicates that judges regularly make the wrong choice at this stage.<sup>57</sup>

Judges also make decisions relating to virtually every other aspect of a child’s health, safety, and welfare. These decisions make a significant impact on children’s lives, and require subtle differentiation between and among numerous options, many of which require predictions of future behavior. These are hard, important decisions.

#### A. Wrong Decisions

*Eight-year-old Jerome steals his uncle’s video game. Furious, the uncle storms to Brian’s schoolhouse and physically beats Brian in the hallway. Instead of sending Brian home to his mother’s embrace, social services workers take him into state custody. Even though the uncle does not live with Brian or either of the child’s parents, the social services agency requests three days later that the child remain in foster care. The judge agrees. Two-and-a-half months later, the government acknowledges that Brian is not in danger. They drop the case and send him home.*<sup>58</sup>

*A fifteen-year-old boy, James, watches his stepfather die of a heart attack. His grown sister is ready, willing, and able to take him in. Instead, the government asks the judge to house James with strangers in foster care,*

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<sup>55</sup> See generally Irving L. Janis, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (2d ed. 1982).

<sup>56</sup> Bodenhausen, Kramer & Susser, *supra* note 25, at 630.

<sup>57</sup> THE DISTRICT OF COLUMBIA CITIZEN REVIEW PANEL, AN EXAMINATION OF THE CHILD AND FAMILY SERVICES AGENCY’S PERFORMANCE WHEN IT REMOVES CHILDREN FROM AND QUICKLY RETURNS THEM TO THEIR FAMILIES 4 (Sept. 2011) [hereinafter CRP Report], available at [http://www.dc-crp.org/Citizen\\_Review\\_Panel\\_CFSA\\_Quick\\_Exits\\_Study.pdf](http://www.dc-crp.org/Citizen_Review_Panel_CFSA_Quick_Exits_Study.pdf) (concluding that it “was often wrong to conclude that removing children from their families on an emergency basis was necessary to address [safety concerns].).

<sup>58</sup> Facts taken from a case in which author’s clinical law students at the University of the District of Columbia David A. Clarke School of Law represented “Jerome’s” mother; see also Petula Dvorak, *Child Deaths Led to Excessive Foster Care Placements, Critics Say*, WASH. POST, Jan. 8, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010703582.html>.

*and the judge complies. After five weeks, the government sends him home to live with the sister.*<sup>59</sup>

*A seven-year-old boy, Isaac, is taken from his mother because his grandfather—who does not live with the mother—allegedly beats him. The judge approves Isaac’s foster care placement, rejecting his mother’s request that the boy be allowed to come home. The boy lives with strangers for six weeks, even though two loving, capable, professional aunts are available to take him in. He sees his mother only two hours each week. He is finally allowed to live with one aunt, with whom he stays for another six weeks—until the judge determines the boy was not abused. After three months, he goes back home.*<sup>60</sup>

In every state and the District of Columbia, an Executive Branch social work agency is responsible for taking into custody children whose families cannot care for them safely.<sup>61</sup> States may take custody of a child when the child is suspected of being in “immediate danger”<sup>62</sup> or “imminent danger.”<sup>63</sup> Endangered children

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<sup>59</sup> Facts taken from a case in which author’s clinical law students at the University of the District of Columbia David A. Clarke School of Law represented “James” mother.

<sup>60</sup> Facts taken from a case in which author’s clinical law students at the University of the District of Columbia David A. Clarke School of Law represented “Isaac’s” mother.

<sup>61</sup> See D.C. CODE § 4-1303.01(b)(4) (West 2012) (“The [Child and Family Services] Agency shall have as its functions and purposes . . . [r]emoving children from their homes or other places, when necessary.”); 20 ILL. COMP. STAT. ANN. 505/1 (West 2012) (“The purpose of this Act is to create a Department of Children and Family Services to provide social services to children and their families . . . . This primary and continuing responsibility applies whether the family unit . . . remains intact . . . or whether the unit has been temporarily broken by reason of child abuse, neglect, dependency or other reasons necessitating state care . . . .”); MD. CODE ANN., HUM. SERVS. § 3-201(a)(3) (West 2012) (“A local department shall be referred to as the department of social services . . . .”); MD. CODE ANN., HUM. SERVS. § 5-710(a) (West 2012) (“the local department shall render the appropriate services in the best interests of the child . . . .”). According to a 2010 report released by the Adoption and Foster Care Analysis Reporting System (“AFCARS”), 254,375 children were removed from their families [entered foster care], part of a total of 408,425 children nationwide in “out-of-home” care. With 739 children in foster care, Delaware has the smallest population of children in custody and California leads the nation, with 58,718 children in foster care, *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf>. The state of Wyoming has the highest rate of children in foster care, with 7.5 of every 1,000 children entering the system in 2010. *See id.* The state of Minnesota removes the highest percentage of its poor children, with 84.8% of impoverished children in foster care, *available at* [http://www.nfpn.org/images/stories/files/removal\\_rates.pdf](http://www.nfpn.org/images/stories/files/removal_rates.pdf). The city of San Francisco took custody of the greatest proportion of its low-income children and youth, with 27.1% of impoverished children entering the system. NATIONAL COALITION FOR CHILD PROTECTION REFORM, THE 2002 NCCPR RATE-OF-REMOVAL INDEX 6 (2002), *available at* <http://www.nccpr.org/reports/2009californiaror.pdf>.

<sup>62</sup> *See, e.g.*, MD. CODE ANN., FAM. LAW. § 5-709(c) (West 2012) (“the representative [of the local social services department] may remove the child temporarily, without prior approval by the juvenile court, if the representative believes the child is in serious, *immediate danger*.”) (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 119, § 51B(c) (West 2012) (“If the department has reasonable cause to believe a child’s health or safety is in *immediate danger*

typically come to the State's attention on the basis of a report telephoned to the agency by a neighbor, relative, or professional service provider, such as a doctor, nurse, therapist, teacher, or school guidance counselor.<sup>64</sup> In 2010, 2,607,798 such reports were made.<sup>65</sup> Investigating social workers determined that 436,321 of those children were abused or neglected.<sup>66</sup>

After determining that a child is in danger, social workers either take a child into custody immediately, or take the child into custody after brief, ex parte judicial review and approval of the seizure. In either event, state and federal statutes and constitutional law require that a court review the child's separation from family within 24 hours to two weeks.<sup>67</sup>

At this hearing, variously titled a "shelter care"<sup>68</sup> hearing or "preliminary"<sup>69</sup> hearing, the court must make its first important decision regarding the child, namely

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from abuse or neglect, the department shall take a child into immediate temporary custody . . . .") (emphasis added).

<sup>63</sup> See, e.g., N.Y. FAM. CT. ACT § 1022(a)(i)(B) (McKinney 2005) ("The family court may enter an order directing the temporary of a child . . . before filing a petition [for removal] if . . . the child appears to suffer from the abuse or neglect of his or her parent . . . that his or her immediate removal is necessary to avoid *imminent danger* to the child's life or health . . . .") (emphasis added); see also FLA. STAT. ANN. § 39.401(1)(b)(1) (West 2012) (a child may be taken into custody if the proper authority "has probable cause to support a finding: 1) That the child has been abused, neglected, or abandoned, or is suffering from or is in *imminent danger* or illness or injury as a result of abuse, neglect or abandonment.") (emphasis added); VA. CODE ANN. § 16.1-251(A)(1) (West 2012) ("A child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order [if it is established that] . . . the child would be subjected to an *imminent threat* to life or health . . . .") (emphasis added).

<sup>64</sup> See generally CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS 2-3 (2010) available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm) (distinguishing "mandatory" reporters, which includes teachers or professional services providers who have a professional duty to report abuse and "voluntary" reporters, which refers to anyone who suspects abuse, such as a neighbor or relative).

<sup>65</sup> CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2010, 11 (2010) available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>.

<sup>66</sup> *Id.* at 12.

<sup>67</sup> See, e.g., FLA. STAT. § 39.402(8)(a) (West 2009) (a child removed pursuant to an emergency order "may not be held in shelter care longer than 24 hours unless an order is entered by the court after a shelter care hearing."); VA. CODE ANN. § 16.1-251(B) (West 2012) (if a child is removed pursuant to an emergency order, a hearing must be held as soon as practicable, but no later than 5 business days after removal); see also TEX. FAM. CODE ANN. § 262.103 (West 2011) ("A temporary restraining order or attachment of the child . . . expires not later than 14 days after [the date of removal].").

<sup>68</sup> See, e.g., D.C. CODE § 16-2312(B) (2011) ("A *shelter care hearing* shall be commenced not later than 72 hours (excluding Sundays) after the child has been taken into custody . . . .") (emphasis added).

whether the child would be in immediate danger if returned home, and therefore must instead be housed with a relative, or a foster family unknown to the child.<sup>70</sup> The Court's decision often is made on the basis of the testimony of a single witness, the social worker who investigated the allegations of child abuse or neglect. Hearsay testimony is permissible.<sup>71</sup>

Separation of a child from her home, family, and community, and, often, school, is a traumatic event for the child, potentially causing significant harm.<sup>72</sup> So too is this a significant Constitutional moment, potentially infringing on a parent's fundamental right to the custody, control, and management of the child.<sup>73</sup> The decision to approve or reject a removal has dramatic, long-lasting consequences on the child<sup>74</sup> and on the course of the dependency litigation itself.<sup>75</sup> Notwithstanding the momentousness of this juncture in a case and in a child's life, a growing body of evidence indicates that judges regularly wrongly "rubber-stamp"<sup>76</sup> approval of foster care requests.

<sup>69</sup> See, e.g., VA. CODE ANN. § 16.1-252(A) (West 2012) (the court may issue a preliminary removal order after a hearing that "shall be in the nature of a *preliminary hearing* rather than a final determination of custody.") (emphasis added).

<sup>70</sup> See 45 C.F.R. § 1356.21(b)-(c) (West 2012) (during the shelter care hearing, the judge also decides whether the agency made "reasonable efforts to . . . prevent the unnecessary removal" of the child, and whether it would be "contrary to [the child's] welfare" to return home. These decisions are required by federal law as a condition of receiving funding assistance from the federal government.).

<sup>71</sup> See D.C. Code §16-2310(b) (West 2009) (shelter care decision based on all "available information"); see also ALASKA STAT. § 47.10.070(a) (West 2012) ("The court may conduct a hearing on the petition in an informal manner.").

<sup>72</sup> See generally Press Release, Richard Wexler & Matthew Fraidin, Number of D.C. Families Torn Apart Soars 41 Percent in Wake of Fenty's "Foster Care Panic" Advocates Say (Jan. 7, 2009) available at <http://www.nccpr.org/reports/dc1709.pdf> (explaining that separation has deleterious, long term effects on children regardless of the length of time they are in custody).

<sup>73</sup> See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man', and 'rights far more precious . . . than property rights'") (citations omitted); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . .").

<sup>74</sup> See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 460-61 (2003) ("What is forgotten or ignored during removal . . . is the range and extent of harm that [a child experiences] that can result from unnecessary removals . . . [M]ultiple [foster care] placements . . . combined with . . . the removal itself, may cause children to develop posttraumatic stress disorder, reactive attachment disorder, or other major psychiatric illnesses.").

<sup>75</sup> See *In re S.G.*, 581 A.2d 771, 786 (D.C. 1990) (Rogers, C.J., concurring) (noting "the reality that [temporary custody] orders may effectively become permanent as a result of the delays attendant to litigation and appeal.").

<sup>76</sup> THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 11 (2009), available at [http://www.nrcps.org/documents/2009/pdf/The\\_Guide.pdf](http://www.nrcps.org/documents/2009/pdf/The_Guide.pdf).

According to U.S. Department of Human Services figures for 2008, 85,000 children were removed from their families, but later were returned without being found abused or neglected, a full 40% of all children taken into foster care during the year.<sup>77</sup>

Students at the University of the District of Columbia David A. Clarke School of Law represented in dependency matters a random sampling of 25 parents whose children were removed by the Executive and whose removals were approved by judges. Sixty percent of those children were returned home without being found abused or neglected, and their cases were closed.<sup>78</sup>

Additional evidence comes from the District of Columbia as well, where the federally-mandated Citizens' Review Panel<sup>79</sup> found that children not in immediate danger routinely are taken from their families.<sup>80</sup> Those removals were approved by the judges charged with oversight.<sup>81</sup>

In Texas, the Supreme Court found that 468 children separated from their parents on the Yearning For Zion Ranch near Eldorado, Texas, were not in immediate danger and should not have been removed.<sup>82</sup> New York's highest state court found that hundreds of children who were not in danger were separated from their mothers nonetheless.<sup>83</sup> And several federal appellate courts have found that children were taken from their families unlawfully.<sup>84</sup>

MIT economics Professor Joseph Doyle provides evidence which is suggestive that judges who decide whether to approve Executive removals repeatedly fail to distinguish between children who are in immediate danger and children who are not. After studying more than 15,000 maltreated children, Doyle found that among similarly-maltreated children, those who were allowed to remain at home fared better with respect to future rates of incarceration, employment, homelessness, and education than those placed in state custody.<sup>85</sup> Though probative only

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<sup>77</sup> See CHILDREN'S BUREAU, *supra* note 65, at 5 (finding that in 2010, state and local CPS agencies investigated 1,793,724 reports of abuse and neglect and found 1,262,118 of these reports to be unsubstantiated).

<sup>78</sup> Wexler, *supra* note 72, at 7.

<sup>79</sup> See 42 U.S.C.A. § 5106a(c)(4)(A) (West 2012) (requiring any state that applies for a grant under the Child Abuse Prevention and Treatment Act ("CAPTA") to establish a citizen review panel to examine the policies and procedures of state and local CPS agencies and evaluate the efficacy of the agencies' responses to reports of abuse and neglect).

<sup>80</sup> See CRP Report, *supra* note 57, at 5 ("No immediate danger to children justified CFSA's quick removals in the majority of cases.").

<sup>81</sup> See *id.* at app'x G, at 6 ("The [Report's] conclusion that . . . removal was not warranted . . . is clearly at odds with the decisions made by . . . the Court on those same cases.").

<sup>82</sup> *In re Texas Dept. of Family and Prot. Serv.*, 255 S.W.3d 613, 615 (Tex. 2008) (per curiam) ("On the record before us, removal of the children was not warranted.").

<sup>83</sup> See *generally* *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004).

<sup>84</sup> See, e.g., *Gates v. Texas Dep't. of Protective and Regulatory Services*, 577 F.3d 404, 429 (5th Cir. 2008); *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1298 (9th Cir. 2007); *Tenenbaum v. Williams*, 193 F.3d 581, 608 (2d Cir. 1999).

<sup>85</sup> See *generally* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (Dec. 2007).

circumstantially, it seems fair to wonder whether the children whose foster care placement caused more harm than good were, at the time they entered foster care, genuinely in immediate danger.

*B. Tough Choices, High Stakes, And Bad Outcomes*

Life-and-death decisions. No obvious answers. What is a judge to do?

*The mother of a seven-year-old girl delusionally believes that family members regularly fill her apartment with an invisible, poisonous gas. When the girl was a toddler, her mother brought her to the apartment's balcony to sleep, fearing that the fumes would overtake them. The girl is successful in school, happy, healthy, well-fed, and well-loved. The State argues that the mother's mental illness puts the child at risk, and asks that the judge find that the girl is neglected. The mother points to the child's glittering report card and up-to-date vaccination record, and asks the judge to dismiss the case.<sup>86</sup>*

What should the judge decide?

*A child is committed to a psychiatric ward, widely-known for its poor conditions, after threatening to kill a roommate in a group home. After a few days, the child's condition stabilizes and he is ready to be discharged. But the child welfare agency asks the judge to order that the child remain in the hospital, because the agency can't locate a foster home or group home with space for the child. Their only option, they say, is to house the boy overnight in the agency's waiting room.<sup>87</sup>*

Should the judge release the boy from the hospital, or order that he remain?

*Kevin, eighteen months, is HIV+. His weight and viral load have careened up and down in the past few months, while his mother and the world-famous doctor at a local hospital meticulously track his intake of food, water, and medication. Kevin's mother loses confidence in the doctor, and announces her plan to seek treatment for Kevin from a doctor across town, with whom the social worker and judge are unfamiliar. The social worker asks the judge to order that the mother continue taking Kevin to the world-famous doctor.<sup>88</sup>*

Should the judge decide that the child must continue receiving treatment from the famous doctor, or defer to the mother's judgment about what is best for her son?

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<sup>86</sup> *In re E.H.*, 718 A.2d 162 (D.C. 1998).

<sup>87</sup> Facts adapted from *In re B.B.* (D.C. Superior Ct.), a case in which the author represented B.B.

<sup>88</sup> Facts adapted from *in re K.M.*, 09 Neg. 20, 09 JSF 50 (D.C. Superior Ct.); see also *In re G.K.*, 993 A.2d 558, 570 (D.C. 2010) (holding that the trial court erred in "delegating to CFSA the ultimate responsibility to make decisions about whether it was [in the child's] best interest to continue taking his psychotropic medications . . . Further, the Family Court cannot exercise its discretion as *parens patriae* to intervene and overrule a parent's prerogative unless it finds by clear and convincing evidence that doing so would be in the best interests of the child.").

*A Michigan mother, hearing-impaired, has two children who also are hearing-impaired. The child welfare agency insists that she have the children undergo surgery that would improve their hearing. The mother refuses, insisting that the shared hearing impairment is an important bond between the children and her, and that altering that bond by correcting their hearing would do more harm than good.*<sup>89</sup>

Should the judge decide in favor of the agency or the mother?

A dependency judge exercises authority over a child for the months or years until a child is returned home, or is adopted or emancipated. During that time, the judge may make dozens and even hundreds of decisions about the child's status as a dependent child,<sup>90</sup> short- and long-term custodial placement,<sup>91</sup> and programmatic services and supports. Each of these decisions may have a significant impact on the child. In general, judges must attempt the tricky feat of predicting and affecting future events in a way that will serve a child's ever-evolving, often-inchoate "best interests."<sup>92</sup> And most often, the options available to the judge are murky, reliable facts on which to base the decision in short supply.

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<sup>89</sup> See generally *The Grand Rapids Case*, COCHLEARWAR.COM, <http://www.cochlearwar.com/newsflash/003a.html> (last visited July 30, 2012).

<sup>90</sup> Most child welfare cases are resolved prior to trial by a plea bargain or stipulation in which the child's parent or guardian admits that the child is abused or neglected, obviating the need for a judge to make a decision. If the parent does not admit that the child is abused or neglected, federal and state law require that a trial take place within approximately 60 to 100 days after a child's entry to foster care. At this trial, the judge must decide whether the government has proven by a preponderance of the evidence that the child is dependent. See, e.g., D.C. CODE § 16-2317(b)(2) (2007); *In re Kassandra V.*, 90 A.D.3d 940, 941 (N.Y. App. Div. 2011) ("[T]he petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected.") (citing N.Y. FAM. CT. ACT § 1046(b)); see also *In re Juan M.*, 968 N.E.2d 1184, 1193 (Ill. App. Ct. 2012) ("In a proceeding for the adjudication of abused or neglected minors, the State must prove the allegations in the petition by a preponderance of the evidence.").

<sup>91</sup> Judges decide a child's custodial placement at the disposition hearing. See 705 ILL. COMP. STAT. 405/2-22(1) (2002); N.Y. FAM. CT. ACT § 1052(a) (McKinney 2010); see also FLA. STAT. § 39.521(1) (2012). The legal standard at this stage is similar to that at the initial hearing, namely whether the child can be maintained safely by her parents or guardian. See ALASKA STAT. § 47.10.082 (2012) ("In making a dispositional order . . . the court shall keep the health and safety of the child as the court's paramount concern and consider (1) the best interests of the child; (2) the ability of the state to take custody and to care for the child . . . (3) the potential harm to the child caused by the removal of the child from the home and family environment."). The child's custody is reviewed regularly. See FLA. STAT. § 39.522 ("The court may change the temporary legal custody or the conditions of protective supervision at a post-disposition hearing . . .").

<sup>92</sup> Birte English, Thomas Mussweiler & Fritz Strack, *The Last Word In Court—A Hidden Disadvantage for the Defense*, 29 L. & HUM. BEHAV. 705 (Dec. 2005) (recognizing that there is "doubt and uncertainty inherent in [all] legal decisions," scholars and practitioners long have bemoaned the unique vagueness of the "best interests" standard); see e.g., Seema Shah, *Does Research With Children Violate the Best Interests Standard? An Empirical and Conceptual Analysis*, NW. J. L. & SOC. POL'Y (forthcoming) (manuscript at 27) ("There are various conceptions of the best interests standard, and one difficulty in evaluating the standard is that it can mean very different things."); see *id.* (manuscript at 27-38) (giving an extended review of critiques of the best interests standard).

Dependency cases generally involve a large number of parties<sup>93</sup> and other individuals and institutions, such as doctors, therapists, teachers, caseworkers, and other service providers. On the basis of information offered by these many system actors, judges make decisions on subjects as varied as whether a child housed in foster care will be permitted to visit with her parents, siblings, and other relatives;<sup>94</sup> whether a parent or child will be required to undergo a psychological evaluation or substance abuse treatment; whether a child should be assigned a mentor or tutor; whether the social work agency must install a wheelchair ramp in the foster home of a child with a disability; whether a child should be sent to a medical specialist; and many other decisions. Judges must determine whether a child should be reunified with her family, or, instead, perhaps, adopted by foster parents.<sup>95</sup> The judge must decide once each year whether the agency has made “reasonable efforts”<sup>96</sup> since the last hearing to bring about reunification or another long-term outcome.<sup>97</sup> The child may wish to appear in court, and the judge will have to decide whether allowing her to do so would be in the child’s best interests.<sup>98</sup> In a state in which dependency

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<sup>93</sup> See W. VA. R. CHILD ABUSE AND NEGLECT P. RULE 3(m) (West 2011) (defining the term “parties” as, “petitioner, the respondent or respondents, and the child or children.”); see also FLA. R. JUV. P. RULE 8.210(a) (West 2012) (“[T]he terms “party” and “parties” shall include the petitioner, the child, the parent(s) of the child, the department, and the guardian ad litem or the representative of the guardian ad litem program, when the program has been appointed.”); W. VA. CODE ANN. § 49-6-1 (West 2012) (identifying the *petitioner* as “the department or a reputable person [that] believes that a child is neglected or abused . . . .”); see also N.Y. FAM. CT. ACT §§ 1012(a) and (b) (McKinney 2009) (defining the term *respondent* as “any parent or other person legally responsible for a child’s care who is alleged to have abused or neglected such child”; and defining the term *child* as “any person or persons alleged to have been abused or neglected, whichever the case may be.”).

<sup>94</sup> See, e.g., *In re D.M.*, 771 A.2d 360, 367 (D.C. 2001) (holding visits between mother and child should be terminated).

<sup>95</sup> See ARK. CODE ANN. § 9-27-338(c) (West 2011) (“At the permanency hearing . . . the court shall enter one (1) of the following permanency goals . . . (1) returning juvenile to parent . . . (2) authorizing plan to return juvenile to parent . . . (3) authorizing a plan for adoption . . .”).

<sup>96</sup> See 45 C.F.R. § 1356.21(b)(2)(i) (“[The CPS agency] must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect . . . and at least once every twelve months thereafter while the child is in foster care.”); see also ALA. CODE § 12-15-312(a)(3) (2012) (Within twelve months of the date of removal and during every twelve month period the child remains in out of home care, the court must issue an order with specific findings as to whether “reasonable efforts have been made to finalize the existing permanency plan.”).

<sup>97</sup> See ARK. CODE ANN. § 9-27-338(a)(2) (West 2011) (“[A]fter the initial permanency hearing, a permanency planning hearing shall be held annually to reassess the permanency plan selected for the juvenile.”); see also *id.* at (d) (“At every permanency planning hearing the court shall make a finding on whether the department has made reasonable efforts and shall describe the efforts to finalize a permanency plan.”).

<sup>98</sup> See FLA. R. JUV. P. RULE 8.255(b) (West 2012) (“The child has a right to be present at the hearing” unless the court finds that the child’s mental or physical condition or age is such that a court appearance is not in the best interests of the child.).

courtrooms are closed to public and press, a judge may be asked to decide whether it is in a child's best interests to allow an observer.<sup>99</sup>

With respect to some issues, the court's decisions simply reiterate previously-issued directives. New issues crop up, however, as children live their lives, and judges are confronted with these issues as well.<sup>100</sup> In a typical case, a judge may make dozens of decisions within the first six months of a child's placement in foster care.

Facts available to a dependency judge are notoriously unreliable. Rules of evidence, which limit admission of hearsay, apply only in the fact-finding hearing and in hearings to terminate a parent's rights; in practice, judges generally conduct even these trials in a relatively informal manner.<sup>101</sup> Thus, rather than obtaining information by listening to and observing witnesses, and reviewing documents submitted in a formalistic, rule-bound manner, judges glean information from unsworn representations by lawyers representing the parties and from social workers monitoring the child.<sup>102</sup>

Emotions run high, and interfere with participants' ability to convey information.<sup>103</sup> Children may be represented by non-lawyers,<sup>104</sup> or by lawyers

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<sup>99</sup> See MICH. COMP. LAWS §§ 712A.17(6)-(7) (West 2012) ("A member of a local foster care review board . . . shall be admitted to a [dependency] hearing . . . . Upon motion of a party or victim, the court may close the hearing of a case brought under this chapter to members of the general public . . . ."); see also CAL. WELF. & INST. CODE § 676(a) (West 2012) ("Unless requested by the minor concerning whom the petition has been filed . . . the public shall not be admitted to a juvenile court hearing.").

<sup>100</sup> *In re S.M.*, 985 A.2d 413, 420 (D.C. 2009) (finding dependency cases "are unlike civil cases, which typically involve only facts gone by . . . . The ultimate parties in interest are the [children] themselves. And for them, their lives an ongoing event.").

<sup>101</sup> See Fraidin, *supra* note 16, at 195 (quoting *In re L.W.*, 613 A.2d 350, 353 n.6 (D.C. 1992) ("[W]here, as here, the future of a child is at stake, the judge should do her (or his) best to obtain all of the information needed to effect a judicious disposition. The rigorous application of evidentiary rules is out of place in a case of this kind . . . .") (citations omitted)) ("[I]n a 1992 case in which the government sought to terminate the parental rights of a mother, the Court of Appeals scolded the trial judge for scrupulously applying the rules of evidence.").

<sup>102</sup> See, e.g., Gupta-Kagan, *supra* note 16, at 14 ("In tens (and perhaps hundreds) of thousands of child abuse and neglect cases, judges decide to change children's permanency plans based solely on the representations of parties, social workers, and attorneys—not actual evidence . . . .").

<sup>103</sup> See Chill, *supra* note 74, at 462 ("Many parents understandably become angry at and highly suspicious of caseworkers who remove their children for reasons that are not readily apparent to them—especially when, as is usually the case, the removal occurs without warning after parents have been speaking and/or working voluntarily with CPS for several days, weeks, or months. Yet any expression of anger may come back to haunt the parent at a neglect or termination hearing."). During the 24 hours to two weeks hours preceding the hearing, the child has resided away from home, in foster care. The parent likely will not have not seen or spoken to the child, and may not have known where the child is. She may have consulted frantically with friends and relatives. She may well have spent that time wracked with guilt, fear, and stress.

<sup>104</sup> See FLA. STAT. § 39.820(1) (West 2012) ("[The term] 'Guardian ad litem' . . . includes the following: a certified guardian ad litem program, a duly certified volunteer, a staff

overburdened with cases<sup>105</sup> and underpaid for their labors.<sup>106</sup> Parents may be entirely unrepresented,<sup>107</sup> if represented, their lawyers are likely to be operating under severe pressures which may diminish the quality of their work.<sup>108</sup> Government social workers, who serve as judges' primary source of information, also are

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attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of the child in a proceeding as provided for by law . . .”).

<sup>105</sup> Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REF. 199, 207 (Fall 2007) (“Dependency court lawyers for children are as overburdened as are the case workers who are responsible for supervising the children’s care on a day-to-day basis.”); Kathleen G. Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW OF SOC. INQUIRY 523, 528 (Summer 2009) (“Representatives for the child . . . typically have high caseloads—100 to 150—and therefore cannot often play an active role in routine decision making.”).

<sup>106</sup> See e-mail from Vicky Masden Arrowood to author (March 15, 2010) (on file with author) (stating in Kentucky, for example, lawyers may bill only \$250.00 to \$500.00 per case); MASS. COMM. FOR PUB. COUNSEL SERV., ASSIGNED COUNSEL MANUAL ch. 5, at 34 (Nov. 2011) (stating in Massachusetts, court-appointed lawyers are paid at the rate of \$50.00 per hour).

<sup>107</sup> See Vivek S. Sankaran, *No Harm, No Foul? Why Harmless Error Analysis Should Not Be Used to Review Wrongful Denials of Counsel to Parents in Child Welfare Cases*, 63 S.C. L. REV. 13, 24-6 (Autumn 2011) (finding at least twelve states do not “offer parents an attorney at public expense whenever the state seeks to remove children from their care . . . [but] because of the critical strategic importance of the preliminary protective hearing, it is essential that parents have meaningful legal representation at [these] hearing[s].”); see also *In re C.M.*, No. 2011-647, 2012 WL 2479619, at \*776 (N.H. June 29, 2012) (holding that “due process does not require that indigent parents have a *per se* right to appointed counsel in abuse and neglect proceedings . . .”).

<sup>108</sup> See Astra Outley, *Representation for Children and Parents in Dependency Proceedings*, at 8 [hereinafter *Representation for Children*] [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster\\_care\\_reform/Representation%5B2%5D.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Representation%5B2%5D.pdf) (“Most attorneys for parents receive either a low hourly rate or a small flat fee per case. Because they are minimally compensated for their time, attorneys are discouraged from carrying out essential preparations, such as meeting, interviewing and counseling clients; conveying basic information about the court system and proceedings to their clients; spending time reviewing their client’s case files; conducting necessary research; preparing witnesses to testify; filing motions; and otherwise preparing for their case.”); COUNCIL FOR COURT EXCELLENCE, THE DISTRICT OF COLUMBIA FAMILY COURT APPOINTED COUNSEL SYSTEM: REPORT AND RECOMMENDATIONS, at 7 (2005), available at [http://www.courtexcellence.org/uploads/publications/WEBSITE\\_CCAN\\_REPORT\\_FINAL\\_2005.pdf](http://www.courtexcellence.org/uploads/publications/WEBSITE_CCAN_REPORT_FINAL_2005.pdf) (finding that since at least 1993, the D.C. Family Court has been aware that “[s]ome lawyers felt their ability to be zealous advocates was chilled, as they believed judges would not appoint them to cases if they represented their clients too vigorously.”). See generally ABA CENTER ON CHILDREN & THE LAW, NATIONAL PROJECT TO IMPROVE REPRESENTATION FOR PARENTS INVOLVED IN THE CHILD WELFARE SYSTEM, <http://www.abanet.org/child/parentrepresentation/project%20description.pdf>.

overburdened,<sup>109</sup> hamstrung by their caseloads from generating comprehensive, accurate information about children for whom they are responsible.

Unsurprisingly, foster care does not work for most children and youth.<sup>110</sup> Thirty percent of foster care alumni experience symptoms of Post Traumatic Stress Disorder in their lifetime.<sup>111</sup> Nearly fourteen percent of youth who emancipate from foster care become homeless within 12 months.<sup>112</sup> Former foster youth tragically outpace other children in rates of early pregnancy, domestic violence, unemployment, and high school dropout rates.<sup>113</sup> By some estimates, within two years of leaving foster care approximately twenty-four percent of emancipated youth will be incarcerated.<sup>114</sup> Perhaps most distressing, children fare worse in foster care than similarly-maltreated children who are simply left at home.<sup>115</sup>

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<sup>109</sup> MICHELE ESTRIN GILMAN, *THE POVERTY DEFENSE* (forthcoming) (manuscript at 39) (“[C]hild welfare workers are often overworked and overwhelmed . . . .”); see also Lowry & Bartosz, *supra* note 105, at 207.

<sup>110</sup> See Theo Liebmann, *What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL’Y* 141, 148 (Fall 2006) (“[P]lacement in foster care itself - even temporarily - poses a risk of harm to children. The standards require no analysis of the specific placement of a child if removed from her parents, what resources that specific placement has to care for the child adequately, what emotional effect a removal will have on the child, or what practical effect removal will have on issues such as a child maintaining ties with her school, community, family, and friends. Across the board, removal standards fail to acknowledge or incorporate into the analysis the poor outcomes for many foster children with respect to education and financial well-being. They fail to account for the very real fact that removal from a parent carries proven risks of mental, emotional, and physical harm, including the development of separation anxiety, depression, and other mental health problems.”).

<sup>111</sup> Peter J. Pecora, et al., *Mental Health Services for Children Placed in Foster Care: An Overview of Current Challenges*, 88(1) *CHILD WELFARE*, 5-26, tbl. 3 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3061347/?tool=pubmed>.

<sup>112</sup> Amy Dworsky & Mark Courtney, *Assessing the Impact of Extending Care Beyond Age 18 on Homelessness: Emerging Findings from the Midwest Study*, *CHAPIN HALL ISSUE BRIEF 4* (Mar. 2010), available at [http://www.chapinhall.org/sites/default/files/publications/Midwest\\_IB2\\_Homelessness.pdf](http://www.chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf).

<sup>113</sup> See generally CASEY FAMILY PROGRAMS, *THE CASEY YOUNG ADULT SURVEY: FINDINGS OVER THREE YEARS* (2008), available at <http://www.casey.org/resources/publications/CaseyYoungAdultSurveyThreeYears.htm>.

<sup>114</sup> See Christine Diedrick Mochel, *Redefining “Child” and Redefining Lives: The Possible Beneficial Impact the Fostering Connections to Success Act and Court Involvement Could have on Older Foster Care Youth*, 40 *CAP. U. L. REV.* 517, 519 (Spring 2012).

<sup>115</sup> Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 *J. OF POL. ECON.* 746, 748 (2008) (“[A]mong children on the margin of placement, children placed in foster care have arrest, conviction, and imprisonment rates as adults that are three times higher than those of children who remained at home.”); See also Doyle, *Child Protection and Child Outcomes*, *supra* note 85, at 1605 (Table 9) (illustrating greater levels of juvenile delinquency and teen motherhood, and worse employment and economic prospects for children placed in foster care, as compared to similarly-maltreated children who were not placed in foster care).

Judges' decisions ought not shoulder all of the blame for the harm children experience in foster care, or for the systematically unsatisfactory outcomes of foster youth across the board. Some children are so traumatized by being separated from their families and communities that they cannot recover. Others experience abuse or neglect at home or in foster care which makes healing impossible. These obstacles, however, only underscore the necessity that judges' decisions squeeze every ounce of possibility from the dire circumstances. To date, clearly, the many tough decisions made by judges about important issues in the lives of foster children are not working out well enough.<sup>116</sup>

In the next Part, we will explore the environment in which judges make incorrect removal decisions and in which they are confronted with the difficult, important decisions described above.

### *C. The Decision-Making Environment—A Breeding Ground For Mental Shortcuts*

We have seen that judges in dependency cases are faced with important decisions with stakes so high that they literally mean life-and-death to children, and which for parents and guardians are freighted with perhaps incomparable emotional significance. Not only are the decisions important, but they are hard to make. Dependency judges seek to predict the future—will a child be safe? Will she benefit—whatever that means—from additional visitation with a parent on the basis of past events?<sup>117</sup> Judges in these cases unavoidably and inextricably are tangled in the famously ambiguous, notoriously unhelpful, legal standard “the best interests of the child.”<sup>118</sup>

These difficult, high-stakes choices among shades of gray are rendered in the dim light of patently suboptimal conditions. To begin, as noted above, the decision-making process is hamstrung by a meager factual record.

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<sup>116</sup> See Liebman, *supra* note 110, at 141-143 (“The 520,000 children in foster care often live in unsafe and unsanitary conditions, with poorly trained foster parents and without crucial mental health, medical, and education services. Even worse, children in foster care are abused and neglected at a greater rate than other children, and have an increased risk of delinquency and other behavioral problems. The longer-term statistics are equally bleak. In a recent broad survey, foster alumni had disproportionately more mental health disorders, significantly lower employment rates, less health insurance coverage, and a higher rate of homelessness when compared with the general population.”) (citations omitted).

<sup>117</sup> Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions In the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 251 (1975) (“Applying the best-interests standard requires an individualized prediction: with whom will this child be better off in the years to come? Proof of what happened in the past is relevant only insofar as it enables the court to decide what is likely to happen in the future.”).

<sup>118</sup> See *id.* at 229 (“[D]etermination of what is ‘best’ or ‘least detrimental’ for a particular child is usually indeterminate and speculative . . . . [O]ur society today lacks any clear-cut consensus about the values to be used in determining what is ‘best’ or ‘least detrimental.’”); see also Pamela Laufer-Ukeles, *Introduction: Custody Through the Eyes of the Child*, 36 U. DAYTON L. REV. 299, 300 (Spring 2011) (“[D]ue to the malleability and ambiguity of the standard, determining the best-interests has proved to be dependent on factors other than a child’s needs: biases of judges; preconceptions regarding socio-economic class, gender and race . . . . While the best interests standard is intended to achieve that which is best for the child concerned, it is also a broad and ambiguous concept subject to manipulation and an unlimited number of interpretations.”).

But are judges making the most of the facts they are given? Do they seek and find available opportunities to improve the factual record which must form the basis of their decisions? Or do they jump to conclusions on the basis of “mental shortcuts”?

It appears that salient factors in the structure and operation of family court inexorably drive judges to employ heuristics inappropriate for the context. The resultant cognitive biases distort judges’ ability to sort through available information to distinguish wheat from chaff, fact from assumption, probative from irrelevant. In this section, I explore the environmental factors which appear likely to cause dependency judges to employ heuristics in decision-making. In the section that follows, I argue that these mental shortcuts lead to harmful cognitive biases.

### 1. Ambiguous Role of Family Court Judges

Perhaps most fundamental to an understanding of how decisions are made in dependency cases is to appreciate that making decisions is an unusually insignificant component of the responsibility of judges in these cases. Family Court judges long have been tasked with responsibilities viewed as special to them and different from other judges.<sup>119</sup> Family and juvenile courts have always been “rehabilitative,”<sup>120</sup> and the Court’s *parens patriae* role has inspired a vision of judges in these courts as people who “nurture,” “provide guidance,” and even serve as role models for the youth and families who appear before them.<sup>121</sup> The “problem-solving court”<sup>122</sup> movement, which has swept family law in the past 15-20 years, has accelerated the realization of this vision. As of 2002, thirty-four states had “unified family courts,”<sup>123</sup> with authority over all family law matters involving a family, and

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<sup>119</sup> See Jane M. Spinak, *A Conversation About Problem Solving Courts: Take 2*, 10 U. MD. L. J. RACE, GENDER, & CLASS 113, 124-25 (2010) (“The role of the judge as a leader of a therapeutic team reinforces the shift of services from the community to the court, as well as the re-characterization of those services from social responsibilities to individualized needs. The team leader role also fundamentally changes the nature of the judge’s job.”); 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 LAW & PSYCHOL. REV. 55, 65 (2010) (pointing out that “[u]nlike the purpose of criminal courts, [family courts] aim is not to punish or penalize, but rather to *help* families and children.”).

<sup>120</sup> Miriam Van Waters, *The Juvenile Court from the Child’s Viewpoint. A Glimpse into the Future*, in THE CHILD, THE CLINIC AND THE COURT 236 (New Republic, Inc. 1925) (“[N]o juvenile court system can do its work well unless the judge assumes leadership and responsibility for the entire situation: court, probation work, detention and treatment. The judge must interpret the work of the court to the community.”).

<sup>121</sup> See Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 382 (Fall 2003) (“[The unified family court is] a safe haven, a space to protect, to rehabilitate, and to heal children, a site of nurturance and guidance, understanding and compassion . . . [with the] Court functioning in the best interest of children and youth, acting in any circumstance . . . exactly as a kind and just parent would act.”).

<sup>122</sup> See Spinak, *A Conversation About Problem Solving Courts*, *supra* note 119, at 113-14 (discussing the arrival of the “problem solving court” movement in the mid-nineties.”).

<sup>123</sup> Barbara Babb, *What Works and What Does Not*, 29 FORDHAM URB. L.J. 1929, 1945 (2002) (explaining that the number of states with unified family courts has increased).

expressly adherent to precepts of the therapeutic justice movement, which “evaluates the legal system by applying mental health criteria.”<sup>124</sup>

What this means is that many judges in child dependency cases serve as “confessor, task master, cheerleader, and mentor.”<sup>125</sup> Judges function as “managers,”<sup>126</sup> “administrators,”<sup>127</sup> coaches, and problem-solvers,<sup>128</sup> rather than arbiters. As Professor Holland writes, “[j]udges in these courts do not spend much time performing traditional judicial tasks, such as finding facts and interpreting law.”<sup>129</sup> Family Court judges encourage and scold parents in an effort to get the parents to address parenting challenges and obstacles. They encourage and scold social workers in an effort to get the workers to fulfill their responsibilities, such as arranging for parent-child visits, referring the child to a therapist, and providing foster parents with necessary support. Judge Cindy Lederman says of her role as judge in a problem-solving court, “I’m not sitting back and watching the parties and making a ruling. I’m making comments. I’m encouraging. I’m making judgment calls. I’m getting very involved with families. I’m making clinical [therapeutic] decisions to some extent, with the advice of experts.”<sup>130</sup> Judges are provided with training, so they can become experts in subjects like the “dynamics of domestic violence,” the effect of substance abuse, and attachment.<sup>131</sup>

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<sup>124</sup> Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 531 (Oct. 2006) (“In these courts, judges do not sit primarily as fact finders or decision makers. Instead, they oversee a multidisciplinary group of service providers who work with the adults and children whose issues are before the court.”).

<sup>125</sup> Jeffrey Tauber, CAL. CTR. FOR JUD. EDUC. & RES., *Drug Courts: A Judicial Manual* 5-6 (1994).

<sup>126</sup> See Barbara A. Babb, *Fashioning An Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 497-98 (1998).

<sup>127</sup> See, e.g., Lisa Lightman & Francine Byrne, *Addressing the Co-occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts*, 6 J. CTR. FOR FAM., CHILD. & CTS. 53, 57 (2005) (“A problem-solving approach . . . posits several new roles for judges: *active case manager*, creative administrator, and community leader.”) (emphasis added) (internal quotation marks omitted).

<sup>128</sup> See Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL’Y, 11, 16 (2009) (“Most [family court] reform efforts have expanded the court’s jurisdiction and supervisory authority in recent years, heralding the family court judge as the leader of a team of professionals who are solving the problems of families that come to court . . . . The acceleration of specialized problem-solving courts within the family court . . . similarly focuses on the judge’s leadership role to create and monitor solutions to families’ problems.”).

<sup>129</sup> Paul Holland, *Lawyering and Learning In Problem-Solving Courts*, 34 WASH. U. J.L. & POL’Y 185, 194 (2010).

<sup>130</sup> Greg Berman, *What Is A Traditional Judge, Anyway?*, 84 JUDICATURE 82 (Sept.-Oct. 2000).

<sup>131</sup> See, e.g., District of Columbia Family Court Act of 2001, Pub. L. No. 107-114, 115 Stat. 2109 (2001) (mandating multi-disciplinary training for all Family Court judges, including training relating to domestic violence and child development); see also Omnibus

The atmospherics in Family Court prize collaboration and cooperation.<sup>132</sup> Mediation is mandatory in many jurisdictions,<sup>133</sup> and fundamental components of the adversarial system intentionally have been jettisoned.<sup>134</sup> Oddly, then, the judge's role as decision-maker is ambiguous—even something from which judges themselves recoil.<sup>135</sup>

Family Court judges spend much of their time and emotional energy on problem-solving, imagining solutions to unwind knotty tangles, and other tasks which are not decision-making in its clearest, purest, most-obvious form. The incessant messaging to which Family Court judges are subjected (“empower families,” “create consensus among the participants in the case,” etc.), and their actual practices, may cause them to experience their roles as blurred, and perhaps to bring to the task of decision-making—when called upon to do it—a distracting ambivalence.

## 2. High Caseloads and Time Pressure

In addition, Family Court is marked by high caseloads, which impose time constraints on all system actors, including judges.<sup>136</sup> For example, a 2004 survey indicates that full-time dependency judges in California are responsible for an

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Budget Act of 1993 sec. 13212(b)(5)(C) (1993) (providing funding to state courts for the implementation of judicial education and training programs).

<sup>132</sup> Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 211 (Apr. 2004) (“[C]hild protection matters are complex problems and that solutions require collaboration [and the cooperative] participation of many other professionals.”); Holland, *supra* note 129, at 186 (finding in dependency court, as in problem-solving criminal justice courts, “erstwhile adversaries are expected to function as members of a single team with a shared mission.”).

<sup>133</sup> See Leonard Edwards, *Child Protection Mediation: A 25 Year Perspective*, 47 FAM. CT. REV. 69, 74 (Jan. 2009) (citing pilot program requiring mandatory mediation in child protection cases. Other jurisdictions, including California and Illinois, have instituted mandatory mediation programs.); see also *The Consistent Use of Child Protection Mediation: A Key to Timely Permanency in Neglect, Abuse and Permanent Custody Cases*, THE JUDGES' PAGE NEWSLETTER (Court Appointed Special Advocates for Children), Oct. 2008, at 19, available at [http://www.casaforchildren.org/atf/cf/{9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B}/0810-Alternative\\_Dispute\\_Resolution\\_Programs-0019.pdf](http://www.casaforchildren.org/atf/cf/{9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B}/0810-Alternative_Dispute_Resolution_Programs-0019.pdf).

<sup>134</sup> See Breger, *supra* note 119, at 71 (reporting that lawyers representing the state in dependency proceedings regularly caution opposing counsel that dependency litigation is not an adversarial proceeding); see also Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 892 (Spring 2010) (“Both the methods and goals of legal intervention for families in conflict have changed. The roles of judges and lawyers are fundamentally different and less important in this new [family court system] where dispute resolution has largely moved out of the courtroom to [non-legal and non-judicial personnel].”).

<sup>135</sup> See, e.g., Holland, *supra* note 129, at 195 (describing their activities, judges emphasize “projecting a message rather than reaching a decision.”).

<sup>136</sup> Lowry & Bartosz, *supra* note 105, at 209 (“Family court judges carry enormous case dockets of their own and must do so with limited administrative support.”).

average of 1,100 cases annually.<sup>137</sup> A single dependency judge in San Joaquin County California ruled on as many as 135 cases in a single day.<sup>138</sup> Thus, judges can barely keep up with the demands to appear in court and preside over matters on a daily calendar and often devote as little as two minutes to each case or decision.<sup>139</sup> Little time is available even to reread a case file prior to a court hearing, simply to acquaint oneself with the names and identities of the people and current issues involved in the case,<sup>140</sup> and even less to calmly and soberly consider the issues to be decided and the options available.

Unsurprisingly, Wells, Petty, and Brock found that decision-makers under time pressure employ a variety of effort-reducing, time-saving heuristics.<sup>141</sup> Guthrie, Rachlinski, and Wistrich agree that “judges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.”<sup>142</sup>

### 3. Poverty, Race, and the Master Narrative of Child Welfare

As reflected in research by John Johnson,<sup>143</sup> Barbara Nelson,<sup>144</sup> Joel Best,<sup>145</sup> and Aubrun and Grady,<sup>146</sup> the commonly-held understanding of parents involved in the

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<sup>137</sup> Admin. Office of the Courts Ctr. for Families, Children & the Courts, *Research Update: Background of Judicial Officers in Juvenile Dependency*, RES. UPDATE at 3 (Dec. 2005), <http://www.courts.ca.gov/documents/JOResUpd.pdf>.

<sup>138</sup> Karen de Sa, *Broken Families, Broken Courts: A Mercury News Investigation, Part I: How Rushed Justice Fails Kids*, MERCURY NEWS, Feb. 8, 2008, [http://www.mercurynews.com/ci\\_8210271](http://www.mercurynews.com/ci_8210271).

<sup>139</sup> Press Release, Children’s Advocacy Institute, *Federal Class Action Lawsuit Against Administrative Office of the Courts Challenges Crushing Caseloads of Sacramento Dependency Court Lawyers: Suit Alleges California’s Courts Are Violating Their Own Caseload Standards For Those Who Represent Abused And Neglected Children*, (Jul. 17, 2009), available at [http://www.cachildlaw.org/Misc/Caseload\\_Press\\_Release.pdf](http://www.cachildlaw.org/Misc/Caseload_Press_Release.pdf).

<sup>140</sup> See de Sa, *supra* note 138 (“high caseloads mean judges regularly rule without time to probe for basic information.”).

<sup>141</sup> Richard E. Petty, Gary L. Wells & Timothy C. Brock, *Distraction Can Enhance or Reduce Yielding to Propaganda: Thought Disruption Versus Effort Justification*, 34 J. OF PERSONALITY & SOC. PSYCHOL., 874, 874 (1976).

<sup>142</sup> *Inside The Judicial Mind*, *supra* note 11, at 783. Guthrie, Rachlinski, and Wistrich, who tested judges’ decision-making processes in a wide variety of experiments, note that “many of the judges we have studied candidly admit [that] time pressures present an enormous challenge, often inducing less-than-optimal decision making.” *Blinking on the Bench*, *supra* note 2, at 35.

<sup>143</sup> See John Johnson, *Horror Stories and the Construction of Child Abuse*, in *IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS* 5, 17 (Joel Best ed., 2d ed. 1989).

<sup>144</sup> See BARBARA J. NELSON, *MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS* 73 (1984).

<sup>145</sup> See JOEL BEST, *THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD VICTIMS* 4-6 (1990).

<sup>146</sup> See AXEL AUBRUN & JOSEPH GRADY, *HOW THE NEWS FRAMES CHILD MALTREATMENT: UNINTENDED CONSEQUENCES* 3 (2003).

child welfare system is of deviant, pathological animals who inflict savage brutality on their children.<sup>147</sup> According to Johnson, 70-90% of stories about child welfare are “horror stories.”<sup>148</sup> Other research indicates that 90% of stories which appear in the media about children and youth are about violence done by or against children.<sup>149</sup> Almost every story in the news media describes an individual incident, and is devoid of informative, contextualizing detail.<sup>150</sup> Because of child welfare confidentiality laws present in most states, the only stories which lawfully may be told are stories of criminal acts.<sup>151</sup> As a result, the only stories relating to children in foster care that may be told and heard are stories of brutal incidents which result in criminal charges.<sup>152</sup>

Notwithstanding pervasive assumptions about child welfare, fewer than 25% of allegations that children are endangered are substantiated. More than 70% of children in foster care are thought to have been neglected, not abused. Virtually every child in foster care is from a family with low- or no income.<sup>153</sup>

In addition, families of color are ensnared in dependency proceedings at rates that far outstrip their representation in the general population. The alarm sounded loudly by Dorothy Roberts in the classic, *Shattered Bonds: The Color of Child Welfare*,<sup>154</sup> both data and institutional analysis studies demonstrate that children and families of color experience every stage of the child welfare system more negatively than do white children and families.<sup>155</sup>

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<sup>147</sup> According to Nelson and Best, the narrative is rooted in the purported “discovery” by Dr. Henry Kempe of “child abuse syndrome.” Although Kempe’s 1962 article reported the results of testing of a small sample of young children, blaring headlines subsequently distorted Kempe’s findings. For a complete historical and sociological treatment of the origin and evolution of the narrative of child welfare, see NELSON, *supra* note 144; see also BEST, *supra* note 145.

<sup>148</sup> Johnson, *supra* note 143, at 20.

<sup>149</sup> Dale Kunkel, et al., *Coverage in Context: How Thoroughly the News Media Report Five Key Children’s Issues*, (2002).

<sup>150</sup> See *id.* at 7 (5 percent of stories about child abuse and neglect include contextualizing information; 17 percent of child abuse and neglect stories include information about policy issues).

<sup>151</sup> See Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race, and Crime in the News*, BUILDING BLOCKS FOR YOUTH, at 22 (Apr. 2001) (youth are rarely covered by the news media, unless it is to report on violent acts committed by or against youth), <http://www.cclp.org/documents/BBY/offbalance.pdf>.

<sup>152</sup> See generally Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 3 (2010) [hereinafter *Untold Stories*].

<sup>153</sup> Mnookin, *supra* note 117, at 242 (“most affected families are very poor”).

<sup>154</sup> DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

<sup>155</sup> See Robert Hill, *Synthesis of Research on Disproportionality in Child Welfare: An Update*, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM 15 (Oct. 2006) (the disproportionality rates for out of home placements, derived by dividing the proportion of a racial group in foster care by the groups’ proportion in the 2000 census, indicate that blacks (2.43) and Native Americans (2.16) are represented in the foster care population at twice their representation in the 2000 census), <http://www.cssp.org/reform/child->

Thus, poverty, race, and the overarching narrative of child welfare are salient aspects of the environment in which dependency judges make decisions about children and families.

#### 4. Need for Cognition

Experience tells us that some people like to puzzle through problems, enjoying the challenge of collecting as much information as possible, generating a range of alternative possible solutions, assessing those options, and finally reaching a conclusion after painstaking analysis. Others derive less personal satisfaction from those activities, or actively dislike the experience. Psychology research describes the former as having a “high need for cognition,” and the latter a “low need for cognition.”<sup>156</sup> In plain English, some of us thrive on confronting complicated questions with elusive answers, whereas others prefer simpler activities, or non-intellectual ones.

Cacioppo, Petty, and Morris found that decision-makers with a high need for cognition are likely to take as much time as possible to resolve a thorny problem.<sup>157</sup> They will seek out as much information as can be generated that is relevant to addressing the problem presented, and will reach a decision only after considering evidence and arguments which illuminate all sides.<sup>158</sup> Decision-makers with a low need for cognition, on the other hand, will try to get the decision-making process over as quickly as possible.<sup>159</sup> Rather than combing through information and considering multiple points of view, they will seek a decision-making shortcut.<sup>160</sup>

At first blush, dependency judges may be expected to have a high need for cognition. Judges arguably sit at the zenith of a profession which trains its adherents to consider and evaluate arguments. Judging may be even more analytical than lawyering, because judges are expected to seek the correct answer, rather than following a client’s instructions. Thus, judging may be a profession which can be expected to attract people interested in decisional accuracy and who enjoy activities which engage significant brain functioning, and can be expected to be a profession which further habituates those people to deep problem-solving.

On the other hand, perhaps an even more important influence on judges’ need for cognition is the lived, day-to-day experience of state court judges. Much of state-level trial judges’ time is spent on simple, run-of-the-mill, routine tasks. Many judges preside over the same kind of case, all day and every day, in an environment

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welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf. See generally CENTER FOR SOCIAL SERVICES RESEARCH, UC BERKELEY, *Group Disproportionality & Disparity (vs. White) by State: Entering and in Care*, (2004), [http://www.f2f.ca.gov/res/pdf/GAO\\_Entry\\_and\\_In\\_Care\\_final.pdf](http://www.f2f.ca.gov/res/pdf/GAO_Entry_and_In_Care_final.pdf).

<sup>156</sup> John T. Cacioppo, Richard E. Petty & Katherine J. Morris, *Effects of Need for Cognition on Message Evaluation, Recall, and Persuasion*, 45 J. OF PERSONALITY & SOC. PSYCHOL. 805, 805 (1983).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 815.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 817.

described by Professor Oldfather as “bureaucratized justice.”<sup>161</sup> Many cases are, or have devolved via courthouse culture, to simple, formulaic affairs. Many judges spend their days filling in the same blank spaces on the same form orders. Many judges in state court, where caseload pressures are extreme,<sup>162</sup> and the need for expeditiousness inescapable, have become functionaries whose role is far more mechanistic than intellectual.

Thus, the experience of judging may actually diminish judges’ need for cognition. Because judges on all calendars are under significant time pressure to reach an answer quickly, they may become habituated to getting things done with little muss and fuss.<sup>163</sup> Moreover, judges are under reputational pressures to get the answers right, and thus may be inclined to perceive problems as simpler than they actually are. And theory aside, Guthrie, Rachlinski, and Wistrich present powerful empirical evidence that judges “rely heavily on their intuitive faculties.”<sup>164</sup>

It is unclear, then, whether dependency judges have a high need for cognition or a low one. The academic and intellectual achievements which tend to decorate judges’ resumes suggest high cognitive capacity and interest. On the other hand, the actual pressures of judges’ jobs may rehabilitate them to recoil from problems perceived as complex and to prefer simple problems which require little thought. As a result, judges may seek decision-making strategies, such as heuristics, which require little cognition.

### 5. Self-Regulatory Focus

According to regulatory-focus theory,<sup>165</sup> humans engage in both “approach-oriented strategies” and “avoidance-oriented strategies.”<sup>166</sup> Approach-oriented strategies are “characterized by an eager form of exploration that encourages the seizing of opportunities. In contrast . . . avoidance-oriented strategies . . . are characterized by a vigilant form of exploration that stresses caution against mistakes.”<sup>167</sup>

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<sup>161</sup> Oldfather, *supra* note 11, at 129-31 (“changes in the context in which judging takes place – and indeed in the nature of judging itself – have affected judges’ perception and performance of their role. Indeed, some have suggested that what has resulted is bureaucratized justice . . . [t]his, in turn, results in a reduction in the judge[s]’ sense of responsibility, for [their decisions], and in a consequent reduction in [their] overall quality.”).

<sup>162</sup> *See de Sa, supra* note 138.

<sup>163</sup> “Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberate decisions because the former are speedier and easier. Furthermore, being cognitively ‘busy’ induces judges to rely on intuitive judgments.” *Blinking on the Bench, supra* note 2 at 35.

<sup>164</sup> *See supra* notes 46-50 and accompanying text (citing *Blinking on the Bench, supra* note 2 at 27) (describing results of tests of decision-making processes administered to judges, demonstrating widespread use of heuristic thinking and resultant decision-making errors).

<sup>165</sup> E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319, 319 (1987).

<sup>166</sup> *Id.*

<sup>167</sup> Ellen Crowe, & E. Tory Higgins, *Regulatory Focus and Strategic Inclinations: Promotion and Prevention in Decision Making*, 69 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 117, 130 (1997).

No study has assessed the typical self-regulatory focus of dependency judges. The conditions under which dependency judges operate, however, seem to encourage avoidance-orientation. Perhaps above all other factors, the one most present in the minds of judges and other system actors in child welfare is danger, or its potentiality. Federal and state laws expressly name “child safety” as the overriding factor with which judges are to be concerned.<sup>168</sup> I have written elsewhere that the “master narrative of child welfare” is one depicting brutal, savage, monstrous parents” who inflict brutal injuries and death on their children.<sup>169</sup> Although the narrative is demonstrably false, even system actors, whose actual experiences could disabuse them of these inaccurate notions, remain deeply in their sway.<sup>170</sup>

Thus, many judges’ primary focus is likely to be ensuring safety. This suggests that judges are likely to seek to avoid error, rather than to seek promotion of health and welfare. As Professor Chill says, “[...]judges, like social workers, understand that a decision *not* to remove a child, or to return a child home who has been unilaterally seized by CPS, is much more likely to come back to haunt them than is a decision to uphold the status quo. Judges thus may order or uphold an emergency removal even on dubious evidence because they do not want to ‘risk making a mistake . . . .’”<sup>171</sup> It appears likely, then, that the possibility of catastrophic error is yet another factor present in Family Court which causes judges to short-cut the decision-making process rather than to consider all available evidence and arguments, and to soberly determine the most appropriate outcome for a child.

## 6. Power

According to Andrew Menzel, power encourages action and accomplishment.<sup>172</sup> Power also insulates the powerful from consequences of poor or unsuccessful choices. Thus, Menzel finds that decision-makers imbued with power tend to reach decisions quickly and abruptly, without taking time to assess available information or deliberate carefully.<sup>173</sup> Menzel observed this effect at even greater levels in decisionmakers with a significant desire for “interpersonal dominance.”<sup>174</sup>

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<sup>168</sup> See, e.g., 42 U.S.C. § 629(2) (2006) (The purpose of [ASFA] . . . [is t]o assure *children’s safety* within the home.”) (emphasis added); see also FLA. STAT. § 39.402(7) (2009) (mandating judicial removal if a “*child’s safety* and well-being are in danger”) (emphasis added).

<sup>169</sup> *Untold Stories*, supra note 152; see also Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. \_\_\_ (forthcoming 2013).

<sup>170</sup> Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 461 (2003) (“although judges are supposed to operate as a check on CPS actions, they exhibit the same defensive outlook as many CPS caseworkers . . .”) (internal citation omitted).

<sup>171</sup> *Id.*

<sup>172</sup> Andrew J. Menzel, *Power, Persuasion, and Heuristic Processing*, (June 24, 2010) (unpublished M.S. thesis, The Florida State University) (on file with author).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Like other judges, those in dependency court are empowered to issue directives which have the force of law. Dependency judges order compliance by a wide range of litigants with a wide range of orders relating to a wide range of subjects perceived as important, such as children's custody, health, safety, and well-being.

We can predict, then, that dependency judges, charged with making difficult, high-stakes decisions, are likely to employ a variety of heuristics which short-cut systematic, deliberate weighing of available evidence. In the next section, I argue that use of a heuristic decision-making approach in dependency cases is ill-suited for the context. Rather than improving accuracy, the inevitable use of mental shortcuts in dependency cases leads to cognitive biases, which distort judges' perceptions and cause them to jump too quickly to conclusions.

#### *D. Cognitive Biases*

We have seen that conditions in dependency cases encourage judges to rely on non-systematic, "fast-and-frugal" heuristic methods of making decisions. When judges hurry through decisions in dependency cases, then, what do they think about? If judges are not influenced by all of the available evidence, what is it that directs them toward the end result of a decision?

##### 1. Primacy Effect

Judges in family court likely are susceptible to a cognitive bias described as the "primacy effect."<sup>175</sup> In short, this bias recognizes that what we hear first is what we remember and what we believe. More technically, the primacy effect, sometimes termed "belief perseverance,"<sup>176</sup> is described by Philip Tetlock as "the tendency to maintain existing beliefs in the face of evidence that ought to weaken or even totally reverse those beliefs."<sup>177</sup>

The primacy effect may be a significant factor in Family Court shelter care hearings. Family court judges often first learn of a family and the allegations of abuse or neglect against the parent or caregiver by reviewing in chambers paperwork submitted by the child welfare agency. The documents describe the agency's investigative findings and set forth, in more or less conclusory fashion, the agency's judgment that the child is in danger. Often, the documents refer to past allegations of abuse or neglect, whether proven or unproven. In general, the documents include a substantial amount of hearsay information, reflecting what the investigative social worker was told by various sources during the course of her investigation.

The judge's next exposure to the case occurs in the courtroom, where the government agency presents its allegations in argument and by presenting the investigating caseworker as a witness. Because the government is charged with the

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<sup>175</sup> *Perseverance of First Impressions*, *supra* note 54 at 286.

<sup>176</sup> RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

<sup>177</sup> *Perseverance of First Impression*, *supra* note 54; *see also*, Arie W. Kruglanski & Tallie Freund, *The Freezing and Unfreezing Of Lay-Inferences: Effects On Impressional Primacy, Ethnic Stereotyping, and Numerical Anchoring*, 19 J. OF EXPERIMENTAL SOC. PSYCHOL., 448, 465 (1983) ("An individual is said to persevere with a belief when (s)he continues to subscribe to it despite discrediting evidence concerning the belief in question.").

burden of proving that the child can be protected only in foster care,<sup>178</sup> the government presents its case first. The parent, who may be unrepresented,<sup>179</sup> or who may have met with her lawyer for as little as one hour prior to the hearing,<sup>180</sup> is heard in defense against the potent allegations with which the judge already has been imbued. The primacy effect suggests that the information provided by the government via paperwork and in the courtroom may generate in the judge beliefs about the family, child, and correct outcome of the foster care placement request which quickly become deeply embedded. By the time the parents or their counsel are heard from, the die are cast and the judge's decision to separate the child from the family all-but-made.

The primacy effect also may impact decision-making in later hearings. For those hearings, caseworkers are required to submit a report prior to the hearing, describing the child's condition and noteworthy events since the prior hearing.<sup>181</sup> The report ordinarily is due to the court and litigants a week or more prior to the hearing itself, but in practice often is distributed in the moments prior to the hearing or during the hearing itself. In either event, the information in the report is the first information provided to the judge for that hearing. The primacy effect indicates that the information in the reports may cause judges to quickly form impressions, seek cognitive closure, and give insufficient regard to information offered subsequently. Thus, the outcomes of the many varied decisions before the judge may be overly influenced by social workers' reports.

Fatigue and the significant time pressures affecting judges in dependency court may make this environment especially fertile territory for the distortions of the primacy effect. Research has shown that both of these factors cause decision-makers to seek "cognitive closure"<sup>182</sup> and "seize upon initial cues and freeze on judgments they imply, according insufficient weight to pertinent subsequent information."<sup>183</sup> Thus, Kruglanski and Freund showed that the primacy effect strengthens when, as in

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<sup>178</sup> See, e.g., D.C. CODE § 16-2310(b) (2009) ("A child shall not be placed in shelter care prior to a factfinding hearing or a dispositional hearing unless it appears from available information that shelter care is required"); see also D.C. SUPER. CT. FAM. DIV. R. N. 13(a) ("When the Corporation Counsel moves the Court to place a child in shelter care, the government shall have the burden of showing that shelter care is required . . .").

<sup>179</sup> See *No Harm, No Foul?*, *supra* note 107.

<sup>180</sup> *Untold Stories*, *supra* note 152 at 47-48 ("A lawyer is appointed for the parent but the lawyer is not provided the name or contact information of the parent until the morning of the hearing. For her part, the parent is advised by a caseworker to arrive at the courthouse one hour prior to the scheduled initial hearing. That single hour will be the only time the parent meets with her lawyer prior to the initial hearing.").

<sup>181</sup> See, e.g., NEV. REV. STAT. § 432B.540(1)(a) ("If the court finds that the allegations of the petition are true, it shall order that a report be made in writing by an agency which provides child welfare services, concerning . . . the conditions in the child's place of residence, the child's record in school, the mental, physical and social background of the family of the child, its financial situation and other matters relevant to the case.").

<sup>182</sup> Donna M. Webster, Linda Richter & Arie W. Kruglanski, *On Leaping to Conclusions When Feeling Tired: Mental Fatigue Effects on Impressional Primacy*, 32 J. OF EXPERIMENTAL SOC. PSYCHOL. 181, 182 (1996).

<sup>183</sup> *Id.*

dependency court, a decision-maker is under time pressure.<sup>184</sup> Richter and Kruglanski found that “mental fatigue” causes a decision-maker to seek cognitive closure, amplifying the primacy effect.<sup>185</sup>

Researchers have identified a similar phenomenon in the realm of criminal sentencing.<sup>186</sup> In a 2001 study, Englich and Mussweiler found that “judges are highly influenced by the prosecutor’s demand, which is the first sentencing recommendation that is presented during the court proceedings.”<sup>187</sup> To isolate the effect of the timing of the recommendation, the researchers administered a subsequent experiment. In the second experiment, they informed subjects that the recommendation was being offered by a computer science student, without legal training or knowledge. Nonetheless, “even though the prosecutor’s sentencing recommendation clearly did not represent any judicial expertise, sentencing decisions were influenced by it.”<sup>188</sup> In a final iteration of the experiment, the researchers administered the protocol to experienced trial judges. Notwithstanding their expertise, the subjects too were influenced by the prosecutor’s statements. Thus, the initial statement of a sentencing recommendation appears to have significant influence, “even if the . . . recommendation is proposed by a non-legal expert and the judge is highly experienced.”

It is worth noting that Englich, et al., attribute the influence of prosecutor’s statements to an “anchoring” effect, rather than to the primacy effect. With availability and representativeness, anchoring is the third major heuristic articulated by Tversky and Kahneman. The term refers to the influence on a decision, as in an estimate or negotiation, of the first numerical value proposed as the optimal outcome. Anchoring, then, has in common with the primacy effect a perseverating effect. In its classic usages, however, anchoring relates more specifically to numbers, whereas primacy affects decisions about ideas, concepts, and non-numerical facts.

Regardless of the particular heuristic and biases with which they are labeled, however, Englich, et al.’s findings may have substantial relevance in the context of dependency case emergency custody placement decisions. First, they illustrate, in a justice context, the weighty influence of the first recommendation made to the decision-maker. Moreover, we may conceive of a judge’s decision at this stage of a dependency case as a binary one; the judge has only two options—the child either may safely reside at home or she may not—and must choose from those. Thus,

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<sup>184</sup> Kruglanski & Freund, *supra* note 177 at 448.

<sup>185</sup> Judges experience mental fatigue from high caseloads and the emotional content of the decisions they are called to make. *See, e.g.*, S. REP. NO. 107-108, at 8 (2001), citing the “emotionally taxing work of the family bench” and “concerns [that judges will] ‘burn-out,’” (citations omitted); *see also* S. REP. NO. 112-178, at 6 (2012), (citing 2010 letter from D.C. Superior Court Chief Judge Lee Satterfield to the Committee, in which “Chief Judge Satterfield noted that the Family Court handles emotionally challenging issues and cases that can place stress on judges assigned there.”).

<sup>186</sup> Birte Englich, Thomas Mussweiler & Fritz Strack, *The Last Word In Court—A Hidden Disadvantage for the Defense*, 29 L. & HUM. BEHAV., 705 (2005).

<sup>187</sup> Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. OF APPLIED SOC. PSYCHOL. 1535 (2001).

<sup>188</sup> Englich, Mussweiler & Strack, *supra* note 186 at 707.

when the government's social worker recommends that the child reside in foster care and the state's attorney requests that the judge enter an order accordingly, the attorney seeks an affirmative response: "yes." The judge's only other option is, of course, "no," rejecting the recommendation and request. By having the opportunity to offer the recommendation and request first, the state may, in effect, be placing an anchoring marker like that of a party to a negotiation or, as in English's studies, a prosecutor seeking a sentencing outcome.

In any event, whether described as a "primacy" effect or an "anchoring" effect, abundant evidence demonstrates that decision-makers are heavily influenced by the first input they receive. In dependency cases, the prosecutor, seeking placement of the child in foster care, always speaks first. Thus, we can expect that judges will form impressions and opinions favoring the government's position promptly, and then seek "cognitive closure." At that juncture, they will be unable to fully assimilate, or assign appropriate weight, to subsequently-acquired information, such as that provided by the parents or their lawyers.

## 2. Fundamental Attribution Error and Over-Reliance on Affect

Dependency judges also seem likely to be prone to "dispositional bias in attribution," also named the "over-attribution" and the "fundamental attribution error."<sup>189</sup> This bias reflects the "pervasive tendency on the part of observers to overestimate personality or dispositional [causes] of behavior and to underestimate the influence of situational constraints on behavior."<sup>190</sup> In a prototypical experimental example of this phenomenon, subjects review an essay advocating a strong position about a controversial topic; on the basis of the essay alone, subjects assess the writer's personality and motives. Time and again, subjects attribute to the essay writer personal attitudes, motives, traits, and biases, even when told that the essay writer was assigned to advocate for the position in the essay.<sup>191</sup>

The confluence of race, poverty, and the narrative of child welfare suggests that dependency decisions may be affected by the fundamental attribution error. Judges faced with a decision about placing a child in foster care, or any of the other myriad decisions relating to children's welfare, inevitably are steeped in the narrative of child welfare that describes as "bestly" and "monstrous" the parents of children

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<sup>189</sup> Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 227 (1985) [hereinafter *Social Check*].

<sup>190</sup> *Id.*; see also Jones, Riggs & Quattrone, *supra* note 53, cite Lee Ross' seminal work in this area as having demonstrated the "ubiquity of overattributing personal dispositions to account for behavior." Jones, Riggs & Quattrone, *supra* note 53 at 1230 (emphasis added); see also *id.* (discussing "the robust tendency to observer bias"); see also Gary L. Wells, Richard E. Petty, Stephen G. Harkins, Dorothy Kagehiro & John H. Harvey, *Anticipated Discussion of Interpretation Eliminates Actor-Observer Differences in the Attribution of Causality*, 40 SOCIOMETRY 247, 251 (1977) (noting that observers tend to ascribe greater causal effect to dispositional factors when there are negative outcomes than do actors, whereas actors tend to ascribe greater personal credit in circumstances of positive outcomes than do observers).

<sup>191</sup> See, e.g., *Social Check*, *supra* note 189 ("Observers . . . infer a significant degree of correspondence between the essay writer's stated position and true attitudes even when it is clearly stated that the writer had been compelled to defend the position taken in the essay.").

involved in foster care.<sup>192</sup> The narrative causes judges to assume that parents are likely to have engaged in acts of great viciousness and that those acts resulted from the parents' personal, deep-seated, pathological deviance, rather than situational circumstances.

Many allegations of neglect are not rooted in the individual pathology of a deviant parent, but are unmistakably situational, inextricably intertwined with poverty and race. Professor Godsoe has pointed out that the "public child welfare story" conflates poverty with neglect.<sup>193</sup> In other instances, as Professor Gilman writes, poverty is itself neglect, as in a situation in which a child is without adequate food or shelter.<sup>194</sup> In still other instances, poverty may be an important causative factor in neglect or abuse, as in situations in which stressors lead to inappropriate physical discipline.

The over-attribution of dispositional traits to parents involved in child welfare is exacerbated by the significant racialized component of the narrative itself. Stereotypic images of promiscuous Black "Jezebels"<sup>195</sup> and wasteful Black "welfare queens"<sup>196</sup> compound the specter of violent parents, embedding in judges' minds fearsome, vivid images.

Professor Tetlock points out that "[t]he overattribution effect is the result of reliance on cognitively simple heuristics."<sup>197</sup> The presence and power of the master narrative suggests that dependency judges inevitably and unavoidably make decisions via the heuristics of representativeness and availability.<sup>198</sup>

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<sup>192</sup> See AUBRUN & GRADY, *supra* note 146.

<sup>193</sup> Godsoe, *supra* note 169.

<sup>194</sup> Michele Estrin Gilman, *The Poverty Defense* (2012) (unpublished manuscript) (on file with author).

<sup>195</sup> ROBERTS, *supra* note 154.

<sup>196</sup> *Id.*

<sup>197</sup> *Social Check*, *supra* note 189 at 229.

<sup>198</sup> According to Tetlock, "Personal traits or dispositions are generally the most cognitively available and representative explanations for behavior. People prefer dispositional explanations because those are typically the first plausible ones to come to mind and people rarely bother to consider less obvious situational ones." *Social Check*, *supra* note 189 at 228; see also Michal S. Schadewald & Stephen T. Limberg, *Effect of Information Order and Accountability on Causal Judgments in a Legal Context*, 71 PSYCHOL. REP. 619, 619 (1992) ("In situations where one must choose between alternative interpretations of facts, judgments about which interpretation is most convincing are influenced by the relative ease with which the competing stories can be mentally constructed."). Daniel Shuman finds a similar phenomenon in the decisions of mental health experts. See Daniel W. Shuman, *What Should we Permit Mental Health Professionals to Say About the 'Best Interests of the Child'?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L. Q. 551, 553-54 (1997) ("The research on human judgment and decision making reveals that judgments of experienced clinicians are as susceptible to error as lay judgments and that experts, like untrained, lay decision makers, use decision-making strategies or mental shortcuts known as heuristics, in arriving at decisions that contribute to the error rate. Decision makers often . . . assume that isolated incidents are representative and capable of being generalized to a broader range of activities . . . . Decision makers also tend to err by giving inappropriate weight to information based on its availability, such as relying on more dramatic recent stories or anecdotes to the exclusion of known statistical information").

Stories about beastly parents and victimized children are inescapably available. Their messages are not challenged by contextualized stories which would reflect messages of poverty and race, or the much broader, more truly representative experiences of children and families involved in the child welfare system. Even if the media's need for sensationalism, and confidentiality laws' restrictions did not preclude the airing of other stories, they would not likely compete in the pool of images in judges' minds with the vividness of stories about death, destruction, murder, mayhem, drugs, iniquity, and violence.

We also may expect the affect heuristic to be triggered by judges' reflexive perceptions of parents who appear before them. If the images promptly available to a judge are those of savagery and pathological brutality, we may assume that negative feelings are triggered.<sup>199</sup> The judge immediately will feel strongly, and will recoil from the person—the parent—who generates in the judge those strong, negative feelings. Lerner, Goldberg, and Tetlock observe that

[A]nger is the principal emotion associated with justice judgments. . . . Once anger arises, it activates simple heuristic modes of information processing. Anger leads people to rely on stereotypes and easily-processed rather than effort-demanding cues. It also leads people to attribute negative outcomes to individuals rather than situational forces.<sup>200</sup>

Thus, judges likely engage in “over-attribution” due to their anger at the person whom they believe has victimized a child. Judges also may feel anger that the accused has caused the judge herself to add to her caseload burdens and confront an upsetting situation in which she has significant responsibility for very important decisions.<sup>201</sup> Over-attribution may be reflected in decisions that are more punitive than justified on the basis of relevant evidence, due to a judge's insistence, contrary to available information, that an actor's behavior reflected immutable personal characteristics, rather than situational influence.<sup>202</sup> In dependency court, punitive decisions, born of anger and over-attribution, may result in unnecessary initial separation of children from their families, unnecessarily lengthy separation of children from their families, and acceptance of inadequate services for children and families.

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<sup>199</sup> Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger and Authoritarianism on Attributions of Responsibility*, 24 *PERSONALITY & SOC. PSYCHOL. BULL.* 563, 563 (1998) (“Anger arises primarily when people attribute harm to stable, controllable, internal causes within a perpetrator, producing strong inferences of blame.”).

<sup>200</sup> *Id.*

<sup>201</sup> See Jefferey A. Kuhn, *A Seven Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 *FAM. L. Q.* 67, 75 (1998) (arguing that highly complex cases and the charged emotional atmosphere in family court causes family court judges to experience high stress, feelings of helplessness, frustration, and burnout, feelings which correlate to mechanistic decision making).

<sup>202</sup> Cf. Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 *AM. CRIM. L. REV.* 315, 318 (1986) (“a civil child protection proceeding, which can involve the child's forced removal from the parents' custody and the parents' involuntary treatment, has indisputably punitive aspects.”).

If, as Zajonc theorizes, we buy cars and houses we like, and forgo those we do not,<sup>203</sup> it is reasonable to assume that judges' behavior sometimes reflects judgments about people whom they do and do not like.

### 3. Groupthink

Thus far, this Article has analyzed dependency court decision-making, including the heuristics employed and the resultant cognitive biases, as the province of the *individual* judge responsible for each child's case. Professor Breger, however, persuasively has characterized decision-making in dependency court as the product of a *group*.<sup>204</sup> She argues that the dependency court environment is marked by the conditions which breed groupthink: "group cohesion, structural faults in the organization, such as insulation of the group and lack of impartial leadership, and a provocative situational context."<sup>205</sup> Under these circumstances, group members' "strivings for unanimity override their motivation to realistically appraise alternative causes of action."<sup>206</sup>

Professor Breger and others point out that many of the lawyers, judges, and caseworkers in dependency cases are "repeat players" in the dependency court system.<sup>207</sup> Many have experience in a large number of dependency cases, and many of those cases may have involved the very same cast of characters.<sup>208</sup> As a result, Breger explains, the social worker, lawyer for the state, lawyer for the child, lawyers for the parents, and the judge, act in unity to promote the interests of the group, rather than the interests of any individual participant, including litigants and child.<sup>209</sup> Breger's description of the "social cohesion" present in the dependency court environment is consistent with that of other observers who have pointed out the "fraternity" or "clubby" atmosphere of dependency cases.<sup>210</sup>

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<sup>203</sup> Zajonc, *supra* note 36 at 155.

<sup>204</sup> Breger, *supra* note 119 at 56.

<sup>205</sup> Marceling B. Kroon, David van Kreveld & Jacob M. Rabbie, *Group Versus Individual Decision Making: Effects of Accountability and Gender on Groupthink*, 23 SMALL GROUP RES. 427, 428 (1992).

<sup>206</sup> Janis, *supra* note 55 at 9.

<sup>207</sup> Breger, *supra* note 119 at 66; *see also* Buss, *supra* note 1 at 319 ("the . . . professionals handle case after case with one another in the same courtroom . . .").

<sup>208</sup> *See* Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 47 (2001) (commenting on the "familiarity that these court workers have with the system and with each other"); *see also* Breger, *supra* note 119 at 72-73 (lawyers representing parents and lawyers representing the state involved in numerous cases, and "regularly oppose each other before the same set of family court judges.").

<sup>209</sup> Breger, *supra* note 119 at 82 ("[T]he desire for uniformity at all costs may nevertheless harm client interests.").

<sup>210</sup> *See* Bean, *supra* note 208; *see also* Amy Sinden, *Why Won't Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339, 352 (1999) (describing family court as a "clubby atmosphere, in which all of the individuals in the courthouse . . . have well-established relationships and a kind of collegiality that comes from daily contact.").

The second and third environmental elements typically present in groupthink situations also appear to be hallmarks of the dependency court environment. Indeed, dependency court is distinct from nearly all other aspects of the justice system by the confidentiality of its proceedings and records. Unlike almost all other areas of law, child welfare court hearings and records are confidential in most states, with state laws and court rules preventing press and public from entering courtrooms to observe proceedings and preventing outsiders from reviewing court files.<sup>211</sup> In contrast, with limited exceptions, such as grand jury hearings<sup>212</sup> and some national security-related matters,<sup>213</sup> civil and criminal court proceedings are open to all. Thus, dependency court is almost-uniquely “insulated” from outside observers and influences. Finally, the matters at issue in dependency court trigger intense emotion on the part of many of those involved.<sup>214</sup> There can be little doubt that dependency court is a “provocative situational context.”

According to groupthink theory, the needs of the group may take precedence over accurate fact-finding and decision-making. As a result, “group processes resulting from the interaction between group members can interfere with the task performance of a group.”<sup>215</sup> Members of a highly cohesive group may prioritize maintenance of cohesion, and refrain from raising questions or concerns, or engaging in debate, for fear of disrupting the cohesive relationships.<sup>216</sup>

In child welfare, the questions not asked, and the debate not had, so as to preserve group cohesion, may relate to a view deviant from the conventional wisdom which supports foster care placements. A master narrative and the heuristics of representativeness, availability, and affect predispose system actors to see the worst in families and children involved in independency cases. Assumptions cause system actors to favor separation of children from their families. So powerful and pervasive is the narrative that experienced system actors safely can assume that others in the courtroom, including the judge, will be most comfortable with a decision to place a child in state custody. If questions or concerns about this outcome somehow emerge to challenge the narrative in the mind of any individual in the group, then, that individual is likely to suppress the question, consciously or not, to maintain a safe place in the unified group.

External role expectations are insufficient to cause group members to stand apart from the group and to challenge the consensus. This is especially remarkable with respect to lawyers for a child’s parents. The lawyer’s fundamental responsibility is

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<sup>211</sup> See *infra* note 274.

<sup>212</sup> FED. R. CRIM. P. 6(e)(2)(B).

<sup>213</sup> See *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002) (holding that the government has a compelling national security interest in maintaining the secrecy of intelligence gathering activities and this interest outweighs the need for public disclosure).

<sup>214</sup> Breger, *supra* note 119 at 78.

<sup>215</sup> Kroon, Kreveld & Rabbie, *supra* note 205 at 427. According to Irving Janis, the leading groupthink theorist, groupthink results in “a deterioration of mental efficiency, reality testing, and moral judgments that results from in-group pressures.” Janis, *supra* note 55 at 9.

<sup>216</sup> “[M]embers consider loyalty to the group the highest form of morality. That loyalty requires each member to avoid raising controversial issues, questioning weak arguments, or calling a halt to softheaded thinking.” Janis, *supra* note 55 at 11-12.

to oppose a decision to place a child in foster care, if the lawyer's client opposes that outcome. Lawyers are, after all, responsible to their clients first and foremost; a fundamental tenet of lawyering is that loyalty to a client requires an effort to bring about the client's wishes.<sup>217</sup> Honoring this principle can bring acclaim, whereas violation of the obligation of loyalty can bring reprobation and adverse professional discipline. Nonetheless, the strength of the narrative overpowers even these ethical and professional concerns. For example, disloyalty consistent with the narrative is reflected in comments such as that by a lawyer who said to a judge that his client's rights likely would be terminated,<sup>218</sup> and another lawyer who stated his belief that his client's rights "should be terminated."<sup>219</sup> In addition, research demonstrates that even the professional requirements imposed on lawyers may be insufficient to guard lawyers from being co-opted.<sup>220</sup> Thus, in a groupthink environment, even lawyers for the parents of a child threatened with foster care may suppress disagreement.

In addition, in a setting marked by groupthink, a group with a strong leader may conform its views to those of the leader.<sup>221</sup> The group will take less time to reach a decision,<sup>222</sup> will take less information into account, and the members will evaluate fewer options and express their own views less. This is especially true if the leader expresses a view early in the decision-making process, even if the leader's views are assumed, rather than stated expressly.<sup>223</sup>

In child welfare, group participants may know or assume that the view of the group leader, the judge, is supportive of the government's request that a child be placed in foster care, and conform its opinion to that view. Participants may believe a judge holds this view because the power of the narrative places any other outcome beyond the realm of the imaginable; thus, even if a judge is not predisposed in favor of separation, or her view is unknown, group members may assume that she is. In addition, few requests for removal are denied, even those later found to be

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<sup>217</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2011) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.").

<sup>218</sup> *In re S.T.W.*, 39 S.W.3d 517, 520 (Mo. Ct. App. 2000).

<sup>219</sup> *In re J.M.B.*, 939 S.W.2d 53, 54 (Mo. Ct. App. 1997).

<sup>220</sup> See, e.g., English, *Mussweiler & Strack*, *supra* note 186.

<sup>221</sup> See Breger, *supra* note 119 at 62 ("groupthink was not intended to address situations in which a group leader makes clear what the decision should be with others blindly following his lead. Instead, groupthink seeks to analyze the 'subtle constraints, which the leader may reinforce inadvertently,' thereby preventing individual group members from thinking critically and independently.") (internal citation omitted).

<sup>222</sup> *Id.* at 58 ([the] group mentality . . . prevents its members from properly or independently thinking through their decisions as thoroughly as they should, thereby causing them to default to short cuts or stereotypes.").

<sup>223</sup> Experiment subjects "shift toward the *presumed* views of the prospective audience." Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 257 (1999). See also Breger, *supra* note 119 at 82 ("Experienced lawyers often know what a particular judge prefers in certain cases, even if nothing is explicitly stated.").

unnecessary, unlawful, and harmful.<sup>224</sup> Thus, group members safely can assume that a judge will “rubber-stamp” the government’s request.<sup>225</sup> As a result, the view of other members of the group, conforming theirs to that of the judge, will support foster care placement.

#### IV. ACCOUNTABILITY

*“Accountability transforms people into more discriminating and complex information processors.”*<sup>226</sup>

*“When participants expect to justify their judgments, they want to avoid appearing foolish in front of the audience. They prepare themselves by engaging in an effortful and self-critical search for reasons to justify their actions.”*<sup>227</sup>

##### A. In General

Ecologically-inappropriate heuristics which give rise to cognitive biases and decision errors need not be the end of the story. Under some circumstances, accountability—“the implicit or explicit expectation that one may be called upon to justify one’s beliefs, feelings, and actions to others”<sup>228</sup>—can guard against decisions being made on the basis of mental shortcuts not useful or appropriate for the context, and attenuate cognitive biases that distort and harm decision-making. Accountable decision-makers seek out and integrate disparate and even conflicting viewpoints, in an effort to “anticipate the objections that reasonable others might raise to positions they might take.”<sup>229</sup> According to Lerner and Tetlock, accountability can correct “‘sins of omission (failing to use a ‘good cue’) and ‘sins of imprecision’ (failing to

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<sup>224</sup> See District of Columbia Citizens’ Review Panel, *supra* note 57; see also Doyle, *supra* note 85.

<sup>225</sup> Renne & Lund, *supra* note 76. A variation on this theme situates the state’s attorney in the role of group leader in a dependency case. Although the judge nominally rules the courtroom and announces decisions, the state’s attorney wields significant power in a dependency courtroom. The state’s attorney’s view is announced early, as the case itself exists only because the state’s attorney seeks to have the child placed in state custody. The view of the state’s attorney is unmistakable, and well-known to other participants— which, in this formulation, include the judge. To the extent that the state’s attorney is viewed as the leader of the group, then, other participants conforming their view to hers will support the outcome of a foster care placement.

<sup>226</sup> Tetlock, *supra* note 189, at 229; see also Karen S. Pincus & Michael Favere-Marchesi, *The Impact of Accountability on Auditors’ Processing of Nondiagnostic Evidence*, 9 *ADVANCES IN ACCT. BEHAV. RES.* 1, 2 (2006) (accountability is “the implicit or explicit expectation that individuals may be called upon to justify their judgments and decisions to others”).

<sup>227</sup> Jennifer Lerner & Philip Tetlock, *Accounting for the Effects of Accountability*, 125 *PSYCHOL. BULL.* 255, 263 (1999).

<sup>228</sup> *Id.* at 255.

<sup>229</sup> *Id.* at 257.

integrate information in the normatively prescribed manner).<sup>230</sup> As compared to an unaccountable decision-maker, then, an accountable decision-maker will seek out and consider more relevant information and less irrelevant information.<sup>231</sup> An accountable decision-maker also will assign more effectively the proper weight to important and unimportant information.<sup>232</sup> An accountable decision-maker will consider a wider range of options, and anticipate and evaluate arguments supporting those options, even when those arguments are in tension or conflict with each other. Accountability focused on the decision-making process, rather than outcomes, may be especially effective in counteracting heuristic biases and improving the process itself.<sup>233</sup> This means that decision-makers responsible to an audience for the type of information the decision-maker considers, the amount of time they spend considering it, and their openness to considering conflicting views, are more likely to “reduce a bias or increase complexity”<sup>234</sup> of thought.

The benefits of accountability extend even to a meta-cognitive level, as accountable decision-makers more-accurately perceive the decision-making process in which they engage, thus permitting them to modify and correct an inadequate or unsuccessful process. In other words, accountability improves decision-makers’ understanding of their own decision-making process. For example, accountability reduces decision-makers’ overconfidence in the accuracy of their decisions, prompting them to engage in more systematic decision-making processes and allowing them to reevaluate preliminary impressions and opinions.<sup>235</sup> Accountability “increases . . . complexity of thought and, as a result, [improves] predictive accuracy.”<sup>236</sup> Cvetkovich found that accountability improved the accuracy of decision-makers’ description of the decision-making process they used.<sup>237</sup> Hagafors and Brehmer found that accountability improved the consistency of decision makers’

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<sup>230</sup> *Id.* at 264 (quoting Norbert M. Kerr, Robert J. MacCoun & Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 699 n.7 (1996)).

<sup>231</sup> Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *supra* note 199, at 567.

<sup>232</sup> *Id.*

<sup>233</sup> See Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. OF APPLIED PSYCHOL. 419, 425 (1992); Patricia M. Doney & Gary M. Armstrong, *Effects of Accountability on Symbolic Information Search and Information Analysis by Organizational Buyers*, 24 J. ACAD. MARKETING SCI. 57, 60 (1996); see also Karen Siegel-Jacobs & Frank J. Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 14 (Apr. 1996).

<sup>234</sup> Jennifer Lerner & Philip Tetlock, *supra* note 227, at 258.

<sup>235</sup> *Id.* at 262

<sup>236</sup> Neal P. Mero & Stephan J. Motowidlo, *Effects of Rater Accountability on the Accuracy and the Favorability of Performance Ratings*, 80 J. APPLIED PSYCHOL. 517, 523 (1995); see also Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Process in Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700, 706 (1987).

<sup>237</sup> George Cvetkovich, *Cognitive Accommodation, Language, and Social Responsibility*, 41 SOC. PSYCHOL. 149, 154 (1978).

processes.<sup>238</sup> An improved level of self-awareness permits judges to identify and correct flaws in a decision-making process which can lead to bias and error.<sup>239</sup>

It is worth noting that accountability is not a cure-all under all circumstances. Several conditions are required for accountability to attenuate cognitive bias and improve decision-making. According to Lerner and Tetlock, “self-critical and effortful thinking is most likely to be activated when decision-makers learn prior to forming any opinions that they will be accountable to an audience . . . whose views are unknown.”<sup>240</sup> In contrast, actors will attempt to please an audience whose views are known, and to conform their opinion to that of the audience, and their actions to those known to be desired by the audience. For example, Adelberg and Batson found that financial aid officials charged with distributing scarce funds allocated a small amount of money to all applicants, rather than distributing the correct sum to applicants who were genuinely eligible, if the official was required to explain to unsuccessful aid applicants the reason that the applications had been denied. Officials who were not accountable to disappointed applicants distributed the funds in accordance with need, the designated criterion for award.<sup>241</sup>

Perhaps the most important limitation on the power of accountability to minimize decision-making errors by attenuating cognitive biases relates to the timing of the decision-maker’s awareness that she will be accountable for the decision.<sup>242</sup> Stated simply, if the decision-maker learns *before* making the decision that she will be accountable afterwards, the decision may reap the host of beneficial effects described above. On the other hand, if the decision-maker has an opportunity *after* making a decision to explain or revisit the decision, she is likely to engage in a damaging phenomenon called “bolstering,” misremembering or misstating the reasoning she used and mischaracterizing the evidence on which she relied to reach her conclusion.

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<sup>238</sup> Roger Hagafors & Berndt Brehmer, *Does Having to Justify One’s Judgments Change the Nature of the Judgment Process?*, 31 *ORGANIZATIONAL BEHAV. AND HUM. PERFORMANCE* 223, 230 (1983); see also Robert H. Ashton, *Effects of Justification and a Mechanical Aid on Judgment*, 52 *ORG. BEHAV. & HUM. JUDGMENT PROCESSES* 292, 293 (1992).

<sup>239</sup> Jennifer S. Lerner, Julie H. Goldberg, & Philip E. Tetlock, *supra* note 199, 265 n.8 (“Self-critical attention to one’s judgment processes—induced by accountability—not only reduces strategy-based errors (i.e., errors resulting from insufficient efforts . . .), it also reduces certain association-based errors (i.e., errors resulting from associations within semantic memory . . .).” (citations omitted)).

<sup>240</sup> *Id.* at 264.

<sup>241</sup> See generally Sheldon Adelberg & Daniel C. Batson, *Accountability and Helping: When Needs Exceed Resources*, 36 *J. OF PERSONALITY & SOC. PSYCHOL.* 343 (1978).

<sup>242</sup> On a narrower scale, one experiment found that accountability *plus* a lack of time constraints was required to avoid specified processing problems—accountability did not protect against them on its own. See Jennifer Lerner & Philip Tetlock, *supra* note 227, at 267 (“[A]ccountable participants were immune to primacy effects, numerical anchoring on initial values, and stereotypic formation only when they were not prevented from systematic processing by time pressure.”). Similarly, in another experiment, accountability *plus* lack of distraction *and* adequate memory were required to avoid a specified processing problem. See *id.* at 267 (“Similarly, accountable participants were immune to the influence of covertly primed trait terms on impression formation of ambiguous targets only when they were (a) not distracted by another cognitively demanding task and (b) able to retrieve the relevant evidence from working memory.”).

Lerner and Tetlock explain that “pre-decisional” accountability causes a decision-maker to “(a) survey a wider range of conceivably relevant cues; (b) pay greater attention to the cues they use; (c) anticipate counter arguments, weigh their merits relatively impartially, and factor those that pass some threshold of plausibility into their overall opinion or assessment of the situation; and (d) gain greater awareness of their cognitive processes by regularly monitoring the cues that are allowed to influence judgment and choice.”<sup>243</sup> Pre-decisional accountability, then, can influence a decision-maker to resist intuitive, less-effortful heuristic approaches. Instead, a decision-maker with pre-decisional accountability may engage in a systematic, effortful, deliberate process of seeking, weighing, and assessing evidence, and reaching a conclusion supported by the evidence. Tetlock, et al., describe the process of deciding with an expectation that the decision must be justifiable as one of “pre-emptive self-criticism.”<sup>244</sup> By engaging in pre-emptive self-criticism, the decision-maker seeks to avoid criticism and embarrassment at the hands of others. This effort can attenuate the cognitive bias that might otherwise have affected the decision, including the primacy bias, over-attribution bias, and groupthink bias found in dependency court decisions.

Thus, several experiments strongly suggest that pre-decisional accountability can control the effects of primacy bias, permitting decision-makers to weigh information in accordance with its significance and probative value, rather than over-weighting information learned earliest.<sup>245</sup> Separately, research suggests that accountability can attenuate primacy effects specifically caused by fatigue.<sup>246</sup>

Pre-decisional accountability also may increase judges’ ability to appreciate a wide range of qualities and characteristics about people whose future acts the judge is tasked with predicting,<sup>247</sup> thus attenuating the dispositional bias in attribution. For example, Wells, et al., found similar results in a sample of 96 female college students.<sup>248</sup> Each subject observed another subject undertake a series of actions with a third person. The third person had been instructed to behave cooperatively with the second, or uncooperatively. Observers were asked subsequently to assess the reasons that the third person behaved cooperatively or uncooperatively. Accountable subjects were less-likely than unaccountable subjects to assume that the actions reflected the actors’ good or bad personal qualities and traits, and more likely to

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<sup>243</sup> *Id.* at 263.

<sup>244</sup> Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. OF PERSONALITY & SOC. PSYCHOL. 632, 633 (1989).

<sup>245</sup> Tetlock, *supra* note 54, at 290.

<sup>246</sup> Donna M. Webster, Linda Richter & Arie W. Kruglanski, *supra* note 182, at 182.

<sup>247</sup> Jennifer Lerner & Philip Tetlock, *supra* note 227, at 267 (“[P]reexposure accountability increased the integrative complexity of the impressions respondents formed of target individuals whose later behavior was to be predicted . . . . [P]reexposure accountability improved both the accuracy of behavioral predictions and the appropriateness of the confidence expressed in those predictions.” (citing Philip E. Tetlock & Jae Il Kim, *supra* note 236)); *see, e.g.*, Philip Tetlock, *supra* note 189, at 230.

<sup>248</sup> Gary Wells et al., *supra* note 190.

ascribe the actions to situational influences and constraints.<sup>249</sup> Similarly, research has shown that accountability lessened less punitive attributions of responsibility.<sup>250</sup>

In addition, decision-makers with pre-decisional accountability may be less-influenced than unaccountable decision-makers by irrelevant “affect,” or their own feelings of pleasure generated by one or more options under consideration.<sup>251</sup> For example, Lerner, Goldberg and Tetlock found that accountable experiment subjects were less influenced by anger in making a judgment about a person’s actions, and were more likely than unaccountable subjects to consider “situational constraints and the extent of the actor’s free will.”<sup>252</sup>

Finally, research also demonstrates that pre-decisional accountability can attenuate groupthink effects.<sup>253</sup> For example, Kroon, Kreveld, and Rabbie instructed groups of college students to play the role of members of a university admissions committee. The committee was responsible for reviewing the curricula vitae of applicants for an MBA program. Results of the experiment indicate that “accountability promotes vigilant and democratic decision-making procedures, in which differing points of view can come to the fore and be carefully scrutinized.”<sup>254</sup>

On the other hand, a *post hoc* opportunity or requirement to explain or revisit judgment may cause “defensive bolstering,”<sup>255</sup> in which a decision-maker may seek out and even distort facts in an effort to explain, justify, or reinforce the decision.<sup>256</sup> According to Tetlock, Skitka and Boettger, “once people have committed themselves to a position, a major function of thought becomes the justification of that position.”<sup>257</sup>

The phenomena of pre-emptive self-criticism, bolstering, and conformance are illustrated in Tetlock, Skitka, and Boettger’s 1989 experiment.<sup>258</sup> Subjects were asked for their views on four policy topics, affirmative action, tuition at the

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<sup>249</sup> *Id.* at 251-52.

<sup>250</sup> See Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *supra* note 199.

<sup>251</sup> Galen V. Bodenhausen, Geoffrey P. Kramer & Karin Süsser, *supra* note 25, at 629.

<sup>252</sup> Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *supra* note 199, at 571.

<sup>253</sup> Lerner & Tetlock, *supra* note 227, at 259, 262 (“Accountability often . . . motivates individual work effort [and] attenuates groupthink . . .”); see also Marceline B. R. Kroon, Paul’t Hart & Dik van Kreveld, *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT’L J. OF CONFLICT MGMT. 91, 109 (1991).

<sup>254</sup> Marceling B. Kroon, David van Kreveld & Jacob M. Rabbie, *supra* note 205, at 449.

<sup>255</sup> Philip E. Tetlock, Linda Skitka & Richard Boettger, *supra* note 244, at 634.

<sup>256</sup> See generally Ola Svenson, Ilkka Salo, & Torun Lindholm, *Post-Decision Consolidation and Distortion of Facts*, 4 JUDGMENT AND DECISION MAKING 397 (2009); see generally Christie Brown & Fred Feinberg, *How Does Choice Affect Evaluations?*, 29 ADVANCES CONSUMER RES. 331 (2002); see generally Alexander Chernev, *The Impact of Common Features on Consumer Preferences: A Case of Confirmatory Reasoning*, 27 J. CONSUMER RES. 475 (2001).

<sup>257</sup> Philip E. Tetlock, Linda Skitka & Richard Boettger, *supra* note 244, at 634.

<sup>258</sup> *Id.* at 632.

University of California, a nuclear freeze, and the death penalty.<sup>259</sup> Two groups of subjects, labeled “thoughts-first” subjects, were instructed to write down their “thoughts and feelings” on each issue. After these subjects listed their thoughts and feelings, their attitudes about the subjects were measured.<sup>260</sup> Subjects in one thoughts-first group were told, prior to listing their thoughts and feelings, that their responses would be “completely confidential and not traceable to you personally.”<sup>261</sup> This confidentiality instruction was repeated subsequently.<sup>262</sup> The second group of thoughts-first subjects was instructed that they would be asked later to “explain and justify your opinions.” Subjects in two other groups, described as “attitudes-first” subjects, were instructed to commit themselves to an “attitudinal stand” (equivalent to a policy position) on the issues *before* writing their thoughts and feelings.<sup>263</sup> As with the thoughts-first subject groups, subjects in one of the attitudes-first groups were told they would be accountable, and subjects in the other were assured of confidentiality.<sup>264</sup> Accountable subjects did not know the views of the audience to whom accountability was to be required.

Accountable, thoughts-first subjects (i.e., who had been instructed to reflect on and articulate in writing their thoughts and feelings about the issues before reaching a decision as to their ultimate position on the issues) demonstrated more complex reasoning and significant pre-emptive self-criticism. These subjects took multiple factors into account before transforming their thoughts and feelings into a generalized policy position, and recognized the complicated interplay of those factors. “These subjects . . . tried to anticipate the various objections that potential critics could raise to the positions they were about to take (e.g., I may favor capital punishment, but I understand the opposing arguments).”<sup>265</sup>

In contrast, the efforts undertaken by accountable, “attitude-first” subjects—participants instructed to reach conclusions *before* considering evidence—were directed primarily toward explaining and justifying the conclusions, rather than careful or thoughtful analysis of the decisions. In a classic reflection of bolstering behavior, “[f]ar from engaging in self-criticism, these subjects were concerned with self-justification—with thinking of as many reasons as they could for why they were right and potential critics were wrong.”<sup>266</sup>

Finally, two additional sub-groups of accountable subjects also were created, to test the effect of accountability to an audience the views of which is known. One sub-group was told they would be asked to explain and justify their position to a person known to have “liberal” views on the topics at issue. The other sub-group of subjects was told they were to explain and justify their position to a person known to

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<sup>259</sup> *Id.* at 634.

<sup>260</sup> *Id.* (“After completing the thought protocols, subjects responded to the attitude scales.”).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 638.

<sup>266</sup> *Id.*

have “conservative” views.<sup>267</sup> Accountable subjects who knew the views of the audience to which they were accountable demonstrated comparatively simple thought processes, took few factors into account and, in the main, appeared primarily to be interested in reaching an outcome they anticipated would be approved by the audience. “Thoughts-first subjects who knew the views of the audience coped by shifting their public attitudes toward those of the anticipated audience. They expressed more liberal views to the liberal audience and more conservative views to the conservative audience.”<sup>268</sup>

Accountability, then, can be a blessing and a curse to decision-making processes. Under some circumstances, accountability can attenuate cognitive biases by promoting the care and accuracy consistent with pre-emptive self-criticism. Under other conditions, however, decision-makers may be prompted to position-hardening behavior, described as bolstering. Tetlock, et al., summarize, “[a]ccountability demands can motivate people to be either more flexible multidimensional information processors or more rigid, evaluatively consistent information processors.”<sup>269</sup>

As we shall see in the following Part, dependency court is marked by a significant deficit of pre-decisional accountability, and an unfortunate abundance of post-decisional accountability and judicial bolstering. I argue that bolstering is encouraged by dependency judges’ extended supervision of dependency cases. I further argue that effective pre-emptive self-criticism is curtailed by courtrooms and records that are closed to the public, and by the limited appeal rights available in dependency cases.

### *B. Accountability In Dependency Cases*

#### 1. Pre-Emptive Self-Criticism In Short Supply

“Pre-emptive self-criticism,” which encourages careful, deliberate, fact-intensive analysis of information prior to making a decision, is promoted by “pre-decisional accountability to an audience with unknown views.” Do dependency judges have pre-decisional accountability to any audience with unknown views? Do dependency judges make decisions with an expectation that the explanation or justification of the decision will subject them to rewards or adverse consequences? Consistent with Lerner and Tetlock’s observation that decision-makers seek to avoid embarrassment,<sup>270</sup> Lawrence Baum pointedly conceives of “audience” as the people or groups to whom a judge presents herself, seeking approval, when taking action or making a decision.<sup>271</sup> A judge’s potential audiences include appellate courts, trial court colleagues, the general public, friends, professional groups, policy groups, and the news media, including as a vehicle for communicating to members of other audiences.<sup>272</sup>

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<sup>267</sup> *Id.* at 634.

<sup>268</sup> *Id.* at 638.

<sup>269</sup> *Id.* at 639.

<sup>270</sup> See Jennifer Lerner & Philip Tetlock, *supra* note 227.

<sup>271</sup> Lawrence Baum, *JUDGES AND THEIR AUDIENCES*, 47 (Princeton Univ. Press 2006).

<sup>272</sup> *Id.* at 23-4; *Id.* at 22 (“Judges care a great deal about what people think of them.”); *Id.* at 47 (suggesting judges themselves are an audience for their own decisions, as they seek to

Is there any individual or group, then, to whom dependency judges perceive themselves speaking when they make decisions? Framed differently, we can ask whether dependency judges make decisions with an eye toward being judged themselves.

It appears that appellate courts constitute dependency judges' only likely pre-decisional audience. In a state in which dependency court hearings and records are closed,<sup>273</sup> for example, we know that judges simply need not justify their decisions to public or press, and thus presumably do not experience decision-making as an explanatory, justification-oriented, or approval-seeking exercise with respect to public or members of the press, or the audiences who might be reached by the press.<sup>274</sup> Members of the public and press may not be present in the courtroom and

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protect and build internal self-esteem; judges have an "interest in establishing a desired image with their audiences and ultimately with themselves.").

<sup>273</sup> Dependency proceedings are closed in 29 states and the District of Columbia (Alabama, Alaska, Arkansas, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming). See Southern Area Consortium of Human Services, *Literature Review: Open Juvenile Dependency Courts*, available at <http://theacademy.sdsu.edu/programs/SACHS/literature/SACHS%20Lit%20Review-Open%20%20Courts%20FINAL.pdf>.

<sup>274</sup> A fundamental cornerstone of American jurisprudence is that courtrooms and court records are open and available to the public. Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1112 (2010) ("The premise that transparency and accountability are good for institutions has animated our traditional preference for open courtrooms."). Thus, with the exception of dependency court, most American courtrooms are marked by their open doors: in virtually any kind of case, including cases involving children and domestic violence, criminal law, divorce, and child custody, press and public may walk in to the courtroom, listen, take notes, and then speak and write about the events they observed. Written case records likewise are open and available to the public and press. See, e.g., *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 573 (1980) (plurality opinion); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999) ("[E]very lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials."); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("[T]he public and press have a first amendment right of access to pretrial documents in general."); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Indeed, whereas scholars continue to debate the pros and cons of dependency courtrooms and records being open to press and public at all, compare Kathleen Bean, *supra* note 208 (supporting open dependency courts), with William Wesley Patton, *When the Empirical Base Crumbles: The Myth that Open Dependency Proceedings do not Psychologically Damage Abused Children*, 33 U. ALA. L. & PSYCHOL. REV. 29 (2009), the debate in other fields has moved to the margins, focusing on such issues as the value of television cameras in the courtroom. See, e.g., Kozinski & Johnson, *supra* at 1112 (arguing that cameras should be allowed in courtrooms because "[t]he public can better monitor the judiciary—to ensure that its processes are fair, that its results are (generally) just and that its proceedings are carried out with an appropriate amount of dignity and seriousness—if it has an accurate perception of what happens in the courtroom. Increased public scrutiny, in turn, may ultimately improve the trial process. Judges may avoid falling

may not access court files. Under these circumstances, the public and press do not serve as an audience for the judge's decisions. Because courtrooms are off-limits to those not participating in a hearing and court files are strictly sealed,<sup>275</sup> the public and press will not be exposed directly to the judge's decisions orally or in writing. Confidentiality laws also prohibit participants in the case, who will be aware of the decisions, from speaking about the decisions.<sup>276</sup> As a result, those who might be reached by the press will not learn about the decisions even by second- or third-hand accounts. Friends, professional acquaintances, and policy groups cannot know of a dependency judge's decisions in a state in which confidentiality laws close courtrooms and records and limit the speech of those involved in a case.

Thus, the judge does not expect to explain or justify her decisions to members of the public, press, or other groups. The judge need not engage in pre-emptive self-criticism to gird for that scrutiny. The judge need not please these audiences, and need not fear embarrassment. Thus, these audiences do not inspire judges to engage in any of the systematic, deliberate analytical behaviors that can be promoted by accountability. In a state with closed dependency courtrooms and records, then, the public, press, and other potential audiences are not available to stimulate dependency judges to gather a wide range of information, consider opposing viewpoints, anticipate arguments supporting all sides of an issue, and comb meticulously through information before making a decision.<sup>277</sup>

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asleep on the bench or take more care explaining their decisions and avoiding arbitrary rulings or excessively lax courtroom management. Some lawyers will act with greater decorum and do a better job for their clients when they think that colleagues, classmates and potential clients may be watching. Some witnesses may feel too nervous to lie; others may hesitate to make up a story when they know that someone able to spot the falsehood may hear them talk. Conscience, after all, is that little voice in your head that tells you someone may be listening after all.”).

<sup>275</sup> Underscoring the lock-and-key quality of court files, District of Columbia statute precludes even a child's parents, whose relationship with their child and Constitutional rights are at stake, and who are parties to the litigation itself, from accessing some portions of a child's file. See D.C. CODE § 16-2332(b) (LexisNexis 2012) (listing persons authorized to view “juvenile social records”).

<sup>276</sup> See generally Matthew Fraidin, *supra* note 169, at 39-48 (by silencing parents, confidentiality laws create a one sided narrative, engendering a court system that devalues and discredits parents' stories).

<sup>277</sup> It is possible that in states in which dependency courts are closed, judges' need to build and maintain self-respect—their internal accountability engine—may fill all or part of the gap left by the absence of the public and press. We may presume that judges seek to make good choices, discover the correct answer, and achieve children's best interests. We may further assume that many judges believe they ordinarily engage in a decision-making process appropriate for their tasks. Judges' subjective beliefs about the adequacy of their decision-making processes hardly can mark the end of the analysis, however. The very need for self-assurance that motivates judges to perform for audiences by undertaking a rigorous and systematic decision making process suggests that emotional self-preservation — a judge's need to believe that she is engaged in a meaningful, worthwhile, constructive endeavor -- may motivate judges to misconstrue their own Herculean efforts, confusing care and anxiety with effectiveness. Indeed, decision-makers frequently overestimate the accuracy of their decisions. As noted in Part IV.A, above, in fact, among the benefits of pre-decisional accountability is a marked improvement in the accuracy of decision-makers' assessment in the quality of their decisions.

Even in states in which dependency court hearings and records are open to the public, judges' decision-making processes may be little-impacted. Although nominally open since 1997,<sup>278</sup> New York's courtrooms were blocked by armed guards as recently as 2011.<sup>279</sup> More typical is the experience of states such as Minnesota, where courtroom attendance by members of the public and press is rare.<sup>280</sup> Under these circumstances, dependency judges presumably know it is unlikely that the public or press will become aware of a dependency-case decision. It seems unlikely, then, that the remote possibility that a dependency judge will have to justify or explain a decision exerts meaningful impact on the decision-making processes of dependency judges in these states. The public and press, and those who might be reached by the media, do not, it appears, serve as an audience that inspires systematic thinking by dependency judges.

Appellate courts, expressly established to review lower courts' decisions, also may be an ineffective means of promoting systematic thinking by dependency trial-level judges. In some states, the court's initial hearing decision may be appealed by any party aggrieved by the decision,<sup>281</sup> in others, however, the decision may be appealed only by the child or the government, but not by the child's parent or guardian.<sup>282</sup> In practice, parties rarely appeal initial hearing decisions.<sup>283</sup> The trial decision is appealable by all parties; again, however, trial decisions rarely are appealed.<sup>284</sup> And among the dozens or hundreds of court decisions judges make while they are responsible for a child, virtually none is appealable. The appeals process, moreover, is slow and impersonal.

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<sup>278</sup> See Alan Finder, *Chief Judge in New York Tells Family Courts to Admit Public*, N.Y. TIMES, Jun. 17, 1997, at A1; see also William Glaberson, *In New Guidelines, Officials Affirm That State's Family Courts Are Open to Public*, N.Y. TIMES, Dec. 21, 2011, at A32.

<sup>279</sup> See William Glaberson, *Family Court Says Keep Out, Despite Order*, N.Y. TIMES, Nov. 18, 2011, at A1.

<sup>280</sup> See Minnesota Supreme Court, State Court Administrator's Office, *Key Findings From The Evaluation Of Open Hearings And Court Records In Juvenile Protection Matters, Final Report* 1, 6 ("[O]pen hearings have led to a slight but noticeable increase in attendance at child protection proceedings.").

<sup>281</sup> See, e.g., WA. JUV. CT. R. 2.5 ("The court may amend a shelter care order . . . at a hearing held after notice to the parties given in accordance with rule 11.2. Any party may move to amend a shelter care order."); see also D.C. CODE § 16-2328(a) (LexisNexis 2012) ("A child who has been . . . placed in shelter care . . . may, within two days of the date of entry of the Division's order, file a notice of interlocutory appeal.").

<sup>282</sup> See, 16 D.C. CODE § 2328(a), *supra* note 281.

<sup>283</sup> A Westlaw search of cases in Florida, Illinois, and Maryland, for example, reveals a grand total of zero appellate opinions reviewing initial hearing decisions.

<sup>284</sup> A Westlaw search of 2011 appellate opinions in Florida, Illinois, and Maryland yields a total of nine, five, and one appellate decisions reviewing trial courts' findings of abuse or neglect. (Author started with the Westlaw Directory, Topical Practice Areas - Family Law - State Cases; from there he entered the search terms "child abuse and neglect" and then used the cases synopses to determine whether the cases were decided on a substantive or evidentiary/procedural issue. He only counted those cases decided on the basis of the substantive issues. Date of search July 27, 2012. Search also re-run November 23, 2012 with identical result.)

The accountability analysis is distorted as well because information about judges' decisions may become public, even in a state with strict confidentiality laws, if a child under the judge's supervision is injured seriously or killed. Under these circumstances, the alleged perpetrator may be charged with a criminal offense, information about which is not restricted from view. Thus, dependency judges are aware that they will not be called on to explain a decision about a child, unless the decision results in a child's injury or death.

Even if a judge does recognize an audience, she probably does not wonder at the audience's views. Indeed, the powerful master narrative of child welfare makes it probable that judges assume that every audience would prioritize protection of a child's physical safety above other considerations.<sup>285</sup> Judges may further assume that separating children from their families would be the decision that would best protect a child's physical safety, and that it would be perceived that way by any audience which might review the judge's actions.

In conclusion, there appears in the dependency system to be little effective pre-decisional accountability to audiences with unknown views. In states in which courts are closed, information is unavailable to public, press, judges' friends and professional acquaintances, and to any audience other than the participants in the case itself.<sup>286</sup> In states in which courts are open, media and public inattention combine to achieve a similar outcome. As a result, dependency judges likely make decisions with an implicit or explicit understanding that the decisions will not be reviewed, scrutinized, or reviewed. The decisions, then, are undertaken virtually in a vacuum, absent an expectation that they must be logically consistent, incorporative of all relevant facts, and based on those facts, rather than unconscious stereotypes and assumptions. Even in states in which dependency courts are open, the only decisions which may see the light of day are decisions which result in, or are related to, the significant injury to, or death of, a child. Because the overarching narrative of child welfare associates safety with children's placement and perpetuation in foster care, we may assume that the only decision that might be the result of a systematic, deliberative process is one to deny a request to place or maintain a child in foster care. In contrast, a decision to place or keep a child in foster care is unreviewable by most of a judge's audiences, depriving judges of extrinsic motivation to explain or justify the decision and the need to arrive at the decision systematically.

Appellate review does not fill the accountability gap. Even emergency custodial decisions are not appealable in some states, and few are appealed in states in which that route is available. Few other dependency-court decisions are appealable, notwithstanding the many years a judge may supervise a child and the many

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<sup>285</sup> Federal and state laws prioritize children's safety. *See, e.g.*, 42 U.S.C.S. § 629(2) (LexisNexis 2012) ("The purpose of [ASFA] is to assure *children's safety* within the home . . .") (emphasis added); *see also* FLA. STAT. § 39.402(7) (mandating judicial removal if a "*child's safety* and well being are in danger") (emphasis added). Margaret Johnson argues that judges and other system actors in the field of domestic violence similarly prioritize safety above other considerations, including the agency and autonomy of women affected by domestic violence. *See* Margaret Ellen Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening* 32 *CARDOZO L. REV.* 519 (2010).

<sup>286</sup> The congenial atmosphere of dependency cases makes it unlikely that judges feel meaningfully compelled to justify their decisions to the participants in the case. *See* Breger, *supra* note 119 (discussing groupthink in dependency cases).

important decisions about the child's life that she may make. Guthrie, Rachlinski, and Wistrich observe that "trial court decisions [in all subject areas] are generally final because appeals are only available on limited bases, occur infrequently, and seldom lead to reversal."<sup>287</sup> Under current circumstances, then, trial judges are unlikely to be meaningfully affected by the possibility of appellate review.

## 2. Bolstering In Abundance

*Reconsider, v. To seek a justification for a decision already made.*  
*Ambrose Bierce, The Devil's Dictionary (1906)*

Dependency judges may be responsible for a dependent child from the day of the child's birth to the day she reaches the age of majority. In twenty-one years, if the judge holds the minimum number of hearings allowable by law, she will have considered the child's fate—her custodial placement and the nearly-infinite number of issues relating to the child's health and welfare—on more than forty separate occasions. Forty custody decisions. Forty decisions about the extent and nature of visits between the child and her family members. Forty times to decide whether the child requires a medical appointment not being provided by the social work agency. And mental health treatment. And is the child in the correct school placement? Should a lawyer be appointed to help seek additional educational services for the child? Should the child be assigned a mentor? On and on, the decisions come.

So we must ask: on the thirtieth occasion, or the fifteenth, or even on the third, how likely is it that the judge will start with a clean slate, gather an armload of evidence on the question, and painstakingly sort through the pros and cons of the available options? The answer, of course, is that it is not very likely. Indeed, on the fifteenth occasion, not to mention the thirtieth, it might not make much sense to do so. By that juncture, the judge is heavily-weighted with information gathered over the course of the many years and many hearings and many social work reports that have come to paint a picture of the child's life and form the wallpaper of the case.

But what we know about bolstering suggests that it is not just after thirty reruns of a decision, or even fifteen, that a decision-maker's mind closes off a range of options. Indeed, the research suggests that after just *one* iteration of a determination, as we understand from Tetlock, et al.'s 1989 experiment, a decision-maker's primary goal is to defend the wisdom and insight of the decision. When questioned about a prior decision, the decision-maker undertakes "an exercise in intellectual self-defense—the generation of justifications for positions taken."<sup>288</sup>

This is the danger presented in child welfare cases. So, although relatively few children remain under the supervision of a dependency court for 21 years, and even fewer are under the eye of the very same judge for that entire time, our concerns about judges' decision-making processes start on a much smaller scale.

Federal and state law require judges to hold an initial hearing and a trial within days of the child's placement in foster care.<sup>289</sup> Judges are required to hold a

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<sup>287</sup> Chris Guthrie, Jeffrey J. Raslinski & Andrew Ristlich, *supra* note 2, at 4-5.

<sup>288</sup> Philip E. Tetlock, Linda Skitka & Richard Boettger, *supra* note 244, at 640.

<sup>289</sup> See, e.g., D.C. CODE § 16-2312(B) (LexisNexis 2012) ("A shelter care hearing shall be commenced not later than 72 hours (excluding Sundays) after the child has been taken into custody . . ."); see also FLA. STAT. § 39.507(1)(a) ("The adjudicatory hearing shall be held as

disposition hearing within several weeks after the trial or settlement of the case.<sup>290</sup> They hold a permanency planning hearing within twelve months of the child's entry to foster care,<sup>291</sup> and a permanency review hearing every six months thereafter.<sup>292</sup> In practice, judges often hold hearings far more frequently, including several hearings prior to the trial, and permanency review hearings as often as every three months.<sup>293</sup> At each of these hearings, with the exception of the trial, the judge is presented with a decision about the child's custody: may she safely reside at home, or must she remain outside the home, with a relative or a foster parent, or in a congregate setting?

It is true that in many instances, circumstances dictate that a child's parent or guardian does not seek the child's return, and the judge thus is not genuinely confronted with a decision—a conflict between or among options. It is equally true, however, that so pro forma are child welfare proceedings, and so automatic and undeliberative is decision-making,<sup>294</sup> that the frequency of genuine contests for a child's custody may be suppressed: parents and guardians may understand, even as early as the shelter care hearing, that an effort to place a question at issue—to force deliberation and a decision—is fruitless, and perhaps will cause them to be the target of anger or demeaning remarks. The parents' lawyers, who have seen it all before and believe they know the outcome in advance—as Professor Buss writes, “there is a strong sense of ‘the way things are done’ that drives the planning and decision-

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soon as practicable after the petition for dependency is filed and in accordance with the Florida Rules of Juvenile Procedure, but no later than 30 days after the arraignment.”).

<sup>290</sup> See 16 D.C. CODE § 2316.01(b)(1) (LexisNexis 2012) (“The fact finding and dispositional hearing shall be held within 45 days after the child's entry into foster care or, if the child is not in foster care, within 45 days of the filing of the petition.”); see also FLA. STAT. § 39.51(1) (LexisNexis 2012) (A disposition hearing shall be conducted by the court, if the court finds that the facts alleged in the petition for dependency were proven in the adjudicatory hearing . . .”).

<sup>291</sup> See, FLA. STAT. §39.621(1) (LexisNexis 2012) (“Time is of the essence for permanency of children in the dependency system. A permanency hearing must be held no later than 12 months after the date the child was removed from the home or within 30 days after a court determines that reasonable efforts to return a child to either parent are not required, whichever occurs first.”); see also ALA. CODE § 12-15-315(a) (“Within 12 months of the date a child is removed from the home and placed in out-of-home care, and not less frequently than every 12 months thereafter during the continuation of the child in out-of-home care, the juvenile court shall hold a permanency hearing.”).

<sup>292</sup> See CAL. R. CT. § 5.708(a) (“The status of every dependent child who has been removed from the custody of the parent or legal guardian must be reviewed periodically but no less frequently than once every 6 months . . .”); see also 705 ILL. COMP. STAT. § 405/2-28(2)(c) (“Subsequent permanency hearings shall be held every 6 months or more frequently if necessary in the court's determination following the initial permanency hearing . . . . Once the plan and goal have been achieved, if the minor remains in substitute care, the case shall be reviewed at least every 6 months thereafter.”).

<sup>293</sup> See, e.g., Pennsylvania Office of Children and Families in the Courts, *Three Month Reviews*, PERMANENCY PRACTICE INITIATIVE, <http://www.ocfcpcourts.us/permanency-practice-initiatives/three-month-court-reviews/>.

<sup>294</sup> See Amy Sinden, *Why Won't Mom Cooperate?*, supra note 210.

making process in . . . the child welfare system . . .”—may counsel the parents to not bother seeking custody.<sup>295</sup>

But even in this environment, suffused with the master narrative and the fundamental attribution error and availability and representativeness and “rubber-stamping,”<sup>296</sup> there often are contests regarding a child’s custody. Even here, especially early in dependency cases, parents remain hopeful, determined, or simply confused and in disagreement about the allegations made against them. Parents regularly ask at a pre-trial hearing, at trial, and in the disposition hearing and permanency review hearings for their child to be returned to their custody.

What we know about bolstering tells us that the judge cannot hear that parent and cannot genuinely assess evidence that bears on the merits of that request. The judge decided at the initial hearing that the child was in imminent danger. It is a frightening, serious finding, one the judge is not likely to revisit searchingly.

Having found previously that this child was at such risk that her life and limb are in dire, immediate peril, the judge now is being asked to decide the degree of the child’s peril. Our brief tour through post-decisional accountability tells us the fruitlessness of such an inquiry. Rather than seek out evidence and systematically sort it; rather than anticipate arguments that others might make; rather than consider opposing viewpoints; rather than engage in searching, pre-emptive self-criticism; the judge embarks on a Herculean struggle of self-defense. She decided within the past few months that the child was in imminent danger, that the parents were unworthy of the tasks that accompany the title, that the family should be disrupted and that encroachment on a fundamental Constitutional right was justified. Bolstering theory tells us that the judge, now, must reaffirm her decision, and must again find that the child is in too much danger to be returned home. Bolstering theory tells us, in fact, that the judge will be focused less on the decision at hand than on the one that came before.

If bolstering causes custody decisions to be an increasingly *pro forma* ratification of parents’ dangerousness as dependency cases march forward, so too can we hypothesize that the many other decisions judges are called on to make also reinforce the same theme. Thus, for example, when a judge must decide whether to direct a parent to undergo a screening for drug use, the decision seems likely to be influenced by the dangerousness decisions that have come before. Rather than explore relevant information that would tend to prove or disprove that a parent uses drugs, the pre-existing determination that the parent is dangerous is a thumb on the scales of justice; the judge’s need to defend the wisdom of the earlier decision makes the outcome of the later one nearly a foregone conclusion. We may hypothesize a similarly truncated and distorted decision-making process when judges must decide on a request by parents and family members to visit with the child.

The dangerousness decision itself is not delinked from the overarching child welfare narrative of beastly and monstrous parents, but rather a manifestation of the judgments reflected in the narrative. Dorothy Roberts and Joseph Tulman have argued that youth suffer the harsh characterizations of the narrative, both derivative

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<sup>295</sup> Emily Buss, *supra* note 1, at 320.

<sup>296</sup> Therese Lund & Jennifer Renne, *supra* note 76 and accompanying text.

of their parents' perceived pathology—as fruit of the poisoned tree<sup>297</sup>—and because they are simply perceived as “undeserving”<sup>298</sup> on their own.

As a result, decisions about the youth themselves may be susceptible to bolstering effects by being unduly harsh and punitive. Thus, when a judge is confronted with options that reflect greater or lesser trust in a child or respect for the child, the judge's decision invisibly but dramatically may be colored by the judge's prior determination that the parent is dangerous and the child unfit to reside in a family home. Those prior judgments, then, are defended, supported, and ratified by decisions that may by turns be punitive, angry, or pitying.

For example, one judge terminated court and social work oversight of a dependent youth, nineteen years old and pregnant with two small children, because, he said, doing so would make her homeless and likely permit the social work agency to take custody promptly of her two children.<sup>299</sup> In another situation, a Florida jail contacted a child's guardian ad litem, informing the GAL that her youthful client was incarcerated. The jailer offered to put the youth on a bus to her home state, if only the social work agency agreed to pay the cost of the ticket. The agency refused. The GAL pleaded with the judge to direct payment, but the judge refused, agreeing with the social worker that incarceration might be better for the child than a foster home.<sup>300</sup>

The decision-makers who chose a harsh option in these examples unlikely did so due to a conscious hatred of the youth or a desire to harm the child. To the contrary, the commitment of dependency judges to support and protect children and youth cannot reasonably be questioned. Like other humans, however, judges are subject to the vicissitudes of the human mind. Like the rest of us, judges seek to avoid embarrassment and to build self-esteem and achieve the respect of others. We can expect, then, that dependency judges' decisions will be affected by their own prior decisions. Psychology theory tells us that after a judge decides, in a shelter care hearing that a parent is too dangerous to function as a full-time parent, we should expect the judge's subsequent decisions about custody and supports and services for both parents and child to be influenced by the judge's need to defend the correctness of the shelter care decision. This does not mean, of course, that the initial decision was wrong or that the subsequent decisions are wrong, but opens a window into the process by which judges reach the conclusions that they do.

#### V. IMPROVING DECISION-MAKING IN DEPENDENCY COURT

How can we replicate in family court an environment that takes advantage of the opportunity presented by accountability and which excises the dangers of bolstering? Unleashing the power of accountability to be a force for good, rather than ill, in dependency proceedings, requires minimizing the conditions which promote bolstering. Beneficial accountability also requires processes and structures which promote pre-emptive self-criticism. The former may be achieved by limiting the occasions on which a judge makes a decision which closely revisits a prior decision

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<sup>297</sup> Dorothy Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 70 (Vintage Books 1999).

<sup>298</sup> Joseph Tulman, *The Undeserving Neglected Child* (manuscript on file with author).

<sup>299</sup> *In re K.W.*, N 1616-98 (D.C. Superior Court).

<sup>300</sup> *In re S.B.* (D.C. Superior Court).

and by imposing structure on the manner in which the judge acquires information and on the decision-making process itself. Pre-emptive self-criticism may be expanded by unleashing the power of existing audiences with unknown views and by creating new ones. I argue below that these goals may be achieved by opening dependency courts to public and press, by improving the functioning of audiences in already-open courts, and by expanding appellate opportunities and the immediacy and effectiveness of the appellate process.

#### *A. Minimizing Bolstering*

As noted above, in most state courts, dependency judges retain exclusive authority over a dependency case for its entirety. This practice reflects the special importance placed on the relationship between the dependency judge and the child and family members, and permits the judge to acquire a cache of knowledge about the child and family that may assist the judge in planning for the child's future. Notwithstanding the potential benefits, however, psychological theory suggests that a judge's repeated decision-making may generate instances of bolstering behavior, in which decisions impose an undue influence on later decisions.<sup>301</sup> In this section, I propose that judges reach decisions together in teams, gain insight from the experiences of others in "case rounds" sessions, and that the information available for a judge to consider in reaching a decision be proscribed more narrowly than at present.

##### 1. Teams of Judges

Courts may wish to expand the pool of judges responsible for decision-making in a case. For example, a team of co-equal judges could be assigned to each case. They could take turns holding hearings, or rotate at pre-established intervals, or collaborate on all decisions. As noted earlier, the initial emergency custodial

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<sup>301</sup> The discussion of bolstering effects in this Article has addressed the potential for such effects within the confines of a single dependency case, because of the oft-lengthy duration of those cases and the ongoing responsibility of a single judge for the case. Although beyond the scope of this Article, I note that another fundamental component of current dependency court structures may contribute to bolstering effects from one case to another. The so-called "one-family, one-judge" model, common throughout the U.S., connotes a system in which a single judge presides over all family-law matters relating to a single family. Thus, if a family presents cases involving divorce, domestic violence, child custody, child support, or dependency, all will be assigned to the same judge. The rationale for this approach is that if a judge has presided over a case involving a family, the judge will, in a subsequent matter, recall information generated by the earlier case that will permit improved decision-making. Proponents of the one-family, one-judge model also anticipate that judges will gain a broad, contextual understanding of a family's strengths and challenges through repeated exposures to members of the family. The judge also is expected to build relationships with the litigants that will help the judge resolve future cases involving the family. Notwithstanding these potential benefits, however, psychology theory suggests that judges' decisions in one case involving a family may cause a bolstering effect in later cases involving the same family, thus distorting judges' decision making processes. To the extent that decisions in later cases relate to earlier decisions – and indeed, the basis for the one-family, one-judge model is precisely that a judge's later decisions will be informed by earlier exposure to the family – conditions for bolstering would be present. Under those circumstances, judges inadvertently may perceive the later decision to be an opportunity to defend or justify the correctness of the earlier, and cut short their assessment of information in the later instance.

decision may be the one most likely to influence future decisions, precisely because it is the first decision about the family. Thus, cases could be transferred from the judge who makes that decision to another judge, with future involvement of the first limited or eliminated altogether.

These recommendations also may have downsides and limitations. In some cases, judges' ongoing involvement permits the judge to build a constructive relationship with the child, family, and others involved in the child's life. The trust and knowledge accrued over the course of months and years can provide valuable insight for judges into the capabilities and potential achievement of all involved. Some youth perceive the judge as a caring authority figure. It is possible that relationships such as these would be less-likely to develop were a single judge's involvement diluted by the involvement of others. It is also possible that the new judge would not be much more likely to revisit or reverse the decision of the original judge than the original judge herself.

## 2. Case Rounds

"Case rounds," a teaching methodology commonly-used in medical and clinical legal education, may offer the benefits of additional voices, without generating the concerns inherent in team-judging. Described as clinical legal education's "signature pedagogy,"<sup>302</sup> case rounds create an opportunity for a wide range of people to provide insight to the decision-maker, without shifting ultimate decision-making responsibility. One of the experiences at the core of many law school clinical courses, a case rounds session typically unfolds with the presentation by a student-lawyer of a problem or concern that has arisen in a case.<sup>303</sup> In general, the student is likely to be faced with a lawyering decision, such as whether to file a motion, how to uncover facts, or how to improve a relationship with a client. The student presents the facts and law relevant to the decision she must make, and asks fellow clinical students to listen, think, and share their insights, borne of their own lawyering or other life experiences. The session frequently resembles a large-group conversation, focused—sometimes loosely—on addressing the problem presented by the student and generating a wide range of options from which she can craft a response to the problem.<sup>304</sup> The session, then, can help the student make a decision about the problem or issue in the case.<sup>305</sup> As Professors Bryant and Milstein write,

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<sup>302</sup> Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 *CLINICAL L. REV.* 195 (2007).

<sup>303</sup> *Id.* at 207 (case rounds topics frequently "aris[e] from an immediate, timely issue in a student's on-going lawyering.").

<sup>304</sup> *Id.* at 208-09 ("Working together [caseroounds participants] often identify a range of options . . . . Collaborative learning allows students to develop new ideas through dialogue with others.").

<sup>305</sup> Susan Bryant & Elliot S. Milstein, *supra* note 302, at 200-01 ("In rounds conversations, students hear about their colleagues' cases, and their colleagues' relationships with clients and others; they come to have a detailed understanding of the legal work their classmates perform . . . . [R]ounds conversations can be . . . fluid and located in the experience of the entire group. As a result, students broaden the knowledge base from which to assess and draw meaning from their own legal work. Critical perspectives emerge from the patterns they see in their own as well as their colleagues' cases."). David A. Binder and Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 *CLINICAL L. REV.* 191, 208 (2003) (arguing that

“In subjecting their decision-making to exploration by their peers, student lawyers get a window in rounds into how and why others may see different choices. They begin to identify which contexts matter in problem definition and how they shape solutions . . . . They [may understand] their clients’ problems differently . . . . [In a case rounds session,] students explored a range of choices possible in their cases, as well as the assumptions underlying particular choices.”<sup>306</sup>

The idiosyncrasies of dependency court are by now well-established.<sup>307</sup> The virtues of case rounds are especially resonant in light of Professor Holland’s observation that in a problem-solving court, “instead of assessing contested stories from competing parties, the judge typically receives a consensus report from the court ‘team.’”<sup>308</sup> Where judges are deprived of robust debate among parties as to the existence and significance of facts, case rounds may provide a means for judges to gather from peers information and insights which might otherwise have failed to occur to them. Premised on the assumption that the problem-solving imagination of the case rounds presenter is limited by her own experiences, and that the wide-ranging experiences of case rounds participants offer rich, varied material from which to draw, case rounds offers a vehicle for the expression of fresh perspectives which may, in turn, open pathways to unexplored decision options.

### 3. Regulation of Information Available to Judge

Another approach to controlling and minimizing the effects of earlier decisions on later ones would be to impose structure and constraints on the information a judge may consider in making decisions. At present, most custodial decisions, and virtually all other decisions, are made on the basis of informal, unstructured argument and representation, rather than in evidentiary hearings with sworn witnesses limited by prohibitions against hearsay. As a result, “non-competent evidence is often allowed to shape the facts of the case.”<sup>309</sup> Judges acquire information to make these decisions prior to the hearing from reports submitted in advance by caseworkers. They also hear from the caseworker, lawyers, litigants, and service providers, and review documents submitted by any of these individuals. The structure provided by stricter regulation of the information provided to the judge, such as that created by application of rules of evidence, may cause the judge to focus on information permissibly-considered and to exclude that which may not. Courts also may wish to consider creating checklists and benchcards which would expressly structure judge’s decision-making processes, and perhaps make them less-vulnerable to the unseen influence of prior decisions and the unconscious preconceived notions generated by those decisions.

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learning “transfer” should be an essential goal of clinical legal education, and that case rounds do not promote achievement of this goal). This critique addresses an issue not central to the potential benefits of case rounds for dependency judges, and does not detract from the value of case rounds as a vehicle for generating a range of problem-solving options for judges confronted with a concrete, specific decision in a case before them.

<sup>306</sup> Susan Bryant & Elliot S. Milstein, *supra* note 302, at 209-10.

<sup>307</sup> See *supra* note 123-135 and accompanying text.

<sup>308</sup> Paul Holland, *supra* note 129, at 194.

<sup>309</sup> Melissa L. Breger, *supra* note 119, at 69.

These suggestions require judges to gather more information than they currently do in conditions of bolstering. At present, bolstering theory suggests that a judge presented with a decision subsequent to the initial custody placement decision gathers and processes little new information, but instead primarily seeks out and uses information that will cause the decision to reflect confirmation of the earlier decision. Hearings conducted pursuant to rules of evidence may be slower, more-halting affairs. Elaborate benchcards and checklists expressly expand the universe of information deemed relevant to the judge's decision. Under conditions of time pressure, courts and judges may find this unpalatable. In the sway of the child welfare narrative, they may believe it unnecessary.

*B. Increase Pre-Emptive Self-Criticism*

1. Counter the Narrative of Child Welfare

Countering the narrative of child welfare, which describes children's parents as savages, beasts, and monsters, may be an important element to ensure that the judge does not know, or assume she knows, the audience's substantive views. The pervasiveness of the existing narrative may cause judges to assume that an audience is interested in a single outcome, namely the separation of the child from her family. The power of the narrative may make it impossible for judges to believe that an audience is interested in the decision-making process, but instead to assume that the audience will be satisfied only by the outcome which reflects the greatest punitiveness. As I have written elsewhere, the narrative may be modified by opening dependency courts in all states; current restrictions on participants' ability to share with the press and public their experiences and observations about cases cause only the harshest, most sensational stories to be available to the public. As noted earlier, the only stories which lawfully may be told about child welfare are those which reinforce the narrative; stories of murders and severe injuries which, because they result in criminal charges, are not confidential.

For the narrative to be remade, child welfare system actors must learn to listen for stories that would contribute to a new world-view. Lawyers, judges and social workers are imbued with the overarching narrative, and operate in a world rigidly controlled by that narrative. System actors expect danger and harm and negativity, and reproduce it by focusing on the deficits and pathologies of families involved in the system. This self-perpetuating cycle can be overcome, as I have written elsewhere,<sup>310</sup> by a more-realistic assessment of the strengths and assets present in families. As system actors view child welfare differently, their stories about child welfare may change. Those stories, in turn, can rebuild a new narrative. As this happens, judges may be less tied to an assumption that their audiences seek only foster care placements and similarly-punitive decisions, thus permitting accountability to have the desired effects.

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<sup>310</sup> See Matthew Fraidin, *Changing the Narrative of Child Welfare*, 19 *Geo. J. ON POVERTY L. & POL'Y* 97, 107 (2012) ("Assuming your client is a bundle of assets unlocks . . . an opportunity to meet those fascinating people and to represent them far more effectively.").

## 2. Open Dependency Courts

Pre-emptive self-criticism also can be generated by opening all child welfare courts and records, so the judges can have audiences of the in-court (observing) public, in-court (observing) press, and readers of the press. The “public audience” may be either members of the public who have an interest in the particular case before the court, such as family members, friends, and neighbors of the child, or members of the community with an interest in Family Court processes generally, such as members of a community “watchdog” organization. Those with an interest in the outcome will not provide effective accountability.

The court itself could establish a monitoring corps, which deployed observers to courtrooms on a regular basis and assigned staff to review documents in the court files. Another approach would be to establish a community watchdog group that has a regular, ongoing presence in the courtrooms and promises to review files as well. Community or court-based monitors should include in their mission statement an expression of substantive neutrality and process-orientation.

To create a process-orientation, observers could be trained regarding optimal procedural steps, and could be armed with a standardized instrument permitting regularized monitoring of procedural components of judges’ work. These components might include the number of parties who provide information or express an opinion leading to a decision, the conditions under which those voices are heard (i.e., sworn or unsworn, biased or not, rules of evidence or not, cross-examined or not), and the amount of time devoted to gathering information and considering the information before the decision is made, etc. The judge could be made aware ahead of time of the specific components of the monitoring.

Another approach to infusing a process with accountability is to include or expand an evaluation component. This would mean that judges would be assessed or reviewed more frequently and more effectively, and the results would have positive or negative consequences. Judges could be affected by the prospect of assessment and review if a greater range of orders were appealable, and if the appeals process were more expeditious. Judges also could be evaluated by press reports or community watchdog reports. A community group could regularly publish a review of its activities, with description and opinion of judges’ activities.

## 3. Reason-Giving

In addition, judges would be more accountable if they were required to give reasons for the decisions they reach. Most dependency court decisions are issued orally, and then memorialized in writing. Observers and watchdogs could be instructed to listen for judges’ oral explanations of their decisions in court, and to evaluate judges on the fulsomeness and logic of their reasoning. Written orders could be reviewed for the depth and persuasiveness of the reasons set forth. One important change would be to limit or discontinue the use of “form orders,” which are used to record almost every decision made by a dependency judge. Form orders create a convenience for dependency judges, who are heavily burdened by large caseloads. Nonetheless, the use of “form orders” discourages reason-giving. These orders are primarily forms with check-boxes and fill-in-the-blank spaces. Where space is allowed for explanation and reason-giving, it is very limited.

#### 4. Strengthen Appellate Review

Pre-decisional accountability also may be increased by expansion of appellate rights in dependency cases. Shelter care decisions should be appealable in all states, by all parties. Another approach, as-yet untried, would be to designate as appealable a small, randomly-selected sampling of dependency court decisions. The availability of appeals from other decisions, such as those regarding visitation and a child's long-term plan, also could create in trial judges' minds an expectation that their decisions must satisfy an audience.

### VI. CONCLUSION

This Article shares a tremendous amount of information, detailing social psychologists' findings about a wide range of issues relating to decision-making and accountability. The psychology research has been done; the findings are, in relation to many subjects, tried and tested; and there are lessons to be learned, generalized, and used. At the same time, we make best use of knowledge by appreciating its limits, and the limits of conclusions that can be drawn from it.

Current knowledge raises unmistakable concerns about decision-making processes in dependency court. Some of the available research-based conclusions seem to be robust, and we may reasonably hypothesize about the application of those findings. For example, decision-makers under time constraints, with a low need for cognition, in a setting characterized by groupthink and in which stereotype is rampant, are likely to use speedy, intuitive decision-making processes. Dependency judges operate under time pressure, and may tend toward heuristic processes because of their conditioned need for cognition and the effect of the overarching narrative of child welfare. The atmosphere of dependency court may generate groupthink, and dependency judges' ambiguous role-definition may affect the decision-making process they employ. Research also tells us that pre-decisional accountability to an unknown audience can attenuate bias, and that post-decisional explanations offer decision-makers an opportunity to self-protectively bolster, or harden, the certitude of a prior conclusion, discouraging a fresh look at a new decision. Dependency court seems to have too little of the helpful kind of accountability, and too much of the harmful kind.

But those assertions are more nearly hypotheses than conclusions. Our knowledge about dependency judges' decision processes is analogic, rather than supported by direct evidence of dependency judges' practices. Most research from which decision-making theory is derived was conducted in carefully prefabricated experimental settings, with subjects merely in role as decision-maker. Professor Mitchell warns of "the difficulty of achieving psychological realism in experimental studies of legal problems."<sup>311</sup> The subjects knew, as they made decisions, that they were participating in an experiment, that they would leave their roles at the end of the day, and that no real consequence would attach to them or anyone else.

Guthrie, et al., advanced the boundaries of our knowledge about judges' decision-making by studying as subjects judges themselves. Guthrie, et al., also contributed by attempting to evaluate the subject-judges' decision-making processes in tasks analogous to those confronted in real-life judging, such as settlement

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<sup>311</sup> Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 128 (2002).

negotiations.<sup>312</sup> Their work moves us closer to reliable data from which to draw conclusions, but does not fully ground analysis of this issue. Their work, too, reflects experimental findings, not assessments of real-world functioning, with real-world pressures and consequences. The judges in those studies were trial judges, like those whose decision-making processes are the subject of this Article, but it is unclear whether any served in the unique hothouse of state-level dependency court. This important work deepens, but does not conclude, a conversation.

This Article carries that conversation forward by applying to a specific, real-world context the Guthrie, et al., findings, and the findings of many, many social psychologists. This Article, too, however, resides at a level of generality forced upon it by the absence of information about dependency judges' real decisions in real cases involving real children and families.

The paucity of direct evidence about dependency judges' decision-making processes requires elision, for now, of important differences between and among decisions. For example, even with respect to a shelter care decision, there is a vast range of variables that may affect the process a judge uses to reach a conclusion. Judges may engage in different approaches to processing based on the age of the child in question, or the number of children involved, or whether the child is threatened with separation from a single parent or a two-parent household, and many other factors. Variance among later decisions in dependency cases may be even greater. The passage of time, maturation of the child, and evolution of relationships between the judge and the child, family members, and foster parents may affect judges' approach to addressing matters that arise in cases. In the absence of empirical and qualitative data, this Article treats as equivalents judges' decisions regarding visitation, medical care, and custodial placement; in fact, however, it seems possible, if not likely, that judges' decision-making processes may vary in accordance with the nature of the decision being made. So too might judges' responses to accountability differ from decision to decision, from day to day, and from judge to judge. One judge may be interested in seeking higher office, and thus may be especially responsive to a perception of voters' interests. Another judge may be a long-term resident of a small town, and feel keenly his neighbor's eyes as he shops for groceries.

Thus, recommendations to improve decision-making in dependency court are offered in the previous section in recognition that they can be grounded in theory, but not empirical evidence. To capitalize on recommendations for change, then, we must consider future directions for research that will promote a truer understanding of decision-making in dependency court. How might the information generated by experiments be supplemented to strengthen the evidence base about decision-making by dependency judges?<sup>313</sup>

Interviews of judges, both before and after decisions are reached, could unearth the information the judge believes she took into account and the weight she assigned to it. In-court observers might listen to judges' real-time announcement of decisions and articulation of factors relevant to their decisions. This process can build a foundation by uncovering what it is that judges think they do when they decide.

Data about a wide variety of variables potentially relevant to decision-making could be collected and catalogued by interviews, observations, and review of court

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<sup>312</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *supra* note 2, at 20-21.

<sup>313</sup> Gregory Mitchell, *supra* note 311, at 129.

files. A child's race, age, family composition, the number and nature (relatives, friends, social workers) of witnesses in a hearing, a judge's daily calendar: which of these factors matter, and which do not, when dependency judges make decisions? Perhaps decisions can be predicted by the time of day a hearing is held—might a judge, like other humans eager to leave work on Friday afternoons, take less time with decisions presented in hearings held then? How are judges' decisions affected by the many substantive trainings they attend? Do they, for example, use in their cases knowledge gained in seminars about family violence, or children's medical needs? Collecting this information would permit finely-grained conclusions to be drawn about the correlation of each variable with decision outcomes, and the interaction of each variable with others.

The work of psychologists and others mentioned and cited in this Article teaches about decision-making and accountability, and also about limitations. Their experiments yield copious amounts of information, but that information seems primarily to illuminate all that we do not know. In his celebration of ignorance, Professor Firestein anticipates our quandary, and celebrates it. He writes,

[F]acts serve mainly to access . . . ignorance . . . . [S]cientists don't concentrate on what they know, which is considerable but minuscule, but rather on what they don't know . . . . [S]cience traffics in ignorance, cultivates it, and is driven by it. Mucking about in the unknown is an adventure; doing it for a living is something most scientists consider a privilege.<sup>314</sup>

“Muck[ing] about in the unknown” of dependency court, legal scholars, like the scientists with whom Firestein primarily is concerned, may be carried by ignorance, as well as curiosity and obligation, to greater understanding of the environment in which so many children and families have so much at stake.

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<sup>314</sup> STUART FIRESTEIN, *IGNORANCE: HOW IT DRIVES SCIENCE* 15 (Oxford University Press 2012).