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WHAT JUDGES NEED TO KNOW: SCHEMAS, IMPLICIT BIAS, AND EMPIRICAL RESEARCH ON LGBT PARENTING AND DEMOGRAPHICS

*Todd Brower**

I. INTRODUCTION

Despite the increasing number of lesbian, gay, bisexual and transgender [LGBT]¹ people on television, most are secondary or background characters.² Since 2000, prime-time, Nielsen top-ten,

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¹ This article acknowledges LGBT persons and communities as subsets of a larger group of individuals whose identities diverge from that of heterosexual, gender-normative persons. *See, e.g.*, Regents of the University of California, Davis campus, *LGBTQIA Resource Center Glossary*, <https://lgbtqia.ucdavis.edu/educated/glossary.html> (last updated Oct. 10, 2017). Brent L. Bilodau & Kristen A. Renn, *Analysis of LGBT Identity Development Models and Implications for Practice*, in *GENDER IDENTITY AND SEXUAL ORIENTATION: RES., POL'Y, AND PERSONAL PERSPECTIVES*, 111 *NEW DIRECTIONS FOR STUDENT SERV.*, 25, 27, 32-33 (Ronnie L. Sanlo ed., 2005). *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

² *See generally*, Kelly Rice, *Out on Television – A Brief History of LGBT Characters in Mainstream Television*, EQUALLI, (April 20, 2015), <https://www.equalli.com/blog/out-on-television-a-brief-history-of-lgbt-characters-in-mainstream-television/> (last visited November 11, 2017); Robert Bianco, *TV's gay characters, before and after Ellen*, USA TODAY, (May 31, 2017), <https://www.usatoday.com/story/life/tv/2017/04/26/tvs-gay-characters-before-and-after-ellen/100898898/> (last visited November 11, 2017); GLAAD Media Report, *Where We Are On TV '17-'18: GLAAD's annual report on LGBTQ inclusion*, GLAAD, 1, 6 (2017), http://glaad.org/files/WWAT/WWAT_GLAAD_2017-2018.pdf (last visited November 11, 2017).

network television has given us three LGBT characters who are the titular or main characters in their show: Will Truman, from *Will & Grace*,³ and Cam Tucker and Mitchell Pritchett from *Modern Family*.⁴ They are White, upper-middle class, educated, urban (Will lives in New York City; Cam and Mitchell in Los Angeles), and sophisticated in tastes in furnishings, food, and clothing. Cam and Mitchell are parents; they adopted a daughter from Viet Nam, Lily Tucker-Pritchett.⁵ Mitchell, like Will Truman, is a lawyer;⁶ Cam stays at home to care for Lily.⁷ For a significant part of the series, Will was single and childless; in the final episode we learn he has had a son with his partner through in vitro fertilization with a surrogate.⁸ However in the current reboot of the sitcom, he is single, childless, and living with Grace again.⁹

³ *Will & Grace*, IMDB, <http://www.imdb.com/title/tt0157246/> (last visited July 24, 2017).

⁴ *Modern Family*, IMDB, http://www.imdb.com/title/tt1442437/?ref_=nv_sr_1 (last visited July 24, 2017).

⁵ *Biography for Lily Tucker-Pritchett*, IMDB, <http://www.imdb.com/character/ch0223363/bio> (last visited July 24, 2017).

⁶ *Biography for Will Truman*, IMDB, http://www.imdb.com/character/ch0019859/?ref_=ttfc_fc_cl_t1 (last visited July 24, 2017); *Biography for Mitchell Pritchett*, IMDB, <http://www.imdb.com/character/ch0161143/bio> (last visited July 24, 2017).

⁷ *Biography for Cameron Tucker*, IMDB, <http://www.imdb.com/character/ch0169632/bio> (last visited July 24, 2017).

⁸ *The Finale: Part 1*, IMDB, http://www.imdb.com/title/tt0786622/?ref_=tt_ep_nx (last visited July 24, 2017); Shannon Carlin, *How Will The 'Will & Grace' Series Finale Affect The Revival? That Time Jump Could Come Into Play*, BUSTLE, (January 18, 2017), <https://www.bustle.com/p/how-will-the-will-grace-series-finale-affect-the-revival-that-time-jump-could-come-into-play-31360> (discussing the characters' lives at the end of the series in 2006).

⁹ Brooks Barnes, *Will & Grace' Is Back. Will Its Portrait of Gay Life Hold Up?*, N.Y. TIMES (Sept. 17, 2017), <https://www.nytimes.com/2017/09/14/arts/television/will-grace-debra-messing-eric-mccormack.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news>

Although living in 2017, Will returns to his mid-2000s existence – despite societal and other changes in contemporary LGBT life.¹⁰

Although praised for being culturally significant,¹¹ and for providing multidimensional, more realistic depictions of gay people,¹² the shows remain part of a portrayal of LGBT life and

¹⁰ *Id.*

¹¹ Jessica Yellin, *Biden says he is 'absolutely comfortable' with same-sex marriage*, CNN (May 6, 2012), <http://politicalticker.blogs.cnn.com/2012/05/06/biden-says-he-is-absolutely-comfortable-with-same-sex-marriage/> (quoting Biden “I think 'Will and Grace' did more to educate the American public than almost anything anybody has ever done”); Jen Chaney, *Ranked: The top 10 NBC comedies of all time*, THE WASHINGTON POST., (Oct. 9, 2012), https://www.washingtonpost.com/blogs/celebritology/post/ranked-the-top-10-nbc-comedies-of-all-time/2012/09/10/9bb471e0-f90d-11e1-a073-78d05495927c_blog.html?utm_term=.c1bf7a194ab9, accessed July 24, 2017; Bruce Feiler, *What Modern Family Says About Modern Families*, (Jan. 21, 2011), NEW YORK TIMES, FASHION & STYLE, <http://www.nytimes.com/2011/01/23/fashion/23THISLIFE.html>, accessed July 24, 2017; Spencer Kornhaber, *The Modern Family Effect: Pop Culture's Role in the Gay-Marriage Revolution TV has convinced America that same-sex couples can be just like straight ones. What's next?*, (June 26, 2015), THE ATLANTIC, <https://www.theatlantic.com/entertainment/archive/2015/06/gay-marriage-legalized-modern-family-pop-culture/397013/>, accessed July 24, 2017 (discussing how support for marriage equality may have been influenced by the gay couple in *Modern Family*).

¹² See David Dodge, *Are Mitch and Cam TV's Most Boring Gay Couple?*, GAYS WITH KIDS (Apr. 6, 2017), <https://gayswithkids.com/2017/05/06/mitch-cam-old-news/>, (discussing how both *Will & Grace* and *Modern Family* broke boundaries in their portrayals of LGBT people); Christopher Kelly, *Will & Grace Changed Nothing*, (Tuesday, Oct 2, 2012 09:10 pm), SALON.COM, http://www.salon.com/2012/10/03/will_grace_changed_nothing/, (praising show for providing rounded, characters not driven to tragedy by their gayness, even as it reinforced some of those same stereotypes); *Challenging Stereotypes, Gay Stereotypes in 'Modern Family'*, <http://analysisofmodernfamily.weebly.com/challenging-sterotypes.html>, accessed July 24, 2017 (same); But see, Gene Wang, *Gender and Sexuality Column, Original run of 'Will & Grace' was revolutionary but problematic; reboot needs to portray queer characters fairly and realistically*, (Feb.

individuals that is problematic. Media and popular culture often depict lesbians and gay men as wealthy, White, childless, urban singles,¹³ and almost entirely ignore bisexuals¹⁴ and transgender persons.¹⁵ Accordingly, if those representations were true, we

2017), THE DAILY ORANGE, <http://dailyorange.com/2017/02/original-run-of-will-reboot-needs-to-portray-queer-characters-fairly-and-realistically/>.

¹³ Gary J. Gates & Adam P. Romero, *Parenting by Gay Men and Lesbians: Beyond the Current Research*, in MARRIAGE AND FAM.: COMPLEXITIES AND PERSP.'S 227, 227 (Elizabeth Peters & Claire M. Kamp Dush eds., 2009); *See generally*, Larry Gross, UP FROM INVISIBILITY: LESBIANS, GAY MEN, AND THE MEDIA IN AMERICA, (paperback ed. 2001) (xvi Preface, 256). *Accord* Romer v. Evans, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (“[T]hose who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, [] have high disposable income,” [] “[T]hey possess political power much greater than their numbers, both locally and statewide” (citations omitted).

¹⁴ Eliel Cruz, *Here's the One Simple Reason Why We Need More Openly Bisexual Characters on Television*, MIC.COM (Sept. 1, 2014), <https://mic.com/articles/97512/here-s-the-one-simple-reason-why-we-need-more-openly-bisexual-characters-on-television#.IQKRNU7JO>.

I refer to bisexuals in this Article and in the common abbreviation, LGBT, although the data on bisexuals in these cases is scant. In custody and visitation cases, courts generally have not acknowledged that bisexuality exists or that bisexual and lesbian or gay identity are distinct. Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 262 (2009). Moreover, when fathers in these cases identified as bisexual, Rosky asserts they were often miscategorized as gay men. *Id. Accord* Fuller v. Lynch, 833 F.3d 866, 871 (7th Cir. 2016) (upholding Immigration Judge's disbelief that bisexual male asylum seeker was truly bisexual). In Conkel v. Conkel, 509 N.E.2d 983, 984-87 (Ohio Ct. App. 1987), the parties stipulated that the father was bisexual, but the trial and appellate courts called him homosexual. This elision may be less true with female bisexuals, although they, too, are largely absent from court opinions. *See*, Ruth Colker, *A Bisexual Jurisprudence*, 3 TULANE J.L. & SEXUALITY 127, 129, 134 (1993); Rosky, 20 Yale J.L. & Feminism at 262, n.11; *see generally*, Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

¹⁵ Jessica N. Jobe, *Transgender Representation in the Media* (Dec. 4, 2013) (unpublished Honors Thesis, Eastern Kentucky University) (on file with the Eastern Kentucky University Library). *Victims or Villains: Examining Ten Years of Transgender Images on Television*, GLAAD,

might conclude that family and parenting law have only a tangential connection to those communities. Similarly, judges, legislators, and policy makers would not need to consider how same-sex couples and their families are affected by domestic relations statutes, rulings, or regulations because popular media says that those families do not exist. Data demonstrate, however, that those portrayals are false.

Moreover, the problem is not simply that these popular media portrayals are misleading, but their utter familiarity flattens the complexity of LGBT life and obscures divergent and more complete information and understanding. Accurate demographic data and empirical research on LGBT people and their families illustrate that those flattened, incomplete depictions warp judicial and legislative outcomes. Moreover, these distortions are exacerbated because the family law doctrines that affect parents and children, including sexual and gender minorities and their families, are designed to be flexible and capture a wide variety of inputs.¹⁶ While usually seen as positive characteristics, flexibility and the broad range of information relevant to decisions under these legal principles also make those doctrines susceptible to cognitive barriers inherent in how we think and process information, and malleable depending on a judge's idiosyncratic images and beliefs about LGBT people.

After the Introduction, Part II of this Article discusses cognitive science and schema theory, linking it to judicial decision-making and implicit bias. It continues that analysis by examining how the demographics of sexual and gender minority communities lead judges to confront a different range of cases and legal issues than they might otherwise have envisioned. Part III addresses how LGBT schemas have affected LGBT parents and their families through the "best interests of the child" standard.

<https://www.glaad.org/publications/victims-or-villains-examining-ten-years-transgender-images-television> (last visited November 5, 2017). Charley Reid, *Why Transgender Representation in the Media has a Long Way to go*, THE GOOD MEN PROJECT (Mar. 20, 2016), <https://goodmenproject.com/featured-content/transgender-representation-media-long-way-go-wcz/>.

¹⁶ See *infra* notes 86 - 105, and accompanying text.

That section seeks to correct these schemas by exploring the data about parenting, children's sexuality and gender identity, and other psycho-social measures. Part IV discusses other impacts that LGBT schemas have on legal institutions and on same-sex couples and their families, the empirical treatment of LGBT parents and children in foster care, and the tax implications of the mismatch between schematic thinking and data on same-sex couples. Finally, Part V considers ways in which empirical data on LGBT people can be used in judicial education to start the process of schema change and correction. That change may then lead to improved treatment and experiences in the family court system for sexual and gender minority individuals and their families.

II. SCHEMAS, IMPLICIT BIAS AND FAMILY COURTS

A. Overview

Psychologists have shown that schemas shape our perceptions of the world. We use a set of beliefs about individuals, situations or events to guide our interactions with those things.¹⁷ Schemas quickly allow us to know (or think we know) a great deal about an individual or thing after only a brief exposure.¹⁸ Thus, if we have a schema about tables and another about chairs, when we encounter a new piece of furniture we know whether to put our drink on it or

¹⁷ E.g., AARON BROWER & PAULA NURIUS, SOCIAL COGNITION AND INDIVIDUAL CHANGE: CURRENT THEORY AND COUNSELING GUIDELINES, 14-15 (1993); Claudia E. Cohen, *Goals and Schemata in Person Perception: Making Sense from the Stream of Behavior*, 45, 60, in PERSONALITY, COGNITION, AND SOCIAL INTERACTION, (Nancy Cantor & John F. Kihlstrom eds., 1981) ;Nancy Cantor & John F. Kihlstrom, PERSONALITY AND SOCIAL INTELLIGENCE, (1987); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124-31 (1974).

¹⁸ For how seemingly unlikely factors like body mass affect perceptions of nationality and other judgments far removed from those inputs, see Caitlin Handron, Teri A. Kirby, Jennifer Wang, Helena E. Matskewich, & Sapna Cheryan, *Unexpected Gains: Being Overweight Buffers Asian Americans From Prejudice Against Foreigners*, 28 PSYCHOL. SCI. 1214, 1227 (2017).

sit in it. By behaving consistently with our schemas, we believe we act appropriately towards that person or object.¹⁹

This reaction is functional for us; we would be unable to keep up with the continual stream of inputs if we perceived them all as novel and unexpected.²⁰ We would be paralyzed into indecision or face unwarranted delay in processing these occurrences while we puzzled out anew how to behave in each situation.²¹

Moreover, cognitive psychologists have demonstrated that we decode the jumble of ambiguous or contradictory information to make it meaningful to us, whether or not our decoding is appropriate or accurate.²² Thus, once we activate a schema, even marginally consistent information is reinterpreted to supplement and strengthen the schema's features; inconsistent data is edited out.²³ We build explanations in line with our schemas, in part because they are the only ones for which we are looking²⁴ and ignore alternatives or more appropriate causes.²⁵ The schema filters how we view events, and how we interpret and utilize information.²⁶ Thus, once created, schemas are stubbornly resistant to change.²⁷

¹⁹ BROWER & NURIUS, *supra* note 17.

²⁰ *Id.* at 28.

²¹ *Id.*

²² *Id.* This decoding has particular relevance to schemas. Because schemas are idiosyncratic, they need not be consistent with others, nor accurate – an outcome reinforced by liberal editing of new inputs to match existing beliefs. Todd Brower, *Social Cognition 'At Work:' Schema Theory and Lesbian and Gay Identity in Title VII*, 18 TULANE J.L. & SEXUALITY 1, 4 (2009); BROWER & NURIUS, *supra* note 17, at 14-15.

²³ Karen Farchaus Stein, *Complexity of Self-Schema and Responses to Disconfirming Feedback*, in 18 COGNITIVE THERAPY & RES. 161 (1994); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1206-07 (1995).

²⁴ Tversky, *supra* note 17, at 1124-31; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

²⁵ Krieger, *supra* note 23, at 1206-07.

²⁶ H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*,

Consequently, schemas underpin the related concept of implicit bias: attitudes that unconsciously affect understanding, decision-making, and behavior.²⁸ This bias stems from what some researchers call “intuitive thinking” in contradistinction to “deliberative” decision-making. Wistrich and Rachlinski define intuitive thinking as

[...] relying on one’s first instinct. Intuition is emotional. It relies on close associations and rapid, shallow cognitive processing. Intuitively, if a choice sounds right and feels right, then it is the right choice. Psychologists sometimes refer to this style of decision making as System 1 reasoning. System 1 produces rapid, effortless, confident judgments and operates outside conscious awareness. When we go with our gut, we decide quickly and feel that we are right.²⁹

There is a significant literature applying implicit biases and schemas to judges and their decision-making processes,³⁰ including those based on race and gender.³¹ These impacts can be severe; some studies found that racial schemas affect capital and

39 J. PERSONALITY & SOC. PSYCHOL. 590, 593-95 (1980); Lee Ross et al., *Social Explanation and Social Expectation: Effects of Real and Hypothetical Explanations on Subjective Likelihood*, 35 J. PERSONALITY & SOC. PSYCHOL. 817, 827-28 (1977); Edward E. Jones, *How Do People Perceive the Causes of Behavior?*, 64 AM. SCIENTIST 300, 304 (1976).

²⁷ BROWER & NURIUS, *supra* note 17; Tversky & Kahneman, *supra* note 17, at 1130.

²⁸ E.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

²⁹ Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, ENHANCING: JUSTICE REDUCING BIAS, 87, 90 (Sarah Redfield ed. 2017).

³⁰ Jeffrey J. Rachlinski et al., *Implicit Bias in the Courtroom: Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000).

³¹ Rachlinski, et al., *Implicit Bias in the Courtroom*, *supra* note 30; Kang, et al., *supra* note 28, at 1146-50.

other criminal sentences.³² Concomitantly, judicial decision-making about LGBT people, their families, and their legal issues can be skewed by schemas or implicit bias³³ and have significant consequences. Because these biases about particular groups are rooted in associations or intuitions, schematic thinking often loops back to media depictions and other representations, as well as individuals' own past experiences.³⁴ Accordingly, it is important, although not sufficient,³⁵ to correct inaccurate images or beliefs about groups of people and types of families – including LGBT people and their families – in order to combat those unconscious biases.³⁶

³² See, e.g., Jennifer L. Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383-386 (2006); Irene V. Blair, Charles M. Judd, & Kristine M. Chapleau, *The influence of Afrocentric facial features in criminal sentencing*, 15 PSYCHOL. SCI. 674-679 (2004); see generally Travis L Dixon, & Keith B. Maddox, *Skin tone, crime news, and social reality judgments: Priming the stereotype of the dark and dangerous black criminal*, 35 J. APPLIED SOC. PSYCHOL. 1555, 1570 (2005).

³³ Brower, *Social Cognition*, *supra* note 22.

³⁴ See Nicholas O. Rule et al., *Accuracy and Awareness in the Perception and Categorization of Male Sexual Orientation*, 95 J. PERSONALITY & SOC. PSYCHOL. 1019 (2008) (discussing five studies on people's intuitions about gay male identity, "gaydar"); Gerulf Rieger et al., *Dissecting "gaydar": Accuracy and the role of masculinity-femininity*, 39 ARCHIVES SEXUAL BEHAV. 124-140 (2010) (discussing the mechanics of judgments about gay male identity); see also, BROWER & NURIUS, *supra* note 17; Kang, et al., *supra* note 28, at 1129, 1156-59.

³⁵ Kang, et al., *supra* note 28, at 1170.

³⁶ Kang, et al., *supra* note 28, at 1170-72; Brower, *Social Cognition at Work* *supra* note 22. Fact-based change to schemas is problematic. An individual's evaluation of research on LGBT parenting is often colored by their own competing factual beliefs, beliefs that are highly resistant to change through empirical data. Accordingly, even when honestly trying to assess factual issues objectively, people are often cognitively prevented from succeeding. Cultural Cognition Project at Yale Law School, *The cultural cognition of gay and lesbian parenting: Summary of first round data collection*, CULTURAL COGNITION PROJECT, 20 at 2 (2009), <http://www.culturalcognition.net/storage/Stage%201%20Report.pdf>.

B. Demographic Data on Same-Sex Couples and Their Families

Despite the long history of media and popular culture tropes about LGBT people,³⁷ demographic data demonstrate that the truth about same-sex couples³⁸ is different from those images. Judges in rural or suburban courts far outside urban, gay ghettos may believe they do not have LGBT families in their courtrooms. Thus, they may not think they have to consider the effects of their rulings on non-heterosexual, non-cisgender persons. Moreover, they may not feel any need to look beyond media images to become aware of, and sensitive to, the diversity of modern American family life generally and same-sex couples in particular.

Those beliefs are false; the data disagree. While some lesbians and gay men reside in cities, many also live in suburban and rural locations.³⁹ For example, per capita the highest percentage of lesbian couples in the United States lives in Northampton, Massachusetts, a college town of approximately 28,000 people about 100 miles from Boston.⁴⁰ By a significant margin, Northampton is the most populous of the top ten places where lesbians live; the other nine are all even smaller rural or suburban communities.⁴¹ Furthermore, these data reinforce a significant difference between the locations where male and female same-sex

³⁷ See, e.g., *Queer As Tropes*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/QueerAsTropes> (last visited June 14, 2017).

³⁸ Because much of the data in this section is sourced from the US Decennial Census and other census documents, same-sex couples are the focus here. The census does not ask about sexual orientation or gender identity, but about relationships within a household. Therefore, more limited or extrapolated data are available on single lesbians and gay men, or bisexual and transgender persons. See Gary J. Gates, *How many people are lesbian, gay, bisexual and transgender?* THE WILLIAMS INST. 1, 6 (2011).

³⁹ *United States Census Snapshot: 2010*, THE WILLIAMS INST.

⁴⁰ *Top 101 cities with the largest percentage of likely lesbian couples*, CITY DATA, <http://www.city-data.com/top2/c15.html> (last visited Apr. 26, 2017); GARY J. GATES & JASON OST, *THE GAY & LESBIAN ATLAS* (2004).

⁴¹ City Data, *supra* note 40.

couples live: men in more urban locales and women in more suburban and rural ones.⁴²

Because inaccurate popular media images buttress the schema that LGBT people are predominantly urban, rural and suburban judges may be the most in need of empirical, data-based education to correct these misleading media portrayals. Consistent with demographic evidence, those judges are more likely to hear matters involving female same-sex couples,⁴³ and a large percentage of those couples will have children.⁴⁴ Knowing these facts is important. As research into court users has shown, one of the central factors in the public's confidence and satisfaction with the judicial system is believing that the courts accurately see, acknowledge, and give voice to the people appearing before them.⁴⁵ None of this can happen without an accurate picture of who is in the courtroom, including sexual and gender minority court users.

As seen above, LGBT identity is not always the dominant factor in where sexual minorities reside. Same-sex couples raising children often live near other different-sex couples with children in suburban and other areas with traditional, family-centered amenities like better schools, parks, and recreational opportunities, and not in predominantly gay urban communities.⁴⁶ Similarly, same-sex couples of color predominantly live with others of their race or ethnicity, instead of in lesbian or gay enclaves.⁴⁷ These data do not conform to common media images of LGBT people. Perhaps unexpectedly, that incongruence also strengthens these misleading media portrayals. If we look for same-sex couple parents or people of color in traditional gay neighborhoods, we are likely not to find them present. Thus, the reality of LGBT

⁴² *United States Census Snapshot: 2010*, *supra* note 39.

⁴³ *Id.*

⁴⁴ *See infra* note 46, and accompanying text.

⁴⁵ David B. Rottman, *Nat'l Ctr. for State Courts*, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS 24 (2005).

⁴⁶ GATES & OST, *supra* note 40, at 46-47.

⁴⁷ Brad Sears, Gary J. Gates & Holning Lau, *Race and Ethnicity of Same-Sex Couples in California: Data from Census 2000*, THE WILLIAMS INST. 1, 3-4 (2006).

demographic patterns increases the invisibility of LGBT parents and people of color, while it reinforces the perception of the gay ghetto as a predominantly White, childless space. Consequently, it buttresses typical schemas about LGBT people as it minimizes other, contrary perspectives. If the creators of “Modern Family” had wanted to create a more truthful image of a gay couple raising a young child near family in Los Angeles, Cam and Mitchell would have been lesbians of color living somewhere in suburban Southern California.⁴⁸

In addition to misidentifying location, inaccurate media images often strengthen the perception that lesbians and gay men are childless or, if they have children, are rearing adopted children or those conceived through assisted reproductive technologies, while heterosexuals are raising biological offspring. The TV portrayals of Will Truman and Cam and Mitchell as gay fathers are good examples of the typical route we expect lesbians and gay men to take to parenthood: adoption or surrogacy⁴⁹ – if they even seek to be parents at all. Nevertheless, here as on many other criteria, sexual minorities are more similar to their non-gay peers than different. Gay and non-gay persons who have not yet had children express similar desires to be parents, and both groups articulate a greater wish to have children than individuals who have already done so. Compared to their heterosexual counterparts, similar percentages of lesbians and gay men want a child or more children: heterosexual women and lesbians, 53.5 and 41.4 percent respectively, heterosexual and gay men, 66.6 and 51.8 percent.⁵⁰ Consequently, despite media depictions that gay men and lesbians lack the desire to parent, often they are similarly situated to their heterosexual peers. Therefore, they will follow comparable

⁴⁸ Gary J. Gates & Abigail M. Cooke, *California Census Snapshot: 2010*, THE WILLIAMS INST. 1, 2-3 (2011); Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST. 1, 3-4 (2013).

⁴⁹ See *supra* notes 8-10, and accompanying text.

⁵⁰ Gary J. Gates, *Geographic Trends Among Same-Sex Couples in the United States in the U.S. Census and the American Community Survey*, THE WILLIAMS INST. 1, 5-6 (2007).

relationship patterns, face comparable parenthood challenges, and will bring comparable issues before courts.⁵¹

Indeed, like their different-sex peers, gay and lesbian couples not only seek parenthood, they already parent and raise a significant number of children. Population-based studies have found that 35 percent of self-identified LGB persons in the US are raising a child under the age of 18 in the home.⁵² Similarly, a recent literature review of 51 empirical studies of transgender and gender non-conforming individuals found that a quarter to one half of transgender respondents reported being parents.⁵³ It is axiomatic that sexual minorities sometimes take different pathways to parenthood than heterosexual peers. Some children born to heterosexual couples have a parent who later comes out as gay or lesbian, and are then raised by a same-sex couple or by a lesbian or gay single parent. Other children are adopted by, or born to, lesbian- or gay-identified parents, or through surrogacy or assisted reproductive technology.⁵⁴ However despite popular media images, same-sex couples' routes to parenthood often resemble that of different-sex counterparts more than they differ.

Consequently, demographic data can be used to correct false intuitions and better inform the courts, the judicial system, and

⁵¹ Accord Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES, Apr. 27, 2008, at MM28. (describing younger gay people's desire to marry and follow other traditional family patterns like their heterosexual peers – including the belief that they will beat the statistical odds of divorce). For the rate of divorce among same-sex couples, see M.V. Lee Badgett & Christy Mallory, *Patterns of Relationship Recognition for Same-Sex Couples: Divorce and Terminations*, THE WILLIAMS INST. 1 (2014).

⁵² Gates, *LGBT Parenting in the United States supra* note 48, at 2.

⁵³ Rebecca L. Stotzer, Jody L. Hermann & Amira Hasenbush, *Transgender Parenting: A Review of Existing Research*, THE WILLIAMS INST. 2 (2014); Accord Gates, *LGBT Parenting in the United States supra* note 48, at 2; Jamie M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, WASHINGTON: NAT'L CTR FOR TRANSGENDER EQUALITY AND NATN'L GAY AND LESBIAN TASK FORCE 88 (2011).

⁵⁴ Abbie E. Goldberg, Nanette K. Gartrell & Gary J. Gates, *Research Report on LGB-Parent Families*, THE WILLIAMS INST. 1-2, 7-13 (2014).

those who work in those institutions.⁵⁵ In fact, schema research demonstrates that one of the surest opportunities to change an inaccurate schema is when it ceases to be functional; when it no longer works to resolve an issue.⁵⁶ Empirical demographic data on the geography of same-sex couples provides one such opportunity.

When people are asked which state or states among these four, California, Idaho, Mississippi, and Oklahoma, has the highest proportion of same-sex couples raising children under 18 in the home, the vast majority respond California.⁵⁷ But according to the 2010 U.S. Census, the top ten states ranked by proportion of same-sex couples raising children under 18 in the home are: Mississippi, Wyoming, Alaska, Idaho, Montana, Kansas, North Dakota, Arkansas, South Dakota, Oklahoma.⁵⁸ Every other state in that multiple choice question ranks higher than California. That answer may be surprising to people familiar with US political and social geography. None of them are perceived to be LGBT-friendly,⁵⁹ and all rank low on LGBT acceptance measures.⁶⁰ Indeed, none have any statewide legal protections against discrimination on the basis of sexual orientation or gender identity.⁶¹ Further, all were among the last states to provide marriage rights or recognition for couples in same-sex marriages, and all by court mandate.⁶²

⁵⁵ Jack B. Soll, Katherine L. Milkman, John W. Payne, *A Users Guide to Debiasing*, 924, 926, in 2 WILEY-BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, (George Wu & Gideon Keren eds., 2016).

⁵⁶ See. e.g., Stein, *supra*, note 23, at 162 (For example, when the college valedictorian needs to accommodate her “naturally smart and effortlessly successful” self-schema to her mediocre first semester law school grades).

⁵⁷ Author’s experience questioning judges across the United States from 2008-2017.

⁵⁸ Gates, *LGBT Parenting in the United States supra* note 48, at 4.

⁵⁹ Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT’L COUNCIL OF FAM. REL., Winter 2011, at F1-F4.

⁶⁰ Amira Hasenbush, et al., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States*, THE WILLIAMS INST. 5-6 (2014).

⁶¹ Jerome Hunt, *A State by State Examination of Nondiscrimination Laws and Policies*, CTR FOR AM. PROGRESS ACTION FUND 3-4 (2012).

⁶² *Same-Sex Marriage: State by State*, PEW RES. CTR (June 26, 2015) <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>.

Once judges receive this unanticipated LGBT parenting geography lesson, they are forced to confront the disconnect between what they thought they knew about LGBT people versus what the data actually show. Their schema is disrupted, their curiosity piqued, and they seek better, alternative explanations for the data. This provides an opportunity for schema change.⁶³ The desire for additional information to harmonize that new data with their old intuitive thinking creates an opportunity for schema alteration. Bench officers and other court employees in those states can no longer simply rely upon stereotypes that LGBT people live elsewhere and that the problems of LGBT families are irrelevant to their courthouses. Indeed, the unexpectedness of the top ten list illustrates that those judges are actually those who may need this information the most. Accordingly, the disjuncture between the demographic data and the social and political landscape has important lessons for schema modification, for legal practice and judging in those locales, and for family law and public policy.

Moreover, the search for more accurate, alternative explanations for the data means that the same gap between LGBT schema and reality can be extended to further upend inaccurate, intuitive thinking, and eventually lead to better outcomes for same-sex couples in family law cases. Another example can show how we might follow up on the earlier-mentioned demographic data to change schemas further. One explanation for the unexpected geographic distribution of LGBT parenting is that in those locations – be that for religious, social or other reasons – people tend to marry and have children early.⁶⁴ Sexual minority individuals who grow up in those communities are themselves products of that same upbringing and many conform to those same expectations. Thus, as young adults, they often enter a different-

⁶³ E.g., BROWER & NURIUS, *supra* note 17, at 94; Stein, *supra* note 23, at 162.

⁶⁴ See generally Gates, *Family Formation and Raising Children Among Same-Sex Couples* *supra* note 59, at F3-F4; Gates, *Geographic Trends Among Same-Sex Couples in the United States in the U.S. Census and the American Community Survey*, *supra* note 50, at 9.

sex relationship and/or marriage into which children are born.⁶⁵ LGBT individuals in those places are also inclined to come out later in life than their peers in more liberal or urban settings.⁶⁶ Therefore, lesbian and gay people in those communities tend to take their biological children from past heterosexual relationships into any same-sex relationship they later enter.⁶⁷

Other empirical data support this explanation. Previously married women and men currently part of a same-sex couple are almost twice as likely to have a minor child at home than their never-married peers.⁶⁸ Further, lesbian or bisexual women are more likely to live with female partners who are already mothers of children from another past or current relationship.⁶⁹ Thus, especially in more traditional social and political environments, LGBT people raise children who are biologically related to them.⁷⁰

Even stronger data patterns exist for LGBT families of color; 83 percent of same-sex couples with children were raising biologically-related children.⁷¹ National and California data show that non-white same-sex couples with children were even more likely to be raising their own children than were white same-sex couples.⁷² When combined with the earlier-cited data that LGBT people of color reside primarily in their racial and ethnic communities,⁷³ these findings mean that judges and others whose

⁶⁵ David Henehan et al., *Social and Demographic Characteristics of Gay, Lesbian, and Heterosexual Adults with and Without Children*, 3 J. GLBT FAM. STUD. 35, 69-70 (2007).

⁶⁶ Gates, *Family Formation and Raising Children Among Same-Sex Couples* *supra* note 59, at F2; Gates & Romero, *supra* note 13, at 234.

⁶⁷ Gates, *Family Formation and Raising Children Among Same-Sex Couples* *supra* note 59, at F2.

⁶⁸ Gates & Romero, *supra* note 13, at 235.

⁶⁹ Gates, *Geographic Trends Among Same-Sex Couples in the United States in the U.S. Census and the American Community Survey*, *supra* note 50, at 5; Gates & Romero, *supra* note 13, at 236-37.

⁷⁰ *Id.* at 234, 238.

⁷¹ R. Bradley Sears & M.V. Lee Badgett, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000*, THE WILLIAMS PROJECT 1, 10-11 (2004).

⁷² Gates & Romero, *supra* note 13, at 232.

⁷³ Sears et. al., *supra* note 47, at 7.

jurisdictions include large populations of persons of color are likely to see LGBT people whose families will often include children from past heterosexual relationships.

The high percentage of biological children raised by LGBT persons also means courts and family lawyers must be aware of those prior heterosexual relationships and their effects on the LGBT individual's current family. Often there is another person, the former heterosexual partner/spouse, who retains parental rights in the same-sex couple's child. That individual may not be in court or involved in the instant legal proceedings between the members of the same-sex couple, yet judges and others who work with same-sex families and their children should consider those persons and their rights.

Furthermore, the data reflect that cases in which LGBT parents appear may be different than expected. Courts may hear more visitation and custody disputes from past heterosexual relationships, rather than assisted reproductive technologies issues, same-sex adoptions, surrogacy, or fostering conflicts. In fact, those past heterosexual relationship disputes are already in the judicial system as different-sex dissolution or custody cases.⁷⁴

In the past, same-sex families often were caught in a negative cycle: estrangement from marriage and other legal institutions led to rejection of those structures and creation of alternatives, including substitute mechanisms for resolving disputes. As they chose alternate structures to traditional court proceedings, LGBT people's absence increased invisibility in, and separation from, those fora, and reinforced their discomfort and estrangement.⁷⁵

⁷⁴ See, e.g., Emily Haney-Caron & Kirk Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*, 1 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 19, 20 (2014) (discussing lesbian and gay parents' treatment in divorce and custody battles with former heterosexual spouse); *Child Custody and Visitation Issues for Lesbian, Gay, Bisexual, and Transgender (LGBT) Parents in Wisconsin*, NATN'L CENTER FOR LESBIAN RTS. 1, 1-2 (2009).

⁷⁵ Todd Brower, *Twelve Angry – and Sometimes Alienated – Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 698-99 (2011).

However, now that same-sex marriage is legal⁷⁶ and on the rise,⁷⁷ and same-sex relationships and families have a recognized and equal status with other married couples,⁷⁸ those relationships and families will move from outside traditional legal institutions to inside those structures⁷⁹ – from being outlaws to in-laws.⁸⁰ Consequently, as LGBT persons also increasingly parent minor children,⁸¹ judges, court evaluators, psychologists, and others working in the legal system are called upon to make decisions about these families. Demands on the domestic relations, family, and juvenile court systems will rise as same-sex couples increasingly identify their relationships to the government and its institutions.⁸²

⁷⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

⁷⁷ Adam P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of Obergefell v. Hodges*, THE WILLIAMS INST. 1 (2017).

⁷⁸ See, e.g., *Pavan v. Smith*, 137 S. Ct. 2075, 2076-80 (2017) (per curiam) (holding same-sex couples are entitled to all the same benefits that the state grants to different-sex couples); *Obergefell*, 135 S. Ct. at 2605.

⁷⁹ Brower, *Twelve Angry – and Sometimes Alienated – Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, *supra* note 75, at 698-99; see e.g., Justin Wm. Moyer, *Utah judge removes lesbian couple's foster child, says she'll be better off with heterosexuals*, WASHINGTON POST, (November 12, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/12/utah-judge-removes-foster-child-from-lesbian-couple-saying-shell-be-better-off-with-heterosexuals/?utm_term=.37d8a7bae0c1.

⁸⁰ E.g., Kenneth Sherrill & Alan Yang, *From Outlaws to In-laws*, PUB. PERSP., Jan.-Feb. 2000, at 20 (discussing changed public attitudes about gays and lesbians).

⁸¹ Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 AM. ACAD. PEDIATRICS 28-36 (2010); Susan Golombok et al., *Adoptive Gay Father Families: Parent-child Relationships and Children's Psychological Adjustment*, 85 CHILD DEV., 456-68 (2014); Gates, *LGBT Parenting in the United States* *supra* note 48, at 2.

⁸² See, Gates, *Geographic Trends Among Same-Sex Couples in the United States in the U.S. Census and the American Community Survey*, *supra* note 50, at 8.

Despite both broader social acceptance⁸³ and greater visibility of LGBT individuals in media, popular culture,⁸⁴ and legal doctrine,⁸⁵ depictions of same-sex parent families still suffer from wide-spread stereotypes. Those images are frequently based on superseded and inaccurate empirical data.

Once more accurate demographic data and research are known and made available to decision-makers, family law practice and policy should incorporate those facts and retire erroneous schemas about the characteristics, composition, and location of LGBT families. Naturally, neither exploration of the issues nor potential solutions to bias problems are as simple as merely mandating exposure to more accurate empirical data. Indeed, the balance of this article illustrates how complex and nuanced the interactions can be between sexual orientation and gender identity schemas and legal doctrine. Accordingly, any possible solutions must be equally protean and sophisticated to begin to ameliorate anti-LGBT bias.

III. “BEST INTERESTS OF THE CHILD” STANDARD AND SCHEMAS

A. *Traditional Applications of the Standard*

In addition to reinforcing schemas about who LGBT parents are and where they live, intuitive thinking about sexual and gender minorities has also influenced parenting and family law doctrine. The primary legal standard in child welfare determinations is the “best interests of the child”⁸⁶ – a standard that allows a judge to

⁸³ See, e.g., Andrew R. Flores & Scott Barclay, *Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes*, 69 POL. RES. Q. 43, 48 (2016); Andrew R. Flores, *Examining Variation in Surveying Attitudes on Same-Sex Marriage: A Meta-Analysis*, 79 PUB. OP. Q. 580, 581 (2015).

⁸⁴ See, e.g., *Characters List*, GLAAD <https://www.glaad.org/publications/whereweareontv11/characters> (last visited June 12, 2017).

⁸⁵ See, e.g., Pavan, 137 S. Ct. at 2076; Obergefell, 135 S. Ct. at 2605.

⁸⁶ See e.g., Claire Breen, *The Standard of the Best Interest of the Child: A Western Tradition in International and Comparative Law*, in INT’L STUD. IN HUM. RTS., (Martinus Nijhoff ed., 2012); Alex S Hall, Chad A. Pulver &

consider a wide variety of inputs and effects and to “consider the full panoply of a child’s physical, emotional, and spiritual well-being.”⁸⁷ On the one hand, the flexibility to include all relevant information about parents and family life gives judges and evaluators the tools to make fully informed judgments.⁸⁸ On the other hand, that flexibility creates opportunities for inappropriate factors to enter the best interests calculus. Preliminary decisions on what inputs are relevant have significant influence in the initial steps in this analysis, while later determinations about the meaning and weight of those contributions become important in later phases.⁸⁹ Indeed, one study of child custody decisions in San Diego found that judges’ custody judgments relied heavily on the recommendations of counselors hired to do family evaluations.⁹⁰ Thus, judges themselves may not have been weighing these factors and evidence, but they accepted the secondhand conclusions of others. Those prior assessments were already filtered through those third parties’ own intuitions and not free from schematic thinking.⁹¹ Accordingly, although some empirical research found

Mary J. Cooley, *Psychology of Best Interest Standard: Fifty State Statutes and their Theoretical Antecedents*, 24 AM. J. FAM. THERAPY 171, 174 (1996); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL’Y REV. 267, 267-68 (1996).

⁸⁷ *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992).

⁸⁸ See Charlow, *supra* note 86, at 268.

⁸⁹ See generally Shirley A. Settle & Carol R. Lowery, *Child Custody Decisions: Content Analysis of a Judicial Survey*, 6 J. DIVORCE 125, 134-36, (1982); accord James N. Bow, *Review of Empirical Research on Child Custody Practice*, 3 J. CHILD CUSTODY 23, 36-39 (2006) (discussing professional psychologists’ critiques of child custody reports written by psychologists and other mental health professionals).

⁹⁰ See Carla C. Kunin, Ebbe B. Ebbesen & Vladimir J. Konečni, *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564, 567 (1992); For a detailed examination of custody evaluations, see Robert E. Emery, Randy K. Otto & William T. O’Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. IN PUB. INT. 1 (2005).

⁹¹ Cf., e.g., *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 834 (1977) (“Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor

that psychologists and judges stated that they did not give much weight to factors like parents' sexual orientation in custody decisions under the best interests of the child standard,⁹² actual case results leave room for skepticism.⁹³

This skepticism is strengthened by a study of judicial custody decisions that found many judges admitted to making those determinations intuitively and holistically.⁹⁴ The admission of intuitive judicial decision-making is particularly significant because we know how schemas affect cognitive processes and biases. If judges measure same-sex families against a flawed prototype, they make commensurately flawed decisions about the best interests of the children in those families.⁹⁵ They employ inputs or evidence that have been shaped by their schemas and get similarly skewed results.⁹⁶

Therefore, the malleable and highly discretionary best interests of the child standard leads to uncertainty and indeterminacy in judicial judgments.⁹⁷ That indeterminacy, coupled with the broad range of legally permissible factors, may facilitate undesirable results because inappropriate images or schemas fill the gaps in the standard's legal calculus.⁹⁸ Accordingly, as courts interpret

continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child.”).

⁹² Bow, *supra* note 89, at 33 (citing studies).

⁹³ For a review of various studies on judicial decision making in child custody cases, see Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making - How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 69-78 (1998).

⁹⁴ See, Settle & Lowery, *supra* note 89, at 136.

⁹⁵ See, Mercer, *supra* note 93, at 67-68.

⁹⁶ BROWER & NURIUS, *supra* note 17, at 86.

⁹⁷ See e.g., Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 229 (Summer 1975); Jane F. Charnas, *Practice Trends in Divorce Related Child Custody*, 4 J. DIVORCE 57, 66 (1981).

⁹⁸ See, e.g., *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) (“In reviewing the entire record before us, we cannot tell what standards of law the trial court followed in reaching its decision on visitation rights.

custody and visitation standards for sexual minorities under the modern best interests of the child standard,⁹⁹ inaccurate assumptions and fears about negative consequences of LGBT parents and parenting influence those decisions.

Moreover, even where the law prevents automatic presumptions about sexuality and child welfare,¹⁰⁰ the discretion inherent in that standard means that judges and other court personnel may err in their judgments and evaluations of home life and parental values.¹⁰¹ First, despite even legislative or jurisprudential restrictions on what evidence is proper to consider, judges may not always follow those limitations or the inapposite considerations may come in through other means.¹⁰² Settle and Lowery queried Kentucky Circuit Court judges about the factors they considered in contested child custody cases. One quarter of judges gave custody of young children to the mother over the

While the findings and conclusions of law suggest the homosexuality of the father was not the determining factor the unfortunate and unnecessary references by the trial court to homosexuality generally indicate the contrary.”).

⁹⁹ *E.g.*, *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890-91 (Mass. 1999); June Carbone, *Legal Applications of the “Best Interest of the Child” Standard: Judicial Rationalization or a Measure of Institutional Competence?* 134 PEDIATRICS S111, S112 (2014).

¹⁰⁰ *See, e.g.*, *Paul C. v. Tracy C.*, 622 N.Y.S.2d 159, 160 (App. Div. 1994) (holding that “[w]here a parent’s sexual preference does not adversely affect the children, such preference is not determinative in a child custody dispute”); *Pryor v. Pryor*, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (holding that “sexual orientation as a single parental characteristic is not sufficient to render that parent unfit to retain physical custody of a child”).

¹⁰¹ *Cf.*, Mercer, *supra* note 93, at 68-69.

¹⁰² *See* Settle & Lowery, *supra* note 89, at 134; Jessica Pearson & Maria A.L. Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 720, 724 (1982-83); *see also* Lenore J. Weitzman & R.B. Dixon, *Child Support Awards: Legal Standards and Empirical Patterns for Child Custody, Support, and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471, 476 (1979) (describing a study of Los Angeles County courts); Laura E. Santilli & Michael C. Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine*, 14 LAW & HUM. BEHAV. 123, 125 (1990) (same, Alabama courts).

father,¹⁰³ even though the “tender years” doctrine – the belief that young children are better off with their mothers – was explicitly not the then-current law. Four years earlier, the Kentucky legislature had already rejected maternal preference in favor of equal consideration of both parents regardless of the age of the child.¹⁰⁴

Second, judges, psychologists, social workers, evaluators, and others who have schemas about LGBT parents and their families may find that implicit bias unconsciously shapes those assessments about children’s best interests.¹⁰⁵ Indeed, courts have often used the best interests standard in ways that demonstrate bias against LGBT parents.¹⁰⁶ Judges have sometimes assumed that a gay or lesbian parent’s custody was automatically against the child’s best interest.¹⁰⁷ Even though it is no longer an automatic bar, the more modern application of the test asks if there is a nexus

¹⁰³ Settle, *supra* note 89, at 134; *Accord* Weitzman, *supra* note 102; Santilli, *supra* note 102, at 135.

¹⁰⁴ KY. REV. STAT. § 403.270 (2) (2017).

¹⁰⁵ *Cf.*, Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 834-35 (1977); (“judges too may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values.”); (“Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child.”); *see generally* Carbone, *supra* note 99, at S114.

¹⁰⁶ *See, e.g.*, RUTHANN ROBSON, LESBIAN OUTLAW: SURVIVAL UNDER THE RULE OF LAW 130 (1992); Christina M. Tenuta, *Can You Really Be a Good Role Model to Your Child if You Can’t Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 357-59 (2011).

¹⁰⁷ *E.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987), *Evans v. Evans*, 8 Cal Rptr. 412, 414 (Cal. Ct. App. 1960), *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985), Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. LAWS., 95, 97-98 (2002); *cf.*, *Pascarella v. Pascarella*, 512 A.2d 715, 717 (Pa. Super. Ct. 1986) (imposing a presumption against custody rather than automatic bar); *see generally*, Todd Brower, “A Stranger to Its Laws”: *Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65, 82 (1997).

between a parent's LGBT identity and the welfare of the child.¹⁰⁸ One scholar argues that this version of the best interest test also places undue weight on sexual orientation and gender identity because it focuses attention on how those identities influence children, rather than presuming that they are irrelevant.¹⁰⁹

The particularized judicial inquiry into how parents' sexuality and gender influence their children is acutely susceptible to incorporating LGBT schemas. For example, some courts have found that open LGBT identity has a direct nexus to negative child outcomes when the gay person is more visible or flamboyant and less impact when the parent plays down or minimizes that identity.¹¹⁰ Thus, judges have sometimes infringed on LGBT parents' freedom of expression to be open about their sexual orientation or gender identity and to live their lives honestly in front of their children.¹¹¹ One court awarded custody to a gay father specifically because his "behavior has been discreet, not flamboyant."¹¹² Another court gave exclusive custody to the heterosexual mother so that the children would not see photos of men wearing gender non-conforming clothing.¹¹³ Still other courts

¹⁰⁸ See, e.g., *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989), *Delong v. Delong*, 1998 WL 15536, at *11 (Mo. Ct. App. Jan 20, 1998), *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1165-66 (2d ed. 2004).

¹⁰⁹ Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 *FAM. L.Q.* 381, 427 (2006).

¹¹⁰ See, e.g., *M. v. M.*, 606 S.W.2d 179, 184-85 (Mo. Ct. App. 1980).

¹¹¹ See, e.g., Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 *N.Y.U. L. REV.* 631, 635-37 (2006) (discussing the various topics on which courts restricted parental speech in custody decisions).

¹¹² *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 963 (Sup. Ct. 1986).

¹¹³ *Pullman v. Smith*, 501 S.E.2d 898, 901 (N.C. 1998) (prohibiting custody by father because father's male partner "keeps in the bedroom he shares with the [father] pictures of 'drag queens,'" and that those photos were accessible to the children); Brower, *Social Cognition 'At Work:.' Schema Theory and Lesbian and Gay Identity in Title VII*, *supra* note 22, at 5 n.33-34; Although sexual orientation, gender identity, and gender non-conformity are distinct concepts, the relationships among them are complex. See, e.g.,

have ruled that a parent's mere exposure of a child to the "homosexual lifestyle" is negative.¹¹⁴

In *Hogue v. Hogue*,¹¹⁵ a gay father was sentenced to two days in jail for violating a court order prohibiting him from telling his son that he (the father) was gay. A second allegation in the contempt proceeding was that the father allowed his son to see the father's boyfriend in church and at the home.¹¹⁶ The trial judge had found that those actions were against the child's best interests and prohibited them in the custodial order for the parents' divorce. In the restraining order hearing, the judge held the father in contempt

Stewart L. Adelson, *Practice Parameters on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 957, 959, 962 (2012) (discussing the interactions among sexual orientation, gender identity and gender non-conformity in child and youth development). *But see* Gerulf Rieger & Ritch C. Savin-Williams, *Gender Nonconformity, Sexual Orientation, and Psychological Well-Being*, 41 ARCHIVES SEXUAL BEHAV. 611, 612 (2011) (suggesting there is a correlation between homosexuality and gender variant behavior). Nevertheless, this conflation often serves as a persistent feature of the gay and lesbian schema which is then utilized by judges in interpreting legal doctrine and decision making. Brower, *Social Cognition 'At Work: 'Schema Theory and Lesbian and Gay Identity in Title VI supra*, note 22, at 38-42 (discussing same-sex sexual harassment cases). As in family law, conflation of sexual orientation and gender variant behavior in sexual harassment cases leads to inconsistent and inapposite reasoning, results and decisions. *See, e.g.*, *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978), *Straley v. Happy Times Nursery, Inc.*, *aff'd in sub nom. DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 328 (9th Cir. 1979), *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332 (6th Cir. 1992), No. 90-2290, 1992 WL 5436 (not certified for publication); *But see*, *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224-25 (D. Or. 2002) (finding workplace harassment based on a lesbian's gender non-conformity stated a claim for sex-stereotyping; her sexual orientation was irrelevant).

¹¹⁴ *Marlow v. Marlow*, 702 N.E.2d 733, 737 (Ind. Ct. App. 1998) (sustaining order barring father from exposing child to "any social, religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle").

¹¹⁵ *Hogue v. Hogue*, 147 S.W.3d 245, 247-48 (Tenn. Ct. App. 2004).

¹¹⁶ *Id.* at 248.

for violating the order and found that the father's actions had adversely affected his son.¹¹⁷ However, the actual testimony in *Hogue* seems to contradict that conclusion. The son

testified that his father told him he was gay at the end of summer on the last week with his Dad. "Yeah, my friends were wanting me to come and play and Dad just wanted to finish our talk. He pointed out on TV people that were gay, and then I went out and played."¹¹⁸

The son's quoted language indicates that learning his father's sexuality had little impact on him – and none of it negative. Thus, the judge's determination of harm to the boy seems colored by the judge's own intuitive thinking about the father's homosexuality and its effect on the child, and not the actual evidence before him.

The other witness at the hearing was the child's counselor. That evidence also seems swayed by schemas on homosexuality and parental influence. The counselor testified that he had worked with the child almost weekly for nearly a year and had professionally opined that the son was not developmentally ready to be told the father was gay.¹¹⁹ When asked to assess whether the son's testimony quoted above demonstrated that the father's disclosure was detrimental to the child, the counselor replied that it was "somewhat detrimental."¹²⁰

As illustrated by *Hogue*, the differential view of same-sex and different-sex parental behavior is shaded by schematic thinking by judicial officers and others involved in the family courts. LGBT schemas negatively color behavior that would be viewed as typical or normal in a different-sex couple – e.g., disclosing one's sexual orientation to the child or others, socializing with other LGBT

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 247-48.

¹²⁰ *Id.* at 248.

people, being physically demonstrative of same-sex affection, or living with a same-sex partner.¹²¹

For example, in *S.E.G. v. R.A.G.*,¹²² the court removed custody from a lesbian mother because it found the mother's behavior inappropriate and not in the children's best interests. That behavior, which the court apparently found an egregious departure from propriety, would be commonly accepted actions if a non-gay couple undertook them.¹²³ The court stated,

[w]ife and lover show affection for each other in front of the children. They sleep together in the same bed in the family home in Union. When the wife and the four children travel to St. Louis to see [lover], they also sleep together there. All of these factors present an unhealthy environment for minor children.¹²⁴

In other circumstances, an affectionate relationship would have been presumed to be a desirable model to show children¹²⁵ – but not with same-sex couples. The LGBT schema sees lesbian and gay relationships not as real relationships marked by love and affection, and LGBT families not as real families.¹²⁶

¹²¹ *N.K.M.*, 606 S.W.2d at 179; *Hogue*, 147 S.W.3d at 247-48; *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982); *Dailey v. Dailey*, 635 S.W.2d 391, 392, 394 (Tenn. Ct. App. 1981).

¹²² *S.E.G.*, 735 S.W.2d at 166.

¹²³ *Cf.*, *Shioji v. Shioji*, 671 P.2d 135, 136-37 (Utah 1983) (denying father's petition for custody modification because mother had her boyfriend staying in home overnight).

¹²⁴ *S.E.G.*, 735 S.W.2d at 166.

¹²⁵ *Accord Shioji*, 671 P.2d at 136-37.

¹²⁶ *Cf.*, *Dronenburg v. Zech*, 746 F.2d 1579, 1584 (D.C. Cir. 1984) (Starr J., concurring in denial of rehearing en banc) ("It simply cannot be seriously maintained that the right of privacy extends [...] beyond traditional relationships – the relationship of husband and wife, or parents to children, or other close relationships, . . .") (emphasis added), SASHA GREGORY LEWIS, *SUNDAYS WOMEN: A REPORT ON LESBIAN LIFE* 116 (1979) (discussing an Ohio judge who denied a lesbian mother custody of her children saying, "[o]rgasm means more to [lesbians] than children or anything else.")

The perceived distance between heterosexual relationships and sexual and gender minority ones can also be seen in the language of the restraining order in *Hogue*. That order prohibited the father "from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle."¹²⁷ Although there was no indication in the case that the father was physically or emotionally involved with other men except the one he brought with him to church, the court added an optional plural to the already insinuation-laden word "lover." Thus, the trial judge undermined the seriousness, fidelity, or committed nature of the father's relationship with his church-going partner/boyfriend and capitalized on the schema of gay sexuality as promiscuous, purely sexual, and lustful.¹²⁸ This reduction of same-sex relationships into casual sexual escapades is not unusual¹²⁹ and has warped other areas of the law,¹³⁰ as it appeared to do in *Hogue* and *S.E.G.* In

¹²⁷ *Hogue*, 147 S.W.3d at 247.

¹²⁸ Brower, *Social Cognition 'At Work': Schema Theory and Lesbian and Gay Identity in Title VII*, *supra* note 22, at 14; *See, e.g.*, 142 CONG. REC. H.7444 (daily ed. July 11, 1996) (statement of Rep. Coburn "[w]hat they [my constituents] believe is that homosexuality is immoral, that it is based on perversion, that it is based on lust").

¹²⁹ Brower, "*A Stranger to Its Laws*": *Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, *supra* note 107, at 77-78; *accord* *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, [...] Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported.").

¹³⁰ *E.g.*, *Dronenburg*, 746 F.2d at 1584 (denying that same-sex relationships have any connection with husband-wife, parent-child, and other meaningful bonds), *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1323 (5th Cir. 1984) (denying LGBT student group university status because of assumption of sexual activity at meetings), *Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855, at *2 (E.D. La. Apr. 20, 1995) (denying same-sex sexual harassment claim if victim were gay, but allowing it because the perpetrator is lesbian and the victim is heterosexual), Press Release, ACLU, *Federal Judge Rules That Students Can't Be Barred From Expressing Support for Gay People* (Apr. 13, 2008) (Panama City, FL school principal testified "that he had banned students from wearing any

short, gay fathers, like heterosexual fathers, have lives, not lifestyles; partners or significant others, not always lovers.

Although the assumption about LGBT parental unfitness as in *Hogue* or *S.E.G.* may now be judicially and legislatively less common under the “best interests” standard,¹³¹ courts must vigilantly police factual determinations and legal conclusions under that standard to ensure bias does not resurface under the guise of intuitive thinking based on erroneous views of lesbian and gay parents and their children.¹³²

B. Data on Gender Development, Sexual Behavior and Sexuality and Their Impact on the Best Interests Standard

As seen in cases like *Hogue*, one of the persistent concerns about children raised in same-sex parented families are impacts on children’s sexuality, gender development, and sexual behavior.¹³³ Because anxieties about sexuality and gender intersect with schemas and implicit biases about the behavior and family life of LGBT people and about the innocence and susceptibility of

clothing or symbols supporting equal right for gay people. [He] also testified that he believed rainbows were ‘sexually suggestive’ and would make students unable to study because they’d be picturing gay sex acts in their mind.”).

¹³¹ Ruthann Robson, *Our Children: Kids of Queer Parents and Kids who are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALA. L. REV. 915, 924-26 (2001); *but see, e.g.*, Moyer, *supra* note 79.

¹³² Cultural Cognition Project at Yale Law School, *The Cultural Cognition of Gay and Lesbian Parenting: Summary of First Round Data Collection*, GAY & LESBIAN PARENTING: PERCEPTIONS AND POLICY PREFERENCES, 20 at 2 (2009), *available at* <http://www.culturalcognition.net/storage/Stage%201%20Report.pdf>; Moyer, *supra* note 79.

¹³³ *See, e.g.*, *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (denying custody to the gay parent because the child “may have difficulties in achieving a fulfilling heterosexual identity of her own in the future.”); *J.L.P. v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (upholding award of custody to the heterosexual mother and against a gay father because the court believed the father might influence the child’s sexuality); *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (agreeing with testimony that living with a gay father would impede the development of healthy sexuality).

children, this area has a large potential to deform family law cases and doctrine.¹³⁴ Not long ago, judges consistently and explicitly awarded custody of children of LGBT parents to their heterosexual ex-spouses on divorce, ruling that boys needed male role models that a lesbian mother could not provide;¹³⁵ or that a gay father was unable to teach his daughter “proper” gender-based behavior, like how to style her hair or use makeup.¹³⁶ Still other cases held that custody should be awarded to the heterosexual parent over the lesbian or gay one believing that children needed different-sex, heterosexual parents to model and inculcate heterosexuality effectively.¹³⁷

Interestingly, children’s gender influences how these schemas and stereotypes manifest themselves within family law. Both lesbian and gay male parents have been seen as recruiting their children into homosexuality or gender non-conformity, either directly or by serving as role models.¹³⁸ However, courts employed this belief most often when lesbian or gay parents raise sons rather than daughters.¹³⁹ The asserted link between parents’

¹³⁴ See generally, Todd Brower, *Using Sexual Orientation Demographics to Predict and Harmonize Family Responsibility*, in *TAKING RESPONSIBILITY, LAW AND THE CHANGING FAMILY* (Craig Lind, Heather Keating & Jo Bridgeman, eds. 2010); BROWER & NURIUS, *supra* note 17; Rosky, *supra* note 14.

¹³⁵ *Accord Harris v. Harris*, 647 A.2d 309, 312, 314 (Vt. 1994) (“In rendering its decision, the family court suggested that Cole had a natural affinity for his father, who teaches him ‘things that a young boy should know’”).

¹³⁶ *Dalin v. Dalin*, 512 N.W.2d 685, 691 (N.D. 1994) (Sandstrom, J., dissenting). Some social science researchers also make this claim. *Cf., e.g.,* Victoria Clarke, *Sameness and Difference in Research on Lesbian Parenting*, 12 J. COMM. & APPLIED SOC. PSYCHOL. 210, 213-14 (2002) (discussing these claims and studies).

¹³⁷ *In re Marriage of Pleasant*, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

¹³⁸ *E.g., N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (giving an example of a lesbian mother); *Dailey*, 635 S.W.2d at 394 (same); *In re J.S. & C.*, 324 A.2d at 96 (giving an example of a gay father).

¹³⁹ Rosky, *supra* note 14, at 294-99.

sexuality and their children's homosexuality or cross-gender behavior has been especially salient in cases of boys raised in lesbian or gay-parented homes. It has specifically justified family court rulings denying custody to gay and lesbian parents under the best interests of the child standard.¹⁴⁰ Rosky roots this differential pattern in anxieties and beliefs about mothers raising effeminate or gay sons and the corresponding importance of fathers in the production of masculine, heterosexual boys.¹⁴¹ This correlation should not be surprising. Scholars have often explored the greater societal concern about male homosexuality and rigidity around masculinity and masculine norms in contrast to the lesser unease with lesbianism and policing of femininity.¹⁴² Accordingly, we see markers of both LGBT schemas and of sex-differentiated gender policing in these cases.

Faced with these questions, some judges may have decided cases based on explicit falsehoods¹⁴³ about how gay and lesbian parents' sexuality affects their children;¹⁴⁴ others may have been rooted in unconscious reliance on inaccurate images that colored

¹⁴⁰ *E.g.*, *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990); *Dailey*, 635 S.W.2d 391; *Pleasant*, 628 N.E.2d 633.

¹⁴¹ Rosky, *supra* note 14, at 301-08.

¹⁴² *See, e.g.*, JOSEPH H. PLECK, *THE MYTH OF MASCULINITY* (1981); James M. O'Neil, *Patterns of Gender Role Conflict and Strain: Sexism and Fear of Femininity in Men's Lives*, 60 *PERSONNEL & GUIDANCE J.*, 203 (1981); Gregory M. Herek, *Assessing Attitudes Toward Lesbians and Gay men: A Review of Empirical Research with the ATLG scale*, *LESBIAN AND GAY PSYCHOL.: THEORY, RES., AND CLINICAL APPLICATIONS*, 206 (Beverly Greene & Gregory M. Herek, Eds., 1994); Richard A. Lippa & Susana Arad, *The Structure of Sexual Orientation and its Relation to Masculinity, Femininity, and Gender Diagnosticity: Different for Men and Women*, 37 *SEX ROLES*, 187 (1997); Saul Feinman, *Why is Cross-Sex-Role Behavior More Approved for Girls than for Boys? A Status Characteristic Approach*, 7 *SEX ROLES* 289 (1981); Selcuk R. Sirin, Donald R. McCreary, & James R. Mahalik, *Differential Reactions to Men and Women's Gender Role Transgressions: Perceptions of Social Status, Sexual Orientation, and Value Dissimilarity*, 12 *J. MEN'S STUD.* 119 (2004).

¹⁴³ Wistrich & Rachlinski, *supra* note 29, at 92 (discussing the difference between explicit and implicit bias).

¹⁴⁴ *E.g.*, *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980); Tenuta, *supra* note 106.

judges' perceptions of facts or LGBT litigants.¹⁴⁵ Despite the persistence of these views in court opinions, the consensus among researchers is that there are few gender development differences between children in lesbian- and gay-parented families and those raised by heterosexual parents.¹⁴⁶ Boys were no less masculine and girls no less feminine in identity and behavior.¹⁴⁷

As noted above,¹⁴⁸ courts have awarded custody to the heterosexual parent and not the gay or lesbian parent out of concern for gender and sexuality appropriate role models for children. Predictably, this reasoning appears to have particular resonance in custody decisions about boys.¹⁴⁹ However, the underlying premise about role modeling is false, as is a need for greater solicitousness for masculine role models. For boys raised in lesbian-parented households, researchers studied the presence or absence of male role models. Half of adolescents reared by lesbians had masculine role models, such as relatives, teachers, or coaches. In adolescents' and mothers' standardized assessments, even the absence of male role models did not negatively impact the boys' psychological well-being.¹⁵⁰ Left unchallenged by empirical evidence, judicial role model preferences would negatively impact LGBT parents' custody opportunities. If a judge's schema insists that a gay father cannot teach his daughter gender-conforming grooming practices,¹⁵¹ or that a lesbian mother

¹⁴⁵ *E.g.*, Hogue v. Hogue, 147 S.W.3d 245, 247-48 (Tenn. Ct. App. 2004); Rosky, *supra* note 14.

¹⁴⁶ *E.g.*, Abbie E. Goldberg, & JuliAnna Z. Smith, *Predictors of Parenting Stress During Early Parenthood in Lesbian, Gay, and Heterosexual Adoptive Parents*, 28 J. FAM. PSYCHOL. 125 (2014); Susan Golombok, Ann Spencer & Michael Rutter, *Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551 (1983).

¹⁴⁷ Golombok, Spencer & Rutter, *supra* note 146.

¹⁴⁸ See *supra* notes 135 - 142, and accompanying text.

¹⁴⁹ See *supra* notes 140 - 142, and accompanying text.

¹⁵⁰ Henry M.W. Bos et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Male Role Models, Gender Role Traits, and Psychological Adjustment*, 26 GENDER & SOC'Y 603, 617-618 (2012)

¹⁵¹ Dalin v. Dalin, 512 N.W.2d 685, 691 (N.D. 1994) (Sandstrom, J., dissenting).

cannot raise her son to be traditionally masculine in gender identity and expression,¹⁵² these conclusions nearly doom that parent's custody petition. This is particularly true because judges in these cases simply assume that a sexual or gender minority parent does not have the same ability to model appropriate behavior as their heterosexual, cisgender ex-spouse.¹⁵³ No evidence was apparently offered in those cases to prove the link between parental sexuality and role models.¹⁵⁴

Note also the heteronormative and gender-normative assumptions embedded in this judicial concern. "Appropriate" role modeling in these cases means cisgender identity and expression as well as heterosexuality. The fundamental premise is that if children do not turn out to be straight or gender conforming, granting custody to the LGBT parent has harmed those children; the best interests of the children have not been properly considered.

Empirical data neither support the hetero- or gender-normative assumptions, nor confirm a causal link between LGBT parents' custody and children's gender development. Bos and Sandfort found no differences in gender development between children raised in lesbian- and heterosexual-parented households. Nor did they report differences in peer pressure to conform to traditional gender roles.¹⁵⁵ The latter finding is significant because of studies that show core aspects of children's gender development may progress independent of parental influence.¹⁵⁶ Indeed, cognitive development theorists argue that children collect and integrate information about their gender from the greater social

¹⁵² Harris v. Harris, 647 A.2d 309, 314 (Vt. 1994).

¹⁵³ See, e.g., *Id.*; In re Marriage of Pleasant, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981); N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980).

¹⁵⁴ See, *Dalin*, 512 N.W.2d at 691; *Harris*, 647 A.2d at 314.

¹⁵⁵ Henny M.W. Bos & Theo G.S. Sandfort, *Children's gender identity in lesbian and heterosexual two-parent families*, 62 SEX ROLES 114, 122 (2010).

¹⁵⁶ Susan K. Egan & David G. Perry. *Gender identity: a multidimensional analysis with implications for psychosocial adjustment*, 37 DEVELOPMENTAL PSYCHOL. 451, 460 (2001).

environment, including peer groups. They actively construct for themselves what it means to be a boy or a girl,¹⁵⁷ and gender construction takes place separate from family or parental environment.¹⁵⁸ Thus, psycho-social data undermine support for judicial concerns about parental role modeling.

Parental sexual orientation does correlate with some gender development differences. Lesbian and gay parents' children were somewhat more gender expansive in their play behavior. They played with a wider range of toys but were well within the range of typical child development patterns.¹⁵⁹ Bos and Sandfort observed other differences between children raised in lesbian families compared to peers in heterosexual-parent families. Those children had a lesser belief in their own gender's superiority. They also reported diminished parental pressure to adhere to traditional gender norms.¹⁶⁰

The evidence of less parental pressure towards traditional gender roles may also mirror findings of less pressure to follow traditional sexuality. Children raised in lesbian households reported they were less certain that they would feel future heterosexual attraction and participate in future heterosexual relationships.¹⁶¹ Likewise, Golombok and Tasker reported a significant number of young adults with lesbian mothers stated they had had a same-sex relationship or considered having a same-sex relationship.¹⁶² Bos and Sandfort posit that children raised by

¹⁵⁷ Carol L. Martin, Diane N. Ruble, & Joel Szykrybalo, *Recognizing the Centrality of Gender Identity and Stereotype Knowledge in Gender Development and Moving Toward Theoretical Integration: Reply to Bandura and Bussey*, 130 *PSYCHOL. BULL.* 702, 704-05 (2004).

¹⁵⁸ Bos & Sandfort, *supra* note 155, at 122.

¹⁵⁹ Abbie E. Goldberg, Deborah A. Kashy, & JuliAnna Z. Smith, *Gender-Typed Play Behavior in Early Childhood: Adopted Children with Lesbian, Gay, and Heterosexual Parents*, 67 *SEX ROLES* 503, 511 (2012).

¹⁶⁰ Bos & Sandfort, *supra* note 155, at 119-20.

¹⁶¹ *Id.*

¹⁶² Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families*, 32 *DEVELOPMENTAL PSYCHOL.* 3, 9 (1996); FIONA TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY* (1997).

lesbians may be less certain about future heterosexual romantic involvement because they grow up in families that are more tolerant towards same-sex relationships.¹⁶³ We should be careful about this last statement. Researchers are not suggesting a causal link between parental sexuality and modeling appropriate behavior; that asserted link is the foundation of judicial decisions preferring heterosexual parents over LGBT ones in custody cases.¹⁶⁴ Rather the scientific correlation appears to be related to the parents' diminished stigmatization of the variety of sexual orientations and heightened levels of acceptance of sexual diversity, as well as freer discussions about diverse sexualities.¹⁶⁵ Lesbian mothers felt more comfortable discussing sexuality with their children, and the teenage children of lesbians communicated their feelings more openly to their mothers.¹⁶⁶ Consequently, these youth may be more comfortable considering and reporting on those options.

Furthermore, when Golombok and Tasker followed those same children through adolescence and adulthood, they found that the children's earlier thoughts about their sexuality and sexual behavior did not necessarily persist in adulthood. Most children raised by lesbian mothers turned out to be heterosexual.¹⁶⁷ Accordingly, even setting aside the embedded heteronormativity in the fear that children of gay parents will themselves be gay, the data demonstrate that that worry is misplaced.

If children in LGBT households do not differ in their sexuality from those raised in heterosexual households, does their sexual behavior vary? A 2011 study by Gartrell, Bos and Goldberg

¹⁶³ Bos & Sandfort, *supra* note 155, at 122.

¹⁶⁴ See, e.g., *Harris v. Harris*, 647 A.2d 309, 314 (Vt. 1994); *In re Marriage of Pleasant*, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993); *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981); *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980).

¹⁶⁵ Bos & Sandfort, *supra* note 155, at 122.

¹⁶⁶ SUSAN GOLOMBOK, *PARENTING. WHAT REALLY COUNTS* (2000).

¹⁶⁷ See generally, Golombok & Tasker, *supra* note 162; Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 1407 (2004).

analyzed data from the *National Longitudinal Lesbian Family Study [NLLFS]*. The NLLFS followed 78 lesbian-mother families from 1986 and is ongoing. Currently, 93 percent of the original NLLFS families are still participating in follow-up studies and publications.¹⁶⁸ Researchers compared those families with general population, same-age peers and regularly assessed them throughout the children's lives. Gartrell and her colleagues found that 17-year-old girls and boys reared by lesbian parents were no more likely to have had same-sex sexual contact than those in heterosexual families. No girls with lesbian mothers self-identified as lesbian; nearly one in five self-identified as bisexual. Less than one in ten boys self-identified as gay or bisexual.¹⁶⁹

That study also found that girls with lesbian parents were no different than heterosexually-parented peers in rates of pregnancies, or in rates of same-sex or different-sex sexual behavior. However, those girls did have a greater number of sexual partners. For boys with lesbian parents, researchers found no differences in same-sex behavior; but those 17-year-old boys did have less heterosexual experience than male peers raised in heterosexually-parented homes.¹⁷⁰ Thus, while children of heterosexual mothers tended to obey gender-based sexual behavior norms, children of lesbian mothers were more likely to challenge them.¹⁷¹

Finally, Golombok and Tasker published a different longitudinal study comparing children in two-parent lesbian mother families at ages 6, 12 and 18 years with children in single heterosexual mother families and in two-parent heterosexual

¹⁶⁸ Gartrell & Bos, *supra* note 81; National Longitudinal Lesbian Family Study, <https://www.nllfs.org/about/> (last visited July 17, 2016).

¹⁶⁹ Nanette K. Gartrell, Henny M.W. Bos & Naomi G. Goldberg, *New Trends in Same-Sex Sexual Contact for American Adolescents? Letter to the Editor*. 41 ARCHIVES SEXUAL BEHAV. 5-7 (2011).

¹⁷⁰ Nanette K. Gartrell, Henny M.W. Bos, & Naomi G. Goldberg, *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual orientation, sexual behavior, and sexual risk exposure*, 40 ARCHIVES SEXUAL BEHAV. 1199, 1205 (2010); Gartrell, Bos & Goldberg, *supra* note 169; Golombok & Tasker, *supra* note 162.

¹⁷¹ Goldberg, Gartrell & Gates, *supra* note 54.

families. As adults, most children raised in lesbian households identified as heterosexual. They found no difference in the children's psychological health as adults, nor in relationship quality with either parent.¹⁷² Accordingly, the data are clear that the best interests of the child in LGBT parenting placement decisions, including custody, fostering, and visitation, should not be influenced by concerns about role models, or by parental influences on children's sexuality or gender.

C. Data on Child Psychological and Psycho-Social Development and Adjustment

In addition to negatively affecting LGBT parents' custody opportunities due to the presumed impact they may have on their children's gender and sexuality, the LGBT schema has also provoked fears about children's broader psychological or psycho-social well-being. These concerns fall into two main groups: that LGBT persons' parenting styles are inferior and injure their children, and that the surrounding community stigmatizes being raised in an LGBT family and thus causes harm to children.

The first harm is centered on family court assessments and evaluations of parental parenting behavior itself. Criticism of same-sex parenting often focuses on the asserted negative psychological and social development outcomes for children reared in those families.¹⁷³ The major critical study of LGBT parenting is by the University of Texas sociologist, Mark Regnerus.¹⁷⁴ That study has been condemned both for its

¹⁷² Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203, 211-212; Golombok & Tasker, *supra* note 162.

¹⁷³ Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 764 (2012); *See also*, Douglas W. Allen, *High school graduation rates among children of same-sex households*, 11 REV. ECON. HOUSEHOLD, 635, 653 (2013); Donald Paul Sullins, *Emotional problems among children with same-sex parents: difference by definition*, 7 BRIT. J. EDUC., SOC'Y & BEHAV. SCI., 99, 108 (2015).

¹⁷⁴ Regnerus, *supra* note 173.

methodology and for the mismatch between the data collected and the conclusions drawn.¹⁷⁵

More circumspect research has shown that children of lesbian and gay parents show positive psychosocial development and good adjustment. Compared to peers in heterosexual two-parent families, children in lesbian-mother and gay-father families showed no difference in psychological well-being or in the quality of their relationships with their parents. Adolescents in lesbian-mother families scored higher on self-esteem, and lower in conduct problems, but they were similar to children raised in heterosexual, married parents on total problem behavior and substance use.¹⁷⁶ Researchers found no differences between lesbian two-mother families and heterosexual two-parent families in adolescent perceptions of how much their parents monitored their behavior, in the quality of their relationships with their parents, or in how open they were with their parents.¹⁷⁷ A study of UK lesbian households advanced similar findings; it found no differences in quality of mother-child relationships, and in children's self-esteem or psychological adjustment, including peer relationships and gender development.¹⁷⁸

¹⁷⁵ E.g., Don Barrett, *Presentation, politics, and editing: The Marks/Regnerus articles*, 41 SOC. SCI. RES. 1354 (2012); Tom Bartlett, *Controversial Gay-Parenting Study is Severely Flawed, Journal's Audit Finds*, CHRON. HIGHER EDUC. (JULY 26, 2012), <http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255>; but see, Mark Regnerus, *Parental same-sex relationships, family instability, and subsequent life outcomes for adult children: Answering critics of the new family structures study with additional analyses*, 41 SOC. SCI. RES. 1367 (2012).

¹⁷⁶ Henny M.W. Bos, Loes van Gelderen, Nanette K. Gartrell, *Lesbian and Heterosexual Two-Parent Families: Adolescent-Parent Relationship Quality and Adolescent Well-Being*, 24 J. CHILD & FAM. STUD. 1031, 1032, 1041 (2014); Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. FAM. PSYCHOL. 526, 528-29 (2006).

¹⁷⁷ Bos, van Gelderen, Gartrell, *supra* note **Error! Bookmark not defined.**

¹⁷⁸ Susan Golombok et al., *Children with lesbian parents: A community study*, 39 DEVELOPMENTAL PSYCHOL. 20-33 (2003).

These child outcomes hold true across nationally-representative samples and smaller, more localized samples, and regardless of method of family creation: for adoptive children, for those born via donor insemination, or those from past heterosexual relationships.¹⁷⁹ Current research reflects that the quality and variety of LGBT parents and their families are largely unaffected by sexuality or gender identity of parents. Indeed, good parenting is good parenting. That is what matters; parents' sexual orientation and gender identity do not.¹⁸⁰

D. Data on Lesbian and Gay Parents Within Their Social Environments

Another set of traditional concerns about LGBT parents stems from the rejection that those families are assumed to face from their neighbors and communities. These consequences then result in poor outcomes for children raised in those families and undermine the best interests of the child.¹⁸¹ First, it should be

¹⁷⁹ See generally, Raymond W. Chan et al. *Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children's Adjustment*, 12 J. FAM. PSYCHOL. 402 (1998); Rachel H. Farr, Stephen Forssell, & Charlotte J. Patterson, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 10 APPLIED DEVELOPMENTAL SCI. 164 (2010); Jennifer L. Wainright, Stephen T. Russell, & Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886 (2004); Wainright & Patterson, *supra* note 176; Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations among Adolescents with Female Same-Sex Parents*, 44 DEVELOPMENTAL PSYCHOL. 117 (2008); Abbie E. Goldberg, & JuliAnna Z. Smith, *Predictors of psychological adjustment among early-placed adopted children with lesbian, gay, and heterosexual parents*, 27 J. FAM. PSYCHOL. 431 (2013).

¹⁸⁰ Rachel H. Farr, *Does Parental Sexual Orientation Matter? A Longitudinal Follow Up of Adoptive Families with School-Age Children*, 53 DEVELOPMENTAL PSYCHOL. 252 (2017); Rachel H. Farr & Charlotte J. Patterson, *Coparenting Among Lesbian, Gay, and Heterosexual Couples: Associations with Adopted Children's Outcomes*, 84 CHILD DEV. 1226 (2013).

¹⁸¹ See, e.g., Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*, *supra* note **Error! Bookmark not defined.**; Regnerus, *Parental*

noted that communities differ in their acceptance of LGBT people and their families.¹⁸² However, the trend is toward greater acceptance.¹⁸³

Second, under this theory, surrounding community stigma is the trigger for the chain of events that are supposed to create the harm; it is not the harm itself. Rather, that injury comes from the psychological damage and stress that children and their parents feel in those negative environments.¹⁸⁴ Empirical data show some differences between LGBT and heterosexual parents and among same-sex parented and different-sex parented children. But generally, demographic information and empirical studies find few psychological impacts and effects.

When lesbian-parented family data were compared to that of heterosexual two-parent families with the same demographic backgrounds, children of lesbian mothers did not differ from children of heterosexual mothers in either problems with peers or psychological problems.¹⁸⁵ Some differences were found, however. Bos and colleagues collected data from lesbian two-mother families when the children were 6, 10, and 16 years old. Lesbian co-mothers had more emotional involvement in childrearing and parental concern than fathers in heterosexual two-

same-sex relationships, family instability, and subsequent life outcomes for adult children: Answering critics of the new family structures study with additional analyses, supra note Error! Bookmark not defined.

¹⁸² See, e.g., Hasenbush, et al., *supra* note 65; Frank Bruni, Opinion, *The Worst (and Best) Places To Be Gay in America*, N.Y. TIMES, (Aug. 25, 2017), <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html?action=click&pgtype=Homepage&clickSource=story-headin%E2%80%A6>.

¹⁸³ See, e.g., Flores & Barclay, et al., *supra* note 83; Flores, et al., *supra* note 83.

¹⁸⁴ See, e.g., Timothy J. Biblarz & Evren Savci, *Lesbian, Gay, Bisexual and Transgender Families*, 72 J. MARRIAGE & FAM. 480, 485 (2010).

¹⁸⁵ Golombok, Spencer & Rutter, *supra* note 146.

parent families.¹⁸⁶ This increased involvement may also have a negative side: a need for external validation of themselves as good parents. Perhaps because they saw themselves as pioneers or under increased scrutiny, lesbian mothers felt more pressure to demonstrate to others in their social communities that they were decent and worthy parents in order to combat rejection.¹⁸⁷

More directly, as part of a best interests analysis, some courts have used adverse community reactions to a child having same-sex parents as a reason to lessen or remove custody from a lesbian or gay parent.¹⁸⁸ This reasoning is exemplified by the Virginia court in *Bottoms v. Bottoms*.¹⁸⁹ In *Bottoms*, the court changed custody from a lesbian mother and her female partner to the child's maternal grandmother. The court stated, "Living daily under conditions stemming from active lesbianism practiced in the home may impose a burden on the child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationship with its 'peers and with the community at large.'"¹⁹⁰ The presumed stress borne by children with LGBT parents in navigating a hostile community also underpinned the custody assessment in *Collins v. Collins*.¹⁹¹ "[S]he [the child] faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt. This adds tremendous pressure to a young child's life."¹⁹² Social science research has found that stressors such as community hostility to a child's family life can certainly

¹⁸⁶ Henny M. W. Bos, Frank Van Balen & Dymphna C. Van den Boom, *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, 77 *AM. J. ORTHOPSYCHIATRY*, 38 (2007).

¹⁸⁷ *Id.*

¹⁸⁸ *E.g.*, *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981), *overruled by* *Damron v. Damron*, 670 N.W.2d 871 (noting court's observation that children [of LGBT parents] will "suffer from the slings and arrows of a disapproving society" when determining custody).

¹⁸⁹ *Bottoms v. Bottoms*, 457 S.E.2d 102 (1995).

¹⁹⁰ *Id.* at 108.

¹⁹¹ *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988).

¹⁹² *Id.* at *3.

negatively affect that child's physiological well-being.¹⁹³ Nevertheless, even assuming that children will be stigmatized because of their parent's sexuality, custody cannot turn on those concerns.

The United States Supreme Court held in *Palmore v. Sidoti* that private biases within the surrounding community and the possible injury they might inflict on the child were impermissible considerations in child custody determinations.¹⁹⁴ There, a White mother with custody of her White child had remarried an African-American man. The Florida courts had shifted custody away from the mother because "the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society."¹⁹⁵ Despite the then-extant social disapproval of the interracial marriage, the U.S. Supreme Court found that the potential for societal ostracism and the resulting injury to the child could not support a change in custody from the mother to the father. By recognizing private prejudices in judicial decisions, the state would be putting its imprimatur on them in violation of the Constitution.¹⁹⁶ Analogously,¹⁹⁷ courts should not employ adverse community reaction to a parent's sexual orientation or gender identity as a

¹⁹³ See, e.g., David J. Lick et al., *Social Climate for Sexual Minorities Predicts Well-Being Among Heterosexual Offspring of Lesbian and Gay Parents*, 9 SEXUALITY RES. & SOC. POL'Y 99 (2012).

¹⁹⁴ *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984).

¹⁹⁵ *Id.* at 431 (citing the Record at 84). See generally, *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 167 (Mo. Ct. App. 1987) (note that the Florida court in *Palmore* uses the term "lifestyle" to deprecate the White mother's interracial relationship. The *S.E.G.* court trivialized same-sex relationships by employing that same word to refer the lesbian mother's family there).

¹⁹⁶ *Palmore*, 466 U.S. at 433.

¹⁹⁷ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (showing the United States Supreme Court has not treated race and sexual orientation alike under the Constitution); *Romer v. Evans*, 517 U.S. 620, 640 n.1 (1996) (Scalia, J., dissenting). The two situations are parallel, if not identical.

factor in best interests analysis¹⁹⁸ – even if that adverse environment is real.

In addition to the jurisprudential reasons under *Palmore* why courts should not use negative community reactions when evaluating LGBT parents' home settings, empirical data demonstrate that the environmental impact is not as simple as it initially appears. We should acknowledge a baseline: in some communities, anti-LGBT hostility and ostracism exists and has deleterious effects on children and families. Several studies found that lesbian and gay parents showed similar levels of mental health and parenting stress in early parenthood as did heterosexual couples. However, parental perceptions of lack of social support from family and friends and feelings of minority stress stemming from homophobia in their neighborhoods and communities negatively affected lesbian and gay parents' mental health.¹⁹⁹

Similarly, negative environments also affected children raised in LGBT parented families.²⁰⁰ A significant number of those children reported being teased about their parents' sexuality. Equally notable, however, most also reported that the families found ways of positively coping with stigmatization. Positive relationships with their families and peers and parental preparation for possible discrimination based on the parents' sexuality counteracted the negative effects of stigmatization.²⁰¹ Therefore, if

¹⁹⁸ See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985) (analogizing to *Palmore* to reject community intolerance of lesbianism as the reason to change custody from an otherwise fit mother).

¹⁹⁹ Goldberg & Smith, *supra* note 146; Abbie E. Goldberg & JuliAnna Z. Smith, *Stigma, Social Context, and Mental Health: Lesbian and Gay Couples Across the Transition to Adoptive Parenthood*, 58 J. COUNSELING PSYCHOL. 139 (2011); Abbie E. Goldberg & JuliAnna Z. Smith, *The Social Context of Lesbian Mothers' Anxiety During Early Parenthood*, 8 PARENTING: SCI. & PRAC. 213 (2008).

²⁰⁰ Lick, et al., *supra* note 193; *but see*, Haney-Caron, et al., *supra* note 74, at 21.

²⁰¹ van Gelderen et al., *Stigmatization and Promotive Factors in Relation to Psychological Health and Life Satisfaction of Adolescents in Planned Lesbian Families*, 34 J. FAM. ISSUES 809, 820-21 (2013); accord Patricia A. Cody, et al., *Youth Perspectives on Being Adopted from Foster Care by*

judges are not going to follow *Palmore* and prohibit consideration of prejudice and bias in the community in which LGBT families exist,²⁰² then at a minimum they should at employ a more sophisticated view of the impact on children of all facets of their environment. Assessments of best interests of the children ought to consider not only the negative social environments in which some same-sex families find themselves,²⁰³ but also the protective resources that LGBT parents can provide their children and sustenance from supportive extended family and neighbors. Accordingly, family court judges and social service organizations may need to recognize positive and negative environmental factors and risks when assessing parental situations, and if possible, provide resources, skills and tools to parents and children to enable them to handle those issues.²⁰⁴ If these negative influences can be controlled or minimized, child and family outcomes are likely to be improved.²⁰⁵

IV. BEYOND “BEST INTERESTS”: OTHER EFFECTS OF LGBT SCHEMAS ON FAMILY LAW AND LEGAL INSTITUTIONS

A. Adoption and fostering

The best interests of the child standard also applies to adoption and fostering issues.²⁰⁶ Naturally, those placement decisions can

Lesbian and Gay Parents: Implications for Families and Adoption Professionals, 20 ADOPTION Q. 98 (2017).

²⁰² See *supra* notes 194 - **Error! Bookmark not defined.**, and accompanying text.

²⁰³ See, e.g., *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (noting court’s observation that children will “suffer from the slings and arrows of a disapproving society” when determining custody); *McGriff v. McGriff*, 99 P.3d 111, 117 (Idaho 2004) (discussing negative environment for children with an openly gay parent in a conservative community as relevant to how a gay father should communicate with his children).

²⁰⁴ Cody et al., (2017), *supra* note 201.

²⁰⁵ van Gelderen et al., (2013), *supra* note 201.

²⁰⁶ See, e.g., Robin Fretwell Wilson & W. Bradford Wilcox, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 885 (2006) (stating that all 50 states use the best interests of the child standard for adoption); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (giving an example of

also be colored by the same implicit bias or inaccurate schemas of LGBT parents present in custody and visitation cases.²⁰⁷ However, even beyond problems in applying that standard, the wide discretion that judges and others have in determining appropriate adoption and foster care placements through their evaluations of home life and family environments leave opportunities for similar schema-based distortions to occur.²⁰⁸

Kimberley and Moore found that LGBT potential adoptive parents faced barriers to adoption stemming from negative perceptions and attitudes toward same-sex couples by adoption professionals and their policies and practices. Whether or not adoption agencies would accept applications from lesbians and gay men was 42% correlated with agency directors' (a) knowledge of state and federal policies on same-sex adoption, (b) attitudes toward equal rights for same-sex couples, and (c) opinions of sexual minorities as parents.²⁰⁹ These findings disparately affect LGBT parents since same-sex couples are six times more likely than their different-sex peers to adopt or foster minor children.²¹⁰ In a 2016 report, the US Department of Health and Human Services, Children's Bureau stated that some child welfare professionals' personal biases, misinformation, or anxieties about

foster care); Robert Mnookin *Foster Care—In Whose Best Interest?* 43 HARV. EDUC. REV. 599 (1973) (giving an example of foster care).

²⁰⁷ Abbie E. Goldberg et al., *Seeking to Adopt in Florida: Lesbian and Gay Parents Navigate the Legal Process*. 26 J. GAY & LESBIAN SOC. SERV. 37 (2014)

²⁰⁸ Sandra J. Hall, *Gauging the Gatekeepers: How do Adoption Workers Assess the Suitability of Gay, Lesbian, or Bisexual Prospective Parents?* 6 J. GLBT FAM. STUD. 265 (2010); Gary P. Mallon, *Assessing Lesbian and Gay Prospective Foster and Adoptive Families: A Focus on the Home Study Process*, 86 CHILD WELFARE 67 (2007); Gary P. Mallon, *The Home Study Assessment Process for Gay, Lesbian, Bisexual and Transgender Prospective Foster and Adoptive Families*, 7 J. GLBT FAM. STUD. 9 (2011).

²⁰⁹ Claire Kimberly & Alexa Moore, *Attitudes to Practice: National Survey of Adoption Obstacles Faced by Gay and Lesbian Prospective Parents*, 27 J. GAY & LESBIAN SOC. SERV. 436 (2015).

²¹⁰ Gates, *supra* note 48, at 3.

working with the LGBT community led to problems in the child welfare system for those families.²¹¹

Moreover, even when not judged differently or under disparate legal standards from different-sex couples,²¹² LGBT prospective foster or adoptive parents were sometimes subjected to increased scrutiny or more intrusive questioning or procedures based on erroneous views and assumptions about those persons.²¹³

Transgender persons confronted even more severe barriers. In the Health and Human Services 2016 report, some of the most severe examples of discrimination and bias arose when child welfare professionals worked with transgender clients, particularly those who had undergone gender transition.²¹⁴ In addition, a review of existing research on transgender parents found that a significant number of transgender potential adoptive or foster-care parents did not ever seek placement with adoption or child welfare agencies because of discrimination or vulnerability to disparate and negative treatment on the basis of their gender identity.²¹⁵ Other research suggests that these negative perceptions of placement institutions may be well founded: few adoption agencies have non

²¹¹ See, *Working with Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption*, CHILD WELFARE INFORMATION GATEWAY, 8-9 (September 2016), https://www.childwelfare.gov/pubPDFs/f_proofbulleting.pdf.

²¹² But see, Sarah Torre & Ryan Anderson, *Adoption, Foster Care, and Conscience Protection*, HERITAGE FOUND. (Jan. 15, 2014), <http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection> (discussing the need to differentiate between LGBT people and heterosexual couples in private adoption services).

²¹³ Michael Boucai, *Is Assisted Reproduction an LGBT Right?*, 2016 WIS. L. REV. 1066, 1105–06 (quoting Gerald P. Mallon, *Lesbian and Gay Prospective Foster and Adoptive Families: The Homestudy Assessment Process*, in *ADOPTION BY LESBIANS AND GAY MEN* 130, 131 (David M. Brodzinsky & Adam Pertman ed., 2012)).

²¹⁴ See, CHILD WELFARE INFORMATION GATEWAY, *supra* note 211.

²¹⁵ Stotzer, Hermann & Hasenbush, *supra* note 53, at 13.

discrimination provisions on gender identity, and children are rarely put in transgender persons' homes.²¹⁶

Consequently, in making determinations under the best interests standard, judges should be aware of how schemas color their assessments of LGBT families as adoptive or fostering placements. Nevertheless, those in-home placements are usually preferable to placement of youth in non-family, institutional, out-of-home care.²¹⁷ The data show that those facilities can result in much worse experiences for LGBT youth in care. LGBTQ youth in the dependency system suffer increased levels of bias compared to non-LGBTQ peers. Wilson and her colleagues found that LGBTQ youth are disproportionately present in foster care and have experienced rejection, abuse, and discrimination by caseworkers, care facility employees, foster parents, and other foster youth. Because of caregivers' discomfort with LGBT identity and/or sexuality, gender and sexual minority foster youth are more likely to experience unequal treatment or frequent and repeated changes in placement. For example, LGBTQ youth report being labeled "unadoptable", being blamed for being out and therefore causing their own negative treatment, and being housed in solitary settings "for their own protection."²¹⁸

Significantly one additional reason for disparate treatment that Wilson and her colleagues found was to "prevent [LGBTQ youth

²¹⁶ Lori E. Ross, Rachel Epstein, Scott Anderson, & Allison Eady, *Policy, Practice, and Personal Narratives: Experiences of LGBTQ People with Adoption in Ontario, Canada*, 12 ADOPTION Q. 272-293 (2009).

²¹⁷ See, e.g., Alysse ElHage, *Keeping Children in the Family Instead of Foster Care*, INST. FOR FAM. CARE (Aug. 18, 2016), <https://ifstudies.org/blog/keeping-children-in-the-family-instead-of-foster-care>, accessed Sept. 29, 2017; Annie E. Casey Foundation: *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, Policy Report (2012), <http://www.aecf.org/resources/stepping-up-for-kids/>, accessed Sept. 29, 2017.

²¹⁸ Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, THE WILLIAMS INST., 11 (2014), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

from] preying on other youth.”²¹⁹ The schema that LGBT people’s sexuality is predatory, stalking innocent heterosexuals, appears in other contexts, most specifically in sexual harassment claims under Title VII of the Civil Rights Act.²²⁰ We should not be surprised to see it resurface here. Because of the perceived different nature of LGBTQ sexuality, queer youth in foster care also confront disparate scrutiny of their behavior. Caregivers are more likely to discipline LGBTQ youth for engaging in age-appropriate sexual experimentation that might not have been punished or have been punished less had it taken place between youth of different sexes.²²¹ Thus, judges and others working on the child welfare side of the family court system should be attentive to the potentially negative experiences of LGBT parents and youth in care. Schematic, intuitive thinking about LGBT people may be endemic to all parts of the child welfare system, and solutions to combat these schemas may be difficult to find.

B. LGBT Parenting Styles and Family Economic Resources

Despite significant similarities in the data noted earlier,²²² parenting styles differ somewhat in lesbian and gay male parented families. Overall, same-sex couples are more likely to share labor evenly, whereas heterosexual couples are more likely to specialize – the man in paid employment, the woman in unpaid family labor.²²³ If we focus on lesbian-parent families specifically, they, too, allocate labor similarly²²⁴ – albeit not according to biological

²¹⁹ *Id.*

²²⁰ See, Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII*, *supra* note 22, at 14-16.

²²¹ Wilson et al., *supra* note 218, at 11.

²²² See *supra* notes 158 - 158, 176 - 180 and accompanying text.

²²³ Chan et al., *supra* note 179; Charlotte J. Patterson, Erin L. Sutfin & Megan Fulcher, *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179 (2004); Samantha L. Tornello, Bettina N. Sonnenberg & Charlotte J. Patterson, *Division of Labor Among Gay Fathers: Associations with Parent, Couple, and Child Adjustment*, 2 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 365 (2015).

²²⁴ Bos, Van Balen & Van Den Boom, *supra* note 186.

sex. In addition to sharing childcare more evenly at home, LGBT couples also work similar hours per week in paid employment and make similar wages.²²⁵ Notwithstanding those distinctions in task allocation, researchers found no effects on children in same-sex parented families.²²⁶

Nevertheless, these differences in family division of labor and work inside/outside of the home have had unforeseen consequences for the legal treatment of LGBT families, notably in the economic resources available to the family through the federal tax structure. American income tax law distinguishes between married and unmarried taxpayers.²²⁷ Unsurprisingly, the schemas of American family life that underpin the federal income tax treatment of married couples are consistent with the mindset of the predominantly male Congress in the 1940s when they were enacted.²²⁸ Naturally, Congress employed exclusively heterosexual schemas of marriage and family since same-sex marriage did not surface in the legal system or mainstream public consciousness until the 1970s.²²⁹ Even then, marriage equality was rejected without much comment.²³⁰

In the tax code, Congress envisioned a married male breadwinner and female stay-at-home mother, a traditional gendered division of labor inside and outside the home.²³¹ Under

²²⁵ *Id.*

²²⁶ Tornello et al., *supra* note 223.

²²⁷ *E.g.*, James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 UNIV. CINN. L. REV. 1409, 1410 (2010).

²²⁸ United States House of Representatives, *Women in Congress*, HISTORY, ART AND ARCHIVES: THE HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibition-and-Publications/WIC/Women-in-Congress/> (last visited July 16, 2017).

²²⁹ *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972) (dismissing the case in one sentence: “The appeal is dismissed for want of a substantial federal question.”), *overruled*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); JASON PIERCESON, *SAME SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT*, 38-43 (2013).

²³⁰ *Baker*, 409 U.S. 810.

²³¹ Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 292–94 (1988).

that model, the sharing of one income within the marital unit means that the married couple pays less tax than if the spouses were taxed separately, a “marriage bonus.”²³² In couples in which both parties bring money into the family unit, and particularly if the two incomes are relatively equal, a “marriage penalty” applies; the married couple is taxed more than if they were single persons.²³³

Even some 70 years later, the wage-earner/homemaker model persists despite modern economic realities.²³⁴ Notice also that each one of the married couples in *Modern Family*, including the gay couple, Cam and Mitchell, is composed of a male breadwinner and a stay-at-home spouse caring for the children.²³⁵ Presumably each family on the show would be the beneficiary of the marriage bonus. As the depiction of Cam and Mitchell illustrate, this male/female, wage-earner/homemaker pattern is replicated in the schematic view of same-sex relationships. Often curious heterosexuals ask gay and lesbian couples, “who is the man and who is the woman?”²³⁶ Moreover, studies have shown that most

²³² Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 332 (2016); Margaret Ryznar, *A Practical Solution to the Marriage Penalty*, 44 PEPPERDINE L. REV. 647, 656 (2017).

²³³ Kahng, *supra* note 232, at 332; Ryznar, *supra* note 232, at 653-55.

²³⁴ See, e.g., The Pew Research Center, *The Rise in Dual Income Households*, (June 18, 2015), PEW RESEARCH CENTER, available at http://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ (last visited July 26, 2017).

²³⁵ Rebecca Raber, *Why ‘Modern Family’ Is One of the Most Old Fashioned Shows on Television*, TAKEAPART, (Apr. 27, 2014), <http://www.takepart.com/article/2014/05/27/why-modern-family-is-old-fashioned-show-television>; cf., generally, Sylvia Henneberg, *Rewriting the How-To of Parenting: What Is Really Modern about ABC’s Modern Family*, 9 J. INTERDISCIPLINARY FEMINIST THOUGHT 1 (2016).

²³⁶ Arwa Mahdawi, “Who is the man?” *Why the gender divide in same-sex relationships is a farce*, THE GUARDIAN, (Aug. 23, 2016), <https://www.theguardian.com/lifeandstyle/2016/aug/23/same-sex-relationship-gender-roles-chores>, (discussing a study presented at the 2016 Annual Meeting of the American Sociological Association); VIRGINIA RUTTER & PEPPER SCHWARTZ, *THE GENDER OF SEXUALITY: EXPLORING*

Americans assign stereotypical male and female chores to members of same-sex couples through an assessment of who is more masculine or feminine based on their interests and hobbies.²³⁷ Accordingly, it is unsurprising that the tax code also shares this persistent gendered view of coupledness – both same- and different-sex.

If the fictional Tucker-Pritchett family accrues tax advantages, many contemporary American couples do not.²³⁸ The mismatch between the tax code's antiquated beliefs about American home life and the realities of modern US families, including LGBT families, impacts lesbian couples more severely.²³⁹ Cam and Mitchell are not the typical same-sex couple raising a minor child. Demographically, those couples have characteristics more likely to be associated with poverty than different-sex couples; they are predominantly female, younger, and persons of color.²⁴⁰ Accordingly, those family units begin with fewer financial resources. Additionally, partners in female same-sex couples are

SEXUAL POSSIBILITIES, 257 (2nd ed. 2012) (discussing the question asked of LGBT people); Ellen DeGeneres, *Quotes*, GOODREADS, <https://www.goodreads.com/quotes/4111301-asking-who-s-the-man-and-who-s-the-woman-in-a>, (last visited Sept. 27, 2017) (according to Ellen DeGeneres, "Asking who's 'the man' and who's 'the woman' in a same-sex relationship is like asking which chopstick is the fork.).

²³⁷ American Sociological Association, *Sex and Gender More Important than Income in Determining Views on the Division of Chores*, EUREKALERT! THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE (Aug. 21, 2016), https://www.eurekaalert.org/pub_releases/2016-08/asa-sag081616.php (discussing a study by Natasha Quadlin, & Long Doan, "Making Money, Doing Gender, or Being Essentialist: Partner Characteristics and Americans' Attitudes Toward Housework"); Samantha Cowen, *Even Gay Couples Are Assigned Gender Roles in Domestic Scenarios*, TAKE PART (Aug. 25, 2016), <http://www.takepart.com/article/2016/08/25/gender-norms-same-sex-couples>.

²³⁸ See, Pew Research Center, *supra* note 234.

²³⁹ Kahng, *supra* note 232, 329 n.8. (stating there is a similar effect with race and African-Americans and a lesser impact on male same-sex couples).

²⁴⁰ Gary J. Gates, *Same-Sex and Different-Sex Couples in the American Community Survey: 2005–2011*, THE WILLIAMS INST., 1 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>.

more likely than different-sex peers to both work outside the home and to work similar numbers of hours.²⁴¹ Consequently, compared to their heterosexual peers, lesbian couples and their families disproportionately suffer the marriage penalty faced by married couples filing jointly. Thus, more financial resources are diverted to income taxes and are less available to these families.²⁴²

Furthermore, lesbian couples' more equal allocation of economic and childcare resources has other tax consequences for those families. The traditionally gendered male wage-earner/female homemaker model also underlies the financial benefits of marital estate and gift tax exclusions and other intra-spousal transfer provisions. Similarly, the earned income tax credit has less value for lesbian-headed households than for different sex households.²⁴³ Consequently, those tax advantages also accrue less to lesbian couples and more to different-sex couples.²⁴⁴

Legislators and policy makers structured these tax programs to fit a schema based on now-outmoded data about mid-twentieth century Americans' gendered marital roles and spousal wealth accrual.²⁴⁵ Even if those data were accurate at that time, today traditional gender role assumptions are increasingly inapposite for heterosexual married couples and are even less valid for same-sex ones.²⁴⁶ Modern, married same-sex couples were completely

²⁴¹ M.V. LEE BADGETT, MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 148–51 (2003); Gates, *supra* note 241; James Alm, J. Sebastian Leguizamon & Susane Leguizamon, *Revisiting the Income Tax Effects of Legalizing Same-Sex Marriages*, 33 J. POL'Y ANALYSIS & MGMT. 263 (2014).

²⁴² Kahng, *supra* note **Error! Bookmark not defined.**, at 342. This disparity is exacerbated because the Earned Income Tax Credit [EITC], designed to help children raised in lower income households, can be less valuable for married couples than for single parents. *See, e.g.*, Angela Rachidi, *The earned income tax credit and marriage penalties: Does a childless worker expansion make them worse?*, AM. ENTER. INST., 1, 2 (2015), <http://www.aei.org/publication/the-earned-income-tax-credit-and-marriage-penalties-does-a-childless-worker-expansion-make-them-worse/>.

²⁴³ Kahng, *supra* note 232, at 360.

²⁴⁴ *Id.* at 354.

²⁴⁵ Jones, *supra* note 231; Ryznar, *supra* note 232, at 671.

²⁴⁶ Kahng, *supra* note 232; Badgett, *supra* note 241.

absent from the foundational data and assumptions legislators used in structuring the tax code's treatment of marriage. Contemporary same-sex couples' marriages are empirically different from both those assumptions and from the current marriages of their different-sex peers. Consequently, the legal structures built on those policy and factual underpinnings are also flawed.

V. WORKING TOWARD CHANGE AND CONCLUSION

As judges, social workers, counselors, and policy makers in the family and juvenile justice sectors encounter LGBT families and the children they raise, they must be alert to missteps, misperceptions, or biases caused by inaccurate data and images.²⁴⁷ These distortions appear throughout family law: from assumptions about which people and families appear in courtrooms, through doctrinal and evidentiary determinations, to what economic and psycho-social resources are available to parents and children.

Those skewed perceptions violate a fundamental principle of justice: judges and others must make rational decisions based on the evidence in the case and not on personal bias or prejudice.²⁴⁸ The best interests of the child standard, in particular, requires judges to form complex judgments among a wide range of factors – often without complete information – in order to balance competing evidence and perspectives effectively and rationally.²⁴⁹ On the other hand, social cognition research strongly suggests that we may not truly be able to sort, classify, and assess those inputs cleanly,²⁵⁰ or that we can only review them idiosyncratically depending on our underlying schemas.²⁵¹ Because these judgments are colored by intuition and schematic thinking, media images of LGBT parents are important; Cam, Mitchell and Lily represent

²⁴⁷ See, e.g., Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 109 (2010).

²⁴⁸ See, e.g., MODEL CODE OF JUD. CONDUCT r. 2.2 (2007) (AM. BAR ASS'N, amended 2015); MODEL CODE OF JUD. CONDUCT r. 2.3 (2007) (AM. BAR ASS'N, amended 2015).

²⁴⁹ See generally, Mnookin, *supra* note 97.

²⁵⁰ Yale Cultural Cognition Project, *supra* note 36, at 2 (finding people may not be cognitively capable of overcoming implicit bias, even when they consciously attempt to do so).

²⁵¹ See, e.g., BROWER AND NURIUS, *supra* note 17, at 14-15.

who we think these families are – particularly if we do not see actual same-sex couples raising children in front of us or in our courtrooms.²⁵²

This salience of popular culture and media is increased when we assess members of communities different from our own.²⁵³ Specifically, cognitive science shows that we tend to attribute outsiders' schema-consistent actions to inherent, unchanging personality traits, and any disconfirming behaviors or events to transient, situational or exceptional circumstances.²⁵⁴ We assign an opposite pattern to in-group members.²⁵⁵ To take a relatively trivial example, if a baby-boomer sees a millennial texting on her phone in line at a store, the boomer may say, "See? They're always on their phones." Whereas, if that same boomer sees a same-aged peer engaging in the same behavior, he might comment, "Wow. She must really need to contact that person right away." However, these insider/outsider effects need not be so inconsequential. Bodenhausen and Wyer found that research subjects made decisions as to whether a hypothetical criminal was likely to reoffend and thus should be denied parole based on whether the crime committed was one that was consistent with a

²⁵² The classic discussion of this effect is described in Tversky and Kahneman's seminal work on the "availability heuristic," a mental shortcut relying on immediate examples that come to mind when evaluating a specific concept or thing. Tversky & Kahneman, *Availability*, *supra* note 24.

²⁵³ E.g., Patricia W. Linville, *The Heterogeneity of Homogeneity*, *ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES* 423, 430, 436 (John M. Darley & Joel Cooper eds., 1998); Marilyn B. Brewer, *Social Identity, Distinctiveness, and Ingroup Homogeneity*, 11 *SOC. COGNITION* 150, 150-51, 157 (1993) (discussing in-group/out-group assessments).

²⁵⁴ See, e.g., Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 267, 268, 279 (1985); Krieger, *supra*, note 23 at 1205-06 (discussing the implications of this research for disparate treatment cases and pretext).

²⁵⁵ E.g., Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 *PERSONALITY & SOC. PSYCH. BULL.* 461, 469-70 (1979); Miles Hewstone, *CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS.* (1989).

stereotypical group trait for a particular ethnic group or whether it was inconsistent.²⁵⁶

Judges are no different; in-group/out-group status also influences their decisions, even where judicial canons and norms mandate impartiality.²⁵⁷ Accordingly, the more judges and others believe that LGBT people are “outsiders” – that their families do not live among them, or share common household or parenting characteristics with different-sex peers²⁵⁸ – the more they will tend to make stereotypic or schematic judgments about LGBT individuals or families. Further, the more people trust the accuracy of their schemas, the more they rely on those judgments.²⁵⁹ Therefore, better and more accurate empirical data on LGBT people and their families are crucial to combatting these cognitive dynamics.

Nevertheless, social cognition research reveals that awareness alone will not alter schemas or behavior.²⁶⁰ It is a necessary, but insufficient, precondition for change. Similarly, neither good intentions, nor admonitions to avoid preexisting schemas will be successful by themselves.²⁶¹ Rather, the schema has to stop functioning, to cease working in real terms for the person using it.²⁶²

²⁵⁶ Bodenhausen, et al., *supra* note 254, at 271.

²⁵⁷ Wistrich & Rachlinski, *supra* note 29, at 98-99.

²⁵⁸ Cf., Mark Rubin & Constantina Badea, *Why Do People Perceive Ingroup Homogeneity on Ingroup Traits and Outgroup Homogeneity on Outgroup Traits?*, 33 PERSONALITY & SOC. PSYCH. BULL. 31 (2007).

²⁵⁹ Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 368 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

²⁶⁰ See, e.g., John Bransford et al., *Teaching Thinking and Problem Solving*, 41 AM. PSYCHOLOGIST 1078 (1986) (stating mere awareness of the presence of a schema is insufficient to modify it).

²⁶¹ See generally, PETER SALOVEY & JEFFERSON A. SINGER, *Cognitive Behavior Modification*, HELPING PEOPLE CHANGE: A TEXTBOOK OF METHODS, 372 (4th ed. 1991) (discussing the goals of cognitive restructuring therapies).

²⁶² See, e.g., Stein, *supra* note 23 at 162; see also, BROWER & NURIUS, *supra* note 17, at 94 (discussing social science practitioners' schema-

One way in which schemas can become non-functional is when we interact with unavoidable, explicitly stereotype-incongruent models and data.²⁶³ We must do more than simply access or acknowledge these data, we must actively connect with those facts and people.²⁶⁴ Judicial education must form part of this project.²⁶⁵ It should be structured to adhere to best practices in adult and judicial education. This includes using scenarios and real-world problems for judges to resolve by actively using the skills and techniques they employ on the bench.²⁶⁶ In keeping with social cognition research on schema change, the scenarios and problems must deliberately seek to unmask schemas and show them to be both false and dysfunctional. At a minimum, two things must be true to change intuitive thinking about sexual orientation

motivated bias not significantly reduced by mere desire to change or awareness).

²⁶³ See NAT'L CTR. FOR STATE COURTS, *Strategies to Reduce the Influence of Implicit Bias*,

http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012 (last visited November 11, 2017); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 988–90 (2006) (charting legal and personal strategies for debiasing).

²⁶⁴ Cf. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 826 (2012) (suggesting that prosecutors could live in high-crime neighborhoods to interact with people like the defendants in their cases); Kang, et al., *supra* note 28, at 1169-1171 (suggesting that judges hire diverse staff, or otherwise expose themselves to a broader range of people); Accord, Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 144 YALE L.J. 1759, 1778 (2005) (showing that increasing the diversity of judicial panels changed outcomes). Counterexamples are only one component of a comprehensive strategy for debiasing. While discussion of the full strategy is beyond the scope of this article, for some examples of that approach, see Wistrich & Rachlinski, *supra* note 29; Kang, et al., *supra* note 28.

²⁶⁵ See, e.g., Wistrich & Rachlinski, *supra* note 29, at 106-08.

²⁶⁶ See, e.g., LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING 144 (1996); see generally, LYNN H. SHAFRAN, PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO THE ISSUES AND RESOURCES (1989).

and gender identity minorities: we need accurate, empirically grounded data on LGBT people and their families, and we need to recognize the limitations that schemas impose on legal doctrine and on participants in the judicial system.

The first is the predominant goal of this Article, to provide judges and others with the information they need to make better informed decisions and assist children and families in the legal system. The second entails mindfulness²⁶⁷ to move from intuitive thinking to more deliberative cognition²⁶⁸ – a process that helps to incorporate new data and neutralize or change schemas.

Judges as a group are trained to deliberate and think analytically, although they are certainly not immune from schemas and cognitive biases,²⁶⁹ as earlier discussions of cases under the best interests standard have demonstrated. In certain circumstances, this analytical training can actually hinder debiasing. Perhaps counterintuitively, empirical studies have shown that believing we are objective increases the risk that we will behave non-objectively.²⁷⁰ This caution applies with particularity to judicial officers, who have ethical and legal canons

²⁶⁷ For a discussion of the role mindfulness plays in combatting implicit bias in judges, see Kang, et al., *supra* note 28 at 1177-78; cf., Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 284, 285, 288 (2015).

²⁶⁸ Cf., Saaid A. Mendoza, Peter M. Gollwitzer, & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010).

²⁶⁹ See, e.g., Wistrich & Rachlinski, *supra* note 29, at 92.

²⁷⁰ See, Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007).

requiring impartiality,²⁷¹ and personal attachments to a self-image as just and unbiased,²⁷² accurate or not.²⁷³

Nevertheless, debiasing research also shows that a strong impetus to change behavior increases the ability to avoid schematic thinking and bias.²⁷⁴ One study found when judges were consciously motivated to be fair, their anti-gay attitudes did not influence decision-making; when that conscious motivation was lacking, bias occurred more often.²⁷⁵ Accordingly, knowledge of the psychological mechanisms of schemas and cognitive bias is a first meaningful step towards decreasing those thought processes. Judges and other court personnel who are aware of how social cognition works can understand how evaluations of parenting, of families and home environments may be colored by schemas and popular images of LGBT people. That knowledge can then make the judge more open to correct empirical data on sexual and gender minorities. Finally, the judge can deliberately and mindfully employ that knowledge to replace pop culture portrayals and other problematic images in order to improve the experiences and treatment of LGBT people and their families in domestic relations courts.

²⁷¹ *E.g.*, ABA Model Code, *supra* note 248, Rules 2.2 and 2.3.

²⁷² *See*, Rachlinski et al., *supra* note 30, at 1225 (discussing survey of judges that found 97% of them thought they were in the top quartile in “avoid[ing] racial prejudice in decisionmaking”).

²⁷³ *See, e.g.*, Richard A Posner, HOW JUDGES THINK, 121 (2010) (“[W]e use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others”).

²⁷⁴ *See*, Margo J. Monteith, Jill E. Lybarger, & Anna Woodcock, *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009); Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

²⁷⁵ Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 275 (2006).