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Considering Vulnerability of Abuse as a Facet of Identity: A Call for Reform in Child Custody Proceedings

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COMMENT

CONSIDERING VULNERABILITY OF ABUSE AS A FACET OF IDENTITY: A CALL FOR REFORM IN CHILD CUSTODY PROCEEDINGS

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For nearly fifty years, the best interest standard has been adopted and applied by all jurisdictions in child custody determinations.[1] The standard aims to impose facially neutral determinations that solely consider the best interest of the child, but many believe that mothers obtain an unfair advantage during these proceedings.[2] A deeper dive into the application and outcomes of courts applying this standard provides that neither aim nor belief is an accurate representation in practice.[3]

Custody proceedings rely on outdated conceptions of patriarchal norms.[4] Under the doctrine of *parens patriae*, family courts receive exclusive jurisdiction to determine the best interest of the child.[5] The standard relies on the paternal figure, the judge, to use their own discretion when determining

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1. *Child Custody, Visitation, & Termination of Parental Rights*, 16 GEO. J. GENDER & L. 41, 44 (2015).

2. *Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981) (regarding the best interest standard as neutral on the basis of gender).

3. *See* Joan Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE & FAM. L. 92, 96 (2020) (highlighting bias women can face in child custody allocation). Gender bias is pervasive throughout child custody proceedings and complicates the aim to impose neutral standards during custody proceedings. *Id.* Data on mothers increased chance of custody loss over their children when alleging claims of domestic violence confutes the belief that mothers obtain unfair advantages during these proceedings. *Id.* For further discussion of impartial custody determinations that do not disproportionately advantage mothers see *infra* Sections I.B. and I.C.

4. *See* Singh v. Singh, 837 S.E.2d 651, 659 (S.C. Ct. App. 2019) (explaining the doctrine of *parens patriae*).

5. *Id.*

what is within the child's best interest.[6] Judges are often tasked with interpreting situations that are different than their own experiences and outside their areas of expertise.[7] Imposing their own discretion in these matters without relevant training can lead to unintended and harmful outcomes.[8]

The standard's facial neutrality along with the application of judicial discretion often results in custody outcomes that overlook facets of identity pertinent to a child's wellbeing.[9] Part I of this Comment will examine case law and research that indicates that courts often leave children vulnerable to abuse by failing to consider how gender, race, and transphobia impact their lives when applying the best interest standard.[10] Part II of this Comment will analyze proposed reforms for the standard and judicial training and take developmental psychology into account to suggest ways to combat inequitable proceedings.[11]

I. BACKGROUND

Courts in all jurisdictions have wrestled with interpreting the best interest standard in custody proceedings.[12] Child custody implicates a level of intimacy and importance experienced in very few other areas of the law, and often leaves judges with the task of navigating through allegations of abuse and matters impacting marginalized communities.[13] The gaps left in the statutory schemes have led judges to exercise a fair amount of discretion in determining what may be weighed when considering a child's best interest.[14]

6. *Id.*

7. Meier, *supra* note 3, at 93.

8. *Id.* at 5; *see also* KRISTIN KALSEM, UNIV. OF CIN. COLL. OF L., JUDICIAL TRAINING ON DOMESTIC VIOLENCE: A 50-STATE SURVEY 1–2 (May 2019) https://ucracegendersocialjustice.com/wp-content/uploads/2019/12/judicialtrainingsurveyarticlefinal.pdf (noting that most states do not have mandated judicial training on domestic violence).

9. *See* Melissa M. Stiles, *Witnessing Domestic Violence: The Effect on Children*, 66 AM. FAM. PHYSICIAN 2052, 2052, 2053–54 (2002) (explaining the negative developmental impact witnessing domestic violence can have on children).

10. *See infra* Part I.

11. *See infra* Part II.

12. *See* Welker v. Welker, 129 N.W.2d 134, 138 (Wis. 1964) (deciding whether religious beliefs should be considered in weighing a child's best interest).

13. S*ee* Ross v. Hoffman, 280 Md. 172, 181, 372 A.2d 582, 588 (1977) (considering the number of abortions a mother had received during a custody determination); Farmer v. Farmer, 439 N.Y.S.2d 584, 589 (N.Y. App. Div. 1981) (stating that race is not a significant factor in awarding custody); Feldman v. Feldman, 358 N.Y.S.2d 320, 322 (App. Div. 1974) (deciding whether evidence of a mother's swinging lifestyle is relevant to a custody proceeding).

14. *See In re* F.C., 482 P.3d 1137, 1149 (Kan. 2021) (Stegall, J., dissenting) ("In the absence of such rigorous and testable measuring sticks, judges will fall back on what often flies under the

Section I.A discusses the history and development of the best interest standard.[15] Section I.B discusses where the best interest standard falls short in domestic violence and child abuse cases.[16] Section I.C examines the best interest standard as applied to marginalized communities.[17]

A. The History and Development of the Best Interest Standard

Prior to the development of the modern best interest standard, common law presumed that child custody was a right of the biological father.[18] Throughout history, women were classified as second-class citizens.[19] This belief was articulated by early influential leaders, such as Martin Luther.[20] Luther asserted that women were naturally inferior to men, and men were entitled to hold women as their property.[21] These beliefs shaped English common law, which held that married women had no legal existence.[22] Their legal status was covered under the law by their husbands, which made women very similar in status to children.[23] Until the early nineteenth century, courts did not grant white women[24] any legal rights to their children, even in the case of divorce.[25]

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banner of 'common sense'—that is, a judge's life experience, norm and taboo matrices, and socio-economic expectations about what constitutes a healthy and abuse-free childhood.").

15. *See infra* Section I.A.

16. *See infra* Section I.B.

17. *See infra* Section I.C.

18. *Ross*, 280 Md. at 175, 372 A.2d at 586.

19. *See* Nonhuman Rts. Project, Inc. v. Breheny (*In re* Nonhuman Rts. Project, Inc.), 197 N.E.3d 921, 940 (N.Y. 2022) (Wilson, J., dissenting) (discussing the legal subordination of women throughout history).

20. *Id.* at 944.

21. *Id.* at 944–45.

22. *Id.* at 945.

23. *Id.*

24. While free women of color may have gained *de jure* custodial rights over their children alongside white women, in practice it was primarily white women who had access to these rights. Marylynn Salmon, *The Legal Status of Women, 1776–1830*, GILDER LEHRMAN INST. OF AM. HIST., https://ap.gilderlehrman.org/essay/legal-status-women-1776%C3%A2%E2%82%AC%E2%80%9C1830 [https://perma.cc/NCK9-ECG7] (last visited Apr. 7, 2023). For instance, Black women faced intense racial prejudice and Indigenous women were subject to colonization, forced relocation, and broken treatise at the hands of the American government that inhibited their access to child custody. Jone Johnson Lewis, *A Short History of Women's Property Rights in the United States*, THOUGHTCO (July 13. 2019), https://www.thoughtco.com/property-rights-of-women-3529578.

25. *In re Nonhuman Rts. Project*, 197 N.E.3d at 945–47. For enslaved people, the right of child custody was nonexistent. NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE 30 (5th ed. 2011). In 1662, during the colonial period, a law passed which mandated the legal status of mothers to pass to their children, so children with enslaved mothers became slaves themselves. *Id.* In 1774, enslaved individuals petitioned the Massachusetts legislature for freedom in which they stressed the inequality they faced in family life. *Id.* at 80. They in part asked, "[h]ow can a slave perform the duties of . . . a parent to a child?" *Id.* Unlike white women, who began to gain freedom after the

Largely influenced by the American Revolution and white women's newfound right in the ability to own property, custody disputes began to change in the 1800s.[26] Courts turned away from the "natural" right of the father and began to exercise their own discretion in custody proceedings, often considering the conduct of parents.[27] The law no longer deemed children parental property.[28] This in turn shifted judicial attitudes as the welfare of the child became pertinent in custody decisions.[29]

In *Commonwealth v. Addicks*,[30] the Supreme Court of Pennsylvania asserted its ability to exercise discretion in child custody proceedings.[31] The dispute arose after Barbara Lee and her husband Joseph Lee divorced on the cause of adultery, and Barbara then married John Addicks.[32] Barbara and Joseph had two children together that had lived with Barbara since their birth.[33] During the marriage, Joseph abandoned Barbara and the children and Barbara began a relationship with John thereafter.[34] Joseph sued Barbara for custody of the children, asserting that it was highly improper for Barbara to maintain custody because she had committed adultery.[35] The court awarded custody to Barbara despite the adultery, because the children were of a tender age, had lived with Barbara since birth, and were well cared for by her.[36] However, years later, the Pennsylvania Supreme Court overturned this decision based on the fact that the mother had legally committed adultery.[37]

At the time, the law held that one could not marry their paramour.[38] The court claimed it took pity on Barbara, stating that she was not "a vulgar prostitute," but rather, a well-educated woman who was forced into an incompatible marriage with Joseph and ignorant to the fact that she was not legally married to John.[39] Regardless, the court decided that it must grant

American Revolutionary War, eventually including the right to custody over their children, slave law in the United States maintained such distinctions. *See* Henderson v. Allens, 11 Va. (1 Hen. & M.) 235, 239 (1807) (finding the law of *partus sequitur ventrem* did not apply to a child who was born to a previously enslaved mother who had gained freedom by the time of the birth).

26. Salmon, *supra* note 24.
27. Commonwealth v. Addicks (*Addicks I*), 5 Binn. 520, 520 (Pa. 1813).
28. United States v. Green, 26 F. Cas. 30, 31–32 (C.C.D.R.I. 1824).
29. *Id.*
30. 2 Serg. & Rawle 174 (Pa. 1816).
31. *Id.* at 176.
32. *Id.*
33. Commonwealth v. Addicks (*Addicks I*), 5 Binn. 520, 520 (Pa. 1813).
34. *Id.* at 520–21.
35. *Id.* at 520.
36. *Id.* at 521–22.
37. *Addicks II*, 2 Serg. & Rawle at 177.
38. *Addicks I*, 5 Binn. at 520 (here, "paramour" refers to the lover of an adulterous party).
39. *Addicks II*, 2 Serg. & Rawle at 176.

Joseph the legal right over the children or else it risked the children thinking that Barbara's actions were approved by the court.[40]

Despite the high court overturning the decision, it is important to note that the lower court in *Addicks* articulated the belief that children in early stages of child development are better off in the hands of their mother.[41] This presumption was adopted by many jurisdictions and titled the "tender years" doctrine.[42] The doctrine originated in the State of Maryland in 1830 and was based on the belief that "mother[s] [are] the softest and safest nurse of infancy."[43] Courts would only negate this presumption if the mother was deemed unfit to parent.[44] Courts often came to the conclusion of unfitness in cases involving acts of adultery.[45] As time progressed, the doctrine became highly criticized, with proponents arguing it advanced old notions of gender stereotypes.[46] All jurisdictions have since overturned the tender years doctrine and have sought to impose an approach that is gender-neutral.[47]

B. The Modern Best Interest Standard

The modern best interest standard does not impose facial discrimination on men or women.[48] As gender ideologies have shifted, states have moved away from the presumption that women are better caretakers than men, and instead implemented custody decisions that could place physical and legal custody in the hands of either parent, or both.[49] Typically, judicial

40. *Id.* at 177.

41. *Addicks I*, 5 Binn. at 521.

42. *Ex parte* Devine, 398 So. 2d 686, 687 (Ala. 1981).

43. *Id.* at 689.

44. *Id.*

45. *See Addicks II*, 2 Serg. & Rawle at 176 (holding that the mother could not retain custody of her children or they may deem adultery appropriate); Winfield v. Winfield, 35 So. 2d 443, 444 (Miss. 1948) (en banc) (holding that a woman is not entitled to custody of her children when a divorce is based off her adultery); Johnson v. Johnson, 111 So. 207, 208 (Ala. 1927) (finding that a wife's affair rendered her unfit to retain custody of her children).

46. *See Devine*, 398 So. 2d at 693 (stating that the doctrine discriminates against men in awarding custody while simultaneously advancing stereotypes regarding a woman's place in the world).

47. *See, e.g.*, *id.* at 696 (turning away from the tender years doctrine in favor of the best interest standard, because "maternal and paternal roles are not invariably different in importance" (quoting Caban v. Mohammed, 441 U.S. 380, 389 (1979))); S.C. CODE ANN. § 63-15-10 (abolishing the tender years doctrine); Brooke v. Brooke, 453 N.W.2d 438, 440 (Neb. 1990) ("Neb. Rev. Stat. § 42-364 (Reissue 1988) provides that in determining custody, no preference shall be given based on the sex of the parent and 'no presumption shall exist that either parent is more fit to have custody . . . than the other.'" (alteration in original) (quoting NEB. REV. STAT. § 42-364 (1988))); Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639 (Pa. 1977) ("We also question the legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union.").

48. *Devine*, 398 So. 2d at 693.

49. *Id.*

proceedings are focused on the rights of both parties and the implementation of a fair outcome.[50] Custody proceedings present courts with unique considerations that supersede the parties' legal rights and instead focus on the best interest of the child.[51] In determining custody in sole or joint arrangements, "the paramount concern is the best interest of the child."[52] This matter is left solely to state courts.[53] Federal courts refuse to hear controversies that stem from family law matters, reserving that such matters are best left to the states.[54] In turn, a federal consensus does not exist on the standard.[55] However, all states, through implementation of either case law or statutes, task judges with determining the best interest of the child in custody proceedings.[56]

States typically hold overarching goals that the standard is meant to achieve.[57] Some common goals held by states are "[t]he importance of family integrity and preference for avoiding removal of the child from [their] home,"[58] "[t]he health, safety, and/or protection of the child,"[59] and "[t]he importance of timely permanency decisions."[60] States vary considerably on how the standard must be imposed.[61] A majority of state statutes do not list specific factors to be considered in the determination.[62]

50. John W. Ester, *Maryland Custody Law – Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225, 227 (1982).

51. *Id.*

52. Taylor v. Taylor, 306 Md. 290, 303, 508 A.2d 964, 970 (1986).

53. United States v. Windsor, 570 U.S. 744, 767 (2013) ("Federal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy . . . of the States in the regulation of domestic relations.'" (alteration in original) (quoting Ankenbrandt v. Richards, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring in judgment))).

54. *Id.*

55. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

56. *See, e.g.*, Nye v. Nye, 105 N.E.2d 300, 303 (Ill. 1952); Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1976); Taylor v. Taylor, 306 Md. 290, 303, 508 A.2d 964, 970 (1986); *In re* C.J.C., 603 S.W.3d 804, 812–13 (Tex. 2020); *In re* M.H., 231 Cal. Rptr. 3d 151, 153 (Ct. App. 2018) (collecting cases).

57. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2.

58. *Id.* at 2; Uren v. Ark. Dep't of Hum. Servs. & Minor Child., 651 S.W.3d 724, 729 (Ark. Ct. App. 2022) (emphasizing the need for stability and permanency).

59. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2; *In re* McCauley, 565 N.E.2d 411, 413 (Mass. 1991) (holding that when a child's life needs to be protected, the rights of the parents are not controlling).

60. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2; *In re* Parental Rights as to A.G. v. Kory L.G., 295 P.3d 589, 594 (Nev. 2013) (emphasizing the importance of permanent placement for children).

61. *See generally* CHILD WELFARE INFO. GATEWAY, *supra* note 55 (outlining several states' approaches to the best interest standard).

62. *Id.* at 3 (highlighting that approximately 28 states provide more general guidance rather than explicit factors for judges to look to for custody determinations).

Approximately twenty-two states have factors explicitly expressed in their child custody statutes.[63] Reoccurring factors include: "[t]he emotional ties and relationships between the child and [their] parents, siblings, family and household members, or other caregivers";[64] "[t]he capacity of the parents to provide a safe home and adequate food, clothing, and medical care";[65] "[t]he mental and physical health needs of the child";[66] "[t]he mental and physical health of the parents;"[67] and "[t]he presence of domestic violence in the home."[68] These states are inconsistent in the application of the factors.[69] Some states hold that all factors must be considered, while others ask the courts "to consider all relevant factors, not only those specifically listed in the statute."[70]

Albeit rare, some states have taken nonhegemonic values into account in their statutory schemes.[71] California and Iowa mandate steps to preserve indigenous children's culture in accord with the Federal Indian Child Welfare Act.[72] Connecticut does not allow socioeconomic status to be weighed in its courts' best interest determination standard, and Idaho does the same for parents who have a disability.[73] Only twelve states and the District of Columbia consider the wishes of a child in custody determinations and they do so only when the child has been determined competent in their reasoning.[74]

C. Where the Best Interest Standard Falls Short in Domestic Violence and Child Abuse Cases

Experts at the Leadership Council on Child Abuse and Interpersonal Violence estimate that more than 58,000 children a year are ordered into unsupervised contact with physically or sexually abusive parents following

63. *Id.* at 2–3.

64. *Id.* at 2; FLA. STAT. ANN. § 39.810(5) (West 2006).

65. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2; VT. STAT. ANN. tit. 15, § 665(2) (West 2018).

66. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2; COLO. REV. STAT. § 14-10-124(1.5)(a)(V) (West 2021).

67. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 3; COLO. REV. STAT. § 14-10-124(1.5)(a)(V) (West 2021).

68. CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 3.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 4 (noting that the courts will consider age and level of maturity when considering if a child is able to express reasonable preferences).

divorce in the United States.[75] For some children, this ordered contact may prove fatal.[76] The Center for Judicial Excellence (the "Center") has tracked news coverage of children murdered by a divorcing or separating parent in the United States from 2008 to 2022.[77] The Center found that there have been 861 cases covered in mainstream media involving the murder of children by a parent engaged in a divorce, separation, custody, visitation, or child support proceeding.[78] Out of these murders committed, fathers made up 71% of the perpetrators, mothers made up 17%, stepmothers 3%, and the remaining 9% were marked as committed by "other."[79] Out of the 861 children killed, 116 of them were involved in cases where concerns for their safety were clearly reported to a family court prior to the murder.[80]

In an attempt to combat domestic violence and child abuse, many jurisdictions have enacted legislation to deny the award of custody to perpetrators of domestic violence.[81] In addition, as stated above, overarching goals of the best interest standard typically include the protection of the child.[82] Despite these efforts, cases that contain documented evidence of child abuse have still resulted in the perpetrator maintaining some form of custody rights.[83] In *Ex parte H.H.*,[84] the Alabama Supreme Court granted certiorari review of a decision modifying physical custody in favor of the mother.[85] The original custody agreement between the parents awarded the mother primary physical custody and both parents joint legal custody.[86] After entering a homosexual relationship with another woman, the mother

75. Joyanna Silberg, *How Many Children are Court-Ordered Into Unsupervised Contact With an Abusive Parent After Divorce?*, LEADERSHIP COUNCIL (Sept. 22, 2008) http://www.leadershipcouncil.org/1/med/PR3.html#:~:text=According%20to%20a%20conservative%20estimate,divorce%20in%20the%20United%20States. This estimate was made by weighing the number of children affected by divorce each year against the number of families with allegations of child abuse or domestic violence, against the percentage of cases found to be valid or suspected to be valid and the percentage of children left unprotected. *Id.* The Council suggests that this is a conservative figure because court records often fail to document domestic violence. *Id.*

76. *See U.S. Divorce Child Murder Data* (*2008–Present*), CTR. FOR JUD. EXCELLENCE https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/ (last visited Feb. 20, 2023) (tracking the number of children murdered by an individual involved in a divorce, custody, or similar proceeding that have received media coverage).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* MD. CODE ANN., FAM. LAW § 9-101 (2023) (noting that in custody or visitation proceedings if the court finds that abuse or neglect are likely to occur, they shall deny custody or visitation, apart from supervised visitation).

82. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 55, at 2.

83. *Ex parte* H.H., 830 So. 2d 21, 25 (Ala. 2002).

84. 830 So. 2d 21 (Ala. 2002).

85. *Id.* at 22.

86. *Id.*

petitioned the court for a modification to transfer physical custody to the father, and the court granted the motion.[87] Years later, the mother once again petitioned the court to modify the arrangement and grant her primary physical custody.[88] The mother argued that the modification was necessary because the father was physically abusing the children.[89]

The mother presented evidence that the father had slapped one of the children across the face causing their nose to bleed, and the father admitted to the act.[90] The father also admitted to kicking their child's boombox and beating the children with a belt, but asserted that the majority of the belt whippings had occurred before the divorce.[91] In addition, the mother testified that the children's grades had slipped since the previous modification, the father made effort to cut off their communication with her, and the father had failed to take their daughter to regular gynecologist appointments.[92] The father contested these allegations and instead asserted the children's grades had slipped when the mother entered a homosexual relationship and asserted that the mother was an "alcoholic lesbian."[93]

The Alabama Court of Civil Appeals granted the mother's request after determining that the father's behavior of physical, emotional, and verbal abuse amounted to family violence. [94] In addition, the court found that the mother was sober from alcohol, had been involved in the children's extracurricular activities when they lived with her, and that there was no evidence to indicate that her relationship would have a detrimental effect on their welfare.[95] Thus, the lower court concluded that the modification would be within the best interests of the child.[96] The father sought certiorari review of the decision and the Alabama Supreme Court granted it.[97]

The Alabama Supreme Court reversed the Court of Civil Appeals' decision.[98] The court held that the Court of Civil Appeals erred by reweighing the evidence presented to the trial court.[99] The supreme court disagreed with the lower court's decision that the trial court's judgment was unsupported by evidence because some of the testimony that presented abuse was disputed at

87. *Id.*
88. *Id.*
89. *Id.* at 23.
90. *Id.*
91. *Id.*
92. *Id.* at 24.
93. *Id.*
94. *Id.*
95. *Id.* at 25.
96. *Id.* at 24.
97. *Id.* at 22.
98. *Id.* at 26.
99. *Id.* at 25.

trial.[100] Alabama law holds that the trial court is in the best position to evaluate testimony and thus the trial court's decision was upheld and the father retained physical custody of the children.[101]

It is not uncommon that a parent that has physically abused their child retains physical custody of them, and oftentimes allegations of physical abuse are often hard to prove or are disbelieved.[102] A 2020 study published by Joan Meier, a law professor whose work focuses on domestic violence, examined ten years of U.S. cases to develop empirical evidence of the rate at which courts believe different types of abuse and alienation allegations[103] in custody proceedings.[104] In cases where mothers allege domestic violence perpetrated by the father, they are believed by the court 41% of the time, and mothers lose custody over their children 23% of the time.[105] In cases where mothers allege child physical abuse perpetrated by the father, they are believed 27% of the time and lose custody 29% of the time, and with child sexual abuse they are believed 15% of the time and lose custody 28% of the time.[106]

In instances in which fathers cross-claim allegations of parental alienation, courts are less likely to believe any claims by mothers against fathers, even if they do not substantiate the claim of parental alienation.[107] In cases where fathers cross-claim parental alienation against a mother's domestic violence claim, courts believe mothers 37% of the time.[108] In cases of the like for child physical abuse, courts believe mothers 18% of the time, and in child sexual abuse cases only 2% of the time.[109] When fathers allege that mothers are alienating children from them, it roughly doubles the mothers' rates of losing custody in child abuse cases.[110] When courts do

100. *Id.*

101. *Id.* at 25–26.

102. Meier, *supra* note 3, at 94.

103. Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegation* 1, 3 (Geo. Wash. Univ. L. Sch., Pub. Research Paper No. 2019-56, 2019), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2712&context=faculty_publications ("[Parental alienation] theory suggests that when mothers allege that a child is not safe with the father, they are doing so illegitimately, to alienate the child from the father."). The Maryland Court of Special Appeals has previously expressed doubt on whether parental alienation syndrome is a valid scientific theory. *See* Ross v. Ross, No. 1473, 2020 WL 7416734 (Md. Ct. Spec. App. Dec. 18, 2020), *appeal dismissed as improvidently granted*, 474 Md. 124, 252 A.3d 966 (2021).

104. Meier, *supra* note 3, at 96. The study was limited in that it could not review the facts in each case to assess the correctness in the court's rulings due to inaccessibility. *Id.* at 95.

105. *Id.* When women make allegations of abuse, they are often met with hostility and criticism from other litigants, advocates, and lawyers, which may correlate with the rise in loss of custody. *Id.*

106. *Id.*

107. *Id.* at 97.

108. *Id.*

109. *Id.*

110. *Id.* at 98.

substantiate parental alienation claims, mothers lose custody at a rate of 73%.[111] Where courts have rendered mothers' claims that a father has perpetrated domestic violence against them to be true, but the father has claimed that the mother is committing parental alienation, the mother is still likely to lose custody to the verified abusive father.[112] In sum, the study indicates that courts are skeptical of mothers' claims of abuse by fathers and fathers' allegations of parental alienation against mothers further work to discredit mothers in the eyes of the court.[113] Meier concludes the disparity between the rare occurrence of intentionally false allegations[114] and high disbelief of abuse allegations is likely a result of gender bias.[115]

Even in instances where a child directly testifies they have been abused, suspicion of parental alienation can work to invalidate their claims.[116] In *Main v. Main*,[117] a daughter's preference of which parent she would like to live with and her experience of abuse was introduced to the court.[118] The case involved a father who was addicted to drugs and previously was granted custody of his son despite the mother warning the court that he had a pattern of abuse.[119] Expert testimony was introduced claiming that the son had developed post-traumatic stress disorder, hyperarousal symptoms, nightmares, and traumatic flashbacks after living with his father.[120] The son's therapist revealed that the father took the son to a strip club during their time

111. *Id.*

112. *Id.* at 99.

113. *Id.* at 94.

114. DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE & CUSTODY VISITATION RECOMMENDATIONS 6 (2012), https://www.ojp.gov/pdffiles1/nij/grants/238891.pdf (stating that evaluators estimate that one fourth to one third of child abuse allegations are false). This report was sponsored by the U.S. Department of Justice but does not necessarily reflect their official position. *Id.*

115. Meier, *supra* note 3, at 101–02; *see also* SAUNDERS, *supra* note 114, at 6 (finding that judges and custody evaluators gave the lowest estimates of fathers making false accusations as opposed to domestic violence workers and legal aid attorneys); *id.* at 18 ("Battered women are at higher risk of negative custody-visitation outcomes due to gender bias by courts, as documented by many federal, state, and local commissions that have studied such bias since the 1980s." (citations omitted)).

116. *See* Jaeger v. Jaeger, 951 N.W.2d 367, 379 (Neb. 2020). The court modified a custody order and granted physical custody of a boy to his father. *Id.* Seven years prior, the boy had testified the father had abused him. *Id.* at 371. The court refused to hear the mother's testimony of prior abuse because the district court suspected she had engaged in allegations of abuse in pursuit of parental alienation and potentially coached the boy to allege abuse when he was younger. *Id.* at 373. The court weighed the boy's preference of wanting to live with his father because he enjoyed his father's farmland against their belief that the mother may have made false allegations and determined it was within the best interest for the boy to live with his father. *Id.* at 372.

117. 292 So. 3d 135 (La. Ct. App. 2020).

118. *Id.* at 140, 146.

119. *Id.* at 139–40.

120. *Id.* at 145.

together in Paris and had paid a prostitute to perform oral sex on the son.[121] In addition, the father would give the son marijuana in exchange for helping the father secure pain killers.[122] The son eventually passed away from a drug overdose.[123]

The father had since made good progress with treatment for alcohol and mental health concerns and sought visitation with his daughter.[124] The daughter disclosed that she did not wish to see her father and "felt better" living in her home without him.[125] She feared her father, due in part to memories of domestic violence including her father threatening to shoot her older brother with a gun.[126]

The court appointed a mental health evaluator who recommended the court should not get involved in the decision of whether the daughter should be forced into physical visitations with her father.[127] The evaluator mentioned that the daughter was now fifteen years old and that the decision of whether she should be mandated to see her father should be left to her own discretion.[128] However, when the court asked the evaluator if denying contact with the father was within the daughter's best interest, the evaluator responded that it was not.[129] The evaluator stated that it was important for the daughter to have a relationship with her father, but he could not be sure that the daughter would be well taken care of.[130] The court weighed the evidence and established that the mother failed to conclusively prove that visitation would endanger the daughter's physical, mental, moral, or emotional health, or that the visitation would not be in the best interest of the daughter.[131] The court cited *C.M.J. v. L.M.C.*,[132] a case where the court had determined that a mother had manipulated her children into making false allegations they had been physically and sexually abused by their father after extensive evaluations by mental health professionals.[133] The court stated that the case at hand, did not reach the threshold of conclusive evidence required by

121. *Id.* at 145–46.
122. *Id.* at 146.
123. *Id.* at 141.
124. *Id.* at 140.
125. *Id.*
126. *Id.* at 146.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 143–44.
132. 156 So. 3d 16 (La. 2014).
133. *Main*, 292 So. 3d at 150 (citing *C.M.J.*, 156 So. 3d at 22).

C.M.J.[134] Thus, the court mandated visitations between the father and daughter supervised by a mental health professional.[135]

D. The Best Interest Standard as Applied to Marginalized Communities

In *Palmore v. Sidoti*,[136] the Supreme Court of the United States determined that race can never be the determining factor in child custody proceedings.[137] The issue arose after two white parents divorced and the mother was granted sole custody of the child.[138] The mother began cohabitating with her new partner and future husband, who was a Black man.[139] The Florida court ordered a custody modification granting the biological father physical custody on the basis that it was not within the child's best interest to be raised in a multiracial household because it could expose the child to otherwise avoidable racial prejudice.[140] In a unanimous decision, the Supreme Court reversed the order.[141] The Court stated that, while it cannot deny the existence of racial prejudice, it can also not give it effect in custody proceedings.[142]

As the law has progressed, most jurisdictions hold that race can be considered in custody proceedings so long as it is not the sole determinative factor.[143] The District of Columbia has codified that the best interest of the child is served by not conclusively considering in and of itself the "race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party."[144] In cases where parents are of two different races but have been found to equally satisfy the standard of best interest, race has tipped the scale in favor of one side or the other.[145]

In *In re Marriage of Gambla & Woodson*,[146] the court justified awarding custody to a Black mother rather than a white father because the mother would be better suited to help her daughter connect with her culture

134. *Id.*
135. *Id.* at 154.
136. 466 U.S. 429 (1984).
137. *Id.* at 430.
138. *Id.*
139. *Id.*
140. *Id.* at 431.
141. *Id.* at 433.
142. *Id.*
143. Davis v. Davis, 658 N.Y.S.2d 548, 550 (App. Div. 1997) (finding that, in a custody dispute, "race 'is not a dominant, controlling or crucial factor' but must be 'weighed along with all other material elements'" (quoting Farmer v. Farmer, 439 N.Y.S.2d 584, 590 (Sup. Ct. 1981))).
144. D.C. CODE ANN. § 16-914(a)(1)(A) (2023).
145. *See In re* Marriage of Gambla & Woodson, 853 N.E.2d 847, 868 (Ill. App. Ct. 2006) (finding that a Black mother could more adequately prepare her daughter for the challenges she may face as a biracial woman than her white father).
146. 853 N.E.2d 847 (Ill. App. Ct. 2006).

and emotionally prepare for challenges she may face as a biracial woman.[147] An expert before the court stated, "African-American women generally face a stereotype of being dominant, rebellious, aggressive, rude, loud, and even sexually promiscuous. Consequently, expressions of anger in African-American women are often seen as more intense or threatening than they actually are."[148] The court found this persuasive and acknowledged that the mother may be better suited to provide for her emotional needs because of these challenges.[149]

Transgender individuals also face unique challenges in judicial proceedings.[150] Judges and court officials often impose their own expectations of gender expression on these individuals and lash out when the expectations are not met.[151] Lawyers have often employed transgender stereotypes to gain an advantage in a case, such as claiming that "transgender people are inherently deceitful because they lie about their gender."[152]

In the past, parents have lost visitation rights with their children after testimony was presented that the parent's gender transition would have a "sociopathic" effect on the child.[153] In *Cisek v. Cisek*,[154] the court terminated parental visitation without any evidence that the parent's gender status would hurt the child, instead relying solely on an assumption that it was not within the best interest of the child.[155] In certain cases, misconceptions of gender identity or transphobia have resulted in child custody disputes failing to reach the merits of a claim, rendering the best interest standard irrelevant.[156]

In the case of *In re Sandoval*,[157] the court determined that a transgender man, Dino, had no statutory standing to assert paternity over the adopted children he and his former partner cared for.[158] Dino had identified as a man

147. *Id.* at 865–66.

148. *Id.* at 858. The expert's testimony was brought in to explain how the daughter may benefit from her mother receiving primary physical custody. *Id.*

149. *Id.* at 862.

150. *See generally* Leigh Goodmark, *Legal System Reform*, *in* TRANSGENDER INTIMATE PARTNER VIOLENCE: A COMPREHENSIVE INTRODUCTION 258 (Adam M. Messinger & Xavier L. Guadalupe-Diaz, eds. 2020).

151. *Id.*

152. *Id*. at 265 (noting that the attorney claimed such stereotypes to argue against the opponent getting custody).

153. Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161, at *1–*2 (Ohio Ct. App. July 20, 1982).

154. No. 80 C.A. 113, 1982 WL 6161 (Ohio Ct. App. July 20, 1982).

155. *Id.* at *2.

156. *See In re* Sandoval, No. 04-15-00244-CV, 2016 Tex. App. LEXIS 754, at *3 (Tex. Ct. App. Jan. 27, 2016) (stating the petitioner has no standing "because he was not a man" when he filed suit).

157. No. 04-15-00244-CV, 2016 Tex. App. LEXIS 754 (Tex. Ct. App. Jan. 27, 2016).

158. *Id.* at *10.

since he was a young child.[159] In 2013, he filed a petition to adjudicate parentage after the co-parent denied contact between Dino and the children that they had raised together.[160] In 2014, Dino obtained an Order Granting Change of Identity, which legally changed his sex from female to male.[161] Dino asserted he had standing under Texas law[162] as "a man whose paternity of the child is to be adjudicated."[163] The court concluded that Dino did not have standing to bring his first suit because "he was not a man at the time he filed his suit."[164]

Other cases have seemingly ignored the best interest standard all together.[165] In *In re Marriage of Magnuson*,[166] the court declared that the impact of a parent's gender reassignment surgery on the child's wellbeing is unknown, and the needs of the child must be put above the "sexual preferences" of the parent.[167] The majority's decision sparked dissent by Justice Kulik, who asserted that just as in *In re Marriage of Cabalquinto*,[168] where it was held that the trial court cannot restrict a parent's rights based on sexual orientation, the majority should not have restricted a person's parental rights solely because they are transgender.[169] Contrary to the majority's statement that the impact on the child of the parent's surgery would be unknown, an expert testified that the parent's transition would not have an impact on their ability to parent.[170] Further, the guardian ad litem[171] presented extensive evidence that the transitioning parent, Robbie, was the primary and more nurturing parent for the children.[172] The court ignoring the evidence presented by the guardian ad litem likely denied the children a custody allocation that was in their best interest.[173] Courts ignoring the paramount

159. *Id.*

160. *Id.* at *3.

161. *Id.*

162. TEX. FAM. CODE ANN. § 102.003(a)(8).

163. *Sandoval*, No. 04-15-00244-CV, at *6–*7 (quoting TEX. FAM. CODE ANN. § 102.003(a)(8) (West 2016)).

164. *Id.* at *8.

165. *See generally In re* Marriage of Magnuson, 170 P.3d 65 (Wash. Ct. App. 2007) (failing to mention the best interest standard).

166. 170 P.3d 65 (Wash. Ct. App. 2007).

167. *Id.* at 67–68 (quoting *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) (en banc)).

168. 669 P.2d 886 (Wash. 1983) (en banc).

169. *Magnuson*, 170 P.3d at 68 (Kulik, J., dissenting).

170. *Id.*

171. WASH. REV. CODE ANN. § 26.12.175 (LexisNexis 2023) ("The guardian ad litem's role is to investigate and report factual information regarding the issues ordered to be reported or investigated to the court. The guardian ad litem shall always represent the best interests of the child.").

172. *Magnuson*, 170 P.3d at 68 (Kulik, J., dissenting).

173. *Id.*

concern in custody proceedings due to preconceived notions of a parent's identity can lead to arbitrary outcomes and potential harm.[174]

II. ANALYSIS

Courts must consider different facets of social identity that can leave children vulnerable to abuse to eliminate further harm in custody proceedings.[175] Gender bias has created the deleterious effect of safeguarding domestic violence and further perpetuating its cycle.[176] Courts recognizing how these biases work and taking steps to overcome them will create more equitable outcomes in custody proceedings.[177] These outcomes will be beneficial to children's well-being and help to limit family violence, which is far too commonplace.[178] Implementing cultural competency and recognizing unique challenges and needs that are attached to features of immutable identity, such as race and gender identity, will ensure that bias does not influence the custody of children.[179] The best interest of the child should be guided by developmental psychology, which indicates that children's best interests are addressed when all facets of their identity are considered.[180]

Section II.A explores reforms that have already been proposed by state legislatures and legal scholars and weighs the pros and cons of the proposals.[181] Section II.B advocates and explains the need for courts to use developmental psychology during child custody proceedings and to shape these reforms and suggestions.[182] Section II.C recommends a solution that takes these considerations into account.[183]

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174. *See id.* (failing to consider the best interest of the child because of predetermined notions of gender).

175. *Id.*

176. *See* Jay G. Silverman et al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, 951, 955 (2004) (demonstrating concern for the biased nature of child custody evaluations and reporting); C. Nadine Wathen & Harriet L. MacMillan, *Children's Exposure to Intimate Partner Violence: Impacts and Intervention*, 18 PAEDIATRICS & CHILD HEALTH 419, 419, 420 (2013) (explaining that children who are exposed to or suffer from abuse are more likely to repeat it).

177. *Id.*

178. CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 45–46 (2014) (noting the high percentage of child abuse in America and instances of children being exposed to violence even if they are not the direct victim).

179. Benjamin L. Jerner, *Culturally Competent Representation*, *in* TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY 1 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012).

180. *See In re* Marriage of Gambla & Woodson, 853 N.E.2d 847, 868 (Ill. App. Ct. 2006) (highlighting the importance of the child's racial identity in determining child custody allocation).

181. *See supra* Section II.A.

182. *See supra* Section II.B.

183. *See supra* Section II.C.

A. Proposed Reforms

Many jurisdictions have recognized the problems that exist within custody decision-making and have proposed several different reforms.[184] The reforms aim to impose gender-neutral standards, mitigate abuse, and account for issues that may not be recognized because they fall outside of the box of a traditional family or hegemonic identity.[185] Each reform provides potential drawbacks and solutions to remedy matters of judicial bias in child custody cases that involve domestic violence, race, and gender identity.[186] The reforms should be evaluated by their ability to account for intersectionality in child custody proceedings.[187]

1. American Law Institute's Principles

The American Law Institute's *Principles of the Law of Family Dissolution* (the "Principles") proposed a departure from the best interest standard, in favor of an approximation standard.[188] The Principles were largely aimed at state legislatures in hopes that they would enact the Principles through legislation.[189] Many legal scholars have commended the Principles and believe that they promote fairness in custody proceedings.[190] The Principles provide those seeking custodial or decision-making responsibility ("parental responsibilities") with an opportunity to work out

184. *See Family Court Reform*, FUND FOR MOD. CTS., https://moderncourts.org/programs-advocacy/access-to-justice/family-court-reform/ (last visited Apr. 9, 2023) (successfully increasing the amount of family law judges in their jurisdiction and advocating for needs such as judicial training); *Rally for Family Court Reform Time with a Parent is Not Litigation Leverage*, FAM. ADVOC. NETWORK POL. ACTION COMM. (Apr. 22, 2019), https://www.fanpacnj.org/news/2019/4/22/rally-for-family-court-reform-time-with-a-parent-is-not-litigation-leverage (calling to clarify New Jersey child custody laws and take into account modern family structures); Chris Bragg, *New York Legislature: Experts in Child Custody Cases Must be Licensed*, TIMES UNION (June 2, 2022, 7:12 PM), https://www.timesunion.com/state/article/Family-Court-reform-bill-passes-both-houses-of-17215511.php (calling for higher hiring and training standards for custody evaluators).

185. *See Rally for Family Court Reform Time with a Parent is Not Litigation Leverage*, *supra* note 184 (advocating for a modern view of families in child custody determinations).

186. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (AM. L. INST. 2002); CHILD CUSTODY CT. PROC. WORKGROUP, RECOMMENDATIONS AND DRAFT RECOMMENDATIONS (2020), https://mgaleg.maryland.gov/pubs-current/Child%20Custody%20Meeting%20Material%20-%20July%2028,%202020.pdf (failing to provide a detailed plan for reform).

187. *See In re* Marriage of Gambla & Woodson, 853 N.E.2d 847, 868 (Ill. App. Ct. 2006) (highlighting the importance of the child's racial identity in determining child custody allocation).

188. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.08 (advocating for the approximation standard).

189. Robin William, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 574 (2008).

190. *Id.* at 573.

the details of a child custody plan.[191] After the plan is completed, the parents present the plan to the presiding court so that it may be legally enforced.[192] As long as neither parent contests any part of the plan, the Principles generally advise the court to accept it without intervention.[193]

The parenting plan allows those seeking parental responsibility to arrange their plan in a way they believe will successfully work for their family and unique circumstances.[194] The autonomy the parties have in creating their own parenting plan works to negate the possibility that a parenting plan will be influenced by "gender or sexual orientation biases of a third party."[195] However, if there is credible evidence that parental or child abuse has taken place, the court must take action to ensure a plan is voluntary.[196] For that to be possible, the Principles advise the courts to create a screening process that takes into account the fact that victims of domestic violence are often silenced and may be afraid to speak up due to fear or humiliation inflicted by their abuser.[197]

On the other hand, the Principles fall short in directing courts on how to implement this screening process.[198] The Principles advise the court to consider that domestic violence victims are often silenced, yet mandate a hearing when they believe that there may be evidence of child abuse or domestic violence.[199] This opens the question of whether a hearing is sufficient if the victim is unwilling or unable to speak out about the suspected abuse.[200] Victims may fail to disclose domestic violence for a number of reasons, including fear of retaliation by their abuser.[201] This is especially true if the victim does not have sufficient resources to ensure the victim or their child's safety after disclosure.[202] Further, the Principles fail to set forth their own definition of child abuse, and instead advise courts to use the relevant

191. PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.05.

192. *See id.* § 2.05 cmt. c (encouraging parents to anticipate their child's needs and determine arrangements for them).

193. *Id.* §§ 2.05–2.06.

194. *Id.* § 2.05 cmt. c.

195. Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, 8 DUKE J. GENDER L. & POL'Y 323, 326 (2001).

196. PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.05 cmt. c.

197. *Id.*

198. *See id.* (leaving out how courts should develop the screening process).

199. *Id.* § 2.06(2).

200. *See id.* § 2.05 cmt. c ("[P]arents often are not forthcoming about the existence of child abuse and domestic abuse . . . .").

201. *Id.*

202. *Id.*

state definition.[203] The Principles do adopt their own definition of domestic abuse, but it falls short of many forms of abuse that may be harmful to family members.[204]

When those seeking parental responsibility cannot reach an agreement on a parenting plan, the Principles suggest implementing an approximation rule.[205] Under the approximation rule, judges allocate custodial responsibility in a fashion that most reflects the responsibilities previously taken on by each parent prior to the action being filed.[206] This allocation marks a significant departure from the best interest standard and could eliminate traditional notions of a mother's or father's role in relation to children.[207] This includes allocation of parental responsibility for de facto parents or "parent[s] by estoppel."[208]

This allocation can result in favorable outcomes for cases that involve transgender caretakers, who may not be biological parents or meet traditional roles of parenthood, but are a primary caretaker in the child's life.[209] The approximation approach would help because transphobia and misconceptions regarding gender-expansive individuals have limited custody allocations that are in the best interest of the child and fail to take into account how domestic

203. *Id.*; *see also* Julie Saffren, *Coercive Control is Finally Engrained in American Law*, 26 DOMESTIC VIOLENCE REP. 49 (2021) (noting that while California has revised its law to include coercive control in its definition of domestic violence, the majority of states have not yet done so).

204. *Compare* PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.03(7) (defining domestic violence as "the infliction of physical injury, or the creation of a reasonable fear thereof . . . ."), *with* Glenda Lux, *The* Divorce Act *and Invisible Abuse: Coercive Control in Family Law*, L. NOW (Nov. 12, 2021), https://www.lawnow.org/the-divorce-act-and-invisible-abuse-coercive-control-in-family-law/ (explaining that coercive control—the ongoing pattern of use of threat, force, emotional abuse, and other means—is regularly at the heart of family violence). Coercive control has been recently added as a factor to consider in Canada's best interest standard. Lux, *supra*; *see also* Lisa A. Tucker, *Domestic Violence as a Factor in Child Custody Determinations: Considering Coercive Control*, 90 FORDHAM L. REV. 2673, 2676 (2022) ("Coercive control, sometimes called 'psychological abuse' or 'emotional abuse,' is universally recognized among experts in the field as a form of domestic violence. Evan Stark, the prevailing expert in the area of coercive control, explains, 'Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).'" (quoting EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 15 (2007))).

205. PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.08.

206. *Id.*

207. *See id.* (allocating responsibility based on past responsibilities instead of considering a parent's gender or sex).

208. *Id.* §§ 2.03(1)(b)–2.03(1)(c). "[P]arent[s] by estoppel" refer to several situations in which either an individual is paying child support for or has been a primary caretaker to the child. *Id.*

209. *Cf. In re* Sandoval, No. 04-15-00244-CV, 2016 Tex. App. LEXIS 754 (Tex. Ct. App. Jan. 27, 2016). Although the transgender petitioner was a primary caregiver to the children, the court determined that he had no standing to bring the suit because he was not a biological parent and could not bring a paternal adjudication claim because of the legal status of his gender. *Id.* at *11, *18.

violence may intersect with identity.[210] In 2012, a national report found that 19% of respondents were victims of domestic violence at the hands of another family member because of their gender identity.[211] Judges having a basic understanding of common transgender experiences and terminology will help uncover more facts in proceedings by creating a space where gender-expansive individuals feel empowered to share the truth.[212] This in turn can work to create an unbiased determination of who the best caretaker for the child is.

In cases such as *In re Marriage of Magnuson*, where the custody rights of a primary caretaker were restricted because they were transgender, the approximation standard could have led to an entirely different outcome, arguably in the better interest of the child.[213] Critics may argue that this is similar to the primary caretaker standard, a standard that has been criticized for disproportionately awarding primary physical custody to the mother in cases of heterosexual relationships.[214] However, this would not award one parent sole custody over the other, but would instead split the responsibilities and time in accordance with what will likely provide the most stability for the child.[215] The approximation standard is preferable in this way because research indicates that stability in relationships and environments promotes healthy brain architecture, behavior development, and intellectual capacity.[216]

Although the Principles may help eliminate gender biases, they hold that race cannot be taken into consideration in deciding a parenting plan for the child.[217] This would undermine the long-held principle that judges should consider race in custody proceedings, as long as it is not their sole determinative factor.[218] *Jones v. Jones*[219] explained that race can be an

210. JERNER, *supra* note 179, at 1.

211. *Id.* at 180.

212. *Id.* at 1–7.

213. *In re* Marriage of Magnuson, 170 P.3d 65, 67–68 (Wash. Ct. App. 2007).

214. Raymon Zapata, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 212–13 (2003). This standard is also criticized because it focuses on the conduct of the parent rather than the best interest of the child. *Id.* It lists activities for the court to consider when determining who the primary caretaker is, such as bathing and toilet training. *Id.* at 213. The only state to ever adopt this doctrine is West Virginia. Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981).

215. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.14 (AM. L. INST. 2002).

216. NAT'L CTR. FOR INJ. PREVENTION & CONTROL: DIV. FOR VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, ESSENTIALS FOR CHILDHOOD: CREATING SAFE, STABLE, NURTURING RELATIONSHIPS AND ENVIRONMENTS FOR ALL CHILDREN 6 (2021), https://www.cdc.gov/violenceprevention/pdf/essentials-for-childhood-framework508.pdf.

217. PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 2.12.

218. *See* Davis v. Davis, 658 N.Y.S.2d 548, 550 (App. Div. 1997).

219. 542 N.W.2d 119 (S.D. 1996).

essential element in a child forming their identity.[220] *Jones* clarified that *Palmore*[221] allows for courts to take a holistic approach in considering race because it is in the child's best interest to learn who they are, such that they can explore their cultural and religious backgrounds.[222]

It is well understood by psychologists that forming an individual identity is crucial.[223] Erik Erikson, a renowned developmental psychologist, advanced the widely held notion that from the period of early adolescence, the primary psychological task is one of identity versus role confusion.[224] This development is crucial for a child to establish a mature sense of self and healthy relationships in the future.[225] *Jones* stands for the proposition that courts who refuse to allow a child to fully develop their cultural identity are not acting within the best interests of the child.[226]

2. Individual State Proposed Reforms

Certain groups have proposed reforms at the state level that warrant national consideration.[227] Advocates in Maryland have suggested several reforms to the best interest standard and judicial training to account for abuse, and other state advocates have called for abandoning the rebuttable presumption of joint custody in contentious cases.[228]

A child custody bill introduced in Maryland in 2020 intended to address child abuse and neglect.[229] The bill sought to expand Maryland's family law provision.[230] It proposed adopting the Principle's provision regarding custody or visitation proceedings in situations where courts have reasonable grounds to believe a child had been abused or neglected by a party.[231] The provision

220. *Id.* at 123 (holding that a child's ethnic heritage should be considered in the child custody proceeding).

221. Palmore v. Sidoti, 466 U.S. 429, 430 (1984).

222. *Jones*, 542 N.W.2d at 123.

223. BENJAMIN D. GARBER, DEVELOPMENTAL PSYCHOLOGY FOR FAMILY LAW PROFESSIONAL: THEORY, APPLICATIONS, AND THE BEST INTERESTS OF THE CHILD 73 (2010).

224. *Id.*

225. *Id.* at 69.

226. *Jones*, 542 N.W.2d at 123–24.

227. S.B. 594, 2020 Gen. Assemb., Reg. Sess. (Md. 2020).

228. ALA. CODE § 30-3-131 (2023) ("In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence.").

229. *See* Md. S.B. 594.

230. MD. CODE ANN., FAM. LAW § 9-101 (2023).

231. *Id.*

prohibits courts from granting the party custody or visitation rights unless it specifically finds that abuse or neglect would not likely occur again.[232]

The bill also intended to add that the court must explicitly state on the record the reason it believes abuse or neglect will not likely occur again.[233] The exception to this provision provided for supervised visitation, and the bill sought to add the requirement that the supervisor must be a neutral party and physically present during the visitation.[234] Although this would not have significantly changed Maryland's existing law, the bill was not enacted and died after its hearing.[235]

In a further effort to address child abuse and neglect, members of Maryland's Child Custody Court Proceedings Workshop Group drafted recommendations to amend the bill.[236] They wished to include judicial training on domestic violence and child abuse and only assign cases with allegations of child abuse or domestic violence to judges who have received the training.[237] The judiciary would be required to work with domestic violence and child abuse advocacy organizations in developing a training program.[238] In addition, they would "[r]equire that Judicial Nominations Commissions include an individual who has expertise in domestic violence and/or child abuse or otherwise receive input from such an individual regarding nominees."[239]

The training would work alongside a new statutory definition of family violence and a rebuttable presumption when dealing with domestic violence in custody proceedings.[240] These changes would amend section 9-101.1 of the Maryland Family Law Article by establishing a new definition of domestic violence and child abuse that would include four categories: physical abuse, sexual abuse, emotional abuse, and neglect.[241] Alongside these changes, the bill would statutorily impose a rebuttable presumption and establish that courts placing custody of any kind with a perpetrator of domestic violence is not in the best interest of the child.[242] Unfortunately, the

232. *See* Md. S.B. 594.
233. *Id.*
234. *Id.*
235. *Id.*
236. CHILD CUSTODY CT. PROC. WORKGROUP, *supra* note 186.
237. *Id.* at 3.
238. *Id.*
239. *Id.*
240. *Id.* at 1–2.
241. *Id.* at 1.
242. *Id.*

committee failed to include specifics of the definitions it wished to incorporate.[243]

Finally, the recommended amendments sought to "[a]lter the current 'friendly parent' statute . . . so that reports of child abuse or domestic violence cannot be considered unfavorably against the reporting parent."[244] In certain states this criteria has already been met.[245] Oregon has statutorily determined that their courts may not consider a parent "unfriendly" if the parent shows that (1) the other side has sexually assaulted or engaged in a pattern of abuse against them or any child in their custody, and (2) that an ongoing relationship between them, such as sharing custody, would put them or the child in harm.[246] This may work to eliminate some of the beliefs that stem from the parental alienation theory[247] by countering the belief that a fit parent should encourage "continuous" and "frequent" contact between the child and a co-parent who has abused the first parent.[248]

Some states have created a rebuttable presumption that children should not be placed in sole custody, joint legal custody, or joint physical custody of a parent who has committed either substantiated domestic violence or child abuse.[249] However, the threshold to reach a determination that abuse has occurred is often quite high, and typically does not account for instances of lesser physical abuse or coercive control.[250] This is especially problematic in regard to states that hold a rebuttable presumption of joint physical and legal custody.[251]

The rebuttable presumption assumes that joint custody is in the best interest of the child prior to any judicial findings.[252] In circumstances where

243. *See generally id.* (proposing ideas to amend Maryland Senate Bill 594 but failing to provide a detailed plan).

244. *Id.* at 2.

245. *See* N.J. STAT. ANN. § 9:2-4 (West 2023); CAL. FAM. CODE § 3044(a) (West 2023); COLO. REV. STAT. ANN. § 14-10-124 (West 2023); WASH. REV. CODE. ANN § 26.09.191(1) (West 2023).

246. OR. REV. STAT. ANN. § 107.137(1)(f) (West 2023).

247. *See generally* Meier, *supra* note 3.

248. UTAH CODE ANN. § 30-3-10(2)(c)(ii)(C) (West 2023).

249. *See* ALA. CODE § 30-3-131 (2023) (creating a rebuttable presumption that cases where abuse is raised there should not be joint custody allocations).

250. *See* ALASKA STAT. ANN. § 25.24.150(h) (West 2023) ("A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence."). *But see* ALA. CODE § 30-3-130 (2023) ("For the purposes of this article 'domestic or family abuse' means an incident resulting in the abuse, stalking, assault, harassment, or the attempt or threats thereof.").

251. *See* KY. REV. STAT. ANN. § 403.270(2) (West 2023) ("Subject to KRS 403.315 [exception for domestic violence], there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child.").

252. Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403, 437 (2018).

parents have not already worked out a parenting plan amongst themselves, likely because they cannot agree to one, the presumption is invoked.[253] Joint legal or physical custody requires an immense amount of cooperation and communication on behalf of both parents.[254] Parents who are unable to settle on a custody agreement absent judicial intervention present a risk of exposing their children to conflict and hostility towards one another, which in turn can damage the child's relationship to either parent and cause low self-esteem in the child.[255]

3. The National Council of Juvenile and Family Court Judges

The National Council of Juvenile and Family Court Judges (the "Council") has also issued recommendations in regard to friendly parent statutes.[256] The Council states that in scenarios where there is evidence that a parent is abusing the other parent or the child, joint physical custody and joint decision-making authority are not appropriate.[257] Instead, it may be in the best interest of the child to order no contact between the parent and child.[258] Further, the Council argues that if a parent is asking the court to substantially exclude the other parent from any form of shared custody, the court should consider if (1) this may be a request by an abusive parent to control the litigation, or (2) this may be a request by an abused parent trying to ensure the safety of their child.[259] In making these two considerations, the Council posits that courts should refrain from subjective decision-making and instead use developmental psychology in making their determination.[260]

B. Utilizing Developmental Psychology as a Guide in Child Custody Determinations

In order to abandon subjective decision-making of what is in a child's best interest, developmental psychology must be used as a tool in understanding different developmental stages of childhood and healthy

253. *Id.* at 437–38.

254. *Id.*

255. *Id.* at 446; *3 Healthy Responses to Bad Mouthing*, OUR FAM. WIZARD, https://www.ourfamilywizard.com/blog/3-healthier-ways-respond-badmouthing (last visited Feb. 24, 2023).

256. JERRY J. BOWLES ET AL., A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES, NAT'L COUNCIL JUV. & FAM. CT. JUDGES 20 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/judicial-guide_0_0.pdf.

257. *Id.*

258. *Id.*

259. *Id.*

260. *See generally* GARBER, *supra* note 223 (discussing the importance of developmental psychology in family law).

familial relationships.[261] The unique nature of child custody requires a blended approach that takes into account psychology and legal reform.[262] Proposed recommendations of the aforementioned ALI Principles, the entirety of Maryland Senate Bill 594, and the Council should be a starting point for all states, but additional psychological research should also be considered when reforming state legislation.[263]

1. Understanding the Implications of Developmental Psychology in High Conflict Custody Cases

Legislative reform should ensure that courts are making fully informed determinations when it comes to the contentious issues of visitation resistance and allegations of parental alienation.[264] Oftentimes, behavior that can typically be categorized as parental alienation can be explained through developmental psychology.[265] A child's resistance to leaving a sending parent[266] is an appropriate and expected reaction for children who are in stages of development prone to separation anxiety.[267] Typically, the most severe peaks of separation anxiety transpire between the ages of eighteen to thirty months, but in certain cases it can occur during adolescence.[268]

Even children that have advanced beyond that developmental stage may be prone to regression in times of stress, such as parental divorce.[269] Children who witness fighting and unhealthy behavior between parents are also more likely to exhibit separation anxiety past the typical age because they are at risk of developmental delays.[270] Confusion amongst parents and family law professionals may set in when children are not developmentally advanced enough to articulate the reason for resistance to leaving the parent.[271]

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261. *Id.*

262. *Id.*

263. *See generally* CHILD CUSTODY CT. PROC. WORKGROUP, *supra* note 186; GARBER, *supra* note 223, at 166.

264. *See* GARBER, *supra* note 223, at 167 (advising against jumping to the conclusion that a child's refusal to visit a parent is evidence of malicious intent of the sending parent).

265. *Id.*

266. Child custody cases and plans often use the terms "sending parent" and "receiving parent" to categorize the parents' roles in the transfer of physical custody. *See In re* J.W.B., 232 A.3d 689, 696 (Pa. 2020) (referring to the father as the "sending parent"). Here, the term "sending parent" refers to the parent sending or bringing the child to the other parent's home for their physical custody time. *Id.*

267. *See* GARBER, *supra* note 223, at 167.

268. *Id.* at 145.

269. *Id.* at 167. However, the child's resistance may also be indicative of mental health concerns or role reversal. *Id.*

270. *Id.*

271. *Id.* at 168–69.

A child may resist leaving the sending parent for a reason that is harmless, such as the receiving parent having more rules or imposing chores on the child that they do not have to do at the sending parent's home.[272] However, it is also possible that the receiving parent is not properly caring for the child, and the child is unable to clearly express that.[273] Therefore, it becomes pertinent for judges to have increased training on how children behave and communicate through different phases of development to properly handle cases where parental alienation is raised as a counterclaim to domestic violence allegations.[274] In addition, because there are so many instances where courts have to conduct a thorough and fact-intensive analysis of whether abuse or parental alienation occurred, states should avoid a one-size-fits-all approach, such as a joint custody presumption.[275]

A parent that is more fit than the other may not necessarily have the means or knowledge to overcome this presumption.[276] Parents who may be particularly disadvantaged at rebutting the presumption are those who are victims of domestic violence, including those experiencing coercive control.[277] For instance, a victim of abuse may not speak out about abuse due to threats from the other party, or because of financial abuse[278] rendering them unable to retain proper counsel.[279] Custody agreements that potentially expose children to domestic violence cannot be in their best interest, even if there is no evidence that child abuse in and of itself is occurring.[280]

In cases where a child has not been directly abused, family law judges are reluctant to deny custody or visitation to a parent who has abused a co-parent, even when there has been physical injury or arrest.[281] This reluctance may be because judges typically do not interpret the act of a child witnessing

272. *See id.* at 168–71 (explaining that a child's resistance to leave a sending parent may be caused by a myriad of factors).

273. *Id.*

274. *Id.*

275. *Id.* at 166–68.

276. Caulley, *supra* note 252, at 447–48.

277. *Id.*

278. ADRIENNE E. ADAMS, UNIV. OF WIS. CTR. FOR FIN. SEC., MEASURING THE EFFECTS OF DOMESTIC VIOLENCE ON WOMEN'S FINANCIAL WELL-BEING 1–2 (2011), https://centerforfinancialsecurity.files.wordpress.com/2015/04/adams2011.pdf. Financial abuse occurs frequently in cases of domestic violence. *Id.* at 1. "Abusers use physical, psychological, and economic tactics to isolate, control, exploit, and terrorize their partners." *Id.* Research indicates this has the impact of weakening the victim's future employability and earning potential. *Id.* at 2.

279. Caulley, *supra* note 252, at 447–48.

280. *See* Stiles, *supra* note 9, at 2058 (explaining the negative developmental impact that witnessing domestic violence can have on children).

281. Tucker, *supra* note 204, at 2684; Simmons v. Simmons, 649 So. 2d 799, 801 (La. Ct. App. 1995) (finding that the father's violence against the mother did not rise to the level to trigger a presumption against him in custody allocation); Tingen v. Tingen, 446 P.2d 185, 186–87 (Or. 1968) (declaring father's abuse against mother not relevant to his parental fitness).

domestic violence as a concern akin to a child directly facing abuse.[282] This is a mistake for several reasons.[283] First, in households where domestic violence occurs, child abuse is more likely.[284] Even if the abuse is not directly aimed at the child, it can put them in danger.[285] In particular, infants exposed to domestic violence are at a significantly higher risk of experiencing physical injury.[286] Second, children of all ages who witness domestic violence are at risk for negative developmental and behavioral effects.[287] School-aged children often develop psychosomatic symptoms resulting in the feeling of being physically ill.[288] This age group commonly experiences guilt surrounding the violence and blame themselves for the occurrence, resulting in issues such as low self-esteem.[289] After witnessing domestic violence, adolescent children have high rates of interpersonal conflict with family members as well as a higher tendency to engage in antisocial and risk-taking behaviors, such as substance abuse.[290] Children of all ages become more likely to use violence themselves.[291] This contributes to a continuous cycle of abuse, as children that are exposed to domestic violence are more likely to experience violent dating and intimate relationships as adults, whether they are the perpetrator or the victim.[292]

2. Going Beyond a Simple Understanding of Abuse and Accounting for Complex Coercive Control

Physical abuse typically indicates that there is psychological abuse (i.e., coercive control) occurring as well.[293] Even in the absence of physical

282. *See* Stiles, *supra* note 9, at 2058 (emphasizing that physicians are only required to report that a child has witnessed domestic violence in five states: California, Kentucky, New Hampshire, New Mexico, and Rhode Island).

283. *See generally id*. (examining the negative effect that witnessing domestic violence has on children).

284. *See* Silverman et al., *supra* note 176, at 952.

285. Stiles, *supra* note 9, at 2055.

286. *Id.* at 2055, 2055 tbl.1.

287. *Id.* at 2064.

288. *Id.* at 2055.

289. *Id.*

290. *Id.*

291. *Id.* at 2055–56.

292. *See* Wathen & MacMillan, *supra* note 176, at 421 (noting that children exposed to intimate partner violence are more likely to experience violent romantic relationships either as the perpetrator or victim); Kathryn H. Howell et al., *Developmental Variations in the Impact of Intimate Partner Violence Exposure During Childhood*, 8 J. INJ. & VIOLENCE RSCH. 43, 52 (2016) (stating that children exposed to intimate partner violence are more likely to use violence as a method of conflict resolution in future romantic relationships).

293. Traci Pedersen, *Witnessing Parental Psychological Abuse May Do More Harm Than Physical Abuse*, PSYCHCENTRAL (May 16, 2017),

violence, children who witness a parent experiencing coercive control are more likely to experience long-term mental health issues over children who witness both physical and psychological abuse.[294] This may be because coercive control is harder to detect and is often not as well understood or believed as physical abuse.[295] This misunderstanding and disbelief suggests that less resources and help are being offered to children who have witnessed coercive control.[296]

3. How Coercive Control Impacts Traits of Immutable Identity

Coercive control can take place in many forms.[297] Licensed social worker Xavier Quinn has developed research indicating that abusers often ignore gender identity as a tactic of abuse.[298] A pattern of intentionally ignoring one's gender identity falls under the category of coercive control because it can be used as a tactic of harassment, humiliation, or intimidation.[299] This leaves those who fall outside of hegemonic identities vulnerable to coercive control, which may be harder to detect or understand than physical abuse.[300] However, the American Bar Association has recognized legal scholar and historian Marie-Amélie George's article that expresses that matters of identity, such as race, religion, and sexual orientation, are pertinent in understanding a child's best interest.[301]

Considering identity in custody disputes is not a new phenomenon.[302] Courts have recognized that it is in the best interest of biracial children to have a parent in their life that safely allows them to learn and embrace their race, heritage, and culture.[303] Courts have also made clear that race can be considered as a factor as long as it is not the sole determination, such that the

https://psychcentral.com/news/2017/05/16/witnessing-parental-psychological-abuse-may-do-more-harm-than-physical-abuse#1.

294. *Id.*

295. *Id.*

296. *Id.* (finding decreased satisfaction in social support among young people who suffered from psychological domestic abuse).

297. *Id.* ("Childhood exposure to parental psychological abuse [can include] name-calling, intimidation, isolation, manipulation, and control . . . .").

298. Xavier Quinn, *Tactics and Justifications of Abuse*, *in* TRANSGENDER INTIMATE PARTNER VIOLENCE: A COMPREHENSIVE INTRODUCTION, *supra* note 150, at 35, 40.

299. *What Is Coercive Control?*, WOMEN'S AID, https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/ (last visited Apr. 11, 2023) ("Coercive control is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.").

300. Quinn, *supra* note 298.

301. Marie-Amélie George, *Exploring Identity*, 55 FAM. L.Q. 1, 7 (2021).

302. *See supra* Section I.D.

303. George, *supra* note 301, at 43.

result is race-matching in custody determinations.[304] This is important because biracial or multiracial children may adopt a racial identity that is different from their parents entirely.[305] Additionally, they may face issues relating to their multiracial status that monoracial parents have never experienced, such as facing pressure to identify with one racial group over the other.[306]

Sexuality and gender are also immutable characteristics because while they allow for fluidity, they are intrinsic to one's identity.[307] Thus, states should consider parents' willingness to support gender and sexual orientation exploration of the child as part of the best interest standard.[308] Parents often ask judges to find that their child is not gender-expansive[309] because they do not adhere to certain stereotypes that are frequently associated with the gender they are exploring.[310] Looking to developmental psychology as a guide, it is impossible for a judge to accurately determine what gender a pre-adolescent child will identify with in adulthood because they have not yet reached that stage in the developmental process.[311] The presumption that children's identities must adhere to stereotypical behaviors also ignores that gender exists on a spectrum, and assumes biological essentialism.[312] Comprehensive training on gender and identity can help steer judges away from determining the gender of a child, and instead opt for a fact-based inquiry to determine which parent is more likely to allow healthy gender exploration. Placing a child with a caregiver who will allow them to explore

304. Farmer v. Farmer, 439 N.Y.S.2d 584, 589–90 (App. Div. 1981) ("As between two natural parents of different races who have opted to have a child, neither gains priority for custody by reason of race alone. Nor can race disqualify a natural parent for custody. The course of the child's future life will indeed be affected by her mixed heritage but it may be more severely affected by an inappropriate custody disposition.").

305. George, *supra* note 301, at 39.

306. *Id.* at 40.

307. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) ("[B]y 'immutability' the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. . . . [Instead] 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them . . . .").

308. George, *supra* note 301, at 9.

309. *See id.* at 1 (categorizing transgender and non-binary children as "gender expansive"). The term "gender-expansive" came out of a 2012 survey done by the Human Rights Campaign. *Resources on Gender-Expansive Children and Youth*, HUM. RTS. CAMPAIGN FOUND., https://www.hrc.org/resources/resources-on-gender-expansive-children-and-youth (last visited Feb. 24, 2023). They used this term to classify youth who did not identify with traditional gender roles but were otherwise not confined to one gender narrative or experience. *Id.* The term "gender-expansive" allowed for discussion of those who did not meet the "traditional" understandings of gender without putting their identity in a box. *Id.*

310. George, *supra* note 301, at 10–11.

311. *Id.* at 21.

312. *Id.* at 12.

their gender identity is important because the rejection of a child's gender identity contributes to the disproportionate rate that gender-expansive youth suffer from depression, anxiety, and suicidality.[313]

C. A Uniform Training Method and Best Interest Standard for the States

Without training on matters of abuse, identity, and how they intersect, judges may not have the expertise to make determinations that are in the child's best interest.[314] Expanding training as well as revising state statutes can work in tandem to eliminate judicial bias in child custody proceedings.[315] First, judicial training that accounts for developmental psychology, family violence prevention, and exploration of identity should be developed by leaders in the respective fields and required for presiding over child custody cases.[316] Training should be ongoing and updated on an annual basis to ensure that outdated conceptions of gender roles and identity do not influence custody proceedings.[317] While this would likely require considerable legislation and funding, the data makes clear that it is necessary for the health and safety of the nation's youth.[318] Further, some of the costs can be offset by implementing suggestions from the Maryland Child Custody Court Proceedings Workshop Group and ensuring that judicial nominations always include at least one individual with expertise in the field of domestic violence or child abuse.[319]

Second, in understanding that children are best served when they have stability in living situations, the Principles' approximation standard should influence custody decisions to keep a sense of normalcy and routine for the child.[320] Rather than a presumption of joint custody, if it is feasible, courts should opt for an agreement that allows custodial responsibility to continue as it did prior to the custody dispute.[321] While allocation of custody would

313. *Id.* at 51.

314. *Id.*

315. *See supra* Section II.A.1.

316. *See* CHILD CUSTODY CT. PROC. WORKGROUP, *supra* note 186, at 3 (suggesting family law courts work with domestic violence and child abuse advocacy organizations in developing a training program).

317. *See* H.B. 1036, 2021 Gen. Assemb., Reg. Sess., at 2–5 (Md. 2021) (outlining expanded and continuing judicial training).

318. *See U.S. Divorce Child Murder Data* (*2008–Present*), *supra* note 76; *see supra* note 76 and accompanying text.

319. *See* CHILD CUSTODY CT. PROC. WORKGROUP, *supra* note 186, at 3 (proposing that the Judicial Nominations Commission recommend those with domestic violence and child abuse expertise to help advise judicial nominations).

320. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. c (AM. L. INST. 2002).

321. *Id.* § 2.08(1).

not abandon the best interest factors, it would focus on the mental health and development of the child rather than what is seen as fair to the parents.[322] This allocation would also work to eliminate any traditional values of gendered norms as modern families continue to progress beyond outdated stereotypes.[323]

Third, while all states take family violence into account during child custody proceedings, they should develop modern statutory definitions that further protect victims of abuse and protect children from witnessing abuse.[324] This would include updating definitions of domestic violence to include coercive control.[325] In addition, abusing a co-parent should be given the same weight as abusing the child because of the detrimental impact it can have on the child's developmental health and wellbeing.[326]

To properly protect against child abuse and domestic violence, state legislatures should codify the factors for courts to consider when applying the best interest standard in custody decisions, rather than leaving it to the common law.[327] The consideration of any and all abuse should be a mandatory factor and should raise a presumption that joint physical or legal custody is not in the best interest of the child.[328] If the states allow an exception when the court believes abuse will no longer take place in the future, they should adopt the explicit findings proposed in the Maryland Senate Bill 594 to ensure that the determination was made from a factual finding rather than a subjective stance.[329] Further, any friendly parent statute should provide an exception for evidence of abuse.[330]

Lastly, the best interest standard should include a factor that considers which parent is more likely to allow healthy exploration of identity and heritage.[331] In considering this factor, judges should rely on the proposed training because it is pertinent that in making this determination, the consideration relies on data driven research and not heteronormative

322. *See supra* Section II.B.

323. *Id.*

324. *Id.*

325. Lux, *supra* note 204.

326. *See* Howell et al., *supra* note 292, at 44–52 (explaining the negative impact that witnessing intimate partner violence has on a child's development).

327. *See* CONN. GEN. STAT. § 46b-56(c)(15) (2022) (stating that courts "may consider" the effect of family violence or abuse on a child); GA. CODE ANN. § 19-9-3(a)(3)(P) (2022) (noting that judges "may consider" relevant factors including different forms of abuse).

328. *Id.*

329. S.B. 594, 2020 Gen. Assemb., Reg. Sess. (Md. 2020).

330. *See supra* Section II.A.2.

331. *See supra* Section II.B.2.

values.[332] Uniform best interest standards and judicial training that take into account abuse and identity would work to eliminate instances of abuse and ensure that the best interest of the child is properly served.[333]

CONCLUSION

The best interest standard's facial neutrality leaves child custody determinations open to wide judicial discretion.[334] States differ in their approach when applying the best interest standard, but the primarily goal in all states is a custody allocation that promotes the best interest of the child.[335] Implicit or explicit biases along with lack of expertise in family violence, developmental psychology, and cultural competency can inhibit this goal.[336] Judicial decisions that overlook different facets of the children's or their caretakers' identities can often lead to deleterious outcomes because they ignore the intricacies of domestic violence, race, gender identity, and how these aspects of a child's life interact with one another.[337] Several reforms have been suggested by individual state legislatures and legal organizations to better account for the welfare of children in child custody determinations.[338] This Comment argues that states should reform their best interest standard to implement uniform factors and definitions that account for differences in identity.[339] In addition, judges should undergo training that explores the intersectionality of gender, race, and sex, and how these factors should be considered during child custody proceedings.[340] A new standard and updated judicial training can help combat subjective child custody determinations.[341]

332. George, *supra* note 301, at 21 (explaining that the American Psychiatric Association and the American Academy of Pediatrics advise that trying to force a child to conform to sex assigned at birth is unethical).

333. *Id.* at 10, 53.

334. *See supra* Section I.C (discussing the potential impact of gender bias in custody proceedings).

335. *See supra* Section I.B (discussing the modern best interest standard).

336. *See supra* Section II.C (suggesting that lack of training on matters of abuse, identity, and how they intersect, judges may not have the expertise to make determinations that are in the child's best interest).

337. *See supra* Section I.D (discussing the unique challenges racial and gender minorities often face in custody proceedings).

338. *See supra* Section II.A (exploring proposed reforms to address judicial bias in child custody proceedings).

339. *See supra* Section II.C (advocating for uniform judicial training and a best interest standard among the states).

340. *Id.*

341. *Id.*