

# insolvency2020



**Oct. 23, 2020, 3:00-4:15 p.m.**

## **American Bar Association: Gender & Judging: Does the Gender of the Judge Matter in Bankruptcy Court Adjudications? A Final Report**

Hon. Frank J. Bailey; U.S. Bankruptcy Court (D. Mass.)

Hon. Bernice B. Donald; U.S. Court of Appeals (6th Cir.)

Dr. Deborah Goldfarb; Florida International University

Danielle Spinelli; Wilmer Cutler Pickering Hale and Dorr LLP

## **Educational Materials**



# GENDER AND JUDGING ON THE BANKRUPTCY BENCH: DOES GENDER MATTER?

An Update for Insolvency 2020

## WELCOME TO THE GENDER AND JUDGING PROGRAM

- While you wait for the program to start:

Please take the brief survey that will appear immediately  
on the next screen!

Thank you, your responses will help our investigators as they continue to  
explore the role of gender in judicial decision making.

## Ruth Bader Ginsburg

When I'm sometimes asked when will there be enough [women on the Supreme Court]? And I say when there are nine, people are shocked. But there's been nine men, and nobody's ever raised a question about that.

## The Panelists

### ❑ Judge Bernice Donald, Sixth Circuit Court of Appeals

- Judge on state court, bankruptcy court (first African American woman), district court
- Has written extensively on implicit bias

### ❑ Deborah Goldfarb, JD, PhD

- Legal psychology professor at Florida International Univ.
- Federal law clerk

### ❑ Danielle Spinelli, WilmerHale

- Law Clerk to Justice Breyer
- Vice Chair, SCUS and Appellate Advocate Group at WilmerHale
- Appointed by Chief Justice to Advisory Committee on Appellate Rules

### ❑ Gent Silberkleit, PhD

- Social and personality psychology at Florida International Univ.
- Studies implicit bias on jurors

## The Support Team

- **Freddi Mack, Esq., JonesDay, Miami, Florida**  
**ABA BLS Business Bankruptcy Committee**

### Research Assistance

- **Caroline Granitur, Simmons University, Boston, MA 2020**
- **Meaghan Cooper, College of the Holy Cross, Worcester, MA 2021**
- **Florida International University, Psychology Department, Graduate Students**

## What We Will Cover Today

- 1. Progress of the Study – Judge Bailey
- 2. The Role Of Implicit Bias and Gender – Judge Donald/Dr. Siberkleit
- 3. Bias and Advocacy: Arguing While Female – Danielle Spinelli
- 4. Results of Analysis of Student Loan Cases – Prof. Goldfarb
  - Gender of the Judge? Gender of the Debtor?
- 5. Table Discussions – Issues and Solutions – Various Judges/Lawyers
- 6. Group Discussion – feedback from tables – Panel
- 7. Wrap Up – Judge Bailey

# INSOLVENCY 2020 · ABA: GENDER & JUDGING: DOES THE GENDER OF THE JUDGE MATTER?

Active Federal Judges by Court Type, Gender, and Race/Ethnicity (FY 2018)

ALL COURTS	GENDER	TOTAL	% in Court Type	CAUC	% in Court Type	AFR-AM	% in Court Type	HISP	% in Court Type	ASIAN	% in Court Type	NAT-AM	% in Court Type	PAC-ISL	% in Court Type	NO RPT*	% in Court Type
Article III Total	Male	480	65.8%	312	42.7%	53	7.3%	44	6.0%	11	1.5%	1	0.1%	1	0.1%	58	7.9%
	Female	250	34.2%	154	21.1%	35	4.8%	25	3.4%	9	1.2%	0	0.0%	0	0.0%	27	3.7%
	Subtotal	730	100%	466	63.8%	88	12.1%	69	9.5%	20	2.7%	1	0.1%	1	0.1%	85	11.6%
Non-Article III Total	Male	635	63.4%	495	49.5%	22	2.2%	15	1.5%	10	1.0%	1	0.1%	1	0.1%	91	9.1%
	Female	366	36.6%	259	25.9%	29	2.9%	11	1.1%	11	1.1%	0	0.0%	0	0.0%	56	5.6%
	Subtotal	1001	100%	754	75.3%	51	5.1%	26	2.6%	21	2.1%	1	0.1%	1	0.1%	147	14.7%
GRAND TOTAL	Male	1115	64.4%	807	46.6%	75	4.3%	59	3.4%	21	1.2%	2	0.1%	2	0.1%	149	8.6%
	Female	616	35.6%	413	23.9%	64	3.7%	36	2.1%	20	1.2%	0	0.0%	0	0.0%	83	4.8%
	GRAND TOTAL	1731	100%	1220	70.5%	139	8.0%	95	5.5%	41	2.4%	2	0.1%	2	0.1%	232	13.4%

\* Race/ethnicity was not reported.

This data is provided to the Bankruptcy Committee and should not be disseminated outside of the Bankruptcy Committee before the September 2019 session of the Judicial Conference of the United States.

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Active Federal Judges by Court Type, Gender, and Race/Ethnicity (FY 2018)

ARTICLE III	GENDER	TOTAL	% in Court Type	CAUC	% in Court Type	AFR-AM	% in Court Type	HISP	% in Court Type	ASIAN	% in Court Type	NAT-AM	% in Court Type	PAC-ISL	% in Court Type	NO RPT*	% in Court Type
Appellate	Male	107	64.5%	65	39.2%	13	7.8%	9	5.4%	4	2.4%	0	0.0%	0	0.0%	16	9.6%
	Female	59	35.5%	42	25.3%	5	3.0%	4	2.4%	1	0.6%	0	0.0%	0	0.0%	7	4.2%
	Subtotal	166	100%	107	64.5%	18	10.8%	13	7.8%	5	3.0%	0	0.0%	0	0.0%	23	13.9%
District	Male	369	66.2%	243	43.6%	40	7.2%	35	6.3%	7	1.3%	1	0.2%	1	0.2%	42	7.5%
	Female	188	33.8%	110	19.7%	30	5.4%	21	3.8%	7	1.3%	0	0.0%	0	0.0%	20	3.6%
	Subtotal	557	100%	353	63.4%	70	12.6%	56	10.1%	14	2.5%	1	0.2%	1	0.2%	62	11.1%
Court of Internat'l Trade	Male	4	57.1%	4	57.1%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
	Female	3	42.9%	2	28.6%	0	0.0%	0	0.0%	1	14.3%	0	0.0%	0	0.0%	0	0.0%
	Subtotal	7	100%	6	85.7%	0	0.0%	0	0.0%	1	14.3%	0	0.0%	0	0.0%	0	0.0%
Article III TOTAL	Male	480	65.8%	312	42.7%	53	7.3%	44	6.0%	11	1.5%	1	0.1%	1	0.1%	58	7.9%
	Female	250	34.2%	154	21.1%	35	4.8%	25	3.4%	9	1.2%	0	0.0%	0	0.0%	27	3.7%
	Subtotal	730	100%	466	63.8%	88	12.1%	69	9.5%	20	2.7%	1	0.1%	1	0.1%	85	11.6%

\* Race/ethnicity was not reported.

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# AMERICAN BANKRUPTCY INSTITUTE

Active Federal Judges by Court Type, Gender, and Race/Ethnicity (FY 2018)

NON ARTICLE III	GENDER	TOTAL	% in Court Type	CAUC	% in Court Type	AFR- AM	% in Court Type	HISP	% in Court Type	ASIAN	% in Court Type	NAT- AM	% in Court Type	PAC- ISL	% in Court Type	NO RPT*	% in Court Type
Bankruptcy	Male	203	63.6%	161	50.5%	5	1.6%	5	1.6%	3	0.9%	0	0.0%	0	0.0%	29	9.1%
	Female	116	36.4%	85	26.6%	7	2.2%	2	0.6%	4	1.3%	0	0.0%	0	0.0%	18	5.6%
	Subtotal	319	100%	246	77.1%	12	3.8%	7	2.2%	7	2.2%	0	0.0%	0	0.0%	47	14.7%
Recalled Bankruptcy	Male	28	90.3%	28	90.3%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
	Female	3	9.7%	3	9.7%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
	Subtotal	31	100%	31	100%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Bankruptcy TOTAL	Male	231	66.0%	189	54.0%	5	1.4%	5	1.4%	3	0.9%	0	0.0%	0	0.0%	29	8.3%
	Female	119	34.0%	88	25.1%	7	2.0%	2	0.6%	4	1.1%	0	0.0%	0	0.0%	18	5.1%
	Subtotal	350	100%	277	79.1%	12	3.4%	7	2.0%	7	2.0%	0	0.0%	0	0.0%	47	13.4%
Magistrate Full-time	Male	310	58.6%	218	41.2%	16	3.0%	9	1.7%	7	1.3%	1	0.2%	1	0.2%	58	11.0%
	Female	219	41.4%	150	28.4%	19	3.6%	8	1.5%	6	1.1%	0	0.0%	0	0.0%	36	6.8%
	Subtotal	529	100%	368	69.6%	35	6.6%	17	3.2%	13	2.5%	1	0.2%	1	0.2%	94	17.8%
Magistrate Part-time	Male	18	69.2%	15	57.7%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	3	11.5%
	Female	8	30.8%	6	23.1%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2	7.7%
	Subtotal	26	100%	21	80.8%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	5	19.2%

\* Race/ethnicity was not reported.

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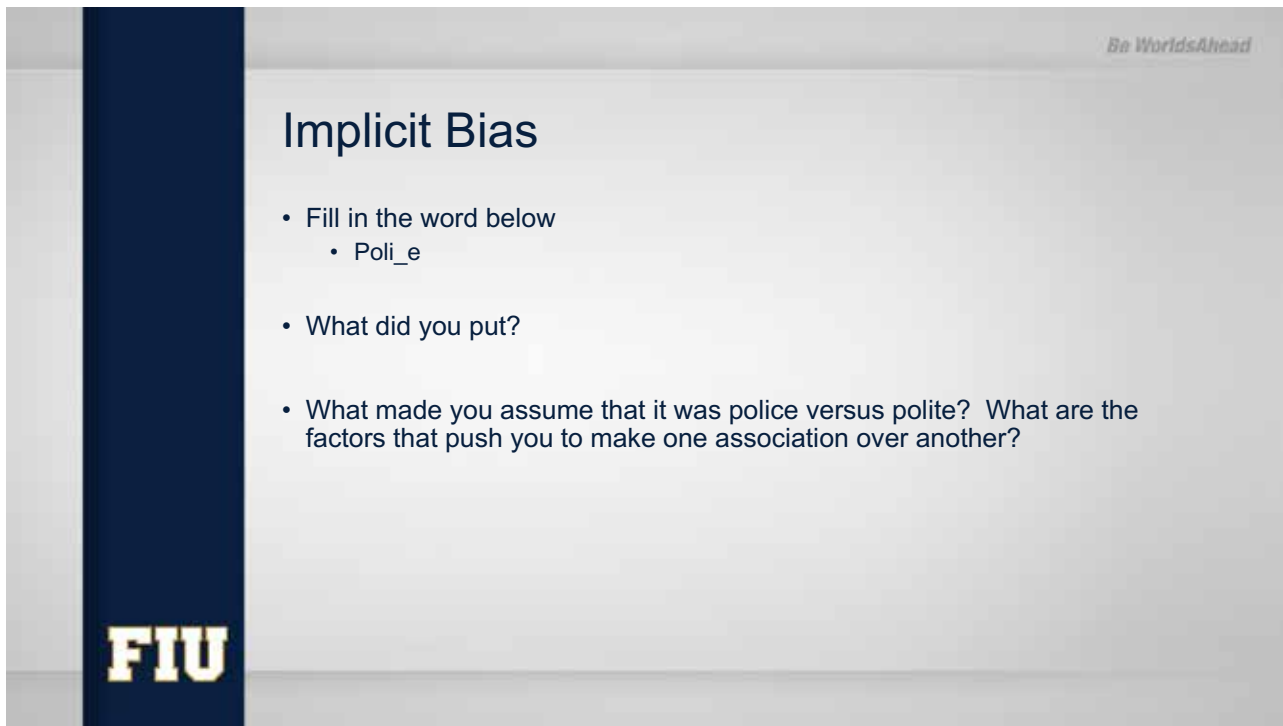
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Active Federal Judges by Court Type, Gender, and Race/Ethnicity (FY 2018)

NON ARTICLE III	GENDER	TOTAL	% in Court Type	CAUC	% in Court Type	AFR- AM	% in Court Type	HISP	% in Court Type	ASIAN	% in Court Type	NAT- AM	% in Court Type	PAC- ISL	% in Court Type	NO RPT*	% in Court Type
Recalled Magistrate	Male	75	82.4%	72	79.1%	1	1.1%	1	1.1%	0	0.0%	0	0.0%	0	0.0%	1	1.1%
	Female	16	17.6%	13	14.3%	1	1.1%	1	1.1%	1	1.1%	0	0.0%	0	0.0%	0	0.0%
	Subtotal	91	100%	85	93.4%	2	2.2%	2	2.2%	1	1.1%	0	0.0%	0	0.0%	1	1.1%
Magistrate TOTAL	Male	403	62.4%	305	47.2%	17	2.6%	10	1.5%	7	1.1%	1	0.2%	1	0.2%	62	9.6%
	Female	243	37.6%	169	26.2%	20	3.1%	9	1.4%	7	1.1%	0	0.0%	0	0.0%	38	5.9%
	Subtotal	646	100%	474	73.4%	37	5.7%	19	2.9%	14	2.2%	1	0.2%	1	0.2%	100	15.5%
Court of Federal Claims	Male	1	20.0%	1	20.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
	Female	4	80.0%	2	40.0%	2	40.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
	Subtotal	5	100%	3	60.0%	2	40.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Non-Article III TOTAL	Male	635	63.4%	495	49.5%	22	2.2%	15	1.5%	10	1.0%	1	0.1%	1	0.1%	91	9.1%
	Female	366	36.6%	259	25.9%	29	2.9%	11	1.1%	11	1.1%	0	0.0%	0	0.0%	56	5.6%
	Subtotal	1001	100%	754	75.3%	51	5.1%	26	2.6%	21	2.1%	1	0.1%	1	0.1%	147	14.7%

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*Be WorldsAhead*

## Implicit Bias

- Fill in the word below
  - Poli\_e
- What did you put?
- What made you assume that it was police versus polite? What are the factors that push you to make one association over another?

**FIU**



*Be WorldsAhead*

## Implicit Associations

- Connections that our mind makes quickly between concepts
- Can be a very useful tool for navigating the world
  - Associate fire to do not touch
- Issues arise when it we make fast associations between one's social group membership and another concept
  - Associating success or monetary potential with.....

**FIU**

## Implicit Associations

- Issue with implicit associations is that they are implicit
- We are often unaware that we are making connections between individuals and their social groups
- We know that judges do fall prey to this issue
  - Wistrich, Andrew J. and Rachlinski, Jeffrey John, Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It (March 16, 2017). Chapter 5: American Bar Association, Enhancing Justice (2017), Cornell Legal Studies Research Paper No. 17-16, Available at SSRN: <https://ssrn.com/abstract=2934295> or <http://dx.doi.org/10.2139/ssrn.2934295>

FIU

## But...What About in Bankruptcy Court?

- Is there room for implicit biases to creep in there?
- And maybe particularly in student loan cases? Where the facts of an individual's life are so particularly salient?
- That is the question that we will ask today

FIU



# Does Gender Influence Student Loan Discharge Decisions?

Deborah Goldfarb, JD, Ph.D.  
Kelsey Hess, M.S.  
Andrea Wolfs, M.S.  
Caroline Granitur, B.A.

Timothy Hayes, Ph.D.  
Stefanie McLaney, B.A.  
Jacqueline Evans, Ph.D.  
Judge Frank Bailey

FLORIDA INTERNATIONAL UNIVERSITY

*Be Worlds***Ahead**

## How did we analyze for gender?

- Searched for all opinions using the term "Brunner"
- Resulting in 840 Bankruptcy Judicial Decisions from 1985 – 2019
  - Have coded cases from 2020 but not part of this discussion today
- Eliminated all non-student loan discharge cases AND cases where a decision was not reached on the merits



## How did we analyze for gender?

- Coded the cases for a number of factors
  - Gender of the debtor
  - Gender of the judge
  - Presence of an attorney
  - Gender of the attorney
  - Debtor medical ailment
  - Dependents
  - Discharge decision (e.g., was the loan discharged)

**FIU**

## Did gender matter?

- Yes and No
- Yes for the.....
  - Debtor
- No for the....
  - Judge
  - Attorney

**FIU**

## How did gender matter for the debtor?

- Males were more likely to obtain a discharge than females
  - About 43.7% more likely
- Predictors also differed across debtor gender (e.g., different things mattered for female debtors than did male debtors)

**FIU**

Variable of Interest	Who has the advantage?	Likelihood Comparison	
Having an Attorney		were	
Case Decided More Recently (marginal)		were	
Having a Medical Condition		were	
Having a Disability		were	
Increased Age		were	
Being a Single Parent		were	

**FIU**

## What does this mean?

- Is this bias? That is probably a larger question for another day.
- It is differential treatment depending on the gender of the debtor
- But, the treatment may not be obvious at first glance because feeds through differential treatment of the facts
- What can we do?

**FIU**

10/21/2020

Female Attorneys Gain Ground In Battle For Clerkships - Law360



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## Female Attorneys Gain Ground In Battle For Clerkships

By Jimmy Hoover

Law360 (October 19, 2020, 8:02 PM EDT) --

When Beth Heifetz clerked for Supreme Court Justice Harry Blackmun back in 1985, men still far outnumbered women. But even then, the tide was slowly starting to turn.

Heifetz, who now leads the issues and appeals practice at Jones Day, was one of three women hired by Justice Blackmun that term for his four clerkships. "If not a first, it was unusual," she said.

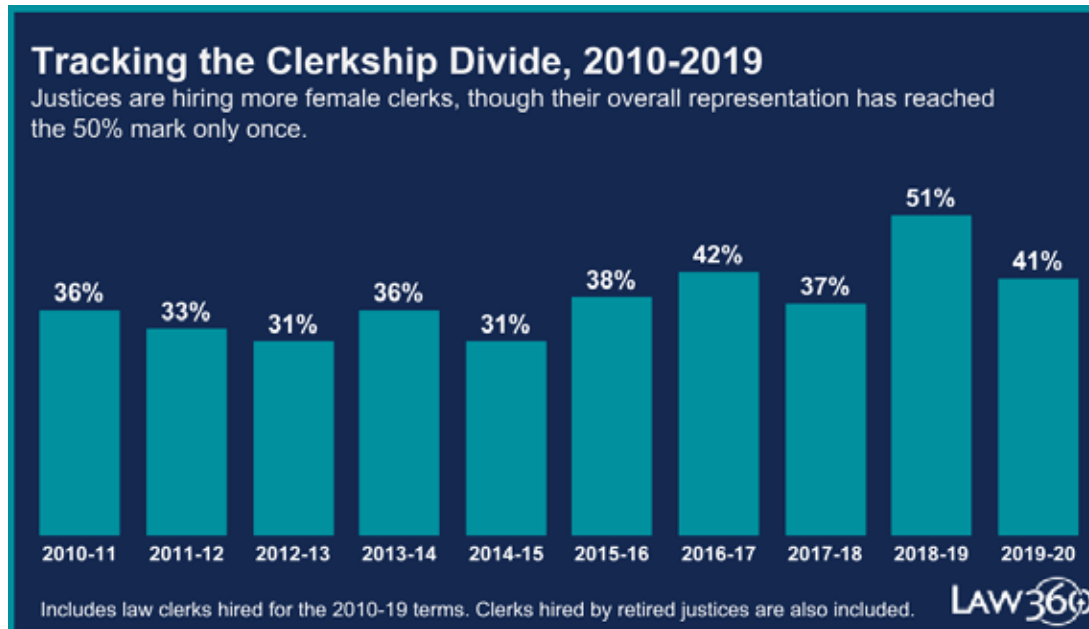
More than three decades have passed since. There's been progress, not parity. At least not yet.

And those clerkships at the high court set the stage for the women who hold them to reach big heights in their careers. Take a civil rights case argued at the Supreme Court in February 2018. All three of the high court advocates for that case — two of whom were women — had clerked for the late Justice Ruth Bader Ginsburg.

A year alongside one of the court's nine justices gives clerks the chance to "watch how a case might evolve from the time it first comes to the Supreme Court until the end of its time at the court," Heifetz explained. Jones Day leads the field in recruiting from First Street, having hired 21 former Supreme Court clerks in the last three years.

"You have a bird's-eye view of what is going on at the Supreme Court," she said.

Still, in the 86 years since Justice William O. Douglas hired Lucille Lomen as the first female law clerk at the high court, clerkships have gone disproportionately to men. That has been the case even in the modern era, when an average of 37% of clerks each term are female. By comparison, women make up more than half of law school students today.





Even though the numbers have dropped slightly since that historic moment, the court is still making gains.

The 2019 term had the third-highest number of female clerks in the last decade, and the numbers have steadily improved since a 10-year low of 31% in 2012 and 2014.

It's hard to overstate what a clerkship at the Supreme Court can do for female attorneys — or any attorney for that matter. Signing bonuses alone have climbed to a whopping \$400,000 at some firms.

"It's definitely been, in many ways, the cornerstone of my career," said Deanne Maynard, the co-chair of Morrison & Foerster LLP's appellate and Supreme Court practice, referring to her experience clerking for Justice Stephen Breyer and retired Justice Lewis Powell from 1993 to 1995.

Maynard rates her time helping two Supreme Court justices handle cases from beginning to end as key to her joining the U.S. Solicitor General's Office, where she furthered her expertise arguing several cases before the court on behalf of the United States. "I'm sure having a Supreme Court clerkship on my resume and having had that experience helped me get that job," she said.

Years later, when Morrison & Foerster was looking for a successor to their appellate practice leader, Maynard was the right person for the job.

"At that point I had more than 10 Supreme Court arguments, and I fit the bill for what they were looking for," she said.

It was an exciting time to clerk at the Supreme Court, with Justice Ginsburg having recently joined the bench as only the second female justice in American history, and Maynard was part of a large cohort of female law clerks that dwarfed the number of the previous term. At the end of Maynard's first year, Glamour magazine wrote a short feature — headlined "Our country's top legal minds" — on the 12 female law clerks hired that year, which the magazine reported was up from "an embarrassing seven last year."

Maynard keeps a clipping of the magazine article, which illustrates just how important these positions can be for shaping women into future leaders of the legal profession; four of the 12 female clerks went on to become judges, including Tenth Circuit Judge Allison H. Eid, whom President Donald Trump has named as a shortlister for a future Supreme Court vacancy.

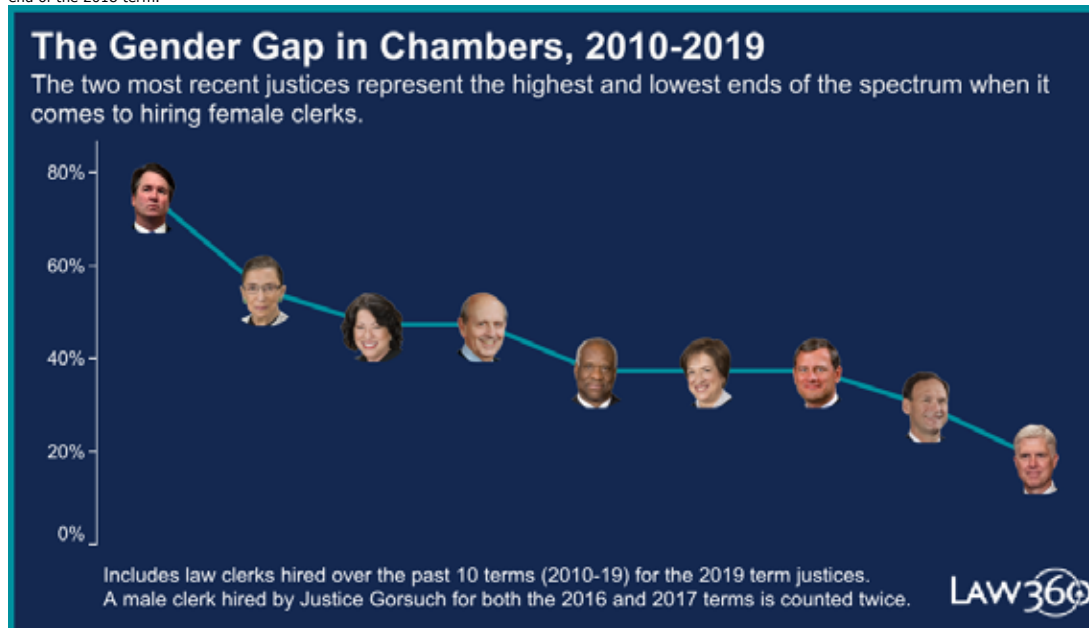
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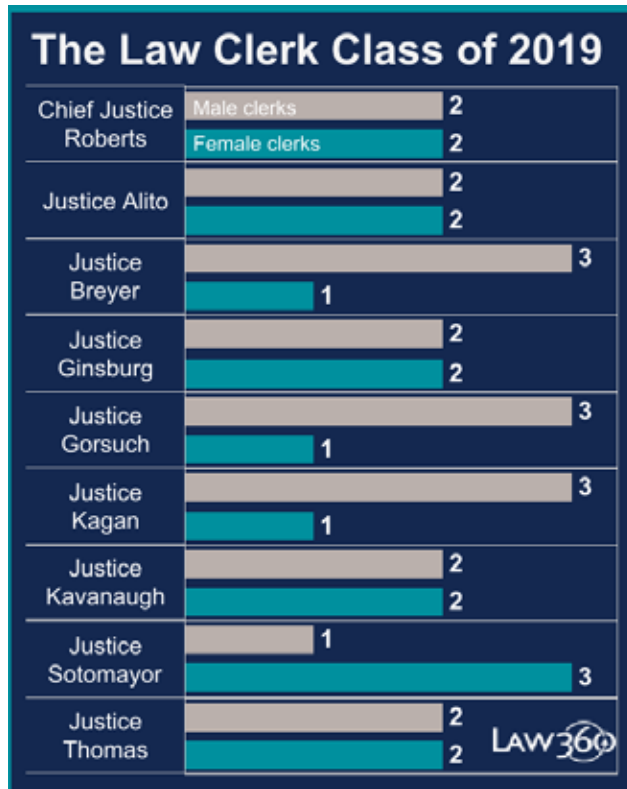
Female Attorneys Gain Ground In Battle For Clerkships - Law360



Female clerks have been in the majority of the high court's hires only once, **in 2018**. Justice Brett Kavanaugh hired four female clerks that year, making good on a promise he had given during Senate proceedings.

"There is a very important first on the Supreme Court this term and it's thanks to our new justice, Justice Kavanaugh," the late Justice Ginsburg said at the end of the 2018 term.





Since the 2017 term, not a single justice has hired an all-male clerk staff.

"I think it's likely that they do think about [hiring more female law clerks] because I think that they listen to their colleagues," said Jennifer Mika, an adjunct professor at American University's Washington College of Law, who has studied gender diversity at the high court. "They don't live in a vacuum."

The absence of all-male chambers is "definitely a trend to watch," Mika said. She predicted that it will "probably be more noticeable going forward if a justice has an all-male class, and that's obviously a good thing."

But having more female Supreme Court clerks is no panacea for the legal profession's glass ceiling. Justice Ginsburg noted that during the court's historic year for female law clerks in 2018, "women did not fare nearly as well as advocates" at the Supreme Court bar.

<https://www.law360.com/articles/1315441/print?section=aerospace>

4/5

10/21/2020

Female Attorneys Gain Ground In Battle For Clerkships - Law360

Only 21% of arguing attorneys that year were women, and still fewer hailed from private practice.

Hiring more female clerks is only part of the solution. "This is great, but let's make sure this translates to some progress down the line and there are more women advocating before the Supreme Court," Mika said.

"If female clerks want to stay in appellate practice and are positioned to become Supreme Court advocates and Supreme Court experts, that's especially important," she said.

--Editing by Pamela Wilkinson and John Campbell.

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GENDER

# Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates

by [Tonja Jacobi](#) and [Dylan Schweers](#)

April 11, 2017



During the Senate hearings on whether he should become the next associate justice of the Supreme Court, Neil Gorsuch maintained iron discipline in refusing to commit himself to any position that could

count against him. Gorsuch maintained a steadfastly calm demeanor, but he showed his cards in one regard: He could not help repeatedly interrupting the liberal female senators. In this way, he proved himself to be well qualified to sit on the highest judicial bench. Our new empirical study shows that the male justices interrupt the female justices approximately three times as often as they interrupt each other during oral arguments. And the conservative justices interrupt the liberal justices more than twice as often as vice versa.

We examined the transcripts of 15 years of Supreme Court oral arguments, finding that women do not have an equal opportunity to be heard on the highest court in the land. In fact, as more women join the court, the reaction of the male justices has been to increase their interruptions of the female justices. Many male justices are now interrupting female justices at double-digit rates per term, but the reverse is almost never true. In the last 12 years, during which women made up, on average, 24% of the bench, 32% of interruptions were *of* the female justices, but only 4% were *by* the female justices.

These results are not limited to the current Supreme Court. We conducted an in-depth analysis of the 1990, 2002, and 2015 terms to see whether the same patterns held when there were fewer female justices on the court. We found a consistently gendered pattern: In 1990, with one woman on the bench (former Justice Sandra Day O'Connor), 35.7% of interruptions were directed at her; in 2002, 45.3% were directed at the two female justices (O'Connor and Ruth Bader

Ginsburg); in 2015, 65.9% of all interruptions on the court were directed at the three female justices on the bench (Ginsburg, Sonia Sotomayor, and Elena Kagan). With more women on the court, the situation only seems to be getting worse.

Prior research in linguistics and psychology has shown that women are routinely interrupted by men, be it in one-on-one conversations or in groups, at work or in social situations. Interruptions are attempts at dominance, and so the more powerful a woman becomes, the less often she should be interrupted. Yet even though Supreme Court justices are some of the most powerful individuals in the country, female justices find themselves consistently interrupted not only by their male colleagues but also by their subordinates: the male advocates who are attempting to persuade them.

Despite strict rules mandating that advocates stop talking immediately when a justice begins speaking, interruptions by male advocates account for approximately 10% of all interruptions that occur in court (excluding justices interrupting advocates, which is standard procedure). In contrast, interruptions by female advocates account for approximately 0%. The problem was particularly observable when, in 2015, male advocates interrupting Justice Sotomayor was the most common form of interruptions of any justice, accounting for 8% of all interruptions in the court. Justice Sotomayor is also the court's only woman of color.

Can this pattern be explained by other factors? Of the 113 justices to have served on the Supreme Court, only four have been women, and three of those four were appointed by Democratic presidents. We expected that partisan differences could account for some portion of the interruptions. Since justices do not always vote in accordance with the party of their nominating president, we used Martin-Quinn scores, the most common way to analyze judicial ideology, to determine how liberal or conservative each justice was. We found that conservative justices disproportionately interrupt liberal justices: 70% of interruptions were of liberals; only 30% were of conservatives. In addition, advocates interrupt liberal justices more than they interrupt conservative justices. Despite this pattern, gender is the stronger factor in interruption: In 1990 the moderately conservative Justice O'Connor was interrupted 2.8 times as often as the average male justice. (It is worth noting that the results were not driven by Antonin Scalia, despite his reputation as a particularly pugnacious justice.)

Two of the three sitting female justices, Kagan and Sotomayor, are the most junior justices on the court. But, once again, seniority does not explain the gender pattern. Although senior justices do interrupt junior justices more frequently than vice versa, and the difference is statistically significant, gender is approximately 30 times more powerful than seniority. The most junior justice on the court will now be Gorsuch, and we expect the greater importance of gender over seniority to become even more apparent.

Length of tenure does matter in one particular respect: Time on the court gives women a chance to learn how to avoid being interrupted — by talking more like men. Early in their tenure, female justices tend to frame questions politely, using prefatory words such as “May I ask,” “Can I ask,” “Excuse me,” or the advocate’s name. This provides an opportunity for another justice to jump in before the speaker gets to the substance of her question.

We found that women gradually learn to set aside such politeness. All four of the female justices have reduced their tendency to use this polite phrasing. Justice Sotomayor adjusted within just a few months. Justices O’Connor and Ginsburg gradually became less and less polite over decades on the court, eventually using the polite phrases approximately one-third as much as they did initially. Justice Kagan is still learning: She uses polite language more than twice as often as the average man, although half as often as she did in 2010. We do not see a similar trend with the men, because male justices rarely use these polite speech patterns, even when they first enter the court. It is the women who adapt their speech patterns to match those of the men.

These behavior patterns are important, as oral arguments shape case outcomes. When a female justice is interrupted, her concern is often left unaddressed, which limits her ability to influence the outcome of the case. Women changing their questioning techniques should not be the only response to this problem. The chief justice should play a larger

role as referee, enforcing the rule that prohibits advocates from interrupting the justices, and preventing an interrupting justice from continuing.

Our research aligns with previous research that has shown that women get talked over much more often than men in all sorts of settings, likely due to unconscious bias. What our findings additionally suggest is that there is no point at which a woman is high-status enough to avoid being interrupted.

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## How Social Science Can Help Us Understand Why Family Courts May Discount Women's Testimony in Intimate Partner Violence Cases

AMELIA MINDTHOFF,\* DEBORAH GOLDFARB,\*\*  
& KELLY ALISON BEHRE\*\*\*

### Introduction

Thirty years ago, legal scholars and social scientists began to note the legal systems' skepticism of women in general and victims of gender-based violence in particular.<sup>1</sup> Despite increased public awareness about domestic violence, female victims<sup>2</sup> of intimate partner violence (IPV) continue to find their credibility discounted. Deborah Tuerkheimer coined the term "credibility discount" to describe how the criminal legal system responds to women's reports of sexual violence by discounting their credibility at every step of the process, from initial reports to law

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1. See, e.g., Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 249 (1993–1994).

2. This Article is primarily focused on family court professionals' discounting of female IPV victims. We generally use the term "IPV victims" to refer to female IPV victims because of both the history of limiting women's access to legal relief from IPV and because of the disproportionate percentage of victims of IPV who identify as female. However, we note that male victims of IPV may also face credibility discounting and that transgendered victims most certainly do, but that discussion is beyond the scope of this Article.

enforcement and prosecutorial discretion through judicial and jury decisions.<sup>3</sup> Deborah Epstein and Lisa Goodman expanded the dialogue on credibility discounting to include the experiences of female victims of IPV in legal and social service settings.<sup>4</sup> IPV victims often access family courts for injunctive relief, child custody and visitation orders, and financial relief following separation from an abusive partner, a time period during which they are at a heightened lethality risk.<sup>5</sup> Consequently, credibility discounting by family courts may prove particularly dangerous for victims of IPV.

This Article builds upon the work done thus far on the intersection of gender and credibility in the family courts by reviewing both psychological research<sup>6</sup> and legal scholarship examining factors that may contribute to the perseverance of credibility discounting of IPV victims. As part of this discussion, we raise potential psychological misperceptions or assumptions that underlie the discounting of people's credibility, including factors that may be particularly pertinent to women reporting IPV; we further consider the implications of these misperceptions in family court settings. We hope this advances the discussion on remedies for credibility discounting to ensure that victims receive just treatment as they navigate the legal system.

Part I of this Article reviews the family court's role in IPV cases and how it can perpetuate credibility discounting. Part II discusses gender biases in the legal system that have the potential to propagate credibility discounting of IPV victims navigating the family court system. Part III explores general psychological theory and associated empirical evidence and considers how theory can shed light on why credibility discounting may persist in family courts. Part IV provides suggestions for ways to mitigate gender bias demonstrated in the credibility discounting of IPV victims in family courts.

## I. Intimate Partner Violence and Family Court

Legal responses to intimate partner violence often focus on intervention through criminal law. The Violence Against Women Act (VAWA), the

3. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

4. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019).

5. See Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION & VIOLENT BEHAV. 514 (2006).

6. Although there is additional research on this topic from related fields, such as sociology, women's studies, criminology, and political science, the present Article focuses primarily on quantitative or empirical psychological research on issues related to credibility.

landmark federal legislation responding to domestic violence signed into law in 1994 and subsequently reauthorized several times, continues to dedicate a majority of federal funding to the criminal legal system.<sup>7</sup> In spite of this intense focus on the criminal legal system in IPV public policy and funding, the criminal legal system is not the only avenue through which victims seek recourse. Indeed, the criminal system is not always responsive to IPV victims and may even run contrary to IPV victims' goals, particularly for victims who do not wish to see abusive partners incarcerated or view the criminal legal system as harmful to their families and communities.<sup>8</sup> Therefore, our Article addresses family courts, rather than criminal courts, as another important source of legal relief for IPV victims.

Family courts<sup>9</sup> can provide IPV victims with legal relief through civil protection orders, including injunctive relief ("stay away" and "no contact" orders); temporary child custody and visitation orders; exclusive temporary use of housing and personal property; financial support and debt payments; and gun restrictions for abusers. In some states, family court findings of IPV trigger rebuttable presumptions in child custody cases<sup>10</sup> and constitute grounds for divorce.<sup>11</sup> Legal relief available through family courts may provide victims of IPV with better tools to access safety than criminal courts. Although studies about the impact of increased criminal responses on rates of domestic violence show mixed results,<sup>12</sup> one study found that the availability of civil legal services for battered women significantly decreased the incidence of abuse.<sup>13</sup>

7. LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 2–3 (2018).

8. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53 (2017); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13 (2011).

9. We use the term "family courts" here to reference all state courts that make findings of domestic violence for the purposes of issuing civil protection orders, custody and visitation orders, and divorces.

10. *E.g.*, CAL. FAM. CODE § 3044 ("Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child . . . there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child.").

11. *E.g.*, MD. CODE ANN., FAM. LAW § 7-103(a)(6)–(7) (West 2020).

12. *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. (2001).

13. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158 (Apr. 2003) (suggesting that the expansion of the availability of civil legal services is more likely to lower the incidence of intimate partner abuse than other services, including hotlines, shelters, job training, outreach, and counseling).

Although family courts offer important legal relief to IPV victims, it remains a difficult path for many victims to navigate. The majority of family court litigants present their cases without legal representation, and the percentage of victims of domestic violence proceeding *pro se* is likely even higher.<sup>14</sup> IPV victims representing themselves in family court often lack access to the kind of corroborative evidence that would strengthen their cases or to the knowledge about the rules of evidence that would enable them to submit corroborative evidence, thus leaving courts to make decisions solely based on credibility assessments.<sup>15</sup> This heavy reliance on testimony may be particularly challenging for IPV victims asked to testify about traumatic events in a public setting made potentially more traumatic by the close proximity of their abusers.<sup>16</sup> Moreover, the testimonial structure of IPV cases in family court can create credibility contests that make discounting of women's accounts of violence especially detrimental to victims' ability to access legal relief.

Family court judges are afforded significant discretion in assessing the parties' credibility, rendering appellate review an unlikely panacea to concerns about discounted credibility of IPV victims.<sup>17</sup> Similarly, family courts tend to receive little public scrutiny, which may enable discounted credibility to continue to disadvantage IPV victims without meaningful examination.<sup>18</sup> As such, it is important to consider what biases could contribute to the persistence of credibility discounting in order to ensure that IPV victims are afforded the protections that they need.

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14. *E.g.*, ELKINS FAMILY LAW TASK FORCE, JUDICIAL COUNCIL OF CAL., FINAL REP. & RECOMMENDATIONS 7 (Apr. 2010), available at <http://www.courts.ca.gov/documents/elkins-finalreport.pdf> (reporting more than 75% of family law cases in many Californian communities have at least one self-represented party); *Domestic Violence Monthly Reports*, MD. CTS., <https://mdcourts.gov/eservices/dvmonthlypublicreports> (showing approximately 80% of petitioners in Maryland civil protective orders were unrepresented by counsel in 2018).

15. Epstein & Goodman, *supra* note 4, at 404.

16. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 537, 568 (2006).

17. In jurisdictions where family courts do not automatically create records, the appellate process is even more challenging for IPV victims, particularly those with limited financial resources. Brief of Amici Curiae Family Violence Appellate Project & 30 Orgs. & Individuals Representing Survivors of Family Violence in Support of Petitioner Barry Jameson, *Jameson v. Desta*, 5 Cal. 5th 594 (2018), [https://www.cpedv.org/sites/main/files/file-attachments/jameson\\_v.\\_desta\\_supreme\\_court\\_amicus\\_brief\\_-\\_filed.pdf](https://www.cpedv.org/sites/main/files/file-attachments/jameson_v._desta_supreme_court_amicus_brief_-_filed.pdf).

18. LYNN HECHT SCHAFFRAN & NORMA J. WIKLER, NAT'L JUDICIAL EDUC. PROG., GENDER FARNNESS IN THE COURTS: ACTIONS IN THE NEW MILLENNIUM (2007), <https://www.legalmomentum.org/sites/default/files/reports/gender-fairness-in-courts-millennium.pdf>.

## II. Gender Bias in Family Court IPV Cases

Gender-based differences in family court outcomes have been noted in findings created by state judicial commissions and domestic violence advocates, as well as in case analyses and empirical studies of family court professionals.<sup>19</sup> Many states created reports in the 1980s and 1990s documenting gender bias in the courts by raising issues ranging from sexism against female attorneys and judges to bias against female litigants.<sup>20</sup> Some of these reports explicitly address the impact of gender bias on how judges assess women's credibility in cases including allegations of domestic violence.<sup>21</sup> Follow-up studies found that victims of domestic violence continue to face challenges in courts, including victim blaming, lack of respect for victim concerns, and skepticism about the credibility of women in domestic violence proceedings.<sup>22</sup>

The Battered Mothers' Testimony Project at the Wellesley Centers for Women created a human rights report in 2002 documenting the experience of battered women in family courts.<sup>23</sup> It concluded that state actors failed to protect battered women and children from abuse, discriminated and engaged in bias against battered women, degraded battered women, and allowed batterers to engage in litigation abuse through family courts.<sup>24</sup> More recent qualitative research focusing on abused mothers' perceptions of family court yielded similar findings.<sup>25</sup>

Although we still have much to learn, research offers insights into potential causes of gender-based bias and credibility discounting of IPV victims in family court, including beliefs in traditional gender roles;

19. See *infra* notes 20–25.

20. SCHAFFRAN & WIKLER, *supra* note 18; See also Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 13, 23 (2012).

21. Czapanskiy, *supra* note 1, at 249 (suggesting that in domestic violence cases, family courts “too often disbelieve credible evidence of domestic violence and discount its seriousness”).

22. Gender Fairness Implementation Comm., *Gender Fairness in North Dakota's Courts: A Ten-Year Assessment*, 83 N.D. L. REV. 309 (2007) [https://law.und.edu/\\_files/docs/ndlr/pdf/issues/83/1/83ndlr309.pdf](https://law.und.edu/_files/docs/ndlr/pdf/issues/83/1/83ndlr309.pdf); see also Dragiewicz, *supra* note 20, at 23.

23. BATTERED MOTHERS' TESTIMONY PROJECT, WELLESLEY CTRS. FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (2002), <https://www.wcwonline.org/vmfiles/execsumm4.pdf> (sharing the stories of forty battered mothers' experiences in Massachusetts family courts); see also Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709 (2005).

24. *Id.*

25. Lyndal Khaw et al., “The System Had Choked Me Too”: Abused Mothers' Perceptions of the Custody Determination Process That Resulted in Negative Custody Outcomes, J. INTERPERSONAL VIOLENCE 1 (2018).

misunderstandings about what IPV victims look like, how they typically behave following assaults, and the emotions they express when recounting violence; and a willingness to credit allegations of ulterior motives. Consistent with a larger body of research into gender bias in family court cases, studies exploring child custody cases with IPV allegations found that gendered beliefs of decision makers impact gendered differences in their recommendations. For example, one study found that custody evaluators who believe in traditional gender roles (e.g., beliefs that women should be homemakers and men should be breadwinners) are more likely to grant the parent accused of perpetrating IPV against the other parent sole or joint custody than are evaluators who hold less-gendered attitudes.<sup>26</sup> Victims' adherence to traditional gender roles also impacts the assignment of blame in IPV cases. People are less likely to blame women who conform to traditional feminine roles for emotional abuse perpetuated against them than they are to blame women described as holding less traditional

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26. Daniel G. Saunders et al., *Beliefs and Recommendations Regarding Child Custody and Visitation in Cases Involving Domestic Violence: A Comparison of Professionals in Different Roles*, 22 VIOLENCE AGAINST WOMEN 722 (2016).

For an example of research into gender bias in family court (and employment law) cases without IPV issues, see Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, 10 SOC. PSYCHOL. & PERSONALITY SCI. 227 (2019) (finding that beliefs in traditional gender roles predicted gendered outcomes for both judges and lay people making recommendations based on a custody and employment discrimination fact pattern). Of note, experienced judges with stronger beliefs in traditional gender roles were more likely to award more parenting time (but not legal decision making) to mothers when parents were equally qualified, demonstrating how men may also experience gender bias from courts in non-IPV family law cases. *Id.*

Research into gender bias in child custody cases without IPV suggests that both family court professionals and lay people might be more likely to engage in sex stereotypes against litigants of the opposite sex. *See, e.g.,* E. Ruth Bradshaw & Robert W. Hinds, *The Impact of Client and Evaluator Gender on Custody Evaluations*, 35 FAM. & CONCILIATION CTS. REV. 317 (1997) (finding that Australian custody evaluators were more likely to include negative sex role and sex trait stereotypes in their written reports when the evaluated parent was of the opposite sex). *See also* Charles D. Hoffman & Michelle Moon, *Mothers' and Fathers' Gender-Role Characteristics: The Assignment of Post-Divorce Child Care and Custody*, 42 SEX ROLES 917, 923 (2000) (describing the tendency of lay people to award more parenting time to parents based on parents' feminine gender characteristics).

The intersection between the sex of a litigant and the sex of the trial or appellate judge may play a role in how the public perceives outcomes in child custody cases, at least in cases involving gender-salient moral issues, such as when a mother had an abortion or engaged in an extramarital affair with a significantly younger man. Michael P. Fix & Gbemende E. Johnson, *Public Perceptions of Gender Bias in the Decisions of Female State Court Judges*, 70 VAND. L. REV. 1845 (2017).

feminine roles (such as being a lawyer).<sup>27</sup> Victims who do not conform to these traditional stereotypes or standards may find themselves already beginning the credibility race a step behind.

IPV victims' credibility may also be discounted through the belief that women have ulterior motives for reporting IPV in family court.<sup>28</sup> Courts are more skeptical of women's reports of IPV when their partners claim parental alienation (i.e., that one parent actively encourages their children to alienate themselves from the other parent).<sup>29</sup> In their analysis of child custody cases with parental alienation (PA) allegations, Joan Meier et al. found courts were less likely to credit mothers' claims of IPV (with and without concurrent claims of child abuse) when fathers cross-claimed PA.<sup>30</sup> Moreover, merely raising the PA cross-claim in the context of child custody cases with IPV and child abuse claims doubles the likelihood that the father will prevail and obtain primary custody, even when the court substantiates the IPV claim.<sup>31</sup>

Skepticism towards IPV victims' claims is not limited to judges. In cases where courts appoint guardians ad litem (GALs) or custody evaluators, courts were even more skeptical of mothers' claims of abuse and more likely to remove children from mothers.<sup>32</sup> Other empirical research reveals that family court professionals are more likely to believe a mother is

27. Nicole M. Capezza & Ximena B. Arriaga, *Why Do People Blame Victims of Abuse? The Role of Stereotypes of Women on Perceptions of Blame*, 59 *SEX ROLES* 839 (2008) (finding that college students were more likely to blame hypothetical wives for their husbands' perpetration of high levels of psychological abuse and perceive them as less warm when the wife was nontraditional and did not highly conform to female stereotypes).

28. Kelly A. Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 *WM. & MARY J. WOMEN & L.* 525 (2015) (noting the role of sexist tropes in public policy narratives suggesting that women commonly make false claims about IPV in family court because they are liars, vindictive, jealous, or trying to obtain an upper hand in a child custody battle).

29. See Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3448062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062); Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 *L. & INEQ.* 311 (2017); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 *L. & INEQ.* 5 (2011).

30. Meier et al., *supra* note 29 (an analysis of over 2,000 child custody cases involving claims of parental alienation published over a fifteen-year span finding that courts are skeptical of mothers reporting abuse by fathers in cases in which fathers cross-claimed with parental alienation).

31. *Id.* at 15–16. The research also revealed gender parity between mothers and fathers in cases in which parental alienation is credited and the alienating parent loses custody. *Id.* at 19.

32. *Id.*

engaging in PA when she alleges the father committed child sexual abuse than when the father alleges abuse.<sup>33</sup>

### III. Misperceptions That May Lead to a Gender-Biased Credibility Discount in IPV Cases in Family Court

Family court employees have to address difficult questions every day: which parent should receive custody; is there truth to child abuse allegations; are custodial parents discouraging a warm relationship with the noncustodial parents; and are claims of IPV in the home credible? Each question requires these professionals to weigh different factors, including the parties' credibility. Credibility determinations carry both benefits and risks, including introducing unintended gender biases or misperceptions of predictors of veracity. When family courts evaluating IPV claims rely primarily on party credibility assessments, especially in the absence of counsel, additional evidence, or expert witnesses, the risk of bias and incorrect assumptions increases.<sup>34</sup> An implicit distrust of victims' reports of IPV may create an insurmountable credibility discount.<sup>35</sup> Such a discount need not be the result of purposeful or even conscious deliberation. It may not even be the result of gender biases, but could instead be caused by misperceptions about factors predicting credibility that then, in turn, result in differential gender-based decisions. Below we shed light on four examples of such misperceptions:

- Misperception #1: "I would immediately leave a partner who abused me."

33. Sidnei Priolo-Filho et al., *Parental Alienation and Child Sexual Abuse Allegations*, 15 J. CHILD CUSTODY 302 (2019) (finding that family court professionals who were older or female were more likely to find a case involving parental alienation when a mother, versus a father, was the alleged alienator). In this study, the description of the case vignettes only varied as to whether the parties were described as male or female; no other facts differed. This supports the argument that these differential decisions appear to be driven by gender and, perhaps, prototypes about gender and parental alienation.

34. Epstein & Goodman, *supra* note 4; Tuerkheimer, *supra* note 3. Court observers noted that pro se litigants often appeared in court without providing corroborating evidence and without an understanding about the rules of evidence. Judges noted their frustrations with their lack of access to relevant information in domestic violence cases that aids them in carrying out their duties in such instances. Cara J. Person et al., "I Don't Know That I've Ever Felt Like I Got the Full Story": A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases, 24 VIOLENCE AGAINST WOMEN 1474, 1484–87 (2018).

35. Tuerkheimer, *supra* note 3.

- Misperception #2: "I can tell if someone experienced interpersonal violence by the way they act when discussing the abuse."
- Misperception #3: "It is easy to detect if someone is lying based on where they are looking and what they are saying."
- Misperception #4: "I know what happened and the evidence supports me."

**A. Misperception #1:  
"I Would Immediately Leave a Partner Who Abused Me."**

Judges and other family court evaluators assessing allegations of IPV may inadvertently allow their credibility decisions to be guided by their misconceptions of IPV. Such misperceptions may be based upon a script in which credible victims of IPV leave a violent partner immediately following an act of physical or sexual violence and report all violence to the police.<sup>36</sup> This "exit myth" does not include an understanding of coercive control, increased lethality risk experienced by women who do separate from their partners, the challenge of limited financial resources, or the reality of parenting.<sup>37</sup> It does not account for the many reasons victims of IPV chose not to contact the police, including a history of lack of police enforcement, conflict between the police and communities of color, and the fear of triggering interactions with child protection services that could result in the removal of their children.<sup>38</sup> And the myth appears to be differentially applied: Women of color and victims of IPV by partners of the same sex find their credibility even further discounted, especially when they take steps to resist IPV.<sup>39</sup>

Judges and custody evaluators might translate their expectations about how "real" IPV victims respond to violence into a disbelief or minimization

36. Deborah Pogrud Stark & Jessica M. Chopin, *Seeing the Wrecking Ball in Motion*, 32 WIS. J.L. GENDER & SOC'Y 13, 33 (2017).

37. Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Towards Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1 (2013) (suggesting that the backlash against battered women may have been influenced by the belief that women's overall increased access to economic security should enable them to immediately leave abusive relationships); see also EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2009) (reframing IPV as an ongoing pattern of behaviors intended to maintain coercive control rather than a series of physical assaults).

38. GOODMARK, *supra* note 7; Harris, *supra* note 8.

39. See Cynthia Willis Esqueda & Lisa A. Harrison, *The Influence of Gender Role Stereotypes, the Woman's Race, and Level of Provocation and Resistance on Domestic Violence Culpability Attributions*, 53 SEX ROLES 821 (2005) (finding that college students' beliefs in gender role stereotypes influenced their perceptions of truthfulness based on race).

of an individual victim's testimony that does not match those expectations. In some examples, it appears as though this misunderstanding may be based on judges' or custody evaluators' beliefs about how they personally would respond to such violence if they were in the victims' situation and to deem any variations of that response as grounds for skepticism of the victims' stories.<sup>40</sup>

### ***B. Misperception #2:***

#### ***“I Can Tell if Someone Experienced Interpersonal Violence by the Way They Act When Discussing the Abuse.”***

Victims of IPV must engage in the challenging task of disclosing and discussing the abuse perpetrated against them and the resulting harm they experienced. Family court professionals, including custody evaluators, mediators, and judges, assess these statements and determine whether or not they believe the victim is telling the truth. There is a rich literature about testimonial factors that affect credibility determinations, such as the angle from which the victim is viewed or priming jurors with particular concepts or ideas. One such factor is the incorrect assumption often made by factfinders inside and outside of the legal system that has been resoundingly debunked by the scientific literature—that victims of violence generally appear sad, if not teary, when discussing the violence they experienced.

Within the context of empirical research, studies found that victims who display negative emotions when testifying about or discussing abuse are viewed as more credible than victims who do not display such expressions.<sup>41</sup> This expectation of negative affective displays is often

40. See e.g., Czapanskiy, *supra* note 1 (sharing the testimony of a woman speaking to a Maryland gender bias committee describing how a judge told her that he did not believe her testimony about abuse because he personally would not have stayed with someone after being threatened with a gun); see also Person et al., *supra* note 34 (noting that some judges indicated that they were less inclined to believe petitioners testifying about acts of violence when the acts were not recent).

41. Karl Ask & Sara Landström, *Why Emotions Matter: Expectancy Violation and Affective Response Mediate the Emotional Victim Effect*, 34 L. & HUM. BEHAV. 392 (2010); Guri C. Bollingmo et al., *Credibility of the Emotional Witness: A Study of Ratings by Police Investigators*, 14 PSYCHOL., CRIME & L. 29 (2008); Guri C. Bollingmo et al., *The Effect of Biased and Non-biased Information on Judgments of Witness Credibility*, 15 PSYCHOL., CRIME & L. 61 (2009); Louisa Hackett et al., *Expectancy Violation and Perceptions of Rape Victim Credibility*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 323 (2008); Kim M. E. Lens et al., *You Shouldn't Feel That Way! Extending the Emotional Victim Effect Through the Mediating Role of Expectancy Violation*, 20 PSYCHOL., CRIME & L. 326 (2014); Mary R. Rose et al., *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims*, 30 L. & HUM. BEHAV. 203 (2006).

referred to as the emotional victim effect (EVE). As with child victims,<sup>42</sup> adult victims do not necessarily display only these expected negative emotions. In fact, emotional displays by adult victims are highly diverse and varied.<sup>43</sup>

Such expectancies or prototypes of how a victim is supposed to behave are similarly found when adult victims testify about IPV. Landström, Ask, and Sommar presented Swedish police trainees with the testimony of a hypothetical victim of interpersonal violence.<sup>44</sup> The victim was shown either in a sad and distressed state (emotional display) or in a neutral state.<sup>45</sup> In line with the EVE phenomenon, participants reported that the emotional victim fit their expectations for how a victim would behave

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42. Within the child victim literature, both jurors and prosecutors expect children to display negative emotions when discussing their abuse, such as sadness or anger. See Daniel Bederian-Gardner & Deborah Goldfarb, *Expectations of Emotions During Testimony: The Role of Communicator and Perceiver Characteristics*, 32 BEHAV. SCI. & L. 829 (2014); Daniel Bederian-Gardner et al., *Empathy's Relation to Appraisal of the Emotional Child Witness*, 31 APPLIED COGNITIVE PSYCHOL. 488 (2017); Jonathan M. Golding et al., *Big Girls Don't Cry: The Effect of Child Witness Demeanor on Juror Decisions in a Child Sexual Abuse Trial*, 27 CHILD ABUSE & NEGLECT (2003); John E. B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL., PUB. POL'Y, & L. 388 (1999); Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 18 J. FAM. VIOLENCE 187 (1998); Paola Castelli & Gail S. Goodman, *Children's Perceived Emotional Behavior at Disclosure and Prosecutors' Evaluations*, 38 CHILD ABUSE & NEGLECT 1521 (2014).

These expectations are often violated by the realities of disclosure: Most children do not exhibit any negative emotions, and in fact many display a neutral demeanor, when they are discussing their abuse in a forensic interview. See Liat Sayfan et al., *Children's Expressed Emotions When Disclosing Maltreatment*, 32 CHILD ABUSE & NEGLECT 1026 (2008); Barbara Wood et al., *Semistructured Child Sexual Abuse Interviews: Interview and Child Characteristics Related to Credibility of Disclosure*, 20 CHILD ABUSE & NEGLECT 81 (1996). Deviations between expectations of emotions and the actual emotions expressed by child witnesses often result in decreases in jurors' judgments of the children's credibility. Bederian-Gardner & Goldfarb, *supra*; Alexia Cooper et al., *The Emotional Child Witness: Effects on Juror Decision Making*, 32 BEHAV. SCI. & L. 813 (2014); Golding et al., *supra*; Ellen M. Wessel et al., *Disclosure of Child Sexual Abuse: Expressed Emotions and Credibility Judgments of a Child Mock Victim*, 22 PSYCHOL., CRIME & L. 331 (2016); Ellen M. Wessel et al., *Expressed Emotions and Perceived Credibility of Child Mock Victims Disclosing Physical Abuse*, 27 APPLIED COGNITIVE PSYCHOL. 611 (2013).

43. Irene H. Frieze et al., *Describing the Crime Victim: Psychological Reactions to Victimization*, 18 PROF. PSYCHOL.: RES. & PRAC. 299 (1987). But see Janne van Doorn & Nathalie N. Koster, *Emotional Victims and the Impact on Credibility: A Systematic Review*, AGGRESSION & VIOLENT BEHAV. (2019) (raising issues as to the universality of the EVE and finding that it may be limited to samples of college students).

44. Sara Landström et al., *Credibility Judgments in Context: Effects of Emotional Expression, Presentation Mode, and Statement Consistency*, 25 PSYCHOL., CRIME & L. 279 (2019).

45. *Id.*

more so than the neutral victim.<sup>46</sup> Further, victims who fit participants' expectations were rated as more truthful than those victims who did not.<sup>47</sup>

Indeed, many legal scholars have noted the pervasive nature of this misperception within the IPV context. Courts assess IPV victims' credibility based on how well they fit into a preconceived notion of a victim: sweet, blameless, scared, and helpless.<sup>48</sup> IPV victims who express anger or fail to express fear during civil protection order hearings are found less credible by judges and court personnel.<sup>49</sup> Mothers who express hostility or anger during a custody evaluation have their allegations of domestic violence disbelieved or discounted, as compared to mothers who appear pleasant.<sup>50</sup> Many of these credibility decisions may be subconscious;<sup>51</sup> participants may not even be aware that they are judging whether testimony violates assumptions they hold about victim emotionality or matching victims to a prototype. This is important because people often assume that if they do not actively consider emotionality or gender, they are not influenced by such factors. Research shows that this may not be true as the weighting and calculus involved in EVE or other related decisions may not be readily apparent to the deciders. Thus, in order to avoid such factors influencing credibility determinations, legal actors must become acutely aware of these issues through training and reflection, as discussed further below.

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46. *Id.*

47. *Id.* However, Landström and colleagues presented an additional finding that raises questions about the contours of EVE: Emotionality expressed by the victim may sometimes work against ratings of credibility. Specifically, emotional displays appear to boost credibility only to the point at which it verified what participants were expecting to see from the victim. However, once the researchers removed the credibility boost related to confirmation of the participants' expectations for emotions displayed, emotional display actually hurt the victim's credibility (as compared to neutral displays). One potential explanation for this finding is that the emotional state displayed by the victim in this study may not have evoked sufficient levels of compassion in the participants. A lack of a compassionate response may have led participants to distrust the victim.

48. Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 733 (2003).

49. *Id.* (noting that explicit and implicit requirements for an expression of fear unfairly disadvantage many victims of domestic violence who are understandably angry at their abusers or feel as though acknowledging their fear in front of the person who terrorized them is akin to admitting defeat); see also Capezza & Arriaga, *supra* note 27 (finding that college students were more likely to blame hypothetical wives for their husbands' perpetration of high levels of psychological abuse and perceive them as less warm when the wife responded to abuse in a negative way, such as yelling back).

50. Jennifer L. Hardesty et al., *The Influence of Divorcing Mothers' Demeanor on Custody Evaluators' Assessment of Their Domestic Violence Allegations*, 12 J. CHILD CUSTODY 47 (2015).

51. Landström et al, *supra* note 44.

**C. Misperception #3:*****“It Is Easy to Detect if Someone Is Lying Based on Where They Are Looking and What They Are Saying.”***

The task of discerning truth from lie is often central in family court cases involving IPV, as these cases frequently lack corroborating evidence.<sup>52</sup> Legal actors often only have the word of both parties as evidence and must therefore rely on their own methods of assessing the veracity of testimony. They are faced with “the intractable task of searching the faces and gestures of strangers for the signs of deceit.”<sup>53</sup> Yet, decades of research in the field of deception detection indicates that humans are generally poor lie detectors, in spite of the persistent belief to the contrary. The common deception detection accuracy rate is approximately 54%, a rate that is essentially at chance or guessing level, with 61% of truths and 47% of lies being correctly classified.<sup>54</sup> And yet, there is an implicit assumption within the legal system that law enforcement, legal actors, and judges have the capability to accurately assess witnesses’ credibility.<sup>55</sup>

**1. SEARCHING FOR THE TRUTH**

People consistently hold stereotypical and incorrect beliefs about how liars behave, such as the belief that liars tend to avoid making eye contact.<sup>56</sup> These beliefs are not constrained to laypersons: “Professional

52. These types of cases are sometimes referred to as “he said, she said” cases because with the lack of corroborating evidence, a credibility contest can ensue. Tuerkheimer, *supra* note 3.

53. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 578 (1997). Although Fisher’s statement specifically referenced members of juries, we believe that this statement can be extended to describe the veracity assessments that judges and attorneys are obliged to make. In addition to this hunt for behavioral cues to deceit, legal actors may also evaluate victim witnesses’ verbal statements for credibility cues.

54. This average accuracy rate was derived from a meta-analysis (an analysis that examines general data patterns across multiple separate studies) assessing deception detection accuracy rates across 24,483 judges of deception in 206 studies. Charles F. Bond Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214 (2006).

55. For instance, the legal system relies on jurors to determine whether a witness is lying or telling the truth, as is reflected in jury instructions. Fisher, *supra* note 53; *see also* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165 (1989).

56. Because gaze aversion is by far one of the most common self-reported cues to deception detection, we focus our discussion on this behavioral cue. When asked, “How can you tell when people are lying?” 63.66% of 2,320 people from fifty-eight different countries reported that liars demonstrate gaze aversion. Following gaze aversion, notable (yet much smaller) proportions of respondents reported that liars demonstrate other stereotypical lying behaviors, including nervousness (28.15%), incoherent statements (e.g., stories demonstrating inconsistencies; 25.30%), and body movements (25.04%). Global Deception Research Team, *A World of Lies*, 37 J. CROSS-CULTURAL PSYCHOL. 60 (2006).

lie-catchers” (e.g., police, customs officers) also believe that liars engage in stereotypical behaviors, including gaze aversion.<sup>57</sup> Despite general acceptance of gaze being indicative of lying, gaze aversion is *not* strongly related with deceit; thus, reliance on this cue does not translate to improved deception detection accuracy.<sup>58</sup>

Although certain evaluators of victims’ credibility (e.g., investigators, jurors) may rely on gaze aversion when assessing credibility, other evaluators, including judges and attorneys, may not depend on this unreliable cue in their credibility assessments. For example, one study showed that unlike police officers, prosecutors and judges are not necessarily convinced that gaze aversion is indicative of lying behavior.<sup>59</sup> Other findings paint a slightly different picture, however, as a sample of Australian police officers, prosecuting and defense attorneys, and mock jurors believed gaze aversion to be indicative of witness inaccuracy.<sup>60</sup> These discrepant findings highlight the importance for further investigation into legal actors’ beliefs about cues to deception, as well as the importance of empirical research to inform legal actors about the diagnostic value of cues such as gaze aversion.<sup>61</sup>

In the context of IPV cases, reliance on the belief that gaze is indicative of lying can be detrimental to victims whose statements are being appraised for veracity. Interviews with thirty-two rape survivors revealed that

57. For example, both college students and experts, including customs officers, police detectives, prison guards, and patrol police officers, incorrectly identified gaze aversion as an indicator of deception. Aldert Vrij & Gün R. Semin, *Lie Experts’ Beliefs About Nonverbal Indicators of Deception*, 20 J. NONVERBAL BEHAV. 65 (1996).

58. Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003); Maria Hartwig & Charles F. Bond Jr., *Why Do Lie-Catchers Fail? A Lens Model Meta-Analysis of Human Lie Judgments*, 137 PSYCHOL. BULL. 643 (2011).

59. The researchers found that a large proportion of police officers believed that liars are more gaze averse than truth-tellers; however, similar proportions of prosecutors and judges believed that liars are more gaze averse or that there is no difference in gaze aversion tendencies between liars and truth-tellers. It is possible that differences in gaze aversion beliefs are due to (1) police often having less information to use in their decision making at the investigation level, as compared to prosecutors and judges in the later stages of cases, and thereby relying more on nonverbal cues for credibility assessment; and/or (2) police officers conducting many interviews and under potential time constraints, thereby leading them to rely on shortcuts, such as assessing nonverbal cues, while making their credibility decisions. See Leif A. Strömwall & Pär Anders Granhag, *How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges*, 9 PSYCHOL., CRIME & L. 19 (2003). Note that all police officers, prosecutors, and judges in this study were recruited from Sweden, where investigative interviewing and legal procedures may differ from those of the U.S. system. *Id.*

60. Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour-Accuracy Relationships Held by Police, Lawyers and Mock-Jurors*, 6 PSYCHIATRY, PSYCHOL. & L. 97 (1999).

61. Strömwall & Granhag, *supra* note 59. Police officers, prosecutors, and judges indicated that they were not up-to-date on the deception detection literature.

survivors reported engaging in gaze aversion not only with the defendant, but also with other persons in the courtroom (e.g., their own supporters, the defendant's supporters, the defense attorney, the jury).<sup>62</sup> By assuming that gaze predicts testimony veracity, family court professionals risk discounting truthful testimony. It is thus important for judges, mediators, and custody evaluators to understand the disconnect between gaze and truthfulness in order to reduce any overreliance on unreliable cues.

Victims and advocates can also work to help improve the courtroom setting so that victims feel comfortable making eye contact during testimony in the courtroom. This being said, it is important to note that creating the environment for "ideal" eye gaze may be impossible. Victims walk an almost impossible tightrope when it comes to gaze: (1) Too much eye contact can be detrimental to victims' perceived credibility;<sup>63</sup> (2) it may be difficult, if not impossible, for a trauma victim to be less gaze aversive; (3) not all individuals use gaze aversion in a similar manner when making credibility assessments;<sup>64</sup> and (4) nonverbal behaviors do not constitute the only factor to influence observers' perceptions of credibility. It is possible that other factors, including observers' preexisting beliefs and case-specific details, may interact with gaze aversion in a manner that influences observers' credibility judgments,<sup>65</sup> even if unconsciously. Alternatively, there are additional factors that may exert their own unique

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62. Amanda Konradi, *"I Don't Have to Be Afraid of You": Rape Survivors' Emotion Management in Court*, 22 SYMBOLIC INTERACTION 45 (1999).

63. Weir and Wrightsman posit that staring may not align with typical Western female stereotypes (e.g., gentle, less confident). Julie A. Weir & Lawrence S. Wrightsman, *The Determinants of Mock Jurors' Verdicts in a Rape Case*, 20 J. APPLIED S. PSYCHOL. 901 (1990).

64. Strömwall and Granhag's, as well as Potter and Brewer's, findings suggest that individuals in different roles reportedly rely on gaze aversion to differing degrees. Attorneys may take such findings into consideration as they develop their witness preparation strategies in a manner that accounts for the context in which their victims will be recounting their trauma (e.g., will their clients' credibility be assessed by judges or jurors?). Furthermore, Weir and Wrightsman found that female participants were more likely to find the defendant guilty when the victim was described as avoiding eye contact with the defendant. Strömwall & Granhag, *supra* note 59; Potter & Brewer, *supra* note 60.; Weir & Wrightsman, *supra* note 63.

65. Weir & Wrightsman, *supra* note 63 (finding that when the victim stared (vs. demonstrated gaze avoidance), female participants with low empathy demonstrated an increase in confidence that the defendant was not guilty).

influence on observers' credibility perceptions beyond gaze aversion.<sup>66</sup> Thus, the most expedient method for encouraging more fair and accurate credibility assessments may be through judicial and legal education on the diagnostic value of cues to deception.

## 2. THE INCONSISTENT STORY

In addition to nonverbal cues, people incorrectly rely on certain verbal cues to detect truthfulness. In their discussion of discounting women's credibility, Deborah Epstein and Lisa Goodman posit that female IPV survivors must tell their stories in an internally consistent manner—the narratives must be coherent, logical, and temporally linear—in order to succeed in the legal system.<sup>67</sup> Judges also believe it is important that victims present narratives consistent with prior statements<sup>68</sup>—a concern victims themselves share, especially during cross-examination.<sup>69</sup> In another example, student participants who either conducted or watched witness interviews most frequently reported that they used consistency between statements as a veracity cue. Yet, reliance on consistency did not translate into predictive deception detection accuracy.<sup>70</sup>

In IPV cases, victims may have to tell their stories multiple times (e.g., in legal pleadings, to custody evaluators, in court), and consistency between their statements on these separate occasions may influence legal actors' judgments of their credibility.<sup>71</sup> Inconsistent narratives, however, are not necessarily indicative of witness deception. Indeed, a number of factors other than deception can influence narrative consistency. Victims may not

66. Cynthia E. Willis & Lawrence S. Wrightsman, *Effects of Victim Gaze Behavior and Prior Relationship on Rape Culpability Attributions*, J. INTERPERSONAL VIOLENCE 367 (1995). For example, Willis and Wrightsman manipulated a rape victim's gaze (gaze maintenance, gaze avoidance, natural gaze) during identification of the defendant in trial proceedings, as well as the victim's relationship with the alleged perpetrator (dating, friends, coworkers, strangers). When the victim demonstrated gaze maintenance or natural gaze, participants rated the victim as more truthful than when she demonstrated gaze avoidance. Furthermore, when the victim had been a coworker or stranger to the alleged defendant, she was seen as more truthful than when she had been friends with the alleged defendant.

67. Epstein & Goodman, *supra* note 4.

68. Potter & Brewer, *supra* note 60.

69. Of Konradi's sample of rape victims who endured trial proceedings, 29% indicated that they worried about their ability to accurately recall specific details of their assault, and especially so in the context of cross-examination. Amanda Konradi, *Preparing to Testify: Rape Survivors Negotiating the Criminal Justice Process*, 10 GENDER & SOC'Y 40 (1996).

70. Pär Anders Granhag & Leif A. Strömwall, *Deception Detection: Interrogators' and Observers' Decoding of Consecutive Statements*, 135 J. PSYCHOL. 603 (2001).

71. People tend to perceive inconsistencies as an indication of deception and consistency as an indication of truthfulness. Aldert Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 PSYCHOL. SCI. IN PUB. INT. 89 (2010).

know which details are important to include in their narratives, which can result in the omission of critical details during victim testimony that can be detrimental to victims' credibility. Furthermore, abuse sometimes results in differences in psychopathology, some of which may predict either improved recall for certain details or, instead, narratives that may present as inconsistent.<sup>72</sup> Thus, in the context of IPV cases, inconsistent narratives do not necessarily indicate deception, but could rather be an artifact of legal actors' beliefs about the information relevant to their testimony or of victims' experiences.

Overall, victims' inconsistent narratives of abuse can negatively impact their credibility in the eyes of legal actors. Although client preparation is always good practice, it may not ameliorate this problem, as testimony that is too well-practiced may also be perceived as deceptive and clients may be unable to amend prior statements.<sup>73</sup> Educating family court personnel about the impact of IPV trauma, as well as the nature of human memory in general, on internal statement consistencies may help decrease the negative impact of this misperception on victim credibility.

#### ***D. Misperception #4:***

##### ***"I Know What Happened and the Evidence Supports Me."***

Family court professionals making credibility assessments can have opinions and beliefs about IPV. As discussed in the prior sections, a myriad of psychological research supports the notion that these opinions and beliefs can unconsciously bias credibility assessors. Indeed, IPV victims' statements are more likely to be assessed as credible when they correspond with assessors' beliefs about the world (i.e., they are externally consistent)—a notion that legal scholars also recognize.<sup>74</sup>

Prior beliefs can often be difficult to overcome. Social scientists have noted that people, including legal actors, frequently avoid having their beliefs challenged. One method they use to avoid such conflicts is confirmation bias—searching for and utilizing information in a manner

72. Traumatic brain injury (TBI) and post-traumatic stress disorder can contribute to inconsistent victim narratives. These two factors are especially relevant in IPV cases. See Epstein & Goodman, *supra* note 4.

73. Potter & Brewer, *supra* note 60. When asked to what extent different behaviors were indicative of witness veracity, police and attorneys reported greater beliefs that clearly rehearsed testimony was inaccurate than did mock jurors. Furthermore, mock jurors were more likely to find nonchronological recall of events as less accurate as compared to police.

74. Epstein & Goodman, *supra* note 4.

that supports one's beliefs or hypotheses.<sup>75</sup> Although such unconscious biases are common throughout the legal system, they may be particularly amplified by IPV victims' heavier reliance on testimonial evidence to prove their case.

When family court personnel have preexisting beliefs about litigants claiming IPV, they may use these beliefs as filters for the evidence they process. Specifically, they are likely to discount or ignore evidence that is diametrical to their beliefs and instead rely primarily on evidence that supports their beliefs.<sup>76</sup> This tendency to prematurely discount or fully ignore evidence can negatively impact perceptions of a victims' credibility. Social psychological research suggests that individuals' preexisting stereotypes,<sup>77</sup> prior knowledge, and belief in a just world can influence their perceptions of victims.<sup>78</sup> For instance, contextualizing the just-world hypothesis within IPV cases, it is possible that increased beliefs in a victim's own contribution to an IPV event can trigger credibility assessors to seek information that confirms their belief in the victim's blame, and consequently lead assessors to discredit certain components of a victim's testimony.<sup>79</sup> Essentially, preexisting beliefs can be detrimental to credibility judgments as these judgments will presumably be founded on only select confirming information, while other potentially valuable information is disregarded.

75. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). Nickerson presents a comprehensive review of the various forms of confirmation bias that are present in the psychology literature. Nickerson's analysis is beyond the scope of the present review; thus, readers are free to delve further into the intricacies of confirmation bias using this reference.

76. Asher Koriath et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107 (1980).

77. For example, see our discussion on Misperception #2, *supra*.

78. For example, the *just-world hypothesis* posits that people tend to believe that they live in a fair world in which everyone gets what they deserve. People presumably believe in a just world in attempt to feel better about their own fate and maintain a sense of control over their own lives. Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978).

79. Researchers examined the just-world hypothesis in the context of legal beliefs, and some studies do find that individuals who score high on measures of belief in a just world are more likely to blame the victims themselves for having to experience ill fates. Connie M. Kristiansen & Rita Giulietti, *Effects of Gender, Attitudes Toward Women, and Just-World Beliefs Among College Students*, 14 PSYCHOL. OF WOMEN Q. 177 (1990); Leif A. Strömwall et al., *Blame Attributions and Rape: Effects of Belief in a Just World and Relationship Level*, 18 LEGAL & CRIMINOLOGICAL PSYCHOL. 254 (2013).

However, there are other studies that do not demonstrate a relationship between belief in a just world and victim blaming. Such discrepancies in the literature could be due to differences in the experimental crime scenarios used. Claire R. Gravelin et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 FRONTIERS IN PSYCHOL. 2422 (2018).

The negative impact that preexisting knowledge and beliefs can have in IPV cases is highlighted by one study in which the researchers examined how prior information influenced law students' and police officers' information-gathering processes during questioning of a fictional rape victim.<sup>80</sup> During questioning, both law students and police officers asked the fictional victim more questions when they had previously read negative assessments about the victim's credibility compared to when they had not read any such information.<sup>81</sup> Furthermore, law students reading a prior negative credibility statement focused their questions on what occurred before the hypothetical rape, while police officers reading the negative statement focused questions on what happened after the rape.<sup>82</sup> These law students and police officers therefore arguably painted an incomplete picture of the hypothetical crime. Taken together, these findings suggest that credibility assessors are indeed impacted by prior knowledge in instances when there is little corroborating evidence—an impact that has the potential to change the manner in which legal actors conduct their case.

Research into confirmation bias not only implicates credibility assessments at the information-gathering stage early in a case, but actually suggests a snowball effect. Specifically, the findings of Koppelaar et al. showed that a negative earlier credibility judgment made by another person influenced the later information-gathering procedures at the witness interview stage. We can speculate that early negative credibility assessments could also negatively influence a victim's credibility during court testimony. In IPV cases, it is possible that the discounting of victims' testimony in early stages of a case may influence credibility judgments by ultimate decision makers.

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80. Leendert Koppelaar et al., *The Influence of Positive and Negative Victim Credibility on the Assessment of Rape Victims: An Experimental Study of Expectancy-Confirmation Bias*, 5 INT'L REV. OF VICTIMOLOGY 61 (1997). Here are some additional notes regarding this study: (1) All participants were Dutch; (2) the law student participants were asked to imagine that they were police officers conducting a witness interview (thus, it is possible that their questioning styles would differ if they were in the context of, say, a client interview or a deposition); (3) the extent to which all participants attributed responsibility to the fictional victim did not differ as a function of the type of prior information they had received; and (4) law students attributed more responsibility to the fictional assailant when they had previously read a positive credibility statement compared to negative and no credibility statements, but this was not the case with police officers, whose responsibility scores did not differ across experimental groups.

81. *Id.* Before questioning the fictional victim, participants read that the on-duty officer either made a positive credibility statement ("I trust her") about the victim's report, a negative credibility statement ("I don't quite trust her"), or no credibility statement.

82. *Id.*

#### **IV. Suggestions to Mitigate Credibility Discounting of Victims' Reporting of Intimate Partner Violence in Family Court**

In the preceding sections, we have discussed potential underlying causes for occurrences of credibility discounting in family courts. We now turn to discuss recommendations that may mitigate credibility discounting by addressing these aforementioned underlying causes.

##### ***A. Engage in Ongoing IPV Training***

Although certainly not a novel recommendation, the importance of updated IPV training of all family court actors bears repeating. Our understanding about IPV is constantly evolving. Legal actors who last received training based on the cycle of violence focused on discrete acts of physical violence should find trainings or engage in research about coercive control, separation violence, danger assessments, the use of litigation abuse, and safety planning in order to better combat the exit myth.<sup>83</sup> More education about IPV will enable family court personnel to ask victims effective questions to help combat the informational problem that often accompanies IPV cases, helping negate situations when *pro se* victims do not know what information is relevant to the applicable legal system.<sup>84</sup> Updated IPV training may also aid family court personnel to better understand why some victims are reluctant to engage with the criminal law and dependency systems and therefore lack corroborating evidence in the form of police reports and child protection agency investigation findings.

##### ***B. Develop Expertise About the Impact of Trauma***

Trainings on the effects of trauma and the disclosure process may help family court personnel understand how IPV victims have diverse reactions to trauma and may not meet their expectations of how a victim will look or discuss abuse. Further training may help us better hear victims' individual stories told in the way that they need to tell them.

For instance, research finds that EVE—the belief that victims will display certain emotions—is not impervious to training. Many of the cognitive aspects of EVE are affected by attempts at deliberate control.<sup>85</sup> Indeed, training appears to ameliorate some of the false assumptions

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83. See Misconception #1, *supra*, discussing the exit myth.

84. Person et al., *supra* note 34, at 1486–87.

85. Landström et al., *supra* note 44.

about the universality of victim's emotions while discussing trauma.<sup>86</sup> Police officers who participate in victim-centered trainings report fewer incorrect assumptions about victims of trauma, including how victims will appear when discussing their trauma. Such trainings may have similar efficacy within the family court context. As a variety of legal actors make credibility decisions in these cases, there are likely benefits to training at the bench, at the bar, and within the courthouse itself.

With access to more psychological research, such as through the websites for the American Psychology-Law Society or the Association for Psychological Science, court personnel may be less likely to believe they can easily identify truths and lies if they better understand the complicated role that trauma plays on victims' ability to provide an internally consistent narrative and present a stereotypical demeanor when describing IPV. Family court personnel need not limit their research to trauma caused by IPV but can also learn from research into the impact of trauma caused by combat, shootings, car accidents, and natural disasters in order to understand that IPV victims are not completely unique in how they process trauma. This broader understanding about trauma may further assist family court personnel in assessing IPV victim narratives and incorporating a more nuanced understanding of what may constitute "typical" post-assault behavior.

### ***C. Decrease Confirmation Bias's Negative Impacts***

Although research suggests that people are susceptible to unconsciously engaging in confirmation bias, there are solutions that potentially reduce related detrimental consequences. One such solution is "blind testing,"<sup>87</sup> by which legal actors carry out casework while aiming to exclude information that is not relevant to the task at hand.<sup>88</sup> Legal actors must routinely make credibility assessments in IPV cases, whether they are attorneys screening clients and creating case strategy, child custody evaluators recommending custody and parenting time schedules, mediators assisting parties in

86. Courtney Franklin et al., *Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses*, CRIME & DELINQ. (2019).

87. Saul Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. APPLIED RES. IN MEMORY & COGNITION 42 (2013).

88. *Id.* To highlight this concept, consider Koppelaar and colleagues' study: The intake officer's negative credibility assessment arguably did not give the law students and police officers any additional value that aided in their line of questioning. We can imagine that if they had not received this information, they may have conducted more comprehensive interviews that would have resulted in the elicitation of potentially valuable case information.

resolving their legal disputes, or judges making findings of fact and court orders. The key is not to rid the process of credibility judgments but to remove extraneous information from the decision process. Does the mediator need to have all of the details in this particular context? If not, which details are essential and which details should be eliminated to decrease potential confirmation bias?<sup>89</sup> Narrowing legal actors' focus to the relevant information may decrease their confirmation bias.

IPV expertise may also mitigate the effects of confirmation bias in the context of IPV cases. Research indicates that domain-specific expertise can reduce confirmation bias.<sup>90</sup> Even when individuals lack domain-specific expertise, a reminder of the responsibility they have (e.g., reminding judges that they hold the fate of the parties' in their hands) can also mitigate confirmation bias.<sup>91</sup> Understanding the importance of what we do and how it might affect other lives can help us be better advocates and judges on a number of levels, including by decreasing confirmation bias.

#### ***D. Build a Bridge Between Legal Actors and Legal Psychologists***

Our present discussion of how the understanding of psychological concepts underlying credibility discounting can be used to mitigate the negative effects discounting inflicts upon victims highlights the need to increase and strengthen the lines of communication between science and the law. There are many potential avenues for research that can benefit from collaboration between legal psychologists and family court actors.<sup>92</sup> By working together, psychology and the law can help to inform practice and policy change that helps victims navigating the family court system.

89. One area for future discussion and conversation is how does one differentiate between extraneous and nonextraneous information—a crucial task as the consequences are impactful to the course of a case.

90. In one empirical study, criminal-law judges were assigned to read a case that corresponded to their domain-specific expertise (criminal-law case) or to their general expertise in the law (labor-law case). In instances when their expertise was general, judges were more likely to demonstrate confirmation bias than were domain-specific experts. Susanne M. Schmittat & Birte Englich, *If You Judge, Investigate! Responsibility Reduces Confirmatory Information Processing in Legal Experts*, 22 PSYCHOL., PUB. POL'Y & L. 386 (2016).

91. *Id.* Bias in general experts, however, was significantly reduced when they were reminded of the tremendous responsibility they have and the ramifications of their legal decisions (such a responsibility reminder did not have an impact on domain-specific experts). To induce a sense of responsibility, judges were told: "As a legal expert, you are involved in important decisions with serious consequences for the person concerned. Please make yourself aware of this societal responsibility before you continue with the next task."

92. There are many legal psychology resources to which family court actors have access, such as those offered by the American Psychology-Law Society ([www.ap-ls.org](http://www.ap-ls.org))



# Faculty

**Hon. Frank J. Bailey** was appointed as a U.S. Bankruptcy Judge for the District of Massachusetts in Boston on Jan. 30, 2009, and served as Chief Judge from December 2010 until December 2015. He also serves on the First Circuit Bankruptcy Appellate Panel. Previously, Judge Bailey clerked for Hon. Herbert P. Wilkins of the Massachusetts Supreme Judicial Court from 1980-81 and was an associate at the Boston office of Sullivan & Worcester LLP until 1987, where he practiced in its litigation and bankruptcy departments. He spent the next 22 years as a partner at Sherin and Lodgen LLP, where he chaired its litigation department and was a member of its management committee. His practice focused on complex business litigation and creditors' rights, and he often represented clients in medical device, pharmaceutical and high-technology businesses. Judge Bailey served as the consul for the Republic of Bulgaria in Boston before his appointment to the bench, and he has participated in many international judicial programs. In 2013, he taught at the Astrakhan State University School of Law in south central Russia, and he has also taught courses in Sofia, Bulgaria and Tashkent, Uzbekistan. In addition, he taught legal writing and research at Boston University School of Law from 1981-93 and currently teaches business reorganizations at Suffolk University Law School in Boston. Judge Bailey was appointed by the First Circuit to oversee the financial restructuring of the City of Central Falls, R.I. He has served on the Board of Governors of the National Conference of Bankruptcy Judges and was its Education Committee Chair in 2017. Beginning in October 2019, he will serve as NCBJ's president-elect. In addition, he is past chair of the National Conference of Federal Trial Judges of the American Bar Association and currently serves as the Judicial Member at Large on the ABA Board of Governors. Judge Bailey received his B.S.F.S. from Georgetown University's School of Foreign Service and his J.D. from Suffolk University School of Law.

**Hon. Bernice B. Donald** is a U.S. Sixth Circuit Court of Appeals Judge in Memphis, Tenn. Prior to her appointment in 2011, she served on the U.S. District Court for the Western District of Tennessee for more than 15 years. Judge Donald is currently chair of the American Bar Association's Center for Human Rights, and she recently chaired a committee that published an implicit bias resource book for judges and practitioners. Previously, she chaired the ABA's Criminal Justice Section, where her focus was on issues concerning implicit bias, children of incarcerated parents, mass incarceration and the collateral consequences of incarceration. Having previously served as secretary of the ABA, Judge Donald is currently a member of the ABA House of Delegates and of the American Law Institute. She has also served as faculty at the National Judicial College, the Federal Judicial Center and the Judge Advocate General's Legal Center and School. Judge Donald has served as a Jurist in Residence at New York University, American University, Washington University and the University of Cincinnati law schools, and is the Edenfield Jurist in Residence at the University of Georgia School of Law. In addition, she has served as faculty for international programs in Romania, Mexico, Turkey, Brazil, Bosnia, Jordan, Botswana, South Africa, Namibia, Senegal, Rwanda, Tanzania, Russia, Egypt, Morocco, Uganda, Thailand, Armenia, Jamaica, Pakistan, Kyrgyzstan, Great Britain, Costa Rica, Vietnam, and the Philippines. Judge Donald has received more than 100 awards for professional, civic and community activities, including the Distinguished Alumni Award from the University of Memphis, the Martin Luther King Community Service Award and the Benjamin Hooks Award from the Memphis Bar Foundation. She received her B.A. and J.D. from the University of Memphis.

**Dr. Deborah Goldfarb** is an assistant professor of psychology at Florida International University in Fort Lauderdale. Previously, she practiced for a number of years as an attorney, including as a law clerk in the federal courts. Dr. Goldfarb studies a number of topics at the intersection of law and developmental psychology, including legal attitudes, developmental intuitive jurisprudence, and memory in victims and eyewitnesses. She received her J.D. from the University of Michigan Law School and her Ph.D. in developmental psychology from the University of California, Davis.

**Danielle Spinelli** is vice-chair of the Appellate and Supreme Court Litigation group at WilmerHale in Washington, D.C. Her practice includes advocacy in the Supreme Court and courts of appeals, and in trial-level matters involving complex legal questions, with a particular emphasis on matters involving bankruptcy, administrative law, constitutional law, criminal law and procedure, and federal Indian law. Ms. Spinelli has argued before the Supreme Court four times, in *Bank of America v. Caulkett*, *Clark v. Rameker*, *United States v. Tohono O'odham Nation* and *Rothgery v. Gillespie County*. She also represented the prevailing parties in *Stern v. Marshall*, *Schwab v. Riley*, *Hall v. Florida* and *Roper v. Simmons*. In addition, she has represented parties or *amicii* in many other Supreme Court cases, including the bankruptcy cases *Wellness Int'l Network Ltd. v. Sharif*, *Executive Benefits, Inc. v. Arkison*, *Law v. Siegel*, *RadLAX Gateway Hotel v. Amalgamated Bank*, *Marrama v. Citizens Bank*, *Marshall v. Marshall* and *Rousey v. Jacoway*, and she has successfully briefed and argued many bankruptcy appeals in the courts of appeals. Ms. Spinelli regularly speaks and writes on issues relating to bankruptcy law and Supreme Court and appellate practice. She received her J.D. from Harvard Law School, and subsequently clerked for Hon. Guido Calabresi on the U.S. Court of Appeals for the Second Circuit and for Justice Stephen Breyer on the U.S. Supreme Court.