1995

Myths and Moms: Images of Women and Termination of Parental Rights

Odeana R. Neal

*University of Baltimore School of Law, oneal@ubalt.edu*

Follow this and additional works at: [http://scholarworks.law.ubalt.edu/all_fac](http://scholarworks.law.ubalt.edu/all_fac)

Part of the Civil Rights and Discrimination Commons, Family Law Commons, and the Law and Gender Commons

**Recommended Citation**


---

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.
Introduction

For most of us, the word “mother” evokes a myriad of often conflicting images and emotions, expectations and disappointments, and gratitude and blame. What a mother is — our own mothers and the class of people who are mothers — means much more than that a woman has given birth. We expect mothers to provide their children with all the love, caring, nurturing, and emotional fulfillment that we perceive those children need and desire; we expect her to be all things that we want her to be when we need her to be them. A woman who can fulfill the expectations of her children and of her community is viewed as a good mother. If she cannot — or if she does not — she is bad. Mothers who are self-sacrificing, who place the needs or desires of their children before everything else, especially themselves, are the good ones. Mothers who decide that any aspect of their lives has greater value than, or is co-equal with their concern for their children, are the bad ones.¹

Notions of what constitutes a good mother are inextricably bound up with ideas about what constitutes a good woman. Many of these ideas come from traditionalists who believe in narrowly-defined roles for women. Our biology is seen as being our destiny: to move too far outside those pre-determined roles is viewed as being harmful for women and the larger society. Recently, however, a growing number of women who consider themselves feminists have been willing to consign women to similarly narrow roles. For these feminists, real women are those who are caregivers and nurturers at home and in the workplace.² Some would even agree with the traditionalists that the highest calling for a woman is as a mother.³ Real women and real mothers, however, are much more ambivalent about their relationships with their children and their status as mothers than traditional stereotypes and other pro-motherhood forces would have us believe.

My mother achieved her status as mother four months after marriage and three months after graduation from college. Her plans had been to spend this time exploring the world and exploring herself. Instead, she found herself with a new husband and often a sick child to take care of. After my parents’ divorce, my mother always spoke harshly about her pre-marital and marital relationship with my father. The harangue would always end, however, with her saying, “But I never regretted having my children.”¹ I cannot help but wonder whether that is true. Surely there must have been some yearning for what she gave up, regardless of the joy she may have found in being a mother. Other mothers with whom I have spoken have shared their ambivalence with me. One friend, a very new mother, said to me, “I love my baby. You know I do. But sometimes I look at him and think, ‘What have I done?’”¹ A woman at work stopped me one evening and asked me...

Odeana R. Neal* is an Assistant Professor of Law at the University of Baltimore School of Law.

---

“Mythers have been told that they must not resist impulses to control their children, but must make their children conform to societal expectations.
if I had any children. When I told her that I did not, she responded, "You are blessed. You may not think you are, but you are blessed. The problem with children is that they never go away." This woman is the mother of five adult children.

This article will discuss the role of images of mothers in American law and how women often have to reconstruct themselves to fit those images, even when they do not comport with women’s experience. It will first examine the American jurisprudential view of the relationship between parents, and particularly mothers, and their children. Parents are presumed to be the best caretakers for their children, and mothers to be the best caretakers of the caretakers. This position, firmly rooted in theories of natural law and property rights, declares the parent-child relationship fundamental. Although the state may infrequently interfere in this relationship of parental unit to child, and the fundamental relationship between the parental unit and child even may be severed if the state has a compelling interest in doing so, the state can and does interfere regularly in the mother-child relationship and, in some circumstances, terminates that relationship altogether. Often that termination is not based on the mother having harmed the child, but rather on the mother exhibiting the characteristics of being a bad woman. Since bad women can never be good mothers, their relationships with their children are terminated on that basis.

The Nature of the Parent-Child Relationship

Natural Law and Property Theories

In In re Lisa H., the Supreme Court of New Hampshire stated succinctly the American legal ideology governing the parent-child relationship: "[A] parent’s authority is not only a natural and essential right which is prior to the State itself, it is an obligation." Three major themes govern the relationship: first, that the parents have a fundamental right to their children and to authority over them; second, that the relationship does not derive from, but is prior to the state, and is "natural"; and finally, that the right to and the authority over children carries obligations to care for the children. American legal ideology concerning the nature of the parent-child relationship was imported from British common law, which was itself rooted in centuries-old ideas about the parent-child relationship. Intertwined with natural law notions were ideas that children were also the property of their parents, and more specifically, the property of the father.

Blackstone’s commentaries reflect the tradition of viewing the parent-child relationship as rooted in nature. He declares as fact that parents have natural affection for their children and that such natural affection causes them to discharge their obligations towards their children:

The municipal laws of all well-regulated states have taken care to enforce this duty of parents to care for their children: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural φιλοσύνη or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

Blackstone’s description of the common law also includes a view of the parent-child relationship as contractual by arguing that parents have entered into a voluntary obligation to care for their children by virtue of having begotten them:

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.

The result of Blackstone’s analysis is that parents and not the sovereign nor the state are ultimately responsible for the care of their children.

Contemporary American jurisprudence, though it permits state intervention in the parent-child relationship to an unprecedented degree, continues the tradition of viewing the parent-child relationship as one rooted in nature itself. Parents are viewed as the people who, by virtue of conception, know what is in the best interests of their children. In Meyer v. Nebraska, for example, the Supreme Court held that a state statute prohibiting teaching children German in school unconstitutionally infringed on their parents’ right to control their children’s education. The holding of unconstitutionality was based, in part, on the premise that adults have a right “to marry, establish a home, and bring up children.” Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, decided two years after Meyer, held that children could not be prohibited from attending parochial or private schools; the Supreme Court reiterated its earlier holding that parents had a right to direct the education of their children:

The child is not the mere creature of the state; those who nurture him and direct his destiny have the right,
coupled with the high duty, to recognize and prepare him for additional obligations.  

The Supreme Court's position has been echoed in Stanley v. Illinois, Lassiter v. Department of Social Services, and Santosky v. Kramer. The fundamental nature of the relationship is now firmly embedded in American law.

The natural law which governs the parent-child relationship simultaneously confers upon parents a kind of property interest in their children. Barbara Bennett Woodhouse suggests that as well as being premised on a natural law theory, Meyer and Pierce are also premised on a parental property interest in children. Granting parents control over their children also means that parents have control over their earnings and assets. Indeed, parents have a right to expect their children to care for them should they be unable to care for themselves. In this respect then, parents have an interest not only in their children as a divine right, but also because they have an interest in the tangible benefits that may be derived from their children.

The property interest in the parent-child relationship is, at least in part, the basis of the Supreme Court decision in Michael H. v. Gerald D. In that case, a child's birth father filed an action to establish paternity and visitation rights. Unfortunately, he was not the same man who was the mother's husband. A California statute created a presumption that the mother's husband at the time of the child's birth was the father of the child and did not permit a purported birth father to challenge paternity. The birth father sought to have the statute declared unconstitutional on the basis of its violating his substantive due process rights. After all, natural law should protect his rights to have a state-sanctioned relationship with his birth child. Moreover, the birth father had lived together with the child and her mother while the mother was separated from her husband; a true emotional relationship between them had been established.

The Supreme Court rejected the birth father's contention. It stated that the common law had created the irrebuttable presumption that a woman's husband was the father of her children, in part, to prevent children from being deprived of the rights of inheritance and succession. In other words, even though the natural law would seem to dictate that the relationship between the birth father and the child would be stamped with the state's imprimatur, the property interests involved superseded the natural law result. The right of the child to inherit property from the mother's husband was more compelling than the birth father's right to have a state-sanctioned relationship with his child. In addition, the mother's husband gained rights of inheritance from the child and denied the birth father any right to inherit property from his daughter.

The American law tradition bases the parent-child relationship both on theories of natural law and property law. The relationship is viewed as pre-existing the state.

Natural Law and Harm to Children

The American law tradition of the parent-child relationship has not always been beneficial to the children themselves. Declaring that parents are to be the only caretakers for their children has meant that practices such as infanticide, abandonment, exposure, mutilation, and other forms of physical and mental cruelty have been performed without legal intervention. One need only think of the mythological stories of Oedipus or Romulus and Remus to appreciate how stories of child abuse permeate ancient culture.

The American view of the parent-child relationship as being virtually inviolable continued until the dawn of the twentieth century. For example, criminal charges were brought against a father accused of beating his sixteen-year-old daughter. The girl testified at trial that he:

[W]as a man of bad temper and frequently whipped her without any cause; that on one occasion he whipped her at the gate in front of his house, giving her about twenty-five blows with a switch, or small limb, about the size of one's thumb or forefinger, with such force as to raise whelks upon her back, and then going into the house, he soon returned and gave her five blows more with the same switch, choked her, and threw her violently to the ground, causing a dislocation of her thumb joint; that she had given him no offense; that she did not know for what she was beaten, nor did she give her any reason for it during the time.

The father's conviction was overturned on the basis that the trial court's jury instruction was erroneous. The trial court had instructed the jury that the punishment need only be cruel and excessive to be criminal. In order to secure a conviction, the
reviewing court stated, the state would have to prove that permanent injury resulted, or was conducted with malicious motive or without corrective authority.29

On the one hand, then, there is an historical belief that parents are the best caretakers for their children. On the other, there is evidence that in many instances those "naturally" charged with caring for their children have failed to do so. Even now, and apart from those instances in which parents affirmatively abuse their children, there are numerous examples of individual parents or even entire societies which make it clear that caring for children is not a high priority. A study of the Ik, a small tribe in Uganda, for example, concluded that there was little parent-child bonding within the group.30 Children were viewed as competitors for food, were routinely turned away from the parental home at the age of three, and might be laughed at by adults if hurt or killed.31 Similarly, after the overthrow of the Communist regime in Romania in 1989, parents were willing to sell their children for video cassette recorders.32 Especially in societies in which resources are scarce, and even in some where they are not,33 children may have to be protected from their parents far more than they can rely on their parents to take care of them.

The recognition that parents do indeed abuse their children has resulted in a tension between the ideology of parents as the best caretakers for their children and a belief that when parents do not care for their children properly, either through neglecting them or through affirmatively harming them, the state has the obligation to care for the children. This tension is one of the reasons for the creation of the American juvenile justice system.

Under the parens patriae theory of the state's relationship to its citizens, the state has the power, if not the obligation, to protect its citizen children from abusive and neglectful parents as well as to protect the larger society from the effects of that abuse and neglect. From requiring that children receive childhood immunization as a pre-condition to receiving public education, to deeming certain child-rearing practices as wrongful, the state can and does control the manner in which parents raise their children. Still, American jurisprudence, and indeed Americans themselves, have been unwilling to declare that this kind of state intervention amounts to the state being a super-parent, the parent which has the authority and the enforcement capability to do those things which, in the state's conception, are in the child's best interest. Although briefly in vogue,34 the concept of parents as simply being the state's caretakers for children, has come to be seen as almost Orwellian.35

Whether parents are deemed to have a fundamental right to the care of their children or whether the state is seen as a super-parent for whom parents care for children, there are special expectations of mothers. Their role in the raising of children is deemed different than that of fathers, and failure to live up to those expectations can result in the social and legal sanction of women.

The Role of Mothers in the Parent-Child Relationship

Mothers are seen as being better equipped — physically, psychologically, emotionally, and mentally — to take primary responsibility for raising their children. This is so even though the only thing that, post-birth, a mother can do that a father cannot is lactate. Fathers who provide for their children materially are often commended for being good fathers; mothers who provide only materially for their children are seen as having deprived their children of the care and attention that they need.

Historical and cultural antecedents have helped create mythologies of motherhood. The Biblical story of Solomon's judgment provides but one of many cultural exemplars of good and bad mothers. In that often-told story, two women come to Solomon each declaring that a male child belongs to her. Solomon decides that the "true" mother of the child is she whose "bowels yearned" for her child at the prospect of his being harmed by Solomon's proposed judgment of dividing the child in two.38 The true mother — the good mother — is she who is willing to give up being a mother to protect her child. The good mother is she who is willing to give up her power and possession for the sake of her child. The non-mother — the bad mother — on the other hand, is she who is willing to do violence to her child.39

In addition to the story of the true mother in the Solomonic story, Moses's birth mother, who protected her child in spite of the Egyptian edict that he be killed,40 and his adoptive mother, whose maternal instinct compels her to care for a child she found floating on a river,41 serve as cultural exemplars of good mothers. Indeed, Biblical stories proclaim that motherhood is a special blessing bestowed upon those women who have obeyed God;42 those who are disobedient may be made barren.43 The mythology creates mothers who are blessed women who should be willing to give up advantages and privileges because of their status as mothers.

American jurisprudence has built upon and added to mythologies about mothers and mothering. Supreme Court decisions which have characterized the mother-child relationship have outlined what the proper role of women as mothers is. In Bradwell v. Illinois,44 for example, an opinion concurring in Illinois' denying a woman a license to practice law says:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a
woman adopting a distinct and independent career from that of her husband . . . [T]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.45

Similarly, in *Muller v. Oregon*, the Supreme Court declared unconstitutional state restrictions on working hours for men, but not restrictions on women:

Even though all restrictions on political, personal, and contractual rights were taken away, . . . it would still be true that [woman] is so constituted that she will rest upon and look to [man] for protection; that her physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the well-being of the race — justify legislation to protect her . . . [T]he limitations . . . are not imposed solely for her benefit, but also largely for the benefit of all.47

Celebration of women’s highest calling being mothering, and of women as the best caretakers for their children extends into the latter twentieth century. During the 1970s and 80s, there was a plethora of media coverage concerning the harm to children of having their mothers work, as well as popular literature that warned women that they should remain home with their children. In an era when women continue to strive for equality of dignity and respect in their public and private relationships and enterprises, women have been bombarded with stories warning that they should opt for motherhood before careerism.48 Society expects the new mother’s primary responsibility and interest to be her children.49 Mothers have been warned about the harm that will befall their children if they are too career-oriented;50 good mothers are those who sacrifice their ambition for their children. A working mother is a good mother only if she would rather be at home raising her children, but must work outside the home out of economic necessity.51

During this time, there was rarely, if ever, an inquiry into whether children needed the regular presence of some adult (not necessarily the mother) or whether there might be similar damage to a child because of a father’s absence during the day. For example, during the January, 1991 Persian Gulf War, in which a number of female members of the armed services served, there was much concern about the effect of the separation of mothers from their children, but not as much concern about children’s separation from their fathers. One article in the *Washington Post* during the war described the author’s debilitating trauma and hospitalization because of her father’s absence while he fought overseas in World War II. On the basis of the harm suffered due to her father’s absence, she concludes that mothers should never be sent to war.52

The controversy surrounding poor, African-American “single-parent (female-headed) households” and their effect on young African-American men53 represents a convergence of the ideology of both the traditionalists and the feminist pro-motherhood forces in placing the responsibility for raising children on mothers’ doorsteps. Young African-American men are at greater risk of dying as the result of homicide than any other group of people in the United States and at greater risk of dying from homicide than by any other means.54 The traditionalists argue that these death rates are the result of the refusal of women to behave in traditional ways. If they would not have sex prior to marriage,55 if they would act, within the marriage, in a way that would not alienate their husbands and drive them away,56 if they would acknowledge their limitations in being able to provide for their children materially and the necessity of having a man present to fulfill a financial role, and if they would understand the importance of having a man present to serve as a good “role model” for their sons,57 their children would grow up to be responsible citizens, free from high risk of death. Their failure to act as good women makes them bad mothers, and their bad motherhood harms them and their children.

The ostensibly feminist position does not blame the poor African-American woman for being a bad woman. It is not, so the argument goes, the fault of single African-American women that they cannot be good mothers, they simply have not been given ample opportunity to do so. Better funding for education, better housing, greater financial resources in the household (especially if the children’s fathers are ordered to pay reasonable child support), and better self-esteem would allow those women to be good mothers and for their children to have healthy childhoods. Nevertheless, these feminists still retain an ideal of motherhood that is very much akin to that of the traditionalists — they seek to make poor, unmarried African-American women as much like middle-class, married white women as possible. They assume both that motherhood is a desired state and that the ultimate responsibility for raising children rests with mothers.58

In addition to media images of motherhood, Freudian theory has significantly shaped the way American culture perceives the appropriate role of mothers. Persistently, psychiatrists, both in individual sessions with patients and in their writings,59 have blamed mothers as the source of virtually all major behavioral
disorders. Television talk shows, magazine stories, and daily conversations all leave mothers in a blame-worthy position. If 96% of what she does is right, the 4% she does imperfectly is the reason for the bad things in us. It is difficult to state with precision what constitutes good and bad mothers; because of the mythological status of mothers, there have been subtle shifts in good mother and bad mother imagery over time and in particular cases. The same actions committed by two different women can be considered either good or bad. For example, is a mother who spans her child — or commits against a child the same act which would be criminal if committed against an adult — a good mother or a bad one? Does the determination lie in whether the mother loves her child, or in whether she says that she committed the act for a good reason? Actions that a mother takes which are culturally acceptable distinguish the good mother from the bad. Women who are able to reshape themselves into the myth of the good mother thereby become good mothers.

Adrienne Rich states the “unexamined assumptions” about motherhood:

[A] “natural” mother is a person without further identity, one who can find her chief gratification in being all day with small children, living at a pace tuned to theirs; that the isolation of mothers and children together in the home must be taken for granted; that maternal love is, and should be, quite literally selfless; that children and mothers are the “causes” of each others’ suffering.

Conversely, in her book on outcomes of mothers in child custody disputes with their children’s fathers, Phyllis Chesler describes five stock types of bad mothers: the sexual mother; the uppit mother; the lesbian mother; the poor mother; and the abused mother. In other words, mothers who are altruistic and self-sacrificing, who do not challenge the blessing of their status as mothers, and who behave as good women are good mothers. Bad mothers are those who challenge patriarchy, who live their lives outside prescribed codes of conduct. Although mothers — or at least the good ones — are the ones who are supposed to have the natural instinct to know what is best for their children and so are specially situated to care for them, mothers are, ultimately, not the people who set the standards for motherhood. Indeed, determination of whether a woman is entitled to be a mother is set by a standard externally imposed. At a time when women were the keepers of the hearth and home but had no final authority in determining how their children should be cared for, they were essentially raising the children for the father. The father was, after all, the property owner who had power over issues of education, financial provision, and even inheritance. The mother was the person who raised the children to be able to receive whatever their father thought was due them or prepared them to take hold of the property they would receive as adults.

Slave mothers in the United States are another example of how little control the mothers charged with rearing children actually had over them. Slave mothers were often charged not only with rearing their own children, but raising the children of their masters as well. In each case, these women were seen as having skills that would allow them to raise children well. Raising the children well, however, meant raising them in accordance with a standard that they themselves did not set. Slave children were to be raised in a manner that would increase their value as assets to the master; white children were to be raised in a manner consistent with their place in the larger society. Slave women had no role in the creation of either of these standards.

Today, mothers are similarly charged with raising their children to meet standards that they did not create. National or community ideals now replace the father as the entity to whom mothers must answer. The United States in recent years has taken the position that mothers must be aided in caring for their children as a matter of national interest; they are preparing the children for their inheritance of the country. Smaller cultural groups make claims that mothers are raising children for the future of the group.

The role and status of mothers are therefore elevated by an ideology which makes women responsible for the future of the country or of the cultural group. The force and importance of these stereotypes are necessary to convince women that their unpaid labor is natural, desired, and important. In an analysis similar to Blackstone’s, women are also told that because they have become pregnant and have given birth, they have a natural obligation to raise their children. But because the state has a great interest in ensuring that children are raised ultimately to serve a national interest, the state can and does interfere in the natural relationship between mothers and children and, indeed, may terminate the relationship altogether.

Terminating Parental Rights

Termination of parental rights is usually based on parental abandonment, neglect, or mistreatment. Generally, some type of hearing determining that the child has been abandoned, neglected or abused, and placing the child under the jurisdiction of a court — but not yet terminating parental rights — has taken place prior to a termination hearing. As part of the same proceeding, or perhaps pursuant to a different proceeding, a parent’s right to parent is terminated. This means that the parent no longer has a right to participate in the life of the child in any way unless the person or agency to whom custody of the child has been granted.
gives permission for the child to see the parent or have the parent be a part of the child’s life.

As stated earlier, the relationship between parents and children is viewed as fundamental. According to doctrinal constitutional theory then, this relationship should not suffer state interference absent some compelling state interest. Constitutional theory generally requires that state action which affects a fundamental right be narrowly tailored to have the least effect on the fundamental right while still fulfilling the state’s interest. Termination of parental rights, therefore, should occur only when less drastic alternatives to complete severance of the parent-child bond have been explored and rejected.

It is understandable why some judges would manipulate or ignore the constitutional issues in making a decision about terminating the relationship between parents and children. Virtually all children involved in termination of parental rights proceedings have been harmed or are perceived to have been harmed by a parent; that harm justifies the state’s intervention in the first place. Termination comes often at a point where foster parents or other adults wish to adopt the child or when the child has been in foster care for a significant period of time. The judge, faced with the choice between an adult who wants custody of the child but who has harmed the child and who lives in unfortunate circumstances on the one hand, and an adult who has not harmed the child and who often has better economic and other circumstances on the other, wants the best for the child.

In dealing with matters of child abuse and neglect, most analysts place the child at the center of their appraisal. Critics of current statutory schema argue not that constitutional law principles are being upset by termination of parental rights on a showing of less than a compelling state interest, but that children are more often than not better off if they are able to retain familial ties with their parents. Cases indicate, however, that constitutional theory is being turned on its head in this area. Mythologies of good mothers are determining what is in the best interest of children. In re Luis.

**Mythologies of good mothers are determining what is in the best interest of... children.**

"Bad" maternal behavior actually causes harm to the child. Several authors have written about how a presumed bad effect on children may result in the termination of the parental relationship between children and those women who abuse alcohol and drugs, or those who are mentally ill or incarcerated, even when there has been no showing that the child has been harmed. In making their decisions, judges often rely on the myths of good mothers and bad mothers and in so doing, perpetuate and re-create the myths of motherhood. Their determination that a mother is a bad mother (or a good one) is often pre-rational; by feeling that a mother either fits or does not fit into mythical images of the good mother, judges determine that children should or should not be permanently removed from their mother’s custody.

In their decisions, judges use language that evokes emotional responses to the question of whether to terminate parental rights. This use of language is important; as writers of texts, these judges include those facts that they feel are necessary to understand why they have come to their conclusions. In cases terminating parental rights, however, the judges do not feel compelled to define the nexus between the behavior or status of the mother and the harm to the child. Because they assume that their readers have internalized the same mythology, they often give information that appeals to the reader on a non-rational level: once you know this one piece of information about this mother (or these pieces of information), it is clear what the result in this case should be.

In re Luis C. serves as an exemplar of how a judge’s pre-rational thinking and images of good and bad mothers resulted in termination of the mother’s parental rights. In that case, the Supreme Court of Connecticut was called upon to determine whether Luis’s mother, Elba M., should have her parental rights terminated. The department of youth services had filed a petition alleging that Luis was a neglected child in April, 1982. At that time, Luis was eighteen months old. The petition alleged that Luis had been physically abused; the opinion does not describe the alleged abuse, nor does it indicate whether Elba or Luis’s father was the abuser.

One month after the petition was filed, Luis was placed into the home of foster parents. A hearing on the petition in September, 1982 determined that Luis was a neglected child. The trial court determined that Luis would remain in the custody of the department of youth services for eighteen months; that commitment was extended by subsequent orders until February, 1987.

Prior to the expiration of the trial court’s order of commitment in February 1987, the commission of the department of youth services filed a petition to terminate the parental rights of
of Luis's parents. The petition, filed in October, 1986, alleged that the now-six-year-old Luis had been abandoned by his father, and that Elba's parental rights should be terminated because she, as the parent of a previously-adjudicated neglected child, had "failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the child's age and needs, could assume a responsible position in the child's life" and because "there was no ongoing parent-child relationship." The trial court terminated Elba's parental rights.

Undoubtedly, return of Luis to Elba's custody after such a lengthy period of living with his foster parents would be traumatizing to all the parties involved. Luis was almost seven years old by the date of the hearing on the petition to terminate parental rights, and had lived with the same foster parents since he was nineteen months old. Nevertheless, the theory of termination of parental rights states that merely determining that a child might be better off in the care and custody of one person rather than another does not justify the termination of parental rights. Instead, because of the fundamental nature of the relationship between parents and children, there should be some compelling state interest, namely harm to the child, which would justify state intrusion upon the relationship between parents and children and termination of parental rights should be the alternative most tailored to the state's interest in protecting the child.

Interestingly, the appellate court opinion does not indicate that there was a fear that Luis would be physically harmed if he were to return to his mother's custody. This is so even though physical abuse served as the basis for the original petition which removed Luis from his mother's care and even though the appellate court opinion indicates that Elba did not regularly attend the parenting skills classes at a local health services center. Instead, the appellate court inspected the relationship between Luis and his mother at the time of the decision, and determined that that relationship should be severed.

One part of the evidence used by the court in determining that Luis's return to his mother would be harmful was the testimony of several counselors who had worked with Luis and Elba. One counselor testified that there was "very little interaction initiated by the mother with Luis" and that "Luis reacted negatively toward his mother." This same counselor further testified that "no meaningful relationship between Luis and his mother would be likely to develop." Another counselor testified that "Luis treated the respondent as a friend and not as his mother," while yet another characterized the relationship between Luis and Elba as "friendly" but not that of mother and child.

The appellate court used this testimony by the counselors to affirm the trial court's decision to terminate Elba's parental rights. What the court does not tell us, however, is exactly what this testimony means. What, for example, does it mean to treat one's mother as a friend? The phrase is one often heard in our society, and has negative connotations. But does treating another as a friend mean that one loves, trusts, and respects that person and perhaps considers the other one an equal? Does it mean that there was a non-hierarchical, or at least a not-so-hierarchical relationship between this mother and child? If so, why should this be used as the basis for determining that Elba should no longer have access to her child?

The idea that "mother" and "friend" are distinct relationships is one example of the mythical and evocative speech used to perpetuate images of motherhood. It is the responsibility of mothers to instill hierarchy within their children; mothers are expected to subjugate children's wills to their own, so the myth tells us. From Puritan New England, where manuals advised parents that children, who came into the world with "stubbornness and stoutness of mind" must be "beaten down" to the mothers of the frontier West who were advised that children must be "broken," mothers have been told that they must not resist impulses to control their children, but must make their children conform to societal expectations. This new world expectation that children's lives were a preparation for their future lives, and not a separate and distinct time, was one that mothers were to fulfill.

Thus, just as Elba's parental rights could be terminated on the basis of her non-hierarchical relationship with her child, so too, in In re E.M., the mother's relationship with her child permanently severed. There, a mother's inability to control her children was used as a basis for termination of parental rights. As the caseworker who testified stated:

If [the children] were fighting over a toy, she would remove the toy. When it got to issues like they were leaving the visiting room, it was more difficult, because the options that she was aware of and the authority that she had over the children was minimal, so she was unable to control the children.

The mythology of the relationship between mother and child is that it must be hierarchical. There is an expectation that parents, and particularly mothers, will teach their children to fear as well as respect them, and that their children must obey authority. Families which affirmatively refuse to recreate hierarchy in their own households are often viewed as being dysfunctional. It would appear, then, that in order for a mother to be a good one, she must insist on having her child fear her more than she must insist that the child be her friend.

Another reason given for affirming the trial court's decision to terminate Elba's parental rights in In re Luis C. was based on the testimony of a "specialist in cultural psychiatry." The psychiatrist, according to the trial court testified:
that it would be “disastrous” for Luis to return to an Hispanic cultural environment in light of the fact that Luis had spent the previous four and one-half years in an Anglo-American environment with his foster parents.99

The trial court does not seem to think it necessary to reveal what “disaster” would befall Luis if he were to return to an Hispanic household; it assumes that readers of the decision would somehow know. The court mentions that Luis had grown up in a non-Hispanic foster home and that his relationship with his mother had suffered, but fails to indicate how Hispanic culture would adversely affect Luis.

The message the court sends in its decision to terminate parental rights on this basis is that there is something bad, or at least less desirable, about Hispanic culture than Anglo culture. The court does not indicate that there exist language barriers between Luis and his mother. It does not indicate why Luis was not placed in a foster home in which Hispanic culture would play a role.100 Nonetheless, there is, by its lack of connection to any specific harm, an assumption that Luis will be harmed by his return to a household of color.

What part of the mythology forms this portion of the court’s opinion? The evocation of the image of a household of color creates, for many, pre-rational negative conclusions. This household must be worse than a white household and, given a choice between a white household and one of color, the white household should be favored. After all, it is more “normal” to be white than it is to be anything else in the United States. Why not allow a child to grow up normally then, rather than to subject him to the abnormality of being of color? Similarly, in In re Sanjivini K.,101 an East Indian woman stood in danger of being deported because her student visa had expired. The mere prospect of her return to India with her child prompted the filing of a petition for neglect. In other words, having a child live in a country and a culture seen as inferior to that of the United States is enough to show that the parent has neglected the child.

Dorothy Roberts has written that women of color are seen as naturally being inferior parents.102 Although seen as appropriate caretakers for white children, women of color are perceived as being less able to care for their own children, perhaps because they do not operate under the supervision and control of white people as they do when working in the homes of white people. The mythology about people of color in general, and mothers of color in particular, serves as a mechanism to permit a court to state, unhesitatingly, that return to a home because of its culture would be disastrous for a child.

A final reason given for determining that it was in Luis’s best interests for his relationship with his mother to be permanently terminated was that she had had problems obtaining housing because of a lack of money and, although she had obtained an apartment in public housing, “the street on which [she] lived was considered the worst street in the project because of a high crime rate.”103 In other words, it would not be a good idea for Luis to live with his mother because she is poor and cannot afford to live in a safe neighborhood.

Again, images of mothers tell us that the best of them are not poor, or certainly not among the urban poor. Moral responsibility for poverty is an American notion that was imported from England. Poor laws and almshouses were created on the basis of the belief that poverty resulted from immorality. The trend continues in this country into the latter part of the twentieth century. The “deserving poor” are separated regularly from the “undeserving poor.” The undeserving poor are poor because of their own weakness.104 It is no accident that among those undeserving poor are women raising their children alone: their immorality is what has made them poor.

Certainly poverty has an impact on any parent’s ability to raise a child. Still, there is no impetus to remove all poor children from their homes. Nor is it clear that being raised poor means that a child has been harmed. But in Luis C., the mere fact of Elba’s poverty is used as a justification for permanently terminating her relationship with her child.

We have seen, then, that a mother’s being of color, being poor, and not abiding by hierarchical precepts of parenting may end her relationship with her child. The relationship between these factors is one falling outside the patriarchy, of being an outlaw against misty images of what a good woman should be. As a result, the perception that a mother has placed her own needs or desires before those of her child may also place her relationship with her child at risk, even though the child may be at least an indirect beneficiary of the acts. In In re Sanjivini K., for example, a mother completed her education while her child remained in foster care. Although she maintained contact with her child during the time she was in school with letters, telephone calls and visits, and although she completed the education plan that had been made a prerequisite to having her child returned to her custody, she was condemned by the trial court for becoming educated.105 The trial court determined that her child, “instead of benefiting from the mother’s plan, was actually ‘a victim of the mother’s own ambitions, however laudable.’”106 This mother is
Judicial systems generally do not seek to discover what role the judges about the emotional, psychic, and other difficulties in mothering to the bench, female judges may bring with them particular knowledge of child-rearing. I would be appropriate to draw on that knowledge in making decisions and to contextualize them in terms of their real lives. But even if the child were not a beneficiary, even if the only person who were to benefit was Sanjivini’s mother, does that mean that the child has been harmed? And why does that mean that the mother is a bad mother?

Women whose lives and interactions with their children challenge patriarchy are perceived as bad women. Judges’ perceptions of them as bad women causes them to conclude that they must be bad mothers, even when no harm to the child has been demonstrated. How, then, can judges be convinced to see “bad” women as “good,” or at least adequate mothers when determining whether or not to terminate their parental rights?

Conclusion

Just as it is difficult to say with precision what creates the mythology, it is also difficult to create solutions that remove myths from the determination of whether the parent-child relationship should be terminated. Part of the problem is that courts, according to states’ termination of parental rights statutes, often do not have the authority to fashion remedies that might be most beneficial to parents and their children, particularly if the parent, for some reason, cannot take full custody of the child, but still maintains a significant relationship with the child. Perhaps as Marsha Garrison has written, it may be that permanent termination of parental rights is never an adequate remedy. If a court feels that the only choices it has are either to terminate parental rights or return a child to a dangerous home, parental rights will be terminated.

In discussion about this article, a number of people have suggested what my law school evidence professor suggested: get better judges or perhaps, get more women judges. Marie Ashe suggests that learning more about mothers and mothering through reading literature would be an approach to teaching lawyers and judges about the emotional, psychic, and other difficulties in child-rearing. Certainly, learning more about who real mothers are as opposed to culturally-created mythical mothers would be an important step in learning how to assess the behaviors of mothers and to contextualize them in terms of their real lives.

Nevertheless, it is not necessarily the case that female judges will be less myth-bound in their decision-making in termination of parental rights cases. Gender bias reports prepared by state judicial systems generally do not seek to discover what role the gender of judges has in their decision-making, if any. Although female judges may bring with them particular knowledge of mothering to the bench, it is not clear that they will deem it appropriate to draw on that knowledge in making decisions nor is it clear that the fact that they are mothers will not cause them to hold other mothers to unrealistic standards that they believe they themselves have met. Indeed, some studies indicate that female judges may adhere to cultural and societal norms in their decision-making even more so than their male counterparts.

Statutory reform in the area might also be in order, but it is probably the case that the reform would still allow judges to misjudge women in termination of parental rights cases. In the general precursor to termination of parental rights for reasons other than abuse, namely neglect, statutory reform underwent major changes during the 1970s and 1980s. Instead of statutes which directed judges to look to parental behavior to determine whether a child had been neglected, judges were directed to determine whether the child had been harmed, regardless of the parents’ behavior. These statutory changes have had little effect in the actual behavior of judges; however, in neglect cases (as well as child custody disputes), judges often construe bad parental behavior as being necessarily harmful to children. Because of the infinite malleability of statutory construction, judges will still have the ability to terminate parental rights even if they may do so only upon an explicit showing of harm.

If, however, judges were permitted to terminate parental rights only upon a showing of physical harm to a child, many abuses might be curtailed. Although requiring such a showing might result in emotional harm to a child — harm which can be as detrimental to a child as physical harm — it is difficult to say whether it is indeed the mother’s behavior which is causing the emotional damage, especially given the high rates of mental illness and emotional difficulties members of the larger society share.

Policy-wise, the provision of additional services in the home would eliminate many of the problems raised in the cases reviewed. If a mother does not have the financial resources to provide her child with a stable environment, she should be provided with those resources. If she has a drug-dependency problem, she should be provided with rehabilitative and other services that will provide meaningful medical assistance that takes into consideration her gender and her maternity. If our society truly believes that mothers are to be the primary caretakers for the future of the country, each of them should be provided with the resources to do her job.

In this discussion of motherhood, some may argue that I cannot speak in an authentic voice because I am not a mother. Nevertheless, I am a woman. To the degree that images of motherhood are imposed on women, images of non-motherhood are equally imposed on women. The societally-imposed gulf between mothers and non-mothers leaves little room for women to be honest about their ambivalence towards child-bearing or our desire not to bear children, and may limit the ways in which we can conceive of ourselves as women. Only by uncovering,
examining, and reclaiming motherhood may all women enjoy the full possibility of existence.

Notes

*The author is grateful for the research assistance of Faith Eidelman, Betty Stilt, and Vanessa Vick, without whom this work could not have been completed. This article is dedicated to the author’s mother, Betty J. Hill Neal, for sharing her thoughts and ideas about mothering, and the author’s sister, Niki Neal, for demonstrating all the ways one can be a good mother.

1. This is not to say that there are not somewhat analogous expectations of fathers. Many men put aside other desires to fulfill their responsibilities toward their children. Still, a father’s expected responsibilities are generally financial; fathers are not expected to provide the emotional care that a mother is. A father who spends little time with his children, but who provides for them financially, is not seen as a bad father in the same way that a mother who did the same would be. See Karen Czapaniski, Volunteers and Draftees: The Struggle for Parental Equality, 38 U.C.L.A. L. Rev. 1415 (1991).

2. See Carol Gilligan, In A Different Voice (1982). Her work popularized the idea that women behaved according to a different ethic than men. Her thesis was that girls and women possess an ethic based on connectedness and relationships, as opposed to a male ethic of justice and individuality.


4. See Lucy R. Fischer, Linked Lives: Adult Daughters and Their Mothers 201 (1986) (“[Women’s] commitment to and involvement with their children stretches over the length of their lives.”).


6. Id. at 1006.


8. 1 BLACKSTONE’S COMMENTARIES 447 (Tucker ed. 1803). The natural law basis of the parent-child relationship was codified as early as the Seventeenth century. See William Gouge, Of Domestical Duties Eight Treatises 210 (1622) (“[I]t was the natural love fast fixed in their hearts by God which made many parents think no pains, cost or care too great to undergo for their children.”) and Thomas Gataker, MARRIAGE DYTIES BRIEFLY COVED TOGETHER, OVT OF COLOSSIANS, 3:18-19, 37-38, 44 (1620) (stating that parents “delighted in their children, not primarily because of their good qualities but because they were theirs”), quoted in Ralph A. Houlbrooke, The English Family: 1450-1700 135 (1984).

9. 1 BLACKSTONE, supra note 8, at 446-447.

10. Viewing the parent/child relationship as being rooted in nature itself, however, was not universal. Plato, for example, in describing an utopian republic, thought that “natural” parent-child ties should be severed, “the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent.” Plato, The Republic, quoted in Meyer v. Nebraska, 262 U.S. 390, 401-402 (1923). Plato does not stop there, however; he continues:

   The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.

But cf. Cicero (“Our parents are dear, dear are our children . . . [N]ature implants in man above all a strong and tender love for his children.”).


12. Id.


14. 405 U.S. 645 (1972) (holding that in a dependency proceeding, an unmarried father may not be deprived of his right to a hearing to determine unfitness by virtue of a statutory presumption of unfitness).

15. 452 U.S. 18 (1981) (emphasizing the fundamental nature of the parent-child relationship but holding that due process does not require that parents be furnished with an attorney in every parental rights termination hearing).

16. 455 U.S. 745 (1982) (holding that a New York statute which permitted termination of parental rights on a finding by a fair preponderance of the evidence that permanent neglect had taken place denied due process to parents).

17. See Francis B. McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 Ga. L. Rev. 975 (1988) (challenging the characterization of the Supreme Court opinions as holding that parental rights are fundamental. She notes that this “fundamental” right is infringed upon regularly with compulsory vaccinations, school attendance, etc., which would seem to indicate that the relationship is not fundamental at all). Still, it is clear that the Supreme Court believes that it is a right that shall not be infringed “absent a powerful countervailing
interest.” Lassiter, 452 U.S. at 27.
20. Id. at 115. The presumption could be challenged unilaterally by the husband of a child’s mother by claiming that he was sterile or by seeking to have another man named as the child’s father within two years after the child’s birth; the mother of the child could challenge the presumption only if the child’s birth father signed an affidavit of paternity.
21. Id. at 110.
22. Id. at 125.
23. See also In re Mullins, 606 P.2d 573, 574 (Okla. 1980) (father’s parental rights terminated on the basis of his willful failure to contribute to his children’s support even though there was no finding that the children were deprived; court determined that it would be "ludicrous" to require such a finding given the mother’s good care for the children, and that to require the finding "would not only [allow the father] to escape his responsibilities, but continue to enjoy the benefits of parenthood, including visitation, rights of inheritance and rights to the children's earnings").
25. In this story, Oedipus was abandoned by his parents, only to be rescued by an anonymous family.
26. These brothers were said to be the founders of the city of ancient Rome. They were abandoned in a forest, the legend goes, and raised by wolves.
27. 95 N.C. 588 (1886).
28. Id. at 588-589.
29. Id. at 592-593.
31. Id.
32. Marilyn Greene, Baby Boom Going Bust — Scandals put Romanian Adoptions in Limbo — New Scrutiny Entangles U.S. Families, USA TODAY, June 20, 1991, at 1A (reporting that Romanian parents were “hawking” their children for a going rate of $1,800, including one couple found trying to sell their child for $500 in order to buy a video cassette recorder); Robin Harvey, Shame of Romania’s “Barter Babies,” TORONTO STAR, March 31, 1991, at A1 (reporting that Romanian babies were being sold for between $500 and $20,000).
33. One exception is the Mundugumor people of New Guinea who were studied by anthropologist Margaret Mead. Although the society lives with more than enough resources, the society itself has an intense dislike for children. SCHAFFER, supra note 30, at 84.
34. See HERBERT LOU, JUVENILE COURTS IN THE UNITED STATES (1927).
35. When I posed to the students in my Juvenile Justice class, for example, a world in which birth parents would have their children removed from them upon birth unless they were able to produce a previously received “parenting license,” one of the students accused me of being a fascist. But see Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. PA. L. REV. 1349, 1356-1357 (1982) (arguing that families operate as agents of the government in child-rearing). See also Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549 (1990) (holding that mother whose child was returned to her custody after a determination that she had abused the child was merely custodian of the child on behalf of the department of social services).
36. I use the word “mythologies” here not only to describe ancient texts, but also as a means of understanding how these stories play a role in our lives and are regularly re-created to give new understanding to our lives. “Myths are living creations of a culture, and viewed from within the culture, they represent core values that some also may view as central truths. In this sense myths are eternal; they explain the past, present, and future.” Jane Rutherford, The Myth of Due Process, 72 B.U. L. REV. 1, 3-4 (1992).
38. 1 Kings 3:26.
41. Exodus 2:5-10.
42. See, e.g., Genesis 16:9-10 (Hagar is promised a “multitude” of descendants if she will return to servitude as God commands); Luke 1:26-38 (Mary is promised the maternity of the Messiah if she accepts God’s will).
43. See, e.g., Genesis 20:17-18 (women were “healed” so that they “bore children” after correcting transgression against God). See also ADRIENNE RICH, OF WOMAN BORN 119 (1986) (stating that a woman’s barrenness is a curse because, as the means of reproduction, she hampers the man’s ability to enhance his position in the world through children. In fact, in some regions in the Middle East to this day, “God is believed to strike a woman barren as punishment for some impiety . . . .”).
44. 83 U.S. 130 (1872).
45. Id. at 141.

The Kansas Journal of Law & Public Policy
46. 208 U.S. 412 (1908).
47. Id. at 422.
48. See SUSAN FALUDI, BACKLASH at 27-29 (1991). Focusing on the 1980s, Faludi cites a New England Journal of Medicine story which inflated statistics concerning infertility in women in their late 1930s and early 40s and which urged women, therefore, to have children before embarking on their careers.
49. See Julia Kagan, Survey: Work in the 1980s and 1990s, 8 WORKING WOMAN 18 (Aug. 1983) (reporting that virtually all respondents to survey agreed that a woman's first responsibility is the care of her children).
50. See FALUDI, supra note 48, at 27-29, 41-45 (1991) (citing media stories which warned of potential harm to children in day care even though children were more likely to be sexually and physically abused in their own homes).
51. The reactions to the child care arrangements of Zoe Baird, a nominee for Attorney General under President Bill Clinton, exemplify the hostile reaction to women who work because they wish to. Baird, an attorney at a large corporation, earned half a million dollars a year; her husband earned slightly over $100,000 annually. When it was revealed that Baird had hired illegal aliens to take care of her children, the public reacted negatively not only to the fact that she had broken the law and failed to pay taxes as required, but that she was working at all. On the other hand, and despite survey responses of Americans that their families are the most important aspect of their lives, most Americans would be willing to sacrifice time with their families if their jobs would pay them more money and grant them higher prestige, two characteristics of Baird's job. See Norval D. Glenn, What Does Family Mean?, AMERICAN DEMOGRAPHICS, June 1992, at 30 (survey of American attitudes on the family).
53. Much less attention is paid to the well-being of young African-American women, except to the extent that there is concern about teenage pregnancy. Still, African-American girls are being incarcerated and murdered in dramatically increasing numbers.
55. See Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 GEO. L.J. 1499, 1520 (1991) (arguing that the Supreme Court's opinion in Dandridge v. Williams, 397 U.S. 471 (1970), which upheld Maryland's statutory scheme of not providing Aid to Families with Dependent Children to families with more than six children, despite the acknowledged need, is based, in part, on the premise that the morally weak, and therefore poor, women need financial incentives to make them refrain from having sex); Chambers v. Omaha Girls Club, 834 F.2d 697 (8th Cir. 1987) (holding that Title VII of the Civil Rights Act does not forbid the firing of an unmarried, pregnant, African-American woman on the basis that she is a negative role model).
56. See SHAHRAZADE ALI, THE BLACKMAN'S GUIDE TO UNDERSTANDING THE BLACKWOMAN (1989), in which the author argues that African-American women should act in a submissive manner, including tolerating physical abuse, in order to keep a man in the home.
57. Vice President Dan Quayle's remark that a television situation comedy denigrated the role of fathers was directed as much towards African-American women as towards the white mother in the program. In addition, the Academy-Award nominated film "Boyz N the Hood" celebrated the presence of a father in the home and contrasted it with the deaths of those young men who were being raised solely by their mothers.
58. Invoking traditional notions of motherhood to promote pro-woman change is not new. At the turn of the century, women interested in changing the practice of awarding custody to fathers in child custody disputes invoked traditional images of motherhood to stress the importance of the mother's nurturing and caregiving roles to the children. See Martha Fineman, The Neutered Mother, 46 U. MIAMI L. REV. 653, 656 (1992).
59. See NANCY J. CHODOROW, The Fantasy of the Perfect Mother, in FEMINISM AND PSYCHOANALYTIC THEORY 79-96 (1989) (stating that psychoanalytic theory posits that mothers are, on the one hand, all powerful because of the profound influence that they can have on their children, and so are appropriately blamed if their children have psychological problems. On the other hand, some feminist writers have concluded that women are powerless in raising their children because of the role of patriarchy governing their lives).
60. See, e.g., Paula Caplan, Take the Blame Off Mother, 20 PSYCHOL. TODAY, Oct. 1986, at 70 (writing that in a review of 125 articles in a study, mothers were held responsible for seventy-two different kinds of psychological disorders, mothers' emotional functioning was analyzed (whereas "fathers were often described mostly or only in terms of their age and occupation") and not one mother was described as emotionally healthy); See also, HANS SEBALD, MISM: THE SILENT DISEASE OF AMERICA (1976) (one example of a text that blames overmothering for emotionally unhealthy children).
61. One example of this was seen in a segment on a television program about child abuse. One woman spoke about how her physical abuse of her children resulted in one of her children's being killed and her later being convicted for the child's murder. The conviction was overturned on appeal. The appellate court noted that the mother stayed at home with her children, kept them well dressed and well fed, and was therefore a good mother.
63. PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR...

64. See TAPPING Reeve, THE LAW OF BARON AND FEMME 431 (3d ed. 1862) (“Mothers, during coverture, exercise authority over their children; but, in a legal point of view, they are considered as agents for their husbands, having no legal authority of their own . . .”). Cf. Thomas Hobbes, Leviathan 253-54 (1651) (“[W]hereas some have attributed the Dominion [over the child] to the Man onely, as being of the more excellent Sex; they misconceiv in it . . . . For in the condition of meer Nature, where there are no Matrimoniall Lawes, it cannot be known who is the Father, unless it be declared by the Mother: and therefore the right of Dominion over the Child dependeth on her will, and is consequently hers.”). See Martha Minow, PovertyDiscourses, 1991 DUKE L.J. 274, 289-290 (“[M]otherhood has always been, and continues to be, a colonized concept — an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology.”).

65. Interestingly, even though mothers were charged with child-rearing. Nineteenth-century advice manuals were directed to fathers. Chesler, supra note 63, at 52-53.


67. See Martha L. Fineman, Images of Mothers in PovertyDiscourses, 1991 DUKE L.J. 274, 289-290 (“[M]otherhood has always been, and continues to be, a colonized concept — an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology.”).

68. This ideology, although hidden, is no less powerful. See Martha Minow, The Supreme Court 1986 Term — Foreword: Justice Engendered, 101 HARV. L. REV. 10, 68 (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination.”).

69. See Rich, supra note 43, at 38 (“[T]he woman at home with children is not believed to be doing serious work; she is just supposed to be acting out of maternal instinct, doing chores a man would never take on, largely uncritical of the meaning of what she does . . . . So child and mother alike are depreciated, because only grown men and women in the paid labor force are supposed to be ‘productive.’”).

70. Robert H. Mnookin & D. Kelly Weisberg, Child, Family, and State: Problems and Materials on Children and the Family, 40 HARV. L. REV. 1067 (1927) (finding that judges in child custody cases often find mothers unfit even though there is no demonstrated connection between the mother’s “bad” behavior and harm to the child).
several studies find no link at all).


78. See, e.g., Philip M. Genty, Protecting the Parental Rights of Incarcerated Mothers Whose Children Are In Foster Care: Proposed Changes to New York’s Termination of Parental Rights Law, 17 FORDHAM URB. L.J. 1 (1989).

79. See Rutherford, supra note 36, at 21 (“[M]yth makers must fill two separate roles in telling the myth. They must act both as priests and prophets. Priests conserve the myth that already exists and see that it is passed down to future generations. Prophets, however, foretell the future and adapt the myth that continues to be inspirational.”).

80. 554 A.2d 722 (Conn. 1989).

81. Id. at 723. There does not appear to have been an allegation that Luis’s mother abandoned him.

82. Id. at 725; see also CONN. GEN. STAT. § 17(a)-112(b)(2).

83. In re Luis C., 554 A.2d at 725; see also CONN. GEN. STAT. § 17(a)-112(b)(4).

84. Id.

85. The statute which governs termination of parental rights in Connecticut provides that unless termination is by consent, the court must make findings concerning

(1) The timeliness, nature and extent of services offered or provided to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (3) the feelings and emotional ties of the child with respect to his parents, any guardian of his person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (4) the age of the child; (5) the efforts the parent has made to adjust his circumstances, conduct, or conditions to make it in the best interest of the child to return him to his home in the foreseeable future, including but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (6) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act or conduct of any other person or by the economic circumstances of the parent.

CONN. GEN. STAT. § 17(a)-112(d).

86. In re Luis C., 554 A.2d at 724.

87. Id.

88. Id.

89. Id.

90. Id.

91. JOHN DEMOS, ENTERTAINING SATAN (1982), quoted in CHESLER, supra note 63, at 51.


93. See JAMES CASEY, THE HISTORY OF THE FAMILY 146 (1989) (noting that Nineteenth-century visitors to America from Europe were often surprised by the amount of child discipline present; Europeans of the period were more inclined to tolerate and perhaps encourage youthful rebelliousness).


95. Id. at 1017.

96. Some women feel ambivalence about whether or not they should attempt to re-create hierarchy within their households, or at least to what degree it should occur. I recall speaking on the telephone to a friend one evening while she chastised her daughter about pulling the pages out of book. After telling her daughter to stop it, “and I mean right now,” her daughter continued to tear pages out of the book. My friend asked her, “Aren’t you scared of me?” Her daughter responded, “No.” “That’s the problem,” my friend said, “you aren’t scared of me.”

This exchange demonstrates the ambivalence many women feel between their authoritarian impulses and their laissez-faire impulses in raising their children. Clearly, my friend had a relationship with her child that had caused the child to not fear her. On the other hand, my friend seemed to feel that perhaps her child should be afraid.

97. Actually, Elba’s behavior towards her son is not much different from that of a non-custodial parent when she or he has been separated from the child. My own observations of these parents, including my father during visitation weekends when I was a child, was a hesitance to discipline in order to try to make the visit as pleasant as possible.

98. Luis C., 554 A.2d at 724.

99. Id.

100. It might be argued then that unless Luis was being prepared for adoption by his foster parents from the outset, he should have been placed in a home in which cultural barriers would not have prevented his return. The kind of reasoning that was apparent in this case supports the notion of some writers that children of color should not be placed in white homes.
103. Luis C., 554 A.2d at 724.
104. See Ross, supra note 55, at 1501.
105. In re Sanjavini K., 391 N.E.2d at 1320.
106. Id.
107. See, e.g., In re Justin S., 595 A.2d 1058 (Me. 1991) (termination of parental rights affirmed because mother will not be in a position to take full custody of the child for two years although child retains strong bond to grandparents and expresses a desire to live with mother; court notes that “the best interest of the child may have been better served if the court had had the flexibility to order an adoption that preserved the natural parent’s visiting privileges” and expresses a wish that the court might have had a better remedy if it had “possessed authority to create such a compromise or to fashion other alternatives to unconditional termination of parental rights. Id. at 1060; Shake v. Darlington County Dept. of Social Services, 410 S.E.2d 923 (S.C. Ct. App. 1991) (holding that the birth mother is not able to care for child and reverses trial court by awarding custody of child to foster mother but still upholds trial court’s refusal to terminate the mother’s parental rights).
110. See, e.g., MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS (1989) (studies gender bias as it relates to attorneys, witnesses, and jurors in the Maryland state court system, but not as it relates to judges; responses of judges not given according to gender).
111. See, e.g., The Honorable Shirley S. Abrahamson, The Woman Has Robes: Four Questions, 14 GOLDEN GATE U. L. REV. 489, 492-494 (female judge writes that being a woman “brings me and my special background [to the bench]. All my life experiences — including being a woman — affect me and influence me.”).
112. See Patricia A. Cain, Good and Bad Bias: A Comment on Feminist Theory and Judging, 61 S. CAL. L. REV. 1945, 1947-1948 (1988) (stating that sharing a “community” with litigants may bring either a bias favorable towards that community, or unfavorable towards it).
116. See Dolgin, supra note 76, at 1230, 1236 (“For the most part, statutes no longer allow neglect determinations to be premised on a parent’s social, moral or financial marginality. But they often do appear to encourage such determinations when a parent’s marginality is combined with drug or alcohol abuse even when there is no convincing evidence that the parent’s drug or alcohol habits cause the sort of harm to the child that warrants coercive intervention.”).
117. See RICH, supra note 43, at 192 (“But before we were mothers, we have been, first of all, women, with actual bodies and actual minds.”).
118. See id. at 11 (“Woman’s status as childbearer has been made into a major fact of her life. Terms like ‘barren’ or ‘childless’ have been used to negate any further identity. The term ‘non-father’ does not exist in any realm of social categories.”) and 199 (relating a story in which a man dating a newly-divorced woman says, “Mothers turn me on — they are more real than other women. They have a foothold in the future. Childless women are already dead.”); Novkov, supra note 60, at 170-171 (“[A] woman with a successful paid career may feel like and be seen as a personal failure if she has no children. Simultaneously, the business world is widely perceived as closing off the option of motherhood to women who wish to achieve the same positions and respect to which we could aspire if we were men [and fathers].”).
119. See RICH, supra note 43, at 15 (describing motherhood as, in part, a division within herself — “a division made more acute by the moments of passionate love, delight in [her] children’s spirited bodies and minds, amazement at how they went on loving [her] in spite of [her] failures to love them wholly and selflessly.”).
120. See id. at 249-253 (discussing the idea of the childless woman and how she has been set in opposition to women with children).