"Mother," "Parent," and Bias

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I. INTRODUCTION

A. Anna J. v. Mark C. *and* Alison D. v. Virginia M.

Two women, Anna and Crispina, called on a California court in 1991[1] to determine which one of them was the legal "mother" of a newborn child.[2] After carrying Crispina's and her husband's embryo to term, Anna asked the court to declare her the "mother" of the newborn.[3] Faced with a case of first impression and no statutory definition of "mother," the court concluded that the "mother" of the child was Crispina—the egg donor. According to the decision, the applicable statute "compelled" the court to decide that Anna was not the mother because blood tests showed that she was not genetically related to the child.[4]

In the same year, Alison D. asked the New York Court of Appeals to declare her the "parent" of a child whom she and her lesbian partner, the biological mother, had together raised from its infancy.[5] Before breaking up, Alison and Virginia shared jointly in all the responsibilities of child-rearing. When their relationship ended, the child lived primarily with Virginia. Alison visited the child several times a week for three years. At the end of that period, Virginia severed all contact between Alison and the child. Alison

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1. The Supreme Court of California recently upheld the court of appeals' decision that Mark and Crispina were the child's natural parents and that Anna had no parental rights. Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206, *cert. dismissed*, 114 S. Ct. 374 (1993). Unlike the court of appeals' decision, the Supreme Court of California held that maternity may be established by intent, rather than childbirth or blood ties. "While both women fit the legal definition of 'mother,' Justice Edward Panelli wrote for the court's six-man majority, 'California law recognizes only one natural mother'—[the genetic mother who intended to have the child]." Claire Cooper & Laura Mecoy, *Court Rules Intent Is Key to Maternity*, SACRAMENTO BEE, May 21, 1993, at A1.

This Note concentrates on the case of *Anna J. v. Mark C.* as an example of statutory interpretation by a court. It will not further discuss *Johnson v. Calvert*, except in reference to the dissent by Justice Joyce L. Kennard. *See infra* notes 206-22 and accompanying text.

2. Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991), *superseded by Johnson*, 851 P.2d 776. Mark, his wife, Crispina, and Anna contracted that Anna would carry an embryo created by Mark's sperm and Crispina's egg and that Anna would waive any parental claims to the child. This case was the first in the country to test the rights of a genetically unrelated birth mother. Cooper & Mecoy, *supra* note 1.

3. The trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother. *Anna J.*, 286 Cal. Rptr. at 373.

4. The court of appeals construed the Uniform Parentage Act of California to require the court to "'resolve' the question of Anna's claim to maternity as [it] would resolve the question of a man's claim to . . . paternity when blood tests positively exclude him as a candidate." *Id.* at 376.

5. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

sought visitation rights as the "parent" of the child. The court denied her standing by limiting the definition of "parent" under the applicable statute to biological and adoptive relations.[6]

These two cases illustrate the difficulty a judicial reader encounters when asked to apply a text to a problematic factual situation. The facts of *Anna J.* and *Alison D.* challenge legal meanings of "mother" and "parent"—words that have "plain meanings" in unproblematic cases.[7] Due to technological innovation[8] and an evolving recognition of the legitimacy of unmarried couples as "family" units,[9] situations arise where the facts of a case lack one or more of the features that normally give these words their generally accepted definitions.

Faced with such novel situations, a judge must decide which of the possible conditions of a word's legal meaning constitute its statutory definition in a particular context.[10] In so doing, a judge may consciously or unconsciously privilege some of the linguistic conditions present in unproblematic cases.[11] A judge's approach to statutory interpretation[12] often justifies those conditions that the judge privileges without acknowledging the role the judge's personal perspective plays in the decision-making process. Since various communities define words differently,[13] judges should acknowledge their limited perspective in light of the inevitable political and social consequences that stem from their definitions of statutory language.[14]

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6. Alison D. brought suit under Domestic Relations Law § 70, which states: "either parent may apply to the supreme court . . . to have such minor child brought before such court; and [the court] may award the . . . charge and custody of such child to either parent . . . ." *Id.* at 29.

7. Unproblematic cases, also referred to as cases of "plain meaning," occur when the facts of a case satisfy "all the plausible conditions" that relate to a meaning of a word. For example, the conditions for "mother" might include providing the egg, giving birth, and caring for a child. "Plain meaning" does not mean that the text is "plain." Rather, the phrase means that the text plainly applies to the facts. For example, a woman who is the gestational and genetic mother is clearly the "mother" under the plain meaning of a statute. WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 311-15 (1993).

8. Technology such as in vitro fertilization has "staggering implications for our social structure" because it gives women the option of avoiding pregnancy altogether by employing gestational mothers, often, less wealthy women, to carry their embryos. MARTHA A. FIELD, SURROGATE MOTHERHOOD 43 (1988); *see also* JIM EVANS, STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION 118-19 (1988).

9. In San Francisco, Proposition K provides that unmarried couples can register with the county clerk as domestic partners. Katherine Bishop, *Not Quite a Wedding, but Quite a Day for Couples by the Bay*, N.Y. TIMES, Feb. 15, 1991, at A16. In Hawaii, same-sex couples soon may be able to enter into same-sex marriages, due to a Hawaii Supreme Court ruling that state marriage law must be subject to strict scrutiny because it discriminates on the basis of gender. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

10. *See* EVANS, *supra* note 8, at 118.

11. Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L. REV. 353, 407 (1989) ("In some cases, it may be that . . . the judge never consciously considers the reasons for the choice and therefore believes that the decision was compelled by objective, external sources.").

12. *See infra* note 18 and accompanying text.

13. *See* Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 990-91 (1991) (arguing that a community is created by individuals who "share common ways of understanding and living in a world").

14. The effectiveness of interpretation hinges on an understanding of how different communities perceive and interpret language. *Id.* at 1002.

Statutes do not always dictate a single outcome. Therefore, judges should take responsibility for the choices[15] they make in the interpretive process.[16]

B. The Judge's Role in Statutory Interpretation: The Scope of This Note

Contemporary legal scholarship focuses on varied methodological approaches to statutory interpretation.[17] Debate over the judicial reader's role in statutory interpretation centers on textual and nontextual legal interpretation and the legitimacy of interpretive sources of authority.[18] Evolving societal norms, due in part to technological innovation, pose factual scenarios that challenge a judge to define statutory language in a social context not envisioned by the drafters at the time they enacted the legislation.[19] Furthermore, "plain meaning" fails to give satisfactory answers to these cases because meanings of statutory words depend on context for definition. Hence, novel situations like those in *Anna J.* and *Alison D.* "call for creativity"[20] on the part of judges.

In cases where the statute's text fails to address contemporary problems, statutes should be interpreted dynamically in light of present social and legal context.[21] Decision-makers should take into consideration the particular factors that distinguish cases and candidly state how these factors influence their decision.[22] Inevitably, courts will privilege one definition over another,

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15. Mary J. Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 WIS. WOMEN'S L.J. 147, 165 (1987) (arguing that judges choose which precedent is relevant and what approach to take in cases of statutory interpretation).

16. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 854 (1990) ("Rules do not absolve the decisionmaker from responsibility for decisions. There are choices to be made and the agent who makes them must admit to those choices and defend them.").

17. *See* Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 136 n.35 (1992) (stating that no single legal subject has been studied more thoroughly than statutory interpretation).

18. *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302 (1991); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 410 (1989).

Some scholars and judges attempt to constrain judicial discretion in statutory interpretation through strict reliance on the "plain meaning" of the text. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting) (arguing that judges should find the ordinary meaning of language in its textual context to determine the meaning of statutory language). Conversely, some judges and scholars look to the statute's purpose for interpretive guidance. *See* 2 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1204-05 (1958).

19. *See* Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11 (1991) (arguing that technological innovations like in vitro fertilization challenge pre-existing linguistic and legal classification systems for judging and understanding).

20. Sunstein, *supra* note 18, at 440.

21. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (arguing for dynamic statutory interpretation in cases where the text becomes unclear because legislators failed to envision changes in the legal landscape).

22. Some theorists, including Guido Calabresi, argue that judges should explicitly state the economic, social, and political factors that shape their results, instead of hiding the process of statutory

and this definition may be the same as one reached by way of another approach.[23] By bringing judicial candor[24] to the forefront of statutory interpretation, however, dynamic interpreters explain and justify legal outcomes in light of contemporary context.[25]

To interpret statutes dynamically, judges need tools for discovering how their unconscious or conscious biases influence decision-making.[26] In cases involving gender issues, judges may take a seemingly unbiased stance which, in fact, perpetuates subordination or exclusion on the basis of "difference" from an unstated norm.[27] To counter possible unconscious bias, judges need to implement interpretive methods that permit them to identify and contain their perspectives through an understanding of the social realities that shape the context of the case.

Feminist legal methodology[28] can supplement and inform a dynamic approach to statutory interpretation[29] that allows judges to take responsibility for their interpretive choices. In cases like *Alison D.* and *Anna J.*, where judges define statutory language that implicates gender "differences," feminist legal methodology proposes three steps for the decision-making process.[30]

First, the judge should acknowledge that bias, whether conscious or not, does influence decision-making.[31] Second, in order to contain and counter possible judicial bias, feminist methodology provides a way to better

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interpretation. Critics of this view counter that "we must shift our strategy from criticizing judges for deceptive practices to devising schemes for more self-awareness in the judicial process." Zeppos, *supra* note 11, at 411 (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 180 (1982)).

23. JULIO C. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 274 (1981) ("Often, different methods of interpretation will lead to the same conclusion . . . .").

24. Dynamic interpreters ask for candid judging because "lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-37 (1987).

25. Multiple legal usages attribute different meanings to the word "context." "Context" can mean: (1) the historical situation of the authors of a statute; (2) the social and contemporary perspective of the reader of the text; and (3) the importance of the particular details of a problem. When referring to "context," this Note emphasizes the third usage while also importing additional meaning to the term. This Note "mean[s] to signal with 'context' a readiness . . . to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems." Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990).

26. *See* Zeppos, *supra* note 11, at 407 ("The judicial decisionmaking process is a complex blend of conscious and unconscious factors.").

27. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13 (1987) [hereinafter Minow, *Foreword*] ("Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, 'minority' races to whites, [and] handicapped persons to the able-bodied . . . ." (footnote omitted)).

28. This Note uses the following general definition of feminist legal methodology: "It is a woman-centered methodology of critically questioning our ideological premises and reimagining the world." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4 (1988).

29. *See* Carol Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INT'L J. SOC. L. 109, 122 (1986) ("The goal of engaging with law as part of the process of transforming the conditions under which women live, is a strategy which integrates the theory and practice of feminism.").

30. This Note only distinguishes and applies three types of feminist legal methodology as they pertain to statutory interpretation. It does not discuss other feminist methodologies.

31. *See infra* notes 46-77 and accompanying text.

understand the litigants' legal context.[32] Finally, feminists ask the "woman question"[33] to ascertain whether the application of a seemingly neutral law disadvantages litigants based upon their gender "differences."[34]

Accepting the premise of dynamic statutory interpretation, this Note does not further cover other methodological approaches to statutory interpretation. Instead, Part II reviews how feminist legal methodology differs from traditional legal reasoning and other legal methodologies. Part III then analyzes the courts' decisions in *Anna J.* and *Alison D.* and reveals the comparative advantages of using a dynamic feminist approach in these and other problematic cases of statutory interpretation. Part IV concludes that a dynamic feminist approach in problematic cases not only exposes and contains judicial and legal bias but also renders a more honest and fair decision-making process than do other legal methodologies.

II. FEMINIST LEGAL METHODOLOGY

Contemporary scholars do not share a single ideological approach[35] to feminist jurisprudence.[36] Feminist legal scholars diverge on questions of law's "equal treatment" and "special treatment"[37] of women, the sources of women's differences from men,[38] and the legitimacy of judicial

32. *See infra* notes 91-103 and accompanying text.

33. *See infra* notes 109-22 and accompanying text.

34. *See generally* Minow, *Foreword*, *supra* note 27.

35. Many feminists, however, agree that feminists should try to create a consensus despite the multiplicity of feminist ideologies. *See, e.g.*, Lynne Henderson, *Law's Patriarchy*, 25 LAW & SOC. REV. 411, 417 (1991) (arguing that feminists should agree that "[w]omen should not be abused, oppressed, or dominated; women should have full human status and a role in defining what that is; [and] women's voices and language should be heard and attended to").

36. Legal feminists are identified in "waves." "First wave" feminists pursue the goal of formal equality for women through equal protection. "Second wave" feminists find law to be a paradigm of maleness and attempted to devise a legal approach in harmony with the lives of women. "Third wave" feminists resist the notion that law can represent male interests in a uniform manner and reject grand theory in favor of analyzing particular instances of oppression. NGAIRE NAFFINE, LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE 3-19 (1990).

37. Some feminists believe that the law should treat men and women similarly, without regard to perceived differences, while others argue that biological differences between men and women necessitate special treatment for women's situations. See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987), for a comprehensive overview of feminist legal perspectives on the treatment of "difference" in law.

38. Many feminists believe that differences between women and men are socially constructed rather than biologically predetermined. Others point out that the social construction thesis falters when differences "seem especially entrenched . . . [like] masculine aggression or feminine compassion." Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048 (1992). Few feminists, however, believe that even deeply embedded differences are essential in nature. Some theorists hypothesize that these differences may arise from a division in labor where women are responsible for caretaking, from psychological bonding between mother and daughter, or from the politicization of gender relations. Judith Resnick, *On the Bias: Feminist Reconsideration of the Aspiration for Our Judges*, 61 S. CAL. L. REV. 1877, 1906-07 (1988). For an overview of modern disciplinary viewpoints on the origins and politics of sexual difference, see THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990).

adjudication.[39] Despite these differences, however, feminists share common themes and goals. Most feminists agree that extensive social, legal, and political reform is needed to combat subordination and discrimination based on gender.[40] Generally, feminist legal theorists[41] challenge norms of judicial reasoning by introducing methods that focus on those aspects of legal issues that traditional methods overlook or suppress.[42] Feminist legal scholars also raise the issue of judicial impartiality and objectivity in decision-making, which has implications for the interpretive process.[43]

A. Feminist Theories on Judicial Impartiality

> You must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible to human beings to do so absolutely, but just so far as you can, not to interject your own personal interests, even your own preeonceived assumptions and beliefs.[44]

This statement by Learned Hand exemplifies Anglo-American legal aspirations for judicial impartiality.[45] Traditional legal reasoning supposes that judges can and should set aside their personal convictions in the objective pursuit of arriving at the "right" answer.[46] Goals of judicial objectivity and impartiality "invest the legal process with considerable prestige and power and secure it . . . immunity from external criticism."[47] Adherence to precedent

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39. Some feminists challenge the legitimacy of hierarchical judicial adjudication as a means of legal problem solving. Conversely, legal scholars like Judith Resnick argue that feminism must address the problems of power and constrain the judiciary by redefining the goals and aspirations of hierarchical relationships in the legal system. Resnick, *supra* note 38, at 1927-28.

40. Rosalind Delmar, *What Is Feminism?*, *in* WHAT IS FEMINISM?: A REEXAMINATION (Juliet Mitchell & Ann Oakley eds., 1986).

41. Feminist legal scholars argue that "law is deeply gendered, although they differ on what that means." Henderson, *supra* note 35, at 417; *see also* Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 66 (1985) ("[F]eminist jurisprudence inevitably raises questions about the methods of jurisprudential inquiry and how these have been or are gender-biased.").

42. Bartlett, *supra* note 16, at 836; *see also* Bender, *supra* note 28, at 4-5 ("Feminism seeks to be inclusive, not exclusive; its teachings illustrate the harm that flows from exclusion.").

43. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *in* CRITICAL LEGAL STUDIES 56, 69-70 (Allan C. Hutchinson ed., 1989) (questioning the desirability of judicial decision-making that is dispassionate, impersonal, and precedential).

44. Resnick, *supra* note 38, at 1943-44 (quoting LEARNED HAND, THE SPIRIT OF LIBERTY 309-10 (Irving Dillard ed., 1958)).

45. *Id.*

46. NAFFINE, *supra* note 36, at 25; *see also* Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47 (1988) [hereinafter Minow, *Feminist Reason*] ("Judges' preoccupation with neutrality . . . upholds existing institutional arrangements while shielding them from open competition with alternatives.").

47. NAFFINE, *supra* note 36, at 25.

and statutory text validate the appearance of judicial impartiality by providing a set of guiding principles that constrain judicial preferences.[48]

Feminists challenge the rhetoric of judicial impartiality.[49] The gender, class, ethnicity, and social position of a judge inevitably affect their decision-making process.[50] Feminists find that traditional legal methods that purport to limit judicial bias create "false comfort"[51] for litigants and "serve[] to disguise what feminists have shown to be the often sexist assumptions implicit in the workings of the law."[52]

For example, extensive gender bias[53] exists in the modern judicial system.[54] Beginning in 1982,[55] fourteen states[56] compiled extensive gender bias reports documenting how a woman is at a disadvantage as a litigant, a party in domestic conflicts, and as a practicing attorney.[57] Focusing on how sexism pervades the judicial system,[58] these reports offer numerous examples of biased decision-making based on stereotypical assumptions.[59]

As Diane Barz, Montana's first female district court judge, states: "Judges must constantly be aware of gender issues. . . . Gender bias[] can result from the attitudes of lawyers and judges."[60] The same reports, however, which cite

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48. *Id.* at 38-39; *see also* Sunstein, *supra* note 18, at 415-16 (arguing that textualists believe that adherence to the text constrains the judge's preferences more than reliance on ambiguous terms like "legislative purpose").

49. Minow, *Foreword*, *supra* note 27, at 75. Minow states that the challenge of acknowledging judicial partiality is not for a judge to automatically adopt a viewpoint other than his or her own, but to examine multiple perspectives in an effort "to retool our methods of classification and consider how they save us from questioning . . . ourselves, and our existing social arrangements." *Id.* at 80.

50. NAFFINE, *supra* note 36, at 46-47.

51. Resnick, *supra* note 38, at 1908 ("A judge is either male or female and is of a particular race, class, and social position; the appearance of neutrality, of evenhandedness, of impartiality is false comfort.").

52. NAFFINE, *supra* note 36, at 47.

53. *See generally New York High Court Calls for Study of Gender Bias in State Court System*, The Bureau of Nat'l Affairs, Government Relations Report, June 4, 1984, at 1082 ("Gender bias occurs when decisions are made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation."). [hereinafter *Study of Gender Bias*].

54. *See, e.g.*, Allan R. Gold, *Sex Bias Is Found Pervading Courts*, N.Y. TIMES, July 2, 1989, at S1-14.

55. New Jersey was the first state to compile a gender bias report through the use of a task force which was initiated in 1982. Gail D. Cox, *Reports Track Discrimination; Fourteen Volumes Chronicle How Women Are Treated in Court*, NAT'L L.J., Nov. 26, 1990, at 1.

56. These states include: New Jersey, New York, Rhode Island, Nevada, Maryland, Massachusetts, Minnesota, Washington, Michigan, Florida, Colorado, Utah, Illinois, and California. *Id.*

57. *Id.*

58. Sexist assumptions often surface in cases dealing with rape, divorce, and child custody. Recently, in an obvious case of gender bias, the Fourth District California Court of Appeals remanded a divorce case for retrial because the superior court judge referred to the woman litigant in her 40's as a "girl" and compared her to a "cow." *Court Watch; Girl Talk*, L.A. TIMES, Jan. 2, 1993, at B6. In more subtle cases of discrimination, women litigants can be treated as "burdensome children" or with "underclass status." *Study of Gender Bias*, *supra* note 53.

59. Rene Lynch, *Lawyers Testify to Gender Bias in Courts*, L.A. TIMES, Jan. 18, 1993, at B1 ("'It's all about the judgments that are based on perceptions or stereotypes . . . .'") (quoting Associate Justice Sheila Prell Sonenshine). Ironically, the court on which Justice Sonenshine sits is the same court that decided *Anna J.* She concurred in the majority's opinion in that case.

60. Tom Howard, *Unequal Justice? Female Lawyers Find Bias in Courtrooms*, BILLINGS GAZETTE, Nov. 8, 1992, at D1.

widespread gender bias in state and federal courtrooms also report that male judges and attorneys do not perceive any sexist attitudes in their courtrooms.[61]

Aside from conscious stereotyping, documentation of gender bias in courtrooms supports the idea that judges view cases from "their social place in the world"[62] even if they are not aware of it. In 1982-83, only six percent of state appellate judges and three percent of state trial judges nationwide were women.[63] Today, these numbers have slightly improved, but the judiciary is still overwhelmingly dominated by men.[64]

A judge's gender, ethnicity, and class all contribute to the formation of a personal perspective that may influence the interpretive process. As Wisconsin Supreme Court Justice Shirley Abrahamson states:

> [T]he experiences that my gender has forced upon me—has, of course, made me sensitive to certain issues, both legal and nonlegal. So have other parts of my background. My point is that nobody is just a woman or a man . . . . Each of us brings to the bench experiences that affect our view of law and life and decision-making.[65]

As Judge Abrahamson points out, a judge's background can influence the decision-making process. This notion challenges traditional legal thinking which "forms the basis of law's claim to impartiality on . . . the idea of the perfectly unbiased and value-free perspective . . . ."[66] In an effort to redefine traditional legal methods that mask judicial bias under the guise of objectivity,[67] feminist legal scholars look at conceptions of "our interrelatedness [and] our interdependencies,"[68] as they relate to the traditional ideal that judges should achieve objectivity through disengagement and impartiality.[69]

Judith Resnick proposes feminist aspirations for judges as an alternative to so-called impartial and disengaged decision-making.[70] These aspirations "empower judges to understand their connections to and separation from those

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61. For example, a gender bias report conducted in the Ninth Circuit found that female judges, lawyers, and clients "face a variety of discrimination problems." The same report observed that male judges and lawyers felt that gender discrimination did not exist in the courtroom. *Court That Attacks Sex Bias Is Reported Often Guilty of It*, N.Y. TIMES, Aug. 7, 1992, at A17.

62. NAFFINE, *supra* note 36, at 39.

63. Judge Gladys Kessler, *Foreword*, 14 GOLDEN GATE L. REV. 473, 474 (1984). At the same time, 8.3% of federal appellate judges and 6.9% of federal district judges were women. *Id.* at 475.

64. Junda Woo, *Widespread Sexual Bias Found in Courts*, WALL ST. J., Aug. 20, 1992, at B2 ("[J]udges are overwhelmingly male. States . . . issued reports from having 7% female judges in Utah, to 24% in Georgia.").

65. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE L. REV. 489, 493-94 (1984).

66. NAFFINE, *supra* note 36, at 47.

67. MacKinnon, *supra* note 43, at 71-72 ("The state will appear most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. . . . When it most closely conforms to precedent, . . . it will most closely enforce socially male norms and most thoroughly preclude questioning their content as having a point of view at all.").

68. Resnick, *supra* note 38, at 1921.

69. Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988).

70. Resnick, *supra* note 38, at 1934.

before them but simultaneously constrain judges who are . . . charged with the responsibility of exercising power over others."[71]

Personal perspective makes complete judicial impartiality impossible. Therefore, judges should not try to mask their bias through disengagement and separation from their perspectives and those of the litigants.[72] Instead, a judge needs to create ways to explore personal bias in light of the problem the judge is asked to resolve.[73] Since unstated judicial bias often affects cases dealing with gender "difference,"[74] feminists urge judges to commit themselves to seeking out contrasting viewpoints, unstated assumptions, and typically unheard vantage points to counter and constrain their own conscious or unconscious preferences.[75] In place of reliance on ideals of judicial impartiality that mask the influence of personal bias,[76] judges can "make decisions by immersing in particulars to renew commitments to a fair [and just] world."[77]

B. A Feminist Approach to Contextualization

Feminists ask that judges recognize their own possible biases when engaging in any interpretive problem. A feminist call to context serves as a means of countering and expanding the judicial perspective by allowing a judge to "move through the particular conditions of others and thereby draw from experience with others."[78] Unlike traditional methodologies, feminist contextual methodology seeks to focus legal analysis on the contingencies of a case relating to particular categories of class, gender, ethnicity, sexual orientation, and other traits.[79] In so doing, feminist approaches to contextualization emphasize how the application of "neutral" rules burden those who do not fit the norm for which the rules were written.[80]

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71. *Id.* at 1928; *see also* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 45 (arguing that creation of legal meaning "entails the disengagement of the self from the 'object' of law, and at the same time requires an engagement to that object as a faithful 'other'").

72. Other feminist legal scholars agree that the pretense of judicial impartiality, without acknowledgment of bias, "contributes to the corruption of power." Cain, *supra* note 69, at 1949.

73. Judges often will prefer legal reasoning that "reinforces a version of reality that coincides with dominant social arrangements." Minow, *Feminist Reason*, *supra* note 46, at 60.

74. *See* Minow, *Foreword*, *supra* note 27.

75. Minow, *Feminist Reason*, *supra* note 46, at 56 ("A useful strategy is to pay attention to competing perspectives on a given problem, and to challenge unstated points of view that hide their assumptions from open competition with others.").

76. *See* Lynch, *supra* note 59, at B1 ("Woman judges and attorneys . . . say the real problem with gender bias is that it goes beyond insults aimed at women . . . . It undermines women who are seeking justice.").

77. Minow, *Foreword*, *supra* note 27, at 91.

78. Minow & Spelman, *supra* note 25, at 1649.

79. *Id.* at 1632-33.

80. *Id.* at 1601.

1. Traditional Legal Reasoning and the "Legal Person"

A fundamental tenet of Anglo-American law is equal treatment of all people.[81] In an effort to treat people equally, traditional legal analysis posits the abstract, universal "individual" as the norm for objectively[82] judging cases.[83] This legal subject is supposedly "a standard individual, abstracted from any particular set of social circumstances: a paradigm person whose needs and priorities law must anticipate and respond to . . . ."[84] The abstract legal person sets the norm of comparison for the principle of treating like cases alike because neutral laws supposedly embody more than the values of a particular group.[85] Therefore, traditional legal analysis abstracts litigants from their social contexts and then imposes on them the character of the "legal person" in order to treat people "impartially" before the law.[86]

Feminists challenge the legitimacy of the abstract "legal person" when substantive results show how apparently neutral rules exclude "anyone who does not share the characteristics of privileged white, Christian, able-bodied, heterosexual, adult men for whom [the] rules were actually written."[87] They argue that "neutral" rules and the "legal person" for whom they were written are not only male in context[88] but that they are often based on the autonomous, middle-class, and self-interested individual.[89] One of the most obvious problematic inequities inherent in the notion of the "legal person" is the fact that the traditionally male "legal person" does not get pregnant.[90]

2. Feminist Contextual Methodology

Feminists challenge the idea of the "legal person" who, far from representing neutral values, actually "mirrors and reflects, the moral and social priorities of [powerful persons]."[91] The application of neutral rules and legal

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81. U.S. CONST. pmbl., amend. XIV; *see also* NAFFINE, *supra* note 36, at 48.

82. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 107 (1989) ("Objectivity has been [the law's] answer, its standard, its method search for truth, its holy grail.").

83. MARC KELMAN, A GUIDE TO CLS 279 (1987) ("[L]iberalism is . . . committed to the notion that groups are artificial, that they can be understood or analyzed only by reference to the individuals who compose them.") (footnote omitted) (citing ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 81-83 (1975).

84. NAFFINE, *supra* note 36, at 51.

85. Roberto M. Unger, *Liberal Political Theory*, *in* CRITICAL LEGAL STUDIES 15, 18 (Allan C. Hutchinson ed., 1989).

86. NAFFINE, *supra* note 36, at 78.

87. Minow & Spelman, *supra* note 25, at 1601.

88. *See* Catharine A. MacKinnon, *Legal Perspectives on Sexual Difference*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990).

89. SUSAN M. OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979) (analyzing Hobbes, Locke, Blackstone, and Rawls to determine that their political philosophies centered around defining the values associated with male heads of family as their idea of the "individual" in society).

90. This fundamental difference leads to decisions that make distinctions between pregnant women and non-pregnant persons a basis for equal treatment analysis. Geduldig v. Aiello, 417 U.S. 484 (1974) (superseded by statute, as stated in Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)).

91. NAFFINE, *supra* note 36, at 100 ("Simply, this group is white, educated, affluent, and male.").

methodologies that assume the existence of this value-laden "abstract person" often creates unjust outcomes "in the context of the excluded."[92]

Instead of relying on this unit of legal analysis—the abstract individual—feminists create "new normative directions for legal . . . life" by stressing group-based traits of individuals in legal analysis.[93] Individuals' perspectives and actions are shaped by their social contexts. Therefore, it is unjust to judge them without reference to the communities that shape their perspectives.[94]

Feminists do not believe that a call to context that focuses legal analysis on the "legacies of power and oppression"[95]—race, gender, class, and sexual orientation—is any more "contextual"[96] than applying an analysis that assumes the values of a "legal person." All legal methodologies use both legal abstraction and contextualization.[97] Theories that analyze a case by applying universal rules to "legal persons" choose features of a context with "particular effects that often benefit some people more than others,"[98] while feminists stress analysis based on abstracted categories like race and gender which are overlooked by traditional legal reasoning.[99]

Moreover, far from destroying the universal principle of trying like cases alike, contextualizing lends legitimacy to this legal principle.[100] Attention to details of societal structures of "difference," including ethnicity, gender, class, and sexual orientation, exposes similarities and differences that justify treating some cases alike and other cases differently.[101] The contextual approach bolsters this universal norm by making case comparisons truer to the respective social realities of the litigants involved.[102] A decision-maker who refers to the contingencies of context effectively exposes the risks inherent in falsely assuming the legitimacy of legal reasoning that carries "with it an absence of responsibility on the part of . . . judges for any negative outcome [that disregards contextual factors]."[103]

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92. *See* Minow & Spelman, *supra* note 25 and accompanying text.

93. Minow & Spelman, *supra* note 25, at 1606.

94. *See* Winter, *supra* note 13, at 991 ("There is . . . no separation between the self and its communities. Self and community are mutually constitutive.").

95. Minow & Spelman, *supra* note 25, at 1601.

96. *Id.* at 1605 ("[W]e are always in some context, as are the texts that we read, their authors and readers, our problems, and our efforts to achieve solutions.").

97. Bartlett, *supra* note 16, at 856 ("Even the most conventional legal methods require that one look carefully at the factual context of a case in order to identify similarities and differences between that case and others.").

98. Minow & Spelman, *supra* note 25, at 1628.

99. *Id.*

100. *See* Deborah L. Rhode, *Feminist Perspectives on Legal Ideology*, *in* WHAT IS FEMINISM?: A REEXAMINATION 152 (Juliet Mitchell & Ann Oakley eds., 1986) (arguing that traditional liberal jurisprudence "draws heavily on Aristotelian premises [while] equality results from treating similarly situated individuals similarly").

101. Minow & Spelman, *supra* note 25, at 1632.

102. *Id.*

103. Mossman, *supra* note 15, at 158.

3. Contextualization and Judicial Bias

A judge's unconscious bias may lead the judge to believe that a legal methodology which assumes the values of the "abstract individual" will lead to an "objective" outcome. By exposing the unequal results inherent in applying supposedly neutral rules and abstract norms to litigants, regardless of their context, feminist contextual methodology seeks to expose the judge to other partial perspectives as they are shaped by their contemporary contexts.[104] A judge can "enlarge [his] own perspective and understanding of the interests at stake,"[105] thereby gaining a sense of informed objectivity rather than adopting a "superior detached viewpoint" which only distances a judge from the litigants' perspectives.[106]

Feminists emphasize categories like race and gender because these bases of power remain "resilient and at the same time elusive" under traditional legal analysis.[107] Therefore, justice "is more likely to be served when judges attend to the specific contexts in which their judgments are rendered."[108] Specifically, in cases involving gender issues, feminist legal methodology further poses "the woman question" to expose the possible gender bias resulting from the application of a seemingly neutral law.

C. The "Woman Question"

Simone de Beauvoir first articulated in print what is known today as the "woman question."[109] Although many feminists use the question within their respective disciplines, asking the "woman question" in law involves examining how "the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason[.]"[110]

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104. Cover, *supra* note 71, at 68 ("Legal meaning is a challenging enrichment of social life. . . . We ought to stop circumscribing the *nomos*; we ought to invite new worlds.").

105. Minow & Spelman, *supra* note 25, at 1649.

106. *Id.* at 1648 & n.169 (citing HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 42 (1982)).

107. *Id.* at 1651.

108. *Id.* at 1598-99.

109. SIMONE DE BEAUVOIR, THE SECOND SEX (1989).

110. Bartlett, *supra* note 16, at 837. Professor Bartlett cites Heather Wishik who suggests that feminists ask a series of questions:

> (1) What have been and what are now all women's experiences of the 'Life Situation' addressed by the doctrine, process, or area of law under examination? . . .
> (2) What assumptions, descriptions, assertions and/or definitions of experience—male, female, or ostensibly gender neutral—does the law make in this area? . . .
> (3) What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures? . . .
> (4) What patriarchal interests are served by the mismatch? . . .
> (5) What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically? . . .
> (6) In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation? . . .
> and (7) How do we get there from here?

Wishik, *supra* note 41, at 72-75.

1. Historical and Contemporary Use of the "Woman Question"

Historically, women used the "woman question" to ask why women were excluded from laws conferring the right to vote,[111] laws granting eligibility for state licenses to practice law,[112] occupational restrictions,[113] and jury duty requirements.[114] In response to these legal challenges, courts often justified the legal exclusion of women on the basis of the "separate sphere" ideology.[115] Legal attitudes slowly changed in the 1970's when the Supreme Court upheld successful challenges to gender discrimination.[116] The Court continues, however, to rule in favor of "legitimate" sex-based classifications that exclude women from combat[117] and define statutory rape only in terms of male offenders.[118]

In contemporary legal analysis, courts often find women's "difference" a sufficient justification for unequal treatment while at the same time constructing a "specious 'sameness' when applying phallocentric standards 'equally' to men and women's different reproductive biology or economic position to yield . . . unequal results for women."[119] Today, feminist legal theorists use the "woman question" to challenge the applications of laws[120] which fail to account for women's different[121] experiences and needs in relation to the unstated male norm upon which the laws are based.[122]

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111. *See generally* DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989).

112. Bradwell v. Illinois, 83 U.S. 130 (1872).

113. Muller v. Oregon, 208 U.S. 412 (1908).

114. Hoyt v. Florida, 368 U.S. 57 (1961); *see* Bartlett, *supra* note 16, at 838-39.

115. Justice Bradley first enunciated the "separate sphere" ideology in *Bradwell*, when he stated that the "natural" differences between men and women dictated that women belonged in the home, thus rendering them unfit for civil occupations. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring in the judgment).

116. *See* Craig v. Boren, 429 U.S. 190 (1976) (holding that drinking age limits must be the same for men and women, despite the fact that males have more alcohol-related accidents); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that a female member of the Army need not prove dependency of a spouse when a male member of the armed services could declare automatically the dependency of a spouse because of societal generalizations); Reed v. Reed, 404 U.S. 71 (1971) (rejecting an Idaho statute that automatically preferred males over females as estate administrators).

117. Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding draft registration law that excluded women because they were unable to fulfill combat duty).

118. Michael M. v. Superior Court, 450 U.S. 464 (1981) (holding that the state had a legitimate interest in preventing illegitimate teenage pregnancies).

119. Littleton, *supra* note 37, at 1282 (footnote omitted).

120. Facially neutral laws that disadvantage women include rape defenses that look to the "reasonable" belief of the defendant. Bartlett, *supra* note 16, at 842, 843 n.52.

121. Whether these differences are biological in nature, socially constructed, or partially both is subject to much debate. MACKINNON, *supra* note 82; THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 38; Bartlett, *supra* note 16; Frug, *supra* note 38; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Littleton, *supra* note 37.

122. *See* Minow & Spelman, *supra* note 25, at 1601.

2. Critiques of the "Woman Question"

Katharine Bartlett identifies a central critique of the "woman question" which argues that the "woman question" is more substantive in form than methodological. She contends that all legal methods are substantive, to the extent that their application ensures certain results.[123] The extensive debates over the use of different methodological approaches demonstrate how important method can be in determining substantive outcomes.[124] Accepting the inevitability of the substantive aspects of all methodological approaches, Professor Bartlett believes that the true question should be whether a judicial reader uses "improper" methodology that allows decision-makers to "decide every case in order to reach the result they think most desirable."[125]

Far from dictating the results of a case, the "woman question" does not compel the decision-maker to rule decisively in favor of a certain interpretation of a statute. Instead, the question forces a decision-maker to look for possible gender bias in the application of a law. Once bias is exposed, the decision-maker must justify their decision in light of that bias.[126] As Professor Bartlett argues:

> Asking the woman question confronts the assumption of legal neutrality, and has substantive consequences only if the law is not gender-neutral. The bias of the method is the bias toward uncovering a certain kind of bias. The bias disadvantages those who are otherwise benefitted by law and legal methods whose gender implications are *not* revealed.[127]

Many feminists would agree that the "bias" of this method is "proper" because it uncovers prejudices within the law and forces a decision-maker to expose any possible personal "bad"[128] bias. Therefore, even if the methodology has substantive impact, the "woman question" is proper because it still structurally restrains the decision-maker's substantive preferences.[129]

A second critique of the "woman question" arises from the feminist community itself. Feminists disagree on the use of the category of "women." The categorization of "women" once assumed a prototype woman representative of universal experiences which predominately reflected the values and needs of white, middle-class, heterosexual, able-bodied women. Today, feminist theory has been significantly revised by the recognition of the

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123. Bartlett, *supra* note 16, at 843-47.

124. *See* CUETO-RUA, *supra* note 23, at 274 ("The use of different methods of judicial interpretation may lead to different conclusions concerning the meaning of the rule of law subject to interpretation; therefore, it is impossible to disassociate the meaning of the rule from the method used to interpret it.").

125. Bartlett, *supra* note 16, at 846.

126. *Id.*

127. *Id.* at 847 (emphasis in original).

128. Cain, *supra* note 69, at 1946 (arguing that "good bias" exists when judges are "compassionate, caring, and connected" and that "bad" bias consists of "bigotry, prejudice, or intolerance.").

129. *Id.*

complexity of a woman's status according to "sex, race, and class, and not sex alone."[130]

Others fear that the use of the category "women" not only overlooks the real differences that differentiate particular women's experiences but it perpetuates theories of "essential" sex-related differences between men and women. They argue that the politics of feminism should expand into an "inclusive emancipatory project, unified only by a political goal of quality of life," rather than exclusively concentrate on gender subordination through the categorization of "women."[131] Mary Joe Frug counters, however, that the category of "women" will not be eliminated in the near future. She states that contrasting definitions of "women" might destroy the universal female identity by showing that the generalized category of "women" does not exist because of contingent particularities inherent in each woman's existence, even though "there remains a common residue of meaning that seems affixed, as if by nature, to the female body."[132]

The contemporary "woman question" looks at legal discrimination and patriarchical subordination within the varying contexts of a woman's particular situation. This inquiry requires a decision-maker to recognize pertinent categories[133] that constitute a woman's gender experience, given contemporary social realities. Asking the "woman question" by identifying a particular woman's complex experiences poses an intricate task for a decision-maker. This methodology, however, opens the door to a "deeper inquiry into the consequences of overlapping forms of oppression . . . that go[es] beyond issues of gender bias to seek out other bases of exclusion[.]"[134]

Through recoguition of factors like race, sex, and class that together comprise the social construction of a person's identity,[135] decision-makers can find gender bias in the law as well as biases that share the same ideological foundation of oppression through subordination. Decision-makers must decide how they can identify forms of oppression and bias within the law. The "woman question" and other questions of exclusion[136] seek to discover the bias of a seemingly neutral law while also imposing methodological constraint on a judicial reader who might otherwise rely solely on personal perspective in the decision-making process.[137]

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130. Bell Hooks, *Feminism: A Transformational Politic*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DISCOURSE, *supra* note 88, at 188. Hooks states that this feminist recognition of women's complex nature "has been most impressed upon everyone's consciousness by radical women of color." *Id.*

131. Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DISCOURSE, *supra* note 88, at 21, 29.

132. Frug, *supra* note 38, at 1049.

133. These categories might include race, age, sexual preference, marital status, class, and religion.

134. Bartlett, *supra* note 16, at 848. Professor Bartlett poses the following questions of "exclusion" that could be made in an effort to expose assumptions made by the law: "[W]hat assumptions are made by law . . . about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?" *Id.*

135. Hooks, *supra* note 130, at 189.

136. For methodological questions identifying exclusion, see Bartlett, *supra* note 16.

137. *Id.* at 849.

III. THE DYNAMIC FEMINIST APPROACH: DEFINING "PARENT" AND "MOTHER"

This is real pioneering stuff. . . . Lesbians are getting pregnant every day because they can. But law has not caught up with what is happening in society and what technology is allowing us to do.
- A Chicago Lawyer[138]

Am I prejudiced? No. . . . Am I homophobic? No. . . .
There is nothing irrational or excessive about my fear regarding the facts surrounding the homosexual community whose goals are clearly stated: same-sex marriages, adoption of children . . . [I]t is not normal!

-Letter to the Editor[139]

Proponents of dynamic statutory interpretation argue that a judge should candidly factor in the contingencies of the contemporary context in cases where novel situations challenge the meaning of statutes and where legislatures failed to envision present-day realities.[140] Some scholars believe that whether or not judges constructively update the statute, they should "feel free honestly to express what they really were thinking about when they decided the case . . . [because t]hese revelations will clarify the moral and political views at stake . . . ."[141] Questions arise, however, concerning unconscious judicial bias in dynamic interpretation: What process will bring about self-awareness of personal bias on the part of a judge; and whose perspectives, stemming from which contexts, should govern statutory definition?

Feminist methodology offers a means of exposing unconscious bias in the process of defining legal meaning. Contextualization and the "woman question" "open up debate . . . [b]y forcing articulation and understanding of [political and moral] considerations . . . [as well as forcing] justification of results based upon what interests are actually at stake."[142] Contextualization shows the decision-maker various perceptions of social reality[143] and the "woman question" demonstrates how certain legal definitions that are based on unstated norms work to the exclusion of women because of gender "differences."

A feminist approach also helps the dynamic interpreter identify unconscious personal bias by exposing the discriminatory effects of certain statutory

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138. Jean L. Griffin, *The Gay Baby Boom*, CHI. TRIB., Sept. 3, 1992, § 5, at 1 (quoting Rosemary Mulryan, a Chicago lawyer who specializes in adoption and who has many gay and lesbian clients).

139. *News Stories Won't Change View on Homosexuality*, SEATTLE TIMES, Sept. 16, 1992, at A13 (quoting Letter to the Editor from Nancy Brown).

140. Eskridge, *supra* note 21, at 1483.

141. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32 (1984).

142. Bartlett, *supra* note 16, at 862-63.

143. *See* Wishik, *supra* note 41, at 77 ("Nothing about existing law should remain immutable in our inquiries, and nothing about existing law should constrain the construction of our visions.").

definitions. By identifying multiple perspectives in context,[144] decision-makers must, at the very least, justify the consequences of their decisions in light of the exclusionary effects of preferring certain perspectives over others.[145] At most, a dynamic feminist interpreter may not find a "right" answer, but the process may lead to a conclusion that might not otherwise be reached under a more traditional approach to statutory interpretation.[146]

A. The Interpretive Process in Alison D.*—Defining "Parent"*

In *Alison D.*, the case involving the rights of a lesbian parent, the New York Court of Appeals determined the meaning of statutory language within a context "hardly dreamt of by [the statute's] drafters."[147] The court was presented with the following facts to determine whether Alison was a "parent" entitled to visitation rights: Alison and her lesbian partner, Virginia, jointly agreed to Virginia's artificial insemination; the child bore Alison's last name; Alison and Virginia shared all birth and support expenses, made joint decisions concerning the child's welfare, and together cared for the child for two years and four months. After the couple broke up, Alison visited the child several days a week and continued to pay one-half of the mortgage payment and other household expenses for two and one-half years, until Virginia forbade Alison to see the child.[148] The court held that as a "biological stranger" to the child, Alison was not the child's "parent."

In light of Alison's relationship with the child and a prior ruling that held that a homosexual couple functioned as a "family" for the purposes of a New York City rent control ordinance,[149] the New York Court of Appeals provided little justification for its strict interpretation of the word "parent." The court only explained:

> Although the Court is mindful of petitioner's understandable concern for and interest in the child and of her expectation and desire that her contact with the child would continue, she has no right under Domestic Relations Law § 70 to seek visitation . . . . She is not a "parent" within the meaning of § 70.[150]

For lack of a statutory definition of "parent," the court relied on precedent to limit its definition to biological or adoptive parents, stating that "[t]raditionally . . . it is the child's mother and father who, assuming fitness, have the

144. Mossman, *supra* note 15, at 167 ("[I]f feminism has a power to transform the perspective of legal method, it must be because it permits feminists 'a new way of seeing' both the reality of present lives and of imagining better ones.").

145. *Id.* at 163. Traditional legal method defines "boundaries" that somehow "confer 'neutrality' on the law and on its decision-makers. In so doing, the process also relieves . . . its decision-makers of accountability for unjust or just decisions . . . ." *Id.*

146. Minow, *Foreword*, *supra* note 27, at 60.

147. Myrna Felder, *Family Law Focused on Visitation Rights and the Changing Definition of "Family"*, N.Y. L.J., Oct. 15, 1991, at S7.

148. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

149. Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989).

150. *Alison D.*, 572 N.E.2d at 29.

right to the care and custody of their child[.]"[151] As a "nonparent," Alison had no standing to pursue visitation rights. Thus, despite her "understandable concern" for her child, the definition of "parent" legally precluded her from having contact with the child. The majority completely avoided contextual references to Alison's perspective as a lesbian, the realities of artificial insemination as a means of creating two same-sex co-parents, and the exclusionary effects of a formal definition of "parent."[152]

1. The Historical and Contemporary Context of Domestic Relations Law Section 70

The lone dissenter and the only woman on the court, Judge Judith Kaye, stated that the legislative purpose of section 70 is to promote "the best interest of the child" and the child's "welfare and happiness."[153] Moreover, as the statute was passed in 1909 and the relevant language last amended in 1964,[154] the drafters of the law could not have envisioned the societal ramifications of artificial insemination and the evolution of gay civil rights at the time *Alison D.* was decided.

Studies show that, in 1991, the year in which *Alison D.* was decided, 15.5 million children did not live with two biological parents,[155] and that as many as eight to ten million were born into families with a gay or lesbian parent.[156] As Judge Kaye argues, the majority's definition of "parent" not only affects lesbian households, but includes "longtime heterosexual stepparents, 'common law' and non-heterosexual partners . . . , and []participants in scientific reproduction procedures."[157]

Alison D.'s specific context, however, also includes the lesbian, two-mother household. One researcher estimates that, in recent years, 5,000 to 10,000 children have been born to openly lesbian mothers.[158] Newspapers report a gay and lesbian "baby boom," fueled largely by the availability of artificial insemination and surrogacy.[159] Psychologists have found that children born

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151. *Id.*

152. It is interesting to note that in 1984, the chief judge of the New York Court of Appeals ordered a study of gender bias in the New York state court system, to "ascertain if there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in our courts." *Study of Gender Bias*, *supra* note 53.

153. *Alison D.*, 572 N.E.2d at 31 (Kaye, J., dissenting).

154. N.Y. DOM. REL. LAW § 70 (McKinney 1988).

155. *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting).

156. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990). This statistic does not reveal how many of these families consist of two-lesbian-mother households.

157. *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting).

158. Polikoff, *supra* note 156, at 461 n.2 (citing Seligman, *Variations on a Theme*, NEWSWEEK (Special Edition) Winter-Spring 1990, at 39).

159. Griffin, *supra* note 138, at 2 ("Evidence of a gay and lesbian boom abounds."); *see also* Scott Harris, *2 Moms or 2 Dads—And a Baby; Gay Parents Give Birth to Families of Their Own, Thanks to Such Methods as Artificial Insemination and Adoption*, L.A. TIMES, Oct. 21, 1991 ("Medical professionals can easily document hundreds of cases in the last decade [of] artificial insemination.").

and raised in lesbian and gay households are developmentally quite similar to children raised in heterosexual households.[160] Yet, nagging stereotypes about child rearing by lesbian families persist in the minds of many Americans. As one lawyer states: "Any time you're dealing with children, it brings out the most primitive kind of reaction to lesbians and gays. . . . People raise concerns about molestation and role modeling. And will children turn out to be lesbian and gay?"[161]

Furthermore, a 1989 survey found that seventy-five percent of those polled opposed the legal adoption of children by gay and lesbian couples,[162] even though many of those same people might support gay rights for other legal benefits.[163] Additionally, some argue that it is not in the best interest of a child to be raised in a two-parent, same-sex household. A spokesperson for the Rutherford Institute states: "[W]hatever the psychological truth about homosexuality, society has a right to determine what types of institutions it wishes to encourage . . . it is a radical departure to permit homosexuals to adopt and thereby teach children a belief that no civilization or religion has publicly condoned."[164]

A judge may not only consider the litigants' perspectives, but could also consider the above, anti-gay parenting perspectives in the interpretive process. After analyzing all the contemporary viewpoints, a judge should candidly state which perspective is determinative in the outcome of the case.

2. The Dynamic Feminist Approach to Defining "Parent"

According to theories of dynamic interpretation, *Alison D.* exemplifies a case of statutory interpretation ripe for a dynamic approach. Altered in part by technological innovation and a shift in the makeup of the "family," the current social landscape challenges the meaning of the term "parent" as used in the 1909 statute. Due to the controversial nature of the issue, the New York legislature may affirmatively choose not to participate in this debate.[165] Therefore, the question remains: Which context should define a statute's wording in a dynamic approach to statutory interpretation?

A dynamic feminist approach asks that judges acknowledge and reconcile their own possible bias by seeking to understand multiple perspectives through contextualization. Even those who deny being homophobic probably will be

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160. *E.g.*, David Tuller, *Lesbian Families—Study Shows Healthy Kids, Gay Advocates Say It Will Help in Legal Disputes*, SAN FRANCISCO CHRON., Nov. 23, 1992, at A13 (citing a University of Virginia psychologist's study).

161. Harris, *supra* note 159, at A1 (quoting an American Civil Liberties Union lawyer).

162. *Id.*

163. Rorie Sherman, *Gay Law No Longer Closeted*, NAT'L L.J., Oct. 26, 1992, at 1 (A *Newsweek* poll found that although "most Americans generally approve of 'gay spouses' receiving economic benefits, they strongly disapprove of giving legal recognition to gay families.").

164. *Id.*

165. Polikoff, *supra* note 156, at 574 ("[L]egislative debates about fundamental family values are exceedingly controversial, and legislators may seek to avoid controversy unless absolutely necessary." (footnote omitted)).

reluctant to accept the "normality" of a two-mother household. The prevalence of homophobic and heterosexist[166] attitudes in American society suggests that judges interpreting an undefined word may approach these problems from a perspective influenced by a homophobic and heterosexist bias. As a lawyer for a domestic relations firm states: "I think (the courts) really freak[] out at the idea of having two parents of the same sex. . . . When it came time for some standing to sue, even for visitation, they just completely shut down [by denying standing to the nonbiological parent]."[167] When lawyers began bringing gay and lesbian custody suits in the 1970's, lawyers viewed "judicial ignorance [about the realities of gay parenting] as the primary obstacle to unbiased decisionmaking."[168] Judicial bias, conscious or unconscious, probably plays a part in the judicial shut down in cases like *Alison D.*[169]

According to feminist legal methodology, judges could reconcile their ignorance and prejudices by considering and trying to understand the child's and the co-parents' respective contexts. They would find that the child called Alison "Mommy" and that the two had a functional parent-child relationship in every sense of the word except for a biological relationship. They could, in turn, weigh their own viewpoints[170] and the perspectives of other communities that condemn nonbiological parenting against the social realities of the functional parent-child relationship. In considering each perspective, a court might ask what values are served by privileging one view over the other. Would granting standing to a lesbian mother in a suit for visitation rights be the demise of the American family? What would be in the best interest of the child?[171]

Moreover, asking "[w]hat is the [a]rea of . . . [d]enial [c]reated by the [d]ifferences [b]etween [w]omen's [l]ife [e]xperiences and the [l]aw's [a]ssumptions[,]"[172] in the context of a lesbian, nonbiological mother, forces a court to acknowledge that a formalistic definition of "parent" absolutely precludes a woman who is not inseminated and who does not have the legal

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166. Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CH. 923, 925-26 (1986) ("While homophobia involves active fear and loathing of homosexuality, heterosexism wishes away lesbian and gay people or assumes that they never really existed.").

167. *Courts Can't Keep Up with New Reproductive Technology and Non-Traditional Families*, MICH. LAW. WKLY., Apr. 13, 1992, at 21.

168. Polikoff, *supra* note 156, at 547.

169. Martha C. Nussbaum, *Sex and Reason by Richard Posner*, NEW REPUBLIC, Apr. 20, 1992, at 36 (arguing that cases that deal with homosexuality are a "rich repository of judicial bias and ignorance").

170. *Id.* at 36 ("Prejudice, a lack of curiosity, flawed logic: all of these are depressingly common when judges confront the complexities of sex."); *see also* Polikoff, *supra* note 156, at 545 ("It is predictable that courts would rely on myths to oppose lesbian and gay parenting. Courts and legislatures have previously seized on discriminatory ideologies disguised as scientific truth to serve as the basis for [decision-making] in the area of child rearing.").

171. Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269, 288 (1991) [hereinafter Minow, *Redefining*] (arguing that, from a child's perspective, "the marital status, biological or nonbiological connection, and also the sexual orientation of such adults is irrelevant.").

172. Wishik, *supra* note 41, at 74.

right[173] to adoption from seeing her child. Asking the question may not lead a court to a more functional definition of "parent," but exposing the bias inherent in a formal definition promotes judicial accountability for the inevitable exclusion of all "parents" that do not meet the requisite traditional criteria. Otherwise, the litigants and future readers of court decisions are left with the majority opinion in *Alison D.*—an opinion that ignores all of the contextual details and exclusionary ramifications involved in privileging a formal definition of "parent."

Given the context of Alison as a co-parent who agreed to the artificial insemination of Virginia and one who actively pursued all the aspects of a functional child-parent relationship; the perspective of a nonbiological lesbian mother who has no legal recourse to become a "parent"; the perspective of a child that calls Alison "Mommy"; and the social realities of nontraditional families, caused in part by shifting societal values and reproductive technology, a dynamic feminist approach could lead to a functional definition of "parent," thus allowing a lesbian mother who met the test to sue for visitation rights.[174] A functional definition could help create a test which defines "parent" as someone who meets certain criteria that focus on the realities of a functional child-parent relationship.[175]

Even if a court chose a traditional, exclusionary definition of "parent" after contextualizing, asking the "woman question," and realizing the potential effects of an alternative definition, a dynamic feminist approach would encourage the decision-makers to account for the consequences of their own biases in the interpretive process. The candid recognition of multiple perspectives reinforces the notion that the judge truly understands the litigants' contexts and the limitations of their own partial perspective. By exposing the bias in the application of a formal definition, the decision-maker takes responsibility for the political and moral consequences of her decision when, in light of that bias, a decision-maker privileges a formal definition over a functional one. While a formal definition of "parent" strikes some as fundamentally unfair, the process of dynamic feminist interpretation promotes

173. The dissent notes that the New York Court of Appeals had not ruled on the legality of adoption by a second mother. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991).

174. *See* Felder, *supra* note 147, at S9 ("A construction of the term 'parent' to include a *de facto* parent, such as the petitioner in *Alison D.*, would have similarly found its foundation in the reality of family life.").

175. Minow, *Redefining*, *supra* note 171, at 284-85. In an amicus brief for *Alison D.*, Professor Minow and several authors proposed criteria for a functional definition of "parent."

> The term "parent" includes a person who meets the following three criteria:
> (a) the person has lived with the child for a substantial portion of the child's life; and
> (b) the person has been regularly involved in the day-to-day care, nurturance, and guidance of the child appropriate to the child's stage of development; and
> (c) if the child has been living with a biologic parent, the biologic parent has consented to the assumption of a parental role by the person, and the child has in fact looked to this person as a parent.

Id. at 285 n.52.

more honest and judicially accountable methods of decision-making, regardless of the outcome.[176]

B. The Interpretive Process—Defining "Mother" in Anna J.

> What used to be among the easiest legal terms to define—maternity—is becoming one of the toughest.[177]

> [J]udges and commentators [who define "mother" as genetic mother] are men whose only possible biological links [to a child] *are* genetic. They'll never have "morning" sickness in the afternoon or swollen ankles in the eighth month because there's a baby in the belly. They'll never worry before drinking a second cup of coffee, lest it affect a developing fetus.[178]

In *Anna J.*, Crispina and her husband, Mark, contracted with Anna to implant in her womb an embryo, prepared in a laboratory from the couple's egg and sperm. Throughout the pregnancy, the relationship between the couple and Anna deteriorated. When the baby was born, Anna sought to retain custody of the child as the legal mother.[179] The California Court of Appeals, while recognizing the social and legal ramifications of its decision, concluded that the controlling statute, the Uniform Parentage Act (the "UPA" or "Act"), "lead[s] us to one inevitable destination."[180] Lacking a statutory definition of "mother," the court looked to the Act for guidance.[181]

The UPA, passed in 1975, was intended to eliminate the legal distinction between legitimate and illegitimate children. Section 7015 of the Act states that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply."[182]

Because sections 7003 and 7004 of the same Act provide that blood tests determine the question of paternity, the court compared Anna's claim to maternity to a man's claim to paternity, where blood tests positively exclude him as a candidate.[183] Of course, blood types excluded the possibility of Anna's genetic ties with the child. Therefore, Crispina, the genetic mother, was declared the legal mother under the statute. The court bolstered its opinion with reports from the Assembly Judiciary Committee on Senate Bill that states that a "[parent-child] relationship can be established . . . either

176. *See generally* Shapiro, *supra* note 24.

177. Milo Geyelin, *Medical Advances Are Changing the Legal Definition of Maternity*, WALL ST. J., Jan. 8, 1993, at B8.

178. R. Alta Charo, *Mommies Dearest, To the Editors: University of Wisconsin School of Law*, 1992 WIS. L. REV. 233, 234 (1992) (emphasis in original).

179. Anna J. v. Mark C., 286 Cal. Rptr. 369, 373 (Cal. Ct. App. 1991), *superseded by* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

180. *Id.* at 371.

181. CAL. CIV. CODE § 7015 (West 1983).

182. *Id.*

183. *Anna J.*, 286 Cal. Rptr. at 376.

through a paternity suit or through the operation of a presumption based upon criteria similar to those presently used to establish 'legitimacy.'"[184] According to the court, this report supported the conclusion that Civil Code section 7015 similarly governs both paternity and maternity suits.

Under its analysis, the court chose to ignore section 700f of the UPA, which allows the husband of a woman who is artificially inseminated to be the legal father of a child even though he is not genetically related to the child.[185] The court found that the spirit of the rule did not apply to the facts in *Anna J.* because "the statute, which was intended to deal only with artificial insemination, has no application to this case."[186] The court was more than willing to apply section 7015, although the statute was written at a time when, as the court admits, "[h]istorically there [had] never been occasion when the . . . mother was not unquestionably also the same woman who bore the child."[187]

Responding to the argument that the UPA violated California's Equal Protection Act, the court reasoned that, while determining paternity and maternity similarly might not be a good idea, "it certainly is not gender discrimination."[188] The court further stated that if the UPA hypothetically distinguished between "classes" of women by emphasizing genetics over gestation (presumably a gestational mother will be poorer than the genetic mother), the choice is a "rational" one because heredity can provide "a basis of connection between two individuals for the duration of their lives."[189] Although the court's opinion reflects contemplation of the social implications of in vitro fertilization and the ramifications of naming the genetic mother the legal "mother," the court still approached the case like a paternity suit because "[o]ur system of government does not make the courts de facto 'philosopher-kings.'"[190]

1. The Dynamic Feminist Approach to Defining "Mother"

The California Court of Appeal turned to the UPA for "necessary signs and markers to find [a] way to a decision."[191] Subsequently, the court felt "compelled" by the Act's language. The court's analysis turned on section 7015 of the Act, which states: "Insofar as practicable, the provisions of this part applicable to the father and child relationship apply [to determine the

184. *Id.* at n.20.

185. CAL. CIV. CODE § 7005(b) states: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

186. *Anna J.*, 286 Cal. Rptr. at 377.

187. *Id.* at 371.

188. *Id.* at 380.

189. *Id.* at 381.

190. *Id.* at 382. The quote seems ironic in light of references to Plato, Mark Twain, the *Bible*, *The Handmaid's Tale*, and *Brave New World* throughout the court's opinion. *See, e.g.*, *id.* at 370 n.1, 371 n.6.

191. *Id.* at 373.

existence of a mother and child relationship]."[192] The 1975 UPA attempted to eliminate the legal distinction between legitimate and illegitimate children by determining parental rights on the basis of an existing parent-child relationship, rather than on marital status alone.[193]

The California legislature did not envision the ramifications of in vitro fertilization and their effect on maternity claims.[194] Thus, under a dynamic feminist approach, the historical context counts for little in the interpretive process, in light of this new reproductive technology. The judicial interpreter is left with only the contemporary context and the statutory text as guides in the interpretive process.

The UPA does state that "insofar as practicable[,]" maternity claims should be decided similarly to paternity claims.[195] A court, however, following principles of dynamic feminist interpretation, might not find section 7015 to be "practicable" in the case of in vitro fertilization.[196] Since the statute was not written with in vitro fertilization in mind, judges need to update the statutory interpretation for such a novel, problematic context.

In terms of judicial bias, the court acknowledges the biological role played by the gestational mother,[197] but does not acknowledge the role male bias may have played in the final decision that pregnancy, in itself, does not make a legal "mother."[198] Men's only biological link to their children consists of passing on their DNA.[199] This factor, among others, may lead male judges to unconsciously underestimate the biological and psychological bonding that occurs between woman and child during pregnancy.[200] As one female author points out: "This rush to impose a male definition on a uniquely female biological experience is almost a bad feminist joke."[201] Even though the text of the statute leads to this male definition in *Anna J.*, unconscious judicial bias may have helped determine that this comparison was "practicable" and

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192. CAL. CIV. CODE § 7015.

193. *Anna J.*, 286 Cal. Rptr. at 373-74.

194. Most cases of in vitro fertilization began in the early to mid-1980's. *See* Penelope McMillan, *Natural Parents' Embryo Living in Surrogate Mother*, L.A. TIMES, Nov. 29, 1986, Part II, at 1; Jay Mathews, *Boy's Birth Is First from Embryo Transfer*, WASH. POST, Feb. 4, 1984, at A14.

195. CAL. CIV. CODE § 7015.

196. FIELD, *supra* note 8, at 38 ("The problems [of] modern technology . . . challenge not only what remains of the traditional nuclear family as a norm, but even our ways of thinking about ourselves and our families.").

197. *Anna J.*, 286 Cal. Rptr. at 378 ("The woman protects and nourishes the child during pregnancy, and, for good or ill, can permanently affect the child by what she ingests. The contribution to the child's development by the woman who gave it birth is . . . profound.").

198. The Fourth District California Court of Appeals was comprised of four men and one woman as of the date of the *Anna J.* decision.

199. Charo, *supra* note 178, at 234.

200. Psychologist Nancy Chodorow argues that all children begin life in a state of "infantile dependence" on a mother. This dependence occurs when the child experiences a "sense of oneness" with the mother, beginning with the "child's prenatal experience of being emotionally and physically part of the mother's body and of the exchange of body material through the placenta." NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 47 (1978).

201. Charo, *supra* note 178, at 234.

that other sections of the statute dealing with artificial insemination were not.[202]

If a judge recognizes the possibility of an unconscious bias preferring genetics over gestation, a judge can expand this limited experience by seeking to better understand the contemporary context. Judges may weigh the claims of the "genetic" mother—the egg donor, who is unable to have a child—against the claims of the "gestational" mother, who claims a biological and psychological connection to the newborn child. Within the process of contextualization, the judge should also consider the litigants' social class[203] and other contingencies that affect questions surrounding surrogate mothering, and ask what values are served by privileging one definition over another.

Additionally, a judge should view maternity claims in the overall context of a sharp and recent increase in surrogacy. In the United States alone, there have been 20,000 surrogate births within the last ten years.[204] By asking the "woman question," a judge will see how applying a statute based on paternity claims to these maternity claims not only precludes a gestational mother from claiming maternal rights, but also raises questions about the genetic mother's control over the gestational mother's conduct during pregnancy.[205]

2. Justice Joyce Kennard's Dissent in *Johnson v. Calvert*: A Dynamic Feminist Opinion

On appeal, the California Supreme Court upheld the court of appeal's decision granting parental rights to the genetic parents, Mark and Crispina.[206] The court, however, did not follow the court of appeal's reasoning, but rather stressed the intentions of the parties as being determinative of the outcome of the case.[207] Therefore, since "Crispina . . . intended to bring about her child's birth and rear him as her own, [Anna] had no maternal rights."[208] Rather than agreeing with the majority's "intent" test, Justice Joyce Kennard, the California Supreme Court's only woman justice, applied "the standard most protective of child welfare—the best interests of the

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202. *Id.* ("A majority of American courts, newspapers, and academic commentators have already adopted the term 'natural' or 'biological' mother to mean 'genetic' mother. They write of conflicts between genetic and gestational mothers as that of 'nature versus nurture,' as if nine months of pregnancy isn't biological.").

203. *See* FIELD, *supra* note 8, at 43 ("If [in vitro fertilization] leads to a sharp increase in demand for surrogates, including gestational surrogates, the exploitation [of the poor] is likely to mushroom.").

204. Geyelin, *supra* note 177, at B8. Most of these 20,000 cases do not involve in vitro fertilization, but the process is becoming increasingly popular. *Id.*

205. If the genetic mother is the legal "mother," can she stop the gestational mother from aborting a fetus? Must she provide for extra health costs? What if the gestational mother ingests alcohol or drugs during pregnancy? *See, e.g.*, Anna J. v. Mark C., 286 Cal. Rptr. 369, 381 (Cal. Ct. App. 1991), *superseded by* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

206. Johnson v. Calvert, 851 P.2d 776, *cert. denied*, 114 S. Ct. 206, *cert. dismissed*, 114 S. Ct. 374 (1993).

207. *Id.* at 782.

208. *Surrogate Case: A Good Ruling*, L.A. TIMES, May 24, 1993, at B6 (Home Edition).

child."[209] Her dissenting opinion demonstrates a dynamic feminist approach to the problem of in vitro fertilization.

First, she discusses the medical advances in surrogacy and then analyzes the "ethical, moral and legal implications"[210] of gestational surrogacy. She then considers the views of surrogacy critics[211] and proponents[212] like the American Medical Association, feminist legal scholars, and the Catholic Church.[213] Second, she finds that the UPA provides "no standards for determining who [the] natural mother should be when . . . two different women can offer biological proof of being the natural mother of the same child under its provisions."[214] Third, she discredits the majority's "intent" analysis, primarily because it "devalues the substantial claims of motherhood by a gestational mother . . . ."[215]

Moreover, Justice Kennard states that since the UPA was not designed to govern gestational surrogacy, she would apply the "best interests of the child" test to determine the outcome of the case.[216] In addition to her primary concern with the child's best interests, Justice Kennard calls for "sensitivity to each of the adult participants"[217] in judging surrogacy cases. In conclusion, she states:

> In this opinion, I do not purport to offer a perfect solution to the difficult questions posed by gestational surrogacy; perhaps there can be no perfect solution. But in the absence of legislation specifically designed to address the complex issues of gestational surrogacy and to protect against potential abuses, I cannot join the majority's uncritical validation of gestational surrogacy.[218]

A dynamic feminist approach, like that taken by Justice Kennard, does not make judges "de facto philosophers," but it does allow for accountable judicial creativity in contemporary contexts that do not fit well into existing statutory frameworks.[219] In light of the possible gender bias in determining maternity as one would paternity, the bias on the part of judges who may underestimate the biological and psychological experience of pregnancy, and

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209. *Johnson*, 851 P.2d at 789 (Kennard, J., dissenting).

210. *Id.* at 790-91.

211. *See* Rene Lynch, *Ruling Seems Sure to Escalate Ethical Debate*, L.A. TIMES, May 21, 1993, at A1 (Orange County Edition) ("'The court is saying that women are nothing more than a womb to be rented for nine months.'" (quoting Andrew Kimbrell, counsel and co-founder of the National Coalition Against Surrogacy)).

212. *See id.*

> "This ruling will serve to keep the option of surrogate parenting open and viable for those couples as well as the women who choose to help them . . . . In an age where female infertility is dramatically increasing, mainly due to changes in lifestyle, surrogacy is more of an option than ever for the one in six couples who are infertile."

Id. (quoting Ralph Fagen, Co-Director, Center for Surrogate Planning, Beverly Hills, California).

213. *Johnson*, 851 P.2d at 792-93 (Kennard, J., dissenting).

214. *Id.* at 795.

215. *Id.* at 797.

216. *Id.* at 799.

217. *Id.* at 800.

218. *Id.* at 801.

219. *See* Shapiro, *supra* note 24.

the legal complications of in vitro fertilization, a dynamic feminist interpretation of a gestational surrogacy case would most likely follow Justice Kennard's dissenting opinion.

For example, if the statute was not applicable to contemporary circumstances, a court could find that *both* mothers are the biological "parents" of the child. In so doing, the court might turn to the question of custody, focusing its analysis on the best interests of the child.[220] An analysis of the child's best interests may prove no less difficult than a maternity claim,[221] but it would not automatically exclude the gestational or the genetic mother from the child's life, nor would it necessarily permit a genetic mother to exercise control over the gestational mother's body during pregnancy.

In *Anna J.*, the court utilized a statute which was designed to determine paternity claims and which was enacted before the advent of in vitro fertilization. A dynamic approach to statutory interpretation requires that, in order to respond to contemporary context, the statute need not dictate that maternity claims be decided like paternity claims. Feminist legal methodology reveals how male bias in the substantive law and in judicial preferences for male-oriented, genetic definitions of "mother" influences the decision-making process in a maternity dispute. In addition, even if the decision-maker follows the methodological steps of a dynamic feminist approach, and then rules in favor of the "genetic" mother under the "best interests of the child" or "intent" standard, the decision-maker takes responsibility for the social and political consequences of the definition, instead of relegating sole responsibility for the decision to a legislature that never considered the issue.[222]

IV. CONCLUSION

Novel situations that are unaddressed and unanticipated by legislatures beg for judicial creativity in light of contemporary developments in the context of familial relationships. Traditional methods of statutory interpretation fail to account for the multiple perspectives that stem from contemporary context, especially in cases involving issues of gender and innovative reproductive technology. A dynamic feminist approach to statutory interpretation exposes and contains judicial bias through a methodological process of contextualizing and posing the "woman question." This process allows a judge to candidly accept responsibility for the political and moral consequences of statutory definitions and applications.

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220. Charo, *supra* note 178, at 235 ("Acknowledging that two women are biologically related to the same child . . . does not . . . dictate custody.").

221. *See* Minow, *Redefining*, *supra* note 171, at 285 ("To talk of children's interests hardly simplifies matters. Just think about emphasizing children's interests in the regulation of in vitro fertilization.").

222. Although the California legislature never contemplated the ramifications of in vitro fertilization, the court of appeal found that "the law of California, as worded by our Legislature, requires us to conclude Mark and Crispina are the naturel and legal parents of the child." Anna J. v. Mark C., 286 Cal. Rptr. 369, 382 (Cal. Ct. App. 1991), *superseded by* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

Ideally, a dynamic feminist approach would encourage judges to rule in favor of statutory definitions that do not discriminate on the basis of gender or sexual orientation. If nothing else, however, a decision made under a dynamic feminist approach would render a more honest and empathic decision in the eyes of the litigants whose families are at stake. Such an approach would also hold judges accountable for statutory definitions that work to exclude and subordinate certain people on the basis of social factors like gender or other "differences" from the assumed legal norm. The social factors and multiple perspectives brought to light by a dynamic feminist approach also may encourage legislatures to enact statutes directly addressing issues surrounding these novel contexts. Overall, the advantages of an honest and judicially accountable method of decision-making present compelling reasons for adopting a dynamic feminist approach to problematic cases of statutory interpretation where the contemporary context challenges the purportedly "plain" statutory meaning.