

MAKING WAVES OR KEEPING THE CALM?: ANALYZING THE INSTITUTIONAL CULTURE OF FAMILY COURTS THROUGH THE LENS OF SOCIAL PSYCHOLOGY GROUPTHINK THEORY

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I. INTRODUCTION

The study of the institutional culture of family courts offers a fascinating glance into the inner workings of courthouses. Yet, family court culture has been largely overlooked in legal and cultural literature. While there is no dearth of scholarly writing on the issue of culture, and a growing body of work on the culture of courthouses,¹ there is a paucity of literature pertaining to the specific organizational culture of family courts.² This article seeks to commence a meaningful dialogue concerning the organizational culture in family courts nationwide. It will utilize the social psychology theory of groupthink as a backdrop to hypothesize why family court culture is unique and worthy of further study and to suggest ideas for reform.

Why is the study of courthouse culture so critical? “It has long been recognized by court administrators and judges that culture plays an important role in how courts function.”³ Culture may have an impact upon access to fairness, justice,⁴ due process, dignity,⁵ and the perspectives of parties before the court. As such, analyzing courthouse culture, especially criminal and family court culture, is essential to ensuring that these ideals do not go unfulfilled. These are the courts which “are called upon to re-

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1. See, e.g., BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS (2007).

2. For some of the leading works, see Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339 (1999) and Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986) [hereinafter Guggenheim, *Divided Loyalties*]. See also Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998).

3. OSTROM ET AL., *supra* note 2, at 3-4.

4. See *id.* at 92.

5. See *id.* at 146-47.

solve some of society's most insoluble problems and to handle people with whom other social institutions have failed miserably," yet which "often operate under a cloud."⁶ Hence, "[t]he invisibility of [trial court] activities contributes further to the public's skepticism of these courts" and "reinforce[s] perceptions . . . to further undermine their credibility and legitimacy."⁷

My thesis is that the institutional culture of family courts across the nation too often stifles conversation and innovation, muffles the voices of the disenfranchised, and serves as a disincentive for zealous legal advocacy. The social psychology phenomenon known as "groupthink" can be shown to be a contributing factor to this culture. In particular, lawyers, court administrators, caseworkers, and judges involved in family court cases often operate in a groupthink-like modality, and that modality—while admittedly possessing some positive attributes—can be harmful to parties involved in family court proceedings and undermine perceptions of fairness and justice. Therefore, breaking groupthink bias would be a forward step towards rethinking the culture of family courts.

There are some remarkably prominent patterns of thinking and decision making that occur in the family court setting, parallel to groupthink, when crisis is injected into adversarial decision making involving the same courthouse actors interacting in the same setting day after day. Hopefully, awareness of these patterns will encourage courthouse actors to consciously avoid faulty group decision making that adversely impacts parties and families in the family court system.

Part II defines groupthink and discusses how its original proponent and others have expanded and refined its contours over the years. Part II.A. discusses the three principal antecedents of groupthink. Part II.B. outlines three overarching symptoms of groupthink. Part II.C. discusses the link between faulty decision making and bad decisions. Part III.A. defines culture as it is utilized in this article. It then discusses the original intentions of family court and certain aspects of its culture, and identifies the power imbalance in family court proceedings. Part III.B. analyzes family court institutional culture through the lens of the principal groupthink antecedents. Part III.C. examines how the overarching symptoms of groupthink intersect with family court institutional culture. Part IV outlines ideas for reforming family court institutional culture by drawing from groupthink reform ideas. Part IV.A. discusses maintaining institutional accountability and control and limiting the practice of judges appointing particular attorneys to their cases, the first reform idea. Part

6. PETER F. NARDULLI, JAMES EISENSTEIN & ROY B. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 1* (1988) [hereinafter NARDULLI ET AL., *TENOR OF JUSTICE*].

7. *Id.* at 2.

IV.B. introduces the second reform idea, which involves protecting whistleblowers and dissenters' rights to opt out of settlement negotiations. Part IV.C. presents and discusses the final reform idea: educating repeat players about the dangers of groupthink. Part V concludes.

This article does not attempt to make any statistical or empirical claim that groupthink is the sole determinant of family court institutional culture.⁸ Rather, it uses the theory as a backdrop for analyzing the existing culture of family courts while also offering ideas for reform. It is my hope that this article will shed light on this understudied field and provide a foundation for further discussion and social science research efforts.

II. OUTLINING THE SOCIAL PSYCHOLOGY THEORY OF GROUPTHINK

*"Man is by nature a political animal with an innate tendency to form into groups."*⁹

—Aristotle

In 1972, Irving Janis arguably revolutionized social psychology when he published *Victims of Groupthink*.¹⁰ Groupthink may be defined as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."¹¹ Groupthink is one of the more commonly cited and utilized theories of social psychology in the world,¹² having legitimized scores of group dynamics, psychological research studies, and other experimental work by

8. My hypothesis is, however, drawn from sixteen years of family court work within and across two states and seventeen counties across those states, as well as a decade of discussion with other family law professors and practitioners in family court about the culture and nature of family courts. Additionally, I draw from the existing academic literature on the topic. I am not positing that all family courts in all jurisdictions nationwide are constant and unvarying; however, there are strikingly similar parallels across every jurisdiction. A future article is in progress that will infuse these hypotheses with qualitative data of a slightly different focus, introducing the concept of organizational court culture through the overlay of other psychological theories, such as cognitive dissonance. This article is part of a larger project which analyzes family courts as well as the lawyers, judges, and parties that come before the court.

9. ARISTOTLE, *THE POLITICS* (T.A. Sinclair trans., Penguin Books 1992) (350 B.C.).

10. See IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1972) [hereinafter JANIS, *GROUPTHINK*]. Since its inception, groupthink has consistently rebutted critiques, remaining a valid principle to this day. It is also routinely included in many introductory and social psychology textbooks. See, e.g., GRAHAME HILL, *A LEVEL PSYCHOLOGY THROUGH DIAGRAMS* 271 (2d ed. 2001).

11. JANIS, *GROUPTHINK*, *supra* note 10, at 9.

12. See Marlene E. Turner & Anthony R. Pratkanis, *Theoretical Perspectives on Groupthink: A Twenty-Fifth Anniversary Appraisal*, 73 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 103, 103 (1998) (describing groupthink as "one of the most pervasive and fascinating models in the behavioral sciences").

giving a context to the processes and potential risks of group decision making.¹³

Janis emphasized that it is the context, not the people, that contributes to groupthink;¹⁴ however, that is not to say that groupthink is a fixed attribute of any group, nor is it dependent upon the types of personalities that happen to be dominant within the group.¹⁵ A famous example of a fiasco caused by groupthink, and the core inspiration for the theory, was the Bay of Pigs invasion.¹⁶ Janis was particularly intrigued by the Bay of Pigs invasion because nearly the exact same group of individuals involved in this fiasco engaged in positive decision making years later in averting the Cuban Missile Crisis. One of the more intriguing aspects of the Bay of Pigs invasion to him was that the group members he studied were all well-educated, intelligent individuals capable of making reasoned and independent decisions. Essentially, these individuals might well have reached different conclusions had they made their decisions outside of the groupthink dynamic.

The group mentality at work in many organizations prevents its members from properly or independently thinking through their decisions as thoroughly as they should, thereby causing them to default to short cuts or stereotypes.¹⁷ No one is truly immune from groupthink, even competent individuals with high self-esteem.¹⁸ In fact, Janis believes that “in certain powerful circumstances that make for groupthink, probably every member of every policy-making group . . . is susceptible . . . whenever circumstances promote concurrence-seeking.”¹⁹ He further explains that:

If the same committee members show groupthink tendencies in making decisions at one time and not at another, the determining factors must lie in the circumstances of their deliberations, not in the fixed attributes of the individuals who make up the group. The

13. See *id.* at 4-5.

14. See JANIS, *GROUPTHINK*, *supra* note 10, at 8-9.

15. See *id.* at 9, 13.

16. See *id.* at 14.

17. IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 174-75* (2d ed., rev. 1982) [hereinafter JANIS, *GROUPTHINK 2D ED.*]. The term “groupthink” is reminiscent of “doublethink,” a term coined by George Orwell in 1984. See JANIS, *GROUPTHINK*, *supra* note 10, at 9. Many before Janis have said groups can bring out the worst as well as the best in man. Friedrich Nietzsche went so far as to say that “madness is the exception in individuals but the rule in groups.” *Id.* at 3 (paraphrased by Janis); see also FARHAD DALAL, RACE, COLOUR AND THE PROCESS OF RACIALIZATION: NEW PERSPECTIVES FROM GROUP ANALYSIS, *PSYCHOANALYSIS AND SOCIOLOGY* 33 (2002); KATHLEEN M. GALOTTI, MAKING DECISIONS THAT MATTER: HOW PEOPLE FACE IMPORTANT LIFE CHOICES 131 (2002). In this second edition, Janis refined and updated the theoretical constructs of groupthink. The book also contains a re-examination of the six policy decisions analyzed in the first edition along with Watergate and two positive policy decisions, the Cuban Missile Crisis and the Marshall Plan.

18. See JANIS, *GROUPTHINK 2D ED.*, *supra* note 17, at 243.

19. *Id.*

determining factors therefore seem to be variables that can be changed and lead to new and more productive norms.²⁰

A common misconception about groupthink is that congeniality and collegiality equals groupthink. Even though Janis cautions that high levels of “amiability and esprit de corps” within a group increases the chances that groupthink will supplant individual members’ critical analyses of problems, he points out that a high level of such amiability will not automatically lead to groupthink.²¹ In fact, if certain safeguards are present, a cohesive group will likely make better decisions than a non-cohesive group.²²

In another related theory of group dynamics, social comparison theory, people strive to verify if their opinions are correct, but when the correct answers are unavailable, they compare their ideas to those of others.²³ Janis cites to social comparison theory when explaining groupthink decisions, which are not necessarily decisions in which a powerful leader subjugates the views of others, but rather are a product of true group dynamics.²⁴ In other words, group members buy into the decision and do not necessarily feel as though they are being forced into a particular pattern of thinking, perhaps unaware of the underlying subtle pressures exerted by the group in order to reach consensus.²⁵

Over the past several decades, many researchers have come forth to validate, expand upon, or criticize groupthink.²⁶ Paul ‘t Hart, for example, has further distilled, reshaped, and expanded upon the theory. He

20. *Id.* at 158.

21. *See id.* at 245.

22. *See id.* at 246.

23. *Id.* at 277 (noting the work Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954)); RUPERT BROWN, *GROUP PROCESSES* 124 (2d ed. 2000).

24. *See* JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 193.

25. *See id.* at 3; BROWN, *supra* note 23, at 126-27; JAMES C. FREUND, *ADVISE AND INVENT: THE LAWYER AS COUNSELOR-STRATEGIST AND OTHER ESSAYS* 28 (1990).

26. *See e.g.*, PAUL ‘T HART, *GROUPTHINK IN GOVERNMENT: A STUDY OF SMALL GROUPS AND POLICY FAILURE* (1990); Ramon J. Aldag & Sally Riggs Fuller, *Beyond Fiasco: A Reappraisal of the Groupthink Phenomenon and a New Model of Group Decision Processes*, 113 PSYCHOL. BULL. 533 (1993); Robert S. Baron, *So Right It’s Wrong: Groupthink and the Ubiquitous Nature of Self Censorship*, 37 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 219 (2005); Matie L. Flowers, *A Laboratory Test of Some Implications of Janis’s Groupthink Hypothesis*, 35 J. PERSONALITY & SOC. PSYCHOL. 888 (1977); Jeanne Longley & Dean G. Pruitt, *Groupthink: A Critique of Janis’s Theory*, 1980 REV. PERSONALITY & SOC. PSYCHOL. 74; Clark McCauley, *Group Dynamics in Janis’s Theory of Groupthink: Backward and Forward*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 142 (1998); Gregory Moorhead & John R. Montanari, *An Empirical Investigation of the Groupthink Phenomenon*, 39 HUM. REL. 399 (1986); Christopher P. Neck & Gregory Moorhead, *Groupthink Remodeled: The Importance of Leadership, Time Pressure, and Methodical Decision-Making Procedures*, 48 HUM. REL. 537 (1995); Glen Whyte, *Groupthink Reconsidered*, 14 ACAD. MGMT. REV. 40 (1989). For a comprehensive overview, see generally James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 116 (1998).

casts groupthink in a more "comprehensive theoretical framework" designed to reflect the interdisciplinary perspectives of social psychology, public administration, and political science.²⁷

Others have argued that groupthink is a much broader concept with wider application than when it was originally conceived.²⁸ For instance, Baron insists that groupthink is much more ubiquitous than Janis implied and applies to everyday situations just as much as high-powered political decision making.²⁹ Although groupthink was initially conceived in a political context and centered on foreign policy decisions, Janis himself has acknowledged a wider application of the theory and addressed its use in other areas, such as business decision making.³⁰

A. Three Principal Antecedents of Groupthink

The convergence of three principal antecedents creates groupthink.³¹ The first antecedent is cohesiveness within a group.³² The second antecedent is the presence of structural faults within the organization of the group and can include insulation, lack of impartial leadership, a lack of methodical procedures, and social and ideological homogeneity among group members.³³ The third antecedent is the existence of a provocative situational context, which often encompasses high external stress and moral dilemmas.³⁴

Cohesiveness is a multi-faceted construct and is frequently examined.³⁵ Despite extensive research, many psychologists disagree about how cohesiveness is actually formed. Some studies have found a link between "self-categorization and social identity aspects of cohesiveness, rather than . . . mutual attraction."³⁶ Other studies have shown that group identifica-

27. See T HART, *supra* note 26, at 5.

28. Some psychologists still remain skeptical about the validity of groupthink because it has never been empirically tested. However, experimental testing may not be a realistic possibility as it would be extremely difficult to artificially create group cohesion or devise a highly stressful situation comparable to a real-life crisis. Thus, even though the theory of groupthink has not been conclusively proven through scientific testing, it is still widely considered a viable theory despite its inherent testing limitations.

29. See Baron, *supra* note 26.

30. See JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 242-43.

31. Unlike Janis, Baron suggests three different antecedents for groupthink: (1) social identification with a group of individuals; (2) salient norms; and (3) low self-efficacy. See Baron, *supra* note 26. In this article, I draw heavily from Janis's original antecedents when applying groupthink to family court culture; however, I will also briefly address the application of Baron's "salient norms."

32. See JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 243-45.

33. See *id.* at 244.

34. See *id.*

35. See Paul B. Paulus, *Developing Consensus About Groupthink After All These Years*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 362, 368 (1998).

36. Glen Whyte, *Recasting Janis's Groupthink Model: The Key Role of Collective Efficacy in Decision Fiascoes*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 185, 188 (1998).

tion and social attraction are more positively linked to cohesion than actual friendship.³⁷ In fact, one study has found that cohesiveness can exist within a group without the group members even liking each other.³⁸

Nardulli and colleagues carefully studied the courthouse culture of criminal courts from a sample of demographically diverse counties in three states to learn more about cohesion within those courthouses.³⁹ The results show that cohesiveness is tied closely to the prevalence of “the grapevine” (i.e., the exchange of information between individuals) among courthouse workers.⁴⁰ The study also notes that some legal offices appear to have automatic “internal cohesiveness,” thus facilitating the quick exchange of the latest news about the courthouse.⁴¹

Individuals who seek cohesion, peer approval, and prefer their work colleagues to be good friends, regardless of their friends’ competence, are more susceptible to groupthink.⁴² Baum has also suggested that judges desire to maintain their group identity and self-preservation and often seek approval from others, making them susceptible to groupthink as well.⁴³ These findings have important implications not only for lawyers, court administrators, clerks, social workers, and judges who work together daily in family court, but also for the litigants appearing before family courts.

B. Three Overarching Symptoms of Groupthink

Next, we look at the three overarching symptoms that would be present in cohesive decision-making groups operating under groupthink bias.⁴⁴ These symptoms may be categorized as: (1) overestimation of the group’s invulnerability or belief in inherent morality and insulation of the group from the judgments of outsiders; (2) close-minded, stereotyped images of outgroups; and (3) pressure towards uniformity or the leader’s promotion of her preferred solution.⁴⁵ Janis was surprised at his findings, particularly in the context of a group’s adherence to group norms and the pressure towards uniformity.⁴⁶ He explained that:

37. See Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, 28 EUR. J. SOC. PSYCHOL. 323, 338 (1998) (finding that group identification and social attraction are more closely related to symptoms of groupthink than actual friendship).

38. See BROWN, *supra* note 23, at 45-52 (disproving the simplistic notion that cohesiveness and friendship are one and the same).

39. See NARDULLI ET AL., TENOR OF JUSTICE, *supra* note 6, at 56-60.

40. See *id.* at 124-25.

41. See *id.*

42. See JANIS, GROUPTHINK 2D ED., *supra* note 17, at 242.

43. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 23 (2006).

44. See JANIS, GROUPTHINK 2D ED., *supra* note 17, at 174-75.

45. See *id.*

46. See *id.* at 11.

Just as in groups of ordinary citizens, a dominant characteristic appears to be remaining loyal to the group by sticking with the decisions to which the group has committed itself, even when the policy is working badly and has unintended consequences that disturb the conscience of the members. In a sense, members consider loyalty to the group the highest form of morality. That loyalty requires each member to avoid raising controversial issues, questioning weak arguments, or calling a halt to softheaded thinking.⁴⁷

When a group displays all or most of these symptoms, the symptoms of defective decision making often follow and lower the probability of a successful decision.⁴⁸ It is important to note that groupthink was not intended to address situations in which a group leader makes clear what the decision should be with others blindly following his lead.⁴⁹ Instead, groupthink seeks to analyze the "subtle constraints, which the leader may reinforce inadvertently," thereby preventing individual group members from thinking critically and independently.⁵⁰

C. *Antecedents + Symptoms Leading to Faulty Decision Making*

The link between faulty group decision making processes and bad decisions is not absolute.⁵¹ Notwithstanding faulty decision making processes, a good decision can result if the decision itself is inherently sound or some other favorable determinative factor outside of the group dynamic transforms a bad result into a good one. Similarly, well-conceived group decisions may utterly fail due less to the process itself than to other contributing factors. For these reasons, this article will analyze the processes that a group follows when making decisions, rather than the actual decisions themselves.

The remainder of this article will describe and analyze family court institutional culture and track the following format:

1. First, are family court decisions and decision makers (e.g., lawyers, judges, caseworkers) susceptible to the antecedents of groupthink?: (a) a cohesive group; (b) a faulty organizational

47. *Id.* at 11-12.

48. *Id.* at 175. The seven symptoms of defective decision making include: "(1) incomplete survey of alternatives; (2) incomplete survey of objectives; (3) failure to examine risks of preferred choice; (4) failure to reappraise initially rejected alternatives; (5) poor information search; (6) selective bias in processing information at hand; [and] (7) failure to work out contingency plans." *Id.* (alteration in original).

49. JANIS, GROUPTHINK, *supra* note 10, at 3.

50. *Id.*

51. *See id.* at 11-12; 'T HART, *supra* note 26, at 19.

structure susceptible to groupthink; and (c) a highly stressful, crisis-level situation.

2. Next, if the answer is “yes,” here are the symptoms we need to be wary of: (a) overarching sense of morality by decision makers; (b) proclivity toward stereotypes and hostility to outside groups; and (c) pressure to conform.

3. Finally, assuming the antecedents and symptoms of groupthink are present, here are ways to avoid the pitfalls of faulty decision making: (a) break group isolation through control and accountability; (b) let objecting voices be heard and offer an opt out option for dissenters; and (c) educate group members about the hazards of groupthink.

III. DEFINING THE CONTOURS AND VAGARIES OF FAMILY COURT INSTITUTIONAL CULTURE AND ANALYZING THE CULTURE THROUGH THE LENS OF GROUPTHINK

A. *What Is Meant by the Concept of Family Court Institutional Culture?*

“The notion of culture is everywhere invoked and virtually nowhere explained.”⁵²

—Professor Naomi Mezey

Economists, sociologists, philosophers, legal theorists, psychologists and others have saturated scholarly literature with discussions of culture. Most of the early literature and discussion centered on corporate culture. However, recent works have expanded the discussion to include the cultures of public agencies and courthouses.⁵³ Despite the abundance of research on the subject, the term “culture” itself remains amorphous and multifaceted and is rarely defined with precision.⁵⁴

52. Naomi Mezey, *Law as Culture*, in *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* 37, 37 (Austin Sarat & Jonathan Simon eds., 2003) (addressing the value of legal scholarship analyzing culture to highlight its “complexity as its virtue” and the “pervasiveness of culture” which so informs our world).

53. See, e.g., OSTROM ET AL., *supra* note 3 (applying the discussion of culture to trial courts).

54. See Mezey, *supra* note 52, at 37. “Culture can mean so many things: collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artifacts, ritual.” *Id.* There are myriad forms of culture. This article will address what is often termed “institutional” or “organizational” culture. These two terms are used interchangeably throughout this article even though there are subtle differences between them. For purposes of this article, these terms will be used to refer to a set of informal norms and rules of behavior in the particular setting of family court. Within that idea of organizational culture, scholars have additionally coined the term “local legal culture,” which implies the “shared beliefs, expectations, and attitudes within the local court

Organizational or institutional culture is often described by theorists as the overarching, unspoken code of the insiders, who proclaim (whether implicitly or explicitly) that “this is the way things are done around here,” often as part of efforts to set themselves apart from outsiders.⁵⁵ The institutional insiders in family court—the lawyers, the clerks, the judges, the social workers, the probation officers, the court officers—and their dynamics and interactions with each other and with the parties who appear in family court combine to shape the institution’s culture.⁵⁶

Many scholars have defined culture in similar terms. A primary, somewhat unencumbered, definition of organizational culture stems from one of the original theorists on the topic of culture, Edgar Schein. Schein defines organizational culture as:

A pattern of basic assumptions—invented, discovered, or developed by a given group as it learns to cope with its problems of external adaptation and internal integration—that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think and feel in relation to those problems.⁵⁷

Additionally, Mashaw and Harfst have theorized that, while an outsider to the culture might find it difficult to ascertain hard evidence of what comprises a particular culture, those familiar with the culture will find it much easier to discern the assumptions which are “embedded in the persistent norms, institutions, and processes of the legal order.”⁵⁸ The study of courtroom culture is similarly infused with the analysis of assumptions, norms, and processes.⁵⁹

community.” OSTROM ET AL., *supra* note 3, at 9; *see also* THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978) (describing “local legal culture” as “established expectations, practices, and informal rules of behavior of judges and attorneys”).

55. Sinden, *supra* note 2, at 350-55.

56. *See id.*

57. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 9 (1985); *see also* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 19-20 (1990).

58. SCHEIN, *supra* note 57, at 20. Notably, critics of Schein’s definition dislike the reference to the unquantifiable “pattern of basic assumptions.” *See id.*

59. *See* OSTROM ET AL., *supra* note 3, at 2. Ostrom further explains that:

Even in the adversary world of law, [those] who work together and understand each other eventually develop shared conceptions of what are acceptable, right and just ways of dealing with specific kinds of offenses, suspects and defendants. These conceptions form the bases for understandings, agreements, working arrangements and cooperative attitudes. Norms and values grow and become a frame of reference which prosecutors, defense attorneys, judges and experienced offenders all use for deciding what is fair in each case. Over time, these shared patterns of belief develop the coherence of a distinct culture, a style of social expression peculiar to the particular courthouse.

In order to properly explore and analyze the institutional culture of family courts, it is important to have a requisite understanding of the original intentions and underpinnings of juvenile courts. The first juvenile court was created at the turn of the twentieth century⁶⁰ to provide an ameliorative and accessible court system for juveniles who would otherwise be charged as adult criminals.⁶¹ The juvenile courts and the judges were originally envisioned to be substitute parents or “*parens patriae*.”⁶² The juvenile courts eventually morphed into family courts, hearing both juvenile court matters and domestic relations cases.⁶³

Today, every state has at least one juvenile or family court,⁶⁴ as do almost all industrialized countries.⁶⁵ Though their names may vary—dependency courts, family courts, juvenile courts, and probate courts are a few common variations—their genesis and purposes are largely the same: to attend to the unique nature of childhood and family issues. Unlike the purpose of criminal courts, their aim is not to punish or penalize, but rather to *help* families and children.⁶⁶

Peter F. Nardulli, *'Insider' Justice: Defense Attorneys and the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLOGY 379, 388 (1986) [hereinafter Nardulli, *'Insider' Justice*]; see also ARTHUR ROSETT & DONALD R. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976).

60. See, e.g., CLEMENS BARTOLLAS, *JUVENILE DELINQUENCY* 12 (5th ed. 1999); ROBERT M. MENNEL, *THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1940*, at 130 (1973); ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 101 (1969).

61. See MENNEL, *supra* note 60, at 130-32; see also Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 39-40 (2003); Kerrin C. Wolf, *Justice by Any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana*, 12 WM. & MARY BILL RTS. J. 275, 278-79 (2003); Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 841-43 (1994). But see PLATT, *supra* note 60, at 36-43 (arguing that the move toward juvenile courts was more about the elite's social control over immigrant and minority youth).

62. See BLACK'S LAW DICTIONARY 1221 (9th ed. 2009) (defining “*parens patriae*” as “parent of his or her country”).

63. See PRESTON ELROD & R. SCOTT RYDER, *JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE* 236 (1999); MENNEL, *supra* note 60, at 132, 150; Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 378-81 (1919). Some states have a number of these courts, overlapping in powers, while other states have merged all family and child-related issues into one court. See ELROD & RYDER, *supra*, at 233-34. Throughout the remainder of this article, I will use the term “family court” to refer to any type of court that handles primarily domestic or juvenile matters.

64. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1083 n.1 (1991); see also ELROD & RYDER, *supra* note 63, at 233.

65. See Ainsworth, *supra* note 64, at 1083 n.2 (listing countries which have family or juvenile court systems).

66. See, e.g., N.Y. FAM. CT. ACT § 1011 (McKinney 2009) (stating that the purpose of family court is to “protect children from injury or mistreatment”). Likewise, New York law codifies that family court orders of protection are to be issued not to mete out punishment but to “stop the violence, end the family disruption and obtain protection.” *Id.* § 812(2)(b); see also *In re Gault*, 387 U.S. 1, 18-19 (1967); MENNEL, *supra* note 60, at 130-32; Wolf, *supra* note 61, at 278-79; Larsen, *supra* note 61, at 841-43; cf. PLATT, *supra* note 60, at 36-43 (arguing that the move toward juvenile courts was less about protecting children and more about the elite's social control over immigrant and minority youth).

Over time, the therapeutic nature and relaxed procedures of family courts raised criticism, and the Supreme Court emphasized the need to provide family court litigants with clear rules and due process rights.⁶⁷ For example, the Supreme Court in *In re Gault* held that juveniles have many constitutional rights, including the right to counsel, the right against self-incrimination, the right to have notice of charges, and the right to confront witnesses.⁶⁸ The Court also criticized family court's informal, sometimes lax, courtroom procedures, noting that "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."⁶⁹

As a result of Supreme Court precedent and other reform efforts, family courts nationwide ultimately evolved to become more adversarial in nature. Yet, even with a push toward more formality, even today many family courts maintain a sense of informality, which while often well intentioned, can be harmful to the families served. Although there are many factors which contribute to family court culture, this discussion will target three primary factors and relate them to the antecedents of groupthink. The three factors are as follows: (1) the residual informality in the courtrooms, arguably stemming from the family court's original therapeutic intentions; (2) the influx of repeat lawyers, coupled with bench trials instead of jury trials; and (3) the crisis-driven nature of family court proceedings. To narrow the analysis even further, the discussion will focus primarily on child welfare and child protective proceedings.⁷⁰

Family court child protective cases involve not only the parties whose rights are at stake, but also an array of individuals charged with certain duties (repeat players) who ensure that the cases are proceeding to a just result. The everyday institutional players typically involved in child protective cases include the judge, one or more agency caseworkers, the attorney for the petitioning agency or for the county, an attorney for the child, and the attorneys for the parents, if any.⁷¹ At times, other players may work on these cases such as treatment providers, social workers, psychologists, psychiatrists, or mediators.⁷²

Child protective cases generally enter the courthouse pursuant to an emergency or by the state child welfare agency filing a petition with the

67. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (parents in termination of parental rights cases); *In re Gault*, 387 U.S. at 28 (juveniles); *Kent v. United States*, 383 U.S. 541 (1966) (juveniles).

68. See *In re Gault*, 387 U.S. at 28-31.

69. *Id.* at 18.

70. Unless otherwise stated, the phrases "child welfare proceedings" and "child protective proceedings" will be used interchangeably throughout the remainder of this article.

71. JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 206-14 (2006).

72. See *id.* at 173-224.

court.⁷³ During the proceedings, the agency bears the burden of proving that child abuse or neglect has occurred and that it was perpetrated by the child's caretaker. If the agency requests that the child be removed immediately from her home, the agency would typically need to demonstrate to the judge that imminent harm will occur if the child remains in her home.⁷⁴ If so, the case proceeds further, and the parents then have the option of deciding whether the case will go to a full evidentiary trial.⁷⁵ If the judge determines after trial that child abuse or neglect has occurred, the case then proceeds to the dispositional stage where the primary focus is on whether the child will remain in the home or, if not, where the child will live. Ultimately, these cases can result in the termination of parental rights, a permanent severing of the parent-child relationship.

The same institutional players—lawyers, government workers, and judges—are involved in each stage of child protective cases, and these players often define and establish the norms and “insider” rules of courthouse culture.⁷⁶ These institutional players are ultimately responsible for determining the outcome of critical and sensitive family matters. As such, these players wield tremendous power over parents and children brought before the court.⁷⁷

B. Analyzing Family Court Institutional Culture Through the Lens of Groupthink Antecedents

As outlined above, the unique aspects of family court institutional culture are closely aligned with the antecedents of groupthink. First, repeat players in the courtroom setting, such as judges, lawyers, and social workers, facilitate the creation of group cohesion. Second, informal pro-

73. S. Wells, *What Criteria Are Most Critical to Determine the Urgency of the Child Protective Services Response?*, in HANDBOOK FOR CHILD PROTECTION PRACTICE 7, 7-9 (H. Dubowitz & D. DePanfilis eds., 2000).

74. The ultimate standard and burdens of proof would be determined by state law.

75. For example, see ARIZ. REV. STAT. ANN. § 8-844 (2009) which dictates the process underlying abuse or neglect determination in Arizona.

76. See NARDULLI ET AL., TENOR OF JUSTICE, *supra* note 6, at 40 (“What types of cases should go to trial? What prosecutorial practices constitute overreaching? Veteran members . . . pass this information on to new recruits.”).

77. See Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2001). Bean further states that:

The familiarity that these court workers have with the system and with each other can breed a “go along to get along” philosophy that pressures not only the regular participants, but also the parents and thus their children to conform and comply. The culture that results is one that does not always encourage thorough and accurate fact-finding or thoughtful decisions about the important matters before the court.

Id. at 47; see also Shari F. Shink, *Hallmarks: New Directions in the Defense of Children*, 26 COLO. LAW. 39, 40 (1997); Sinden, *supra* note 2, at 350-55.

cedures in family court cases and pressure to resolve disputes in a therapeutic, non-adversarial manner are structural aspects of an organization that may be more prone to groupthink-like decision making. Third, family courts must frequently address crises when hearing and deciding child protective cases.

Groupthink can invade the decision making process in family court cases in two distinct ways. First, groupthink can occur during the actual court proceedings. The second, more subtle way in which groupthink can affect decision making is through discourse among institutional players that occurs before, after, and between cases. Thus, my discussion will address groupthink in both of these contexts and analyze the incremental steps taken to reach a final decision, rather than analyzing the final decision in isolation. Some specific examples of the incremental steps that may be taken to reach a decision in a child protective case include: whether the child's attorney interviews the child; whether the judge and lawyers involved in the case consider the child's wishes; whether the parties to the case settle; and whether one considers the reaction of the judge or opposing counsel if the case goes to trial.

Groupthink has the power not only to affect individual cases, but also to permeate the decision making processes of future cases. Groupthink can result in a symbiotic herd mentality fostered among institutional players, through monolithic thinking and myopic decision making, or through the court's entrenched resistance to outsiders or outside opinions. Groupthink can discourage group members from challenging the status quo and often stifles innovation and fresh dialogue among institutional players. If left unchecked in family court, groupthink can result in "mindless conformity" and a "collective misjudgment of serious risks" in case decisions, thus negatively impacting parties, in particular, and the legitimacy of family court, in general.⁷⁸

1. The Informality and Inherent Power Imbalances in Child Protective Proceedings as the First Antecedent to Groupthink: Structural Aspects of the Organization

"Under our Constitution, the condition of being a boy does not justify a kangaroo court."⁷⁹

-United States Supreme Court

As noted earlier, despite the Supreme Court's decisions⁸⁰ family courts today still retain much informality both legally and structurally.⁸¹ Legally,

78. See JANIS, GROUPTHINK 2D ED., *supra* note 17, at 3.

79. *In re Gault*, 387 U.S. 1, 28 (1967).

evidentiary standards can be relaxed in many child welfare proceedings so that judges can access as much information as possible on behalf of children's best interests and safety. Additionally, many family court proceedings are bifurcated into fact-finding hearings and dispositional hearings, with the latter permitting traditionally inadmissible evidence. Thus, in circumstances where the fact-finding and dispositional phases are heard together, non-competent evidence is often allowed to shape the facts of the case. Moreover, with the national trend of assigning one judge to handle all of a family's disputes ("one family, one judge"), judges are often privy to far more information than they would otherwise be under a different court model.⁸²

Another factor contributing to family court's informal organizational culture involves the frequent occurrence of *ex parte* conversations between the judge and attorneys, often while waiting for cases to be called. Even if these improper conversations do not affect the final outcome of a given case, the practice has the appearance of impropriety⁸³ and, in most cases, is specifically forbidden.⁸⁴ Additionally, some family court judges have a practice of calling "attorneys only" into the courtroom and initiating an off-the-record informal discourse about the case outside of the presence of the parties. In addition to the risks inherent in unrecorded dialogue between the bench and the bar, parties may feel uneasy that it is not themselves, but rather the educated "insiders," who are discussing *their* families and making decisions that affect *their* lives in a clandestine meeting

80. See cases cited *supra* note 67.

81. Structurally, many family courts are housed in buildings that do not resemble courthouses and in rooms that do not resemble courtrooms or have deteriorating conditions. This structural setting can affect a court's culture in a multitude of ways. For example, former Chief Judge of New York, Lawrence H. Cooke noted that: "Poor physical conditions in our courthouses not only detract from the dignity of the law; they also adversely affect the decorum of court proceedings, have a psychologically depressing effect on already burdened parties to criminal and civil actions, and decrease the morale of court employees." THE FUND FOR MODERN COURTS, REPORT ON NIAGARA COUNTY (Jan. 1989) (quoting Judge Cooke). Former New York Chief Justice Judith Kaye successfully fought to refurbish or replace as many family court courthouses in New York as possible during her tenure.

82. See Andrew Shepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 341 (2003); see also Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258 (2008) [hereinafter Spinak, *Romancing the Court*] (evaluating the benefits and drawbacks of the traditional court model where a detached judge rules on issues versus the specialty court model where the judge takes a more active role as a participant in disputes).

83. See Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 272 (2000) ("The citizen that observes a friendly relationship between the judge and the prosecutor may question the fairness of that proceeding."); see also Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1 (2006) (discussing the possibility of jury trials in family courts, one solution to reduce the power imbalance between courthouse insiders and litigants).

84. See, e.g., MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)(7) (1999) ("A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties . . .").

behind closed doors.⁸⁵ Amy Sinden's feminist critique of the informality of family courts, in the context of child protective proceedings, aptly summarizes the problem as follows:

[A] subtle dynamic arises on a day-to-day level . . . due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist.⁸⁶

Moreover, as explained above, the power imbalance is especially pronounced in family court child protective proceedings because the social workers, lawyers, and judges wield such tremendous power over whether a family stays together. The power imbalance becomes especially salient when you consider that the parties in family court are often educationally or economically disadvantaged and are overwhelmingly women and persons of color, which is in stark contrast to an overwhelmingly homogenous majority of the bench and the bar.⁸⁷

85. Parties in family courts across the nation are increasingly self-represented. A power imbalance is inherent in the dynamics of a lawyer-represented party versus a pro se party. Thus, this infusion of self-represented litigants coupled with the informal roots of family court adds to the unique institutional culture. Family courts are often termed "the poor people's court" due to the overwhelming majority of poor parties appearing before them, and in states such as New York, a party need not pay any filing fees or retain a lawyer to have access to the court. Data has shown that, in the majority of family law cases nationally, at least one party does not have an attorney. See JANE C. MURPHY & ROBERT RUBINSON, FAMILY MEDIATION: THEORY AND PRACTICE 160 (2009); Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 114-16 (2004-05); see also Deborah J. Chase, *Pro se Justice and Unified Family Courts*, 37 FAM. L.Q. 403 (2003) (cautioning that with an influx of pro se litigants, family courts must be diligent not to repeat the same mistakes of unstructured, informal court procedures pre-*Gault*). In the context of the criminal system, see PETER F. NARDULLI, THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE 66-81 (1978) [hereinafter NARDULLI, THE COURTROOM ELITE].

86. Sinden, *supra* note 2, at 343-44.

87. See Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court – the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 *passim* (2007); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1617 (2003) [hereinafter Spinak, *Why Defenders Feel Defensive*]; see also Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144-45 (1999) [hereinafter Guggenheim, *Foster Care Dilemma*]; Randolph Stone, *Race and Imprisonment*, 7 U. CHI. L. SCH. ROUNDTABLE 127, 127-28 (2000). Issues of race, ethnicity, and class in family courts cannot be overlooked when, in cities such as Chicago, over 95% of children in foster care are non-white. This disparity is shockingly high in the New York area where one out of every ten children from central Harlem is placed in foster care (as compared to only 200 in total from the well-to-do Upper East Side). See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 205 (2005) [hereinafter GUGGENHEIM, CHILDREN'S RIGHTS]; see also LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989).

Our discussion of family court culture would be remiss without acknowledging that there have been several growing movements to reform family courts which tend to intersect, overlap, and at times, converge. Some of the more prominent movements include the alternative dispute resolution movement, collaborative law movement,⁸⁸ the movement to return family courts back to their original roots as problem-solving courts,⁸⁹ and therapeutic jurisprudence in all areas of the law.⁹⁰ This article does not support one form of adjudication over another, yet notes that in less formalistic, less due process-oriented frameworks, the courthouse culture can perhaps become more susceptible to groupthink.⁹¹

It is admittedly true that alternative means of dispute resolution outside of the adversarial family court system are often in the best interests of children and families. These alternatives seek to empower litigants and decrease the acrimony among family members in an informal setting. Non-litigation resolutions can, in fact, be fair and legitimate options, and judges and lawyers in family court should encourage amicable resolutions for reasons of efficiency and promoting family harmony.⁹² However, the

88. See, e.g., MODEL UNIFORM COLLABORATIVE LAW ACT (2009); Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465; see also Terri Breer, *Has the Family Law System Reached a Tipping Point?*, ORANGE COUNTY LAW. MAG., Mar. 2009, at 23 (discussing resistance from lawyers accustomed to an adversarial system toward transitioning away from an adversarial model).

89. See, e.g., Judge Leonard P. Edwards, Superior Court of Santa Clara County, Cal., Remarks of Judge Leonard P. Edwards at the Presentation of the William H. Rehnquist Award for Judicial Excellence (Nov. 18, 2004), www.improvingoutcomesnetwork.org/downloadDocument.jsp?docid=8.

90. See, e.g., DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); see also PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000); Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997); cf. Barbara Atwood, *Therapeutic Jurisprudence and American Family Law: A Modest Caveat About Our Good Intentions* (2006) (unpublished manuscript, on file with author).

91. A complete discussion of these broad and important topics is outside the scope of this article. They are introduced here only to highlight that there are often inherent tensions among family law movements. See Jane M. Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11 (2009) [hereinafter Spinak, *Reforming Family Court*]. To date, there is no definitive empirical evidence that problem-solving courts are indeed better for children and families, and to the contrary, recent studies have shown the opposite in terms of expediency, efficiency, and the like. See, e.g., Nuno Garoupa et al., *Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain*, 24 INT'L J.L. POL'Y & FAM. 54, 55-66 (2010); Spinak, *Reforming Family Court*, *supra passim*; Spinak, *Romancing the Court*, *supra* note 82, at 258; see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (outlining how non-adversarial procedures can disempower battered women).

92. It cannot be ignored that any overcrowded, heavily burdened courthouse inevitably houses underpaid lawyers, caseworkers, judges, and court personnel who are all burdened with crushing caseloads. Thus, in exploring these areas, one must be mindful of such pressures. Not every family court case can or should proceed to a full evidentiary trial with multiple expert witnesses. However, one must remain equally cognizant that working in such an environment does not justify ineffective assistance of counsel. In Martha Davis's insightful book about the poverty law movement, she mentions a placard that was distributed to the New York City Legal Aid Society lawyers in 1907. It quoted Abraham Lincoln as stating: "Discourage litigation. Persuade your neighbor to compromise

best interests of parties are not served if informality erodes due process rights or if lawyers pressure settlement in dereliction of their duty to provide zealous advocacy to their clients.⁹³

2. The Influx of Repeat Players Coupled with the Prevalence of Bench Trials in Child Protective Proceedings as the Second Antecedent to Groupthink: Highly Cohesive Group

The constant influx of repeat players in the courthouse plays a role in shaping family court institutional culture. The term "repeat players" can include lawyers, judges, court personnel, and even parties who repeatedly appear in the same court.⁹⁴ While it is unfortunately true that many parties return to family court month after month and may be termed repeat players, the focus here is upon the lawyers who tend to represent similarly situated litigants day after day. When a courthouse frequently conducts bench trials and employs a staff of regular courthouse lawyers, the institutional culture is formed, in part, by the dynamics of having the same attorneys appear before the same judges day after day.

Defense attorneys in family court represent scores of individuals who have been accused of child abuse and neglect. Similarly, those lawyers who prosecute the parents accused of child abuse or neglect consistently represent the county, state, or child welfare agency. These two sets of lawyers regularly oppose each other day after day before the same set of

whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man." MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973*, at 10 (1993). Part of this institutional policy to push for settlements was due to the situation of clients living in dire financial need and requiring resolution of welfare cases without delay, but the "local courts were [also] frightfully congested" which created added pressure for lawyers to arrive at settlements. *Id.* at 13 & n.24.

93. For example, Professor Paul Chill examined these insider effects in child welfare proceedings and made the following observation:

Finally, the very knowledge by system insiders of the tendency of emergency removals to become self-reinforcing itself contributes to the phenomenon . . . [Parties] are told that their best chance of regaining custody quickly is by showing "cooperation" and settling. This creates enormous pressure to settle, and most parents in fact do. *Settling* in this context generally means admitting or pleading *nolo contendere* to abusing or neglecting the child and accepting the services deemed necessary by the CPS agency to permit the child to return home. Thus, some cases that might actually result in a child being returned home quickly, if the parents were to litigate the matter aggressively, wind up being settled with the child remaining in foster care for an extended period.

Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 462 (2003).

94. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 1 (1974) [hereinafter Galanter, *Why the "Haves" Come Out Ahead*] (coining the term "repeat players" in legal parlance and differentiating repeat players from "one-shotters").

family court judges. Add to the mix the attorneys for the children, and up to three attorneys (four if each parent has a separate attorney) may be involved in any given child welfare case. It is quite common for this same set of attorneys to work together regularly on different cases. In addition to the lawyers and judges, various other professionals, such as court clerks, bailiffs, agency caseworkers, mental health evaluators, and law enforcement officers, may be “regulars” in family court.

Repeat player dynamics have an enormous impact upon the culture of family courts. People typically seek to resist change, keep the calm, and not rock the proverbial boat.⁹⁵ Applied in a legal milieu, the repeat players employed in a particular courthouse usually develop and adhere to customary routines and procedures when executing their daily job responsibilities. This often results in the formation of highly cohesive insider groups, and such players may not be keen on having outsiders disrupting the daily work routine.⁹⁶ When looking at attorneys through the lens of groupthink theory, an attorney’s desire for cohesion, group acceptance, or avoiding confrontation even in an adversarial setting, is sometimes strong enough to trump loyalty and professional obligations to his client. Thus, lawyers’ zealous advocacy may be compromised by groupthink-like decision making.

Without question, there are some benefits to being a repeat player, such as gaining expertise and familiarity with the forum while increasing one’s work efficiency in the process.⁹⁷ Unfortunately, the dynamics created between the interactions of repeat players can also generate capricious results, such as when a judge or opposing counsel makes decisions on one case based upon the outcome of earlier cases presented that day.⁹⁸

Many family court judges nationwide play a direct role in determining who will become a repeat player in family court proceedings. In many

95. Spinak, *Reforming Family Court*, *supra* note 91, at 22 (“Our emotional attachment to ideas is a central component to resisting change. . . . [T]his emotional attachment, compounded by a public commitment to a particular idea, is among the key elements to resisting change.”). For an insightful article about status quo bias in family law cases, see Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995).

96. See, e.g., NARDULLI ET AL., TENOR OF JUSTICE, *supra* note 6, at 125-26 (describing some criminal courts in which institutional players emphasize “going along and getting along . . . [and] not rocking the boat” while other courts expect a certain level of conflict and accept that “cohesiveness and congeniality [are] neither synonymous nor inevitable”).

97. See Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 94, at 98-104 (discussing the various advantages of the repeat player).

98. See, e.g., Jennifer Earl, *The Process Is the Punishment: Thirty Years Later*, 33 LAW & SOC. INQUIRY 737, 743-44 (2008) (“[I]f a prosecutor has ‘played hardball’ with a defense attorney on earlier cases in the day, the prosecutor may be more lenient later in the day, net of other factors. Conversely, if a prosecutor feels that earlier cases squeaked by too easily, a defendant later in the day may face harsher plea offerings, net of other factors.”). Furthermore, it cannot be overlooked that “how and what a lawyer argues in one case, or whether a lawyer raises a controversial policy concern, may affect all future cases.” Breger, *supra* note 83, at 24 & n.124.

jurisdictions, attorneys for children are personally appointed by a judge or a judge uses his discretion in appointing a lawyer from a court-approved list to a particular case. Naturally, this discretion gives rise to a whole host of issues centered on the potential for attorneys to alter their behavior or demeanor before a particular judge in an attempt to secure future appointments. Alternatively, in some jurisdictions, judges appoint institutional providers, such as a public defender's office or a legal aid society, which then assigns its own lawyers to each case. Thus, by undertaking the roles of fact finder and sentencer and by appointing attorneys or institutions to represent parties in court cases, a judge can dramatically influence courtroom culture by unilateral action.⁹⁹

Repeat players are arguably prone to developing a group mentality and subscribing to cohesive thinking after years in the same judicial system. Experts who have studied the relationship between judges and lawyers emphasize the "interdependence of lawyers and judges in those courts and the close working relationships" fostered. Baum has observed that:

In themselves, the working relationships between lawyers and judges make court regulars highly salient to judges. Further, regulars are the most proximate observers of judges' work, which also makes them a key source of information about that work. A judge's reputation in the legal community as a whole and in the broader community is based largely on the judgments of lawyers who practice in the judge's court . . . To the extent that [the lawyers and judges] share certain values, their presence and interactions with judges may sway judges toward support of those values. This influence might be easiest to discern in courts with narrow jurisdiction.¹⁰⁰

Family court lawyers and judges are especially susceptible to this dynamic because of family court's narrow jurisdiction and its high volume of repeat players.¹⁰¹ This relationship can be beneficial, on the one hand, because lawyers and judges become experts in family law and procedure;

99. A similar dynamic occurs in criminal law when a prosecutor is assigned to a particular judge in court. For a deeper analysis of these issues in the criminal arena, see R. Flowers, *supra* note 83. Although repeat players and their resultant dynamics can be seen in many types of trial courts, including criminal, housing and others, the discussion of the dynamics of family courts and the potential for change can be extrapolated and adapted to various other court cultures. Similarly, the repeat player effect relates to most legal fields: labor law, criminal law, death penalty cases, securities cases, insurance law, and housing law. See, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 241 (1998).

100. BAUM, *supra* note 43, at 99-100.

101. See *id.* at 100 (noting that "[t]his influence might be easiest to discern in courts with narrow jurisdiction").

however, on the other hand, the relationship can be problematic if it shifts from being merely collegial to “symbiotic” or “enmeshed.”¹⁰²

One might argue that opposing counsel and the judge hardly make a cohesive decision making group since opposing counsel is responsible for advocating favorable positions on behalf of his client, while the judge serves as an impartial fact finder. However, this premise overlooks the reality of the cohesiveness developed while working day in and day out in the same courthouse with the same institutional players and becoming a member of the “courtroom elite.”¹⁰³ The “courtroom elite” in a family court child welfare case would be the caseworker, the attorney for the county, the attorney for the child, the parents’ attorneys, and the judge. Left unchallenged, the inside players are at risk of—perhaps subconsciously—pushing for settlements and docket efficiency at the expense of justice.¹⁰⁴ Janis has acknowledged that members of cohesive groups may reap social rewards, such as “being in a pleasant ‘clubby’ atmosphere” or “gaining prestige from being a member of an elite group.”¹⁰⁵ Thus, a lawyer’s inclination to concede and concur in certain matters may depend on whether or not she values being part of the insider group more than obtaining the best possible result for each client.

Professor Deborah Rhode has examined the practice of sacrificing client interests for the sake of maintaining collegiality in the courtroom. She summarizes the problem as follows:

Inadequate representation of client interests is . . . common where lawyers place priority on maintaining good relationships with other members of their community or participants in the legal process. If zealous pursuit of any single matter will antagonize individuals whose continuing cooperation or client referrals is important, attorneys may adjust their partisanship accordingly. For example, lawyers in surveyed consumer protection cases have often accommodated business opponents’ concerns rather than maximized client objectives. Practitioners in small towns have similarly reported foregoing strategies that would generate ill will among opposing lawyers and established interests. Criminal defense attorneys have sometimes found that retaining the good will

102. See R. Flowers, *supra* note 83, at 270-73 (describing the problems of “too close of a relationship” between the judge, defense attorney, and prosecutor in a criminal context); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 43, 77 (1985) (describing the symbiotic relationship that develops between judges and attorneys in a repeat player, high-caseload environment); see also Shink, *supra* note 77, at 39, 40 (describing the conflict of interest faced by guardians *ad litem* who seek to zealously advocate for children but who must also maintain favor with the judge and opposing attorney).

103. See NARDULLI, *THE COURTROOM ELITE*, *supra* note 85, at 67-78.

104. *Id.* at 69-71.

105. JANIS, *GROUPTHINK 2D ED.*, *supra* note 17.

of prosecutors and trial judges is more important than securing the best outcome for a particular client. There are, to be sure, limits on how far a lawyer can compromise fiduciary obligations and still maintain collegial respect. But there are also limits on what attorneys can do without jeopardizing their own workplace relationships and referral networks.¹⁰⁶

In the context of family court, the regular lawyers in the courthouse are sometimes prone to forego certain strategic stances to maintain collegial respect and goodwill with opposing counselors and judges. Lawyers working day in and day out in the family court system often become very risk averse, preferring “not to make any waves” and instead attempting to “keep the calm.”¹⁰⁷ In essence, these attorneys feel pressure to avoid being branded as “overly zealous” or “bad team players” which, in turn, may lead them to pursue less aggressive legal tactics.

Jury trials are rarely seen, and are often not even permitted, in family court cases.¹⁰⁸ This results in lawyers arguing cases before the same judges day after day instead of trying cases before different sets of jurors. Thus, when a judge sends a message, stated or implied, that a case should be settled, the pressure on the repeat lawyer to comply is intense.¹⁰⁹ Adding to this dynamic, the judges in family court may encourage swift resolution of a case through settlement or alternative dispute resolution even when a trial may produce a fairer result.¹¹⁰

Repeat lawyers may fight less vigorously for each client if they believe that subsequent clients could be harmed by vigorous advocacy that alienates opposing counselors, judges, or both. Indeed, lawyers who frequently make evidentiary objections and due process arguments in family court proceedings are far too often mocked or chided as they are informed “things just aren’t done that way around here.”¹¹¹ To an observer, this may raise concerns about the objectivity of the bench and the loyalties of lawyers to their clients.¹¹²

106. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 681-82 (1994).

107. See Breger, *supra* note 83, at 24 (“The influx of many repeat players creates an atmosphere and culture in the Family Court that may contribute to a predetermined mindset and myopic decision making rather than to a fresh and objective approach to new cases.”); Neck & Moorhead, *supra* note 26, at 537-57.

108. See Breger, *supra* note 83 (describing the history and modern-day disfavor of juries in family court proceedings, but advocating for implementation in family violence proceedings).

109. See *id.*

110. See, e.g., discussion *supra* note 91.

111. Sinden, *supra* note 2, at 352. “Familiarity and collegiality can become a cliquishness in which newcomers and outsiders feel an intense pressure to conform to established rules of behavior in this ‘microsocial’ setting.” *Id.*; see also 3 CHILDREN AND YOUTH IN AMERICA, 1933-1973, at 1437-65 (Robert H. Bremner et al. eds., 1974); Guggenheim, *Divided Loyalties*, *supra* note 2.

112. See Guggenheim, *Divided Loyalties*, *supra* note 2, at 571-75. For an interesting analysis of these issues when lawyers represent groups of clients, see Stephen Ellmann, *Client-Centeredness*

To accurately evaluate family court culture, one must account for the interplay among all of the attorneys in a case as well as their interactions with other courthouse players, including the particular judge on a case, other judges in the courthouse, clerks, court officers, administrators and the parties to the cases who bring their own perceptions and, perhaps, stereotypical misconceptions about the inner workings of the courthouse. Case proceedings do not occur in a vacuum. The cases and the facts therein are discussed in the hallways, in the attorney's room, in the clerk's office, and in chambers. This talk behind the scenes is perhaps due to the stress of handling so many emotionally-laden cases, but ultimately may cause cases or parties to become categorized or stereotyped.¹¹³

Sinden partially attributes the culture of family court to the extreme specialization of lawyers and other institutional players in the field of family law.¹¹⁴ Those familiar with family court would be hard-pressed to disagree with Sinden that the cumulative effect of these factors results in:

[A] "clubby" atmosphere, in which all of the individuals in the courthouse—from the lawyers and social workers to the judges, their courtroom deputies, stenographers and clerks—have well-established relationships and a kind of collegiality that comes from daily contact. This atmosphere fosters the development of a set of unwritten rules and shared expectations that govern the expected and accepted behavior of players in the system.¹¹⁵

This type of culture can form the basis for the second antecedent of group-think: highly cohesive groups.

Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups, 78 VA. L. REV. 1103 (1992) and Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class Action Cases*, 64 FORDHAM L. REV. 1435 (1996).

113. Repeat lawyers in family court naturally begin to bond together as they often identify themselves as "front line" attorneys working "in the trenches" together. These attorneys have too many cases, too little time, and too much trauma and tragedy that they witness on any given day. Thus, collegiality amongst front line attorneys, at times, can be a true stress reliever and emotional savior. However, collegiality can go too far and become stifling and troublesome when it encourages stereotyping and debasing banter about cases and the parties to those cases. Joking, laughter, and chitchat among repeat lawyers serve a constructive function by letting lawyers "blow off some steam," yet when this is done in front of parties, they may perceive it as minimizing the import of their cases and feel disempowered. And while the lawyer-to-lawyer relationship is obviously different than the lawyer-to-judge relationship, it is hardly distinguishable from the point of view of the parties who witness the "courtroom elite" functioning as a cohesive unit. Often, the "law in action" does not correspond to the law on the books, especially when the laws are favorable to the "have-nots." Marc Galanter, *Missed Opportunities: The Use and Non-Use of Law Favourable to Untouchables and Other Specially Vulnerable Groups*, in LAW AND SOCIAL CHANGE: INDO-AMERICAN REFLECTIONS 183 (Robert F. Meagher ed., 1988) [hereinafter Galanter, *Missed Opportunities*].

114. See Sinden, *supra* note 2, at 352.

115. *Id.*

3. *The Emotionally Charged Subject Matter in Child Protective Proceedings as the Third Antecedent of Groupthink: Provocative Situational Context*

Family courts routinely respond to crisis situations in child protective cases. The lawyers, staff members, and judges in family court are bound by a common thread that everyone must quickly assess and resolve family trauma and crises every day. Effective resolution of these crises may require institutional players to exercise their collective judgment in deciding on the best course of action. In turn, the collective judgment of the group may sway individuals' decisions and judgment.

Furthermore, family court lawyers and judges are often deeply affected by the nature of the cases they are called upon to handle.¹¹⁶ At times, these institutional players may be susceptible to secondary traumatic stress disorder,¹¹⁷ "vicarious traumatization," or "compassion fatigue."¹¹⁸ These terms describe the emotional impact of highly volatile, crisis-driven cases on the professionals called to work on them.

This emotional impact can drain family court judges, social workers, and lawyers when they must manage daunting caseloads fraught with both complicated emotional and legal issues on a daily basis.¹¹⁹ As a result, some of these professionals may be less jarred by stories of violence, child neglect, or criminal activity after repeatedly listening to these stories.¹²⁰ Additionally, this causes many professionals to become emotionally detached from their work. Dutton and Rubinstein have examined this phenomenon and found that:

116. This type of reaction is hardly unique to family court professionals. See Charles R. Figley, *Compassion Fatigue As Secondary Traumatic Stress Disorder: An Overview*, in *COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED 1* (Charles R. Figley ed., 1995); see also Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 *UMKC L. REV.* 965 (2007).

117. See generally Figley, *supra* note 116; see also Marcia Coyle, *Burnout, Stress Plague Immigration Judges*, *NAT'L L.J.*, July 13, 2009, at 4 (showing that immigration judges dealing with emotional issues have similar reactions).

118. See generally Figley, *supra* note 116; JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS* 25-69 (2d ed. 2001); JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999). See also Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 *FAM. CT. REV.* 435 (2002).

119. See DOUGLAS E. ABRAMS & SARAH H. RAMEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE* 12 (2003); PTACEK, *supra* note 118, at 126-27.

120. See ROBERT E. KEETON, *JUDGING* 3 (1990); PTACEK, *supra* note 118, at 114, 126-27 (noting the intense emotional burden of empathizing with victims of domestic violence and the risk that judges dealing with that burden might turn against the victims); Breger, *supra* note 83, at 22 ("A backdrop of jaded skepticism may permeate the courtroom . . ."); see also GUGGENHEIM, *CHILDREN'S RIGHTS*, *supra* note 87, at 574-75.

Distancing from the client may involve judging, labeling, or pathologizing the traumatic reaction . . . which creates the illusion that the client's reaction to the traumatic event is in some way different from that of a "normal" individual. Other forms of detachment include adopting a personal and emotional distance from the client . . . Attorneys may be particularly vulnerable to this approach since their training may not typically focus on establishing emotional contacts with their clients or on dealing with their own emotional reactions to clients.¹²¹

The culture of crisis that so pervades family courts across the nation conclusively establishes the third antecedent of groupthink, the existence of a provocative, crisis-laden situational context.

C. Analyzing How the Overarching Symptoms of Groupthink Intersect with Family Court Institutional Culture

"[N]ewcomers and outsiders feel an intense pressure to conform to established rules of behavior in this 'microsocial' setting."¹²²

—Amy Sinden

As addressed above, the culture of family court often mirrors the antecedents of groupthink. However, the convergence of these antecedents does not necessarily result in groupthink. The presence of one or more symptoms should be observed before such a conclusion can be reached. That said, this article will now analyze whether family court institutional culture exhibits any of the overarching symptoms of groupthink.¹²³

1. Overestimation of Insular Group's Inherent Morality Applied in Family Court Setting

Many family court institutional players may bring a sense of inherent morality to their work. Experienced judges, caseworkers, and lawyers who have worked on child welfare and child protective cases for years have had to resolve heart-wrenching instances of abuse and neglect. After years of handling this type of work, it is not uncommon for those professionals to believe that they know what is best for children and families. Moreover, many jurisdictions nationwide subscribe to the view that the

121. Mary Ann Dutton & Francine L. Rubinstein, *Working with People with PTSD: Research Implications*, in *COMPASSION FATIGUE*, *supra* note 116, at 82, 87.

122. Sinden, *supra* note 2, at 8.

123. See *supra* text accompanying notes 44-50 for a discussion of the overarching symptoms of groupthink.

role of a child's attorney is to determine "the best interests" of the child, even though the child and other interested parties may have a better understanding of the child's needs and wishes.¹²⁴ Lawyers practicing in those jurisdictions can be especially vulnerable to falling into the mindset that they truly know what is best for child clients.¹²⁵ Unfortunately this may result in professionals becoming paternalistic and believing their own morality is higher than that of others. In other words, if these lawyers and judges buy into the philosophy that they know what is best for children and families without looking at particularized facts and speaking to their child clients to understand their needs and desires, they risk taking actions that may not actually be in the child's best interests.

Groupthink is applicable when "there is a sense of inherent morality" by the group and group "members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."¹²⁶ Illustratively, in family court child protective proceedings, if the internalized group norm amongst judges and lawyers is that young children do not have valid opinions and do not need to be consulted prior to a decision, due to their immaturity, there will be pressure on group members not to waste time by interviewing young children. Thus, if this becomes the salient norm, group decision making can be negatively impacted.¹²⁷

2. *Close-Minded, Stereotyped Images of Outgroups Applied in Family Court Setting*

Family court institutional players may develop into close-minded, insular groups that embrace stereotypes about outsiders. This insularity can manifest itself as a suspicion of outsiders such as new attorneys in the area, attorneys who do not practice in the courthouse as much, or even court administration officials trying to revamp internal operations.¹²⁸ These people may be viewed as overly enthusiastic reformers who seek to change how things are done in the courthouse. Group insularity becomes even stronger when members begin to make unfounded judgments about outsiders.

Alternatively, the parties involved in family court proceedings may be viewed as outsiders by insular courthouse groups. This perception may be further exacerbated by the already existing power imbalance held by fami-

124. See generally NATIONAL SURVEY OF STATE LAWS (Richard A. Leiter ed., 6th ed. 2008).

125. For a more in-depth look at this issue, see Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 1 (2010).

126. JANIS, GROUPTHINK, *supra* note 10, at 9.

127. See Baron, *supra* note 26, at 33; see also JANIS, GROUPTHINK 2D ED., *supra* note 17, at 37; Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 696 (2003).

128. See, e.g., Nardulli, *'Insider' Justice*, *supra* note 59, at 387-88.

ly court institutional players over parties in case proceedings. Negative stereotypes and stigmas may be formed in the minds of institutional players about the very people they should be helping. These stereotypes operate to disempower marginalized groups¹²⁹—the poor, persons of color, women and children—who do not always see themselves reflected in the bar and the bench, but who are disproportionately affected by the existence of courtroom-insider group dynamics.¹³⁰ Additionally, it is not uncommon for lawyers or judges to compare current cases to previous cases. This further solidifies the group dynamic because lawyers and judges start to group together similar cases and develop stereotypes about them and the parties involved.¹³¹

Members of these insular courthouse groups may not immediately form stereotypes about outsiders, but group pressure to conform may ultimately change their views. Sinden describes the problem as individuals feeling intense pressure to conform to the “expected and accepted behavior of players in the system.”¹³² Janis further finds that individuals who might not have extreme views of their own, or at the outset of decision making, ultimately allow group dynamics to override moderation and quickly conform to the more extreme position of the group.¹³³ In fact, Janis describes this symptom of groupthink as the “members’ persistence in conveying to each other the cliché and oversimplified images of political enemies embodied in long-standing ideological stereotypes.”¹³⁴

3. Pressures Toward Uniformity Applied in Family Court Setting

Groups have a predilection to achieve uniformity, which is often embedded in members’ subconscious. This desire for uniformity is specifi-

129. See, e.g., MASHAW & HARFST, *supra* note 57, at 26; see also Breger, *supra* note 83, at 2-3; Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 76-78 (2007); Sinden, *supra* note 2, at 377-78.

130. For example, a party entering the clubby environment of family court and feeling “particularly vulnerable and insecure” may be “especially eager to be accepted and viewed as normal and respectable.” Sinden, *supra* note 2, at 352. Such a client “may be particularly sensitive to any cues she receives from professionals as to how she should act to fit in with the norms of this microsocial setting.” *Id.*; see also AUSTIN SARAT & STUART SCHEINGOLD, *THE CULTURAL LIVES OF CAUSE LAWYERS* 3-5 (Austin Sarat & Stuart Scheingold eds., 2008).

131. This stereotyping can perpetuate a type of unethical lawyering that can be jarring to incoming family law attorneys. As a clinical professor who has taught and practiced in various states, I am always reminded of this disconnect as the students are shocked at the apparent “go with the flow” culture of many family court courtrooms. See Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 295-96 (2009) (articulating this concept as it relates to paternalistic forms of lawyering in the criminal defense arena).

132. Sinden, *supra* note 2, at 352.

133. See JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 11-12. For a comprehensive discussion of group polarization phenomenon, see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000).

134. JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 37.

cally manifested in the context of a leader who exerts subtle pressure on the group to achieve consensus. In the family court context, this leader is the judge.

Experienced lawyers often know what a particular judge prefers in certain cases, even if nothing is explicitly stated. This can be particularly true in family court due to the repeat players involved. Further, there are times when judges are, in fact, quite explicit that they are seeking global resolution on a case. In some instances, judges have made it known to all parties how they are leaning, or even how they intend to rule, before evidence is even presented. Hence, there too often exists subtle or overt pressure on the attorneys to settle the case. Finally, lawyers may even feel pressure from opposing counsel to settle a case in order to secure cooperation in future cases.¹³⁵

It is again worth stating that there can be true benefits in achieving a mutually agreeable outcome, especially when resolving a case short of litigation is in the best interests of the children and families involved. Yet, when cases are settled due to unethical or sloppy lawyering or the desire to merely please the judge or opposing counsel, the goal of uniformity at all costs should be reexamined.

In all, this confluence of factors may contribute to a court culture which discourages intelligent discourse, innovation, zealous advocacy, client-centeredness, and loyalty. Intrinsicly, it is human nature to want "to get along to go along" and "go with the flow." To that end, lawyers can shrewdly play the game of keeping the calm and not rocking the boat with opposing counsel, caseworkers, or judges in the hopes of getting better resolutions in future cases. However, the desire for uniformity at all costs may nevertheless harm client interests, keep courtroom dialogue stagnant, and create the potential for groupthink.

135. See Nardulli, *'Insider' Justice*, *supra* note 59 (presenting a study of criminal courts which found that defense attorney "insiders" are more likely to compromise earlier in case proceedings and ensure a pleasant working environment with other courthouse insiders than other groups).

IV. NORMATIVE ANALYSIS AND IDEAS FOR REFORM THROUGH THE
APPLICATION OF GROUPTHINK

*“Nevertheless, instead of striving for comfortable feelings of security, they resisted the temptation to develop a set of shared beliefs that might have reassured them that their side was bound to win and that the evil enemy would give in”*¹³⁶

—Irving Janis

So far, this article has described the groupthink antecedents and symptoms that are too often observed in family court and contribute to the court’s unique organizational culture and, at times, flawed decision making. Building upon this premise, the final section of this article will introduce ideas that may help implement reinvigorated productive norms in family court culture. My normative analysis raises two important questions. Is it ever a good thing for a courthouse to have an institutional culture where players operate in a group mentality? If not, what ought the culture to be?

Certainly, there are many benefits to forming courthouse groups. Groups allow those who specialize in a particular type of law to exchange ideas and address trends within that domain. Further, those on the front lines day after day need to develop a healthy outlet through their interactions with each other to relieve the daily stresses and vicarious trauma endured. Nonetheless, if these groups are resistant to newcomers and are close-minded, the climate can be more harmful than advantageous to parties appearing before the court. Moreover, institutional players should be mindful of parties’ perceptions of the interactions among courthouse group members. What must it look like from the party’s perspective when opposing counsel and the judge engage in jovial banter prior to a court proceeding that will determine whether the party’s child will be placed in a foster home? How must it appear to the party who observes this “cozy, intimate relationship” which may occur despite eroding the party’s due process rights?¹³⁷ Even if a lawyer’s loyalty is to his client, does the client always recognize that this is so?

The positive attributes of a collegial courthouse culture may include: (1) allowing for true expertise in a particular field of law, encouraging

136. JANIS, GROUPTHINK 2D ED., *supra* note 17, at 158 (describing a group that did not fall prey to groupthink).

137. See Meekins, *supra* note 129, at 91-92 (describing the compromising of zealous advocacy in the collaborative atmosphere of specialty criminal courts); see also Breger, *supra* note 83, at 22-24 (describing the perception of institutional bias in family courts); Guggenheim, *Divided Loyalties*, *supra* note 2 (describing the tactical compromises criminal defense attorneys regularly make to the detriment of individual clients).

specialization, and creating economies of scale;¹³⁸ (2) permitting parties to obtain a more favorable result in particular cases if the lawyer shares a closeness with the judge or opposing counsel;¹³⁹ (3) preventing some parties from being harmed because their lawyers will know not to make waves which might trigger backlash from the judge or opposing counsel;¹⁴⁰ (4) providing an opportunity for judges and attorneys to bond;¹⁴¹ and (5) moving along cases expeditiously, if all players work together to settle a matter instead of going to trial.¹⁴² Thus, collegiality among group members can promote work harmony, efficiency, and economies of scale. In discussing family court institutional culture, it is important to keep in mind that collegiality is not the problem. The problem is when collegiality creates a *tendency* for institutional players to engage in groupthink and make faulty decisions.

How can positive change be made to family court institutional culture? Some general ideas for injecting fresh dialogue and instituting reform include: maintaining some type of institutional accountability and limiting the ability of judges to appoint particular attorneys on cases; providing education about groupthink pitfalls; and giving all parties to court proceedings the choice to opt out of settlement negotiations, with no questions asked, and go to trial.¹⁴³ These ideas are somewhat overlapping and inter-related because in order to change the behavior of repeat players, they must be held accountable for their actions, and players will not be able to do this unless they are properly educated about the perils of groupthink.

Despite proposals to reform family court culture, change often comes slowly to any organization, and family court is no exception. There are many reasons why this is so, but in general, institutions are highly resistant to change.¹⁴⁴ This is particularly true when an institution's principles are predicated upon "seemingly neutral beliefs and corresponding practices [that] have come to be taken for granted as legitimate."¹⁴⁵ As applied in the family court setting, there are some beliefs and practices that are viewed by many institutional players as neutral and legitimate, such as the belief that settling cases is always better than going to trial. These genera-

138. See Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 94, at 4; see also Bingham, *supra* note 99.

139. See Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 94, at 3, 4 n.9.

140. See *id.* at 9-10 & n.21 (describing the repeat players' superior knowledge of which rules can be bent and which must be strictly followed).

141. See *id.* at 4.

142. For an example of a court that has run smoothly due to rapport among attorneys and judges, see THE FUND FOR MODERN COURTS, REPORT ON NASSAU COUNTY FAMILY COURTS 16 (Jan. 1991) (report on file in the Schaffer Law Library, Albany Law School).

143. See JANIS, GROUPTHINK 2D ED., *supra* note 17, at 262-67.

144. See Debra Meyerson & Megan Tompkins, *Tempered Radicals As Institutional Change Agents: The Case of Advancing Gender Equity at The University of Michigan*, 30 HARVARD J.L. & GENDER 303, 305 (2007).

145. *Id.* at 306-07.

lizations can adversely affect parties' rights if the lawyers and judges involved do not take a step back and look at the specific facts of each individual case and make a concerted effort to avoid falling prey to shortcuts and ultimately groupthink.

Several steps may be taken to alter family court culture to prevent groupthink from developing in the courthouse and allow a free flow of ideas between institutional players. Janis proposed some ideas for increasing intragroup dialogue when he first updated and expanded the theory. His ideas include the leader encouraging critical evaluation of his decision making, striving to remain impartial, and establishing independent evaluation groups under different leaders.¹⁴⁶ The method which might apply best in the family court setting is for the leader (i.e., the judge) to strive to maintain impartiality. This can be accomplished if the judge refrains from stating preferences and expectations at the start, limits herself to neutral, unbiased statements, and abstains from advocating specific proposals she would like to see adopted.¹⁴⁷

Paul 't Hart has proposed additional ideas for increasing intragroup dialogue and discouraging groupthink that supplement Janis's proposals.¹⁴⁸ Specifically, 't Hart suggests that groups should: (1) eliminate group isolation and establish institutional accountability and control,¹⁴⁹ (2) protect whistleblowers,¹⁵⁰ (3) allow motivated dissenters to say "no" to ideas¹⁵¹ and (4) manipulate decisional rules and their acceptance.¹⁵² These ideas are more compatible with the type of decision making seen in family court, and thus, they merit discussion and adoption with slight modifications. It should also be noted that, although 't Hart believes that some of Janis's solutions are beneficial in theory, they can be difficult to implement in actual organizations and may result in substantial time and monetary costs.¹⁵³

Building upon the ideas of Janis and 't Hart, this discussion will first address institutional accountability and control. Next, the discussion will address a modified version of 't Hart's third suggestion which proposes enacting a viable option for attorneys and parties to opt out of settlement negotiations at any time with no questions asked. Finally, institutional players, especially repeat judges and attorneys, should be educated about

146. See JANIS, GROUPTHINK 2D ED., *supra* note 17, at 262-65.

147. See *id.*

148. See 'T HART, *supra* note 26, at 290-94.

149. See *id.* at 290.

150. See *id.* at 291.

151. See *id.* at 292.

152. See *id.* at 293.

153. See *id.* at 289.

the dangers of groupthink to the decision making process and parties' rights.¹⁵⁴

A. Breaking Through Group Isolation: Institutional Accountability and Appointment of Lawyers

Institutional accountability and control may potentially be less of an issue with attorneys who work for a public defender's office or legal aid society than attorneys who are solo practitioners or work for law firms. Institutional providers often have established internal checks and balances which provides some level of accountability for attorneys. This can facilitate better decision making because these attorneys know that their actions in court will be scrutinized by their employers.¹⁵⁵ However, it is also common for family court attorneys to be solo practitioners or work in small firms. This, in turn, raises other issues about how priorities and accountability may differ from attorneys who work for larger organizations and are presumably accountable to a supervising partner or associate.¹⁵⁶

All attorneys are naturally held accountable in that there is always the threat of a malpractice lawsuit by their clients or an appeal based upon ineffective assistance of counsel. Lawyers are expected to zealously advocate for their clients and exhibit loyalty to them at all times. In family court cases, however, an attorney's accountability to his client may be compromised if the client is a young child who is unaware of his right to pursue an ineffective assistance of counsel claim.

Judges and opposing counsel can also provide accountability to lawyers by reporting the unsavory actions of an attorney to the state ethics

154. *See id.* at 293.

155. *See* JANIS, GROUPTHINK 2D ED., *supra* note 17, at 266. On the other hand, one could argue that an institutional provider is more prone to groupthink because an institutional provider is a group of lawyers who work together and often hold strong beliefs about certain ways of thinking and practicing law.

156. Solo practitioners often do not have the luxury of paralegals and investigators, yet they must take on high caseloads to ensure their survival. According to the New York County Lawyers' Association:

Data obtained from the Assigned Counsel Plan reveals, for example, that last year 41 attorneys each handled 150 or more felony cases. Such caseloads exceed nationally-recognized standards for representation of indigent defendants by attorneys in public defender agencies who—unlike most assigned counsel—have the benefit of paralegals, investigators, and support staff to assist them.

New York County Lawyers' Association, Executive Summary of Motion for Preliminary Injunction, Re: New York County Lawyers' Association v. State of New York (Index No. 102987/00) (May 31, 2001), http://www.nycla.org/publications/mpiexecutivesummary.html#N_1_. Solo practitioners also do not have the benefit of enjoying camaraderie with other attorneys at the office to relieve the stress of dealing with daily crisis situations in the courthouse.

committee. In practice, though, members of the bar may be hesitant to report other attorneys absent evidence of serious ethical breaches. Moreover, the effects of groupthink are subtle and unlikely to be noticed. Thus, some type of formal institutional accountability may be the first step in preventing groupthink. This could be coupled with an effort to relieve judges of the responsibility of appointing attorneys in family law cases, a process that has raised concerns about judges appointing attorneys whose views are closely aligned with their own views. In fact, a working group convened to address the representation of children in the judicial system and concluded that relieving judges of this responsibility would be a step in the right direction.¹⁵⁷ This would certainly reduce the appearance of impropriety and eliminate many conflicts of interest that could potentially arise. Ultimately, some or all of these reforms should be implemented to maintain accountability, for without accountability, real change will not be possible.

B. Protecting Whistleblowers and Dissenters' Right to Say "No" by Offering Opt Out Provisions for Negotiations

Another method for counteracting groupthink is to provide a way for litigants themselves to challenge the institutional players who might fall prey to groupthink. One suggestion is that all parties to a settlement should be given the choice of opting out of the settlement process with no questions asked and without recourse. This would release a judge's stronghold over parties and attorneys to work out a settlement and give parties a safety valve in case they feel disempowered by the process.¹⁵⁸ The parties and lawyers need to agree that if at any point negotiations break down and one party no longer wishes to negotiate, discussions will cease and the court will be notified that settlement is not possible. To operate effectively, the opt out provisions need to be exercisable without the judge knowing who exercised the option. At no time should the judge be told who wished to continue negotiating and who wished to go to trial. As it stands now, it can be tempting for an attorney to utilize a breakdown in negotiations to his client's advantage. It is not uncommon to witness an attorney tell a judge on the record that "My client was willing to nego-

157. See *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Report of the Working Group on the Judicial Role*, 64 *FORDHAM L. REV.* 1389, 1392 n.18 (1996) (The working group noted that it was "particularly concerned about the unethical practices of appointing attorneys who already have unmanageably large caseloads; appointing attorneys who consistently 'rubber stamp' the department of social services' or agency's recommendations; appointing attorneys who, to maintain the judges' patronage, will not advocate zealously or 'rock the boat'; and the practice of refusing to appoint attorneys who are likely to challenge policies and practices that negatively impact children.").

158. See Grillo, *supra* note 91, at 1600-10 (discussing the dangers of compelled mediation).

tiate, but the other side would not agree.” This is done in the hopes that the judge will be more willing to rule in favor of the cooperative party rather than the party who is trying to make waves. Before this proposal can be implemented, though, repeat players should be educated about the negative consequences of groupthink, which forms the basis for the third reform idea.

C. Educating Repeat Players About the Dangers of Groupthink

Promoting education and awareness of groupthink is necessary to institute reform proposals. Although there is always a risk that a person could use limited information about groupthink as a basis for abandoning group discussions and making unilateral decisions to avoid groupthink pitfalls, it is more important that institutional players are aware of groupthink so that they can consciously avoid falling prey to it.¹⁵⁹

Repeat players must be willing to embrace reform and avoid falling into old routines if education and reform proposals are to be effective. This might require an influx of new players to spur and advance change since organizations are generally resistant to change.¹⁶⁰ Additionally, outsiders should not be afraid to make waves and challenge the status quo.¹⁶¹ Moreover, positive change can become a reality if insiders seek to include outsiders' views in the decision making process.¹⁶² Susan Carle believes that:

[P]eople have to want to change the organizations of which they are a part. Processes need to be developed that will generate such buy-in and allow institutional insiders to design effective solutions tailored to particular circumstances. But attempts to make organizations more inclusive through internally generated processes run

159. See JANIS, *GROUPTHINK* 2D ED., *supra* note 17, at 275-76. Janis has raised thoughtful and ethical concerns about the “wrong” or exploitative type of group using these theories to their advantage, but he ultimately believes that “[i]mproving the quality of decision-making by eliminating certain sources of error that prevent a group from achieving its goals can be expected to have good social consequences for policy-making groups that have good goals.” See *id.* at 273-74.

160. NARDULLI ET AL., *TENOR OF JUSTICE*, *supra* note 6, at 40-41 (“Veteran members . . . act as repositories of collected experiences, observed relationships, and court lore . . . [which] provides stability and continuity to the court’s activities. Although leaders and assistants come and go, the court community’s traditions and norms change very slowly.”).

161. See Bean, *supra* note 77, at 51-63 (arguing for opening family courts to the public to effectuate reform).

162. See Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 *HARVARD J.L. & GENDER* 323, 352 (2007).

into the problem that the people already at the table do not represent those who have been excluded.¹⁶³

If repeat players welcome new players, this may increase the chances of instituting successful reform proposals and prevent institutional players from falling into groupthink traps.¹⁶⁴

As addressed earlier, the temptation to avoid groupthink may result in the belief that it is best to abandon group dynamics altogether.¹⁶⁵ Since the judge is typically the final decision maker in family court, it may seem like this model is already in place; however, this view is too simplistic and ignores the reality of nuanced family court dynamics. Often, the judge is not the sole decision maker but rather acts as a referee in cases or “rubber stamps” settlement agreements. As such, judges who make efforts to maintain impartiality and neutrality while encouraging open dialogue among all courtroom players are more likely to avoid groupthink in their courtrooms.¹⁶⁶

V. CONCLUSION

Reforming family court institutional culture may seem unworkable and challenging,¹⁶⁷ yet culture can be malleable, particularly if all players are open to reform and are cognizant of the existing culture.¹⁶⁸ This article demonstrates one way to analyze family court institutional culture through the lens of another discipline, namely the social psychology theory of groupthink. We can then borrow from the groupthink theoretical construct its suggested ways to try to counteract the drawbacks of groupthink, such as: breaking through group isolation and establishing institutional accountability; providing parties with an anonymous opt out provision for negotiations; and raising awareness about groupthink pitfalls. In sum, the significance of this topic is threefold: (1) if the culture of family courts remains stagnant, then innovation and meaningful conversation for reform is also stagnated; (2) if the culture of the family courts remains resistant, and even hostile, to outsiders and newcomers, then even more stagnation occurs without allowing for fresh thinking; and (3) most importantly, such a culture is harmful to litigants—litigants who are already marginalized in

163. *Id.*

164. For an excellent discussion of how education can be utilized to inform prosecutors and judges about the “costs to the system caused by intimate relationships between them,” see R. Flowers, *supra* note 83, at 290. See also Galanter, *Missed Opportunities*, *supra* note 113.

165. See JANIS, *GROUPTHINK 2D ED.*, *supra* note 17, at 260.

166. See *id.* at 263.

167. See OSTROM ET AL., *supra* note 3, at 3-4.

168. See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

our society—most typically the impoverished, persons of color, women and children, and those in the midst of trauma.

There are multiple parallels between groupthink and the prevalent culture that exists in many family courts nationwide, and increasing knowledge about the dangers of groupthink may help family court institutional players avoid its pitfalls. This article provides a theoretical framework to inspire further discussion and research about the nexus between groupthink and family court institutional culture. Hopefully, these ideas will help to revamp the stagnant, “no waves” culture that has been perpetuated in family courts for decades and serve as a catalyst for instituting meaningful court reforms and protecting the rights of family court litigants.