

TRANSPARENT: WHEN LEGAL FICTIONS AND JUDICIAL IMAGINATION MAKE FACTS DISAPPEAR, THEY ENFORCE TRANSPHOBIC DISCRIMINATION

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INTRODUCTION

Kim¹ is a transgender parent who was ordered to pay more in child support than she² earned. When she could not pay, a court found her in contempt and put her in jail. In jail, she was dressed in a woman's uniform, paraded through every part of the men's population, and then held in solitary confinement in the wing for violent male offenders. Her story provides an example of how courts sometimes view legal fictions as more real than the facts of a person's life.

Legal fictions include presumptions, which are defined as “legal inference[s] or assumption[s] that a fact exists because of the known or proven existence of some other fact or group of facts.”³ When used appropriately, legal fictions can facilitate the law's

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1 Kim's story is told with her permission. My clinic students and I represented her in appealing the amount of her child support obligation. For an interview with Kim, see *Gender Talk: Program 522* (Aug. 6, 2005), <http://www.gendertalk.com/real/500/gt522.shtml> [<http://perma.cc/M7RF-3PU4>].

2 Although Kim's assigned sex at birth was male, her self-identity is female. Out of simple respect for the people behind the pronouns, this Article uses pronouns according to the preference of the persons to whom the pronouns refer.

3 BLACK'S LAW DICTIONARY (10th ed. 2014) (“A presumption may be defined to be an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection.”) (citing WILLIAM P. RICHARDSON, *THE LAW OF EVIDENCE* § 53, at 25 (3d ed. 1928) (“‘Conclusive presumptions’ or ‘irrebuttable presumptions’ are usually mere fictions, to disguise a rule of substantive law [e.g., the conclusive presumption of malice from an unexcused defamation]; and when they are not fictions, they are usually repudiated by modern courts.”)); JOHN H. WIGMORE, *A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE* 454 (1935) (“Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law. Thus it is said that a child under the age of fourteen years is conclusively presumed to be incapable

legitimate purposes. However, when facts contradict legal fictions, facts should be considered, in order to temper the potential for resulting irrationality and injustice. Legal fictions impact specific groups disproportionately. This is particularly true for those whose experiences are outside judges' experiences.

This Article gives an example of this disproportionate impact and recommends that courts setting child support obligations consider discrimination in hiring as relevant to whether a parent is voluntarily unemployed when they decide whether to impute income to a parent. Part I demonstrates how multiple judicial officers' distraction, imagination, and misguided reliance on legal fictions, rather than on the facts of the individual's life, made injustice real in Kim's life. It attempts to understand judges' unarticulated reasoning through a re-created conversation. Part II discusses legal treatment of transgender people in general. Part III suggests changes in legal doctrine to promote clearer thinking and more rational decisions within the courts regarding the distracting and emotionally charged issues surrounding transgender individuals. Specifically, I suggest that the legal fiction that permits courts to impute income to unemployed parents should change to explicitly recognize discrimination in hiring. Courts should adopt an evidentiary rule accepting self-reports of gender identity. To facilitate legal thinking that transcends simplistic binary models of human experience, judges should make an effort to understand more about trans people. Judges should also adopt a simple schema for understanding the distinct categories of sex, gender identity, gender expression, and sexual orientation. Judges should be evaluated according to their ability to prioritize facts (here, discrimination against transgender people in hiring, which leads to unemployment) over legal fictions (here, a parent able to work but not working is voluntarily unemployed, rather than the target of discrimination in hiring). Finally, judges should be evaluated for their ability to prioritize facts over their own fears.

I. Kim's Story

Kim is a pre-operative⁴ transgender Caucasian woman. I met her in rehearsal for *The Vagina Monologues*.⁵ Kim's youngest daughter was with her, apparently comfortable with Kim's appearance as a woman, referring to her as "Dad." Kim's monologue was

of committing rape. This is only another way of saying that such a child cannot be found guilty of rape."); RICHARD EGGLESTON, EVIDENCE, PROOF AND PROBABILITY 92 (1978).

4 Not all transgender people plan to go through sex reassignment surgery. Pre-operative, post-operative, and non-operative statuses are relevant only to some transgender people. Those statuses have been treated as highly relevant by some courts.

5 EVE ENSLER, THE VAGINA MONOLOGUES (2008).

“They Beat the Girl Out of My Boy, Or So They Tried.”⁶

They assigned me a sex
 The day I was born.
 It’s as random as being adopted
 or [as] being assigned a hotel room on the 30th floor.
 It has nothing to do with who you are
 Or your fear of heights.
 But in spite of the apparatus I was forced to carry around
 I always knew I was a girl.

. . . .

My mother was worried what people would think of her
 That she made this happen
 Until I came to church
 And everyone said you have a beautiful
 Daughter.
 I got to be soft
 I am allowed to listen
 I am allowed to touch
 I am able to
 To receive.
 To be in the present tense
 People are so much nicer to me now
 I can wake up in the morning
 Put my hair in a pony tail
 A wrong was righted.
 I am right with God.

. . . .

I live now in the female zone
 But you know how people feel about
 immigrants.
 They don’t like it when you come from someplace else.

6 EVE ENSLER, *They Beat the Girl Out of My Boy . . . Or So They Tried*, in *THE VAGINA MONOLOGUES*, *supra* note 5, at 141, available at <http://umassvagina.wordpress.com/2010/12/30/they-beat-the-girl-out-of-my-boy-or-so-they-triedkelsey-pratto-and-sam-creedintronikki-simpson/> [<http://perma.cc/QH2H-995H>]. The play *The Vagina Monologues* includes optional pieces that change from year to year. *They Beat the Girl Out of My Boy . . . Or So They Tried* is one of the optional pieces.

Before she began presenting as a woman, Kim had depression and intrusive suicidal thoughts from the disconnection between her gender identity and her physical sex.⁷ Her doctor medicated her, in an attempt to ameliorate the depression, but the medications never worked appropriately. Kim disclosed her female self-identity to her fiancée, a cisgender⁸ woman, two years before their marriage. Two children were born of the marriage. Both were teenagers when I met Kim.

During the beginning of the fifteen-year marriage, Kim dressed and presented as a male, and worked as a mechanic. Her highest yearly income never exceeded \$23,016. She earned that amount in 1996, working full-time as a certified mechanic. As a result of physical injuries, 1996 was the last year in which Kim earned income above the poverty level for one person. Between then and when I met her, nine years later, her highest yearly income had barely reached one-half of her 1996 earnings.

In 1997, Kim began seeing a counselor about her transgender identity. Her spouse⁹ occasionally visited the counselor with her. The children received counseling of their own to address having a transgender parent.

7 Sex is biological; gender identity is psychological. See Appendix I for a fuller description of the distinction between sex and gender identity.

8 The term “cisgender” refers to a person whose sex assignment at birth is congruent with her or his gender identity. See Appendix I for further discussion.

9 This Article uses “spouse” rather than “wife” because using “wife” would give the appearance of a same-sex marriage, when, at the time of the marriage, under the law of any state that had examined the validity of transgender marriage, Kim’s marriage would not be considered a same-sex marriage. See *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004), where the Florida District Court of Appeal held the nine-year marriage between Michael Kantaras, a transgender man, and his wife, void ab initio; see also *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), where the Court of Appeals of Texas found that although Christie, a transgender woman, had a legal name change, a complete sex reassignment, and had married a man in Kentucky with whom she lived until his death, the court concluded, “We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse.” See also *Goodwin v. United Kingdom* (No. 28957/95), 2002-VI Eur. Ct. H.R. 3 (considering many restrictions on a post-operative transgender woman’s ability to live as a woman). The European Court of Human Rights held that forbidding a transgender woman’s marriage to a biological male violated her rights under the European Convention. *Id.* at 93, 104. The court said, “a test of congruent biological factors can no longer be decisive in denying legal rights” to a post-operative transgender person. *Id.* at 100. For an interesting discussion of approaches to using international law to analyze same sex marriage, see Anjuli Willis McReynolds, Commentary, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1073 (2006). McReynolds analyzes doctrinal, empirical, and dialogic approaches to using international materials. *Id.* at 1102–04.

A year later, Kim began hormone therapy, but continued to dress and present as male. In the meantime, she had begun developing carpal tunnel syndrome, which impaired her ability to work full-time as a mechanic. As a result, her business faltered and ultimately went bankrupt in 2000. For the next two years, Kim worked part-time as a mechanic, earning \$10 per hour. In late 2001, she was injured in a work-related automobile accident. She received a worker's compensation award of almost \$25,000 and an award of \$15,000 from the other driver's insurance, which she used to support her family.

In 2002, Kim had neck and carpal tunnel surgeries. She spent months in rehabilitation. As a result of her injuries and surgeries, lifting and bending over, common activities for a mechanic, caused her severe pain. On August 1, 2002, Kim was fired. She did some light mechanic work from her home, but her earnings did not add up to a significant amount.

That same year, Kim's brother-in-law died unexpectedly. His death made her realize life's fragility and preciousness. She could no longer afford to waste it. She began publicly presenting herself as a woman. Her depression and suicidal thoughts vanished. Kim talked with her daughters and told them she would support whatever name they wanted to call her. She suggested that they might even want to call her their aunt, so they could avoid potential social discomfort. They chose to continue calling her "Dad."

Physically unable to perform full-time work as a mechanic, Kim knew she needed education to become more employable. In the fall of 2002, she enrolled in community college. She paid for college with student loans and used the remainder of her settlement awards, along with loans from her father, to support the family. Kim received her Associate of Arts degree in the summer of 2004. In the meantime, Kim's transition was too difficult for her spouse, who filed a petition to dissolve their marriage, requesting primary placement of the children,¹⁰ child support, and spousal maintenance.¹¹

Kim sought additional work, unsuccessfully. She used employment agencies and temporary agencies to hunt for work. She placed twenty to thirty job applications per week. She sent résumés and applied for work online. She applied for positions from administrative assistant to fast-food worker. She applied to shopping malls, retail stores,

10 Washington does not use "custody" and "visitation" but instead uses the concept of a parenting plan, which outlines when the children will spend time with each parent, allocates decision-making authority, and determines how disputes in administering the parenting plan will be resolved. WASH. REV. CODE ANN. § 26.09.184 (West 2015).

11 WASH. REV. CODE ANN. § 26.09.090 (West 2015) (providing for spousal maintenance).

restaurants, and call centers. If she had been offered a job at McDonald's, she would have taken it.

However, Kim faced significant discrimination because she is visibly transgender. When she submitted applications online, she would get an interview. She said, "As soon as they see me, they thank me for coming in, and that's the last I hear from them. And I know I'm qualified for the job[.]"¹²

Kim stayed in school, pursuing a bachelor's degree, and worked part-time at an auto repair shop. Her student loans brought in some income, but most of that was earmarked for tuition and other school-related costs. Kim's financial aid and student loan package was calculated to allow for less than \$10,000 living expenses for the entire year. The student loans and financial aid were conditioned on her being a full-time student. If she dropped out of school, she would lose her main source of income and would be required to re-pay her student loans, at \$500 per month.

Washington law permits the court to impute income to a voluntarily unemployed or underemployed parent, and set a child support obligation based on the imputed income.¹³

12 Transcript of Record at 45, *Stankovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. Aug. 31, 2005).

13 WASH. REV. CODE ANN. § 26.19.071(6) (West 2015):

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off

Income cannot be imputed to an unemployable parent.¹⁴ The statute does not contemplate the possibility that a parent may be employable, but unable to find an employer to hire her. At a temporary orders hearing in August 2004, the Superior Court¹⁵ commissioner¹⁶ imputed Kim's net income to be \$1,800 a month. Kim had never had a net income of \$1,800 per month. The commissioner set a corresponding child support obligation at \$994 per month.

In Kim's case, the commissioner roughly based her findings on income information that was eight years old, and pre-dated Kim's injuries and resulting surgeries. The commissioner directed Kim to get a job and commented that Kim's education was a luxury. The commissioner ordered Kim to "dress as a male" during contact with the children.¹⁷ Though she did not know the children in this case, the commissioner apparently assumed that, by definition, she knew what was best for the children, and that it would be best for the children to avoid confronting the complexity of their parent's transgender status.¹⁸

Kim moved to revise¹⁹ the commissioner's order. On September 30, 2004, the Superior Court judge upheld the commissioner's imputing income at \$1,800 a month.²⁰ The judge

public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

See Appendix II, *infra*, for all other states' rules or statutes on imputing income.

14 *Id.*

15 The Superior Court is Washington State's court of general jurisdiction. WASH. REV. CODE ANN. § 2.08.010 (West 2015).

16 A commissioner is a judicial officer with the same duties as a judge. WASH. REV. CODE ANN. §§ 2.24.010(1), 2.24.040 (West 2015). A commissioner's decisions may be subject to revision by a Superior Court judge. WASH. REV. CODE ANN. § 2.24.050 (West 2015).

17 Transcript of Record at 12, *Stanovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. Aug. 6, 2004).

18 A study of 3,474 transgender people in the United States found that children were generally supportive of their parents who came out as transgender. GENNY BEEMYN & SUSAN RANKIN, *THE LIVES OF TRANSGENDER PEOPLE* 11, 71 (2011).

19 WASH. REV. CODE ANN. § 2.24.050 governs revision procedure, stating, "Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner . . .".

20 Minutes and Order, *Stankovich v. Stankovich*, No.04-3-01492-0 (Wash. Super. Ct. Sept. 30, 2004).

upheld the amount of support due, but characterized part of the payment as spousal support. She found no indication that Kim's dressing as a woman caused any detriment to the children, and ordered that Kim could dress as she chose during her time with the children.

Over the next several months, as Kim and her attorney were preparing for trial, Kim's spouse filed three consecutive motions for contempt, seeking to have Kim imprisoned for failing to pay child support. Kim responded to each motion, pointing out that the child support and maintenance she was ordered to pay exceeded any monthly income she had earned since 1996. The first motion was denied, with a finding of no contempt.²¹

In November 2004, Kim went to work part-time for her former employer, earning \$8 per hour, for a total of approximately \$250 per month. In February 2005, the parties agreed to an order dividing their 2004 tax refund equally, with Kim's half, \$2,343.50, also going to her spouse for back child support and maintenance.

In March 2005, Kim's spouse again moved for an order finding Kim in contempt of court for failure to pay child support and maintenance. Again, Kim responded that she was unable to pay the amounts ordered. The commissioner found contempt, but denied the request for imprisonment.

Two months later, Kim's spouse again moved for an order finding Kim in contempt.²² Kim was on the verge of homelessness.²³ She had searched diligently to find work that would allow her to comply with the child support and spousal maintenance order. Given her physical disabilities and her education level, it was impossible for her to earn the income imputed to her. She had lost her mechanic's certification because she was unable to pay to renew it. Her parents could no longer help the family financially. Kim had no source with which to pay the child support and maintenance ordered.

However, on July 1, 2005, yet another commissioner found that Kim had the ability to comply with the temporary child support and maintenance order because "[y]ou've already got a job skill and there are lots of jobs available frankly that don't require much in the way

21 Inability to comply with an order is a defense to contempt. *See Stablein v. Stablein*, 368 P.2d 174, 175 (Wash. 1962).

22 Minutes, *Stankovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. Apr. 1, 2005).

23 Declaration of Kimberly Stankovich in Response to Motion for Contempt, *Stankovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. Aug. 6, 2004).

of job skills.²⁴ Um, so you are in contempt.”²⁵ The commissioner ordered Kim to pay \$500 in attorney’s fees and a civil penalty of \$100, and to serve seven days in jail unless she paid \$1,000 before the end of the month. The commissioner commented that Kim’s being transgender was a choice, like “deciding that she wants to be a punk rocker.”²⁶ Kim had no way to raise \$1,000, so she reported to jail and served the seven-day sentence.

Kim had legally changed her name and her sex designation on her driver’s license.²⁷ When Kim reported to jail, the jailer called out her current legal name. That was the last time any jail personnel used her current legal name. The jail required Kim to wear a woman’s uniform, but it did not house her in the women’s part of the jail. Instead, she was placed in solitary confinement, in the wing reserved for the most violent male offenders.²⁸ In a powerful display of enforcing gender norms, she was paraded through the general population in the men’s part of the jail, dressed in a woman’s uniform. The male inmates yelled curses and insults at her as she passed. Although Kim is a white woman with fair skin, blue eyes, and blonde hair, many of them called her “N***er.” She was surprised to hear racist insults. Before that, she had not thought of insults based on perceived assignment to one less-privileged category as transferable to someone assigned to another less-privileged category.

Unlike other inmates, she was denied exercise time, denied access to books, denied visits, and denied letters. Her friends, members of a local activist feminist group, Stop the

24 These are two true statements, which can lead to a false conclusion, if other important, relevant statements (i.e., that she can no longer perform the work associated with her mechanic skill, and that she is unable to find an employer willing to hire her for any of the jobs that require little to no skills) are omitted.

25 Transcript of Record at 15, *Stankovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. July 1, 2005).

26 “How is what your client did any different from deciding that she wants to be a punk rocker and she has her hair spiked and died purple and has body piercings and dresses in godly black and tries to get a job and is turned down?” *Id.* at 8.

27 See WASH. REV. CODE ANN. § 46.20.205 (West 2015) (procedure for changing one’s name). See also WASH. ADMIN. CODE § 308-104-014 (West 2015) (procedure for applications for driver’s licenses).

28 The Prison Rape Elimination Act, 42 U.S.C. §§ 15601–15609 (2003), was passed unanimously by Congress in 2003, with final enabling regulations enacted in 2012 at 28 C.F.R. Part 115. The enabling regulations provide that decisions about where a transgender person may be housed must be dealt with on a case-by-case basis, 28 C.F.R. § 115.42(c) (2012), with the prisoner’s expressed safety concerns taken into account. 28 C.F.R. § 115.42(e) (2012). The standards require assessing all available alternatives before placing transgender prisoners involuntarily into “protective custody” (which can be a form of torture). 28 C.F.R. § 115.43(a) (2012). See NAT’L CTR. FOR TRANSGENDER EQUAL., LGBT PEOPLE AND THE PRISON RAPE ELIMINATION ACT (2012), http://transequality.org/sites/default/files/docs/resources/PREA_July2012.pdf [<http://perma.cc/WX2G-NUFL>].

Clock,²⁹ wrote scores of supportive letters and attempted to visit her. At first, they were turned away because they requested visits with her using her current name. Later, they were turned away even though they requested visits with her using her former male name. Their letters to her were returned. Kim believed her friends had deserted her. She sank into despair. She went on a hunger strike, but the guards told her they were keeping records that showed she was eating, so her hunger strike would be for nothing.

Kim's friends went online, telling her story in their blogs. Eventually, Kimberly Hyatt-Wallace, a transgender psychoanalyst in Illinois, read one of these entries and telephoned the jail commander, explaining that the jail's treatment of Kim would damage her emotionally and psychologically. Kim was then transferred to the administrative reception area, a less restrictive area, and released.

About a month after Kim's release, the case went to trial on issues of child support and maintenance only. Kim was unemployed and was no longer receiving financial aid for school. She received \$149 per month in food stamps. She had minimal expenses, but was unable to meet them. Her rent was unpaid for that month. Her telephone service was shut off. Her automobile insurance had lapsed. She had no money to pay her utility bills. She had not made the car payment on her seventeen-year-old Chevrolet Beretta. A local work-promotion program had given her fifteen bus tokens so she could ride the bus to look for work. She had dropped the most expensive part of her hormone therapy,³⁰ to reduce its cost to \$12 per month. Over the course of the year that the case had been in litigation, she had paid a total of \$2,000 for her attorney.³¹

29 The group's name came from founder Anne Dietz-LaVoie's desire to stop the clock that counts out how often a woman or girl is raped in the United States. Various conversations between Anne Dietz-LaVoie and the author in Spokane, Wash. (Feb. 2005).

30 Transgender people often use hormonal therapy to induce or maintain the physical and psychological characteristics of the sex that matches the person's gender identity. UNIV. OF CAL., SAN FRANCISCO, DEP'T OF FAMILY & COMMUNITY MEDICINE, *Primary Care Protocol for Transgender Patient Care*, CTR. OF EXCELLENCE FOR TRANSGENDER HEALTH (2011), <http://transhealth.ucsf.edu/trans?page=protocol-hormones> [<http://perma.cc/A832-23RM>]. Hormonal therapy for male to female transgender people may include anti-androgen therapy, which blocks testosterone, estrogen therapy, and progesterone. *Id.*

31 This number is low only due to the generosity of Kelly Malone of the Maxey Law Firm. Ms. Malone responded to multiple motions, which each required responsive declarations (the equivalent of affidavits under WASH. REV. CODE ANN. § 9A.72.085) (West 2015)) and made multiple court appearances, including arguing at seven separate contested motion hearings, before the case even got to trial.

At trial, Kim testified that she was able and willing to perform unskilled minimum wage work. She submitted a minimum of fifteen employment applications per week. When she talked with prospective employers on the telephone, they were enthusiastic about hiring her, but when she appeared for interviews, everything changed. She reasonably concluded that, because she was obviously transgender, she was unable to find an employer willing to hire her. In order to make herself employable, she enrolled in college classes. The superior court judge summarized Kim's current situation: "She's out of work. She doesn't have any money. She's hocking her personal effects and belongings to pay for her rent. It's clear to me that it's a bad situation. I'm satisfied it's a situation that [she] doesn't want to be in."³² In spite of evidence of Kim's physical disabilities unrelated to her gender identity—disabilities that made her previous work impossible—and in spite of his conclusion that Kim was in a situation that she did not want to be in, the judge inexplicably went on to say, "I have seen no evidence presented, I have heard no testimony, expert or otherwise in this proceeding which indicates to me that [she] cannot earn income at a level at least marginally equivalent to what was historically earned by her."³³

Instead of taking into consideration the facts of Kim's circumstances, the court used income information from nine years before the trial, before Kim's injuries, and during a time when she was employed in skilled work she could no longer perform, to impute income for child support purposes. The judge imputed gross income to Kim at \$1,720 a month with a net amount of \$1,500 a month. The corresponding child support calculation was \$615 a month.³⁴ The judge took into account the need standard³⁵ for one person and

32 Transcript of Record at 99, *Stankovich v. Stankovich*, No. 04-3-01492-0 (Wash. Super. Ct. Aug. 31, 2005).

33 *Id.* at 100.

34 WASH. REV. CODE ANN. § 26.19.065 (West 2015) limits the amount of child support a parent must pay to no more than 45% of actual income, with an exception for good cause, which includes substantial wealth, day care expenses, special medical need, educational need, psychological need, and larger families.

35 When Kim's case went to trial, the version of WASH. REV. CODE § 26.19 in effect, at 183–84, <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/2005/Final05SuppBody.pdf> [<http://perma.cc/HSU7-H3QF>], authorized administrative creation of the child support guidelines. WASH. ADMIN. CODE § 388-14A-3400 (2005) at 210, <http://leg.wa.gov/CodeReviser/WACArchive/Documents/2005/WAC388.pdf> [<http://perma.cc/Y3VL-A6RX>], provided that, unless there are special circumstances, the monthly support amount cannot reduce a parent's income below the need standard for one person, as defined in WASH. ADMIN. CODE § 388-478-0015 (2005) at 909, <http://leg.wa.gov/CodeReviser/WACArchive/Documents/2005/WAC388.pdf> [<http://perma.cc/Y3VL-A6RX>]. At that time, the need standard for one person was \$1,021.

deviated³⁶ from the standard calculation³⁷ to set Kim's final child support obligation at \$478 per month.

Kim remained unable to obtain work that would result in even a fraction of the income imputed to her. Her child support obligation still exceeded her income.

The commissioner who earlier ordered Kim to dress like a man explicitly demanded that she hide her transgender status; the trial court implicitly demanded that she hide her transgender status—that she disguise herself as a man³⁸—which she can no longer do. As a result of hormone therapy, Kim has visible breasts that cannot be hidden without considerable discomfort. Even after being held in contempt of court and incarcerated³⁹ for not paying the impossible temporary child support and maintenance awards set, and although the trial court denied the request for maintenance and reduced the child support amount, the child support amount remained impossible for her to pay. Contempt findings and incarceration were likely in her future.

36 WASH. REV. CODE ANN. § 26.19.075 (West 2015) permits deviations from the presumptive child support amount for specified reasons.

37 WASH. REV. CODE ANN. § 26.19.035 (West 2015) provides that worksheets must be used to calculate child support obligations.

38 For a discussion of hiding status, see generally Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (identifying three demands on members of low-status groups: 1) conversion, or altering one's identity; 2) passing, or hiding one's identity and pretending that one's identity is different; and 3) covering, or not flaunting one's identity).

39 Incarceration presents complicated issues, such as how transgender individuals should be housed and whether they should be permitted to continue hormone treatment. See, e.g., *Praylor v. Tex. Dep't of Criminal Just.*, 430 F.3d 1208, 1209 (5th Cir. 2005) (holding that a transgender inmate had no Eighth Amendment right to hormone therapy and that the prison's refusal to provide hormone therapy did not constitute deliberate indifference to a serious medical need, because the inmate had been evaluated and "did not qualify" for hormone treatment); *White v. Farrier*, 849 F.2d 322, 325, 328 (8th Cir. 1988) (determining that "transsexualism is a serious medical need" but reversing the district court's grant of summary judgment in favor of the prisoner, stating, "[H]ere there is a question whether White is a transsexual and whether treatment is required."); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("We therefore conclude that plaintiff has stated a valid claim under the Eighth Amendment which, if proven, would entitle her to some kind of medical treatment. It is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy which appears to be the focus of her complaint."); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (refusing to recognize a constitutional right under the Eighth Amendment to estrogen therapy provided that some other treatment option is made available).

When Kim's case went to trial, in August 2005, discrimination in hiring and employment against transgender people was perfectly legal in Washington.⁴⁰ Washington is now one of only eighteen states, with the District of Columbia, to extend protection from discrimination by private employers to transgender people.⁴¹ Some municipalities have extended protection as well.⁴²

In Kim's case, commissioners and judges repeatedly refused to recognize that discrimination against transgender people exists and might prevent Kim's employment. If discrimination against transgender people had been illegal at the time of Kim's trial, the court might have erroneously concluded that, because employers are legally forbidden to discriminate against Kim in hiring, they did not discriminate.⁴³ Either way, no matter the judicial reasoning, Kim loses because she is a gender transgressor.

In Kim's case, the trial court judge provided very little explanation of his reasoning. He apparently reasoned that because Kim would be able to perform some job, her unemployment must have been voluntary. He skipped over an important intervening variable—the requirement that an employer hire her. He seems to have reasoned from an unarticulated premise that Kim's transgender status was a matter of choice. From that, the court apparently reached an unarticulated conclusion that her encounter with discrimination must also have been a matter of choice, and therefore her unemployment resulted as well from a personal choice. However, if physical survival or psychological well-being is

40 In January of 2006, S.H.B. No. 2661 was signed into law, amending the law against discrimination to include sexual orientation, and defining sexual orientation to include "gender expression or identity." S.H.B. 2661, 59th Leg., Reg. Sess. (Wash. 2006), WASH. REV. CODE ANN. § 49.60.030 (West 2015). As of June 7, 2006, it is illegal in Washington State to discriminate in employment, housing, public accommodations, credit and lending, and insurance, based on race, color, national origin, creed, sex, sexual orientation, disability, familial status, marital status, and age. All employers with eight or more employees, except tribes and religious non-profit institutions, are covered by the law. *See* WASH. REV. CODE ANN. § 49.60.040 (West 2015).

41 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. *See* NON-DISCRIMINATION LAWS: STATE BY STATE, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> [<https://perma.cc/GG7V-F7ZH>] (last visited June 11, 2015).

42 *See* CITIES AND COUNTIES WITH NON-DISCRIMINATION ORDINANCES THAT INCLUDE GENDER IDENTITY, HRC, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [<http://perma.cc/CAA9-FDWE>] (showing 225 cities and counties as of January 28, 2015).

43 I base this conclusion on twenty-seven years of practicing family law in four different states, during which I have been astonished to hear judges use precisely this type of reasoning: if the law says something is true, then it is true. In other words, if the law says discrimination is illegal, then either it does not happen or else there are other means to address it and it is not the judge's concern.

threatened by one “choice,” it is not a genuine choice. In Kim’s words, “But it’s a choice like eating. If you don’t nourish your soul, like not eating, you die.”⁴⁴

Judges compound the effects of discrimination when they pretend or assume that it does not exist or has no effect. This is similarly true when judges assume that, if discrimination does exist, the targets of discrimination could choose to avoid it by covering a facet of their being and, resultantly, hold the targets strictly accountable for the results of discrimination.⁴⁵ This is how the trial court supported, endorsed, and reinforced the discrimination against Kim.

Parents have a moral obligation to support their children.⁴⁶ If the moral obligation insufficiently motivates parents, legal obligations to support one’s children exist in every state in the United States.⁴⁷ The legal obligations are tailored to the parents’ ability to earn money. To comply with notions of justice and the rule of law, there must be some rational relationship between the parent’s earning power and the obligation imposed. Supporting one’s children is considered such an important obligation that extraordinary remedies are available to enforce child support obligations.⁴⁸ But the extraordinary importance of child

44 Kevin Graman, *Controversy follows transgendered father*, SPOKESMAN-REVIEW (Aug. 5, 2005), <http://www.spokesman.com/stories/2005/aug/05/controversy-follows-transgendered-father> [<http://perma.cc/JT52-HGQT>].

45 See Leticia Nieto & Margot F. Boyer, *Understanding Oppression: Strategies in Addressing Power and Privilege*, COLORS NW. MAG., Mar. 2006, at 30, available at <http://beyondinclusionbeyondempowerment.com/about-the-book> [<http://perma.cc/7DHZ-QNHN>]. See also LETICIA NIETO ET AL., BEYOND INCLUSION, BEYOND EMPOWERMENT: A DEVELOPMENTAL STRATEGY TO LIBERATE EVERYONE (2010). In her workshops, Ms. Nieto sometimes makes the point that race is an artificial construct, but it has very real effects. Oppression can result from paying too much attention to either part of this paradox. *Id.* See also Yoshino, *supra* note 38, at 781.

46 See, e.g., *McGee v. McGee*, 262 S.W.3d 622, 626 (Ark. Ct. App. 2007) (citing *Akins v. Mofield*, 132 S.W.3d 760, 767 (Ark. 2003)); *Hartman v. Stassis*, 504 N.W.2d 129, 134 (Iowa Ct. App. 1993) (citing *In re Marriage of Carney*, 206 N.W.2d 107, 112 (Iowa 1973)).

47 See generally 59 AM. JUR. 2D *Parent and Child* § 45 (2015).

48 For example, in Washington the following remedies may be used to enforce the payment of child support: contempt of court, execution, garnishment, *ne exeat*, receivership, appointment of a commissioner, injunction, obtaining a specific judgment or lien, recourse to statutory proceedings, action on contract or for specific performance, wage assignments, and the use of a *lis pendens*. See KENNETH W. WEBER ET AL., 20 WASH. PRAC. FAM. & CMTY. PROP. L. § 36.7 (2014). WASH. REV. CODE ANN. § 74.20A.324 allows suspending a license for a parent who is not in compliance with a child support order. Federal law permits state child support agencies to intercept federal tax returns for child support debt. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, § 2331, 95 Stat. 357. The Debt Collection Improvement Act of 1996, Pub. L. No. 104–134, § 3720C, 110 Stat. 1321, contains important provisions for collecting past-due child support obligations, which

support obligations does not justify maximizing the amount of the child support obligation in a way unrelated to the parent's actual earning capacity.⁴⁹

In contrast with too many other courts, this trial court judge spoke courteously and appropriately to Kim, always referring to her by her self-identified gender. Unfortunately, the court disregarded the role played by discrimination in Kim's employment history and, however well-meaning, worked a profound injustice against Kim.

The first time I discussed this case with Kim, she was reluctant to appeal the child support order. She said, "I don't want to claim that my children aren't worth \$478 a month—they're worth more than that. They deserve more than that. I just can't pay it."⁵⁰

We appealed Kim's case, unsuccessfully. In an unpublished opinion, the Washington Court of Appeals upheld the trial court's child support order, with very little analysis.⁵¹ The Court of Appeals noted the unusually high number of contempt motions in the case and apparently concluded, without discussion or analysis, that the motions must have been justified, and that the unusual number of motions proved that Kim was intransigent.⁵²

Since neither the trial court nor the court of appeals provided meaningful analysis, a research assistant and I, both cisgender, had a series of conversations attempting to develop what we thought might be the court's rationale. Those conversations are excerpted below.⁵³

were further strengthened by an Executive Order directing the Secretary of Treasury, in consultation with the Secretary of Health and Human Services, to develop and implement procedures necessary to collect child support debts by administrative offset. Supporting Families: Collecting Delinquent Child Support Obligations, Exec. Order No. 13019, 61 Fed. Reg. 51,763 (Sept. 28, 1996). Federal law provides for passports to be denied, revoked, or limited if a parent owes more than \$5,000 in child support. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 370, 110 Stat. 2105.

49 When I worked for the Montana Child Support Enforcement Division, we termed large child support debt that we knew a parent would never be able to pay "mirage debt." We adopted a policy of reducing mirage debt to a more realistic amount, because research and our experience showed that a parent with a realistic child support obligation was much more likely to actually pay at least some child support. If the obligation was set too high, parents were more likely to pay nothing at all, even if they could afford to pay some.

50 Interview with Kim Stankovich in Spokane, Wash. (Oct. 2005).

51 *In re Marriage of Stankovich*, No. 24647-7-III, 2007 WL 241794 (Wash. Ct. App. Jan. 30, 2007), *rev. denied*, 175 P.3d 1094 (Wash. 2008).

52 175 P.3d at 1094.

53 A fuller conversation would include Kim and the children.

Liz: Because they have no way to meet their needs independently of their parents, children's needs must take precedence over parents' needs.

Gail: But children exist in families. We can't fully talk about children's needs independently from their parents' needs. As John Bowlby, M.D., says, "If a community values its children it must cherish their parents."⁵⁴ So the realities of parents' lives count. The realities must factor into the child support obligation. In setting a child support obligation, the court must take into account discrimination against transgender people that may interfere with a parent finding employment.

Liz: But maybe some of that discrimination is voluntarily encountered. Some people can pass. Maybe a transgender parent should be required to pass, if that's possible. Maybe a transgender parent should be required to wait until the children are eighteen before giving full expression to gender identity.

Gail: Is a transgender parent who needs to transition really free to put it on hold until the children reach eighteen? Gender identity appears to be immutable. There can be real effects on a parent's psychological well-being. Whether or not to make gender expression or sex congruent with gender identity might not be a choice.

Liz: Maybe there are parallels here with obesity.⁵⁵ That too affects employability and is the subject of discrimination. It is sometimes called a disability, but is judged as the result of a choice. For both transgender status and obesity, our understandings have evolved from seeing them as a matter of pure choice, to psychologically caused, to biologically caused. But they're not completely analogous because the transformation is viewed differently. A person of one sex transitioning to another is still socially negative. But an obese person transitioning to a non-obese person is socially positive. And what about alcoholism? There was a lot of progress made when it was considered a disease rather than a moral failing.

54 JOHN BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 84 (1951), available at http://apps.who.int/iris/bitstream/10665/40724/2/WHO_MONO_2_%28part2%29.pdf?ua=1 [<http://perma.cc/DDJ2-REP5>] (summarizing multiple studies in different countries on the adverse effects on children of maternal deprivation). Part 1 of the monograph is available at http://apps.who.int/iris/bitstream/10665/40724/1/WHO_MONO_2_%28part1%29.pdf?ua=1 [<http://perma.cc/B94Y-5DWP>].

55 See Elizabeth M. Glazer & Zachary A. Kramer, *Trans Fat* (Feb. 3, 2009) (unpublished manuscript) (on file with Hofstra University Maurice A. Deane School of Law and Penn State University Dickson School of Law), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337129 [<http://perma.cc/72BB-576M>]. The authors extend an analysis of fat discrimination to transgender discrimination, arguing, among other things, that fat and transgender employees should not have to negotiate their identities to win anti-discrimination lawsuits.

Gail: And the disability notion has been used in some cases to provide protection from employment discrimination. But transgender status as a disease is trading one stigma for another.⁵⁶ It's another way to be, not a pathological way to be.

Liz: Is there a parallel with decisions about when to divorce, staying together for the children? If you have children they need to be a priority. I know gender identity is fundamental, but parents should sublimate their needs to the needs of their children. I realize there's unfairness here, but if expression of a parent's gender identity hurts that parent's earning power, shouldn't expression of the parent's gender identity be sublimated to the child's needs? Being a parent is a sacrifice. The preciousness of childhood would warrant parents making sacrifices for their children. It's not fair that the prejudice exists.

56 Transgender status is explicitly not covered under the Americans with Disabilities Act. Section 512 provides:

Definitions: (a) Homosexuality and Bisexuality. For purposes of the definition of "disability" in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act. (b) certain conditions. Under this Act, the term "disability" shall not include—(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting from physical impairments, or other sexual behaviour disorder.

Americans with Disabilities Act of 1990 § 511, 42 U.S.C. §§ 12207–12211 (2005) (renumbered § 512, 42 U.S.C. § 12211, as of Sept. 25, 2008). A common element for homosexuality, bisexuality, and transsexualism is that they all "violate the heteronormative ideal." Fedwa Malti-Douglas, *Legal Cross-Dressing: Sexuality and the Americans with Disabilities Act*, 15 COLUM. J. GENDER & L. 114, 121 (2006).

The specter that haunts the ADA is a collapsing of categories and a swirl of marginalities. Struggling with the issue of mainstreaming different forms of marginality (and with the changes in our relations to our bodies and reproduction offered by modern medicine), we are unsure of our ability to keep each thing in its proper place. . . . Transvestism is the perfect emblem of the paradigmatic anxiety. A person of one category is clothed in the garment of the other. One social category masquerades as another. This creates something even more threatening than marginality: ambiguity.

Id. at 136–37 (citing CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* 10 (1966) (taking objects out of their place threatens the entire order of the universe)). See Zach Strassburger, Note, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337 (2012) for an analysis of the limitations and possible uses of disability law for anti-discrimination protection. See also S. Elizabeth Malloy, *What Best to Protect Transsexuals From Discrimination: Using Current Legislation of Adopting a New Judicial Framework*, 32 WOMEN'S RTS. L. REP. 283, 315–16 (2011), for a discussion of the tension between disability law and discrimination law.

But if you can avoid the prejudice, if you can be in the power position, why aren't you in the power position?

Gail: But not everyone values power and money. There are other values.

Liz: Don't children have a right to have parents who earn money?

Gail: Also a right to have parents be who they are? Children need more than financial support. There's a complex interplay of interconnecting needs, which requires case-by-case analysis.

Liz: But there's a hierarchy of needs—children's survival needs must be met first and are surely more important than a parent's need for gender expression congruent with gender identity. Money meets children's most basic survival needs.

Gail: If a parent's inability to authentically express his or her gender identity threatens that parent's psychological well-being, the parent may become unavailable for the child, either symbolically or literally. And that will have an effect on the child's most basic survival needs.

Liz: What about those who are wealthy enough to support their children regardless of any discrimination? Once again the wealthy would be treated differently from the poor.

Gail: And wealth is not a suspect category⁵⁷—it doesn't matter if wealthy transgender people express their gender identity. How can we justify requiring a parent living in poverty to sublimate his or her need for authentic gender expression when we won't require that from a wealthy parent?

Liz: But that's true for many things. If a parent is independently wealthy, we won't require them to work. There is a basic unfairness based on income level. But, since a visibly transgender parent is likely to earn less, maybe if that transgender parent can "pass," that parent should pass.

57 See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). The United States Supreme Court found that a Texas school finance system was constitutional because "residence in districts that happen to have less taxable wealth than other districts" did not create a suspect class. *Id.* at 28. The court also rejected the idea that education was "a fundamental right or liberty." *Id.* at 37.

Gail: Attractive people are more successful and earn more.⁵⁸ Should parents be required to undergo plastic surgery to increase their earning power? Men earn more than women.⁵⁹ Should an androgynous-appearing woman be required to disguise herself as a man in order to get a better-paying job? Pretending to be male may be psychologically harmful to a female parent. Isn't it more important for a parent to be both alive and psychologically healthy than for a parent to maximize income?

Liz: Location is important too. Should a parent have to move to a more welcoming place, to a more tolerant place, where the parent would encounter less discrimination?

Gail: That would remove the parent as an immediate resource for the child. A parent's presence is potentially more important for the child's overall health than financial support. And if that's true for physical presence, it must be true for psychological presence too.

Liz: Escaping from poverty is more important for physical health and physical health is the most important, most basic need. But could I say these things to Kim? It's hard because I know who she is. She is revealed to me as an individual in all that individual's complexity. It's much harder to say to someone you know, "Your needs don't matter as much as your children's needs."

Liz makes an important point. In theory at least, bias can be broken down with individual stories. They make principles concrete and reveal the additional complexity woven through each individual's life. Everyone who has practiced law knows that the most complex law school or bar exam question pales in comparison with the complicated dynamics of clients' situations. This is why we need courts to interpret and apply statutes. However, the efficacy of individual stories depends on a sincere and present listener using a legal framework that includes recognition of trans individuals' lived experiences. The courts must pay attention to the actual humans in the cases, preferring focusing on fact as opposed to legal fiction.

58 See Kate Lorenz, *Do Pretty People Earn More? Research, Reality Can be at Odds Over the Ugly Truth*, CNN (July 11, 2005, 1:06 PM), <http://www.cnn.com/2005/US/Careers/07/08/looks/> [<http://perma.cc/PAP4-L35B>] ("The ugly truth, according to economics professors Daniel Hamermesh of the University of Texas and Jeff Biddle of Michigan State University, is that plain people earn 5 percent to 10 percent less than people of average looks, who in turn earn 3 percent to 8 percent less than those deemed good-looking.").

59 Marilyn Watkins, *Washington's Working Women 2010: Progress Stalled without New Workplace Policies*, ECONOMIC OPPORTUNITY INST. (Apr. 2010), <http://www.eoionline.org/wp/wp-content/uploads/state-economy/WashingtonWorkingWomen-May2010.pdf> [<http://perma.cc/C5FP-GNJW>].

For Kim, there is a double bind, a catch-22.⁶⁰ To maintain her psychological health, she must present herself in the world as a woman. To maximize her earning potential (to the extent that her earning potential would not be harmed by her psychological distress) and prevent future incarceration, however, she must present herself in the world as a man.

The resolution to this dilemma may lie in looking beyond the individual lives of Kim and her family members. In a sense, Kim's story is a story of our culture in microcosm. Martha Fineman points out that parents are increasingly unable to support their children; unfettered market capitalism has impoverished our children.⁶¹

Kim's situation was a case in point. Even if she were not transgender, Kim could not

60 JOSEPH L. HELLER, *CATCH-22* 46 (1961):

There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), the United States Supreme Court condemned the double bind Ann Hopkins was in—she could not be a partner unless she was aggressive and masculine, and she could not be a partner because she was not feminine enough.

61 See generally Martha A. Fineman, *The Public and Private Faces of Family Law: Article: Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1.

My point is that the pressures generated by uncontrolled market institutions are at least as relevant to the health and well-being of children and families as are uncontrolled mothers and fathers. The irresponsibility of the state in not regulating or mediating the excesses of market activities is at least as devastating to a child as the irresponsibility of any unwed or divorced parent. We must count the costs to the family and its children of increased income disparity, wage stagnation for middle- and lower-income wage earners, and persistent impoverishment for too many of our nation's families.

Id. at 19. "Perhaps the real danger to civic society is the runaway nature of contemporary American capitalism and the inequities it has generated." *Id.* at 24.

earn what she did in the past. Her physical disabilities resulting from work-related accidents made her previous work impossible. Even if she could have convinced an employer to hire her, she most likely would have worked for minimum wage, which still would not provide enough income to meet her family's needs. At the time of Kim's trial in 2005, the federal minimum wage⁶² had not increased since September of 1997,⁶³ although inflation had increased by nearly twenty-six percent.⁶⁴ Washington State's minimum wage, \$7.35 per hour,⁶⁵ was higher than the federal minimum wage, but even that higher minimum wage would not meet the family's needs. Full-time employment at that minimum wage would have yielded a monthly gross income of \$1,264.20⁶⁶ and an approximate net income of \$1,041.49.⁶⁷

62 The federal minimum wage in 2005 was \$5.15 per hour. *History of Changes to the Minimum Wage Law*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minwage/coverage.htm> [<http://perma.cc/AG44-XV3X>] (last visited Apr. 24, 2015).

63 *See id.*

64 Using the inflation calculator found on the website of the U.S. Bureau of Labor Statistics, \$100 in 1997 had the same buying power as \$125.61 in 2006. The website explains the calculator as follows:

The CPI inflation calculator uses the average Consumer Price Index for a given calendar year. This data represents changes in prices of all goods and services purchased for consumption by urban households. This index value has been calculated every year since 1913. For the current year, the latest monthly index value is used.

CPI Inflation Calculator, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm [<http://perma.cc/LYR3-LZAQ>] (last visited Apr. 27, 2015). Proposed Senate Amendment 4322, which would have raised the federal minimum wage, was withdrawn pursuant to an order of June 20, 2006. *See* CONGRESS.GOV, <https://www.congress.gov/amendment/109th-congress/senate-amendment/4322> [<https://perma.cc/87LC-YGNX>] (last visited Apr. 25, 2015). Since July 24, 2009, the federal minimum wage has been \$7.25 per hour. *See History of Changes to the Minimum Wage Law*, U.S. DEP'T OF LABOR, *supra* note 62. However, gasoline, for example, has doubled in cost. According to the U.S. Bureau of Labor Statistics, a gallon of unleaded gasoline in January of 2009 cost \$1.787, compared to \$3.277 per gallon in December 2013. *See Consumer Price Index—Average Price Data: Gasoline, unleaded regular, per gallon/3.785 liters*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/APU000074714> [<http://perma.cc/RJJ6-76QE>] (last visited Apr. 27, 2015). As of January 2015, Washington State's minimum wage was \$9.47 per hour. *See History of Washington Minimum Wage*, WASH. STATE DEP'T OF LABOR & INDUS., <http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp> [<http://perma.cc/D8Z8-FU7H>] (last visited Apr. 25, 2015); *Minimum Wage Laws in the States – January 1, 2015*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minwage/america.htm> [<http://perma.cc/2FS7-PEN2>] (last visited Mar. 31, 2014).

65 *History of Washington Minimum Wage*, WASH. STATE DEP'T OF LABOR & INDUS., *supra* note 64.

66 Figure reached by multiplying \$7.35 by 40 hours per week and 4.3 weeks per month.

67 This amount of net income derives from deducting \$126.00 for income taxes and \$96.71 for FICA.

Washington law recognizes a living cost “need standard,” based on studies of actual living costs and generally recognized inflation indices.⁶⁸ A child support order cannot reduce a parent’s income below the need standard for one person except for the statutory minimum child support amount (\$25 per month per child in 2005).⁶⁹ The need standard for one person in 2005 was \$1,021 per month, or \$12,252 per year. If Kim had been able to find an employer who would hire her for a minimum wage job, she would have been \$20.49 above the need standard each month, and her maximum child support obligation would legally have been \$50 per month.

A more realistic standard is the self-sufficiency standard. This standard measures how much income is needed for varying family compositions in a given place to adequately meet its basic needs, without public or private assistance.⁷⁰ Kim’s 2006 self-sufficiency standard would have been \$15,356 annually, \$1,279 monthly: more than Kim could have earned at a minimum-wage job, if she had been able to find an employer willing to hire her.

Kim’s situation changed when she received an additional settlement for her industrial accidents. This enabled her to pay her past-due child support. Shortly after that, her remaining dependent child moved in with her. For the next two years, Kim drove her daughter fifty miles round trip every school day, so her daughter could finish school with her friends. None of the judges involved in Kim’s case saw this facet of her parenting. The powerful distraction of her transgender status, combined with the allure of a legal fiction, distracted them from the possibility of understanding Kim’s full humanity.

Kim went back to college and graduated with a bachelor of arts in psychology and women’s and gender studies. She earned a chemical dependency certification and began work as a chemical dependency counselor; she soon became the clinical supervisor for the agency’s chemical dependency program. She was recently recruited to open a new treatment agency in another city. She is applying to a doctoral program in clinical psychology. Her children are both enrolled in college.

See Internal Revenue Service 2006 Tax Table, INTERNAL REVENUE SERV., <http://www.irs.gov/pub/irs-prior/i1040tt--2005.pdf> [<http://perma.cc/NFW9-PBJB>]; *2005 Social Security Changes*, SOCIAL SECURITY, <http://www.socialsecurity.gov/cola/colafacts2005.htm> [<http://perma.cc/7LK9-75LR>].

68 WASH. ADMIN. CODE § 388-478-0015 (2015); WASH. REV. CODE ANN. § 74.04.770 (West 2015).

69 WASH. REV. CODE ANN. § 26.19.065 (2) (West 2015); WASH. ADMIN. CODE § 388.14A-3400(b) (2015).

70 DIANA M. PIERCE, *THE SELF-SUFFICIENCY STANDARD FOR WASHINGTON STATE 1* (2007), <http://www.wowonline.org/ourprograms/fess/state-resources/documents/WASSSfullreport6-29-07.pdf> [<http://perma.cc/4T58-CVFC>].

In reflecting on her experience with the court system and the jail, Kim says, “It was horrific, but now I use my experience and what I learned to help others heal.”⁷¹ Through the power of her formidable intelligence and insight, Kim used her dehumanizing experiences to deepen her wisdom, strength, and compassion; she transformed her horrific experiences into a force for decreasing human suffering.

II. Transgender People and the Law

Is the need to understand the sex of beings something innate in us? When my nephew, Kelly,⁷² was three years old, he, his father, and his siblings lived with me. I watched the intimate details of his thinking processes unfold. At age three, he seemed to need to understand everything in dichotomies or binaries. When he watched movies or television, he needed to know about every person or animal: “Is that a good guy or a bad guy?” and, “Is that a boy or a girl?” He had these questions regardless of whether those categories were relevant to what he was watching. The adults in his life could not always answer: sometimes we did not know, usually it was not relevant, and often it was not that simple. Because he was not developmentally ready to contemplate much complexity, we learned to arbitrarily tell him it was one or the other. According to Perry’s theory of learning,⁷³ beginning learners like Kelly tend to understand things in dichotomies. This is the predictable first stage of intellectual development.⁷⁴ It is not surprising that a three-year-old might be in that first stage of intellectual understanding: dichotomous analysis.

Courts have been engaging in similar inquiries to three-year-old Kelly’s, wondering how to categorize transgender individuals by sex, regardless of whether categorization is or should be relevant. Sex is legally relevant for very few purposes. It is relevant in

71 Telephone conversation with Kim Stankovich (Mar. 4, 2014); Conversation with Kim Stankovich in Spokane, Wash. (Apr. 5, 2014).

72 Kelly is now my adopted son, and a source of great joy and inspiration.

73 See generally GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 5–7 (1999) (discussing William Perry’s schema of intellectual and ethical development and its implications for legal education).

74 Perry’s schema includes four categories of development: Dualism (students see the world as a set of absolutes of right/wrong, good/bad, true/false), Multiplicity (students confront disagreements and uncertainty and come to acknowledge three categories of knowledge: right, wrong, unknown), Contextual Relativism (students begin to recognize themselves as legitimate sources of knowledge/truth), and Commitment in Relativism (students accept complexity, think analytically, and make informed decisions for which they take responsibility). *Id.*

sex discrimination cases; it is not relevant in name change cases.⁷⁵ Depending on their sexual orientation, individuals may need to know the sex of other individuals for choosing potential mates.⁷⁶ This should not be the law's concern. Assessing danger may be the law's concern. Statistics show that men are more dangerous than women are.⁷⁷ So, it may be appropriate for the law to focus on reducing male violence. Any other inquiry into a person's sex is unnecessary and, really, no one else's business. Nonetheless, it is treated as a vitally important inquiry by many courts.⁷⁸

Discrimination against transgender people is widespread.⁷⁹ Transgender people encounter extreme discrimination and prejudice in every facet of life, including

75 Nothing inherent in a name makes it male or female—we have arbitrarily assigned some names to both male and female (e.g., Lee, Chris, Shawn, Kelly, Gail, Pat) and some to only one (e.g., Rachel, Mary, John, Tiffany, Joshua). The assignments can change (e.g., Shirley, Leslie).

76 See, e.g., Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 160–71 (2005); Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169, 178–80 (2008) (discussing cases that invalidated marriages by transgender persons, effectively disinheriting some individuals or denying benefits to others, despite informed spouses and stable relationships of substantial duration).

77 See Scott O. Lilienfeld & Hal Arkowitz, *Are Men the More Belligerent Sex?*, SCI. AM. (Apr. 1, 2010), <http://www.scientificamerican.com/article.cfm?id=are-men-the-more-belligerent-sex> [<http://perma.cc/74T2-SM96>].

In the U.S., the rate of violent crime for girls and women aged 10 and older is one in 56; the corresponding figure among their male counterparts is one in nine. Men commit close to 90 percent of the murders in the U.S. and more murders than women in all the countries researchers have examined, according to a 1999 report by psychologist Anne Campbell of Durham University in England.

Id.

78 Allen, *supra* note 76, at 178–80.

79 See, e.g., Shannon H. Tan, Note, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 583 (2008) (“Transgender people face discrimination in many areas other than employment . . . [and] are often the victims of brutal hate crimes.”). See also Jack Harrison-Quintana et al., *Injustice at Every Turn: A look at multiracial respondents in the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY AND LESBIAN TASK FORCE (Nov. 2013), http://www.nwnetwork.org/wp-content/uploads/2014/02/ntds_multiracial_respondents.pdf [<http://perma.cc/99S2-B9A3>].

“employment, housing, public accommodations, credit, marriage, parenting and law enforcement.”⁸⁰

Of course, discrimination can be ameliorated or exacerbated by other characteristics. Systems of oppression and privilege interact.⁸¹ Transgender persons of color face heightened discrimination.⁸² Well-educated transgender individuals of at least middle

80 See Lisa Mottet & John M. Ohle, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People*, NAT'L COALITION FOR THE HOMELESS & NAT'L GAY & LESBIAN TASK FORCE POL'Y INST. 3–4 (2003), <http://srp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> [<http://perma.cc/VVC4-24YN>]:

Transgender people are disproportionately represented in the homeless population because of the frequent discrimination they face at home, in school, and on the job. It is not uncommon for transgender youth to be harassed out of school and left unable to acquire a job because of a lack of education. . . . Many times, transgender people lose their jobs when their employers learn of their transgender status. Moreover, it is often very difficult to find employment as an openly transgender person (and it can be incredibly hard to conceal one's transgender status from a potential employer). Studies have verified that transgender people face severe discrimination in everyday life, increasing their need for shelter services. . . . As studies show, there are many reasons why transgender people have a greater need for shelter and other social services. These factors interact with one another, and the cumulative effect can be staggering. The factors transgender people may be dealing with include: Poverty due to discrimination in employment and chronic under-employment . . .

See also Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE 3 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [<http://perma.cc/LD42-8UQR>].

Survey respondents experienced unemployment at twice the rate of the general population, with rates for people of color up to four times the national unemployment rate Forty-seven percent (47%) said they had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender/gender non-conforming. Over one-quarter (26%) reported that they had lost a job due to being transgender or gender non-conforming.

Id. A needs assessment survey of transgender people conducted in Washington, D.C. from September 1998 to May 2000 revealed that forty-two percent were unemployed, and another thirty-one percent had income below \$10,000. JESSICA M. XAVIER, THE WASHINGTON, DC TRANSGENDER NEEDS ASSESSMENT SURVEY: EXECUTIVE SUMMARY (2000), <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml> [<http://perma.cc/6MWY-PE9U>]. Fifteen percent reported losing a job due to discrimination in the workplace. See *id.*

81 See generally Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

82 For an interesting discussion of the combined effects of membership in multiple low-status categories,

income are more likely to be able to choose their associates, more likely to be employed in a workplace with progressive attitudes and policies. Yet even in more progressive settings, transgender people experience “the moments of identity management and discord that are the specific burden of those with tenuous relationships to the purportedly neutral, meritocratic, multicultural, inclusive terrain of white, straight, hetero, cisgender, bourgeois male” culture.⁸³

Law and medicine interact to invent and enforce notions of sex and appropriate gender expression.⁸⁴ Attending medical personnel assign sex to babies at birth.⁸⁵ For most babies, there is nothing remarkable about that. However, if a child is born intersex, medical decisions are made to please the parents, not to meet the needs of the child.⁸⁶ Likewise, medical standards define how a person can qualify to undergo sex reassignment surgery.⁸⁷ Medically and legally, we attempt to impose a binary value on something more complex than binary.⁸⁸

see generally Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005–2006). See also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241 (1991) (where systems of domination converge, intervention strategies based on experiences of those who do not share backgrounds will be of limited help).

83 Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 76 (2010). Although Professor Spade refers specifically to legal academic culture, the same principle operates in other employment contexts as well.

84 Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 40 (Sept. 2007) (“Although this observation reveals the assignment of gender at birth to be an imperfect science, it continues to privilege the scientific or objective assignment of gender.”).

85 Katie D. Fletcher & Judge Lola Maddox, *In re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 534 n.7 (2006) (“The law in the United States generally determines sex based on a person’s birth-assigned sex.”); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999) (“An individual’s sex is established for legal purposes on a person’s birth certificate. The sex designation on the birth certificate is determined by the birth attendant.”).

86 See generally Gregory Dolin, Dorothy E. Roberts, Lina M. Rodriguez & Teresa K. Woodruff, *Medical Hope, Legal Pitfalls, Potential Legal Issues in the Emerging Field of Oncofertility*, 46 SANTA CLARA L. REV. 673, 697–98, 703 (2009) (including discussion of the requirement that parental decision-making for minor children be in the child’s best interest, regarding sterilization and oncofertility).

87 See E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165–232 (2012), http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf [<http://perma.cc/DUF7-UQJR>].

88 This is analogous to the ultimate rejection of *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896) (creating

Analysis and dissection both involve artificially separating things that are not by their nature separate. Most living things cannot survive dissection; a full understanding of life's complexity cannot survive myopic analysis. A full understanding of human sex and gender identity cannot survive division into a binary.

Binaries invite stagnation. Binaries easily become dilemmas. As a crisis counselor, I observed the effect of individuals seeing only two options. They were caught in a dilemma, immobilized. My job was often to generate a third option, creating the possibility of movement. Even if the third option was not chosen, its existence freed the person from the dilemma and made a choice possible. Just as individuals must be freed from the binary dilemma to make workable choices, the same process seems to be called for on the broader societal level. We need a social and legal acknowledgement that not all humans fall neatly into the binary categories law and medicine sometimes attempt to impose.

Too many courts conflate or confuse the dimensions described here to place transgender people outside the boundaries of "normal" and therefore outside the boundaries of legal protection. Too many courts appear to make the analytical error of basing decisions on bias and preconception rather than on fact and rationality.

Many familiar patterns⁸⁹ emerge in courts' treatment of transgender people: a habit of unquestioningly assuming that the judge's own characteristics are normal and anything else is abnormal; defining the other as not human; denying protection by defining protection as conveying special rights; and moving the focus to a proxy for the targeted status.

"separate but equal" doctrine):

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.

In *Brown v. Board of Education*, 347 U.S. 483, 495 (1955), the U.S. Supreme Court overturned *Plessy v. Ferguson* and the "separate but equal" doctrine, finding that it had no place in public education. Segregation was a denial of the equal protection of the laws under the Fourteenth Amendment. Separate educational facilities were inherently unequal.

89 The patterns are familiar in other instances of legally supported discrimination. Perhaps it is true that "[w]hich has been is what will be, [t]hat which is done is what will be done, [a]nd there is nothing new under the sun." *Ecclesiastes* 1:9 (New King James).

Judges, like other people, have the habit of seeing their characteristics as “normal” and therefore unmarked and right, and seeing anything else as “abnormal” or marked and wrong. This habit is what lets me believe I have no accent, unlike my colleagues from other countries or other parts of the United States. Whether or not judges may explicitly express beliefs underlying this habit, those beliefs are the subtext of many opinions.

Sometimes the habit of seeing the other as abnormal leads to equating the other with animals,⁹⁰ or otherwise defining the other as an “it” or not human.⁹¹ Transgender people are often characterized in everyday life as monsters, even referred to in connection with Frankenstein.⁹² Many courts considering transgender issues engage in “the dehumanizing rhetoric the law relies on to excuse doctrinally unsupportable denial[s] of legal protection for transgender people[.]”⁹³ Examples include analogizing surgical reassignment to being “surgically transformed into a donkey,” comparing transgender individuals to “gargoyles of medieval architecture, with their distortion of human and animal figures,” describing a transgender woman as assuming “a role of female who could never be either mother or sister to his daughter,” describing a transgender person’s body as “man-made,” and considering whether a transgender person was merely a “facsimile.”⁹⁴

Sometimes courts claim the case is not about the transgender issue, but rather some other issue that has the appearance of appropriateness for judicial determination, which

90 See, e.g., Lloyd, *supra* note 76, at 160 (“surgically transformed into a donkey”) (quoting *Ashlie v. Chester-Upland Sch. Dist.*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *1 (E.D. Pa. May 9, 1979)).

91 See, e.g., *Ulane v. E. Airlines Inc.*, 742 F.2d 1081, 1085, 1087 (7th Cir. 1984) (Title VII does not outlaw discrimination against an individual with a “sexual identity disorder,” “even if one believes that a woman can be so easily created from what remains of a man”).

92 See, e.g., Lloyd, *supra* note 76, at 159–60.

93 Lloyd, *supra* note 76, at 152.

94 See Lloyd, *supra* note 76, at 160–71 (giving examples: “It might just as easily be argued that the right of privacy protects a person’s decision to be surgically transformed into a donkey”); *Ulane*, 742 F.2d at 1083 n.6 (“These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely ‘facsimiles.’”) (quoting testimony of Dr. Richard Green, expert witness for plaintiff, Trial Transcript for Sept. 27, 1983, 10:35 AM, at 226, 252); *Ashlie*, 1979 U.S. Dist. LEXIS 12516, at *14 (“Like the gargoyles of medieval architecture, with their distortion of human and animal figures, Percy wishes to fasten to his male body the female appellation of ‘Diane Diane.’”); *In re Estate of Gardiner*, 42 P.3d 120, 124 (Kan. 2002); *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (“It was strictly Tim Daly’s choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.”), *overruled by In re Termination of Parental Rights as to N.J.*, 8 P.3d 126 (Nev. 2000) (“Her female anatomy, however, is still all man-made.”); *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199 (Pa. Com. Pl. Sept. 24, 1982).

in fact travels with and operates as a proxy for transgender status. For example, the Washington Supreme Court considered whether Washington's anti-discrimination law, RCW 49.60, could protect a transgender employee who was discharged for violating the employer's sex-specific dress code.⁹⁵ The court concluded that the employer did not discriminate against her based on "her abnormal condition," but instead, discharged her for "refusal to conform with directives on acceptable attire."⁹⁶ The court reasoned that because the employee's condition did not affect her ability to work, the employer had no duty to provide accommodations: "[G]enerically-applied work rules are not discriminatory per se unless they affect an employee's ability to perform his or her job. In Doe's case, 'different' treatment was not required to accommodate her condition because her condition did not affect her ability to perform her job."⁹⁷

The law, as a collective statement of what is and is not tolerable in civil society, has great symbolic power. Those symbols are made real in action and in the law's protection. Unfortunately, the law best protects those who need no protection. The law's symbolic power has not served trans people well. "[L]itigation consistently fails to win basic civil rights protection for transgender people."⁹⁸ Circuits are split as to whether transgender people are protected from employment discrimination under Title VII of the Civil Rights Act of 1964.⁹⁹ In *Price Waterhouse v. Hopkins*, the United States Supreme Court seemed to open up new possibilities for protecting transgender people from discrimination when it held that a plaintiff who does not act according to the stereotypical notions of how a woman should act is protected under Title VII.¹⁰⁰ However, these new possibilities have not come to fruition in most circuits, and the sex stereotyping prohibition "has not led to

95 *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993).

96 *Id.* at 536.

97 *Id.* at 538. For other examples of courts finding that the case is not about transgender status, but is instead about some other issue, see also *Ulane*, 742 F.2d at 1085, 1087 (Title VII does not outlaw discrimination against an individual with a "sexual identity disorder", "even if one believes that a woman can be so easily created from what remains of a man"); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-49 (8th Cir. 1982) (in which a transgender woman was fired because she had "misrepresented" her gender on her application form, holding that Congress did not intend to bring transsexuals within the protection of Title VII); and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (holding that discrimination on the basis of the plaintiff's decision to undergo a sex change is not within the scope of Title VII).

98 Lloyd, *supra* note 76, at 153.

99 See Tan, *supra* note 79, at 589-92.

100 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

workplaces in which gender is expressed freely, creatively, and idiosyncratically. Instead, its change has been more incremental.”¹⁰¹

Many federal cases decided since *Price Waterhouse* have continued to exclude transgender people from Title VII protection.¹⁰² In *Schwenk v. Hartford*,¹⁰³ however, the Ninth Circuit Court of Appeals opined in dicta that, under the principles articulated in *Price Waterhouse*, Title VII prohibits discrimination on the basis of both sex and gender.¹⁰⁴ Relying on *Schwenk*, the Sixth Circuit extended the *Price Waterhouse* reasoning to include transgender people in the protection Title VII offers.¹⁰⁵ There are other signs of movement. In 2011, the Eleventh Circuit held that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”¹⁰⁶ On April 29, 2014, the United States Department of Education provided to all educational institutions receiving any federal financial assistance “additional guidance concerning their obligations under

101 Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 803 (2013) (arguing that Title VII protections have been extended by reinforcing traditional gender categories).

102 See, e.g., *Broadus v. State Farm Ins. Co.*, No. 98-4254, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (distinguishing *Price Waterhouse* by noting that *Price Waterhouse* did not concern a transsexual, and “it is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII”); *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994) (“Even if plaintiff is psychologically female, Congress did not intend ‘to ignore anatomical classification and determine a person’s sex according to the psychological makeup of that individual’”) (quoting *Sommers v. Budget Mktg., Inc.*, 677 F.2d 748, 749 (8th Cir. 1982) (reiterating that Title VII does not prohibit employment discrimination based upon transsexualism)).

103 *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), was a case brought under the Gender Motivated Violence Act, 42 U.S.C. § 13981(d)(1) (1984). That statute has since been ruled unconstitutional. See *United States v. Morrison*, 529 U.S. 598 (2000).

104 *Schwenk*, 204 F.3d at 1202.

105 *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572–74 (6th Cir. 2004). See also *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011), which explained *Smith v. City of Salem*:

The Sixth Circuit likewise recognized that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause. The court concluded that a transsexual firefighter could not be suspended because of “his transsexualism and its manifestations,” because to do so was discrimination against him “based on his failure to conform to sex stereotype by expressing less masculine, and more feminine mannerisms and appearance.”

106 *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

Title IX to address sexual violence as a form of sexual harassment,” explicitly including transgender students in the protection provided by Title IX.¹⁰⁷

As for the states, employment discrimination against transgender people remains perfectly legal in thirty-four states.¹⁰⁸ Denying protection gives implicit permission to do violence to the person who lives in the category of “other.”

Discrimination travels with violence. A Washington, D.C., survey found that forty-three percent of responding transgendered people had been victims of violence or crime, with seventy-five percent attributing a motive of transphobia to the violence or crime.¹⁰⁹ By failing to extend protection from violence, courts further support and enforce institutionalized bias. Institutionalized bias both permits violence and is enforced by violence and fear. Fear interferes with creativity, expansion, and reaching one’s full potential.

Courts appear to be distracted or confused by their own unexamined notions of appropriate gender expression, their own unexamined emotional responses to a gender expression that varies from their own, and lack of clarity regarding the distinctions between sex, gender expression, gender identity, and sexual orientation. It is unsettling and uncomfortable for a cisgender person to imagine being transgender. Judges understandably reject imagining that for themselves. But unexamined and disowned emotional responses exert unrecognized power over thinking. “As a result, we get rationalizing instead of rationality and justification instead of justice.”¹¹⁰

Legal writing about transgender people and theorizing about gender from a queer perspective is relatively new, beginning to grow in the 1980s and 1990s.¹¹¹ The first courses

107 OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/W4XT-8UPM>].

108 See NAT’L GAY & LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS (June 2012), http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_6_12.pdf. [<http://perma.cc/K5UJ-L4QF>].

109 XAVIER, DC TRANSGENDER NEEDS ASSESSMENT SURVEY, *supra* note 80.

110 Gail Hammer & James Celto Vaché, *A Conversation Between Friends: Adventures in Collaborative Planning and Teaching Ethical Issues in Representation of Children*, 75 UMKC L. REV. 1025, 1036 (2007) (discussing the nature of emotion’s role in law and ethics).

111 Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 55 (2006).

on sexuality and gay rights were offered in the 1980s, with casebooks¹¹² offered in the late 1990s.¹¹³ Standards of civility and decency are evolving and courts' thinking must evolve too. The law must keep up. It must give up "speaking to the living in the language of the dead."¹¹⁴ To retain its legitimacy, the law must remain relevant and responsive to the human condition. To retain its legitimacy, the law must rely on decisions based on fact, not bias.¹¹⁵

It is a small and obvious request of judges to pay attention to the facts, and to resist the tempting biases that are shortcuts for thinking, to resist the apparently hypnotically distracting powers of difference, and to accept self-reports of gender identity.

III. Suggestions for Change

From the jailers' (and inmates') more crude retaliation for transgressing gender norms, through the commissioners' blatantly ignorant comments, to the judge's more refined social skills but still faulty reasoning, the actions of players in the legal system created and enforced irrationality and injustice in Kim's life.

When agents of the legal system blatantly force, enforce, and reinforce discrimination (and accompanying violence) against transgender people, they allow fear to override rationality. They threaten the perceived legitimacy of the entire legal system. They lend credence to the voices claiming that dismantling the system is the only way to achieve real change.

Is the existing legal system capable of protecting transgender people as it protects cisgender people? Or is it true that "the master's tools will never dismantle the master's

112 See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1st ed. 1997); WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (2d ed. 1997).

113 Bowman et al., *supra* note 111, at 55.

114 CHARLIE KING, *TWO GOOD ARMS, ON TWO GOOD ARMS* (Vaguely Reminiscent Sounds 1992) (referring to Judge Webster Thayer's speaking in the murder trial of Sacco and Vanzetti). For an interesting account of the trial, see Felix Frankfurter, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* (2d ed. 1927).

115 See generally Sue Bryant and Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in *RACE, CULTURE, PSYCHOLOGY & LAW* 47 (Kimberly Holt Barrett & William H. George eds., 2005).

house[?]"¹¹⁶ One view is that strengthening legal inclusion is the solution.¹¹⁷ Another is that the existing legal system will never win true protection for transgender people, and that, even if it did, there is no authentic benefit in being included in a system that enforces colonialism and racism, and that system must be dismantled.¹¹⁸ Social change

116 Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 110–14 (2007).

Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference—those of us who are poor, who are lesbians, who are Black, who are older—know that *survival is not an academic skill*. . . . It is learning how to take our differences and make them strengths. *For the master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.

Id. at 112 (emphases in original).

117 See, e.g., Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 *WM. & MARY J. WOMEN & L.* 187 (2013) (arguing that gender nonconformity is expressive conduct and warrants protection under the First Amendment); Amy D. Ronner, *Let's Get the "Trans" and "Sex" Out of It and Free Us All*, 16 *J. GENDER RACE & JUST.* 859, 908 (2013) (citing various sources on therapeutic jurisprudence, and writing a happy ending to the novel *Catfish and Mandala* by Andrew X. Pham (1st ed. 1999)) (“[T]he law needs to banish or greatly diminish the role of strangers who get to intrude on someone else’s self-definition-evolution process.”). Ronner’s happy ending comes as a judge’s response to the question, “[W]hat sex are you?”:

I self-identify as “being” and my spouse self-identifies as “soul.” I want you to know that I hear your voice and know how important it is for you to have judicial validation of your identity—as “man.” For that reason, I will issue an order proclaiming Minh to be a “man.” But you, of course, can voluntarily participate in what we see as an ongoing, fluid choice. For that reason, my order will be without prejudice, just in case you ever want to change the name you assign to yourself.

Id. at 916; Courtney Sirwatka, Note, *Unlikely Partners: Tort Law as a Tool for Trans Activism*, 20 *CARDOZO J.L. & GENDER* 111, 136–37 (2013) (recommending connecting tort and civil rights law, recognizing sexual integrity as triggering a duty of care, reforming legal tort education, and collaboration between tort reformers and trans activists, while acknowledging that this solution is flawed because it relies on the legal system, which has not been friendly to trans people).

118 See Dean Spade, *Under the Cover of Gay Rights*, 37 *N.Y.U. REV. L. & SOC. CHANGE* 79, 84–85 (2013); Dean Spade, *Methodologies of Trans Resistance*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* 237, 243 (George E. Haggerty & Molly McGarry eds., 2007) (referring to the “difficult questions about reforming systems of oppression versus overturning them”); Richael Faithful, *Toward the Heart of Justice*, 69 *NAT’L L. GUILD REV.* 239, 243 (2012) (“Often, it is posed this way—is it better to work on the ‘inside’ or ‘outside’ of the system? I don’t think that this framing is complete. . . . We are influenced by and exist within powerful institutions, even if we are actively resisting their forces.”).

seems to come from a variety of sources, and from an array of actions on a number of fronts. “[T]he existential problem for those who want to strive toward the heart of justice is how to engage with powerful institutions without being crushed.”¹¹⁹

In that light, this Article’s request is modest and obvious. It does not call for dismantling the legal system as some trans advocates do. It calls for changes within the existing legal system. States should amend their child support guidelines to allow courts to consider discrimination in hiring when deciding to impute income to an unemployed parent. Courts should adopt a new rule of evidence, accepting self-reports of gender identity. To facilitate their advance to an intellectual stage more fitting for those entrusted as arbiters of justice, judges should be required to learn the basics of human sex and gender. Finally, judges should be evaluated based on their ability to prioritize facts over both legal fictions and their own fears.

A. States Should Amend Their Child Support Guidelines Explicitly to Allow or Require Courts to Consider Discrimination in Hiring When Deciding Whether to Impute Income to an Unemployed Parent.

If, because of discrimination in hiring, a parent is unable to find work, the parent should not be presumed to be voluntarily unemployed. In a minority of jurisdictions, courts explicitly are permitted to consider factors that could, but do not necessarily, include discrimination in hiring.

Federal law requires each state to adopt child support guidelines as a condition of funding for state health and welfare programs.¹²⁰ States are free to adopt different guidelines and codify them in different ways. The child support guidelines appear as statutes,¹²¹

119 Faithful, *supra* note 118, at 243.

120 42 U.S.C.A. § 602(a)(2) (West 2015) requires all states to adopt child support guidelines as a condition of federal funding for Temporary Assistance to Needy Families (“TANF”) and child welfare programs. 42 U.S.C.A. § 667 (West 2015).

121 Statutes contain Child Support Guidelines in California (CAL. FAM. CODE §§ 4050–4076 (West 2015)), Colorado (COLO. REV. STAT. ANN. § 14-10-115 (West 2015)), Connecticut (CONN. GEN. STAT. ANN. § 46b-84 (West 2015)), the District of Columbia (D.C. CODE § 16-916.01 (2015)), Florida (FLA. STAT. ANN. § 61.30 (West 2015)), Georgia (GA. CODE ANN. § 19-6-15 (West 2015)), Illinois (750 ILL. COMP. STAT. ANN. 5/505 (West 2015)), Kentucky (KY. REV. STAT. ANN. § 403.212 (West 2015)), Louisiana (LA. REV. STAT. ANN. § 9:315 *et seq.* (2015)), Maine (ME. REV. STAT. ANN. tit. 19-a (West 2015)), Maryland (MD. CODE ANN., FAM. LAW § 12-201 *et seq.* (West 2015)), Massachusetts (MASS. GEN. LAWS ANN. Child Support Guidelines (West 2015)), Minnesota (MINN. STAT. ANN. § 518A.32 (West 2015)), Mississippi (MISS. CODE ANN. § 43-19-101 (West 2015)), Nevada

rules of civil procedure,¹²² other types of court rules,¹²³ or administrative regulations.¹²⁴

The District of Columbia¹²⁵ and all but one state¹²⁶ include the possibility of imputing income to an unemployed parent.¹²⁷ Some jurisdictions simply give broad discretion to the court to consider earning capacity or potential income,¹²⁸ consistent with the best interests

(NEV. REV. STAT. ANN. § 125B (West 2015), New Hampshire (N.H. REV. STAT. ANN. § 458-C (2015)), New Mexico (N.M. STAT. ANN. § 40-4-11.1 (West 2015)), New York (N.Y. FAM. CT. ACT § 413 (McKinney 2015)), Ohio (OHIO REV. CODE ANN. § 3119 (West 2015)), Oklahoma (OKLA. STAT. ANN. tit. 43, § 118B(D) (West 2015)), South Dakota (S.D. CODIFIED LAWS § 25-7-6.1 *et seq.* (2015)), Tennessee (TENN. CODE ANN. § 36-5-101 (West 2015)), Texas (TEX. FAM. CODE ANN. § 154 subchapter C (West 2015)), Utah (UTAH CODE ANN. § 78B-12-202 *et seq.* (2012)), Vermont (VT. STAT. ANN. tit. 15 §§ 653–657 (West 2015)), Virginia (VA. CODE ANN. § 20-108.1 *et seq.* (West 2015)), Washington (WASH. REV. CODE ANN. 26.19.001 *et seq.* (West 2015)), West Virginia (W. VA. CODE ANN. § 48-13-101 *et seq.* (West 2015)), and Wyoming (WYO. STAT. ANN. § 20-2-301 *et seq.* (West 2015)).

122 Rules of civil procedure contain the Child Support Guidelines in Alaska (ALASKA R. CIV. P. 90.3), Delaware (DEL. FAM. CT. R. CIV. P. 500–507), and Pennsylvania (PA. R. CIV. P. 1910.16).

123 Court administrative rules or rules other than rules of civil procedure contain the Child Support Guidelines in Alabama (ALA. R. JUD. ADMIN. 32, Child Support Guidelines), Arizona (ARIZ. SUP. CT. CHILD SUPPORT GUIDELINES (amended by Admin. Order 2011-46(5)(B) (2011)), Hawaii (Haw. Fam. Ct. Mem.: 2010 Hawaii Child Support Guidelines (Aug. 1, 2010), <http://www.courts.state.hi.us/docs/form/maui/2CE248.pdf> [<http://perma.cc/3YEE-488W>]); Idaho (IDAHO. R. FAM. L. P. 126), Indiana (IND. R. CT. Child Support Rules and Guidelines (amended 2010), http://www.in.gov/judiciary/rules/child_support/ [<http://perma.cc/S5L6-FQRF>]); Iowa (IOWA CT. R. 9), Kansas (KAN. SUP. CT. R. Child Support Guidelines, <http://www.kscourts.org/rules-procedures-forms/child-support-guidelines> [<http://perma.cc/B22P-HYEN>]); Michigan (Friend of the Court Bureau, 2013 Michigan Child Support Formula Manual, <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/FOC/Pages/Child-Support-Formula.aspx> [<http://perma.cc/Z34Y-VMTK>]); Missouri (MO. SUP. CT. R. 88.01 and MO. SUP. CT. R. CIV. PROC. FORM 14), Nebraska (NEB. CT. R. ch. 4, art. 2), New Jersey (N.J. CT. R. PRAC. APP. 9), North Carolina (Conf. of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES, Jan. 1, 2011, <http://www.nccourts.org/forms/documents/1226.pdf> [<http://perma.cc/R38K-RVLF>]); and Rhode Island (R.I. FAM. CT. CODE R. 2007-03, http://www.cse.ri.gov/documents/admin_order2007_03.pdf [<http://perma.cc/PPP8-8Y3F>]).

124 Administrative regulations contain the Child Support Guidelines in Montana (MONT. ADMIN. R. ch. 37.62 (2015)), North Dakota (N.D. ADMIN. CODE 75-02-04.1 (2015)), Oregon (OR. ADMIN. R. 135.050), South Carolina (S.C. Child Support Guidelines, <http://www.state.sc.us/dss/csed/forms/2006guidelines.pdf> [<http://perma.cc/KFF5-SLY9>]), and Wisconsin (WIS. ADMIN. CODE DCF § 150).

125 D.C. CODE § 16-916.01(d)(10).

126 Rhode Island, instead of imputing income, requires unemployed parents to perform community service. See R.I. GEN. LAWS ANN. § 15-5-16.2(f) (West 2015).

127 Each state's provisions related to imputing income to an unemployed parent are set out in Appendix II.

128 Illinois (750 ILL. COMP. STAT. ANN. 5/505(a)(5)), Missouri (MO. SUP. CT. R. 88.01), Nevada (NEV. REV. STAT. ANN. § 125B.080 (West 2015)), North Dakota (N.D. ADMIN. CODE 75-02-04.1-01(4)(b) (2015)), Oregon

of the children,¹²⁹ as the court considers just,¹³⁰ or if there is “sufficient evidence.”¹³¹ The other jurisdictions’ various codifications provide specific factors to consider in determining whether a parent is voluntarily unemployed.

Iowa permits imputing income only if substantial injustice would occur otherwise.¹³² Most states do not consider bad faith. Two jurisdictions, however, require a finding of the parent’s bad faith refusal to work before imputing income.¹³³ Georgia’s law states no bad faith is necessary to show willing unemployment, and that unemployment cannot be willful if a parent is activated from the National Guard or enlists or is drafted to full-time service in the armed forces.¹³⁴

Some jurisdictions provide that the court may decline to impute income to parents who are custodians of young children,¹³⁵ are under eighteen themselves and are still in high school,¹³⁶ have a mental or physical illness making them unable to work,¹³⁷ have children or

(OR. REV. STAT. ANN. § 25.275 (West 2015)), Tennessee (TENN. CODE ANN. § 36-5-101), Wisconsin (WIS. STAT. ANN. § 767.511(1)(g) (West 2015)), and Wyoming (WYO. STAT. ANN. § 20-2-303 (West 2015)) give broad discretion to the court to consider earning capacity or potential income.

129 California (CAL. FAM. CODE § 4058(b)) gives broad discretion to consider earning capacity or potential income consistent with the best interests of the children.

130 Connecticut (CONN. GEN. STAT. ANN. § 46b-84(d), (f)(1) (West (2011)) gives broad discretion to consider earning capacity or potential income as the court considers just.

131 Maine gives broad discretion to consider earning capacity or potential income if there is sufficient evidence. *See* ME. REV. STAT. ANN. tit. 19-A, § 2001(5)(D) (West 2015).

132 IOWA CT. R. 9.11(4).

133 The District of Columbia (D.C. CODE § 16-916.01 (2015)), and North Carolina (Conf. of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES 3 (Jan. 1, 2011)) require a finding of the parent’s bad faith refusal to work before imputing income.

134 GA. CODE ANN. § 19-6-15 (f)(4)(d) (West 2015).

135 Alabama (ALA. R. JUD. ADMIN. § 32(B)(5)), Minnesota (MINN. STAT. ANN. § 518A.32 (West 2015)), New Mexico (N.M. STAT. ANN. § 40-4-11.1(C)(1) (West 2015)), South Carolina (CHILD SUPPORT GUIDELINES 3.1.5 (2006)) permit the court to decline to impute income to parents who are custodians of young children.

136 Arizona permits the court to decline to impute income to parents who are under eighteen and still in high school. ARIZ. REV. STAT. ANN. § 25-320(N) (West 2015).

137 Ohio (OHIO REV. CODE ANN. § 3119.01 (C)(11)(a)(iii) (West 2015)) and Michigan (2013 Michigan Child Support Formula Manual) permit courts to decline to impute income to parents with mental or physical illness.

other dependents with special needs who need the parent's presence in the home,¹³⁸ receive means-tested public assistance,¹³⁹ are engaged in education or training to enhance earning capacity,¹⁴⁰ are veterans who are seeking or have been awarded disability benefits,¹⁴¹ or are subject to other circumstances which make imputing income inequitable.¹⁴²

Some jurisdictions also prohibit imputing income to parents who are physically or mentally incapacitated,¹⁴³ are incarcerated,¹⁴⁴ are unemployed as a result of other circumstances beyond their control,¹⁴⁵ care for young children,¹⁴⁶ receive means-tested

138 Alabama (ALA. R. JUD. ADMIN. 32(B)(5)), Montana (MONT. ADMIN. R. 37.62.106(6)(C) (2012)), Oklahoma (OKLA. STAT. ANN. tit. 43, § 118B(D)(2)(f) (West 2015)), and South Carolina (CHILD SUPPORT GUIDELINES 3.1.5 (2006)) allow courts to decline to impute income to parents who have children or other dependents with special needs who need the parent's presence in the home.

139 The District of Columbia (D.C. CODE § 16-916.01 (2015)) and Arizona (ARIZ. SUP. CT. CHILD SUPPORT GUIDELINES (amended by Admin. Order 2011-46(5)(B) (2011))) allow courts to decline to impute income to parents who receive means-tested public assistance.

140 Arizona allows courts to decline to impute income to parents who are engaged in education or training to enhance earning capacity. ARIZ. SUP. CT. CHILD SUPPORT GUIDELINES, amended by ADMIN. ORDER 2011-46(5)(E)(2) (2011).

141 Texas allows courts to decline to impute income to parents who are veterans who are seeking or have been awarded disability benefits. TEX. FAM. CODE ANN. § 154.066(b)(1) (West 2015).

142 Montana allows courts to decline to impute income to parents who are subject to other circumstances which make imputing income inequitable. MONT. ADMIN R. 37.62.106 (6)(e)(2012).

143 Alaska (ALASKA R. CIV. P. 90.3(a)(4)), Colorado (COLO. REV. STAT. ANN. § 14-10-115 (West 2015)), the District of Columbia (§ 16-916.01), Florida (FLA. STAT. ANN. § 61.30(2)(b) (West 2015)), Kentucky (KY. REV. STAT. ANN. § 403.212(2)(d) (West 2015)), Louisiana (LA. REV. STAT. ANN. § 9:315.11(A) (2015)), Minnesota (MINN. STAT. ANN. § 518A.32 (West 2015)), Montana (MONT. ADMIN R. 37.62.106(6)(b) (2012)), New Hampshire (N.H. REV. STAT. ANN. § 458-C:2(IV)(a) (2015)), North Carolina (Conference of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES 3 (Jan. 1, 2011)), Oregon (OR. ADMIN. R. 137-050-0715(8)(a)), South Dakota (S.D. CODIFIED LAWS § 25-7-6.4 (2015)), Utah (UTAH CODE ANN. § 78B-12-203(7)(d)(2) (West 2015)), and Vermont (VT. STAT. ANN. tit. 15 § 653(5)(A)(iii)(1) (West 2015)) prohibit imputing income to parents who are physically or mentally incapacitated.

144 Colorado (§ 14-10-115), Minnesota (§ 518A.32) (unless the incarceration is for non-payment of child support), and Oregon (OR. ADMIN. R. 137-050-0715(8)(c)) prohibit imputing income to parents who are incarcerated.

145 Florida prohibits imputing income to parents who are unemployed as a result of other circumstances beyond their control. § 61.30(2)(b).

146 Hawaii (Haw. Fam. Ct. Memorandum: 2010 HAWAII CHILD SUPPORT GUIDELINES (V)(J)(3) (Aug. 1, 2010)), Kentucky (§ 403.212(2)(d)), Louisiana (§ 9:315.11(A)), North Carolina (Conference of Chief District Judges,

public assistance benefits,¹⁴⁷ would have their imputed income off-set in whole or in substantial part by daycare costs,¹⁴⁸ care for a dependent with special needs,¹⁴⁹ have made diligent efforts to find work, to no avail,¹⁵⁰ are in training related to current employment or to establish basic job skills,¹⁵¹ are making satisfactory progress in an educational program which will result in an economic benefit to the children within a reasonable time,¹⁵² are unemployed because of efforts to comply with court-ordered reunification with a child,¹⁵³ are unemployed as a result of a hurricane,¹⁵⁴ or are subject to conditions which would otherwise make imputing income inequitable.¹⁵⁵ One jurisdiction also prohibits imputing income if the parent's unemployment is in the best interest of the child.¹⁵⁶

NORTH CAROLINA CHILD SUPPORT GUIDELINES 3 (Jan. 1, 2011), Virginia (VA. CODE ANN. § 20-108.1(B)(3) (West 2015)), and West Virginia (W. VA. CODE ANN. § 48-1-205(c)(1) (West 2015)) prohibit imputing income to parents who care for young children.

147 Minnesota prohibits imputing income to parents who receive means-tested public assistance benefits. MINN. STAT. ANN. § 518A.32 (West 2015).

148 Montana (MONT. ADMIN. R. 37.62.106 (2015)) and Utah (UTAH CODE ANN. § 78B-12-203(7)(d)(i) (West 2015)) prohibit imputing income to parents whose imputed income would be offset in whole or substantial part by daycare costs.

149 Montana (MONT. ADMIN. R. 37.62.106) and Utah (UTAH CODE ANN. § 78B-12-203(7)(d)(iv) (West 2015)) prohibit imputing income to parents who care for a dependent with special needs.

150 Montana prohibits imputing income to parents who have made diligent efforts to find work, to no avail. MONT. ADMIN. R. 37.62.106.

151 Utah (UTAH CODE ANN. § 78B-12-203(7)(d)(iii) (West 2015)) and Vermont (VT. STAT. ANN. tit. 15 § 653(5)(A)(iii)(II) (West 2014)) prohibit imputing income to parents who are in training related to current employment or to establish basic job skills.

152 West Virginia prohibits imputing income to parents who are in an educational program which will result within a reasonable time in an economic benefit to the children and are making satisfactory progress. W. VA. CODE ANN. § 48-1-205(c)(2) (West 2015).

153 Washington prohibits imputing income to parents who are unemployed because of efforts to comply with court-ordered reunification with a child. WASH. REV. CODE ANN. § 26.19.071(6) (West 2015).

154 Louisiana prohibits imputing income to parents unemployed as a result of Hurricanes Katrina or Rita. LA. REV. STAT. ANN. § 9:315.11 (2015).

155 West Virginia prohibits imputing income to parents who are subject to conditions, which would otherwise make imputing income inequitable. W. VA. CODE ANN. § 48-1-205(c)(4) (West 2015).

156 Vermont prohibits imputing income if the parent's unemployment is in the best interest of the child. VT. STAT. ANN. tit. 15 § 653(5)(A)(iii)(III) (West 2014).

In determining the amount of income to impute, most jurisdictions consider factors such as recent work history, education, and occupational qualifications.¹⁵⁷ Some include the current job market¹⁵⁸ or local earnings,¹⁵⁹ whether a parent's involvement in education is reasonable and may ultimately benefit the child,¹⁶⁰ whether a parent's bona fide career change will outweigh the adverse effect on the child,¹⁶¹ whether the unemployment is temporary and will ultimately lead to increased income,¹⁶² the parent's diligence in seeking employment,¹⁶³ whether there has been a significant reduction in income since the action was

157 See ALA. R. JUD. ADMIN. 32 for an example of guidelines directing imputation based on recent work history, education, and occupational qualifications.

158 Delaware (DEL. FAM. CT. R. CIV. P. 501(c)), Hawai'i (HAW. FAM. CT. MEMORANDUM: 2010 HAWAI'I CHILD SUPPORT GUIDELINES (V)(J)(3)), Idaho (IDAHO R. FAM. L. P. 126(F)(3)(a)(i)), Indiana (IND. R. CT. CHILD SUPPORT RULES AND GUIDELINES 3(A)(3) (2010)), Kansas (KAN. SUP. CT. R. CHILD SUPPORT GUIDELINES (II)(F)(1)(b)), Maryland (MD. CODE ANN., FAM. LAW § 12-201(I) (West 2015)), Massachusetts (specifically, "the availability of employment at the attributed income level") (MASS. GEN. LAWS ANN., CHILD SUPPORT GUIDELINES (West 2015)), Michigan (Friend of the Court Bureau, 2013 MICH. CHILD SUPPORT FORMULA MANUAL § 2.01(G)(2)(e)), Montana (MONT. ADMIN. R. 37.62.106 (2015)), Nebraska (NEB. CT. R. § 4-204), North Carolina (Conf. of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES 3), Ohio (OHIO REV. CODE ANN. § 3119.01 (West 2015)), Pennsylvania (PA. R. CIV. P. 1910.16-2(d)(4)), and South Carolina (CHILD SUPPORT GUIDELINES 3.1.5(2)) allow courts to consider the current job market in setting the amount of income to impute.

159 Maryland (§ 12-201(I)), Michigan (Friend of the Court Bureau, 2013 MICH. CHILD SUPPORT FORMULA MANUAL § 2.01(G)(2)(f)), Montana (MONT. ADMIN. R. 37.62.106), North Carolina (Conf. of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES), Ohio (§ 3119.01), South Carolina (Child Support Guidelines 3.1.5(2)), and Utah (UTAH CODE ANN. § 78B-12-203(7)(b) (West 2015)) allow courts to consider local earnings in setting the amount of income to impute.

160 Georgia (GA. CODE ANN. § 19-6-15 (f)(4)(d) (West 2015)) and Oklahoma (OKLA. STAT. ANN. tit. 43, § 118B(D)(2)(a) (West 2015)) allow courts to consider whether a parent's involvement in education is reasonable and may ultimately benefit the child in setting the amount of income to impute.

161 Minnesota allows courts to consider whether a parent's bona fide career change will outweigh the adverse effect on the child in setting the amount of income to impute. MINN. STAT. ANN. § 518A.32(3)(2) (West 2015).

162 Minnesota allows courts to consider whether the unemployment is temporary and will ultimately lead to increased income in setting the amount of income to impute. § 518A.32(3)(2).

163 Michigan (Friend of the Court Bureau, 2013 MICH. CHILD SUPPORT FORMULA MANUAL § 2.01 (G)(2)(g)) and Pennsylvania (PA. R. CIV. P. 1910.16-2(d)(4)) allow courts to consider the parent's diligence in seeking employment in setting the amount of income to impute.

filed,¹⁶⁴ decreased earning capacity because of a felony conviction,¹⁶⁵ a parent's lifestyle, including ownership of assets,¹⁶⁶ good faith and reasonableness of a parent's employment decisions,¹⁶⁷ official government documents such as median income tables,¹⁶⁸ and any other relevant factor.¹⁶⁹

Pretending discrimination does not exist extends its reach. Judges should explicitly be enabled or required to acknowledge the fact and effects of employment discrimination and should allow its existence to figure into the legal calculus.

In theory at least, Kim might have been able to prevail in a jurisdiction that permits the court to consider diligence in seeking employment, education to enhance earning capacity, or other conditions that would make imputing income inequitable. In jurisdictions that permit the court to consider any other relevant factor, the court could arguably consider discrimination in hiring. However, Washington does permit courts to consider any other relevant factor, and the court did not consider discrimination in hiring as a factor in deciding to impute income to Kim. A requirement that the court consider the possibility of discrimination in hiring is more likely to be effective.

164 Michigan allows courts to consider whether there has been a significant reduction in income since the action was filed in setting the amount of income to impute. Friend of the Court Bureau, 2013 MICH. CHILD SUPPORT FORMULA MANUAL § 2.01(G)(2)(k).

165 Ohio allows courts to consider decreased earning capacity because of a felony conviction in setting the amount of income to impute. OHIO REV. CODE ANN. § 3119.01 (West 2015).

166 Oklahoma allows courts to consider a parent's lifestyle, including ownership of assets, in setting the amount of income to impute. OKLA. STAT. ANN. tit. 43, § 118B(D)(2)(e) (West 2015).

167 Virginia allows courts to consider good faith and reasonableness of a parent's employment decisions in setting the amount of income to impute. VA. CODE ANN. § 20-108.1(B)(3) (West 2015).

168 Louisiana (LA. REV. STAT. ANN. § 9:315.11(A) (2015)), New Jersey (using average earnings of the person's usual or former occupation as reported by the state Department of Labor) (N.J. CT. R. PRAC. APP. 9-A (29)), Utah (UTAH CODE ANN. § 78B-12-203(7)(b) (West 2015)), and Washington (WASH. REV. CODE ANN. § 26.19.071 (West 2015)) allow courts to consider official government documents such as median income tables in setting the amount of income to impute.

169 Ohio (OHIO REV. CODE ANN. § 3119.01) (West 2015)), Oklahoma (OKLA. STAT. ANN. tit. 43, § 118B(D)(2)(g) (West 2015)), and Washington (WASH. REV. CODE ANN. § 26.19.071 (West 2011)) allow courts to consider any other relevant factor in setting the amount of income to impute.

B. Courts Should Adopt a New Rule of Evidence, Accepting Self-Reports of Gender Identity.

Rationality requires recognizing the truth of individuals in their mystery and complexity. This means, at a minimum, not requiring that transgender people go through or even contemplate sex reassignment surgery before believing they are transgender. People can best report the truth of who they are. In other areas, the law sometimes relies on self-reports of an internal state, to determine, for example, motive, intent, age, and apprehension of bodily harm.

The Federal Rules of Evidence permit a lay witness to testify to opinion, provided it is rationally based on the witness's perception, helpful to understand a fact in the case, and not based on scientific or other technical knowledge.¹⁷⁰ Under this rule or the state equivalent, many courts permit owners of property to testify to the value of their property, understanding that the owner knows the property at least approximately as well as experts.¹⁷¹

However, courts have been reluctant to believe transgender individuals' self-reports of gender identity, unless the individual expressly identifies as being "trapped in the wrong body,"¹⁷² or unless the individual has undergone or intends to undergo sex reassignment surgery.¹⁷³ An often-expressed fear of believing self-reports of gender identity is that men will pose as women to get easier access to women in order to victimize them. This fear seems to underlie prison policies about housing transgender inmates. However, there is so much stigma associated with transgressing gender lines, particularly for males, that this possibility seems unlikely.

Because it is not objectively determinable, determining gender identity requires deferring to individuals' self-reports of who they are.

170 FED. R. EVID. 701.

171 For examples of courts invoking the "property owner rule" permitting property owners to testify to the value of their property without expertise beyond knowledge of the property, see *Mertz v. Mertz*, 858 N.W.2d 292, 299 (N.D. 2015); *Reed v. Reed*, 339 P.3d 1109, 1119 (Idaho 2014); *City of Jacksonville v. Nixon*, 442 S.W.3d 906, 911 (Ark. 2014); *Briggs v. City of Palmer*, 333 P.3d 746, 748 (Alaska 2014); and *Worthington City Sch. Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 17 N.E.3d 537, 543–44 (Ohio 2014).

172 See Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.- C.L. L. REV. 329, 354 (1999) (internal quotation marks omitted).

173 See, e.g., *City of Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (finding a city ordinance prohibiting cross dressing to impermissibly infringe on the constitutional liberty of a man who was preparing for sex reassignment surgery).

How do you know that you are the gender you are? What makes you a woman or a man? . . . Suddenly these seemingly simple questions aren't so simple. Who you're attracted to, the toys you played with as a child, the clothes you wear now, your ability to process emotion or think analytically—all of these could be true of someone who is of the 'opposite' gender. . . . By now you may be yelling out loud, 'I just know! I've always known!' Well that is probably the truest answer you can give. The proof of what gender you are lies within your brain.¹⁷⁴

Rules of evidence are adopted by states' highest courts. Those courts should adopt a rule of evidence explicitly recognizing individuals' competence to testify to their own gender identity.

C. Judges Should Be Required to Learn the Basics of Human Sex and Gender, as well as Tools to Increase Their Cultural Competence.

When courts employ inaccurate and outdated social constructs instead of considering important and relevant factors, irrationality and injustice result. When considering transgender issues, courts tend to simultaneously conflate categories and artificially impose binary values on multi-faceted characteristics until their internal representations of life look very little like real life and more like caricatures. Rationality requires resisting the urge to collapse into unexamined thinking.¹⁷⁵

To be empowered to resist that urge, judges need education. All judicial officers should be required to learn basic information about human sex and gender. A brief example of a possible educational piece appears below as Appendix I. All judicial officers should also be required to learn tools to increase their cultural competence. Examples of useful tools appear in the work of Jean Koh Peters and Sue Bryant, on habits for cross-cultural lawyering.¹⁷⁶

174 NICHOLAS M. TEICH, *TRANSGENER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE* 1–2 (2012).

175 See generally Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 WM. MITCHELL L. REV. 655 (2006). Franklin attempts to map the courts' minds and analyze their thinking, showing that only some strands of thought are conscious; others are reflexive and unexamined. Charting "patterns of the relationship between the precedential, the analogical, and the methodological" reveals "the implicit factual predeterminations built into what look like exclusively procedural and jurisdictional conversations." *Id.* at 660. When courts examine novel questions with profound cultural implications, their choices of which topics to address are significant. *See id.* at 672.

176 See generally Peters and Bryant, *supra* note 115.

D. Judges Should Be Evaluated Based On Their Ability To Prioritize Facts over Their Emotional Reactions.

Decisions based on ignorance and intolerance do not belong in the courts. To ensure that those we entrust with important decisions are capable of making those decisions in rational ways, judges should be routinely evaluated for their ability to prioritize facts over their emotional reactions to the litigants before them.

The test of character and clear thinking is not in how one treats those one likes, but in how one treats those one does not like. Too many courts in the United States apparently do not like transgender people and lack the ability to see beyond their own unarticulated and sometimes unrecognized emotional reactions. As a result, they read protective or rights legislation and the Constitution in a highly constricted way.

Competent judges should be able to prioritize facts over legal fictions. Judges should not be so distracted by difference that they fail to recognize facts. “The politics of control and domination are interrupted when we embrace our own fears and anxieties to transcend them.”¹⁷⁷ Competent judges should be able to notice, recognize, acknowledge, evaluate, and then set aside their own discomfort and emotional reactions.¹⁷⁸ Those reactions are a source of information, but just one of the sources of information available to judges. They are not the guiding principles. Even if courts do not love transgender people, they are tasked with working justice and, at a minimum, tolerating difference.¹⁷⁹ In courts’ decisions, love, or the lack of it, should not determine whether the result is justice.

Whether judges are appointed or elected, a part of the selection and retention process should be to evaluate potential judges’ ability to recognize and set aside their emotional reactions toward people unlike themselves. Bar associations, individual attorneys, and judicial conduct commissions are often asked to rate judicial candidates on a variety of dimensions; how the candidates treat those unlike themselves should be one of those dimensions.

177 Faithful, *supra* note 118, at 249.

178 Hammer & Vaché, *supra* note 110, at 1036.

179 As noted author Sherman Alexie observed, in commenting on the Museum of Tolerance, “Tolerance. That’s aiming low. I tolerate you. Sounds like marriage.” Sherman Alexie, Gonzaga University, Spokane, Washington (Jan. 30, 2007) (poetry reading, in which Alexie, a gifted storyteller and public speaker, read one poem, and reflected on various topics. He summed his talk up for the students in the audience, whom he thought might have to write a report about it, as: “There was a war. He said ‘fuck.’ He almost cried.”).

CONCLUSION

Structural changes could make it easier for judges to see and make decisions based on the facts of a trans person's life. An evidentiary rule requiring courts to accept individuals' self-reports of gender identity, education of judicial officers about the dimensions and fluidity of human sex and gender identity, evaluation of judges based on their ability to prioritize facts over their own emotional reactions, and changes to legal fictions explicitly to allow rebuttal could put an end to stories like Kim's.

Kim's story and stories like it should never happen again.

APPENDIX I

Suggested information to use in educating judges about transgender people

Language

All professions' members talk to each other in their own special language. The law is no exception. In the law, we sometimes use what appear to be ordinary words in extraordinary ways.¹⁸⁰ Words have power.

[W]ords in the law, their meaning, their selection, and order, are paramount. The particular selection and sequence of the words in the law are the source of its power. A single, well-chosen word can win a case, or a heart, or enforce a contract. A single, ill-chosen word or comment can, on the other hand, breach a contract, destroy a relationship, or lose a case.¹⁸¹

Though words have power to connect us, they also have power to exclude. Some people are outsiders, excluded from the heart of community life, by the words used to define them.

Pronouns.

“People should be treated according to their self-identified gender. . . . While most people have never questioned their gender identity, some people have spent a great deal of time struggling over it,” trying to reconcile how they feel with how they look, trying to decide how to cope with the discrepancy, how to tell family and friends.¹⁸² Living differently from one's sex assigned at birth “is not undertaken lightly.”¹⁸³ Simple respect requires referring to people with the words they prefer. Some activists advocate using gender-neutral pronouns: ze (pronounced zee) or sie (pronounced see) in place of he or she, and hir (pronounced heer) in place of his or her. However, some have fought very hard

180 Examples of words whose legal meanings differ from their meanings in ordinary usage are “intent” and “malice.”

181 Hon. Nancy L. Coats, *The Power of Words*, 29 OKLA. CITY U. L. REV. 449, 450 (2004).

182 Lisa Mottet & John M. Ohle, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People*, THE NATIONAL COALITION FOR THE HOMELESS AND THE NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE 11–12 (2003), <http://srp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> [<http://perma.cc/VVC4-24YN>] (emphasis in original).

183 *Id.* at 12.

to claim a gendered pronoun and prefer to use that hard-won pronoun. Identification defined by others can negatively affect transgender people. “Because it connects people to data, identification attaches informational baggage to people. This alters what others learn about people as they engage in various transactions and activities.”¹⁸⁴

“**Transgender**” is an “umbrella term” for “a wide range of identities” including what some sources describe as transsexual people, regardless of whether they undergo or plan to undergo hormone treatment or sex reassignment surgery.¹⁸⁵ In its most inclusive sense, transgender means not conforming to gender expectations. In an award-winning play entitled *Clearly Marked*, S. Bear Bergman¹⁸⁶ asks the audience, “Who here with a vagina has repaired something?” and “Who here with a penis has helped raise a child?”¹⁸⁷ When audience members raise their hands in response, Bergman points at them and names them “transgender, transgender, transgender, transgender.”¹⁸⁸

Although anyone who transgresses or transcends gender lines could be characterized as transgender, the term is also often used to refer to individuals whose sex assignment at birth is incongruent with their gender identity.

“**Cisgender**” (pronounced sizz-gender) refers to a person whose sex assignment at birth is congruent with her or his gender identity.¹⁸⁹ Along with that congruence

184 Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 511–12 (2006) (identification documents designating sex lead to difficulties for the social and professional integration of transgender people, paraphrasing Solove’s discussion of a case rather than the holding of the case). Solove discusses a case before the European Court of Human Rights, *B. v. France*, 232 EUR. CT. H.R. 33 (1992). *Id.* at 512.

185 Marvin Dunson III, *Comment: Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 466 n.5 (2001). Note that the term “transsexual” (also spelled transexual) is considered derogatory by some.

186 S. Bear Bergman is a writer, theater artist, and a frequent lecturer at colleges and universities regarding issues of gender and sexuality, who has advised numerous institutions on their policies regarding transgender students. For more information, see S. Bear Bergman, <http://www.sbearbergman.com> [<http://perma.cc/X566-M38A>] (last visited Apr. 13, 2015).

187 S. Bear Bergman, *Clearly Marked*, play presented at Spokane Falls Community College, Spokane, Washington (June 7, 2007).

188 *Id.*

189 Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination ‘Because of . . . [Perceived] Sex,’* 34 N.Y.U. REV. L. & SOC. CHANGE 55, 114 n.237 (2010) (“Cisgender people are those who are born with bodies that conform to expectations of either ‘male’ or ‘female’ and who also identify themselves with the ‘matching’ gender.”); see also DOUGLAS M ANDERSON, ET AL., DORLAND’S ILLUSTRATED

comes an ease, an unquestioning comfort, not generally available to transgender people.¹⁹⁰

A schema for analyzing dimensions of human sexual identity.¹⁹¹

For clarity, it may be useful to consider four distinct dimensions related to human sexual identity: sex, gender identity, gender expression, and sexual orientation. None of these dimensions is necessarily binary, and, although some are more highly correlated, all are capable of functioning independently.

Sex is defined biologically, with reference to chromosomes, genitalia, internal sex organs, secondary sex characteristics, and hormones.¹⁹² Sex is generally regarded as a binary, i.e., male or female.¹⁹³

Chromosomes are the only biological characteristics used to define sex that cannot

MEDICAL DICTIONARY (30th ed. 2003) (“Cis” is Latin for “on this side” and is “a prefix denoting on this side, on the same side, on the near side.”).

190 Knauer, *supra* note 84, at 24 (“Unfortunately, non-trans individuals often fail to see the extent of this commonality because, for us, it is often easy to forget that we are actively gendered. Indeed, this is precisely the problem; for many of us gender is simply a non-issue. It is not a source of daily friction and discomfort.”).

191 Sometimes what makes logical sense is not what makes practical sense. For Title VII jurisprudence, it may not be beneficial to understand the categories discussed in this section as distinct. Pulling the categories apart could lead to an even more constricted and less protective reading of Title VII’s protections. The federal courts have interpreted sex in a wide variety of ways, from a narrow view including only anatomical or biological characteristics (e.g., *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 704 (7th Cir. 2000) (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984))) to a reading that includes notions of gender norms and stereotyping (e.g., *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (allowing recovery on sexual harassment claim based on sex role stereotyping)). The Supreme Court appears to use “gender” as a synonym for “sex.” See Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 100 (2004). Commentators continue to debate the relationship between the concepts of sex and gender in the sexual harassment context. See, e.g., Andrea Meryl Kirshenbaum, “Because of. . . Sex”: Rethinking the Protections Afforded Under Title VII in the Post-Oncale World, 69 ALB. L. REV. 139, 156–65, 173–74 (2005); Dunson, *supra* note 185, at 495.

192 See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (stating the plain meaning of the word “sex” is in reference to anatomical and biological facts, which determine whether a person is male or female).

193 The definition in Merriam-Webster’s Medical Dictionary depends on the binary. It defines “sex” as: “the sum of the structural, functional, and behavioral characteristics of living things that are involved in reproduction by two interacting parents and that distinguish males and females.” *Sex Definition in Merriam-Webster’s Medical Dictionary*, DICTIONARY.COM, <http://www.merriam-webster.com/medlineplus/sexes> [<http://perma.cc/ML9W-QDJQ>] (last visited Apr. 27, 2015).

be changed medically.¹⁹⁴ Chromosomes are not divisible into binary categories.¹⁹⁵ Using chromosomes to define sex is problematic, because they are not readily visible. Testing is intrusive and violates privacy and the results are not always unambiguous.¹⁹⁶

Genitalia can be changed medically.¹⁹⁷ They are not always divisible into binary categories.¹⁹⁸ Using genitalia to define sex is problematic because testing is intrusive and violates privacy, and the results are not always unambiguous.

Internal sex organs can be changed medically.¹⁹⁹ They are not always divisible into binary categories.²⁰⁰ Using internal sex organs to define sex is problematic because testing is intrusive and violates privacy, and the results are not always unambiguous.²⁰¹

194 This is the basis for the Texas Court of Appeals' decision in *Littleton v. Prange*: "Christie was created and born a male There are some things we cannot will into being. They just are." *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

195 Medicine has recognized an intersex category, which is more recently referred to as Disorders of Sexual Development ("DSD"). Intersex is an umbrella term for the various biological characteristics that may contribute to incongruent gender assignments. See INTERSEX SOCIETY OF N. AMERICA, CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 2 (Aug. 2006), <http://www.dsdguidelines.org/files/clinical.pdf> [<http://perma.cc/J83A-LZQH>].

196 See Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 403 (2004).

197 See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 61 (2006).

198 See *id.* (pediatric guidelines for treatment of intersexed infants rely on arguably arbitrary measurements for determining whether an infant has "adequate phallus," e.g., "penile length should measure at least 2 [centimeters]," and reductions should be performed on clitorises "larger than .9 centimeters") (internal quotation marks omitted).

199 See Fletcher & Maddox, *supra* note 85, at 562.

200 See Greenberg, *supra* note 85, at 278–79.

201 See Greenberg, *supra* note 85, at 279 (stating that some individuals are born with both male and female internal sex organs).

Secondary sex characteristics, such as a beard and breasts, can be changed medically.²⁰² They are not necessarily divisible into binary categories.²⁰³ They are not necessarily reliable indicators of a person's biological sex.²⁰⁴

Hormones can be changed medically.²⁰⁵ They are not divisible into binary categories, and in fact all humans have the same sex hormones, but in different quantity.²⁰⁶ Using hormones to define sex is problematic because testing is intrusive and violates privacy, and the results are not always unambiguous.²⁰⁷

United States jurisprudence provides some protection against discrimination based on sex: i.e., sex is a category subjected to heightened scrutiny for equal protection analysis.²⁰⁸

202 Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 L. & SEXUALITY 51, 58 (2005).

203 Greenberg, *supra* note 85, at 282.

204 Natalie Brown Michalek, Note, *Littleton v. Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, 52 BAYLOR L. REV. 727, 732 (2000).

205 See Dana O'Day-Senior, Note, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453, 458 (2008):

[T]he most common treatment sought by transgender persons is hormone replacement therapy (providing male hormones to a female-to-male transgender person or providing female hormones to a male-to-female transgender person) in order to provide desired results in acquired secondary sex characteristics and to help the person's physical body to more closely match their psychological gender.

206 Greenberg, *supra* note 85, at 281 n.84 (internal quotation marks omitted).

207 See Jennifer M. Protas, *Divesting From the Apartheid of the Closet: Toward an Enriched Legal Discourse of Sexual and Gender Identity*, 38 McGEORGE L. REV. 571, 585 (2007) (“[I]f hormones alone are a determining factor of gender, gender can be bought over-the-counter. Moreover, the varying degree of hormonal presence between people suggests varying degrees of gender, a notion that defies the binary system.”).

208 See *Craig v. Boren*, 429 U.S. 190 (1976). In that case, the U.S. Supreme Court found the gender-based prohibition under state statute regarding the sale of “nonintoxicating” 3.2% alcohol beer to males under the age of twenty-one and to females under the age of eighteen to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment for males eighteen to twenty years of age. *Id.* at 210. See also *id.* at 197 (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

Gender identity (man / woman / androgynous²⁰⁹ / genderqueer²¹⁰ / boi²¹¹ / transgender / trans / transman / transwoman etc.) is self-defined.²¹² It is possibly the only truly immutable dimension of the four identified here. Some courts have recognized its immutable quality.²¹³ For example, the Ninth Circuit Court of Appeals said, “Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”²¹⁴ In considering whether persecution based on transgender status qualified an immigrant for asylum, the court concluded as a matter of law that the plaintiff’s “female sexual identity is immutable because it is inherent in his identity; in any event, he should not be required to change it.”²¹⁵ The court noted, in response to descriptions

209 Androgynous - an-drog-y-nous, adj[.]: having the characteristics or nature of both male and female. *Androgynous Definition in Merriam-Webster’s Medical Dictionary*, DICTIONARY.COM, <http://www.merriam-webster.com/medical/androgynous> [<http://perma.cc/EY2M-EELW>] (last visited Apr. 27, 2015). “The truth is, a great mind must be androgynous.” SAMUEL T. COLERIDGE, SPECIMENS OF THE TABLE TALK OF SAMUEL TAYLOR COLERIDGE 199 (1851).

210 See Knauer, *supra* note 84, at 22:

In its broadest sense, genderqueer embraces a fluidity of gender roles and behaviors that encompasses the type of gender variance generally approved within the progressive understanding of gender. However, genderqueer parts company with the progressive critique in that it rejects not simply the gender role behavior and expectations associated with one’s gender assigned at birth, but the act or meaning of that assignment.

211 See Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 266 (2005) (“Some transgender people identify as trans, tranny, trannyboy, trannygirl, transsexual, transgender, shinjuku boy, boi, grrl, boy-girl, girl-boy-girl, papi, third gender, fourth gender, no gender, bi-spirit, butch, dyke-fag, fairy, elf girl, glitterboy, transman, transwoman—just to name a few.”).

212 “Those who experience their gender as different from their sex are constantly aware of that difference—even if the difference is not visible to others—and they often search for ways to explain their experience.” Jamison Green, *Foreword* to NICHOLAS M. TEICH, *TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE*, at i (2012).

213 Tan, *supra* note 79, at 579, 591 (“The Sixth Circuit was the first circuit to explicitly hold that Title VII protected transgender employees.”) (citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)).

214 *Hernandez-Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* *Thomas v. Gonzalez*, 409 F.3d 1177, 1187 (9th Cir. 2005).

215 *Hernandez-Montiel*, 225 F.3d at 1087. Although the court recognized the litigant’s female sexual identity, it chose to use male pronouns to refer to her.

of persecution, that the plaintiff's "female sexual identity must be fundamental, or he would not have suffered this persecution and would have changed years ago."²¹⁶

Gender identity cannot be changed by psychotherapy or by medical intervention.²¹⁷

Gender identity receives no protection from employment discrimination under federal law.²¹⁸ It does receive protection under the laws of eighteen states,²¹⁹ the District of Columbia,²²⁰ and at least 225 cities and towns.²²¹

Gender expression (masculine, feminine, androgynous, butch, femme) encompasses appearance, demeanor, mannerisms, and various other trappings that communicate gender. It is a gloss laid on and perceivable by others. It includes some voluntary and some involuntary elements. For example, how one dresses is usually within the individual's control; how dress is culturally defined and assigned according to sex is not within the individual's control. Gender expression receives some protection in the employment context.²²²

216 *Id.* at 1095.

217 Ben-Asher, *supra* note 197, at 94–95.

218 *See* Lloyd, *supra* note 76, at 177 ("Yet this hoped for revolution in transgender Title VII jurisprudence has been slow to materialize. In Title VII cases decided since *Price Waterhouse*, federal courts have almost without exception continued to interpret 'sex' to exclude transgendered people.").

219 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. *See* NON-DISCRIMINATION LAWS: STATE BY STATE, *supra* note 41.

220 *See* NON-DISCRIMINATION LAWS: STATE BY STATE, *supra* note 41.

221 *See* CITIES AND COUNTIES WITH NON-DISCRIMINATION ORDINANCES THAT INCLUDE GENDER IDENTITY, *supra* note 42.

222 *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (a plaintiff who does not act according to the stereotypical notions of how a woman should act is protected under Title VII). *See also* *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), in which a pre-operative transgender female police officer who was a candidate for promotion alleged illegal sex discrimination based on failure to conform to sex stereotypes. *Id.* at 737. She was told she lacked a "command presence" and did not act masculine enough, was evaluated in a more intrusive and embarrassing manner than classmates, and was told by a superior officer that she would fail probation for not acting masculine enough. *Id.* at 734–35. The Sixth Circuit found Barnes to be a member of a protected class and held that discrimination based on gender non-conformity is illegal. *Id.* at 737. In *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574–575, 578 (6th Cir. 2004), the court held that gender-non-conforming conduct is covered by sex discrimination prohibitions and that discrimination based on transgender status (which is rooted in insistence that sex organs and gender must coincide) is the very root of sex discrimination.

Cultural notions of gender are fluid and evolving, and include arbitrary assignment of gender meaning to things that have no inherent gender. For example, pink, considered a feminine color today, was considered a masculine color in the 1800s.²²³ Judith Butler refers to our gender performances as “ritual social drama.”²²⁴ Hafiz says, “I view gender as a beautiful animal that people often take for a walk on a leash and might try to enter in some odd contest to try to win prizes.”²²⁵

Gender expression is one area where transgender individuals can be distinguished from those who “cross-dress.” It is possible to play with the costuming of a sex without desiring to be or believing oneself to be of that sex.

Sexual orientation (heterosexual, homosexual, bisexual, asexual, pansexual) is often defined in a purely binary framework (heterosexual or not heterosexual), referring to the object(s) of one’s physical and emotional attraction. The binary provides categories that are over-inclusive and may simultaneously be under-inclusive. Sexual orientation functions independently of the other dimensions. It is not necessarily binary. It appears to have a biological base.²²⁶ It appears to be immutable. Whom “we love and why we love them is often as mysterious and as unfathomable as we are.”²²⁷ There is no general protection under federal law against employment discrimination based on sexual orientation, though “[t]he federal government and a large majority of states bar sexual orientation discrimination in government employment; nearly half the states and more than 100 municipalities bar such discrimination by private employers.”²²⁸

Transgender people tend to be included with gay, lesbian, and bisexual people, but this is not necessarily a logical inclusion. A transgender person can have any of the possible sexual orientations. The sexual orientation of some transgender people changes as a result

223 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 62 n.256 (1995); see also Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN’S L.J. 226, 230 (1998).

224 JUDITH BUTLER, *GENDER TROUBLE: FEMINISM & THE SUBVERSION OF IDENTITY* 191 (1999).

225 DANIEL LADINSKY, *I HEARD GOD LAUGHING: RENDERINGS OF HAFIZ*, 69 (1996) (internal line breaks omitted).

226 See Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How It Is Met*, 53 CLEV. ST. L. REV. 545, 562 (2006).

227 E-mail from Patrick A. White, Ph.D., to the author (Sept. 9, 2006) (on file with author).

228 William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1349–50 (2010).

of going through sex reassignment treatment.²²⁹ However, people living on the margins of “ordinary” sexual definitions tend to be more accepting of transgender individuals and issues than those who live squarely within what is considered “normal.” S. Bear Bergman refers to transgender rights and gay and lesbian rights as two separate boats.²³⁰ “As a person with one foot in each boat, I have a vested interest in being sure they stay close together,” Bergman says.²³¹ Depending on how and when a person’s sex is defined, a trans person attracted exclusively to men could be characterized as exclusively heterosexual or exclusively gay.

Some feminists, while supporting gay and lesbian rights, object to regarding transgender women as women.²³² The objections seem to have two bases. One basis for objection is the notion that a transgender woman has participated in patriarchal privilege as a biological man and therefore cannot belong to the group that is defined partly by its members being targets of oppression.²³³ But trans women are not full participants in patriarchal privilege and are outsiders of a different kind. It is short-sighted to look at only one dimension, when oppression is multi-dimensional. A second basis for objection is that trans women seek out that which they regard as feminine, while some feminists deconstruct and reject femininity; they see transgender women as undoing all of their hard work. I heard a woman who identified herself as a feminist lesbian protest to a group of transgender women, “I’ve been working so hard to take apart the gender box and here you are, trying to climb in it.”

Cisgender people are generally more able than trans people to choose, with few psychological consequences, whether to go along with their expected gender expression or to defy it. Because of the shared experience of marginalization, it makes practical sense for transgender people to ally with gay, lesbian, and bisexual people, even though it does not make logical sense.

229 Knauer, *supra* note 84, at 42 (“What about the transwoman who post-transition identifies as a lesbian?”).

230 See Bergman, *supra* note 187.

231 S. Bear Bergman, panel discussion at Spokane Falls Community College, June 7, 2006.

232 Knauer, *supra* note 84, at 1–2 (“The feminist reception to transgender issues has been arguably even less successful and, at times, has been marked by outright hostility.”). Different threads of feminist thought treat transgender issues differently. A full discussion is beyond the scope of this Article.

233 *Id.* at 42 (“To some feminists, the transwoman cannot be a lesbian because her gender assigned at birth was not female and, therefore, she was not a ‘womyn born womyn.’”) (citing Aaron H. Devor & Nicholas Matte, *ONE Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism*, in *TRANSGENDER STUD. READER* 389 (Susan Stryker & Stephen Whittle eds., 2006)).

APPENDIX II

Statutes, court rules, administrative regulations, and documents adopted pursuant to them, addressing imputing income to unemployed parents for setting child support obligations

Emphasis added to highlight portions relevant to imputing or attributing income to an unemployed parent.

Alabama

ALA. R. JUD. ADMIN. 32, CHILD SUPPORT GUIDELINES (B)(5)

(B) Definitions.

(1) *Income.* For purposes of the guidelines established by this rule, “income” means actual gross income of a parent, if the parent is employed to full capacity, or the actual gross income the parent has the ability to earn if the parent is unemployed or underemployed.

...

(5) *Unemployment; Underemployment.* If the court finds that either parent is voluntarily unemployed or underemployed, it shall estimate the income that parent would otherwise have and shall impute to that parent that income; the court shall calculate child support based on that parent’s imputed income. **In determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of that parent, based on that parent’s recent work history, education, and occupational qualifications, and on the prevailing job opportunities and earning levels in the community. The court may take into account the presence of a young or physically or mentally disabled child necessitating the parent’s need to stay in the home and therefore the inability to work.**

Alaska

ALASKA R. CIV. P. 90.3(a)(4)

(4) *Potential Income.* The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. **A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent’s work history, qualifications, and job opportunities. The court also may impute potential income for non-income or low income producing assets.**

Arizona

ARIZ. REV. STAT. ANN. § 25-320 (West 2014)

N. The court shall presume, in the absence of contrary testimony, that a parent is capable of full-time employment at least at the applicable state or federal adult minimum wage, whichever is higher. This presumption does not apply to noncustodial parents who are under eighteen years of age and who are attending high school.

Ariz. Sup. Ct. Child Support Guidelines, amended by Admin Order 2011-46 (2011)

E. If a parent is unemployed or working below full earning capacity, the court may consider the reasons. **If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity. If the reduction in income is voluntary but reasonable, the court shall balance that parent's decision and benefits therefrom against the impact the reduction in that parent's share of child support has on the children's best interest.** In accordance with Arizona Revised Statutes Section 25-320, **income of at least minimum wage shall be attributed** to a parent ordered to pay child support. If income is attributed to the parent receiving child support, appropriate childcare expenses may also be attributed.

The court may decline to attribute income to either parent. **Examples of cases in which it may be inappropriate to attribute income include, but are not limited to, the following circumstances:**

- 1. A parent is physically or mentally disabled,**
- 2. A parent is engaged in reasonable career or occupational training to establish basic skills or reasonably calculated to enhance earning capacity,**
- 3. Unusual emotional or physical needs of a natural or adopted child require that parent's presence in the home, or**
- 4. The parent is a current recipient of Temporary Assistance to Needy Families.**

California

CAL. FAM. CODE § 4058 (West 2015)

§ 4058. ANNUAL GROSS INCOME OF PARENTS

(B) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children.

Colorado

COLO. REV. STAT. ANN. § 14-10-115 (West 2015)

3(c) "Income" means the actual gross income of a parent, if employed to full capacity, or potential income, if unemployed or underemployed. Gross income of each parent shall be determined according to subsection (5) of this section.

...

5(b)(I) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income; except that **a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a child under the age of thirty months for whom the parents owe a joint legal responsibility or for an incarcerated parent sentenced to one year or more.**

Connecticut

No explicit provision for imputing income to unemployed parent, but

CONN. GEN. STAT. ANN. § 46b-84 (a), (d), (f)(1) (West 2015)

(a) Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance.

...

(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, **the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child.**

...

(f) (1) After the granting of a decree annulling or dissolving the marriage or ordering a legal separation, and upon complaint or motion with order and summons made to the Superior Court by either parent or by the Commissioner of Administrative Services in any case arising under subsection (a) or (b) of this section, the court shall inquire into the child's need of maintenance and the respective abilities of the parents to supply maintenance. **The court shall make and enforce the decree for the maintenance of the child as it considers just,** and may direct security to be given therefor, including an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable.

Delaware

DEL. FAM. CT. R. CIV. P. 501(a)–(c)

Rule 501. Income attribution.

(a) General. In determining each parent's ability to pay support the Court considers the health, income and financial circumstances, and earning capacity of each parent, the manner of living to which the parents had been accustomed as a family unit and the general equities inherent in the situation.

(b) Actual income. A parent employed full-time in a manner commensurate with his or her training, education and experience shall be presumed to have reached their reasonable earning capacity.

(c) Attribution. **Unemployment or underemployment either voluntary or due to misconduct or failure to provide sufficient evidence or failure to appear for a hearing or mediation conference may cause income to be attributed. The Court may examine earnings history, employment qualifications and the current job market. The Court may take judicial notice of Department of Labor wage surveys for individual occupations to estimate or corroborate earning capacity. Where no better information exists, a parent may be attributed at least as much income as the other party.**

District of Columbia

D.C. CODE § 16-916.01(d)(10) (2015)

(10) If the judicial officer finds that a parent is voluntarily **unemployed or underemployed as a result of the parent's bad faith or deliberate effort to suppress income, to avoid or minimize the parent's child support obligation, or to maximize the other parent's obligation, the judicial officer may impute income to this parent and calculate the child support obligation based on the imputed income. The judicial officer shall not impute income to a parent who is physically or mentally unable to work or who is receiving means-tested public assistance benefits.** The judicial officer shall issue written factual findings stating the reasons for imputing income at the specified amount.

Florida

FLA. STAT. ANN. § 61.30(2)(b)–(c) (West 2015)

61.30. Child support guidelines; retroactive child support

(2)(b) Monthly income shall be imputed to an unemployed or underemployed parent if such **unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control.** In the event of such voluntary unemployment or underemployment, **the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work**

history, occupational qualifications, and prevailing earnings level in the community if such information is available. If the information concerning a parent's income is unavailable, a parent fails to participate in a child support proceeding, or a parent fails to supply adequate financial information in a child support proceeding, income shall be automatically imputed to the parent and there is a rebuttable presumption that the parent has income equivalent to the median income of year-round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census. However, the court may refuse to impute income to a parent if the court finds it necessary for that parent to stay home with the child who is the subject of a child support calculation or as set forth below:

1. In order for the court to impute income at an amount other than the median income of year-round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census, the court must make specific findings of fact consistent with the requirements of this paragraph. **The party seeking to impute income has the burden to present competent, substantial evidence that:**

a. The unemployment or underemployment is voluntary; and

b. Identifies the amount and source of the imputed income, through evidence of income from available employment for which the party is suitably qualified by education, experience, current licensure, or geographic location, with due consideration being given to the parties' time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.

2. Except as set forth in subparagraph 1, **income may not be imputed based upon:**

a. Income records that are more than 5 years old at the time of the hearing or trial at which imputation is sought; or

b. Income at a level that a party has never earned in the past, unless recently degreed, licensed, certified, relicensed, or recertified and thus qualified for, subject to geographic location, with due consideration of the parties' existing time-sharing schedule and their historical exercise of the time-sharing provided in the parenting plan or relevant order.

(c) Public assistance as defined in s. 409.2554 shall be excluded from gross income.

Georgia

GA. CODE ANN. § 19-6-15 (f)(4)(D)(i)–(vi) (West 2015)

(D) *Willful or voluntary unemployment or underemployment.* In determining whether a parent is willfully or voluntarily unemployed or underemployed, the court or the jury shall ascertain the reasons for the parent's occupational choices and assess the reasonableness of these choices in light of the parent's responsibility to support his or her child and whether such choices benefit the child. A determination of willful or voluntary unemployment or underemployment shall not be limited to occupational choices

motivated only by an intent to avoid or reduce the payment of child support but can be based on any intentional choice or act that affects a parent's income. In determining willful or voluntary unemployment or underemployment, the court may examine whether there is a substantial likelihood that the parent could, with reasonable effort, apply his or her education, skills, or training to produce income. Specific factors for the court to consider when determining willful or voluntary unemployment or underemployment include, but are not limited to:

(i) The parent's past and present employment;

(ii) The parent's education and training;

(iii) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's responsibility to support his or her child and, to this end, whether the training or education may ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future;

(iv) A parent's ownership of valuable assets and resources, such as an expensive home or automobile, that appear inappropriate or unreasonable for the income claimed by the parent;

(v) The parent's own health and ability to work outside the home; and

(vi) The parent's role as caretaker of a child of that parent, a disabled or seriously ill child of that parent, or a disabled or seriously ill adult child of that parent, or any other disabled or seriously ill relative for whom that parent has assumed the role of caretaker, which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in the role of caretaker in the future. When considering the income potential of a parent whose work experience is limited due to the caretaker role of that parent, the court shall consider the following factors:

(I) Whether the parent acted in the role of full-time caretaker immediately prior to separation by the married parties or prior to the divorce or annulment of the marriage or dissolution of another relationship in which the parent was a full-time caretaker;

(II) The length of time the parent staying at home has remained out of the work force for this purpose;

(III) The parent's education, training, and ability to work; and

(IV) Whether the parent is caring for a child who is four years of age or younger. If the court or the jury determines that a parent is willfully or voluntarily unemployed or underemployed, child support shall be calculated based on a determination of earning capacity, as evidenced by educational level or previous work experience. In the absence of any other reliable evidence, income may be imputed to the parent pursuant to a determination that gross income for the current year is based on a 40 hour workweek at minimum wage.

A determination of willful and voluntary unemployment or underemployment shall

not be made when an individual is activated from the National Guard or other armed forces unit or enlists or is drafted for full-time service in the armed forces of the United States.

Hawaii

Haw. Fam. Ct. Mem.: 2010 HAWAII CHILD SUPPORT GUIDELINES (IV)(I)(2) (2010), *available at* <http://www.courts.state.hi.us/docs/form/maui/2CE248.pdf> [<http://perma.cc/Q4EE-M9T4>]

IV. TERMS AND DEFINITIONS

I. Income

(2) IMPUTED INCOME may be used when a parent is not employed full-time or is employed below full earning capacity. The reasons for this limitation must be considered.

If a parent's income is limited in order to care for the child(ren) to whom the parents owe a joint legal responsibility, at least one of whom is 3 years of age or younger, then no additional income will be imputed to that parent. If all of the subject child(ren) are over 3 years of age, and the parent that receives support is mentally and physically able to work, and remains at home and does not work, then thirty (30) hours or less of weekly earnings at the minimum wage may be imputed to that parent.

If a parent's income is limited for any other reason, the parent's income will be determined according to his or her income capacity in the local job market, considering both the reasonable needs of the child(ren) and the reasonable work aspirations of the parent.

Idaho

IDAHO R. FAM. L. P. 126(F)(3)(a)(i)–(ii) (2015)

Rule 126. Child Support Guidelines

F. Guidelines income determination—income defined.

3. *Potential Income.*

a. Potential earned income. If a parent is voluntarily unemployed or underemployed, child support shall be based on gross potential income, except that **potential income should not be included for a parent that is physically or mentally incapacitated.** A parent shall not be deemed under-employed if gainfully employed on a full-time basis at the same or similar occupation in which he/she was employed for more than six months before the filing of the action or separation of the parties, whichever occurs first. On post-judgment motions, the six month period is calculated from the date the motion is filed. Ordinarily, a parent shall not be deemed underemployed if the parent is caring for a child not more than 6 months of age. Determination of potential income shall be made according to any or all of the following methods, as appropriate:

i. **Determine employment potential and probable earnings level based on the parent's**

work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

ii. Where a parent is a student, potential monthly income during the school term may be determined by considering student loans from any source.

Illinois

750 ILL. COMP. STAT. ANN. 5/505(a)(5) (West 2015)

(5) If the net income cannot be determined because of default or any other reason, the court shall **order support in an amount considered reasonable in the particular case**. The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered.

Indiana

IND. R. CT. Child Support Rules and Guidelines 3.A.1. 3. (amended 2010), *available at* http://www.in.gov/judiciary/rules/child_support/ [<http://perma.cc/5CQF-Y4KT>]

GUIDELINE 3. DETERMINATION OF CHILD SUPPORT AMOUNT

A. Definition of Weekly Gross Income.

1. *Definition of Weekly Gross Income (Line 1 of Worksheet)*. For purposes of these Guidelines, "weekly gross income" is defined as actual Weekly Gross Income of the parent if employed to full capacity, **potential income if unemployed or underemployed**, and imputed income based upon "in-kind" benefits. Weekly Gross Income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received from other marriages. Social Security disability benefits paid for the benefit of the child must be included in the disabled parent's gross income. The disabled parent is entitled to a credit for the amount of Social Security disability benefits paid for the benefit of the child. Specifically excluded are benefits from means-tested public assistance programs, including, but not limited to, Temporary Aid To Needy Families (TANF), Supplemental Security Income, and Food Stamps. Also excluded are survivor benefits received by or for other children residing in either parent's home.

...

3. *Unemployed, Underemployed and Potential Income.* If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income. **A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.** If there is no work history and no higher education or vocational training, the facts of the case may indicate that Weekly Gross Income be set at least at the federal minimum wage level.

COMMENTARY TO GUIDELINE 3A

Weekly Gross Income.

...

2c. Potential Income. **Potential income may be determined if a parent has no income, or only means-tested income, and is capable of earning income or capable of earning more.** Obviously, a great deal of discretion will have to be used in this determination. One purpose of potential income is to discourage a parent from taking a lower paying job to avoid the payment of significant support. Another purpose is to fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed. **However, attributing potential income that results in an unrealistic child support obligation may cause the accumulation of an excessive arrearage, and be contrary to the best interests of the child(ren).** Research shows that on average more noncustodial parental involvement is associated with greater child educational attainment and lower juvenile delinquency. Ordering support for low-income parents at levels they can reasonably pay may improve noncustodial parent-child contact; and in turn, the outcomes for their children. The six examples which follow illustrate some of the considerations affecting attributing potential income to an unemployed or underemployed parent.

(1) **When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earning enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent.** It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home.

(2) **When a parent has some history of working and is capable of entering the work force, but without just cause voluntarily fails or refuses to work or to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income shall be included in the gross income of that parent.** The amount to be attributed as potential

income in such a case may be the amount that the evidence demonstrates he or she was capable of earning in the past. If for example the custodial parent had been a nurse or a licensed engineer, it may be unreasonable to determine his or her potential at the minimum wage level. Discretion must be exercised on an individual case basis to determine whether under the circumstances there is just cause to attribute potential income to a particular unemployed or underemployed parent.

(3) Even though an unemployed parent has never worked before, potential income should be considered for that parent if he or she voluntarily remains unemployed without justification. Absent any other evidence of potential earnings of such a parent, the federal minimum wage should be used in calculating potential income for that parent. However, the court should not add child care expense that is not actually incurred.

(4) When a parent is unemployed by reason of involuntary layoff or job termination, it still may be appropriate to include an amount in gross income representing that parent's potential income. If the involuntary layoff can be reasonably expected to be brief, potential income should be used at or near that parent's historical earning level. If the involuntary layoff will be extensive in duration, potential income may be determined based upon such factors as the parent's unemployment compensation, job capabilities, education and whether other employment is available. Potential income equivalent to the federal minimum wage may be attributed to that parent.

(5) When a parent is unable to obtain employment because that parent suffers from debilitating mental illness, a debilitating health issue, or is caring for a disabled child, it may be inappropriate to attribute any potential income to that parent. Another example may be when the cost of child care makes employment economically unreasonable.

(6) When a parent is incarcerated and has no assets or other source of income, potential income should not be attributed.

Iowa

IOWA CT. R. 9.11(4)

9.11(4) The court may impute income in appropriate cases subject to the requirements of rule 9.5. If the court finds that a parent is voluntarily unemployed or underemployed without just cause, child support may be calculated based on a determination of earning capacity. **A determination of earning capacity may be made by determining employment potential and probable earnings level based on work history, occupational qualifications, prevailing job opportunities, earning levels in the community, and other relevant factors.** The court shall not use earning capacity rather than actual earnings or otherwise impute income unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child(ren) or to do justice between the parties.

Kansas

KAN. SUP. CT. R. Child Support Guidelines II.F(1)–(2), *available at* <http://www.kscourts.org/rules-procedures-forms/child-support-guidelines> [<http://perma.cc/8VGR-XMLS>]

II. DEFINITIONS AND EXPLANATION

F. Imputed Income

1. Income may be imputed to the parent not having primary residency in appropriate circumstances, including the following:

a. **Absent substantial justification, it should be assumed that a parent is able to earn at least the federal minimum wage and to work 40 hours per week. Incarceration does not constitute substantial justification.**

b. When a parent is **deliberately unemployed**, although capable of working full-time, **employment potential and probable earnings may be based on the parent's recent work history, occupational skills, and the prevailing job opportunities in the community.**

c. **If a parent is terminated from employment for misconduct**, rather than laid off, their **previous wage may be imputed, but shall not be less than federal minimum wage.**

d. When a parent receives significant in-kind payment that reduces personal living expenses as a result of employment, such as a company car, free housing, or reimbursed meals, the value of such reimbursement should be added to gross income.

e. When there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the court may evaluate the circumstances to determine whether actual or potential earnings should be used.

2. Income may be imputed to the parent having primary residency in appropriate circumstances, but should not result in a higher support obligation for the other parent.

Kentucky

KY. REV. STAT. ANN. § 403.212(1)–(2) (West 2015)

403.212 Child support guidelines; terms to be applied in calculations; table

(1) The following provisions and child support table shall be the child support guidelines established for the Commonwealth of Kentucky.

(2) For the purposes of the child support guidelines:

(a) “Income” means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.

...

(d) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a **determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a**

joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

Louisiana

LA. REV. STAT. ANN. § 9:315:2(B) (2015)

315:2. Calculation of basic child support obligation

B. If a party is voluntarily unemployed or underemployed, his or her gross income shall be determined as set forth in R.S. 9:315.11.

LA. REV. STAT. ANN. § 9:315.11(A)–(C) (2015)

§ 315.11. Voluntarily unemployed or underemployed party

A. If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a **determination of income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. In determining the party's income earning potential, the court may consider the most recently published Louisiana Occupational Employment Wage Survey.**

B. The amount of the basic child support obligation calculated in accordance with Subsection A of this Section shall not exceed the amount which the party paying support would have owed had a determination of the other party's income earning potential not been made.

C. **A party shall not be deemed voluntarily unemployed or underemployed if he or she has been temporarily unable to find work or has been temporarily forced to take a lower paying job as a direct result of Hurricane Katrina or Rita.**

Maine

ME. REV. STAT. ANN. tit. 19-a, § 2001 5.D. (2015)

§ 2001. Definitions

5.D. **Gross income may include the difference between the amount a party is earning and that party's earning capacity when the party voluntarily becomes or remains unemployed or underemployed, if sufficient evidence is introduced concerning a party's current earning capacity.**

Maryland

MD. CODE ANN., FAM. LAW § 12-201(1) (West 2015)

§ 12-201. Definitions

Potential income

(1)²³⁴ “Potential income” means income **attributed to a parent determined by the parent’s employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.**

Massachusetts

MASS. GEN. LAWS ANN. Child Support Guidelines E. (West 2015)

E. Attribution of Income

Income may be attributed where a finding has been made that either party is capable of working and is unemployed or underemployed. **The Court shall consider all relevant factors including without limitation the education, training, health, past employment history of the party, and the availability of employment at the attributed income level.** The Court shall also consider the age, number, needs and care of the children covered by this order. If the Court makes a determination that either party is earning less than he or she could through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its order.

Michigan

Friend of the Court Bureau, 2013 Michigan Child Support Formula Manual, *available at* <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/FOC/Pages/Child-Support-Formula.aspx> [<http://perma.cc/C52E-7ZSY>]

2.01(G) Potential Income

When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, **income includes the potential income that parent could earn, subject to that parent’s actual ability.**

(1) The amount of potential income imputed should be sufficient to bring that parent’s income up to the level it would have been if the parent had not voluntarily reduced or waived income.

(a) The amount of potential income imputed (1) should not exceed the level it would have been if there was no reduction in income, (2) not be based on more than a 40 hour work week, and (3) not include potential overtime or shift premiums.

(b) Imputation is not appropriate where an individual is employed full time (35 or more

234 This is a lower-case L, not the number one.

hours per week), but has chosen to cease working additional hours (such as leaving a second job or refusing overtime). Actual earnings for overtime, second job, and shift premiums are considered income.

(2) Use relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income. **To figure the amount of potential income that parent could earn, consider the following:**

(a) Prior employment experience and history, including reasons for any termination or changes in employment.

(b) Educational level and any special skills or training.

(c) Physical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment.

(d) Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).

(e) Availability of opportunities to work in the local geographical area.

(f) The prevailing wage rates in the local geographical area.

(g) Diligence exercised in seeking appropriate employment.

(h) Evidence that the parent in question is able to earn the imputed income.

(i) Personal history, including present marital status and present means of support.

(j) The presence of the parties' children in the parent's home and its impact on that parent's earnings.

(k) Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification.

(3) Imputation of potential income should account for the additional costs associated with earning the potential income such as child care and taxes that a parent would pay on the imputed income.

(4) The court makes the final determination whether imputing a potential income is appropriate in a particular case.

Minnesota

MINN. STAT. ANN. § 518A.32 (West 2015)

Subdivision 1. General. This section applies to child support orders, including orders for past support or reimbursement of public assistance, issued under this chapter, chapter 256, 257, 518B, or 518C. If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income. **For purposes of this determination, it is rebuttably presumed that a parent can be gainfully employed on a full-time basis.** As used in this section, "full time" means 40 hours of work in a week except in those industries, trades, or professions in which most employers, due to custom,

practice, or agreement, use a normal work week of more or less than 40 hours in a week.

Subd. 2. **Methods. Determination of potential income must be made according to one of three methods, as appropriate:**

(1) the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community;

(2) if a parent is receiving unemployment compensation or workers' compensation, that parent's income may be calculated using the actual amount of the unemployment compensation or workers' compensation benefit received; or

(3) the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher.

Subd. 3. **Parent not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis. A parent is not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis upon a showing by the parent that:**

(1) the unemployment, underemployment, or employment on a less than full-time basis is temporary and will ultimately lead to an increase in income;

(2) the unemployment, underemployment, or employment on a less than full-time basis represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child; or

(3) the unemployment, underemployment, or employment on a less than full-time basis is because a parent is physically or mentally incapacitated or due to incarceration, except where the reason for incarceration is the parent's nonpayment of support.

Subd. 4. **TANF recipient. If the parent of a joint child is a recipient of a temporary assistance to a needy family (TANF) cash grant, no potential income is to be imputed to that parent.**

Subd. 5. **Caretaker. If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:**

(1) the parties' parenting and child care arrangements before the child support action;

(2) the stay-at-home parent's employment history, recency of employment, earnings, and the availability of jobs within the community for an individual with the parent's qualifications;

(3) the relationship between the employment-related expenses, including, but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;

(4) the child's age and health, including whether the child is physically or mentally disabled; and

(5) the availability of child care providers.

This subdivision does not apply if the parent stays at home only to care for other nonjoint children.

Subd. 6. Economic conditions. A self-employed parent is not considered to be voluntarily unemployed, underemployed, or employed on a less than full-time basis if that parent can show that the parent's net self-employment income is lower because of economic conditions that are directly related to the source or sources of that parent's income.

Mississippi

MISS. CODE ANN. § 43-19-101 (West 2015)

§ 43-19-101. Calculating support

3) The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:

(a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self-employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an Individual Retirement Account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

Missouri

MO. SUP. CT. R. 88.01

Rule 88.01. Presumed Child Support Amount

(a) When determining the correct amount of child support, a court or administrative agency shall consider all relevant factors, including all relevant statutory factors.

(b) There is a rebuttable presumption that the amount of child support calculated pursuant to Civil Procedure Form No. 14 is the correct amount of child support to be awarded in any judicial or administrative proceeding.

MO. SUP. CT. R. Civ. Proc. Form 14

Form 14. Presumed Child Support Amount Calculation Worksheet

Line 1: Gross income

DIRECTION: Enter one-twelfth of the parent's yearly gross income.

"Gross income" includes, but is not limited to, salaries, wages, commissions, dividends, severance pay, pensions, interest, trust income, annuities, partnership distributions, social security benefits, retirement benefits, workers' compensation benefits, unemployment compensation benefits, disability insurance benefits, social security disability benefits (SSD) due to a parent's disability, veterans' disability benefits and military allowances for subsistence and quarters.

Overtime compensation, bonuses, earnings from secondary employment, recurring capital gains, prizes, retained earnings and significant employment-related benefits may be included, in whole or in part, in "gross income" in appropriate circumstances.

If a parent is unemployed or found to be underemployed, "gross income" may be based on imputed income.

Montana

MONT. ADMIN R. 37.62.106 (2015)

(1) "Imputed income" means income not actually earned by a parent, but which is attributed to the parent based on the provisions of this rule. It is presumed that all parents are capable of working at least 40 hours per week at minimum wage, absent evidence to the contrary.

(2) It is **appropriate to impute income** to a parent, subject to the provisions of (6) of this rule, **when the parent:**

- (a) is unemployed;**
- (b) is underemployed;**
- (c) fails to produce sufficient proof of income;**
- (d) has an unknown employment status; or**
- (e) is a student.**

(3) In all cases where **imputed income is appropriate, the amount is based on the following:**

- (a) the parent's recent work history;**
- (b) the parent's occupational and professional qualifications; and**
- (c) existing job opportunities and associated earning levels in the community or the local trade area.**

(4) Imputed income may be in addition to actual income and may not necessarily reflect the same rate of pay as the actual income.

(5) **Income is imputed according to a parent's status as a full- or part-time student, whose education or retraining will result, within a reasonable time, in an economic benefit to the child for whom the support obligation is determined, unless actual income is greater. If the student is:**

- (a) full-time, the parent's earning capacity is based on full-time employment for 13 weeks and approximately half of full-time employment for the remaining 39 weeks of a 12-month period; or
- (b) part-time, the parent's earning capacity is based on full-time employment for a 12-month period.
- (6) **Income is not imputed if any of the following conditions exist:**
- (a) **the reasonable and unreimbursed costs of child care for dependents in the parent's household would offset in whole or in substantial part, that parent's imputed income;**
- (b) **a parent is physically or mentally disabled to the extent that the parent cannot earn income;**
- (c) **unusual emotional and/or physical needs of a legal dependent require the parent's presence in the home;**
- (d) **the parent has made diligent efforts to find and accept suitable work or to return to customary self-employment, to no avail; or**
- (e) **the court or hearing officer makes a finding that other circumstances exist which make the imputation of income inequitable.** However, the amount of imputed income shall be decreased only to the extent required to remove such inequity.

Nebraska

NEB. CT. R. § 4-204

. . . If applicable, earning capacity may be considered in lieu of a parent's actual, present income and **may include factors such as work history, education, occupational skills, and job opportunities.** Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.

Nevada

NEV. REV. STAT. ANN. § 125B.080 (West 2015)

Amount of payment: Determination.

8. If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, **that obligation must be based upon the parent's true potential earning capacity.**

New Hampshire

N.H. REV. STAT. ANN. § 458-C:2 (2015)

458-C:2 Definitions.

In this chapter:

iv. (a) **The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where**

the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated.

New Jersey

N.J. CT. R. 5:6A [Child Support Guidelines]

The guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court. **The guidelines may be modified or disregarded by the court only where good cause is shown. Good cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and b) the fact that an injustice would result from the application of the guidelines.** In all cases, the determination of good cause shall be within the sound discretion of the court.

N.J. CT. R. PRAC. APP. 9-A

APPENDIX IX-A. CONSIDERATIONS IN THE USE OF CHILD SUPPORT GUIDELINES

10. Adjustments to the Support Obligation- The factors listed below may require an adjustment to the basic child support obligation.

a. *Other Legal Dependents of Either Parent.* These guidelines include a mechanism to apportion a parent's income to all of his or her legal dependents regardless of the timing of their birth or family association (i.e., if a divorced parent remarries and has children, that parent's income should be shared by all children born to that parent). *Legal dependents* include adopted or natural children of either parent who are less than 18 years of age or more than 18 years of age and still attending high school or other secondary school. Stepchildren are not considered *legal* dependents unless a court has found that the stepparent has a legal responsibility for the stepchildren. When considering the use of this adjustment, the following principles shall apply:

- (1) this adjustment shall be used only if requested by a serial-family parent and the income, if any, of the *other parent* of the secondary family is provided to the court;
- (2) **if the other parent in the secondary family is voluntarily unemployed or underemployed, the court shall impute income to that person (see paragraph 12) to determine the serial family parent's obligation to the children in the secondary family;**
- (3) this adjustment may be applied to other dependents born before or after the child for whom support is being determined;
- (4) this adjustment may be requested by either or both parents (custodial and/or non-custodial);
- (5) the adjustment may be applied when the initial award is entered or during subsequent modifications of the support order.

...

12. Imputing Income to Parents. The fairness of a child support award resulting from the application of these guidelines is dependent on the accurate determination of a parent's net income. **If the court finds that either parent is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent according to the following priorities:**

- a. impute income based on **potential employment and earning capacity using the parent's work history, occupational qualifications, educational background, and prevailing job opportunities in the region.** The court may impute income based on the parent's former income at that person's usual or former occupation or the average earnings for that occupation as reported by the New Jersey Department of Labor (NJDOL);
- b. if potential earnings cannot be determined, impute income based on the **parent's most recent wage or benefit record** (a minimum of two calendar quarters) on file with the NJDOL (note: NJDOL records include wage and benefit income only and, thus, may differ from the parent's actual income); or
- c. if a NJDOL wage or benefit record is not available, **impute income based on the full-time employment (40 hours) at the New Jersey minimum wage (\$7.25 per hour).**

In determining whether income should be imputed to a parent and the amount of such income, the court should consider: (1) **what the employment status and earning capacity of that parent would have been if the family had remained intact or would have formed,** (2) **the reason and intent for the voluntary underemployment or unemployment,** (3) **the availability of other assets that may be used to pay support, and (4) the ages of any children in the parent's household and child-care alternatives.** The determination of imputed income shall not be based on the gender or custodial position of the parent. Income of other household members, current spouses, and children shall not be used to impute income to either parent except when determining the other-dependent credit. When imputing income to a parent who is caring for young children, the parent's income share of child-care costs necessary to allow that person to work outside the home shall be deducted from the imputed income.

New Mexico

N.M. STAT. ANN. § 40-4-11.1 (West 2015)

§ 40-4-11.1. **Child support; guidelines**

C. For purposes of the guidelines specified in this section:

- (1) "income" means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed. **Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled.** If income is imputed, a reasonable child care expense may be imputed. The

gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage;

New York

N.Y. FAM. CT. ACT § 413 (McKinney 2015)

§ 413. Parents' duty to support child

1.(b) (5) "Income" shall mean, . . . (v) **an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;**

North Carolina

Conf. of Chief District Judges, N.C. CHILD SUPPORT GUIDELINES, January 1, 2011, <http://www.nccourts.org/forms/documents/1226.pdf> [<http://perma.cc/JZ33-K8RV>]

Income: (3) Potential or Imputed Income. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. Potential income may not be imputed to a parent who is physically or mentally incapacitated or is caring for a child who is under the age of three years and for whom child support is being determined.

The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

North Dakota

N.D. ADMIN CODE 75-02-04.1-01 (2015)

Definitions. 4.b.

b. Examples of gross income include salaries, wages, overtime wages, commissions, bonuses, employee benefits, currently deferred income, dividends, severance pay, pensions, interest, trust income, annuities income, gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, distributions of retirement benefits, receipt of previously deferred income to the extent not previously considered in determining a child support obligation for the child whose support is under consideration, veterans' benefits

(including gratuitous benefits), gifts and prizes to the extent they annually exceed one thousand dollars in value, spousal support payments received, refundable tax credits, value of in-kind income received on a regular basis, children's benefits, **income imputed based upon earning capacity**, military subsistence payments, and net income from self-employment.

Ohio

OHIO REV. CODE ANN. § 3119.01(5), (11) (West 2015)

Calculation of child support obligation definitions.

(5) "Income" means either of the following:

- (a) For a parent who is employed to full capacity, the gross income of the parent;
- (b) **For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent.**

...

(11) "Potential income" means both of the following for a parent who the court pursuant to a court support order, or a child support enforcement agency pursuant to an administrative child support order, determines is voluntarily unemployed or voluntarily underemployed:

(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

- (i) **The parent's prior employment experience;**
- (ii) **The parent's education;**
- (iii) **The parent's physical and mental disabilities, if any;**
- (iv) **The availability of employment in the geographic area in which the parent resides;**
- (v) **The prevailing wage and salary levels in the geographic area in which the parent resides;**
- (vi) **The parent's special skills and training;**
- (vii) **Whether there is evidence that the parent has the ability to earn the imputed income;**
- (viii) **The age and special needs of the child for whom child support is being calculated under this section;**
- (ix) **The parent's increased earning capacity because of experience;**
- (x) **The parent's decreased earning capacity because of a felony conviction;**
- (xi) **Any other relevant factor.**

Oklahoma

OKLA. STAT. ANN. tit. 43, § 118B(D) (West 2015)

D. Imputed income.

1. Instead of using the actual or average income of a parent, **the court may impute gross income to a parent under the provisions of this section if equitable.**

2. The following factors may be considered by the court when making a determination of willful and voluntary underemployment or unemployment:

- a. whether a parent has been determined by the court to be willfully or voluntarily underemployed or unemployed, including whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the obligation of the parent to support his or her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future,
- b. when there is no reliable evidence of income,
- c. the past and present employment of the parent,
- d. the education, training, and ability to work of the parent,
- e. the lifestyle of the parent, including ownership of valuable assets and resources, whether in the name of the parent or the current spouse of the parent, that appears inappropriate or unreasonable for the income claimed by the parent,
- f. the role of the parent as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the ability of the parent to work outside the home, and the need of that parent to continue in that role in the future, or
- g. any additional factors deemed relevant to the particular circumstances of the case.

Oregon

OR. REV. STAT. ANN. § 25.275(1)(a)–(b) (West 2015)

Criteria for determining amount of child support awards

(1) The Division of Child Support of the Department of Justice shall establish by rule a formula for determining child support awards in any judicial or administrative proceeding.

In establishing the formula, the division shall take into consideration the following criteria:

- (a) All earnings, income and resources of each parent, including real and personal property;
- (b) **The earnings history and potential of each parent;**

OR. ADMIN. R. 137-050-0715

(1) "Income" means the actual or potential gross income of a parent as determined in this

rule. Actual and potential income may be combined when a parent has actual income and is unemployed or employed at less than the parent's potential.

...

(3) "Potential income" means the parent's ability to earn based on relevant work history, including hours typically worked by or available to the parent, occupational qualifications, education, physical and mental health, employment potential in light of prevailing job opportunities and earnings levels in the community, and any other relevant factors. A determination of potential income includes potential income from any source described in section 4 of this rule.

...

(6) If a parent's actual income is less than the parent's potential income, the court, administrator, or administrative law judge may impute potential income to the parent.

(7) **If insufficient information about the parent's income history is available to make a determination of actual or potential income, the parent's income is the amount the parent could earn working full-time at the minimum wage in the state in which the parent resides.**

(8) **Potential income may not be imputed to:**

(a) **A parent unable to work full-time due to a verified disability;**

(b) **A parent receiving workers' compensation benefits;**

(c) **An incarcerated obligor as defined in OAR 137-055-3300; or**

(d) **A parent whose order is being temporarily modified under ORS 416.425(13).**

Pennsylvania

PA. R. CIV. P. 1910.16-2

Support Guidelines. Calculation of Net Income

(d) Reduced or Fluctuating Income.

(1) ***Voluntary Reduction of Income.* When either party voluntarily assumes a lower paying job, quits a job, leaves employment, changes occupations or changes employment status to pursue an education, or is fired for cause, there generally will be no effect on the support obligation.**

(2) ***Involuntary Reduction of, and Fluctuations in, Income.* No adjustments in support payments will be made for normal fluctuations in earnings. However, appropriate adjustments will be made for substantial continuing involuntary decreases in income, including but not limited to the result of illness, lay-off, termination, job elimination or some other employment situation over which the party has no control unless the trier of fact finds that such a reduction in income was willfully undertaken in an attempt to avoid or reduce the support obligation.**

(3) ***Seasonal Employees.* Support orders for seasonal employees, such as construction**

workers, shall ordinarily be based upon a yearly average.

(4) *Earning Capacity.* If the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing or on the record. Generally, the trier of fact should not impute an earning capacity that is greater than the amount the party would earn from one full-time position. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including the choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment.

Rhode Island

R.I. GEN. LAWS 1956 § 15-5-16.2(f) (2015)

§ 15-5-16.2. Child support

(f) In any proceeding to establish support, or in any case in which an obligor owes past due support, for a child or children receiving public assistance pursuant to chapter 5.1 of title 40, the court or its magistrate, **upon a finding that an able bodied absent parent obligor is unemployed, underemployed or lacks sufficient income or resources from which to make payment of support equal to the public assistance payment for the child or children, or is unable to pay the arrearages in accordance with a payment plan, may order that parent to perform unpaid community service for at least twenty (20) hours per week through community service placements arranged and supervised by the department of human services or to participate in any work activities that the court deems appropriate. The performance of community service shall not be a basis for retroactive suspension of arrears due and owing.**

South Carolina

Child Support Guidelines, <http://www.state.sc.us/dss/csed/forms/2006guidelines.pdf>
[<http://perma.cc/R33E-7SWC>]

3. DETERMINATION OF CHILD SUPPORT AWARDS

3.1 Income

3.1.1 Definition

The guidelines define income as the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed.

...

3.1.5 Potential Income

If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent. **If income is imputed to a custodial parent, the court may also impute reasonable day care expenses. Although Temporary Assistance to Needy Families (TANF) and other means-tested public assistance benefits are not included in gross income, income may be imputed to these recipients. However, the court may take into account the presence of young children or handicapped children who must be cared for by the parent, necessitating the parent's inability to work.**

1. The court may also wish to factor in considerations of rehabilitative alimony in order to enable the parent to become employed.
2. **In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community.**

South Dakota

S.D. CODIFIED LAWS § 25-7-6.4 (2015)

25-7-6.4. Rebuttable presumption of employment at minimum wage

Except in cases of physical or mental disability, it is presumed for the purposes of determination of child support that a parent is capable of being employed at the minimum wage, including while incarcerated, and the parent's child support obligation shall be computed at a rate not less than full-time employment at the state minimum wage. Evidence to rebut this presumption may be presented by either parent.

Tennessee

TENN. CODE ANN. § 36-5-101(a)(8) (West 2015)

§ 36-5-101. Orders for support and maintenance; modifications; enforcement

(a)(8) When a court having jurisdiction determines child support pursuant to the Tennessee child support guidelines, based on either the actual income or the court's **findings of an obligor's ability to earn income**, the final child support order shall create an inference in any subsequent proceeding that the obligor has the ability to pay the ordered amount until such time as the obligor files an application with the court to modify the ordered amount.

Texas

TEX. FAM. CODE ANN. § 154.066(a)–(b) (West 2015)

(a) **If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply**

the support guidelines to the earning potential of the obligor.

(b) In determining whether an obligor is intentionally unemployed or underemployed, the court may consider evidence that the obligor is a veteran, as defined by 38 U.S.C. Section 101(2), who is seeking or has been awarded:

(1) United States Department of Veterans Affairs disability benefits, as defined by 38 U.S.C. Section 101(16); or

(2) non-service-connected disability pension benefits, as defined by 38 U.S.C. Section 101(17).

Utah

UTAH CODE ANN. § 78B-12-203(6)–(7) (West 2012)

§ 78B-12-203. Determination of gross income--Imputed income

(6) Gross income includes income imputed to the parent under Subsection (7).

(7)(a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally unable to earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills;
or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

Vermont

VT. STAT. ANN. tit. 15 § 653(5)(A) (West 2015)

§ 653. Definitions

5) “Gross income” means actual gross income of a parent.

(A) Gross income shall include:

...

(iii) the potential income of a parent who is voluntarily unemployed or underemployed, unless:

(I) the parent is physically or mentally incapacitated; or

(II) the parent is attending a vocational or career technical education program related to current employment, or a job training program sponsored by the Department of Labor, the Department of Economic Development, or the Agency of Human Services;

or

(III) the unemployment or underemployment of the parent is in the best interest of the child;

Virginia

VA. CODE ANN. § 20-108.1(B)(3) (West 2015)

§ 20-108.1. Determination of child or spousal support

B. In any proceeding on the issue of determining child support under this title, Title 16.1, or Title 63.2, the court shall consider all evidence presented relevant to any issues joined in that proceeding. The court’s decision in any such proceeding shall be rendered upon the evidence relevant to each individual case. . . The finding that rebuts the guidelines shall state the amount of support that would have been required under the guidelines, shall give a justification of why the order varies from the guidelines, and shall be determined by relevant evidence pertaining to the following factors affecting the obligation, the ability of each party to provide child support, and the best interests of the child:

....

3. Imputed income to a party who is voluntarily unemployed or voluntarily underemployed; provided that income may not be imputed to a custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation and provided further, that any consideration of imputed income based on a change in a party’s employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party, including to attend and complete an educational or vocational program likely to maintain or increase the party’s earning potential;

Washington

WASH. REV. CODE ANN. 26.19.071(6) (West 2015)

(6) Imputation of income. The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. **The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors.** A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. **Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census, current populations reports, or such replacement reports as published by the bureau of census.**

West Virginia

W. VA. CODE ANN. § 48-13-804(a)–(b) (West 2015)

§ 48-13-804. Default orders

(a) In any proceeding in which support is to be established, if a party has been served with proper pleadings and notified of the date, time and place of a hearing before a family court judge and does not enter an appearance or file a response, the family court judge shall prepare a default order for entry establishing the defaulting party's child support obligation consistent with the child support guidelines contained in this article.

(1) When applying the child support guidelines, the court may accept financial information from the other party as accurate, pursuant to rule 13(b) of the Rules of Practice and Procedure for Family Court; or

(2) **If financial information is not available, the court may attribute income to the party based upon either:**

(i) **The party's work history;**

(ii) **Minimum wage, if appropriate; or**

(iii) **At a minimum, enter a child support order in a nominal amount unless, in the court's discretion, a zero support order should be entered.**

(b) All orders shall provide for automatic withholding from income of the obligor pursuant to part 4, article fourteen of this chapter.

W. VA. CODE ANN. § 48-1-205(a)–(d) (West 2015)

§ 48-1-205. Attributed income defined

(a) “Attributed income” means income not actually earned by a parent but which may be attributed to the parent because he or she is unemployed, is not working full time or is working below full earning capacity or has nonperforming or underperforming assets. Income may be attributed to a parent if the court evaluates the parent’s earning capacity in the local economy (giving consideration to relevant evidence that pertains to the parent’s work history, qualifications, education and physical or mental condition) and determines that the parent is unemployed, is not working full time or is working below full earning capacity. Income may also be attributed to a parent if the court finds that the obligor has nonperforming or underperforming assets.

(b) If an obligor: (1) Voluntarily leaves employment or voluntarily alters his or her pattern of employment so as to be unemployed, underemployed or employed below full earning capacity; (2) is able to work and is available for full-time work for which he or she is fitted by prior training or experience; and (3) is not seeking employment in the manner that a reasonably prudent person in his or her circumstances would do, then an alternative method for the court to determine gross income is to attribute to the person an earning capacity based on his or her previous income. If the obligor’s work history, qualifications, education or physical or mental condition cannot be determined, or if there is an inadequate record of the obligor’s previous income, the court may, as a minimum, base attributed income on full-time employment (at forty hours per week) at the federal minimum wage in effect at the time the support obligation is established. In order for the court to consider attribution of income, it is not necessary for the court to find that the obligor’s termination or alteration of employment was for the purpose of evading a support obligation.

(c) Income shall not be attributed to an obligor who is unemployed or underemployed or is otherwise working below full earning capacity if any of the following conditions exist:

(1) The parent is providing care required by the children to whom both of the parties owe a legal responsibility for support and such children are of preschool age or are handicapped or otherwise in a situation requiring particular care by the parent;

(2) The parent is pursuing a plan of economic self-improvement which will result, within a reasonable time, in an economic benefit to the children to whom the support obligation is owed, including, but not limited to, self-employment or education: *Provided*, That if the parent is involved in an educational program, the court shall ascertain that the person is making substantial progress toward completion of the program;

(3) The parent is, for valid medical reasons, earning an income in an amount less than previously earned; or

(4) The court makes a written finding that other circumstances exist which would

make the attribution of income inequitable: *Provided*, That in such case the court may decrease the amount of attributed income to an extent required to remove such inequity.

(d) The court may attribute income to a parent's nonperforming or underperforming assets, other than the parent's primary residence. Assets may be considered to be nonperforming or underperforming to the extent that they do not produce income at a rate equivalent to the current six-month certificate of deposit rate or such other rate that the court determines is reasonable.

Wisconsin

WIS. STAT. ANN. § 767.511 (West 2015)

767.511. Child support

(1g) Consideration of financial information. In determining child support payments, **the court may consider all relevant financial information or other information relevant to the parent's earning capacity**, including information reported under s. 49.22(2m) to the department or the county child support agency under s. 59.53(5).

(1j) Percentage standard generally required. Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9).

(1m) Deviation from standard; factors. Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:

(a) The financial resources of the child.

(b) The financial resources of both parents.

(bj) Maintenance received by either party.

(bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 U.S.C § 9902(2).

(bz) The needs of any person, other than the child, whom either party is legally obligated to support.

(c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.

(d) The desirability that the custodian remain in the home as a full-time parent.

(e) The cost of child care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.

(ej) The award of substantial periods of physical placement to both parents.

(em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.41.

(f) The physical, mental, and emotional health needs of the child, including any costs for health insurance as provided for under s. 767.513.

- (g) The child's educational needs.
- (h) The tax consequences to each party.
- (hm) The best interests of the child.
- (hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.**
- (i) Any other factors which the court in each case determines are relevant.**

WIS. ADMIN. CODE DCF § 150.04

(3) DETERMINING INCOME IMPUTED BASED ON EARNING CAPACITY. In situations where the income of a parent is less than the parent's earning capacity or is unknown, the court may **impute income to the parent at an amount that represents the parent's ability to earn, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community.** If evidence is presented that due diligence has been exercised to ascertain information on the parent's actual income or ability to earn and that information is unavailable, the court may impute to the parent the income that a person would earn by working 35 hours per week for the higher of the federal minimum hourly wage under 29 USC 206 (a) (1) or the state minimum wage in s. DWD 272.03. If a parent has gross income or income modified for business expenses below his or her earning capacity, the income imputed based on earning capacity shall be the difference between the parent's earning capacity and the parent's gross income or income modified for business expenses.

Wyoming

WYO. STAT. ANN. § 20-2-303(a)(ii) (West 2015)

§ 20-2-303. Definitions

(a)(ii) Gross income also means potential income of parents who are voluntarily unemployed or underemployed[.]