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Note

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Albert Einstein said that “[w]e can’t solve problems by using the same kind of thinking we used when we created them.” In spite of the wisdom of this quote, the field of child protection attempts to do just that—often couching seemingly new initiatives within old business methods and ways of thinking. The result is a system that disparately impacts people of color at every stage of child protection intervention. To be sure, the system recognizes that these disproportionate numbers exist. But what child protection agencies fail to appreciate is the impact that implicit bias has upon these outcomes. The failure to fully recognize this precursor to disproportionality has the unintended effect of endorsing it. What is more is that child protection is a field that implicates a fundamental right—perhaps the most basic of all fundamental rights—the right to raise one’s children. This Note recognizes the incongruity that arises when a system is permitted to exist that disparately impacts a fundamental right along racial lines. When state actions threaten such important rights, the intent requirement traditionally required to make out a constitutional disparate impact claim should be waived. By acknowledging that child protection engages in constitutionally suspect disparate impact, the seeds for new ways of thinking about the problems in child protection will be sown.
Implicit Bias in Child Welfare: Overcoming Intent

RAKESH BENIWAL

INTRODUCTION

It does not take much to recognize the pervasive force of race relations in society today. From the Black Lives Matter movement, to the Supreme Court’s repeated forays into Affirmative Action plans, race is no less an issue today than it was during the civil rights movement of the 1960s. While the underlying issue has largely been the same throughout our country’s history—the treatment of the minority by the majority—race relations today have a covert and systemic tone, making it a difficult issue to evaluate, to comprehend, and, perhaps most important, to remedy. Thus, the current civil rights movement faces a significant challenge to overcome the ills of racism. In hindsight, it was rather easy to identify a practice in the Jim Crow South that needed remedying. A water-fountain or bathroom designated “Whites Only” was an easy target. The readily identifiable target says nothing of the difficulty in instilling a cultural shift and wrestling power away from the majority. Still, at a minimum, the fact that a target could be identified assured that the minority could at least focus their attention. This is not the case when battling racially suspect, implicit bias. Often, such behavior or comments go unnoticed or, more problematically, are engrained in everyday life. Additionally, the status quo is a powerful tool in governance, and changing the hearts and minds

* Rakesh Beniwal has over fifteen years of social work experience, with ten years in the child welfare system. He has served in every stage of the child welfare model, from intake/investigations to adoption-related services. Special thanks to Professors Anne C. Dailey and Peter Siegelman for their guidance as well as my colleagues on the Connecticut Law Review. Most notably, I would like to thank my colleagues at the Department of Children and Families who toil endlessly every day for the less fortunate. Special thanks to Ryan Williams for his invaluable guidance.

1 See Melissa Hart, Subjective Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741, 741 (2005) (noting a similar dynamic in the difference between overt racism of the 1960s and the unconscious bias of the present).

2 See, e.g., Ijeoma Oluo, Uncomfortable Fact: Hipster Racism is Often Well-intentioned, GUARDIAN, (Feb. 13, 2015, 10:00 AM), http://www.theguardian.com/commentisfree/2015/feb/13/hipster-racism-well-intentioned [https://perma.cc/8RL4-NA3M] (describing how overt racism often elicits a negative reaction from society, whereas subtler forms of racism do not).

3 For example, the defendant in McCleskey v. Kemp relied upon a study exhibiting disparate impact in the imposition of the death penalty in the State of Georgia. 481 U.S. 279 (1987). In particular, the study “found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.” Id. at 287. Despite the disparate impact on blacks, the Court held that
of those who benefit from it is a difficult, if not insurmountable, task. These issues are particularly true when the driver of racial disparity is rooted in implicit bias.

Implicit biases are subtle thoughts that are activated involuntarily and, thus, are beyond our awareness or control. They differ from stereotyping because implicit biases are predominantly unconscious. In and of itself, implicit bias may be benign and can even be positive. However, when these negative biases are the predicate for decision making, a problem begins to take shape. Because of the unconscious nature of implicit bias, it is virtually impossible to prove through direct evidence. It is only in the resultant data that one can evaluate trends and postulate that implicit bias is a factor in those trends. Often, the only measure of implicit bias is through disproportionate results—the misrepresentation of an adversely affected subgroup compared to the larger population.

Implicit bias can take many forms and have a variety of impacts. Its resultant disproportionality in housing, educational, and employment opportunities is merely the starting point. In spite of the scope of the impact to society, our system of laws is stuck in between evidentiary requirements to combat the problem. Under a number of federal statutes, a showing of intent is not required to establish disparate impact liability, providing some measure of remedy for the effects of implicit bias. Under the Constitution, however, disparate impact liability requires a showing of intent, leaving implicit bias unchecked in an array of situations. Indeed, the study failed to “demonstrate a constitutionally significant risk of racial bias.” See id. at 313; see also Karlo v. Pittsburgh Glass Works, LLC, No. 2:10-cv-1283, 2015 WL 4232600, at *9 (W.D. Pa. July 13, 2015) (barring expert testimony on implicit bias in an employment disparate impact claim); Jones v. Nat’l Council of YMCA, No. 09 C 6437, 2013 WL 7046374, at *9 (N.D. Ill. Sept. 5, 2013) (striking testimony of expert witness’s evidence on implicit bias).


See id. (noting that implicit bias is “[a]ctivated involuntarily, without awareness or intentional control”).

See id. (noting that implicit bias “can be either positive or negative”).

FRED WULCZYN & BRIDGETTE LERY, RACIAL DISPARITY IN FOSTER CARE ADMISSIONS 5 (2007), http://www.citizenreviewpanelsny.org/documents/chapin_hall_document.pdf [https://perma.cc/B8CG-N6VH] (“Disproportionality arises whenever the proportion of one group in the comparison population (i.e., foster children) is either proportionally larger (overrepresentation) or smaller (underrepresentation) than the general population.”).


See, e.g., McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)) (“Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’”); Washington v. Davis, 426 U.S. 229, 239 (1976) (“We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”).
the Supreme Court appears to be recognizing the incongruity. In endorsing the availability of disparate impact claims under the Fair Housing Act, Justice Anthony Kennedy recently wrote,

Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way, disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.¹¹

Implicit bias can pervade the culture and function of administrative agencies as well. This is particularly evident when evaluating implicit bias as a function of discretion,¹² something agencies have no shortage of.¹³ Discretion can act like a petri dish—the more discretion an entity with power has, the more feasible it is for implicitly biased decision making to foster disproportionate results. The chain of events is as follows: discretion in the administrative function permits implicit bias to influence decision making, which leads to disparate treatment, and, ultimately, disproportionate results.¹⁴

This Note will evaluate this dynamic in the child welfare system. Section I will describe the scope of the problem, including the underlying disproportionate data, and the ways in which implicit bias is a precursor to that data. Much of the literature makes note of the importance of “decision points” in a Child Protection Services (“CPS”) case. This Note takes on a


¹² See McCleskey, 481 U.S. at 312 (acknowledging that “the power to be lenient [also] is the power to discriminate”) (internal citation omitted); see also Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 374 (2007) (arguing that social cognition research on implicit bias exhibits actors in the legal system may “unknowingly misremember trial information in systematically biased ways”); Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 SEATTLE U. L. REV. 795, 805–22 (2012) (describing how implicit bias can pervade three primary areas of prosecutorial discretion).

¹³ See, e.g., Autotote Enter., Inc. v. Conn. Div. of Special Revenue, 898 A.2d 141, 144 (Conn. 2006) (quoting Wood v. Zoning Bd. of Appeals, 784 A.2d 354, 360 (Conn. 2001)) (“[A]n agency’s factual and discretionary determinations are to be accorded considerable weight . . . .”)). For a state-by-state survey concluding the vast majority of jurisdictions defer to state-agency statutory construction, see Michael Pappas, No Two-Stepping in the Laboratories: State Deferece Standards and Their Implications for Improving the Chevron Doctrine, 39 MCGEORGE L. REV. 977, app. A (2008).

¹⁴ See WULCZYNN & LERY, supra note 7, at 5 (noting that “[d]isparity means a lack of equality” and thus “disproportionality . . . is a function of disparity in the entry and/or exit process [of a system]”).
similar approach, but this Section will pay particular attention to the life of a case in the Connecticut Department of Children and Families ("DCF"). What will become evident is that the volume of resources required to stamp out the problem of implicit bias pales in comparison to the sheer dearth of resources available.

In the context of child protection, the state-run administrative agency finds itself at the crossroads between the fundamental right to parent one’s child (and perhaps for a child to be parented by her parents and/or kin), and the right of the state to intervene when the health and safety of that child is threatened. As will be demonstrated, this state right is mired with opportunities for implicit bias to influence decision making. It is, however, impossible to find evidence of systemic implicit bias through any means other than the resultant data. Thus, the issue is locked in the dichotomy between different types of disparate impact claims presently available—a systemic problem that can be readily observed through data, but for which proving the requisite intent is impossible. Section II will evaluate this problem. In particular, this Note will argue that the Supreme Court should approach disproportionality in CPS in the same way it approaches any issue that curtails fundamental rights—with a more searching eye. As noted, the Court’s most recent foray into disparate impact suggests a greater understanding of how implicit bias can be evidence of disparate impact. Ultimately, the Section will argue that the intent requirement of a disparate impact claim should be waived where such an important fundamental right is involved.

A principal argument against the disproportionality observation is that people of color are more likely to have the characteristics associated with child maltreatment due to their underlying socioeconomic status ("SES"). Section II will combat this argument by drawing upon the growing recognition of the indigent as a discrete class, especially against such

15 See Kenji Yoshino, The Court Acknowledges "Unconscious Prejudice," SLATE (June 25, 2015), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_the_court_acknowledges_unconscious_prejudice.html [https://perma.cc/V3JB-YRHP] ("[T]he idea that disparate impact can be used to get at ‘unconscious prejudices’ is... an idea new to a Supreme Court majority opinion.").

16 That is, a person of color is more likely to be poor, which makes them more likely to suffer from the associated ills of poverty such as stress or drug use. See Elizabeth Bartholet, The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions, 51 ARIZ. L. REV. 871, 900 (2009) (arguing black children are “disproportionately associated with a set of characteristics that have been repeatedly found to be accurate predictors for child maltreatment... includ[ing] poverty, unemployment, single-parent status, substance abuse, and living in a significantly disadvantaged neighborhood”) (footnote omitted). This then results in greater degrees of maltreatment of their children. See MARIA CANCIAN ET AL., THE EFFECT OF FAMILY INCOME ON RISK OF CHILD MALTREATMENT 3 (Inst. of Res. & Poverty, Discussion Paper No. 1385-10 2010), http://www.irp.wisc.edu/publications/dps/pdfs/dp138510.pdf [https://perma.cc/K2VM-QFAJ] (noting that “child maltreatment risk is associated with various indicators of economic hardship...”) (internal citations omitted).
significant state action, and argue that the high Court should continue to
advance this protection within the context of CPS proceedings because of
the fundamental rights involved. As will be shown, it makes little
difference if the true culprit behind disproportionality in child welfare is
poverty because the Court has already suggested that the state is forbidden
from drawing distinctions that cast a dramatic burden upon the indigent.

The ultimate goal of this Note is not to define CPS as unconstitutional,
but to promote change within the system to combat this growing problem.
In that vein, Section III will argue for the acceptance of implicit bias as
part of the human condition. What is apparent is that, while there is no
universal remedy to combat implicit bias, ignoring the problem is not the
answer. The system needs to be more cognizant of the amount of discretion
involved in CPS, the way in which this discretion is ripe for the influence
of implicit bias, and the disproportionality that results. Alternatively, if the
culprit behind such pronounced disproportionality is SES, then the state
should be doing more to combat these underlying factors at their inception.
Regardless of one’s position, it is clear that “[t]he data on race, foster care,
disproportionality, and disparities indicate that something is out of balance
in the juvenile dependency system.”¹⁷ It is incumbent upon the same
system to provide the resources to fix it.

I. IMPLICIT BIAS AND THE DISPROPORTIONATE REPRESENTATION OF
PEOPLE OF COLOR IN CONNECTICUT’S DCF

Child protection is a decidedly polarizing field. There are certainly
those cases at the margins where there can be little doubt that state
intervention is not only warranted but necessary. Cases with clear physical
or sexual abuse, gross negligence, or abandonment are easily discernable
as warranting intervention. These cases, however, are few and far between.
Often times, issues fall within a middle gray area. In such instances, it is
quite likely that CPS workers’ biases pervade their assessments, whether or
not these biases are drawn along racial lines. One’s own experience in
childhood, as a parent, or in life in general, invariably shapes how they
would approach a particular situation in the home of another.¹⁸ These

¹⁷ Jesse Russell, Racial Disproportionality in Child Welfare: False Logic and Dangerous

¹⁸ For example, if a CPS worker grew up in a meticulously neat environment, they may be more
likely to condemn marginal environments. On the other hand, a worker that grew up in a less structured
environment may be more welcoming of the same home environment while conducting an assessment.
See JINA LEE ET AL., NAT’L CTR. FOR YOUTH LAW, IMPLICIT BIAS IN THE CHILD WELFARE,
EDUCATION, AND MENTAL HEALTH SYSTEMS 2, http://youthlaw.org/wp-
content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-
Literature-Review_061915.pdf [https://perma.cc/DME4-AE3Q] (last visited Nov. 6, 2016) (arguing
that “[d]epending on a decision-maker’s perspective, the idea of ‘abuse and neglect’ can encompass a
range of experiences . . .”).
implicit biases can certainly take on a racial dimension. Moreover, some of the “non-racial” biases—biases that a person may even be aware of—can serve as a proxy for race, compounding the problem.

Consistent with much of the literature in the area, this Section describes the main decision points in the average CPS case, but attempts to discern some of the areas that are prone to bias. It is vital to recognize that these different phases of a case are frequently handled by different employees within the same system. Each employee making these individualized decisions is not an automaton and thus brings his own worldview and experience (or lack thereof) into the equation. Increased exposure to people with authority to make insular decisions that affect the end result increases the likelihood of bias being a contributor to that result. While these decisions are subject to review, deference to the initial assessment is, by and large, the accepted practice.

As will become apparent below, DCF does not accept the majority of its referrals. When it does, it closes a lot of those referrals as being unsubstantiated. Still, these decisions should be viewed along a continuum with compounding effect. The more frequently a family receives a referral, the more likely it is to be accepted; the more often it is accepted, the more likely it is to be substantiated; the more often a family has allegations substantiated, the more likely a case gets opened for services; and the more often a case gets opened for services, the more likely a child ends up in care. Add implicit bias at one or more of these stages, and a concerning picture emerges.

A. The Referral

Exposure to Connecticut’s DCF begins with a referral to the Careline. In 2014, a black child was nearly twice as likely to be subject to a Family Assessment Response (“FAR”) as his white counterpart. For
the same year, a Hispanic/Latino child was 1.7 times as likely to be subject to the same type of intervention. In 2015, a black child was 2.9 times as likely to be subject to an investigation, while a Hispanic/Latino child was 2.6 times as likely to suffer the same fate.

National data suggests a similar dynamic. Indeed, some studies posit that similarly situated black families are overrepresented at about three times the rate of their white counterparts in acceptance for investigation by CPS.

Reports have a multitude of sources, but can generally be divided into two categories—community based reports and those made by mandated reporters. The first category refers to reports that are made by community members under no obligation to make such a report. The second refers to individuals who are obligated by state statute to make reports. Mandated reporters, however, tend to have experience with children and with the child welfare system in general. This affords them the knowledge to ask the child questions relevant to the report, which, in theory, creates more reliable information. Still, there is no reason to presume that mandated reporters are not subject to the same biases as everyone else.

Though the Careline relies on a Structured Decision Making ("SDM") tool to help make decisions, there are myriad ways in which bias can influence the decision whether to accept a report, as evidenced by the sheer volume of reports that are not accepted for intake. Writing for the Casey-CSSP Alliance for Racial Equity in the Child Welfare System, Dr. Robert B. Hill described a number of arbitrary factors—such as the report being made in the winter or spring, or coming from a professional—that...
influence the likelihood of whether a report will ultimately be accepted. A level of discretion (and a potential for bias) begin at this early stage because a Careline operator must decide whether to accept the report. These decisions, often made under pressure and within a short time frame, have the ingredients that could result in implicit bias. For example, studies have shown that individuals make disparate decisions based on black-sounding names alone. If such an effect were observed at the report acceptance stage, the entire decision tree that follows is based upon skewed data.

Several compelling, if dated, studies are suggestive of this dynamic and illustrate the fact that people of color are more likely to be reported for child maltreatment than white children. Dr. Hill describes situations in which “both public and private hospitals overreport[] abuse and neglect among blacks and underreport[] maltreatment among whites.” The research also indicates that black women are more likely to be reported for abuse when their newborns test positive for drugs at birth. Certainly such women should be subjected to CPS intervention. However, if bias is observed in reports that should be based on objective criteria for acceptance, then it does not bode well for allegations that fall in a grey area where acceptance is subject to discretion.

Upon acceptance, the reports are classified according to severity and a response time is assigned, which governs how promptly the intake worker must respond to the family. A report codified with a short response time can create heightened tension in the responding worker and direct outcomes. Noting the presence of a similar dynamic in the judicial branch, the National Center for State Courts observed, “[d]ecision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes—recalling facts in ways biased by stereotypes and making more stereotypic judgments—than decision makers whose cognitive
abilities are not similarly constrained." \(^{39}\) Indeed, due to the incredible demands placed upon the average CPS worker, this issue pervades the endeavor from start to finish.

Connecticut, along with a number of other states, has adopted a differential response model ("DRS")\(^{40}\) that is in line with the nationwide trend.\(^{41}\) The system, however, presents an added level of discretion—and with it, an increase in disproportionality. In DRS, a determination is made by the Careline as to whether the report is of one of two types. The report may either be found to be of: (1) a less severe nature, warranting only a voluntary, Family Assessment Response ("FAR") track; or (2) of a more severe nature, warranting an investigation track.\(^{42}\) It is important to note that the voluntary track is just that—a family can decline assessment before it even begins.\(^{43}\) However, Connecticut’s system contains certain "rule-outs" which require an investigation, regardless of the allegations.\(^{44}\) While there are some purely objective rule-outs such as a newborn or mother testing positive for drugs, others are contingent upon exposure to the DCF system itself, such as two or more substantiated investigations within the last year, or a previous risk assessment of "high."\(^{45}\) These are

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\(^{39}\) NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 4 (2012), http://www.ncsc.org/-/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.aspx [https://perma.cc/BYG-7RXD]. The paper relies on a number of empirical studies to come to the general conclusion that stressful situations increase the prevalence of implicit bias. Id.


\(^{41}\) See id. (signifying the importance of DRS by stating that DRS has been instituted or is being planned in twenty-four states); see also U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, DIFFERENTIAL RESPONSE TO REPORTS OF CHILD ABUSE AND NEGLECT 3 (2014) [hereinafter DIFFERENTIAL RESPONSE], https://www.childwelfare.gov/pubPDFs/differential_response.pdf [https://perma.cc/MLF2-7AD8] ("Over the past two decades, more than two-thirds of all states across the country have implemented or initiated plans for [Differential Response]"). This system, however, is not without its critics. See, e.g., Daniel Heimpel & Elizabeth Bartholet, DCF Shift Puts Children’s Safety at Risk, HARTFORD COURANT (Jan. 24, 2014), http://articles.courant.com/2014-01-24/news/hc-op-dheimpel-connecticut-dcf-children-safety-at--20140124 _dcf-response-children [https://perma.cc/WHZ3-628F] ("The state’s reliance on an unproven money-saving system . . . raises questions about their safety and appears to contribute to worsening treatment of children under the supervision of [DCF].").

\(^{42}\) See DIFFERENTIAL RESPONSE, supra note 41, at 2 (describing the difference between an "investigation," which is reserved for high-risk cases, and an "alternative response," which is reserved for low- and moderate-risk cases).

\(^{43}\) See Hamilton, supra note 40 (explaining that participation in DRS for families is voluntary).

\(^{44}\) CONN. DEP’T OF CHILDREN & FAMILIES, DIFFERENTIAL RESPONSE: A PROMISING APPROACH TO SERVING CONNECTICUT’S CHILDREN, FAMILIES, AND COMMUNITIES 3 http://www.ct.gov/def/lib/dcf/drs/pdf/drs_model_overview.pdf [https://perma.cc/5KT6-7Y55] (presenting fifteen examples of "exceptional circumstances" where DCF may investigate due to safety and/or risk concerns).

\(^{45}\) Id. For an explanation of how subjectivity can be imbued into a purportedly objective risk assessment, see infra text accompanying notes 75–76.
problematic because if the underlying system is implicitly biased and disparate impacts result, then utilizing past dispositions to make future determinations becomes a self-fulfilling prophecy. More concerning is the fact that this decision can be made in the field as well, since a worker has the option of switching the tracks to an investigation, adding yet another opportunity for bias to influence a decision. The practical effect is that if families are repeatedly referred for a FAR, and decline or do not comply with services, they are eventually placed on the investigation track.

B. The Intake

In 2015, black children who came to the attention of DCF were nearly twice as likely to be substantiated as victims of abuse and/or neglect as their white counterparts. Similarly, those children classified as “Hispanic/Latino, Any Race” were 2.6 times as likely to be substantiated victims, and the catch-all category of “Non-Hispanic, Other” were three times as likely to be substantiated victims of abuse and/or neglect.

These trends are reflected nationally. The United States Department of Health and Human Services collects data submitted voluntarily by the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico. Specifically, the National Child Abuse and Neglect Data System (“NCANDS”) collects “case-level data” for each report of alleged child abuse and neglect, as well as the disposition of the CPS response. Like Connecticut, the two most prevalent dispositions are whether the allegations are substantiated or unsubstantiated. Using overall child population estimates released annually by the United States Census Bureau, the NCANDS establishes rates of abuse or neglect per one thousand children in the overall population. The study defines a victim “as a child for whom the state determined at least one maltreatment was substantiated or indicated, or the child received a disposition of alternative response victim including any child who died of child abuse and/or neglect.” The aggregate national results indicate that CPS found black children to be victimized at 15.3 per one thousand children, while white children were subject to the same finding at just 8.4 per one thousand

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46 Id.; see also Hamilton, supra note 40.
47 PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3.
48 Id.
49 CHILD MALTREATMENT, supra note 33, at 3.
50 Id.
51 POLICY MANUAL, supra note 21, at 34–36 (“Upon completion of the field response, the investigator shall . . . complete the investigation and make a determination, based upon reasonable cause . . . whether child abuse or neglect is substantiated or not substantiated . . . .”).
52 CHILD MALTREATMENT, supra note 33, at 17.
53 Id. at 27.
54 Id. at 21.
Implicit Bias in Child Welfare: Overcoming Intent

Interestingly, the NCANDS data indicates that Hispanic children are subject to a relatively similar rate of abuse and/or neglect as white children at 8.8 per one thousand children. The decision to substantiate allegations of abuse or neglect are rife with opportunities for implicit, or even explicit, bias to influence decision making. At the outset, one must be prepared to define what abuse and neglect are, since the definition sets the standard for what is to follow. Though a CPS agency may offer a sound definition, whether this is actually perceived as abuse or neglect to the individual child is an altogether different, and rather nebulous, question. This is different from other social crimes. While one can argue over the legal label placed upon a homicide (e.g., manslaughter, second-degree murder, or first-degree murder), the effect is the same—there are not varying degrees of death with varying impacts upon the victim. Death is death. Conversely, a “spanking” to one child may be abuse, where the same action committed against another may be discipline. Going without food for a day may be neglect in one context (e.g., a substance-abusing parent failing to feed his child), abuse in another (e.g., a parent depriving their child of food for extended periods as a form of punishment), or a socio-economic issue in a third (e.g., a loving parent who simply cannot afford a consistent meal). The ambiguity of this underlying definition is problematic because it requires discretion to resolve and becomes an incubator for bias. Moreover, the demands of the average CPS worker’s ever-increasing caseload compound the problem because they contribute to an inadequate assessment.

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55 Id. at 23.
56 Id. But see LEE ET AL., supra note 18, at 3 (“Latino children are disparately affected, since Latino families are more likely to have a substantiated case than White counterparts. Cases involving Latino children were also brought into the system more quickly, with less time devoted to assessment from the time of referral to the time of substantiation.”) (internal citations omitted).
57 See, e.g., POLICY MANUAL, supra note 21, at 34-2-7 (“A child may be found to have been physically abused who: has been inflicted with physical injury or injuries other than by accidental means, is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment, and/or has injuries at variance with the history given of them.”). The policy goes on to define neglect as a child who “has been abandoned, is being denied proper care and attention physically, educationally, emotionally, or morally, is being permitted to live under conditions, circumstances or associations injurious to his well-being, [or] has been abused.” Id.
58 See, e.g., id. (referencing abuse specifically, by adding that “[e]vidence must be ruled in after accepting for the child’s misbehavior, surrounding circumstances including the parent’s motive; the type of punishment administered; the amount of force utilized; the child’s age, size, and ability to understand the punishment.”) (emphasis added).
59 See NAT’L CTR. FOR STATE COURTS, supra note 39, at 2 (noting that “[w]hen the basis for judgment is somewhat vague (e.g. situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely.”).
60 See id. at 4 (describing the relationship between pressurized decision making and implicit bias).
A related issue in the investigation stage is the added subjectivity of applying a set of facts to these definitions. A child’s ability to recall facts with any degree of certainty varies as a function of his age. Additionally, much like the perception of the same incident may vary across children, the perception of an incident may vary across CPS workers. For example, appropriate discipline to one investigator may be abuse to another. To recapitulate, these perceptions are inevitably shaped by one’s own experience, both as children and as parents. This discretion is a natural outgrowth of the "reasonable cause to believe" standard espoused by DCF. However, what is "reasonable cause" to one worker may not be reasonable to another.

Perhaps the most impactful decision in this stage is the one that follows. Connecticut maintains a Central Registry—a list of individuals deemed too risky to be in contact with children. Until 2005, a substantiation carried with it automatic placement on the Central Registry. Since that time, it is a separate decision that is made based on a number of factors, but still subject to discretion. Individuals placed on the Central Registry are precluded from becoming foster parents in the future, both as kin and non-kin. Additionally, these individuals are limited in terms of what areas in which they may seek employment. There is an avenue for appeal, but oftentimes the individuals are placed on the registry well before their appeal is heard. This can have the effect of depriving the alleged perpetrator of significant rights with minimal due process. Moreover, assuring the individual receives notice of the decision and their right to

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61 See Duneesha De Alwis et al., Children's Higher Order Cognitive Abilities and the Development of Secondary Memory, PSYCHONOMIC BULL. & REV. 4 (Oct. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2834651/ (describing the results of a study exhibiting that the ability to recall improves significantly with age).

62 See POLICY MANUAL, supra note 21, at 34-2-2, 34-2-6.

63 See CONN. GEN. STAT § 17a-101k (2016) (describing DCF's statutory mandate to "maintain a registry of . . . findings of abuse or neglect of children"). The statute charges the Department with adopting regulations which "shall provide for the use of the registry on a twenty-four-hour daily basis to prevent or discover abuse of children." Id.

64 CONN. AGENCIES REGS. § 17a-101k-3(b) (describing a list of objective factors to consider when determining whether to place an individual on the Central Registry).

65 See id. § 17a-101k-3(c) ("In all other cases in which the department substantiates abuse or neglect by an individual responsible, and the individual is not recommended for entry on the central registry pursuant to subsection (b) of this section, the investigator shall review the case to determine whether the individual responsible poses a risk to the health, safety and well-being of children and should be listed on the central registry.").

66 See id. § 17a-145-152 (noting that a foster care license shall be denied to an individual who has ever had an allegation of child abuse or neglect substantiated, the necessary predicate to Central Registry placement).

67 Id. § 17a-101k-15(c) ("As permitted by law, prospective employers . . . may request background checks for any person . . . .")
IMPLICIT BIAS IN CHILD WELFARE: OVERCOMING INTENT

appeal is lacking at best.68

Also apart from a decision to substantiate allegations of abuse or neglect, is a decision as to whether a case shall be opened for further ongoing services.69 Additionally, a worker may elect to transfer an unsubstantiated case to community-based programs, or to open the case for ongoing services if his perception of the underlying issues warrants such an intervention.70 This latter standard is decidedly subjective and requires a worker to determine whether, in his view, a particular family can benefit from state intervention. The potential for arbitrary decision making under such a standard is patent—and another place in which bias can exert great influence. Compounding the issue is the fact that the decision governs how much additional exposure a particular family has to CPS.71 Indeed, there is a prevalent school of thought suggesting that this increased exposure may be the cause of disproportionality in child welfare.72

Illustrative of this problem is one of the principal tools DCF has to standardize these decisions—Structured Decision Making (“SDM”).73 This results-based tool is made up of several components, which are applied at various levels in the life of a case.74 Like all such tools, the “risk assessment” component is subject to a discretionary override of one level.75 Thus, a “low” risk case can become a “moderate” case at the investigator/supervisor’s discretion and subject a family, with no

68 See, e.g., Frank v. Dep’t of Children & Families, 94 A.3d 588, 607 (Conn. 2014) (holding the statute defining abuse, read in conjunction with DCF’s policy manual, is sufficient as notice of a teacher’s placement on the registry).

69 See POLICY MANUAL, supra note 21, at 34-3-6 (“Transfer to a DCF service unit is mandatory in all cases in which abuse is substantiated, unless deemed inappropriate by the Program Supervisor.”).

70 See id. (noting that if the investigation is unsubstantiated the CPS worker must determine whether to “[c]lose the case, with or without referral for services to be provided by another state agency or a community service provider[] or [t]ransfer to ongoing services if risk assessment indicates a moderate to high risk of child maltreatment, or if the family could benefit from the services offered by the Department.”).

71 See Harris & Hackett, supra note 19, at 202 (noting that children of color are more likely to be exposed to the child welfare system).

72 See LEE ET AL., supra note 18, at 4 (describing a study which found that black children were twice as likely to be placed in foster care in counties where black children comprised a small proportion of the total population).


74 For example, there are SDM tools that govern the decision whether to accept a report, whether there is an imminent safety risk warranting removal of children, or whether to reunify children with their family of origin. CHILDREN’S RESEARCH CTR., THE STRUCTURED DECISION MAKING MODEL: AN EVIDENCED-BASED APPROACH TO HUMAN SERVICES 4, http://www.nccdglobal.org/sites/default/files/publication_pdf/2008_sdm_book.pdf [https://perma.cc/8P9Q-9PF5] (last visited Sept. 24, 2016).

75 See id. at 10 (providing a template for the “risk assessment” tool adopted in a number of states, including Connecticut).
substantiated allegations, to the child welfare system. Since this tool purports to be objective, this finding is particularly problematic because it arbitrarily supports DCF’s decision to open the case, even in the context of any ensuing judicial proceedings.

Other jurisdictions have echoed this concern. During a visit to the University of Southern California, California’s CPS director, Phillip Browning, expressed his dismay with SDM: “[i]t’s a manual process. I was really very disappointed in the ability of a worker to manipulate [SDM] in any way they want to.”76 This same dynamic is present in Connecticut. If a worker views the family system in a way that is concerning to him, the tool is malleable enough to support his concerns. As suggested above,77 some of DCF’s practices can be rather self-fulfilling in nature. This dynamic is exacerbated by SDM: “[b]ecause these tools are products of research on the actual experience of families previously reported to the agency, it is possible to assess risk with a reasonably high degree of accuracy.”78 However, if the previous actual experience itself was inundated with bias, then these tools only serve to effectuate the bias.

Another problem with SDM is that the tools are not capacious enough to capture the variety of scenarios that any family may face.79 Marie Cohen, a former CPS worker in Washington, D.C.,80 writes: “[u]nfortunately, these SDM assessments rely on yes-or-no questions that do not capture many important factors.”81 Similarly, Los Angeles social worker Ruby Guillen describes an all too common problem in Connecticut: “With [SDM’s] yes or no approach, it does not differentiate between domestic violence involving threats with deadly weapons and verbal domestic disputes, or between a mother experiencing depression in the wake of her husband’s death and a mother suffering from schizophrenia who refuses medication.”82 Faced with fitting a square peg into a round hole, CPS workers are left making results-oriented decisions to complete

77 See supra text accompanying notes 44–46 (describing the self-fulfilling nature of DRS “rule-outs” that are reliant upon previous exposure to DCF).
78 CHILDREN’S RESEARCH CTR., supra note 74, at 9.
79 See id. (”[B]ecause they are research-based, risk assessments do not have to incorporate a comprehensive list of every conceivable variable that might be related to outcomes.”).
81 Id.
82 Slattery, supra note 76. Guillen is a twenty-year veteran of social work and has assessed the safety of over 6,000 children in their homes. Id.
what often becomes a mundane task. That is, the SDM does not govern the results, the results govern the SDM, and it becomes one of a long list of tasks the social worker must complete to move the case along to the next worker.83

C. Opened for Ongoing Services

In 2015, a black child was 1.8 times more likely than his white counterpart to be the subject of a case for ongoing services.84 A Hispanic/Latino child was 2.5 times more likely to suffer the same fate, and the catchall “other” category faced this disposition at three times the rate as white children.85

Occasionally, a particular family refuses to accept services. There are a number of reasons for this beyond that of the opinion of the social worker making this decision. The family may truly require assistance but refuse to succumb to the paternalistic notion of state oversight. More often, however, cases are in a grey area—there are some concerns, but no objectively clear indicators of abuse or neglect. The de facto rule for such cases is to implement services. If a family objects and the perceived issues continue, the case is referred to the Superior Court for Juvenile Matters.86 However, these perceived issues need not be directly observed by CPS, but, rather, can be based upon the observations of any service providers or school-based personnel that have contact with the family and make repeated referrals to DCF.87

When a case is considered ripe for judicial intervention, the DCF social worker prepares a petition (commonly referred to as a “neglect petition”) and seeks either protective supervision or commitment.88 While these petitions are subject to legal review, many of the staff attorneys are subject to the same working conditions as the CPS line staff and thus are prone to bias themselves. Moreover, these reviews are predicated upon the facts presented. If these facts are skewed at the outset, legal review is little more than a rubber stamp.

Protective supervision amounts to conditions set forth by the court.

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83 See, e.g., id. ("The [LA] county’s Children’s Special Investigation Unit reported in 2012 that SDM can be manipulated to justify pre-determined outcomes or avoid higher-level review.").
84 PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3.
85 Id.
86 See CONN. GEN. STAT. § 46b-129 (2015) (describing the authority of the Commissioner of DCF or designee to “file with [the] Superior court that has venue over such matter a verified petition plainly stating such facts as bring the child or youth within the jurisdiction of the court as neglected, uncared for or abused . . . .”).
87 See supra text accompanying notes 27–30 (describing the variety of sources that can make a referral to DCF).
88 CONN. GEN. STAT. § 46b-129(j) (2016).
which it (and, by proxy, DCF) monitors for a period,\textsuperscript{89} frequently six months. In practice, however, these court-mandated expectations largely mirror the expectations of DCF, and the impressions of the assigned social worker and/or supervisor. Thus, the court largely gives judicial approval of whatever implicit bias was imported into the case by a social worker.

Another feature that may promote this dynamic in Connecticut is the system for the appointment of legal representation.\textsuperscript{90} There are often repeat players:\textsuperscript{91} not only the attorneys, but many of the clients. Thus, an attorney representing a client may have formed an opinion well before reading the facts of a given case. Much like the child protection world in general, there are certain cases at the margins in which an attorney will defend their clients vigorously. But like any overworked, publicly appointed defender, there are limits to this zealously. Moreover, these attorneys are subject to bias themselves.\textsuperscript{92} This serves to protect the status quo, and maintain any underlying bias in the system that brings a case to the court system in the first place.

D. The Removal

In 2015, black children were almost twice as likely to enter into DCF care as their white counterparts.\textsuperscript{93} Hispanic children were three times as likely to be removed, and the other category was over three times as likely to suffer the same fate.\textsuperscript{94}

The outlook is not much better on the national scale. Securing overall population estimates from the United States Census and comparing it to statistics on children entering state care, the Child Information Gateway concluded that black children made up 31\% of those in foster care, while they only represent 14\% of the total population. Interestingly, Hispanic children make up 20\% of foster children but 22\% percent of the total child

\textsuperscript{89} Id.
\textsuperscript{90} See id. § 46b-129(b) ("[A]n attorney will be appointed for parents who cannot afford an attorney.").
\textsuperscript{91} See CONN. VOICES FOR CHILDREN, PROVIDING QUALITY REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN I (Apr. 2008), http://www.ctvoices.org/sites/default/files/welf08legalrepresent.pdf [https://perma.cc/8JLL-P33Y] (noting that Connecticut employs an "independent contractor" model, with a total of "196 separate contracts" that provide representation for children and parents in CPS proceedings).
\textsuperscript{92} See Harris & Hackett, supra note 19, at 209 ("I have a problem with any African American male over the age of twelve," was a statement from one court appointed attorney."). While the statement itself is closer to an example of explicit bias, the fact that it was made in the context of a focus group suggests that the attitude is more accurately described as implicit bias.
\textsuperscript{93} PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3.
\textsuperscript{94} Id.
Certainly there are instances in which the removal of a child appears objectively necessary. In Connecticut, the Department will seek an order of temporary custody in the first instance. However, should the matter be too imminent, or occur during a time in which an ex parte order is not possible (e.g., a weekend or after hours), the Department has the power to invoke an administrative hold for ninety-six hours. During this period, the Department is required to file for the order of temporary custody with the court, or return the child. Agency deference results in many of the administrative holds being accepted judicially. Once again, a major decision point is left in the hands of the agency and, in essence, the worker(s) involved. To be sure, an additional level of internal protection is included since a manager is tasked with the “hold” decision. However, the principal basis for this decision will always be rooted in the report of the assigned worker, and to a lesser extent, the supervisor. This is because the worker is tasked with gathering all relevant information and disseminating it up the chain of command. How this information is gathered and presented is within the discretion of the individual worker.

There is a rather perverse incentive at play in this decision. From a practical standpoint, it is actually easier to remove a child from a marginal situation, than endure the herculean effort of keeping a vulnerable child in a home with a number of risk factors. Add in any underlying bias and it becomes easy to see why the data is so skewed. Certainly there are CPS workers who err on the side of caution and remove a child in the marginal case. When considering children’s well being, there is a body of support for the idea that children have the right, beyond the rights of their parents, to safety and well-being. Yet many children in marginal cases are not removed. This disparity illustrates the incredible amount of discretion in

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96 See CONN. GEN. STAT. § 46b-129(b) (2016) (“If it appears from the specific allegations of the petition . . . the child . . . is in immediate physical danger from the child’s or youth’s surroundings, and . . . as a result of said conditions, the child’s or youth’s safety is endangered and immediate removal from such surroundings is necessary to ensure the child’s or youth’s safety, the court shall either (A) issue an order to the parents . . . or (B) issue an order ex parte vesting the child’s or youth’s temporary care and custody in a person related to the child or youth by blood or marriage or some other person or suitable agency.”).

97 Id. § 17a-101g(e)–(f).

98 Id. § 17a-101g(f).

99 See, e.g., Pamela Laufer-Ukeles, The Relational Rights of Children, 48 CONN. L. REV. 741 (2016) (arguing that legal rules intended to protect children should not rely on what is best for children alone, but take on a broader approach that considers the child’s relationships).

this decision that no current attempt at standardization can resolve. Though there is post hoc judicial scrutiny, agency deference offers little in the way of assurance that the agency is truly doing the right thing, and not suffering from bias. Moreover, the judicial system itself is no stranger to the phenomenon of implicit bias.\textsuperscript{101}

In some ways, however, a biased removal decision may have been made well before a case enters the ongoing services system. Utilizing probabilities analysis, Jesse Russell, senior research associate at the National Council of Juvenile and Family Court Judges, established an interesting concept. Extrapolating data from the 2005 National Survey of Child and Adolescent well-being, Russell determined that the probability that a black child will be placed in state care if a case is substantiated for abuse or neglect to be 0.84, whereas the probability that a white child whose allegations have been substantiated will end up in care is 0.61.\textsuperscript{102} Put differently, a black child who is determined to be a victim of abuse or neglect is 38\% more likely to be removed than his white counterpart.\textsuperscript{103} When considering all the potential bias that enters into the substantiation decision alone,\textsuperscript{104} the problem is quite telling.

E. The Long Road to Reunification

Children of color tend to remain in care longer than their white counterparts. While the data suggests that the overall length of stay in foster care is declining for all populations,\textsuperscript{105} the length of stay for black

\textsuperscript{101} See NAT'L CTR. FOR STATE COURTS, supra note 39, at 1 (describing the scope of the implicit bias problem in the judicial context); PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3 (indicating that black children are 13.7 times more likely to be committed for delinquency than white children).

\textsuperscript{102} Russell, supra note 17, at 111. Russell utilizes Bayes' theorem to come to this conclusion which is defined as "the probability of event A (e.g., rain tomorrow) given event B (e.g., the weatherman forecasting rain) depends not only on the relationship between A and B (i.e., the accuracy of the forecast) but [also] on the absolute probability of A independent of B (i.e., how much rain the area gets normally)." Id.

\textsuperscript{103} Id.

\textsuperscript{104} See Hill, supra note 34, at 20 (noting that one of the factors that made substantiation more likely was whether the family was black or Hispanic); see also supra text accompanying notes 47-62 (describing the disproportionate number of people of color subject to substantiation, coupled with the many ways in which implicit bias can enter into the decision-making process).

\textsuperscript{105} See DEP'T OF HEALTH & HUMAN SERVS., RECENT DEMOGRAPHIC TRENDS IN FOSTER 3 fig.3 (Sept. 2013), http://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf [https://perma.cc/2M5F-3N8Z] (indicating that the average length of stay in foster care across all races has decreased from an average of 31.3 months to 22.4 months from 2002 to 2012). But see CHILD MALTREATMENT, supra note 33, at ii ("The national estimates of children who received an investigation or alternative response increased 7.4 percent from 2010 (3,023,000) to 2014 (3,248,000).") (emphasis added). As result, the drop in overall length of stay may reverse course as well. Indeed, other data sources support this notion. See, e.g., CHILD WELFARE INFO. GATEWAY,
IMPLICIT BIAS IN CHILD WELFARE: OVERCOMING INTENT

children tends to be longer. National data indicates that, as of 2012, a black child’s length of stay in care was twenty-nine months, while his white counterparts exited care at around eighteen months.\textsuperscript{106}

Upon removal, a parent has to rehabilitate within fifteen months or face the prospects of a termination of parental rights petition.\textsuperscript{107} This is inherently problematic for the CPS worker since he has to make reasonable efforts to reunify the child,\textsuperscript{108} while at the same time seeking permanency for the child. The former task entails a great deal of effort on the part of the worker because he must refer the parents/guardians to services to address whatever issues led to the removal in the first place; conversely, the latter task may entail a completely different arrangement.\textsuperscript{109} Since the two goals may not always be aligned, deft maneuvering by the worker is required. Under such conditions, implicit bias can easily affect decision making. When faced with two equally competing interests, how is one to decide which path to take, without resorting to their own personal views? The prevailing standard for such a determination is the “best interests of the child.”\textsuperscript{110}

Still, this inquiry is fraught with ample opportunity for subjective

\textsuperscript{106} DEP’T OF HEALTH & HUMAN SERVS., \textit{supra} note 105, at 4 fig.3.

\textsuperscript{107} CONN. GEN. STAT. § 17a-111a(a) (2016) (“The Commissioner of Children and Families shall file a petition to terminate parental rights pursuant to section 17a-112 if . . . the child has been in the custody of the commissioner for at least fifteen consecutive months, or at least fifteen months during the [preceding] twenty-two months . . . .”).

\textsuperscript{108} \textit{Id.} § 17a-111a(b) (“The Commissioner of Children and Families Shall make reasonable efforts to reunify a parent with a child . . . .”).

\textsuperscript{109} \textit{Compare} CHILD WELFARE INFO. GATEWAY, \textit{Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children} 1 (Mar. 2016), https://www.childwelfare.gov/pubPDFs/reunify.pdf [https://perma.cc/47F--4AGS] (“Generally, these [reasonable] efforts consist of accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children. These services may include family therapy, parenting classes, drug and alcohol abuse treatment, respite care, parent support groups, and home visiting programs. Some commonly used terms associated with reasonable efforts include ‘family reunification,’ ‘family preservation,’ ‘family support,’ and ‘preventive services.’”), \textit{with id.} at 2 (“In many States, the statutes also require that when a court determines that family reunification is not in the best interests of the child, efforts be made to finalize another permanent placement for the child. Under the Adoption and Safe Families Act of 1997 (ASFA), while reasonable efforts to preserve and reunify families are still required, the child’s health and safety constitute the paramount concern in determining the extent to which reasonable efforts should be made.”).

\textsuperscript{110} See CONN. GEN. STAT. § 17a-111a(b) (2016) (noting the exception to the filing of a termination petition is “a compelling reason to believe that filing such petition is not in the best interest of the child”); \textit{id.} § 17a-111b(d) (“If the court determines that reasonable efforts to reunify the parent with the child are not required the Department of Children and Families shall use its best efforts to maintain the child in the initial out-of-home placement, provided the department determines that such placement is in the best interests of the child . . . .”); \textit{see also} CHILD WELFARE INFO. GATEWAY, \textit{Grounds for Involuntary Termination of Parental Rights} 2 (2013), https://www.childwelfare.gov//pubpdfs/groundtermin.pdf [https://perma.cc/7PP2-L9V9] (“When
analysis on any level.\textsuperscript{111}

To complicate matters further, research consistently indicates that the rehabilitative services available to families of color are significantly deficient and they are the strongest contributor to disproportionate numbers of children in foster care.\textsuperscript{112} This is even true when controlling for poverty; and though black parents are more likely to be in drug treatment, the services are found to be less adequate.\textsuperscript{113} The same holds true for mental health services.\textsuperscript{114} In concert, a person of color is more likely to have their child removed, and then more likely to face a more arduous journey in getting the child back.

In many ways, the length-of-stay metric is the culmination of a deficient system. In the first instance, DCF is mandated to try and locate a viable family for a child who comes into care.\textsuperscript{115} In a vacuum, this is a noble and proper endeavor with the most potential for a positive outcome, and one for which this Note ultimately argues. Longitudinal studies suggest that children placed with kin develop into healthier adults.\textsuperscript{116} However, if a family of color is more likely to receive a report,\textsuperscript{117} more likely to have the report accepted when received,\textsuperscript{118} more likely to be substantiated when investigated,\textsuperscript{119} and more likely to have a child addressing whether parental rights should be terminated involuntarily, most States require that a court . . . [d]etermine whether severing the parent-child relationship is in the child's best interests.

\textsuperscript{115} See, e.g., Hanke v. Hanke, 615 A.2d 1205, 1209, 1209 n.5 (Md. Ct. Spec. App. 1992) (reversing trial court's decision to grant overnight visitation with the child's biological father in spite of the fact that he admitted to sexually abusing his step-daughter; the appellate court noted "[i]t [was] obvious that the trial court was annoyed because Ms. Hanke moved to Kentucky and was unwilling to allow visitation" and "[i]t [was] also clear from reading the record that the trial judge had no particular fondness for Ms. Hanke's attorney.").

\textsuperscript{116} See, e.g., Harris & Hackett, supra note 19, at 202 (noting that children of color and their parents receive fewer, and poorer quality, service providers).

\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{117} See CONN. GEN. STAT. § 46b-129(c) (2016) ("The preliminary hearing on the order of temporary custody . . . shall be held in order for the court to . . . [i]dentify any person or persons related to the child or youth by blood or marriage residing in this state who might serve as licensed foster parents or temporary custodians and order the Commissioner of the Department of Children and Families to investigate and report to the court, not later than thirty days after the preliminary hearing, the appropriateness of placing the child or youth with such relative or relatives . . . ").

\textsuperscript{118} See, e.g., NAT'L SURVEY OF CHILD & ADOLESCENT WELL-BEING, NO. 15 KINSHIP CAREGIVERS IN THE CHILD WELFARE SYSTEM 1, http://www.acf.hhs.gov/sites/default/files/opre/rb_15_2col.pdf [https://perma.cc/5UGY-HJDY] (noting that children in kinship care arrangements are more likely to stay with kin caregivers, less likely to be subjected to repeat maltreatment, and exhibit improved behavioral symptoms).

\textsuperscript{119} See supra text accompanying notes 21–25 (describing the increased likelihood that people of color receive referrals for CPS involvement).

\textsuperscript{111} See supra text accompanying notes 34–37 (describing the ways in which bias can influence the decision to accept a CPS referrals on black families).

\textsuperscript{112} See supra text accompanying notes 47–48 (describing the higher rate of substantiated CPS reports against people of color).
removed when substantiated, then the kin options for children of color are severely limited. Children’s extended family members have an increased probability of suffering the same fate as their immediate family. Since these children are more likely to grow up in non-kin homes, and face the associated ills, they too are more likely to enter the system as adults, and repeat the cycle.

F. The Disproportionality Debate

To be sure, this issue is fraught with a nationalized debate. The most common counterargument to the notion of implicit bias in the child welfare system is that if children of color are more often the victims of actual abuse and/or neglect, then they will naturally be represented at higher rates in the ensuing child welfare system. However, some studies indicate that there is no difference in the overall maltreatment rate between black children and white children. Still others suggest that the maltreatment rates for black children are actually lower than that of white children. If true, such children should be subject to CPS less frequently.

One of the preeminent studies in the field presenting contrasting data is the National Incidence Study (NIS–4). This study is unique in that it attempts to identify not only incidences of abuse or neglect that come to the attention of CPS, but also those incidences that do not come within the purview of CPS. Its findings “revealed several significant and statistically marginal differences across the racial/ethnic groups in the incidence of . . . maltreatment.” This, however, contradicts the three previous iterations of the very same study in which no difference in maltreatment rates between races were found. The authors attribute the difference in findings “at least partly [to] . . . the greater precision of the NIS-4 estimates and partly due to the enlarged gap between black and

120 See supra text accompanying notes 102–04 (describing the increased probability that a black child substantiated as abused or neglected will enter care, as opposed to his white counterpart).
121 See, e.g., LEE ET AL., supra note 18, at 3 ("[M]any scholars show that similarly situated Black families are most severely overrepresented—about three times the rate of White families—at acceptance for investigation or assessment, despite no evidence to suggest that Black children were abused more severely than White children.") (internal citations omitted).
122 HILL, supra note 34, at 13–14 (citing ANDREA J. SEDLACK, & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3) (1996)).
124 Id. at 4-22.
white children in economic well-being.\textsuperscript{126}

However, there may be other factors at play. The NIS-4 takes a unique approach to identifying those children that do not come to the attention of CPS by relying on “sentinels”—community professionals who recognized maltreatment of children that were screened out by CPS without an investigation.\textsuperscript{127} A difference between the NIS-4 and its predecessors is that it increased the number of sentinel agencies by three hundred.\textsuperscript{128}

The NIS uses standard definitions of abuse and neglect and then applies two, overarching definitional standards: the Harm Standard and the Endangerment Standard.\textsuperscript{129} The study notes that the Harm Standard’s principal advantage is its strong objectivity because it requires an actual “act or omission [that] result[s] in demonstrable harm in order to be classified as abuse or neglect.”\textsuperscript{130} This, however, is only as objective as the agency making the determination that an event results in demonstrable harm.\textsuperscript{131} In contrast, the Endangerment Standard “counts children who were not yet harmed by abuse or neglect if a sentinel thought that the maltreatment endangered the children or if a CPS investigation substantiated or indicated their maltreatment.”\textsuperscript{132} This is not altogether different from a CPS agency’s fundamental charge—to try and determine whether a report of abuse or neglect is to be substantiated or unsubstantiated. However, the sentinels have an even more difficult task since they are attempting to quantify predictive neglect/abuse. This is notoriously difficult and wholly contingent upon discretion. Moreover, the sentinel agencies making these assessments are represented by “county sheriff departments, county departments of juvenile probation, public health, and public housing, and samples of municipal police departments, hospitals, shelters, day care centers, schools, other social services and mental health agencies.”\textsuperscript{133} Many of these agencies suffer from implicit bias themselves.\textsuperscript{134} If the NIS relies upon entities that suffer the same

\begin{itemize}
  \item \textsuperscript{127} SEDLACK ET AL., supra note 123, at 2-1-2-4. This presents a question beyond the scope of this Note. If the children in question were screened out by CPS which is governed by, perhaps arbitrarily, a common definition of abuse/neglect, then why are they considered maltreated by the study?
  \item \textsuperscript{128} Id. at 2-6.
  \item \textsuperscript{129} Id. at 3.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} See LEE ET AL., supra note 18, at 5 (noting that existing research “confirm[s] that racial bias plays some role in the decision-making process”).
  \item \textsuperscript{132} SEDLACK ET AL., supra note 123, at 3 (emphasis added).
  \item \textsuperscript{133} Id. at 2-7.
  \item \textsuperscript{134} See WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., A RESEARCH STUDY BRIEF: DO EARLY EDUCATOR’S IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? (Sept. 28, 2016), http://ziglercenter.yale.edu/publications/Preschool%20Implicit%20Bias%20Policy%20Brief
biases to determine whether abuse or neglect occurred, then they do not add any meaningful data to help make the assessment. They are merely repeating what a CPS agency does.

This dynamic is consistent with another counter-theory to disproportionality in the CPS system—visibility. Visibility theory suggests that children of color are more visible to the CPS system because their low socioeconomic status (“SES”) makes them more likely to be “visible” to a variety of social service systems like public medical care and public housing, which results in referrals to CPS. The notion of visibility alone engendering such heady state intervention is troubling in and of itself, particularly when these entities suffer the same issues related to implicit bias.

Another closely related counterargument is the prevalence of underlying disparities in SES. The theory holds that, since adults of color are more likely to be of lower SES, their children will naturally be subject to greater degrees of actual child maltreatment because of the stressors associated with low SES. If this alone explains the disproportionality, then it is still problematic and a potential violation of indigents’ fundamental rights just the same. Another matter to consider is how this issue exacerbates a child’s length of stay in state care. If given a choice, is a CPS worker more likely to place a maltreated child of color in the home of his extended family, which is more likely to be financially bereft, or with a well-off foster family which is statistically more likely to be white? Many of these families, however, are unwilling to take cross-cultural placements.

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135 See supra note 18, at 6–14 (describing implicit bias problems prevalent in the education system and the mental health system); PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3 (reporting that in 2014 a Hispanic child was nearly five times more likely to be committed delinquent than a white child, and a black child was over thirteen times more likely to suffer the same fate).

136 See, e.g., Harris & Hackett, supra note 19, at 202 (describing the visibility-bias hypothesis).

137 See supra note 16 (describing poverty as a precursor to CPS involvement).

138 See infra Part II.C. (describing the Supreme Court’s protection of the indigent in state action that disparately affects the poor).

139 See supra text accompanying note 126 (describing the growing income gap between white and black families).
G. The Social Worker

The information above makes use of data on disproportionate outcomes in the CPS system to arrive at the conclusion that there is implicit bias within the system’s workforce. However, it says little about the individual workers who practice. To be sure, CPS work is draining on many levels. One must be prepared to work long hours, to be saddled with administrative burdens, and to deal with some of the most horrific scenes imaginable. Still, there is always room for improvement, and several studies have looked at employee behavior to study the phenomenon of implicit bias.

A common teaching tool in the field of social work is the use of vignettes—a small illustration or account of an event to illicit a response from a social worker. One study constructed a test utilizing a “messy house” vignette in which social workers were offered photos of rooms from actual case files taken by law enforcement during a removal case. The authors superimposed either no baby, a white baby, or a black baby into the photo. The study concluded that “respondents who see the vignette with the black baby are more likely to say that the situation meets the state definition of neglect and/or is a reportable offense according to state law.” The authors added that the “indicators are highly correlated with the overrepresentation of black children among substantiated maltreatment cases.”

Another study relied on individuals in King County, Washington, and included not only CPS workers but also mandated reporters from hospitals, mental health, public health, schools, and interim care, as well as attorneys, court officials, and service providers like mental health, and family preservation specialists. The study attempted to discern the potential for bias across the key decision points in CPS. It revealed that many stakeholders were ill-prepared to account for culture or race in their process of assessing risk or in the family’s own approach to child safety.

[T]he evidence is clear that racial bias exists in the assessment of risk, sending children and families of color into the child welfare system at a higher rate. The

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140 Ards et al., supra note 125, at 1483.
141 Id.
142 Id. at 1489.
143 Id.
144 Harris & Hackett, supra note 19, at 204. Note that these are many of the same stake-holders relied upon for the NIS-4 “sentinel” cohort. See SEDLACK ET AL., supra note 123, at 2–7 (describing the demographics of the “sentinel” cohort).
145 Harris & Hackett, supra note 19, at 205–06.
146 Id. at 206.
disproportionate number of children of color in the child welfare system is reflective of racism that exists in the larger society.\textsuperscript{147} Another of the study's key findings was a confirmation of "earlier research that both attitudinal and structural factors appear to influence outcomes of decision making."\textsuperscript{148}

II. THE CONSTITUTIONALITY OF DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM

The Supreme Court has held that one of the fundamental rights protected by the Fourteenth Amendment includes the primacy of family, while also acknowledging that the definition of "family" has changed over time.\textsuperscript{149} Certainly, this "right" does not encompass being completely free from state intervention, particularly when parental behavior threatens the health and safety of children. Still, if exposure to a state-run system increases the probability of disrupting the fundamental right, then the Court certainly should be casting a more searching eye upon CPS. Indeed, the Court has repeatedly recognized that termination decrees "work[] a unique kind of deprivation,"\textsuperscript{150} in which a parent has a "fundamental interest[] ... in ensuring that the order which terminated all [their] parental ties was based upon a fair assessment of the facts and the law."\textsuperscript{151} If this "assessment" results in entire swaths of the population being represented in CPS at such a disproportionate rate, then its fairness is in doubt.

This Section makes the argument that, since these fundamental rights are implicated, the Court should remove the "intent" requirement to proving the disparate impact of CPS under the Fourteenth Amendment.

\textsuperscript{147} Id. at 207.
\textsuperscript{148} Id. at 210. Additional findings were as follows:

1. Subjective factors in the risk assessment processes may open the door for racial bias in assigning cases for investigation. 2. A lack of culturally specific remedial services (family preservation, mental health, substance abuse) or differences in perception regarding the value of these services may result in fewer in-home services to support the preservation of families of color and could play a role in differences between in-home placement vs. out-of-home services, and in the filing of dependencies. 3. Bias against fathers who do not dress consistent with the dominant court culture and failure to seek fathers or other relatives may increase the number of children of color remaining in out-of-home care rather than reunifying with family or kin. 4. A perception that the court process is objective may allow the bias reported in #3 above to proceed unchecked.

because it would warrant a strict-scrutiny approach when curtailed in any other way.\textsuperscript{152} In a sense, this is a hybrid Due Process/Equal Protection argument—there is a fundamental right being curtailed, that has a greater impact upon a protected class.\textsuperscript{153} The Section also makes note of the case \textit{M.L.B. v. S.L.J.},\textsuperscript{154} which, when viewed in the context of some of the SES counterarguments to disproportionality in CPS, suggests that the Court may have already set out such protection as it relates to indigency.

\textbf{A. CPS Involvement Significantly Burdens the Fundamental Right to Parent}

The seeds of a fundamental right to parent were sown in the Supreme Court's decision in \textit{Meyer v. Nebraska}.\textsuperscript{155} The Court, while reluctant to define the breadth of the liberty interests protected by the Fourteenth Amendment, noted that it at least includes the right to "establish a home and bring up children."\textsuperscript{156} Two years later, in \textit{Pierce v. Society of the Sisters},\textsuperscript{157} the Court limited the state from "unreasonably interfere[ing] with the liberty of parents and guardians to direct the upbringing . . . of children."\textsuperscript{158} The Court added that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."\textsuperscript{159} To be sure, this high duty encompasses assurances of safety, but it also encompasses an implicit promise that the same child will not languish in state care—if a parent possesses this high duty for the children in their care, certainly the state does too. The best way a state can limit children's length of stay in foster care is to find ways to prevent it from happening in the first place.

This fundamental right was revisited some years later in \textit{Prince v. Massachusetts},\textsuperscript{160} where the Court, despite endorsing a state law that prohibited child labor, still noted that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} That is, if the protected class was disparately impacted by something more than implicit bias, the Court would apply the familiar "strict-scrutiny" approach to evaluating the issue.
\item \textsuperscript{153} See Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way. . . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.").
\item \textsuperscript{154} 519 U.S. 102 (1996).
\item \textsuperscript{155} 262 U.S. 390 (1923).
\item \textsuperscript{156} Id. at 399.
\item \textsuperscript{157} 268 U.S. 510 (1925).
\item \textsuperscript{158} Id. at 534–35.
\item \textsuperscript{159} Id. at 535.
\item \textsuperscript{160} 321 U.S. 158 (1944).
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can neither supply nor hinder.” The Court added that the family is not beyond regulation in the public interest, but also noted that there is a “private realm of family life which the state cannot enter.” Indeed, time and time again, the Court has recognized that “[t]he liberty interest at issue . . . the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”

At minimum, the Court’s conclusion suggests that these rights must lay first with the parent before being relinquished to the state. Taking it a step further, they suggest that it is only through a parent’s omission that the state can interfere with this liberty interest. At the margins, it is easy to see where the state should fill these “parental gaps” and intervene—clear cases involving imminent risk to a child, for example, would be an appropriate exercise of the state’s police power. However, when the state endeavors to fill gaps that are debatable, or in a gray area, the state begins to encroach upon this fundamental right. Under such circumstances, a more exacting review of the state’s actions is warranted. Some years later, the Court would endorse this concept in one of the more influential decisions in the world of CPS—Santosky v. Kramer.

In Santosky, the Court took a procedural approach to protecting the fundamental right in question. The Court remained steadfast in its endorsement of the right to parent by ensuring that a burden of proof greater than a “preponderance of the evidence” was required for a state to sever this important bond. Writing for the majority, Justice Blackmun opined that a “‘clear and convincing’ standard of proof [struck] a fair balance between the rights of the natural parents and the State’s legitimate concerns” in a termination of parental rights proceeding. Importantly, the opinion added that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.” However, this is precisely what can happen in a CPS system that is infected with bias—

\[161 \text{Id. at } 166.\]

\[162 \text{Id.} \]

\[163 \text{Troxel v. Granville, 530 U.S. 57, 65 (2000); see also Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential . . . .'"); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role . . . is now established beyond debate as an enduring American tradition.").} \]

\[164 \text{While an abuse case may be viewed as an "act," in a broader sense it is a failure of the parent to provide a safe environment.} \]

\[165 455 U.S. 745 (1982). \]

\[166 \text{Id. at 769.} \]

\[167 \text{Id. at 753.} \]
particularly in any marginal case. An individual worker, relying on his own bias, takes on the perception that a parent or guardian is not a "model," and sets the chain of events in motion. This is confirmation bias in action—coming to a conclusion and finding facts to support that conclusion, rather than relying on the facts to reach the outcome. This becomes quite troubling if this "model" concept is actually a proxy for race.

The Court's language in *Troxel v. Granville*\(^\text{168}\) is particularly pertinent to the issues that CPS involvement can present. There, the Court addressed a state statute that permitted any third party to petition the local court for visitation.\(^\text{169}\) The Supreme Court was troubled, however, by the infringement on the parent's ability to make decisions for their own child.\(^\text{170}\) The Court noted that the practical effect was that the state could "disregard and overturn any decision by a fit custodial parent concerning visitation . . . based solely on a judge's determination of the child's best interests."\(^\text{171}\)

At the outset, CPS determines what a "fit" parent is. Moreover, a necessary component of the CPS system is that it cannot avoid imposing certain decisions upon a parent. To be sure, these tend to be in accord with social norms, but norms change. Indeed, Justice O'Connor was correct in her assertion that "[t]he demographic changes of the past century make it difficult to speak of an average American family."\(^\text{172}\) The same holds true for styles of parenting, but the state may be slow to respond to these normative changes, triggering CPS involvement.\(^\text{173}\) This provides ample opportunity for CPS to infringe and impose the decisions that it, as the state, thinks best. This becomes very evident in neglect cases—a dirty home, for example. A CPS worker may be quick to make a judgment concerning the overall state of a family based purely on the condition of

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\(^{168}\) 530 U.S. 57 (2000).
\(^{169}\) Id. at 60.
\(^{170}\) See id. at 67 (noting that the underlying statute contained "no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever").
\(^{171}\) Id.
\(^{172}\) Id. at 63.
the home; but the condition of the home says little of how impacted the child is by the home. This latter assessment is a more appropriate measurement that serves to recognize the state’s valid interest in the welfare of the child. In such cases, the imposition upon the fundamental right is less troubling, but such an assessment requires a broader, more holistic view, free of implicit bias.

Much of the jurisprudence in the fundamental rights sphere takes on the perspective of parents, though the Court has often taken on a protective view of the family in general, beyond that of the right to parent. However, this understanding of the fundamental nature of family should encompass a child’s right as well. While the state does have a “

\[\text{parens patriae} \text{ interest in preserving and promoting the welfare of the child,} \]

the child has a liberty interest too. This may take the form of preserving the bond with their biological parent or it may come in the form of preserving their right to associate with extended family and not be stuck in foster care. Indeed, the dissent in Santosky took on the perspective of the child, and their right to a normal home life: “[a] stable, loving home life is essential to a child’s physical, emotional, and spiritual well-being.” For a child languishing in foster care, however, her home life is anything but normal. It may well be that some form of separation from her parents is the only path to a normal home life, but there are more ways to accomplish this than by severing the parental right. This is particularly true in our changing society where the concept of family is not what it used to be.

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174 See Ards et al., supra note 125, at 1484 (containing two photos from CPS cases used in a vignette, one of which the average CPS worker would likely construe as “dirty” while the other would be viewed as marginal).

175 See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (“When a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate.”); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.”).


177 See, e.g., Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (2005) (“The court finds that the children have fundamental liberty interests at stake in deprivation and TPR [termination of parental rights] proceedings. These include a child’s interest in his own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his biological parents.”). But see DeShaney v. Winnebago Cty. Dep’t. of Soc. Serv., 489 U.S. 189, 191 (1989) (holding that the state has no constitutional duty to protect a child from the abusive acts of his father).

178 Santosky, 455 U.S. at 788–89 (Rehnquist, J., dissenting); see also Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“While this court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interest, and so, too, must their interests be balanced in the equation.”) (internal citations omitted); Santosky, 455 U.S. at 779 n.8 (“This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionality protected rights and liberties.”).
While these issues pervade CPS as a general matter whenever bias impedes sound decision making, it is more troubling when racially motivated implicit bias is involved. If the same hypothetical child referenced in Santosky is of color, she is more likely to wait to find a “stable loving home” than her white counterpart. And when she grows older, her children are more apt to suffer the same fate.

The argument is not that individuals should be completely free from state intervention that implicates this fundamental right. It would be irresponsible to suggest that the state should not intervene in certain circumstances. Indeed, the state clearly has an interest in regulating such matters. But that regulation can only go so far. There should be a recognition that CPS involvement has more impact than merely a social worker attempting to lend a helping hand. Were this the case, perhaps the issue would not be as disconcerting. However, those affected by the decisions of CPS do not always view them as a helping hand. This is particularly true, and rather self-fulfilling, when the system is prone to implicit bias—it stops looking like a helpful social worker, and more like undue intervention.

That CPS burdens the fundamental right to parent one’s children is beyond argument. This would not be troubling in the least if the state did so in a fair and unbiased way. But the chain of events that CPS involvement sets in motion does not foster unbiased results—the data is clear on that accord. Given the ills that a CPS system is prone to, as well as the degree of power it wields, the Court should apply a heightened level of scrutiny to CPS actions that cut across racial lines. If considering the data alone, this is an easily answered question. Indeed, the only remaining barrier is the acceptance of implicit bias as a predicate to the disparate results.

B. CPS Adversely Affects People of Color and Warrants an Exception to the Intent Requirement of Disparate Impact Claims When a Fundamental Right is Involved

It is difficult to argue against a disparate impact upon people of color in CPS as a construct, given the underlying data. The problem, however, is whether there is legal redress for what is happening in CPS. To be sure, the

179 See, e.g., Dorothy E. Roberts, Child Welfare’s Paradox, 49 WM. & MARY L. REV. 881, 884-85 (2007) (describing the results of case study conducted in Chicago in which three primary paradoxes were uncovered: individuals exposed to CPS viewed “caseworkers as both meddling investigators and appreciated helpers . . . foster parents take care of children [only] for the money, but also that some need more money to take proper care of their foster children . . . [and] protection agencies’ pervasive regulation of their lives, yet reli[ance] on the resources that these agencies provide.”).
legal standard for disparate impact is inconsistent at best.\textsuperscript{180} Still, this inconsistency has not gone unnoticed by the Court,\textsuperscript{181} and perhaps the tide is turning.

The Court’s most famous foray into disparate impact was in \textit{Washington v. Davis}.\textsuperscript{182} Here, the majority ultimately concluded that a purpose to discriminate must be present to invalidate an otherwise facially neutral statute that has a disproportionate impact.\textsuperscript{183} It would be naïve to think that there are not insular examples of CPS workers intentionally discriminating on the basis of race, such as removing or not removing a child simply because she is a person of color.\textsuperscript{184} However, it is doubtful that this occurs on a scale grand enough to trigger constitutional disparate impact claims. The more pressing issue in the CPS world is not purposeful, but rather, implicit discrimination. Conventional wisdom is that \textit{Davis} forecloses such a claim, but in the same opinion, the Court noted,

\begin{quote}
[A] law’s disproportionate impact is [not] irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race . . . . invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.\textsuperscript{185}
\end{quote}

A statutory framework that burdens a particular race twice as heavily as another should create this inference of discriminatory purpose.\textsuperscript{186} Indeed, there have been occasions on which “[t]he Court has accepted statistics as proof of intent to discriminate in certain limited contexts.”\textsuperscript{187}

\begin{footnotes}
\item[180] See supra text accompanying notes 8–10 (describing the inconsistency between constitutional claims of disparate impact which require an intent showing, and those under various federal statutes under which no such showing of intent is necessary).
\item[181] See supra text accompanying note 11 (describing Justice Anthony Kennedy’s acknowledgment of this inconsistency).
\item[182] 426 U.S. 229 (1976).
\item[183] Id. at 239.
\item[184] See Harris & Hackett, supra note 19, at 208 (describing a specific focus group in which a white social worker indicated that “I look at them [African American parents] to decide if they need services.”) (bracketed language in original).
\item[185] Davis, 436 U.S. at 241–42.
\item[186] See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 359, 374 (1886) (holding that an ordinance which operated to permit an overwhelming majority of white operators to keep their laundry services, but denied all but one Chinese operator the same luxury, as evidence that the state acted with discriminatory purpose).
\end{footnotes}
What is more is that this disparity is not only drawn along racial lines, but it also implicates a fundamental right. Thus, the Court should be even more willing to relax the intent requirement and evaluate CPS with greater scrutiny.

The concurrence in *Davis* supported this notion. Justice Stevens wrote, "[f]requently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally, the actor is presumed to have intended the natural consequences of his deeds." Justice Stevens went on to "suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's opinion might assume." Such is the case when evaluating gossamer concepts like implicit bias. Finding a bright line in such an esoteric domain is next to impossible. This, however, should not dissuade the Court from protecting the interests at stake here, and extending the special protection the Court has repeatedly afforded them in other contexts. To recapitulate, the real question is whether this oft recognized special protection supersedes the intent requirement of disparate impact analysis under the Fourteenth Amendment.

While the Court has not answered this question precisely, it has offered some guidance on the issue. In *M.L.B. v. S.L.J.*, Mississippi conditioned the appeal of a judicial termination of parental rights decree on the petitioner's ability to pay for the transcripts of the original proceeding. The result was that indigents were affected at greater rates since they could not pay for transcripts. In invalidating the underlying statute, the Court narrowed the *Davis* holding and added "we have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody . . . [is that] Termination decrees 'work[k] a unique kind of deprivation.'" Though the Court took note of the underlying policy concerns in the *Davis* holding by recognizing that if no intent requirement

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188 *Washington*, 426 U.S. at 253 (Stevens, J., concurring). We certainly prescribe to this concept in tort law.

189 Id. at 254.


191 See id. at 126 ("Washington v. Davis, however, does not have the sweeping effect respondents attribute to it."). Instead, the Court compared the instant case to that of *Williams v. Illinois*, 399 U.S. 235 (1970), which held unconstitutional an Illinois law neutral on its face, but "in operative effect expose[d] only indigents to the risk of imprisonment beyond the statutory maximum." *M.L.B.*, 519 U.S. at 126-27 (quoting *Williams*, 399 U.S. at 242) (emphasis in original).

for disparate impact analysis were present, then a whole class of laws would be suspect, it still remained on the side of family and protected the petitioner, despite the lack of intent in the underlying statute. Perhaps most important, the Court was willing to provide protection to the indigent, which is not even a protected class. Much like the instant issue, the Court seemed to recognize that the fundamental right involved is far more important than the intent requirement.

Like M.L.B. and unlike Davis, the policy concerns underlying the disproportionality debate are about the fundamental right to parent one's child, not about whether a whole class of laws would be subject to disparate impact analysis. Indeed, no invalidation of a class of laws is warranted here. The individual states can, and should, protect their youth. However, greater protections to limit the invidiousness of implicit bias are necessary when a fundamental right is involved.

The principal counterargument to the M.L.B. v. S.L.J. logic would be that, given the facts of that case, it only applies to the termination of parental rights proceeding itself, and not necessarily the CPS system as a whole. But the chain of events described in the decision points are a precursor to the ultimate result of a termination decree. Each decision point compounds upon the next. What is more is that these deficiencies propagate on their own accord exponentially, targeting swaths of communities. This is well illustrated by Dorothy Roberts in *The Community Dimension of State Child Protection*:

Many Black and Native American children grow up in neighborhoods with a lot of state supervision of children and families while few white children do. . . . These starkly disparate neighborhood experiences are surely an important component of the child welfare system’s racial disproportionality. In other words, racial differences in rates of foster care placement affect not only children’s individual chances of becoming a ward of the state, but also affect children’s chances of growing up in a neighborhood where state supervision of children is prevalent. The spatial concentration of child welfare agency involvement in African American neighborhoods is what makes the child welfare system a distinctively different institution for white and

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193 See id. at 126 (quoting Washington, 426 U.S. at 248) ("[A] whole range of tax, welfare, public service, regulatory, and licensing statutes may be more burdensome to the poor and to the average black than to the more affluent white.").

194 Id. at 128.

Black children in America.\textsuperscript{196}

There can be little doubt that black and Hispanic families have markedly different experiences with child protection because of the implicit biases of their CPS workers. This is reflected in the disproportionality data. To combat this, the Court has to acknowledge the existence of implicit bias by removing the intent requirement to a disparate impact claim.\textsuperscript{197} Where a fundamental right is involved, the Court has already suggested that disparately impacted indigents have a viable claim.\textsuperscript{198} Thus, this is only a matter of extending the same protection to a protected class.

C. The Court Has Recognized a Disparate Impact Claim as to the Indigent, Without the Requisite Intent Showing Because of the Fundamental Right to Parent

The disproportionality debate relies upon data to establish the existence of implicit bias. Admittedly, this is rather attenuated since it is difficult to pinpoint a causal factor. This, in turn, gives credence to arguments against the concept—the argument that disproportionality is not due to implicit bias within the system, but rather, to the underlying factors like poverty.\textsuperscript{199} From a fundamental rights perspective, however, this argument is unavailing. While the Court has never expressly provided the indigent with the status of a protected class, it has spoken out against "bolt[ing] the door to equal justice."\textsuperscript{200} Moreover, the Court has been apt to offer such protections when fundamental rights are involved. In a way, this circumvents the "protected class" issue because the Court can couch the analysis in Due Process, rather than Equal Protection.

Since the Court has recognized the value of equal justice within a judicial proceeding, it should also recognize that the state actions that lead to such judicial proceedings could suffer the same polarity. This is precisely the landscape of CPS, and their ensuing intrusion into the family. People of color are overwhelmingly represented in the system, but so too are the indigent. Under this rubric, it does not matter if the implicit biases are real and cut across racial lines, or if poverty is the actual culprit—the Court is more interested in the right itself being infringed upon.

\textsuperscript{197} See Papillon, supra note 10 (arguing that the intent doctrine facilitates implicit bias).
\textsuperscript{198} M.L.B., 519 U.S. at 125–28.
\textsuperscript{199} See LEE ET AL., supra note 18, at 3 ("Some scholars view poverty as the primary factor accounting for high levels of disproportionality in cases of child maltreatment . . . ."); see also CANCION ET AL., supra note 16.
\textsuperscript{200} Griffin v. Illinois, 351 U.S. 12, 24 (1956).
In *Griffin v. Illinois*, the Court was faced with the question of whether a state may condition appellate review of a criminal case upon a defendant’s ability to pay for a transcript necessary for appeal. Finding such a practice inconsonant with the Fourteenth Amendment, the Court aptly noted “the Due Process and Equal Protection Clauses protect persons like [indigent] petitioners from invidious discriminations.” Responding to concerns by the dissent that the law in question should be upheld because, by its terms, it applied to the rich and poor alike, Justice Black famously proclaimed “a law nondiscriminatory on its face may be grossly discriminatory in its operation.” This concept underlies the entire gamut of CPS operations because the intent is never to be disproportionate, but the results are just that.

While *Griffin* itself was limited to the criminal context, the protection of the indigent made its way to the civil arena in *Boddie v. Connecticut.* Here, the Court was dealing with a Connecticut procedure that required the payment of court fees to initiate a divorce proceeding. The effect of this procedure was that the class of indigent plaintiffs was unable to seek a divorce due to their inability to pay the required fees. Stuck in dissolving marriages, the plaintiffs’ fundamental rights were impeded because they could not remarry. The Court responded to this by noting that, “given the basic position of the marriage relationship . . . due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.” Here, the Court exhibited a willingness to offer the poor some measure of protection in part, because of fundamental rights. This is no different than the CPS issue.

At first glance, it may appear that the Court limited the protection of the indigent in the CPS context in *Lassiter v. Department of Social Services*, where the Court held that the failure to appoint counsel in a

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201 Id. at 12.
202 Id. at 13–14.
203 Id. at 18. The Court added, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Id. at 19.
204 Id. at 17 n.11.
206 Id. at 372 (1971).
207 Id.
208 Id. at 374.
209 Id. at 383 (“Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.”). The Court has also suggested that a state cannot curtail access to paternity determinations based on indigence alone. See *Little v. Streater*, 452 U.S. 1, 16–17 (1981) (upholding as applied challenge to statute which conditioned blood grouping paternity test upon the party’s ability to pay).
termination of parental rights proceeding did not offend the Constitution. This is true in a global sense because both parties are vested in the well-being of the child. However, these interests diverge when trying to define what the “well-being” is, particularly if the state has a problem with implicit bias. This is even more evident in the marginal case where the state propounds one standard of “well-being” and the parent describes another. The default rule in such a situation appears to be deference to the state’s version of “well-being,” yet for a child languishing in foster care, this is anything but. Notably, subsequent decisions sharply limited the holding of Lassiter, and actually defined it in a way that suggests that it stands for the proposition that an attorney should be appointed for an indigent parent facing a termination petition.

The notion of protecting the indigent in termination proceedings culminated in M.L.B. v. S.L.J., where the Court was faced with an issue similar to Griffin—the appeal of a judicial decree on the petitioner’s ability to pay for the transcripts. Much like Griffin, the Court noted that conditioning such a significant appeal upon one’s financial status is at the point where ‘‘[d]ue process and equal protection principles converge.’’ The Court evaluated the interests at stake and observed that while the state has a legitimate pecuniary interest, “the stakes for petitioner M.L.B.—forced dissolution of her parent rights—are large, ‘more substantial than mere loss of money.’” Ultimately, the Court deemed that the Mississippi statute violated the Fourteenth amendment. Importantly, the Court stuck to the notion that termination of parental rights are “quasi-criminal in nature” and thus, conditioning an appeal upon the ability to pay, cannot survive rationality review. The Court added that the petitioner was

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211 Id. at 31–32.
212 See id. at 27 (“Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision.”).
213 See supra text accompanying note 173 (describing parenting styles which diverge from the state concept of “appropriate” parenting styles).
214 See M.L.B. v. S.L.J., 519 U.S. 102, 123 (1996) (noting that if the appellant’s case were “sufficiently complex, state-paid counsel, as Lassiter instructs, would be designated for her.”).
215 Id. at 106.
216 Id. at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).
217 Id. at 122.
218 Id. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).
219 See id. at 128 (“W]e hold that Mississippi may not withhold from M.L.B. ‘a record of sufficient completeness to permit proper [appellate] consideration of [her] claims.’”).
220 Id. at 124 (quoting Mayer v. City of Chi., 404 U.S. 189, 196 (1971)).
221 See id. at 123–24 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956)) (noting that “fee requirements ordinarily are examined only for rationality,” but ultimately “plac[ing] decrees forever terminating parental rights in the category of cases in which the State may not ‘bolt the door to equal justice’”).
“endeavoring to defend against the State’s destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication.”

In CPS, however, this “branding” applies to more than just a termination proceeding. It is implicated whenever a parent is placed in the Central Registry because it limits his ability to provide care for extended relatives or to seek employment in certain sectors. This is not problematic if the parent actually belongs on the Registry, but if placement is predicated upon bias, the “branding” is improper. More importantly, Central Registry decisions can “brand” children, since they can no longer be placed with individuals on the Registry. This, in turn, increases the likelihood that children get stuck in foster care.

The indigent (and by proxy, people of color) are at a marked disadvantage when entering the world of CPS. At the initial stage, their families are more likely to receive a referral. While there are certainly referrals due to actual mistreatment, others result from a lack of financial means to meet the needs of their children, or are a result of limited means to address the real issues that led to the referral in the first place. In these latter scenarios, the state should buttress the family, not dissolve it. The Court has already protected the family in the context of termination decrees that unduly burden the indigent. Even if the observed disproportionate results in CPS stem from underlying socioeconomic disparities, and not implicit bias, the Court has determined that state action that burdens these fundamental rights warrant strict-scrutiny. Thus, CPS needs to find ways to partner with the community, and resolve the underlying issues.

III. ADDRESSING IMPLICIT BIAS AND DISPROPORTIONATE RESULTS WITHIN DCF

The purpose of this Note is not to condemn child protection as an unconstitutional action by the state. Instead, it is to draw attention to the problems in CPS and to require the state to resolve the underlying issues. This problem goes well beyond the scope of CPS alone and requires the various institutions subject to implicit bias work together to arrive at better

\[222\] Id. at 125.
\[223\] See supra text accompanying 66–67 (describing these limitations).
\[224\] See supra note 16, at 3 (noting that “child maltreatment risk is associated with various indicators of economic hardship.”) (internal citations omitted).
\[225\] See supra note 16, at 3 (noting that “child maltreatment risk is associated with various indicators of economic hardship.”) (internal citations omitted).
\[226\] See id. at 3 (describing a hypothesis that “poverty may reduce a parent’s ability to provide for a child’s most basic necessities.”).
\[227\] See id. at 10 (describing the results of an experiment which suggest that increasing the income of low socio-economic families reduces the risk of child maltreatment).
outcomes for people of color. There is no easy solution to this problem, and it is sure to be costly. But the social implications of ensuring that a class of children can grow up with their families are certainly worth this cost. Despite the poor outlook, Connecticut’s DCF, and many other CPS agencies throughout the country, are committed to stamping this problem out.228 Indeed, many of the initiatives that are currently underway, if fully embraced, may go a long way toward curbing the issue.

Still, more needs to be done, and at a quicker rate. A recent NCANDS report indicated that overall maltreatment rates have increased.229 These numbers may vary as a function of the overall economic health of our nation, but with a growing lower class,230 there is greater cause for concern if child maltreatment is viewed as a function of poverty. More pertinent to this Note is the concern that, as the growing economic divide continues to skirt racial lines,231 the disparate outcomes are sure to be observed at a greater rate. Though Connecticut’s DCF has implemented a number of changes in practice, the data cited above232 is similar to that of prior years of data.233 The theme of this Section is to find ways to buttress CPS with additional resources—both financially and with a larger, more skilled workforce. Still, it is vital to recognize that there is no panacea to the problem of implicit bias in CPS, but accepting it as a problem is certainly the first step.

A. Implicit Bias is a Natural Phenomenon

One might read this Note and draw the conclusion that everyone and every system is biased. While this may appear alarmist on the surface, it is, in fact, reality.234 Humans are biased.235 It is a natural phenomenon,236 and

228 See PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3 (setting a goal to “achieve racial justice across the DCF system”).
229 See CHILD MALTREATMENT, supra note 33, at ii (describing a 7.4% increase in reports from 2010 to 2014).
230 See The American Middle Class is Losing Ground, PEW RESEARCH CTR. (Dec. 9, 2015), http://www.pewsocialtrends.org/2015/12/09/the-american-middle-class-is-losing-ground [https://perma.cc/4AV7-F43T] (noting that the percentage of low-income Americans has increased from 16% to 20% since 1971).
231 See supra text accompanying note 126 (describing the growing economic divide between children of color and their white counterparts).
232 Supra Section I.
233 See PERFORMANCE EXPECTATIONS, supra note 23, at tbl.3 (reporting a lack of meaningful change in racial disparity statistics between 2014 and 2015).
236 See STAATS ET AL., supra note 4, at 14 (describing implicit bias as an unconscious phenomenon).
accepting its existence is critical. Indeed, a number of field and laboratory experiments exhibit that people discriminate against out-groups even when randomly assigned to the in-group and based on trivial dimensions. This leads to the hypothesis that the human mind is programed to categorize people by race.238 There is some support for this from an evolutionary standpoint. Writing for the Center for Voluntary Psychology, Robert Kurzban et al. propose that the encoding of racial differences evolved because of the nature of early human hunter-gatherers. These early humans would frequently come into conflict with neighboring bands, and/or form intra-band alliances.240 Thus, "[t]o negotiate their social world successfully . . . our ancestors would have benefited by being equipped with neurocognitive machinery that tracked these shifting alliances."241 Thus, categorization of out-groups can be viewed as evolutionarily adaptive. By acknowledging that categorization based on race has a natural component, the concept of implicit bias is more palatable. Indeed, just knowing about implicit bias can prompt people to change their behavior.242

There is neurological support for the existence of implicit bias as well. Studies demonstrate that specific areas of the amygdalae are activated when subjects feel fear, anxiety, or distrust.243 When coupled with the fact that many people show a similar reaction to typically African facial features versus that of typically European facial features, a case for the existence of implicit bias as a neurological construct emerges. The results can manifest in disparate outcomes from criminal sentencing to treatment recommendations in the health care settings, and child protection.245 All

237 See Robert Kurzban et al., Can Race Be Erased? Coalitional Computation and Social Categorization, 98 PNAS 15387, 15387 (2001) (describing studies which exhibit that "people discriminate against out-groups even when they are assigned to groups temporarily and anonymously by an experimenter who uses dimensions that are trivial, previously without social significance, and random with respect to any real characteristics of the individuals assigned") (internal citations omitted).

238 See id. (describing "considerable empirical support[] that encountering a new individual activates three ‘primitive’ or ‘primary’ dimensions—race, sex, and age—which the mind encodes in an automatic and mandatory fashion . . . .") (internal citations omitted). Kurzban et al. go on to propose an alternative theory that, while sex and age were evolutionarily adaptive categories for humans to encode, race is not. Id.

239 See id. (proposing that race encoding is a "byproduct of adaptations that evolved for an alternative function . . . detecting coalitions and alliances.").

240 Id.

241 Id.

242 See NAT’L CTR. FOR STATE COURTS, supra note 39, at 5 (noting that, while awareness of implicit bias alone is not sufficient to combat its effects, it is a "crucial starting point that may prompt individuals to seek out and implement . . . strategies").

243 Papillon, supra note 10, at 178 (citing Sergi, G. Costafreda et al., Predictors of Amygdala Activation During the Processing of Emotional Stimuli: A Meta-Analysis of 358 PET and fMRI Studies, 58 BRAIN RES. REV. 57 (2008)).

244 Id. at 179–80 (citing Jaclyn Ronquilo et al., The Effects of Skin Tone on Race-Related Amygdala Activity: An fMRI Investigation, 2 SOC. & COGNITIVE & AFFECTIVE NEUROSCI. 39 (2007)).

245 Id. at 180–81.
this is to say that acknowledging the existence of this issue is the first step towards curbing it.

Child protection is aware of the disproportionality that results from the manner in which it conducts business. Indeed, it is a phenomenon that has been observed for over thirty years. However, agencies could do more to understand and accept the link between implicit bias and the resultant disproportionality revealed by the data. The failure to accept this is an issue that contributes to disproportionate results. If the individual worker does not know they have a problem, they cannot be expected to resolve it. This is reflected in service provision, for example. Focus group studies reveal that “worker attitudes and bias . . . appear[] to play a significant role in determining the quality of and quantity of services.” These outcomes are the results of workers who lack awareness of their own attitudes and beliefs. The study concluded that “[c]hild welfare professionals need to be conscious of their underlying bias which increases the importance of checks and balances.”

The acceptance of this relationship may go beyond that of the individual CPS agencies to the public at large. For example, when the CPS agency implements strategies that reduce disproportionate results and fail, public sentiment is none too accepting. However, these individual failures should not detract from the overall charge of reducing disproportionality. The community at large must also be willing to accept that the conventional way of doing business is no longer viable, and that new ways of approaching child protection work are necessary in order to combat disparity. Certainly, the Supreme Court recognizing a disparate impact claim in this arena would go a long way towards public acceptance. Indeed, studies exhibit that, when individuals believe there are no consequences from bias, the systems in the brain least equipped to combat

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246 See supra Section 1.
247 Harris & Hackett, supra note 19, at 200.
248 Id. at 208.
249 Id.
250 Id. at 211.
251 See, e.g., id. at 210 ("Disproportionality of children of color in the child welfare system is not an individual child or family issue but a large social issue.").
252 For example, DCF has recently been promoting an increase in the use of kinship care as a placement option for children. On the surface, this would be precisely the type of measure that may help to resolve some of the disparate outcomes that are observed. However, when DCF has failed in isolated incidents using this approach, public sentiment is harsh. See Josh Kovner, Two DCF Workers Suspended, Others Face Probe, In Groton Child-Abuse Case, HARTFORD COURANT (Sept. 2, 2016), http://www.courant.com/news/CONNECTICUT/HC-dcf-workers-suspended-foster-care-abuse-0903-20160902-story.html [https://perma.cc/T7M2-S8VM] (describing an extreme case in which a relative foster parent neglected her foster child, nearly to the point of starvation). While this incident is tragic, it is also isolated. See NAT’L SURVEY OF CHILD & ADOLESCENT WELL-BEING, supra note 116 (noting that children placed in kinship care are less likely to face repeat maltreatment).
bias, activate.\textsuperscript{253} Thus, there must be some mechanism in place to recognize the existence of bias, and institute consequences for that bias.\textsuperscript{254} That power rests with the Supreme Court.

B. Cross-Cutting Themes in Light of the Existence of Implicit Bias

There is no single answer to this problem. More importantly, resolving disparate outcomes resulting from bias goes far beyond changes to the CPS system. Still, the system can do its part to resolve its contribution to the disparities that are observed. Regardless of any policy changes, one factor has always remained true—CPS line staff are overworked. They cannot keep up with the demands of an \textit{old} caseload, much less the increased demands that new initiatives require. This is particularly true since DCF switched to a DRS model, because a properly executed DRS case requires a more holistic assessment. However, under current conditions, workers are forced to apply antiquated techniques in the interest of being as efficient as possible.\textsuperscript{255} The problem has an exponential tone to it. As referrals increase,\textsuperscript{256} the ability of a CPS worker to develop a comprehensive and effective assessment decreases.\textsuperscript{257} Workers are spread too thin to seek out the information required and formulate a proper evaluation. This limits a family’s ability to resolve whatever issue brought them to CPS’s attention in the first place because their worker is ill-prepared to address their individual needs. As a result, the case may close prematurely, increasing the likelihood of a repeat referral.

More troubling is that the lack of a thorough assessment may result in unnecessary removals in unwarranted situations, or the failure to remove a child where such action is necessary. This is because, under pressure, CPS staff are more likely to make decisions that align with their individual biases.\textsuperscript{258} The solution to this problem must be an increase in the CPS staff

\textsuperscript{253} Papillon, supra note 10, at 182.

\textsuperscript{254} See id. at 184 (arguing that the intent doctrine fosters scenarios in which people, justifiably, believe that their discriminatory acts will remain hidden with no public consequence, resulting in a neurophysiological reaction least suited to overcome bias).

\textsuperscript{255} See Heimpel & Bartholet, supra note 41 ("'Front line staffing levels are inadequate given the complexity of cases that now make up the pool of investigation and ongoing service cases that social workers have on their caseloads since the implementation of the Differential Response System (DRS),' the court monitor wrote in the quarterly report released in October. 'DRS results in the diversion of low-risk cases from workers' caseloads, leaving staff with caseloads made up of only complex cases.'").

\textsuperscript{256} See CHILD MALTREATMENT, supra note 33, at ii (describing a 7.4\% increase in reports from 2010 to 2014).

\textsuperscript{257} See NAT'L CTR. FOR STATE COURTS, supra note 39, at 4 (describing the relationship between bias and pressurized decision making).

\textsuperscript{258} See David M. Amodio, et al., Neural Signals for the Detection of Unintentional Race Bias, 15 PSYCHOL. SCI. 88, 92 (2004) (noting that "unintended race bias occurs when responses are made quickly and in the absence of sufficient process resources") (internal citation omitted).
that services the community. This will allow individual CPS workers to make less pressurized decisions. Moreover, it would increase the ability to process decisions with peers, reducing the likelihood of bias. Developing a comprehensive system of peer review that includes feedback from the community at large would be critical to evaluating existing and future practice models.

Developing these coalitions with the community may be the touchstone of eliminating racially suspect implicit bias. Though theories abound that racial appearance is encoded by the human brain, studies show that these can easily be broken down. The key is to find a common goal that transcends race, and becomes the thing to work towards. This may require a conceptual change that values "risk" as much as "safety." That is, if the risk of removing a child would result in a lengthy stay in foster care, was weighed against the immediate safety concerns, then perhaps it would be better to mitigate the safety concerns, rather than expose the child to the foster care system. In such a change in practice, the efforts to reduce the immediate safety concerns must be made at all costs. To be sure, these are often controversial endeavors, but the cost of maintaining the same child in foster care for years to come is greater. This will also buy the CPS worker additional time to locate kin resources and frontload the services to help resolve the problem altogether.

Another vital change would be a data collection system that better assesses which methods work and which do not. As presently constructed, Connecticut's DCF operates in several regions, each with a number of offices within the region. This method has the benefit of promoting pilot programs within any given region for experimentation, before rolling it out to the entire state. The downsides of regionalization are operational inconsistencies within the state as a whole (differing

259 Supra text accompanying notes 237–41.
260 See Kurzban et al., supra note 237, at 15389 (describing the results of an experiment which "show[ed] that a new and arbitrary coalition can be encoded just as strongly as race is.").
261 For example, in the study conducted by Kurzban et al., the team was able to create a scenario whereby the subjects were more apt to encode the color of a person's shirt, than their race. Id. at 15389–90. The implication is that, by finding a common, transcendent ground that the community and DCF can rely on, individuals will be less likely to rely on racial categorizations and more likely to categorize based on this new goal (e.g., those who are seeking the same goal, versus those who are not).
262 Russell, supra note 17, at 112 (arguing that combating disproportionality requires an "accurate, reliable and valid measurement of not only the incidence of disproportionality, but also the variances in disproportionality across units, such as courts, jurisdictions, counties, states, years, or decision points is needed."); see also Ards et al., supra note 125, at 1489 ("Much of the controversy over whether in fact there is racial disproportionality in actual child maltreatment arises from the differing data used to establish maltreatment rates by race and ethnicity.") (internal citation omitted).
264 See, e.g., Hamilton, supra note 40 (describing the incremental roll out of the DRS system).
practices between regions) and within the regions themselves (differing practices between the offices that comprise the region). Balkanization can undermine credibility when those who are exposed to the same system, experience vastly different results. This is far more prevalent than appreciated, particularly in a small state like Connecticut, where moving from one end to the other is not a difficult proposition. Finding ways to standardize decision making, and data collection based on that decision making, will promote a better relationship between DCF and the surrounding community. The SDM tool is an example that seeks to accomplish this, but in a way that relies upon old methods of doing business.\textsuperscript{265} Standardization is important, but it must be able to encompass the unique needs of individual families and be particularly sensitive to the divergent views of CPS between populations.\textsuperscript{266}

It is also vital to consider the variable of “time,” particularly when considering decision points. Each of the decision points, and the administrative burdens attached, take time and compound upon each other. One of the most prevalent disproportionate results is the amount of time that minority children languish in foster care compared to the majority.\textsuperscript{267} Theoretically, the time variable should impact the populations equally, explicit bias notwithstanding. In spite of this, the results are anything but equal.\textsuperscript{268} Finding methods that can reduce the overall time of a CPS case, regardless of race, is crucial. Again, this endeavor can only be accomplished by reducing the overall caseload. Under this scenario, a caseworker can focus her attention upon families in need on a deeper level, with a quicker pace. If cases can be resolved without legal intervention, or by relying upon kin, the overall demands of each case will be reduced. This affords even more time to focus on the fewer cases in which there are no kinship resources. Moreover, this deeper attention promotes the alliances that reduce the prevalence of racial categorization.

Relatedly, another important change would be a concerted effort to promote staff retention. A seasoned, well-trained staff that is aware of the natural tendency toward implicit bias would be the ultimate goal. While Connecticut’s DCF is seeking to better train its workforce, it is not

\textsuperscript{265} See supra text accompanying notes 73–83 (describing the standardized SDM tool and its deficiencies).

\textsuperscript{266} See Roberts, supra note 179, at 884–85 (describing paradoxical views on CPS by a particular community).

\textsuperscript{267} See supra Section I.E (examining disproportionate length-of-stay results between minority and non-minority children in foster care).

\textsuperscript{268} DEP’T OF HEALTH & HUMAN SERVS., supra note 105, at 4 fig.3 (reporting that a black child’s length of stay in care was twenty-nine months, while his white counterparts exited care at around eighteen months).
defining staff retention as a primary goal.269 Nationwide, the average CPS worker stays on the job for less than two years.270 This impacts permanency for children because it leads to longer lengths of stay and multiple placements for children, fewer preventative services for families, and failed reunifications.271 Workforce turnover takes a financial toll on the state in the form of the costs associated with rehiring and re-training new employees.272 This must be viewed as an issue, rather than the inevitable result of difficult work. A significant contributor to the high attrition rate is the impact of secondary trauma.273

Secondary trauma results from repeated exposure to other individual's traumatic events or stories (e.g., repeatedly hearing tales of child abuse from a victim), resulting in their own traumatic symptoms.274 While there is no clear remedy to this prevalent issue, CPS agencies tend to put the onus for remedying the effects of secondary trauma on the individual worker.275 This re-victimizes the worker, and leads to burnout. Instead, the agency must take some responsibility for this necessary work condition, and solve the problem administratively.276

The effect of staff-retention would be twofold. First, it will reduce the time variable since cases would not need to leave the hands of the departing worker into the hands of either an under-trained, new worker; or over-burdened, existing worker. Perhaps more importantly, retention will support the family better because they can then form a relationship with their worker, offering greater opportunity for the family to buy-in. It may also help to reduce bias if the worker becomes motivated to protect the family it has been working with on a deeper level.

Suffice it to say that there are a myriad of changes in technique and policy that are required to make meaningful changes in the CPS system—

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269 See PERFORMANCE EXPECTATIONS, supra note 23, at tbl.5 (listing the goals as: social workers hired with social work degrees, and supervisors/managers trained in the supervision model).


271 Id. (noting that the cost of worker turnover is about a third of the average worker’s annual salary).

272 See id. (noting that the cost of worker turnover is about a third of the average worker’s annual salary).

273 See ACS-NYU CHILDREN’S TRAUMA INST., ADDRESSING SECONDARY TRAUMATIC STRESS AMONG CHILD WELFARE STAFF: A PRACTICE BRIEF 2 (2012), http://www.nctsn.org/sites/default/files/assets/pdfs/addressing_sts_among_child_welfare_staff_practice_brief_0.pdf [https://perma.cc/7T2R-WT4X] (describing a number of studies which support the prevalence of secondary trauma in child protection).

274 Id. at 1.

275 Id. at 4.

276 Id. Relatively, the agency must recognize that conventional interventions aimed at reducing secondary trauma are often perceived by CPS workers as an added burden or “more work.” Id. Instead, the administration must make interventions a feature of the job, so as not to add additional burdens to an already stressed staff. Id.
perhaps too many to list in this Note. Still, all such ideas share a common thread that is a necessary condition to invoking changes to disparate outcomes—acknowledgment of the existence of implicit bias and the role it plays in the disproportional outcomes that ensue. By acknowledging these issues, and increasing awareness among its professionals, CPS can work towards equalizing the system, and being viewed as helpers.

CONCLUSION

While the legal redress that people of color have towards remedying the foster care system is far from clear, one thing is certain—the system impacts families of different cultures in different ways, and only serves to perpetuate this dynamic. In order to break this invidious cycle, the Supreme Court’s view on intent as a barrier for redress for implicit bias must change. It is incumbent upon the Court to require states make fundamental changes to practice in order to resolve these disparate outcomes. The only way this can be accomplished is by acknowledging the fact that intent is not a viable predicate to a disparate impact claim when a fundamental right is involved. There is simply too much at stake.

While the efforts underway by states, and Connecticut in particular, are truly promising, they will not reach their full potential under the current regime. By giving voice to disparate impact liability without intent in this limited, fundamental context, the philosophical changes that must follow will be much more palatable for a system so mired in status quo.