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CAN SCIENCE HELP SOLOMON? CHILD MALTREATMENT CASES AND THE POTENTIAL FOR RACIAL AND ETHNIC BIAS IN DECISION MAKING

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INTRODUCTION

Over the last three decades, there has been an increasing debate, both domestically and internationally, regarding the consideration that is given to children's rights within the legal system.¹ Nowhere has the protection of children's rights been upheld more strongly than in the passage and application of child protection reporting laws and related statutes. The intent of such statutes is to give the state the power to attend to the needs of children and their safety, when parents have failed to do so. Concerns, however, have arisen that there may be an unequal application of such statutes along racial and ethnic lines.²

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¹ See Sandra T. Azar & Linda R. Cote, *Sociocultural Issues in the Evaluation of the Needs of Children in Custody Decision Making: What Do Our Current Frameworks for Evaluating Parenting Practices Have to Offer?*, 25 INT'L J.L. & PSYCHIATRY 193, 193 (2002); see also Convention on the Rights of the Child, G.A. Res. 44/25, at 1, U.N. Doc. A/Res/44/25 (Nov. 20 1989) (recognizing the need for an "international convention" on children's rights); Catherine M. Brooks et al., *Child Abuse and Neglect Reporting Laws: Understanding Interests, Understanding Policy*, 12 BEHAV. SCI. & L. 49, 49-50 (1994) (discussing domestic regulations regarding child abuse and reporting laws).

² See Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 L. & HUM. BEHAV. 249, 250, 252-53 (1994); Azar & Cote, *supra* note 1, at 194-95. See generally Robert L. Hampton, *Race, Class, and Child Maltreatment*, 18 J. COMP. FAM. STUD. 113, 116-18 (1987) (discussing differences in abuse characteristics among ethnicities, particularly among African American children); Michael Lauderdale et al., *Race, Ethnicity, and*

Evidence has shown that higher numbers of non-Whites are represented in CPS generally, and that racial and ethnic minority children move through the system at differing rates and in differing ways (e.g., length of placements of children in foster care, greater use of kinship foster care, less provision of mental health services). Such data is worrisome because it may mean that unbalanced, or in some cases, inadequate attention is being given to children's safety and care needs, and that disparate levels of scrutiny are being applied to parents. Further, the data also suggest that a greater burden is being placed on extended family within some groups as a consequence of state decision making.

The goal of this article is to review this evidence and then to suggest more subtle ways of understanding the current state of affairs than has been done previously. To date, most of the work done to decrease error in decision making within the CPS system has focused on improving *explicit* decision making processes, for example, through the use of statutory safeguards or other procedurally-based methods, such as risk assessment protocols. Emphasis has not been placed on the *implicit* processes that can affect professionals in these procedures, such as moment-by-moment appraisals that may be infused with biases, differing values, and stereotypical views, which can then alter child welfare and legal professionals' interactions with families, and ultimately culminate in faulty decision making. Drawing on the research of social psychologists and bias researchers, the present article will discuss transactional bases for biases in decision making that occur on the more implicit level and involve both the professional actors in the system and the family members. This article will review some prominent examples of implicit processes that have been demonstrated to affect interpersonal responses and decision making and that may contribute to disparities in levels of parental scrutiny and state-provided childcare. Although the literature is still quite limited, research on the malleability of these implicit processes will be utilized to suggest future directions for reducing such bias.

Child Maltreatment: An Empirical Analysis, 4 CHILD ABUSE & NEGLECT 163 *passim* (1980) (evaluating variations of child maltreatment among ethnicities).

I. EVIDENCE FOR RACIAL AND ETHNIC BIAS IN THE CHILD PROTECTION SYSTEM

Much evidence exists that there is overrepresentation and differential treatment of children and families from racial and ethnic minorities within CPS. This evidence falls into three core domains: (1) entry level into the system (e.g., reporting and substantiation rates); (2) foster care placement (e.g., rates, types made, and their lengths); and (3) level of service provision. The data found in each of these areas cannot be considered in isolation, but rather must be seen in light of larger inequities³ that occur generally within society. Each domain will be reviewed briefly, and in doing so, an effort will be made to describe this larger context.

A. *Entry into the System*

Official governmental reporting and substantiation rates for child maltreatment clearly indicate that children who come from non-White backgrounds are overrepresented within the CPS. According to the US Administration for Children, Youth, and Families, rates of maltreatment by race/ethnicity per 1,000 children in the population are 10.7 for White children, 19.9 for Black children, 10.4 for Hispanics, 15.5 for American Indian/Alaskan Natives, and 2.9 for Asian American.⁴ This translates into proportions within CPS caseloads of 53.8% for Caucasians, 25.2% for African Americans, 17% for Latinos, 1.3% for Native Americans, and 0.9% for Asian Americans.⁵ These rates are far greater than the overall percentage of Black children in the U.S. population and are lower than the overall percentage of Latino children—in the general population, 16% of all children are Black and 18% are Latino.⁶

Periodically, the federal government conducts a community survey to achieve a national estimate of rates of maltreatment

³ These larger inequities may also reflect the operation of implicit biases later discussed in this article.

⁴ U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2004 SUMMARY (2004), available at http://www.acf.dhhs.gov/programs/cb/pubs/cm04/table3_12.htm.

⁵ *Id.*

⁶ See CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 118 (2005), available at http://www.childrensdefense.org/site/DocServer/Greenbook_2005.pdf?docID=1741.

that are not based solely on official reports to governmental agencies. It has been clear from such data gathering efforts that the number of children maltreated in the community far exceeds the number that is substantiated by formal CPS processes. The last National Incidence Study, for example, found that when cases identified from a community survey were matched against existing cases in CPS records, as many as 58% of children who met study criteria for maltreatment were not identified by the CPS.⁷ Most relevant to the discussion at hand is that this large-scale survey did not find the kinds of racial disparities in the community that are found in official cases.

Attempts to examine the reporting rates in settings where case level information is available have begun to show further support for biases in reporting. For example, Lane and colleagues examined the records of almost 400 children under the age of three who were hospitalized for primary skull or long bone fractures at Children's Hospital in Philadelphia (N=388) between 1994 and 2000.⁸ Reports of suspected abuse were more often made for minority children (52.9% of cases) as compared to non-minorities (22.5% of cases),⁹ and minority children greater than 12 months of age were three times more likely to be reported for suspected abuse than their white counterparts.¹⁰

Such findings raise multiple concerns. First, the findings suggest that there is greater scrutiny of minority families for suspected abuse. What might not come to mind as quickly, however, is a second corollary issue that there may be less concern for non-minority children. That is, we are not being as vigilant regarding the potential maltreatment risk to these children. Both of these concerns warrant attention.

B. Placement

As with substantiation rates, differential rates of foster care placement occur by race, with significantly more non-White children in foster care than in the overall U.S. population—34%

⁷ See ANDREA SEDLAK & DIANE D. BROADHURST, *THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT* 4-28 (1996).

⁸ See Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED. ASS'N 1603, 1603-04 (2002).

⁹ See *id.*

¹⁰ See *id.* at 1607.

of the children in foster care are Black.¹¹ It is noteworthy that, as with the reporting of child maltreatment, other factors beyond case-related factors like child risk and injuries have been documented as playing a role in the decision to place a child in foster care. For example, Runyan, Gould, Trost, and Loda found that the jurisdiction where a case came before the court determined where a child was placed or not.¹² Length of placement is also greater for minority children and the rates of reunification once they are placed are also significantly lower for minorities.¹³ For example, "[a]mong children admitted [into care] in 1990, African American children were also more likely [than other children] to still be in care 10 years after their initial placement."¹⁴

Data on where children are placed for foster care also indicate that disparities exist. Changes in the child welfare system have fostered pressure on kin to take children due to increases in the number of children needing care, the risk of substance abuse in urban settings, and a shortage of foster care families, as well as a growing acceptance of the value of placing children with kin (e.g., continuity).¹⁵ Consequently, kin have increasingly been sought out to care for children.¹⁶ Kin foster

¹¹ See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, AFCARS REPORT #11, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report11.htm (last visited Jan. 27, 2007).

¹² See Desmond K. Runyan et al., *Determinants of Foster Care Placements for the Maltreated Child*, 6 CHILD ABUSE & NEGLECT 343, 345, 348 (1982).

¹³ See U.S. CHILDREN'S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE, AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES (1994); Mark E. Courtney, *Factors Associated with the Reunification of Foster Children with Their Families*, 68 SOC. SERV. REV. 81, 93, 98 (1994) (noting that African American children were slower to "go home"); Kathleen Wells & Shenyang Guo, *Reunification and Reentry of Foster Children*, 21 CHILD. & YOUTH SERV. REV. 273, 284, 287, 289 (1999); Fred Wulczyn, *Family Reunification*, 14 FUTURE OF CHILD. 94, 101 (2004). See generally Richard Barth et al., *Contributors to Reunification or Permanent Out-of-Home Care for Physically Abused Children*, 9 J. SOC. SERV. RES. 31, 31-45 (1987). It is noteworthy that in the only study that examined whether the racial/ethnic match of the caseworker and family played a role, significantly longer rates of placement were found for the African American caseworker-Hispanic family match. See Joseph P. Ryan et al., *Investigating the Effects of Caseworker Characteristics in Child Welfare*, 28 CHILD. & YOUTH SERV. REV. 993, 1004 (2006).

¹⁴ Wulczyn, *supra* note 13, at 101.

¹⁵ See generally Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 FUTURE CHILD. 131 (2004) (examining kinship care). Prior to this, kin were suspect because of beliefs in the intergenerational cycle of abuse. See *id.* at 142.

¹⁶ See *id.* at 132. From colonial days (e.g., poor laws) to the relative

placements, however, are more common for minority children.¹⁷ For example, in one study of kinship care youth, 24.3% were African American.¹⁸ In California, between 1989 and 1996, Grogan-Kaylor found African American children 1.53 times and Latino children 1.16 times more likely than Caucasian children to enter kinship care.¹⁹ With the passage of the Adoption and Safe Families Act of 1997,²⁰ the number of children being placed with relatives as adoptive placements or in long term guardianship situations has increased dramatically. In Illinois, for example, adoption increased from 1,640 children to 7,315 over a four year period.²¹ The higher proportion of minority kin who act as foster placements, coupled with the fact that minority children are staying in placements longer, suggests that a disproportionate amount of the families who adopt or who assume guardianship are minority families.²²

This differential placement of minority children with kin has implications for both the children and the families who take them. The state is asking them to take on a greater burden, and there is some evidence of greater suffering among such kin caregivers. Kin care homes have received less in the way of

responsibility laws of the 1960s, there has been a legal assumption that kin had both the natural inclination and the moral obligation to assume such care.

¹⁷ It is noteworthy that kinship care is generally more common for minority children in the U.S. population. See generally STACY FURUKAWA, *THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991*, at 11 (1991) (living with a grandparent is three times more common among African American children and two times more common among Hispanic children, than among white, non-Hispanic children). In the United States, between 2.3 million and 4.3 million children live with relatives other than their parents. See Jennifer Ehrle & Rob Geen, *Children Cared for by Relatives: What Services Do They Need?*, *NEW FEDERALISM: NATIONAL SURVEY OF AMERICAN FAMILIES* (The Urban Inst., Washington, D.C.), June 2002, at 1; *RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE* (Joseph Crumbley & Robert L. Little eds., 1997).

¹⁸ Nancy Shore et al., *Foster Parent and Teacher Assessments of Youth in Kinship Care and Non-Kinship Foster Care Placements: Are Behaviors Perceived Differently Across Settings?*, 24 *CHILD. & YOUTH SERVS. REV.* 109, 119 (2002).

¹⁹ Andrew Grogan-Kaylor, *Who Goes into Kinship Care? The Relationship of Child and Family Characteristics to Placement into Kinship Foster Care*, 23 *SOC. WORK RES.* 132, 138-39 (2000).

²⁰ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

²¹ Mark F. Testa, *Kinship Care and Permanency*, 28 *J. SOC. SERVICE RES.* 25 (2001).

²² See Wulczyn, *supra* note 13, at 101 (noting that among a "cohort" of children placed in foster care in 1990, African American children were more likely to be adopted).

resources and thus, minority children living with kin may be placed in situations where the State is offering them less assistance. It was found in New York, for example, that caseworkers did not provide kin homes with the level of monitoring required, oftentimes due to the perception of the child being safe or concerns about intruding on family life.²³ In addition, the states are left with discretion as to how to provide foster care payments, and many states have procedures in place (e.g., tightened licensing standards, courts ordering less payment to kin, diversion of kin care children out of the foster care system entirely), which lead to kin caregivers receiving less financial support than other foster care parents, or even no support at all.²⁴ Although some states do provide some financing to kin caregivers, overall, the support is unevenly distributed and simple geography may be the determinant of the resources that a child's placement receives.

In addition, kin are often not informed regarding funding that does exist and how to obtain such payments.²⁵ Payments vary based on the eligibility standards of the child, the standards used to assess the caregiver family, licensing requirements in each state, and even the decision making of individual welfare supervisors and caseworkers. Again, many more of the burdens associated with kin placement fall on the shoulders of families who are from minority backgrounds. Literature on minority kin caregivers suggests that they tend to suffer more mental and physical stress due to these disproportionate burdens.²⁶ Custodial grandparents rate themselves as being in poorer health than non-kin caregivers, and the rates are worse for minority caregivers. Since many of those assuming this role are overly concentrated in urban, low-income areas, they are also likely to live with environmental stressors, such as higher levels of crime and violence and fewer support services. Kin caregivers also feel more responsible than do non-kin caregivers for (1) facilitating the relationship with the birth family, in effect

²³ BERNARD S. MEYER, TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, KINSHIP FOSTER CARE: THE DOUBLE EDGED DILEMMA (1990).

²⁴ See Geen, *supra* note 15, at 137-38 (discussing licensing and payment policies and their effects on kin).

²⁵ *Id.* at 138-39.

²⁶ Sandra T. Azar & Lisa K. Hill, *Adoption, Foster Care, and Guardianship in Minority Families*, in ADOPTIVE FAMILIES IN A DIVERSE SOCIETY 190, 195 (Katarina Wegar ed., 2006).

assuming a part of the role of the caseworkers, and (2) for parenting. At the same time, kin caregivers also feel judged by others, including their caseworkers, and thus may be reluctant to accept or ask for services. They appear to over-report their well-being and deny their own needs because such admissions may be used to justify removing children from their care.²⁷

The differential placement of minority children with kin, therefore, may mean less state financial and physical attention to their needs. It also means that minority kin are placed in a role with fewer resources than what state-funded providers of foster care give to paid caregivers of Caucasian children, thereby inflicting greater psychological strain upon them. Further, the state's discretion in how much support to provide the kin caregiver means *de facto* inequalities.

C. Services

Health care and mental health services are provided to minority children and families in our society in a disproportionate manner.²⁸ Data on CPS children in these two areas is limited, but the data that is available suggests similar disparities. Within CPS caseloads, overall, a surprisingly small proportion of children receive mental health services. As many as one half of all maltreated children have clinically significant emotional and behavioral problems, yet only one-fourth to one-third receive mental health services,²⁹ even in those cases when

²⁷ As will be discussed later, this fear may grow out of implicit assumptions of being perceived as being less competent to raise children well (a stereotype). See *infra* notes 76–86 and accompanying text.

²⁸ According to a recent Children's Defense Fund report, Latino and African American children receive less treatment than Caucasians. For African Americans, the proportion receiving mental health services varies by the availability of insurance. African American children with insurance receive disproportionately more treatment than other groups, but less without insurance. Similar disparities exist in the provision of health care. Among the uninsured, African American children are almost 60% more likely than White children to have unmet medical needs and Latino children are more than 3 1/2 times more likely than White children to lack a regular place to receive health care. CHILDREN'S DEFENSE FUND, IMPROVING CHILDREN'S HEALTH: UNDERSTANDING CHILDREN'S HEALTH DISPARITIES AND PROMISING APPROACHES TO ADDRESS THEM 3–6 (2006).

²⁹ See NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 20–21 (1993); Barbara J. Burns et al., *Mental Health Needs and Access to Mental Health Services by Youths Involved with Child Welfare: A National Survey*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 960, 965 (2004).

they are placed under state care.³⁰ Again, however, minority children fail to receive services in significantly greater numbers. African American and Latino children are less likely to receive mental health services than Caucasian ones, even if they are in foster care. This is even more problematic given that data exists that shows that minority children develop more severe symptoms and experience more serious consequences following child abuse.³¹

Furthermore, children in the custody of CPS are in poorer health, which compounds the problem of inadequate health care. Foster children compared to children from the same socioeconomic background have higher rates of chronic physical disabilities and birth defects. It has been argued that their health care has been compromised by system-based factors, such as insufficient funding, lack of coordination of services, and lack of access.³² Given that more minority children are in foster care, their health care is particularly affected. Overall, minority children appear to be receiving fewer services and, when in foster care with kin, in particular, there appears to be less provision of services.³³ Since the state plays a role in referring and subsidizing such services, this fact further suggests racial and ethnic disparities in the manner in which system agents attend to child needs.

D. *What Accounts for Such Differences?*

Do these differences reflect real differences in family characteristics (e.g., in maltreating behavior, need for, or responsiveness to, services, or devotion by families for taking care of their own) or are these differential rates evidence of biases entering into transactions between professionals and families and into the decisions that are made? The response to

³⁰ Ann F. Garland et al., *Type of Maltreatment as a Predictor of Mental Health Service Use for Children in Foster Care*, 20 CHILD ABUSE & NEGLECT 675, 676 (1996).

³¹ See Judith A. Cohen et al., *The Importance of Culture in Treating Abused and Neglected Children: An Empirical Review*, 6 CHILD MALTREATMENT 148, 149 (2001) (discussing the possible effects of ethnicity on the severity of symptoms following child abuse).

³² Am. Acad. of Pediatrics, *Health Care of Young Children in Foster Care*, 109 PEDIATRICS 536, 536 (2002).

³³ MEYER, *supra* note 23.

the questions is probably both. Viable hypotheses for each of the disparities presented above have been put forth.

The most attention has been given to trying to explain the differential rates of entry into the CPS system. Two of the reasons given for such differences have focused on actual disparities in the occurrence of maltreatment.³⁴ First, it has been argued that rates differ due to greater pressures placed on parents from minority backgrounds in our society, which then results in less adequate and appropriate parenting responses (e.g., higher rates of poverty and residency in deteriorating neighborhoods placing greater strain on parents). A second explanation offered is context-driven: Minority families are the object of greater scrutiny (e.g., due to higher levels of poverty and lack of health care, they are more likely to seek assistance in emergency rooms and clinics where scrutiny of possible maltreatment may be higher). Community-based data in the incidence of child maltreatment, however, does not show the racial and ethnic disparities with regard to minority children found in the CPS system.

In the case of placement with kin, it has been argued that there are stronger cultural mandates in some sub-cultures within our society to take on the raising of familial offspring and thus, more willingness on the part of minority families to assume custody of offspring of family members who are not carrying out their role adequately.³⁵ At the same time, however, as discussed above, there is evidence that such kin are not receiving the same amount of support for this care as the foster parents who are more often assuming care of the non-minority children in the CPS system.³⁶ Relative responsibility laws may be offered as a

³⁴ Murray Levine et al., *African-American Families and Child Protection*, 18 CHILD. & YOUTH SERVS. REV. 693, 694-95 (1996).

³⁵ Many groups who are labeled minorities within our society (African American, Hispanic, Native American) have had long traditions of caring for younger family members who were not their own. See Rebecca L. Hegar, *The Cultural Roots of Kinship Care*, in KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH 17-27 (Rebecca L. Hegar ed., 1999); Pertti J. Pelto et al., *Family Structures in an Urban Puerto Rican Community*, 11 URB. ANTHROPOLOGY 39-58 (1982); Fabio Sabogal et al., *Hispanic Familism and Acculturation: What Changes and What Doesn't?*, 9 HISP. J. BEHAV. SCI. 397, 398-99 (1987); see also Azar & Hill, *supra* note 26, at 191-92 (discussing how this cultural mandate may be utilized to place pressure on minority kin to assume foster care role). See generally COLIN HEYWOOD, *A HISTORY OF CHILDHOOD* (2001).

³⁶ See *supra* text accompanying notes 28-33.

reason for why kin are so often seen as resources when children need care and for why the state provides kin with fewer resources to care for children than what "strangers" receive. However, the data still suggests some sub-groups are asked more often to assume the burden of such responsibilities than others and that an inconsistent distribution of resources by CPS system agents is occurring.

Fewer explanations are available to account for the fact that a lesser amount of services are being provided to minority children. Although it might be argued that existing mental health treatments are less effective with minority children, there is little evidence to support such a contention.³⁷

In sum, although there are viable explanations for differences in the rates provided above, these authors and others have suggested the possibility of bias in the judgments of those who report and make decisions regarding placements and services.³⁸ Indeed, early scientific experiments that examined reporting using hypothetical vignettes that portrayed child injury cases indicated that, all things being equal, more reporting would occur by physicians for minority or low socioeconomic families than other families.³⁹ The hospital study examining actual injury cases described above further supports this idea. An understanding of this potential for bias needs to be achieved in order to develop methods of decreasing it.

Social information processing research has documented a great potential for humans to be inaccurate in their perceptions of themselves and others. It is this potential that may help us to understand the responses of caseworkers, mental health evaluators, lawyers and judges, and medical professionals when they are dealing with members of minority groups in society.

³⁷ Behavioral parent training has been shown to have differential treatment effectiveness in changing child behavior with parents of lower socioeconomic status. So only in this case would differential patterns of referral make sense. Although the differences are in degree, such efforts have been shown to be effective. See Cohen, *supra* note 31, at 152.

³⁸ Global findings exist, for example, that the local CPS office in which decisions are made is one of the most powerful predictors of discretionary decision making in child protection (e.g., organizational context, relationship between the referring agency and the CPS office). See Susan J. Wells et al., *Ecological Factors and Screening in Child Protective Services*, 26 CHILD. & YOUTH SERVS. REV. 981, 994-95 (2004) (addressing the factors in screening and other decisions).

³⁹ See J.P. Turbett & R. O'Toole, *Physicians' Recognition of Child Abuse*, Paper Presented at the Annual Meeting of the American Sociological Association (1980).

Such professionals may possess negatively biased knowledge structures regarding such groups and overly positive ones regarding their own group. They may also have faulty social information processing capacities (e.g., poor ability to be flexible in their thinking), and may misjudge the meaning of the behaviors of others. Contributing to this inaccuracy may be a lack of experience with minorities (putting them in a state of ambiguity). Being bombarded with the negative societal views of such groups and the narrowing of cognitive processing due to being in situations of high stress (e.g., concerns regarding potential for child deaths) are also contributing factors. A social information processing approach to understanding the occurrence of such biases is outlined below.

II. SOCIAL INFORMATION PROCESSING RESEARCH: WHAT CAN IT TELL US ABOUT THE POTENTIAL FOR BIAS IN DECISION MAKING?

Concerns regarding unequal application of legal statutes and processes emerged in the 1960's with the advent of social justice agendas within the law (e.g., critical legal studies, feminist legal studies, critical race theory). Historically, data regarding disparities such as those presented above in the CPS system have been used in other areas of the law to substantiate concerns and further legal actions to reduce injustices against marginalized groups in our society (e.g., laws requiring desegregation of schools, affirmative action, disability laws). The typical manner of evaluating how such biases operate and then using legal means to remedy them, however, has not taken us far enough. Although a marked decrease in the expression of overt racial and ethnic hostility in the United States has occurred with such approaches,⁴⁰ it has not brought a similar decline in inequality in several domains, such as health care, education, income, wealth accrument, and criminal justice.⁴¹ This has led researchers and concerned laypersons to wrestle with a conundrum. How does one account for such disparities in the absence of overt prejudice?

⁴⁰ See Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1198 (1983).

⁴¹ See generally JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 127-224 (1999) (discussing the various forms of institutional racism that still exist today).

Social scientists have devoted sizeable resources to resolving this conundrum, and one of the most striking findings has been the profound role of subtle racial and ethnic bias. That is, research suggests that contemporary inequality is often created and maintained even in the absence of the fire hoses, white sheets, and other trappings of iconic racism. In fact, it is frequently the subtle forms of bias that have the strongest influence and need to be addressed (e.g., bias that occurs on a more implicit level among professional decision makers). Science allows for a more systematic means of evaluating the subtle ways in which such biases operate and provides ways to rule out other explanations for why differential judgments might have been made. It also holds promise for constructing programs to sensitize the actors in CPS legal actions (caseworkers, lawyers, judges, medical professionals, and mental health professionals) to the potential for bias.

Social information processing research,⁴² drawing on social cognitive science, has attempted to define the processes whereby the human cognitive system takes in and utilizes social information. One of the most prominent areas of this research has been the study of systematic errors and bias in this information processing.⁴³ This body of work has only recently been applied to understanding transactions within legal processes (e.g., lawyers' implicit theories regarding jurors and implicit biases in their selection of jurors; clients' perception of procedural justice)⁴⁴ and decision making within the child protection system, in particular.⁴⁵ It offers some promise for helping to identify systematic ways in which biases operate at the level of interactions between professionals and members of minority groups in our society that may alter the meaning derived from these transactions (the appraisals made by both

⁴² This body of work crosses disciplines within psychology, including social psychology, human cognition, and clinical psychology, and has been discussed under various labels (e.g., social cognition, information processing, therapy process studies, judgment and decision making, and stereotyping).

⁴³ See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124, 1130 (1974).

⁴⁴ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 945-46 (2006).

⁴⁵ See Azar & Benjet, *supra* note 2, at 249.

participants) and that, in turn, may lead to less just actions (i.e., those that do not carry out the intent of statutes in an even handed manner). It has been suggested and supported by qualitative work, for example, that over and above the qualities of the case (e.g., child injury level), social workers' decision making rests heavily on their assessment of the relationships they form with parents. The quality and importance of these interactions is forged during the assessment processes. Holland, in a qualitative study of social workers' descriptions of their assessments of parents, found that social workers focus heavily on parents' performance during interviews and specifically on relationship-based factors (such as the labeling of the parent as cooperative, motivated, and having an explanation of the events that is plausible) as determining the reunification of parent and child.⁴⁶ Wells and her colleagues also found that the biggest determinant of dispositions in child maltreatment cases was the CPS unit (e.g., organizational climate, culture of individual units), further supporting the idea that factors extraneous to the facts of the case are operating.⁴⁷

Work on human decision making in transactions with diverse groups using social information processing models has documented systematic ways in which humans make inaccurate and biased judgments. These judgments, which occur at the moment-by-moment level, may influence appraisals and set in motion unnecessarily negative transactions between members of different groups within our society. Such transactions over the course of the professional-family relationship may produce biased conclusions by professionals. Moreover, these processes are not within individuals' awareness.⁴⁸

We will first outline the elements of the human cognitive system where error can occur. Then, systematic biases in social

⁴⁶ See Sally Holland, *The Assessment Relationship: Interactions Between Social Workers and Parents in Child Protection Assessments*, 30 BRIT. J. SOC. WORK 149, 149, 152 (2000).

⁴⁷ See Wells et al., *supra* note 38, at 981-82.

⁴⁸ The question as to whether these processes are "unconscious" or just "less available" to actors in transactions is open to some debate at present. This article does not allow for a thorough discussion of this issue. For a discussion of this issue, however, see generally Bertram Gawronski, Wilhelm Hofmann & Christopher J. Wilbur, *Are "Implicit" Attitudes Unconscious?*, 15 CONSCIOUSNESS & COGNITION 485, 485 (2006) (finding that individuals lack consciousness of where their attitudes derive).

information processing will be discussed with examples of relevant existing research. Some of the research has focused on general tendencies in the human's cognitive system that produce errors in judgment (e.g., biased schema, attribution biases, impression formation), while other work has focused on tendencies that are specific to processing information when marginalized groups in our society are involved. In considering the latter, we will discuss three psychological phenomena that can contribute to bias: implicit prejudice, aversive racism, and stereotype threat. We will also discuss how both general tendencies toward errors and those specific to making judgments regarding racial and ethnic minorities each might contribute to bias in child welfare decision making. Since more is known about caseworker roles in the CPS decision making process, the focus of most of our examples will be on these roles. This, however, does not necessarily mean that the same issues do not apply to other actors in CPS procedures, and where possible, a link to the responses of these other professionals will be made.⁴⁹

A. *A General Social Information Processing Framework*

The social information processing framework used to understand human judgment has three core elements, each of which may be relevant to the promotion of negative transactions: (1) biased schemas or knowledge structures (role schemas/scripts/expectancies/attitudes)⁵⁰ that are linked to certain groups in our society and how transactions should occur between professionals and clients; (2) weak executive functioning capacities (more basic cognitive skills such as capacities to problem solving, cognitive flexibility, information search processes); and (3) appraisals which are the products of the first two (judgments we make about others—in this case, risk to children, who is to blame, need for placement, and service needs, etc.).

The first element, the schema, acts as the foundation for social information processing. Schemas are knowledge structures stored in memory that help people organize past

⁴⁹ See Azar & Benjet, *supra* note 2, at 249, for a discussion that is focused specifically on the mental health evaluator of parental fitness in termination of parental rights situations.

⁵⁰ Schemas are cognitive structures that organize memory and influence our perception and judgment. Schemas are both the social categories (e.g., politicians) and the concepts that are associated with them (e.g., intelligent, manipulative).

experiences and respond to novel situations.⁵¹ They are the basic premises from which humans operate and act as templates for our interactions with others. These templates grow out of experience within one's family, interactions with other individuals, encounters with institutional settings (e.g., members of one's neighborhood, social status, and culture), through media representations of one's own group and of other groups, and for professionals, via educational training. Schemas help people to perceive and interpret new information, filter additional input, lengthen or shorten the search for more information, and serve as templates to judge the need for a behavioral response and the type of response chosen. If these templates are not complex enough, contain biased content, or are rigid, they can lead to biased data gathering, premature closure of the decision making process, or misinterpretations and missteps in one's responses. In our discussion, these missteps are biased judgments regarding members of minority families. Such "missteps" have even been observed among professionals making judgments about each other. For example, Black female lawyers report that judges at times mistake them for defendants in cases or for court personnel, rather than attorneys.⁵² That is, their labeling them as defendants is based on "automatic" categorization of Blacks as criminals.

In the case of racial and ethnic minorities within our society, the schemas held by majority members⁵³ are often tainted with

⁵¹ See J.M. Mandler, *Categorical and Schematic Organization in Memory* (1978), reprinted in *MEMORY, ORGANIZATION, AND STRUCTURE* 303-319 (C.R. Puff ed., 1979).

⁵² See PA. SUPREME COURT COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., FINAL REPORT 543 (2003), <http://www.courts.state.pa.us/Index/supreme/Bias Cmte/FinalReport.pdf>.

⁵³ It is especially noteworthy that although inroads have been made, the number of racial and ethnic minority members of the professions involved in CPS decision making remains disproportionately low compared to the population and the adult population within the CPS system (estimates within the US population of adults suggest that 24 percent fall into these categories). For example, only 14 percent of social workers are from diverse backgrounds. See NAT'L ASSOC. OF SOC. WORKERS, ASSURING THE SUFFICIENCY OF A FRONTLINE WORKFORCE: A NATIONAL STUDY OF LICENSED SOCIAL WORKERS, EXECUTIVE SUMMARY 12 (2006), http://workforce.socialworkers.org/studies/nasw_06_execsummary.pdf. Only 19 percent of psychologists are from minority backgrounds, see Deborah Smith Bailey, *Number of Psychology PhDs Declining*, 35 *MONITOR ON PSYCHOL.* 18, 18 (2004), available at <http://www.apa.org/monitor/feb04/number.html>, and only 10 percent of lawyers and judges are from minority backgrounds, see ABA COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, GOAL IX REPORT 2003-2004: THE STATUS OF

negative elements (e.g., Blacks are viewed as prone to violence). In general, the schema for another's group is more complex than for one's own group, providing less guidance in making fine-grained distinctions among members of the other's group.⁵⁴ In some cases, the schema can have extreme negative components (highly prejudiced individuals). These schema produce a network of negative associations, which then color each stroke in an interaction (what one says, asks, and even non-verbal responses such as smiling or making eye contact)⁵⁵ and, ultimately, the labels applied by each participant in the transaction. Conversely, members of ethnic and racial minorities within our society can have a similarly negatively colored schema regarding professionals and the institutions in which they exist. They may expect prejudicial treatment and may not see themselves as having power or control in transactions.⁵⁶

Membership in minority racial and ethnic groups can mean differential socialization practices during childhood, and this may mean that members of such groups make different verbal and visual presentations as to the nature of family roles.⁵⁷ In the language of social information processing, their scripts⁵⁸ for

RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 13 (2004), available at <http://www.abanet.org/minorities/ftp/goal9report04.pdf>.

⁵⁴ See Michael A. Hogg et al., *Uncertainty, Entitativity, and Group Identification*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 135, 135 (2007); Thomas M. Ostrom & Constantine Sedikides, *Out-Group Homogeneity Effects in Natural and Minimal Groups*, 112 PSYCHOL. BULL. 536, 536 (1992).

⁵⁵ See full discussion in Greenwald & Krieger, *supra* note 44, at 948.

⁵⁶ As will be discussed later, the "script" of feeling unentitled to engage in confrontation with powerful others may be socialized very early in the childhood of individuals from minority families and then reinforced with multiple experiences with disempowerment due to racial or ethnic background.

⁵⁷ For instance, families differ in how children and parents should relate and what their respective "job descriptions" are, how help-seeking should take place, what the relationships should be like with helpers outside the family, who is an allowable helper, how much control one should have in the help seeking transaction, the directness, and indeed the moment by moment process of contact with others both inside and outside the family. See generally Azar & Benjet, *supra* note 2, at 249, and Azar & Cote, *supra* note 1, at 193, 197, for a discussion of socialization and interpersonal transaction differences. These may be as minute as whether one makes eye contact with someone who is more powerful or whether one will answer the questions of someone that is viewed as subordinate to you.

⁵⁸ According to script theory, the scene—an event with a perceived beginning and end—is the basic unit of analysis; the connected set of scenes lived in sequence is called the "plot" of life. The script does not deal with all the scenes or the plot, but rather, with individual rules of predicting, interpreting, responding to, and controlling a magnified set of scenes. An example of a script would be the automatic

social behaviors may have different elements. Although some of these differences in social behavior may be harmless, they can be infused with inaccurate meaning for the professionals who are not from the same sub-group as the parent. This inaccurately ascribed meaning may influence the decisions being made in CPS (e.g., harmless information may be labeled as evidence of child risk). That is, professionals may look at transactions through different "cultural" filters.

Although it might be argued that professional training and knowledge guard against the use of heuristics⁵⁹ that stem from one's personal background, it has been documented that the foundation of scientific knowledge regarding child development and parenting in families from minority backgrounds is quite limited.⁶⁰ Thus, the non-minority professional is in a state of greater ambiguity when encountering racial or ethnic minorities and is forced to draw more on their personal experiences and own socialized views. Indeed, people in our society have been shown to have an ethnocentric tendency to attribute positive traits, values, and behaviors to their own group at the expense of other groups of society.⁶¹ We also have tendencies to rely on heuristics that are negatively biased (e.g., poor people have historically been seen as helpless, incompetent, and despicable).⁶² The use of

response of "fine" when someone asks how we are, or smiling when someone we know and like comes into our visual field.

⁵⁹ A heuristic is a common sense or short-hand way of directing attention or coming to understand something.

⁶⁰ Most of the research in child development has focused on non-minority and middle-class families (only 3 to 8 percent of articles in major child development journals from 1979 to 1993 were devoted to families who were racially or ethnically diverse). See Ana Mari Cauce et al., *Children and Adolescents of Color, Where Are You? Participation, Selection, Recruitment, and Retention in Developmental Research*, in *STUDYING MINORITY ADOLESCENTS: CONCEPTUAL, METHODOLOGICAL, AND THEORETICAL ISSUES* 147, 148-49 (Vonnie C. McLoyd & Laurence Steinberg eds., 1998); Sandra Graham, "Most of the Subjects Were White and Middle Class," 47 *AM. PSYCHOLOGIST* 629, 629, 631, 632 tbl.1 (1992). Also, this research is inherently constructed to look for deficits in minority families (i.e., studies are not begun with an eye to looking for strengths). See Cauce, *supra*, at 152-53; see also Azar & Cote, *supra* note 1, at 198.

⁶¹ See ROBERT A. LEVINE & DONALD T. CAMPBELL, *ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR* 8, 11, 12 tbl.1.1 (1972); RALPH K. WHITE, *NOBODY WANTED WAR: MISPERCEPTION IN VIETNAM AND OTHER WARS* (1970).

⁶² See Raymond P. Lorion & Robert D. Felner, *Research on Mental Health Interventions with the Disadvantaged*, in *HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE* 739, 746 (Sol L. Garfield & Allen E. Bergin eds., 1986); Sandra T.

such heuristics is related to novice problem solving, rather than the kind of organized and calculated processes associated with expertise.⁶³ Thus, the "templates" used to make judgments are often ones that have inherent biases built into them.

Cultures differ in the meaning they attribute to particular parenting responses.⁶⁴ Caseworkers, home visitors, and mental health evaluators who observe parents from a group different than their own may infuse parent-child interactions they observe with inaccurate meaning. For example, a caseworker might perceive "harsh" words about a child as a "lack of bonding" or an example of "rejecting the child," when in reality such "harshness" does not evoke the same feelings in the parent's cultural group, and more importantly, is not seen negatively by the child from that cultural group.

The second component of social information processing, executive functioning, involves the ability to perceive stimuli in the environment in complex and flexible ways in order to identify problems when they occur, regulate emotion, inhibit responses, generate problem-specific responses, prioritize and enact responses, and evaluate the resulting outcomes, as well as adjust one's behavior when responses are not effective. Although executive functioning capacities can be affected by biologically-based cognitive limitations, contextual stress can also decrease them. For example, cognitive performance can narrow under stress.⁶⁵ This may include the kind of constant bombardment with trauma experienced by caseworkers, lawyers, and mental

Azar, *Cognitive Restructuring of Professionals' Schema Regarding Women Parenting in Poverty*, 18 *WOMEN & THERAPY* 149, 151-52 (1996).

⁶³ See generally MICHELENE T.H. CHI ET AL., *THE NATURE OF EXPERTISE*, at xv-xvi (1988) (explaining the "highly organized structure of specific knowledge" typically utilized by experts when solving complex problems); PAT LANGLEY ET AL., *SCIENTIFIC DISCOVERY: COMPUTATIONAL EXPLORATION OF THE CREATIVE PROCESS* 22 (1987).

⁶⁴ See Craig A. Mason et al., *Ethnic Differences in the Affective Meaning of Parental Control Behaviors*, 25 *J. PRIMARY PREVENTION* 59, 61-62, 74 (2004). For a full discussion of examples of parental behaviors that might be mislabeled, see Azar & Benjet, *supra* note 2, at 249-61 (discussing various examples of cultural mislabeling) and Azar & Cote, *supra* note 1, at 197, 208-09.

⁶⁵ Small stresses have been shown to produce decrements in cognitive performance (e.g., test taking ability). Burnout has also been seen as a common problem in professionals with high levels of trauma exposure and rigid thinking patterns and difficulties regulating emotional responses have been seen as typical characteristics when burnout occurs. Stress also frequently accompanies social threat, a topic that will be covered in some detail later.

health and medical professionals in the CPS system, as well as the anticipation of negative consequences if one makes an error in judgment (e.g., a child death or notoriety in the press for failures of the system).

In scientific literature, executive functioning has been seen as a self-correcting element in decision making when one makes a biased response. Specifically, behavioral inhibition is said to take place when such errors occur—slowing responses, when a prejudicial response has been made, resulting in discomfort, and the occurrence of new learning so that the error is not made again. It has been argued that in high prejudice individuals, this process may not operate as well or at all.⁶⁶ For professional actors in the CPS system, executive functioning capacities include the professional's ability to quell prejudicial reactions, preventing their interference with accurate assessments and decision making; knowing when a situation needs intervention (making a risk assessment); generating appropriate responses (e.g., removal of the child from the home); being able to generate effective interventions (e.g., making specific referrals); and, finally, shifting solutions if one of these interventions fails. If executive functioning serves this self-correcting function, its smooth operation is essential to restrict biases from entering decision making.⁶⁷

The last element of social information processing, appraisal processes, is the product of the first two elements. When a situation does not occur in-line with professionals' expectancies, (e.g., "a parent should listen and do what his/her lawyer tells him/her to do"; "a parent should do what a service plan says he/she should do", or even more basic, "someone in trouble should be nice to the person helping them"), then a cause must be attributed to this discrepancy. Appraisals (the inferences made) can influence further thoughts about what has occurred in a transaction, the emotions experienced, and choice of responses made. Schemas and executive functioning capacities work in

⁶⁶ See Margo J. Monteith et al., *Putting the Brakes on Prejudice: On the Development and Operation of Cues for Control*, 83 J. PERSONALITY & SOC. PSYCHOL. 1029, 1038, 1041-42 (2002).

⁶⁷ These capacities are not the same as general intellectual ability. One can go through much professional training and still not have well-developed executive functioning capacities (e.g., possess more rigid thinking patterns). Further, as noted above, prolonged exposure to job stress can produce deficits in executive functioning capacities (e.g., greater rigidity and poorer problem solving).

concert to determine appraisals. For example, when a parent is undergoing a parenting competency evaluation, the evaluator's experience of a parent reporting that he or she has always worked nights might be interpreted (appraised) as diligent economic effort and good problem solving (one gets paid more to work nights and one's partner can care for the children reducing child care costs) or as evidence of some sort of attachment problem to the child (i.e., evidence of avoiding caretaking).⁶⁸ The appraisal made may be based on a script for "good mothering" that comes from the evaluator's own care giving (e.g., the evaluator may have had a working mother and, therefore, possess a knowledge structure about "good mothering" that includes such mothers working and making choices that make sense to their own situation). Also, even if the more negative inference is made initially, with good executive functioning capacities, the professional might question this judgment and search for another plausible interpretation and gather more information to support one of the hypotheses made. Indeed, the adversarial process in the legal system itself is based on such formation of competing interpretations and seeking evidence to support or refute each.

The social information processing framework and the science it has generated around human bias, therefore, may be helpful in understanding the potential for error entering CPS processes. With this framework in mind, examples of documented systematic errors that occur in human information processing will be discussed, including general errors made and three specific examples that are particularly relevant to transactions between White and non-White actors.

B. Some Examples of General Subtle Biases

Over the last three decades, social scientists have documented many general tendencies in our cognitive system that lead to errors in judgments made by participants in interactions. A few examples will be considered here to illustrate the relevance of a social information processing approach to understanding how bias may enter transactions between the CPS system and families. Since space is limited here, examples

⁶⁸ The first author observed the latter appraisal being made by a mental health professional as justification for saying a mother was not "attached" to her children.

involving transactions between caseworkers and parents will be presented, but as noted above, these same processes operate among other professionals involved in legal procedures in the CPS system.⁶⁹

The first example is a tendency in human information processing called *the fundamental attribution error*.⁷⁰ This bias involves a tendency for observers to discount the role of the situation in affecting other people's behavior and to over-estimate the importance of personal or dispositional factors (e.g., traits, personality, or personal motivation). As it applies to decision making in CPS, this means that decision-makers are more likely to blame the parent (ascribe intent, label them as bad parents, etc.), rather than identify or even search for situational determinants of their behavior. The best example of this in the area of family violence is a once strongly held belief in "masochism" as at the root of battered women being beaten. There were cases in which judges actually cited this as a reason for terminating parental rights, arguing that a mother would continue to seek out abusive men because of this personality predisposition.

Actors in situations, however, have a different bias in labeling the causes of their own behavior, as opposed to the behavior of those they are observing. The *actor-observer difference*, as it has been called, is that actors tend to explain their own behavior by reference to the situation.⁷¹ Such an attribution diffuses responsibility for bad acts. These first two errors may work in concert in caseworker-parent transactions to produce negative judgments and errors in decision making. The fundamental attribution error would lead caseworkers to over-attribute negative intent to parents when maltreatment is found. The actor-observer difference would also explain parents wishing to blame someone else or something else for the alleged abusive or neglectful behavior when they are confronted with it during

⁶⁹ For a discussion in the mental health field, see Sandra T. Azar & Kerry N. Makin Byrd, *When Family Values Clash with Therapists' Goals and Treatment Delivery*, in ANGER, AGGRESSION, AND INTERVENTIONS FOR INTERPERSONAL VIOLENCE 349 (Timothy A. Cavell & Kenya T. Malcolm eds., 2006).

⁷⁰ See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991).

⁷¹ See Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTIONS: PERCEIVING THE CAUSE OF BEHAVIOR* 79, 84 (Edward E. Jones et al. eds., 1972).

the investigation. This failure to take responsibility for actions when first contacted by the CPS, although understandable in light of the actor-observer phenomena, may be labeled by caseworkers as evidence of a lack of commitment to change on the parent's part, which would be detrimental to later decisions made about the parent's fitness.⁷²

Impression formation research also has implications for understanding the strength with which biased views can be held once made and how impressions form very quickly in human interactions. Meehl, very early in the study of interactions between professionals and clients, showed that professionals' impressions form within the first three contacts with the other party and that the impressions formed do not change even after close to thirty contacts have occurred.⁷³ That is, the introduction of new information does not shake those early views of the individual.⁷⁴ This has implications for the first contacts that caseworkers and parents have with each other. Based on what is known about the filtering role of schema, once this template is formed, only confirming information will then be taken in to further reinforce the negative views formed regarding that person.⁷⁵

An accumulation of "misappraisals" can lead to less effective or less appropriate transactions between professionals and parents, and ultimately, to discriminatory decision making. Other tendencies exacerbate these misappraisals when families from minority backgrounds are involved.

C. *Examples of Subtle Bias When Members of Diverse Backgrounds Are Considered*

Along with science directed at human information processing errors more generally, there is science that has specifically attempted to understand transactional processes when stereotypes and prejudice occur. Three psychological phenomena

⁷² See Holland, *supra* note 46, at 152-55.

⁷³ See Paul E. Meehl, *The Cognitive Activity of the Clinician*, 15 AM. PSYCHOL. 19, 22 (1960).

⁷⁴ See Nalini Ambady et al., *Toward a Histology of Social Behavior: Judgmental Accuracy from Thin Slices of the Behavioral Stream*, 32 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 201, 201, 203-04 (2000).

⁷⁵ See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979).

that have been studied in relation to racial bias specifically will be used to illustrate how subtle biases can contribute to the potential for error in decision making by the child protection, mental health, medical, and legal systems.

Much of the research on subtle bias has centered on the notion of *implicit prejudice*, the idea that we may hold biased views unbeknownst even to ourselves. This research begins with the idea that, while not everyone endorses negative racial stereotypes, mere participation in a culture requires one to be aware of stereotypes.⁷⁶ To be aware of negative racial stereotypes does not mark someone as morally deficient, but these stereotypes are not entirely harmless either. As people learn racial stereotypes, they also learn to associate members of a racial group with the stereotypes about that group—at least implicitly. So, just as one might think of hospitals when one hears the word “doctor,” one might think of crime when one hears the word “Black.”⁷⁷ This association between Blacks and illegal behavior might be easy to suppress while holding a casual conversation—it would be considered offensive to accuse Blacks of being criminals—but may have deadly consequences in high stakes situations.⁷⁸

Research on implicit associations encompasses countless social groups and equally numerous behavioral changes.⁷⁹ While

⁷⁶ See Devine, *supra* note 43, at 5.

⁷⁷ Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (discussing the “automatic stereotyping process”).

⁷⁸ For example, some researchers have even suggested that it is this association that leads to the disproportionate number of Black suspects who are shot and killed by law enforcement officers. Across a number of experiments, Correll and colleagues have shown that even individuals for whom it is important to be non-racist are more likely to “shoot” an unarmed Black male than an unarmed White male in a training simulation as a result of these implicit racial associations. The association between “Black” and “crime” ostensibly led participants to spontaneously “see” a weapon where there was none and, consequently, to fire on unarmed Blacks. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327–28 (2002); see also B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 190–91 (2002) (suggesting an officer will be more likely to believe a Black suspect is armed). Similarly, Eberhardt and colleagues found that even police officers who are trained to be deliberative and unbiased are more likely to decide that a Black face looks like a criminal than a White face does. Eberhardt, *supra* note 77, at 889.

⁷⁹ See generally John A. Bargh, *Agenda 2006: What Have We Been Priming All*

the issue of child welfare has not been studied directly, it is not difficult to imagine how stereotypes about non-White parents as incompetent, absent, criminal, substance abusing, or non-compliant could lead to biased observations of their behaviors or of the interactions caseworkers might have with them. Similarly, stereotypes about non-White children might lead caseworkers to over-estimate the severity and number of behavioral problems observed (e.g., seeing the child as having more problems and, therefore, being at greater risk and needing foster care).

In addition to the problems that implicit racial bias may cause for caseworkers, implicit bias can impact interactions between caseworkers and families. Of particular importance to this point is a theory known as *aversive racism*, which simultaneously considers implicit bias and explicit attitudes.⁸⁰ This theory asserts that most American Whites generally hold explicit positive attitudes toward members of out groups and are strongly identified with egalitarian beliefs. However, these self-same egalitarians frequently hold implicit biases towards devalued out groups (e.g. non-Whites). That is, they may unconsciously associate non-Whites with negative concepts (e.g., crime, drug use, or parental neglect). In interpersonal interactions, one's explicit attitudes govern how one believes they have behaved.⁸¹ However, one's implicit attitudes govern one's non-verbal communication—the number of times one blinks, the physical distance one puts between oneself and another, the amount of eye contact one makes, the number of “fake” smiles one displays, etc. These non-verbal cues are the primary evidence all people use to determine if a conversation partner is

These years? On the Development, Mechanisms, and Ecology of Nonconscious Social Behavior, 36 EUR. J. SOC. PSYCHOL. 147 (2006) (surveying the major research on implicit associations).

⁸⁰ Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, & RACISM 61, 61–63 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

⁸¹ See John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 841–42 (2001) [hereinafter Dovidio, *Third Wave*] (demonstrating that Whites with positive explicit attitudes will probably believe they appear favorably to Blacks); see also John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 66 (2002) [hereinafter Dovidio et al., *Implicit and Explicit*] (discussing study results which revealed a connection between explicit attitudes and deliberative behavior, as well as a connection between implicit attitudes and spontaneous behavior).

nice or mean—racist or egalitarian. Social psychologists have recently begun to document the kinds of miscommunications this can create.⁸²

Imagine you are a White caseworker who sees herself as non-racist. When assigned to work with a Black parent, you imagine that you are more than capable of working effectively with her since you are “not prejudiced.” When the parent reacts to you coolly, you reasonably conclude that it is her personality—and not your ambiguous eye-blinks, gaze avoidance, and physical distancing—that is responsible for her behavior.

The interaction between professionals involved in the CPS system and parents is often a new one or one with only a limited amount of interaction, and often takes place under conditions of high stress (e.g., investigations to substantiate cases, evaluations by mental health professionals to determine parental fitness, brief meetings with court appointed lawyers and their clients). Thus, non-verbal feedback becomes a crucial source of information as transactions unfold. If this feedback is tainted by a participant's implicit biases, then misjudgments can take place. Parents who come from non-White backgrounds have a long history of encountering racism and thus, may approach interactions with Whites with such expectations. When they meet a professional, who seems to be intending to be as friendly as anyone with strong egalitarian values would be, the parent might still notice that the professional seems uncomfortable. If the professional sits far away from the parent, does not look the parent in the eye, and smiles uncomfortably, as someone with a high implicit bias might, it is difficult for the parent to determine if the professional is friend or foe, prejudiced or simply awkward.

In pairing these experiences, one can imagine how these subjective experiences might combine for an unpleasant interaction for both parties. Ironically, it may be more taxing for the Black participant to interact with someone who—unintentionally—sends mixed signals, than it would be to interact with someone who is overtly racist. This is precisely what Dovidio found.⁸³ In a study on problem solving efficiency, Black participants who were paired with overt racists were able

⁸² See Dovidio, *Third Wave*, *supra* note 81, at 846; Dovidio et al., *Implicit and Explicit*, *supra* note 81, at 67; J. Nicole Shelton et al., *Ironic Effects of Racial Bias During Interracial Interactions*, 16 *PSYCHOL. SCI.* 397, 401 (2005).

⁸³ See Dovidio, *Third Wave*, *supra* note 81, at 842–44.

to solve problems with that partner faster than those who were paired with "aversive racists."⁸⁴ From this example, it is not difficult to imagine that the establishment of trust and compliance between a family and caseworkers might take longer than one might hope. Attributing the "non-compliance" of non-White families to a family's deficiencies may underestimate the role of non-verbal cues on the part of both participants in the transaction, and result in *aversive racism*, in the caseworker/family relationship.

Lastly, psychologists have increasingly investigated how stereotypes about one's own group might impact social interactions. *Stereotype threat theory* suggests that there is frequently a performance decrement when one is concerned with conforming or being evaluated in terms of a negative stereotype about one's own group.⁸⁵ This research began as an investigation into the underperformance of Blacks and women on standardized tests.⁸⁶ Early research demonstrated that even students who were highly identified with academic success and were as talented as their White and male counterparts underperformed when they were threatened with the possibility that their poor performance might be seen as confirming evidence of the negative stereotype about their group. That is, when Blacks and women were under threat of being stereotyped, their test scores suffered.

⁸⁴ See *id.* at 844–45.

⁸⁵ See Claude M. Steele, *Race and the Schooling of Black Americans*, THE ATLANTIC MONTHLY, Apr. 1992, at 68, 72–74; Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 614 (1997). Awareness of stereotypes develops early (somewhere between ages 6 and 10), and once that awareness has occurred, it has been shown to have a negative impact on the performance of children from stigmatized ethnic groups. For example, only those who are aware of stereotypes performed worse when given a cognitive task characterized as diagnostic of ability. Melanie Killen & Clark McKown, *How Integrative Approaches to Intergroup Attitudes Advance the Field*, 26 APPLIED DEV. PSYCHOL. 616, 617 (2005). This process of stereotype threat operates throughout the life cycle, and non-White parents are subject to the impact of being stigmatized when they encounter institutional settings like the child protection system and the associated legal procedures.

⁸⁶ Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 4 (1999); Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 380–82 (2002); Claude M. Steele et al., *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

Research has recently been expanded to look at how Whites respond to the concern that they will be stereotyped as racist in interracial interactions.⁸⁷ Goff and colleagues found that, when Whites were concerned with appearing racist, they physically distanced themselves from Black partners.⁸⁸ Ironically, this distancing is one of the non-verbal cues that Black participants in previous research used to determine how hostile White partners were. That is, the further away a White partner sits, the more Black participants felt that the person was racist. Here, simply being concerned with being seen as racist has the ironic and unintended consequence of producing anti-social behavior that can ultimately hurt Black partners.

In a child welfare setting, it is easy to see how interracial interactions between White caseworkers and non-White families might, again, result in unintentional, yet difficult transactions. Ultimately, if the non-White family is convinced that the caseworker has racially suspect motives, trust is extremely difficult to establish and compliance is likely to suffer. A great number of researchers studying subtle forms of prejudice have called for increased attention to the grave impact that subtle forms of bias can have.⁸⁹

III. IMPLICIT PROCESSES AND THE FAILURE OF EFFORTS TO IMPROVE DECISION MAKING: HOW THE SCIENCE OF NON-BIASED DECISION MAKING MIGHT HELP RECTIFY SUCH EFFORTS

For the most part, the professional groups involved in CPS procedures have not been oblivious to the need for efforts to improve the transactions between professionals and families to produce better decision making. Their efforts to date, however, have fallen short of the hopes tied to them. The influence of biases in social information processes we have described may be at fault. We will briefly describe these efforts and highlight how implicit processes may have stymied their positive goals. Hints at how implicit processes may be changed that are based on

⁸⁷ Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611, 1612 (2004).

⁸⁸ Phillip A. Goff et al., *The Space Between Us: Stereotype Threat and Avoidance in Interracial Contexts* 53 (2005) (unpublished manuscript, on file with author).

⁸⁹ See Dovidio, *Third Wave*, *supra* note 81, at 846.

research will be offered for future program development where they exist.

Some efforts have been attempted within the CPS to increase generally the accuracy of decision making. Others have focused directly on producing greater multi-cultural sensitivity. The general changes have been in the development and use of structured protocols for risk assessment and, to a more limited extent, intervention choices,⁹⁰ implementation of mediation and family conferencing to decrease the power differential parents may feel and empower them to have a stronger voice in decision making, and engaging in professional training in multicultural sensitivity (both early in careers in educational training settings and later in careers in ongoing practice settings).⁹¹ Efforts have also been initiated to improve the evaluations performed by mental health professionals who have been contracted to conduct assessments of parental competency for service planning and parental fitness for termination of parental rights hearings.⁹² Some of these efforts have drawn on science as they were being developed (e.g., actuarial studies of risk prediction, program evaluations, studies of validity of instruments for measuring parenting). For the most part, efforts directed at multi-cultural sensitivity have been directed mostly at professionals in the social work, mental health, and medical fields.⁹³ The efforts, however, have not been extended to training of legal professionals. All of these efforts have been on the explicit level

⁹⁰ The term intervention here is intended to denote gross level interventions such as emergency placement of children, not the services level intervention such as offering family or child mental health services.

⁹¹ See generally Diane DePanfilis & Maria Scannapieco, *Assessing the Safety of Children at Risk of Maltreatment: Decision-Making Models*, 73 CHILD WELFARE 229 (1994) (reviewing ten different models that evaluated the safety of maltreated children).

⁹² For discussions of the limited information in this arena, see Azar & Benjet, *supra* note 2, at 249–52; Sandra T. Azar et al., *Child Maltreatment and Termination of Parental Rights: Can Behavioral Research Help Solomon?*, 26 BEHAV. THERAPY 599, 602–03 (1995); Sandra T. Azar et al., *The Evaluation of Parental Fitness in Termination of Parental Rights Cases: A Functional-Contextual Perspective*, 1 CLINICAL CHILD & FAM. PSYCHOL. REV. 77, 78 (1998); Karen S. Budd et al., *Clinical Assessment of Children in Child Protection Cases: An Empirical Analysis*, 33 PROF. PSYCHOL.: RES. & PRAC. 3, 3 (2002); Karen S. Budd et al., *Clinical Assessment of Parents in Child Protection Cases: An Empirical Analysis*, 25 LAW & HUM. BEHAV. 93, 106–07 (2001).

⁹³ There have been some efforts within psychology and social work to develop programs for increasing multi-cultural sensitivity in staff. To date, the evaluation of such efforts has been very limited.

and concerns about the effectiveness of each have been raised. The failure to address the more implicit processes outlined above may be at fault. We will outline below these domains and indicate how implicit processes may be interfering with their effectiveness.

A. *Use of Risk Assessment Protocols*

Use of actuarial risk assessment systems have occurred in a number of states.⁹⁴ These protocols were developed to provide systematic structures for workers' decision making and to overcome the unreliability of the use of clinical judgments, which are subject to more errors. Unfortunately, these systems have not as yet fulfilled their promise, as there are problems with their reliability and validity.⁹⁵ It has been argued that clinical judgments of individual caseworkers are still being used in these systems either in the caseworkers' application of the elements or in their continuing reliance on their own subjective interpretations, over the standardized criteria in the decision making process.⁹⁶ That is, the errors outlined above may still be creeping into decision making despite their use.

Educating professionals about the implicit processes we have outlined as part of their training in these risk assessment protocols, generally, might decrease some circumvention of the systems and help caseworkers accept their use more completely. However, as our discussion below will suggest, other work will also need to be done.

B. *Use of Mediation and Family Conferencing*

To alleviate the felt power imbalances, the CPS system has tried to work procedurally on providing contexts where greater power is given to parents. Mediation (family conferencing)⁹⁷ has

⁹⁴ See Hyun-Ah Kang & John Poertner, *Inter-Rater Reliability of the Illinois Structured Decision Support Protocol*, 30 CHILD ABUSE & NEGLECT 679, 680 (2006).

⁹⁵ *Id.*

⁹⁶ See Eileen Munro, *Common Errors of Reasoning in Child Protection Work*, 23 CHILD ABUSE & NEGLECT 745, 753-54 (1999); Aaron Rosen, *Knowledge Use in Direct Practice*, 68 SOC. SERV. REV. 561, 574 (1994); Peter H. Rossi, John Shuerman & Stephen Budde, *Understanding Decisions About Child Maltreatment*, 23 EVALUATION REV. 579, 579-98 (1999).

⁹⁷ See generally PETER MARSH & GILL CROW, FAMILY GROUP CONFERENCES IN CHILD WELFARE (1998); Allen Barsky, *Mediation and Empowerment in Child Protection Cases*, 14 MEDIATION Q. 111-34 (1996).

been used in some CPS systems to make decisions once a family is involved in the system (when children are placed) or to negotiate permanent custody decisions (termination of parental rights). Advocates for mediation argue that it is not as oppressive as the court process. In court settings, for example, parents are silent, and in many cases, their views may never be heard directly. Only lawyers and judges speak. Parents' own lawyers may be hesitant to call them as witnesses (perhaps for fear that the cues discussed above would lead to erroneous or negative judgments being made about them). Parents, however, feel they have no part to play in legal proceedings that affect their families so deeply. In interviewing women whose parental rights have been terminated, the first author found that they cite the lack of a voice as being problematic for them. One mother interviewed noted that her lawyer got paid no matter what the outcome was. She described herself as being an object in the courtroom, not a person. Mediation, which is designed to "level the playing field," might, therefore, be a fruitful direction.

Based on our discussion of subtle biases above, however, it is not clear if mediation or family conferencing is as free from the power imbalances that occur in other settings. Mediation itself assumes a sense of empowerment and negotiation capacities that, as noted above, may be less available to some racial and ethnic groups in our society.⁹⁸ Although the need to empower lower class minority individuals has been discussed much in the mental health and social work literature, little research has been done on effective strategies for doing so.⁹⁹ It has also been argued that levels of potential for empowerment need to be determined by mediators. For example, Giovannucci argues that

⁹⁸ Part of dealing with conflict is having a wide repertoire of conflict resolution strategies and both the skill and the social power to implement them. Sub-cultural groups in our society vary in the manner in which they feel empowered to engage in disputes with powerful others. For example, Laureau, in examining socialization processes within African American families, found they were less geared toward producing children with a sense of entitlement. See Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 AM. SOC. REV. 747, 760 (2002) (explaining that black middle-class fathers tend to teach their sons "what it means to be a black man in this society"). This can become part of a script of interaction that leaves members of these groups with less practice in negotiating with others in power.

⁹⁹ Sally Schwer Canning & John W. Fantuzzo, *Competent Families, Collaborative Professionals: Empowered Parent Education for Low Income African American Families*, 20 J. PREVENTION & INTERVENTION CMTY. 179, 179-96 (2000).

there may be cases where the imbalance of power is a permanent one and cannot be resolved by the mediation process.¹⁰⁰ It is unclear if mediator training provides strategies for determining when such conditions occur. Misappraisals made of transactions with mediators can occur. Parents may be less able to discriminate a professional respectful style ("they were so nice to me") from someone who is "on their side" and thus, they may not recognize that the mediator is neutral and may go along with what he or she says because they believe the mediator is speaking in their "best interest."

Some pre-mediation work where parents are coached in negotiation skills and the optimal use of mediation methods may be useful. Again, this may still be too "explicit" and may not really shift the implicit perceptions of lack of power and entitlement enough to allow for full participation in the process. Work also needs to be done with the professionals involved. They carry an implicit role schema of greater power.¹⁰¹ This schema might trump even successful efforts to change parents' skill levels to negotiate. Therefore, making the process more transparent may be a successful strategy. Work by Tyler and others has suggested that the more a system is transparent, and seems to possess elements of procedural justice, the more cooperation those involved in the system are likely to give.¹⁰² However, as much as it may behoove the system to work on increasing family compliance, it is clearly the case workers who are most easily influenced by CPS.

C. *Multi-Cultural Sensitivity/Anti-Stigma Training of Professionals*

In the past decade or more, potential for bias in professional-client interactions has been acknowledged in the mental health, social work, and medical fields. The typical manner it has been addressed is through "multicultural" sensitivity training or anti-stigma training. Typically, such training has included some education about specific "out groups" in our society and about "culturally sensitive" approaches to dealing with common issues

¹⁰⁰ Marilou T. Giovannucci, *Understanding the Role of the Mediator in Child Protection Proceedings*, 35 FAM. & CONCILIATION CTS. REV. 143, 146 (1997).

¹⁰¹ This will be difficult to shift with the pressures society places on CPS to protect children and the consequences paid by CPS units if they fail to do so.

¹⁰² LIND & TYLER, *supra* note 44.

(e.g., methods of alliance building, use of interpreters, etc.). On occasion, more experiential approaches have been tried. These experiential approaches involve groups with professionals and/or students in training where they explore their personal experiences of class, race, and ethnicity.¹⁰³ On the whole, the effectiveness of these approaches has not been studied systematically. When programs geared toward training and reduction of stigma toward other out groups in our society have been employed (e.g., stigma reduction toward the psychiatrically disabled), evidence suggests some limited immediate effects changing negative attitudes and decreasing social distancing (the relative willingness of one person to participate in relationships of varying degrees of intimacy with a person who has a stigmatized identity¹⁰⁴). These effects, however, disappear quickly (e.g., as soon as one month later). Moreover, those programs directed at reducing racial and ethnic bias have also been faulted for their treating groups as homogenous, rather than reflecting sub-cultural differences (e.g., the cultural style of "Asians" may vary depending upon what the country of origin is) and, thereby, replacing one set of categorically based biases with another set. Again, these approaches are directed at explicit processes, not implicit ones.

D. Improving Evaluations of Parenting

Much has been made of the poor quality of custody evaluations in general¹⁰⁵ and in CPS work specifically.¹⁰⁶ Reform efforts have taken place in some courts, like in Chicago, for example,¹⁰⁷ on the heels of evaluations being conducted on the reports written, which have shown deficiencies. These kinds of efforts have resulted in some improvement in the methods used

¹⁰³ See Teresa McDowell et al., *Making Space for Racial Dialogue: Our Experience in a Marriage and Family Therapy Training Program*, 29 J. MARITAL & FAM. THERAPY 179, 180–82 (2003) for an example of this approach.

¹⁰⁴ Abdurrahman Altindag et al., *Effects of an Antistigma Program on Medical Students' Attitudes Toward People with Schizophrenia*, 60 PSYCHIATRY & CLINICAL NEUROSCIENCES 283, 283–88 (2006).

¹⁰⁵ See generally THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 229–308 (2d ed. 2003).

¹⁰⁶ See *supra* note 92 and accompanying text.

¹⁰⁷ See Budd et al., *supra* note 92, at 5 (discussing the Clinical Evaluation and Services Initiative ("CESI") in Chicago and how the initiative began at the request of the chief judge of the Circuit Court of Cook County).

(e.g., more use of standardized measures, behavioral observations, and other more valid procedures), but still have not addressed the issues of bias. A lack of (1) culturally sensitive models of the elements of competent parenting, (2) a knowledge base on diverse families, (3) instruments validated for use with racial and ethnic minorities, and (4) culturally competent evaluators, have all been cited as problems.¹⁰⁸ Given that reports are typically created at the most crucial juncture of decision making (i.e., termination of parental rights), the stakes are high. Foundational improvements in custody evaluations are under way. With these completed, more specific efforts regarding the problems cited above are needed. The last of these, the training of culturally competent evaluators, will require work directed at subtle biases.

E. The Promise of Science-Based Interventions to Reduce Implicit Biases

Can the social information processing approach to understanding bias described above and the science upon which it is based tell us anything about how one may short-circuit the tendency for the cognitive systems' biases to manifest themselves? These implicit biases do appear to be open to some changes. It has been "shown that when a person forms a new personal connection with a member of a previously devalued outgroup, implicit attitudes toward that group may change dramatically and rapidly," such as in interracial dating experiences or "when a son or daughter marries a member of a racial or ethnic minority."¹⁰⁹ Some hints about developing more effective programs are emerging in the social psychology and clinical psychology literature.¹¹⁰ At this point, most of the social psychological experimental work attempting to manipulate implicit bias is laboratory based and, therefore, has not been conducted with professionals within the CPS system. Strategies that have been studied include practice in resisting stereotypes and normalizing biases to reduce the threat of their appearance.

¹⁰⁸ See *supra* note 92.

¹⁰⁹ Greenwald & Krieger, *supra* note 44, at 964.

¹¹⁰ See Dovidio, *Third Wave*, *supra* note 81, at 832-33, 846. The reader is strongly cautioned that these are just "hints" and work in this area is just beginning to emerge.

Kawakami and colleagues, for instance, found that participants who practiced resisting racial stereotypes actually reduced their implicit biases.¹¹¹ Kawakami and her colleagues asked participants who held implicit racial biases to practice associating, for instance, "Black" with positive stereotypes and actively rejecting negative stereotypes by indicating on a computer keyboard that "Black" and "criminal" did not go together. The fact that extended training in this "forced re-education" paradigm produced positive results with some level of longitudinal success, suggests that creating stereotype-disconfirming habits may help reduce both implicit bias and the aversive racism that can stem from it.

Similarly, diversity among professionals themselves may go a long way to reducing bias within the system.¹¹² Though it would be absurd to suggest that only in group members can effectively work in non-White communities, there is a growing amount of literature suggesting that the presence of in group members can alleviate non-Whites' suspicion of racial bias. Work by Marx and Goff demonstrated that when a person in a position of power is an in group member, non-Whites experienced less stereotype threat and performed as well as their White colleagues.¹¹³ Similarly, Tyler and colleagues found that diversity among those in power is sometimes seen as a sign of procedural justice.¹¹⁴ This could, again, promote the perception of CPS procedures as fair among non-Whites.

Lastly, recent literature suggests that stereotype threat can be reduced through relatively straightforward efforts. Work by Goff and colleagues suggests that treating interracial interactions as learning opportunities helps to reduce the threat experienced by egalitarian Whites.¹¹⁵ That is, telling CPS workers that they are likely to experience anxiety around a particular interracial interaction, that this anxiety is normal,

¹¹¹ Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871, 884-85 (2000).

¹¹² See *supra* note 53 for evidence of low representation of diversity among professionals involved in CPS processes.

¹¹³ See David M. Marx & Phillip A. Goff, *Clearing the Air: The Effect of Experimenter Race on Target's Test Performance and Subjective Experience*, 44 BRIT. J. SOC. PSYCHOL. 645, 654-56 (2005).

¹¹⁴ See Lind & Tyler, *supra* note 44.

¹¹⁵ Goff et al., *supra* note 88, at 53.

and that it can be unlearned, may either reduce the actual anxiety, or at least minimize the distancing behaviors that tend to result from it. Work by Gregory M. Walton suggests that simply normalizing the anxiety one feels by telling someone "this anxiety is part of being a good caseworker" might reduce stereotype threat.¹¹⁶

In addition to this experimental work, strategies based on the application of social information processing in the field of clinical psychology have been suggested. These strategies have been used by the mental health field to change patients' implicit biases in psychotherapy (e.g., the distorted beliefs of angry, depressed, and anxious patients, as well as parents who are showing difficulties in the appraisals of their children).¹¹⁷ These applications have employed cognitive restructuring techniques, whereby efforts are made to make implicit biases (biased schema in particular) more explicit. Once awareness of biases is recognized, a process of cognitive re-evaluation takes place in a collaborative manner with the patient, and challenges to the beliefs are made. Such techniques have been shown to reduce the impact of appraisals that lead to maladaptive interpersonal responses (e.g., the "distorted" thinking that leads to mislabeling of interpersonal cues and to both depression and anger and the maladaptive responses associated with both these emotions). Stereotype threat researchers have suggested something along the same lines. For instance, these researchers have suggested that removing the concern that Whites might be seen as racist can reduce implicit bias or at least limit the exacerbation of it.¹¹⁸ As suggested earlier, Goff and his colleagues' model to alleviate stereotype threat would involve teaching Whites to treat each interracial interaction as an opportunity to learn, rather than a setting in which their "level of racism" is on trial.¹¹⁹ Essentially,

¹¹⁶ Walton's work was conducted on non-Whites in an elite academic institution. See Gregory M. Walton, *The Role of Social Identity Processes in Motivation* (May 2005) (unpublished Ph.D. dissertation, Yale University) (on file with author).

¹¹⁷ For an in-depth discussion of these techniques as applied in parenting and in supervision of mental health and social professionals, see Sandra T. Azar, *Preventing Burnout in Professionals and Paraprofessionals Who Work with Child Abuse and Neglect Cases: A Cognitive Behavioral Approach to Supervision*, 56 JCLP/IN-SESSION: PSYCHOTHERAPY PRAC. 643, 650-52 (2000); Sandra T. Azar et al., *Parenting Schemas and the Process of Change*, 31 J. MARITAL & FAM. THERAPY 45, 45-47 (2005).

¹¹⁸ Frantz, *supra* note 87, at 1622.

¹¹⁹ See Goff et al., *supra* note 88, at 22, 53.

this would involve a different schema about the transactions that occur where the professional is fearful of appearing prejudiced.

Like bias researchers, social scientists using behavioral observations as a method of study have also been well aware of the error in human information processing, given that it muddies findings. They have shown that they can eliminate a portion of the error with training. Recently, they have begun to systematically study how such error works in practice and how change can be produced. Some error is due to poorly constructed observational coding systems; thus, it can be argued that the risk assessment systems described above might need further development to reduce some error. Another portion of error can be attributed to something about the person making the judgments. Indeed, in practice, some coders are "fired" from the task because they cannot make reliable judgments with other coders who are working on the same research project. This coder-based error has been studied, and it appears that males under-code aggression and females over-code behaviors as signifying this trait (which reflects differential socialization for men and women regarding the use of aggressive behavior). Most relevant to the discussion here is specific data, although limited at this point, that a coder's race and family race have been shown to interact to produce differential coder judgments.¹²⁰ This study also offered clues as to how one might change implicit processes, demonstrating that with more training in the specifics of errors made, practice coders showed fewer errors in their judgments.¹²¹ Clearly, more study is needed to determine whether such work will offer us more hints for reducing observational errors in professionals working with diverse families.

In addition, active coaching for both professionals and parents could be performed; whereby new transactional capacities are learned (much like that which is done in social skills training by mental health professionals). Use of videotaped training where behavioral evidence of implicit biases might be pointed out over and over again may begin to help the professional identify elements to be "on the watch for" in their

¹²⁰ Janet N. Melby et al., *A Generalizability Approach to Assessing the Effects of Ethnicity and Training on Observer Ratings of Family Interactions*, 20 J. SOC. & PERSONAL RELATIONSHIPS 171, 176-82 (2003) ("[I]nvestigating race of coder and race of family member as contributors to bias.").

¹²¹ See *id.* at 182.

own behavior and in their appraisals of parents. Science is needed to identify a fuller list of what these cues are. Ongoing monitoring and "re-training" to reduce drift would be crucial, as most effects to change biases seem to be short-lived.

Peggy Cooper Davis¹²² has also suggested training parents on how to deal with the CPS processes by using theater coaches who can teach them to "act" more in the way a middle class client might if confronted with the same procedures. This may reduce the occurrence of moment-by-moment cues that can set negative judgments about parents in motion. Along these lines, one court employed support groups to help parents learn from each other about how to deal with transactions with caseworkers and legal actors and to share knowledge and increase their sense of empowerment. A manual was developed that gives advice to mothers on how to respond during court proceedings and on the other procedures that occur. It functions as a sort of do's and don'ts guide, intended to reduce interpersonal cues that might be misinterpreted by professionals (e.g., it is not good to yell at the judge or CPS workers).¹²³ Reducing the most blatant cues that set off negative transactions may prove useful.

Some biases may always be present. Kang and Banaji, in their discussion of affirmative action in the area of assessment in hiring decisions, argue that blind measurement may be helpful.¹²⁴ A similar suggestion has been made in the area of assessment of parenting. It has been suggested that just as laboratories test medical samples to decrease error in judgments, for certain CPS functions (e.g., evaluations used to make fitness judgments), observations of parent-child interaction should be videotaped with the tapes being sent elsewhere for judgments regarding patterns of behavior.¹²⁵ This, of course, would not rule out the possibility that the person setting up the observational sessions might introduce bias based on their ethnic or racial

¹²² Email from Peggy Cooper Davis, Professor of Law, The Lawyering Program at New York University, to author (Dec. 28, 2006) (on file with author).

¹²³ Suffolk County Mothers on Trial (unpublished manuscript, on file with author).

¹²⁴ Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1091-95 (2006) (discussing how "cloaking" certain social categories such as race may prove useful).

¹²⁵ ERIC H. MASH, *Measurement of Parent-Child Interaction in Studies of Maltreatment, in THE EFFECTS OF CHILD ABUSE AND NEGLECT* 203, 230-45 (Raymond H. Starr & David A. Wolfe eds., 1991).

background, or in the manner in which they set up the observation. As is outlined below, implicit biases can be reduced in observations if careful training is done and if a "lab" is designed to provide standardized feedback on tapes that could keep ratings more consistent. For instance, more time could be devoted to training and the ongoing scrutiny of raters, and raters would be free of the day-to-day stress that caseworkers experience.

These suggestions hold promise for informing core elements of future programming. These programs might include both work with professionals and work with families who enter the child protection and related legal systems. They need to each be evaluated scientifically before they could be adopted, but they clearly warrant further exploration.

CONCLUSION

The need for cultural sensitivity in understanding definitions and devising procedures in child abuse and neglect work has become prominent in the last few decades. To date, the discussion has for the most part focused on the idea that various cultural groups differ in childrearing practices. That is, what may be considered as acceptable and common within one culture may be unacceptable within another. There have been concerns raised that social standards in the treatment of children could be biased in favor of some selected segments of society, such as the White-middle class and others who are in positions of social and professional power.¹²⁶ The dialectic here has been cultural relativism versus universalism. Clearly, promoting cultural relativism at the expense of the best interest of either the child or society is not wise.

This debate has entered the legal arena. The present article, however, has focused more attention on a different element in this same domain, namely how socialization experiences with one's culture or status within society may alter appraisals that are made during professional-family transactions, and perhaps ultimately affect decision making outcomes. Although there has been some attention given to the former issues in professional

¹²⁶ G.K. Hong & L.K. Hong, *Comparative Perspectives on Child Abuse and Neglect: Chinese Versus Hispanics and Whites*, 70 *CHILD WELFARE* 463, 463-75 (1991).

training in social work, psychology, medicine, and to a limited extent, in the law (e.g., discussions of the definition of child abuse), these more subtle problems, for the most part, have not received much attention.

Recently, reform involving multi-cultural sensitivity in professional training has faltered in the fields in which it has been undertaken. In psychology, for example, there has been debate as to whether multi-cultural training further marginalizes sub-groups within our society thereby producing a backlash.¹²⁷ The movement toward training "thinking lawyers" who are sensitive to diversity issues with respect to culture, class, and gender has also moved forward in much smaller fits and starts. However, based on what is known about the properties of systems that facilitate or stymie change, such change is difficult to make. There are homeostatic mechanisms that allow systems to return to former states when they encounter stresses (e.g., attempts to change the "culture" of professional training). It has been argued that law schools in particular, because of their emphasis on conformity in their training and on competition, may be particularly resistant to changes in curriculum and the aims of education.¹²⁸ Further limiting attempts to enhance the training of professionals around these issues is that the typical methods of training do not address these implicit processes. If anything, it has been suggested that they may even help to maintain these implicit bias processes. For example, in mental health and social work, when clients are difficult or "non-compliant" and "resistant" to interventions or confront the professional,¹²⁹ it is framed as evidence of the client's pathology.¹³⁰ Overall, almost nothing is

¹²⁷ Stanley Sue, *In Defense of Cultural Competency in Psychotherapy and Treatment*, 58 AM. PSYCHOL. 964, 964-65 (2003).

¹²⁸ Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. (forthcoming Spring 2007).

¹²⁹ See Azar & Makin-Byrd, *supra* note 69, at 349-92.

¹³⁰ This view is captured well in a classic discussion of Hans H. Strupp's regarding client resistance in psychotherapy. He argues that:

[T]he fundamental difference between the client and therapist is that the client subscribes to maladaptive beliefs while the therapist subscribes to more adaptive beliefs. The client enters treatment with a well-worn path of neurotic behaviors. Interventions present an alternative route, a detour from the frequently traveled road. A rupture [resistance] in therapy highlights this fork in the road: faced with irreconcilable options, the client

said about the professionals' involvement in potentially triggering these "behaviors" in clients. Some exceptions have occurred and hint at a vision of future efforts. Writers have focused on one element in the social information processing framework presented above—schema or expectancies. Attempts to outline professionals' cognitive problems (assumptions) that may act as obstacles have occurred, trying to make that which is implicit more explicit. For example, the use of supervision with trainees (or full fledged professionals) to reduce negative judgments made about clients and to keep them focused on the needs of the case has been outlined.¹³¹ Additionally, some law schools have experimented with smaller class sizes and atypical teaching techniques—use of psychodrama, for example, to get at implicit processes. These efforts, however, have been limited.

Our discussion argues that more attention needs to be given to these approaches. Our society is changing in composition and the demographics of families are rapidly changing with it. Yet the demographics of professional groups that are the primary actors in social services and family court systems have not kept pace with these changes. It is predicted that decision making which is subject to the errors we have outlined here may become even more frequent as these demographic changes continue to occur. Science is needed to guide our efforts in further identifying the nature of these biases and how they operate. Related to that, guidance is also needed on change processes to inform training and decrease the inequities that may be found within the CPS system, so as to ultimately be more effective in protecting children.

cannot, at once, continue to engage in the neurotic behavior and remain connected to the therapist . . . [for the client,] the lure of the novel path is only as strong as the positive valence of the relationship with the therapist.

Gia G. Maramba et al., Paper Presented at the Meeting of the North American Society for Psychotherapy Research: Beliefs and Early Alliance Ruptures (Nov. 6, 2004) (on file with the author) (relating ideas from HANS H. STRUPP, *PSYCHOTHERAPY: CLINICAL, RESEARCH, AND THEORETICAL ISSUES* (1973)).

¹³¹ Azar, *supra* note 62, at 160–61; Azar, *Preventing Burnout*, *supra* note 117, at 647–52.