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Author

Shenoy, Akila

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Negotiations in Juvenile Dependency: Addressing Power, Race, and Class Inequities

Akila Shenoy*

A primary goal of the juvenile-dependency system is the preservation of the family, yet this goal is undermined by the gross disparity in bargaining power that exists between parties and that disproportionately affects poor families of color. This Note argues that the systemic power imbalance within the dependency system that disadvantages parents and is exacerbated by racial and class bias can be ameliorated by incorporating objective criteria into proceedings, moving from an adversarial to problem-solving approach in negotiations, requiring cultural competency that acknowledges disproportionality and its sources, and expanding access to mediation. This Note proceeds in five parts. Part I provides an overview of the juvenile-dependency system. Part II discusses racial and class disparities in juvenile dependency. Part III describes negotiations in juvenile dependency, particularly the parties involved, the way information is gathered and shared, and how race and class impact negotiations. Part IV offers a series of case studies, which are incorporated into Part V to illustrate proposed reforms.

* J.D. University of California, Irvine School of Law, M.U.P. New York University, Robert F. Wagner Graduate School of Public Service. Many thanks to Professor Carrie Menkel-Meadow for comments, suggestions, and encouragement.

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INTRODUCTION

Negotiations take place throughout juvenile-dependency proceedings between all counsel. Based on observations of the dynamics between counsel assigned to a courtroom at the Edmund D. Edelman Children's Courthouse (Edelman Court) in Monterey Park, Los Angeles County, California, parents and their counsel maintain an inferior negotiating position to other counsel and parties throughout proceedings, which impacts the outcomes of dependency cases. There are several possible reasons for this imbalance. First, the stakes for parents—the loss of their children—are incredibly high, forcing parents either to accept any demands made of them by opposing counsel or else to risk permanently losing their children. Second, cases often involve several parties, such as multiple parents and children, with competing interests, placing additional pressure on parents. A mother, for example, may have to fight not only with the Department of Child and Family Services (DCFS) to get her children back but also with former partners asserting a custody claim to her children. Third, parents' negotiating position suffers due to an informational imbalance that gives DCFS unfettered access to any and all details of a parent's life and penalizes parents for withholding information. Fourth, racial and

class biases taint how evidence is interpreted and the perceptions of parents' ability to provide a safe home for their children, further weakening the negotiating position of poor parents of color.

A stated goal of the juvenile-dependency system is the preservation of the family,¹ yet this goal is undermined by the gross disparity in bargaining power that exists between parties. This power imbalance disproportionately affects families of color, who enter the system at a greater rate than White families.² Within the system, families of color continue to be treated differently, which is reflected in their disproportionate outcomes. As one study reveals, Black children nationwide “are more likely to be separated from their parents, spend more time in foster care, are less likely to be either returned home or adopted, and receive inferior services.”³ In Los Angeles County, Black children are overrepresented in the foster-care system at a rate three times higher than in the general population.⁴ The instability these children experience during their lives has long-term impacts: statistics on children aging out of foster care reveal that only fifty-three percent graduate from high school on time⁵ and eleven to thirty-eight percent will experience homelessness.⁶ While courts in California must generally appoint counsel for indigent parents whose children are subject to jurisdiction of the court,⁷ this is not the case across the nation.⁸ Yet, even with this representation, parents encounter a severe power imbalance inside and outside the courtroom.

1. *What is Juvenile Dependency Court?*, SUPERIOR CT. CAL. CNTY. L.A., <http://www.lacourt.org/division/juvenile/JV0010.aspx> [<https://perma.cc/SH9D-NBD7>] (last visited Jan. 28, 2022).

2. DEP'T OF CHILD. & FAM. SERVS., CNTY. OF L.A., CHILD WELFARE SERVICES DATA FACTSHEET FISCAL YEAR 2019–2020 (2020), <https://dcfs.lacounty.gov/wp-content/uploads/2020/11/Factsheet-FY-2019-2020.pdf> [<https://perma.cc/M33A-U5ZF>].

3. Akhila L. Ananth, *The Home the Law Built: White Domesticity and the Designs of Juvenile Dependency Law in Los Angeles, California*, 24 GENDER, PLACE & CULTURE 189, 192 (2017).

4. Black Lives Matter—Los Angeles, *This Is Not a Drill! Protecting Our Children in Foster Care in a Time of Coronavirus*, FACEBOOK (May 28, 2020), <https://www.facebook.com/watch/live/?v=633422830628056&ref=watch> [<https://perma.cc/3QYZ-KXUU>].

5. *Foster Care Facts*, CHILD'S L. CTR. CAL., <https://www.clccal.org/resources/foster-care-facts/> [<https://perma.cc/HE7R-KZDN>] (last visited Jan. 28, 2022) (citing Data Reporting Off., *2017–18 Chronic Absenteeism Rate*, DATAQUEST (2018), <https://data1.cde.ca.gov/dataquest/DQ/Census/AttChrAbsRate.aspx?agglevel=State&cds=00&year=2017-18> [<https://perma.cc/Q4AB-8KAZ>]).

6. *Id.* (citing HUILING FENG, JUSTIN S. HARTY, NATHANAE L. OKPYCH & MARK E. COURTNEY, MEMO FROM CALYOUTH: PREDICTORS OF HOMELESSNESS AT AGE 21, at 1 (2020), https://www.chapinhall.org/wp-content/uploads/CY_PH_IB0520.pdf [<https://perma.cc/U245-QESL>]).

7. CAL. WELF. & INST. CODE § 317 (Deering 2016).

8. The Supreme Court last considered the right to counsel for indigent parents in termination-of-parental-status proceedings in *Lassiter v. Department of Social Services of Durham County*, N.C. 452 U.S. 18 (1981). There, the Court kept with precedent establishing a right to appointed counsel only for indigent criminal defendants facing deprivation of physical liberty, and “le[ft] the decision [of] whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject [] to appellate review.” *Id.* at 32. Some states have declined to follow *Lassiter* and have adopted legislation providing parents a right to counsel in termination-of-parental-rights proceedings.

Power inequities and racial and class biases in negotiations within the juvenile-dependency system must be addressed to effectively work towards family reunification and to counteract the disparate outcomes for poor families of color. This Note discusses issues facing negotiations in the juvenile-dependency system and suggests reforms. Part I provides an overview of the juvenile-dependency system including the types of proceedings and the organizations that are a part of the system. Part II discusses the race and class disparities in juvenile dependency. Part III describes negotiations in juvenile dependency, particularly the parties involved, the way information is gathered and shared, and how race and class impact negotiations. Part IV offers a series of case studies, which are incorporated into Part V to illustrate proposed reforms.

I. OVERVIEW OF JUVENILE DEPENDENCY

Parents have a constitutional right to raise, care, and educate their children; however, this right is not absolute.⁹ The Supreme Court has repeatedly found that the State has the authority to limit parental freedom and can sever familial relationships as long as due process requirements are met.¹⁰ “The termination of parental rights . . . divests a parent of all rights and privileges regarding the child . . . severing the parent-child relationship.”¹¹ Parental rights are intended to be protected in the juvenile-dependency system through extensive court proceedings and the provision of services to maintain and reunify families. While the Supreme Court has not yet interpreted the Constitution to guarantee a right to indigent parents to counsel in termination-of-parental-rights proceedings,¹² currently forty-five states and Washington, D.C., provide a categorical right to counsel for suits pertaining to the termination of parental rights of birth parents.¹³ Of the five

9. *Troxel v. Granville*, 530 U.S. 57, 65–69 (2000) (discussing the Court’s extensive precedent recognizing parents’ fundamental right to make decisions in the care, custody, and control of their children, and “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family”).

10. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (finding that “the family is not beyond regulation in the public interest” and “that the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare”); *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (“[W]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”).

11. Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 103 (2012).

12. Sarah Dina Moore Alba, Comment, *Searching for the “Civil Gideon”: Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. PA. J. CONST. L. 1079, 1079 (2011); see also *Lassiter*, 452 U.S. at 25–27 (noting that the Supreme Court has only recognized a right to counsel “where the litigant may lose his physical liberty if he loses the litigation,” and acknowledging parental custody as a commanding interest warranting deference, but declining to extend a *per se* right to counsel in parental-termination proceedings).

13. *Status Map*, NAT’L COAL. FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/PV79-4AU2>] (choose “Right to Counsel Status” from options in grey bar, then chose “Termination of Parental Rights (State) - Birth Parents” from first dropdown) (last visited Jan. 28, 2022).

remaining states, Minnesota legislation provides for discretionary appointment of counsel, and Nevada, Delaware, and Vermont have legislation providing for the discretionary appointment of counsel specifically for indigent parents.¹⁴ In 2016, Mississippi was the last and final state to adopt legislation authorizing judges to appoint counsel for parents in termination-of-parental-rights cases.¹⁵

A. Juvenile-Dependency Proceedings

Families in Los Angeles County enter the juvenile-dependency system when DCFS files a Welfare and Institutions Code (WIC) petition alleging the child has suffered, or that there is substantial risk the child will suffer, serious physical harm, illness, emotional abuse, sexual abuse, and/or neglect.¹⁶ Children may remain in their parent or guardian's custody until the detention hearing unless a peace officer determines that the child's safety cannot be assured at home.¹⁷ If a child is removed from their home, the court must review allegations at a detention hearing as soon as possible but no later than the end of the next court day after the filing of the petition;¹⁸ otherwise, the initial hearing must take place within fifteen days.¹⁹ Each parent or legal guardian is appointed an attorney from Los Angeles Dependency Lawyers (LADL) if needed, and affected minors also receive free representation from Children's Law Center (CLC).²⁰ DCFS is represented by Los Angeles County Counsel (County Counsel).

Once families enter the juvenile-dependency system, they may remain involved with DCFS and the children's court for years. A jurisdictional hearing must be set within fifteen days of the detention hearing if a child is detained and within thirty court days of the filing of the petition if the child is not detained.²¹ During the jurisdictional hearing, the court makes a factual determination about whether the child has been abused or neglected as defined in WIC section 300(a)–(j).²² If a finding is made that the child is within the jurisdiction of the court, the court must decide whether to declare the child a dependent.²³ The disposition hearing may take place on the same day as the jurisdictional hearing.²⁴ Alternatively, if the child is not

14. *Id.*

15. *Id.*

16. CAL. WELF. & INST. CODE § 300 (Deering 2016).

17. *Id.* § 305.

18. *Id.* § 315.

19. CAL. R. CT. 5.670(a).

20. Parents and children may choose to be represented by private counsel. For simplicity, going forward all children's counsel in this Note will be referred to as a CLC attorney and all counsel for parents will be referred to as a LADL attorney, unless otherwise noted.

21. WELF. & INST. § 334; CAL. R. CT. 5.670(f).

22. WELF. & INST. § 355.

23. CTR. FOR FAMS., CHILD. & THE CTS., JUD. COUNCIL OF CAL., DEPENDENCY QUICK GUIDE: A DOGBOOK FOR ATTORNEYS REPRESENTING CHILDREN AND PARENTS, at H-85 (3d ed. 2017) [hereinafter DOGBOOK], <https://www.courts.ca.gov/documents/dogbook.pdf> [<https://perma.cc/B997-EZSE>].

24. WELF. & INST. § 358.

detained, the hearing can be continued to a date no later than forty-five days from the jurisdictional hearing.²⁵ If a child is detained and DCFS recommends that reunification services not be offered to one or both parents, the disposition hearing must take place within thirty days of the jurisdictional hearing, otherwise within ten days if services are recommended.²⁶ Possible outcomes at the disposition hearing include (1) dismissal of the petition, (2) entry of legal guardianship, (3) in-home placement of the child with family maintenance services for the parent or guardian, (4) removal of the child with family reunification services ordered for the parent or guardian, or (5) the parent or guardian is bypassed for reunification.²⁷ If removed from the custodial parent, the court will decide where the child is placed, visitation, and what services, if any, are appropriate.²⁸ Case reviews are held at least once every six months following an order for, or denial of, family maintenance or reunification and can result in involvement by DCFS and the children's court in the family's life for as long as two years.²⁹ If family reunification fails, a permanency planning hearing is scheduled, and the child is placed for adoption, in guardianship, or in long-term foster care.³⁰

B. *The Players*

Attorneys involved in dependency hearings in Los Angeles County primarily work at CLC or LADL, or they work as County Counsel. Many families in dependency proceedings are low income, requiring court appointment of an attorney; some parents elect to obtain private counsel. A unique characteristic of dependency attorneys is that many of the attorneys have experience working at two or more of the dependency organizations. For instance, many CLC and LADL attorneys have spent time working at both organizations during their career. Attorneys who work for DCFS often transition to the position from CLC or LADL. Some dependency attorneys have worked for all three entities. Whether this exposure to the different sides of dependency affects negotiations and outcomes of cases is unclear; as of yet, there is no research available on this issue. Observations suggest that it depends on the attorney and their personal experience. For example, one County Counsel who previously worked at LADL was observed regularly exhibiting hostility towards parents and their attorneys, whereas another was regarded as collaborative and empathetic towards parents' experiences. A possible reason for the variation in attitudes may be that former LADL attorneys did not

25. *Id.*

26. *Id.*

27. DOGBOOK, *supra* note 23, at H-90 to -103.

28. *Id.* at H-95 to -102, H-117 to -119.

29. WELF. & INST. §§ 364, 366, 366.3. Parents' involvement with the court may extend beyond two years if an attorney is successful in continuing a hearing under section 352. Pregnant mothers with an open case also face prolonged court involvement as DCFS can, and frequently will, file on a newborn baby under a sibling count.

30. *Guide to Dependency Court—For Parents*, CAL. CTS., <https://www.courts.ca.gov/1205.htm> [<https://perma.cc/G5YJ-DMZ7>] (last visited Jan. 28, 2022).

feel aligned with the goals of the organization and have carried that sentiment to their position as County Counsel. Another potential explanation is that some former LADL attorneys developed biases during their representation of parents, which now impacts the way they interact with parents in their role as County Counsel.

Research on outcomes of private versus court-appointed attorneys in dependency proceedings could not be identified specifically for Los Angeles County, but studies in other counties reveal some trends. For instance, in a study of dependency proceedings across California, “[t]he relation between type of representation and median length of stay approached significance, indicating that children in counties where independent representation was used tended to remain in the foster-care system approximately three months longer than children in counties employing county-affiliated types of representation.”³¹ This supports personal observations of courtroom proceedings involving private attorneys who generally performed worse in court than court-appointed attorneys. Private attorneys were often unacquainted with the procedures of the dependency courtroom, appeared to not fully understand their client’s case, and did not always have the appropriate experience to represent their client. For example, an attorney representing a client in family court was requested by the client to represent her in dependency court. The attorney’s unfamiliarity with dependency law and procedures prompted the judge to recommend that the client seek counsel familiar with dependency law for future proceedings.

Court-appointed attorneys have the benefit of not only being specialists in dependency law but also of working with the same handful of counterparts every day in the courtroom. Typically, attorneys from LADL, CLC, and the Office of County Counsel are assigned to a particular courtroom at the Edelman Court. Attorneys may appear in other courtrooms to cover a case for a colleague; in general, however, attorneys primarily work with the same counterparts and appear each week before the same judge. Theoretically, attorneys should have an easier time negotiating with one another as they are “repeat players.”³² According to Galanter’s theory of “repeat players” and “one-shot players” in *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, attorneys assigned to the same courtroom with the same counterparts and presiding judge multiple times in a week should experience cumulative benefits stemming from increased knowledge and experience.³³ However, personal observations suggested that these benefits only manifested for attorneys when they were placed in courtrooms with judges amenable to their position and when their attorney counterparts were collaborative.

31. Gail S. Goodman, Robin S. Edelstein, Emilie B. Mitchell & John E.B. Myers, *A Comparison of Types of Attorney Representation for Children in California Juvenile Court Dependency Cases*, 32 CHILD ABUSE & NEGLECT 497, 500 (2008).

32. Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and, of Course, Class*, 22 ANN. REV. SOCIO. 187, 188–92 (1996) (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 160).

33. *Id.*

For the unfortunate attorneys who were paired with adversarial counterparts on cases multiple times during a week, or who sat in courtrooms with judges unsympathetic to the histories and circumstances of their clients, being a repeat player in the courtroom was more of a burden.

The quick pace at which proceedings move in the dependency system and high caseloads of attorneys also necessitate improved negotiation among counsel. Based upon conversations with multiple parents' and children's counsel, a typical caseload for a LADL or CLC attorney is about 250 clients at any given time. Negotiations between attorneys take place during courtroom proceedings, by email and text, during phone calls, and in settlement meetings. Negotiations were also observed being carried over multiple emails, when issues were quite small and could have been resolved more efficiently. Possible reasons for this include attorneys being wed to their position, lack of trust of the parent, implicit and explicit biases, or being persuaded by emotions rather than objective criteria. The high caseloads and high stakes in juvenile dependency require a better approach to negotiations between counsel.

II. RACE AND CLASS DISPARITIES IN JUVENILE DEPENDENCY

A prevalent problem of the dependency system is the disparity in race and economic status of the families who have cases filed against them. Much research has been carried out in this area, and studies indicate that “cases involving Black children are more likely to be assigned for investigation than in cases involving White children,” and cases of families of color are “more likely to be substantiated at investigation than White, non-Hispanic families.”³⁴ As of June 2020, DCFS reported 36,874 total children receiving child welfare, including open emergency-response cases, family maintenance, family reunification, permanent placement, and supportive transition.³⁵ The majority of these children are Hispanic (57.9%) or Black (23.3%), with White children making up 12.1% of the population receiving child-welfare services.³⁶ According to KidsData, a program of Population Reference Bureau, African-American/Black children make up 7.5% of the child population of Los Angeles County, whereas White children make up 20.4% of the child population.³⁷ Comparing these percentages indicates that Black children are

34. CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ISSUE BRIEF: RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 9 (2016), https://ncwwi.org/files/Cultural_Responsiveness_Disproportionality/Racial_Disproportionality_and_Disparity_in_Child_Welfare.pdf [<https://perma.cc/ZF8Q-J9VH>]; see also Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 73 (2019); Crystal Soderman Duarte & Alicia Summers, *A Three-Pronged Approach to Addressing Racial Disproportionality and Disparities in Child Welfare: The Santa Clara County Example of Leadership, Collaboration and Data-Driven Decisions*, 30 CHILD & ADOLESCENT SOC. WORK J. 1, 2–4 (2013).

35. DEP'T OF CHILD. & FAM. SERVS., *supra* note 2.

36. *Id.*

37. *Child Population, by Race/Ethnicity: Los Angeles County*, KIDSDATA, <https://www.kidsdata.org/topic/33/child-population-race/table#fmt=144&loc=364&tf=110&ch=7,11,726>,

represented in the dependency system at a rate 3.1 times their rate in the general population. The rate of Hispanic children in the dependency system is similar to their overall representation in the child population of Los Angeles County (55.7%).³⁸ While DCFS indicates that it evaluated out 33,435 children after the initial emergency referral during the 2019–2020 fiscal year, the agency does not provide information on the demographics of these children.³⁹ It is unclear whether racial disparity begins at DCFS's evaluation phase; studies on disproportionality in juvenile dependency suggest that this is likely the case.⁴⁰

The alarming statistics for families of color are not limited to Los Angeles County. Nationwide, Black children are more likely to be separated from their parents, and a November 2016 brief by the Children's Bureau discussing the "prevalence of racial disproportionality and disparity in the child welfare system" across the nation indicated that Black children in foster care were represented at a rate 1.8 times their rate in the general population.⁴¹ Black children also spend more time in foster care, are more likely to endure multiple placements, are less likely to be reunified with their parents, and are less likely to be adopted.⁴² The disparities and disproportionalities between children of color and White children also tend to increase as a case progresses "from the initial complaint, to placements and services, to final disposition";⁴³ the disparities are "greatest at the later stages of a case (i.e., placement in foster care)."⁴⁴

Among the possible explanations cited for the racial disparity in juvenile dependency are (1) racial bias and discrimination by mandated reporters, such as social workers and medical practitioners; (2) the inaccessibility or availability of services to families of color, which can negatively impact a parent's case plan;⁴⁵ and (3) the disproportionate need families of color have for public services, which increases their contact points with government agencies and makes them more visible to the child-welfare system.⁴⁶ It is important to note that research indicates that there is "no relationship between race and the incidence of child maltreatment after controlling for poverty and other risk factors" and that "socioeconomic status is the strongest predictor of maltreatment rates."⁴⁷ As discussed by Vicki Lens

10,72,9,73&sortColumnId=0&sortType=asc [https://perma.cc/EPR9-YVNN] (last visited Jan. 28, 2022) (choose "Table" from options in orange tabs, then choose "show" next to "Location:" in the grey bar, then choose "Los Angeles County" from the gray filter bar).

38. *Id.*

39. DEPT OF CHILD. & FAM. SERVS., *supra* note 2.

40. *See* CHILD.'S BUREAU, *supra* note 34, at 1, 5; Ananth, *supra* note 3, at 192.

41. CHILD.'S BUREAU, *supra* note 34, at 1, 3; *see also* Duarte & Summers, *supra* note 34, at 2 ("Disproportionality occurs when a particular racial or ethnic group is represented within a social system at a rate or percentage that is not proportionate to their representation in the general population.").

42. CHILD.'S BUREAU, *supra* note 34, at 3–4; Ananth, *supra* note 3; Lens, *supra* note 34.

43. Lens, *supra* note 34, at 73.

44. Duarte & Summers, *supra* note 34, at 4.

45. CHILD.'S BUREAU, *supra* note 34, at 5, 7, 10.

46. Duarte & Summers, *supra* note 34, at 4.

47. CHILD.'S BUREAU, *supra* note 34, at 6.

in *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, juvenile-dependency cases require the individuals involved—such as social workers, police officers, judges, and witnesses—to make subjective judgments about human behavior.⁴⁸ Lens notes that this leaves “ample opportunity for implicit bias, and the stereotypes it triggers, to seep in and substitute for more nuanced judgments, especially when mental shortcuts are used to process a large number of complex cases.”⁴⁹ Moreover, as discussed earlier, the stakes are high for DCFS, CLC, and the court, who are all tasked with ensuring the protection of children. This situation can lead to “reluctan[ce] to challenge, or even acknowledge, negative stereotypes, as they strive to protect children.”⁵⁰

Research on causes of and consequences of racial disproportionality in juvenile dependency needs to be part of the negotiation dialogue between counsel and the presiding judge. As discussed below, race and class impact negotiations inside and outside of the courtroom. Juvenile-dependency systems must incorporate cultural-competency and racial-bias training for attorneys, judges, and social workers to counteract how biases and stereotypes impact the cases of families of color entering the child-welfare system.

III. NEGOTIATIONS IN JUVENILE DEPENDENCY

Attorneys interact with one another throughout the juvenile-dependency-court process. Conversations take place over the phone, through emails, during settlement meetings, and during court proceedings. There are many features that are unique about negotiations in juvenile dependency, including what is at stake for the parties, the parties’ respective goals, and how the information imbalance between parties plays out during negotiations.

A. The Parties

The parties involved in children’s court create a unique situation for negotiations. Each party in the juvenile-dependency process is appointed its own attorney, with the exception of minor siblings who may be represented by one counsel depending on the individual interests of the children involved.⁵¹ For example, consider a case with a single mother living with her three children, each

48. Lens, *supra* note 34.

49. *Id.*

50. *Id.*

51. Minors have a statutory right to appointed counsel under section 317 of the California Welfare and Institution Code. CAL. WELF. & INST. CODE § 317 (Deering 2016). If requested to represent multiple minors in the same family, counsel should perform a conflict check in accordance with the guidelines provided in rule 5.660(c) of the California Rules of Court, CAL. RULES OF CT. 5.660(c), and should withdraw if an actual conflict between minors arises, per rule 3-310(C)(2) of the California rules of Professional Conduct. CAL. RULES OF PRO. CONDUCT r. 3-310(C)(2) (CAL. BAR ASS’N 2020); *see also* Carroll v. Superior Ct., 124 Cal. Rptr. 2d 891, 895 (“If an appointed attorney is representing multiple minors in a dependency proceeding, and an actual conflict of interest between the minors arises, the attorney is obliged to withdraw from representing the clients.”).

with a different father. A petition is filed against the mother alleging physical abuse. The three fathers would be contacted and, if found to be the presumed father of the respective minor, each would have the right to reunification services and to custody.⁵² In this scenario, there could potentially be eight attorneys involved in court proceedings: one attorney for each parent (i.e., the mother and three fathers), one attorney for each child (if a conflict existed requiring separate representation), and one attorney representing DCFS.

This multiparty scenario, which is not unusual, presents obvious challenges to negotiations. Each parent that is party to the case has their own underlying interests—namely, where they want their child to live in the long-term and also in the short-term should the child be detained out-of-home. Other underlying interests that differ among parents include the terms of visitation, the need and desire to participate in services, the requirements of drug testing, and the balancing of other personal needs, such as work and living situations. Negotiations may also be more strained if parents are estranged and previously had a fraught relationship. Children living together within a home may have varying underlying interests due to the children not sharing the same set of biological parents, which can impact the placement of the child. In addition, the interests of children may be affected by their age and gender, which contribute to the way the child experiences and perceives the conditions of homelife.

Another problem with the multiparty structure is that families—who ideally should be collaborating with one another to reunify—can be positioned as adversaries due to the nature of the proceedings. For instance, siblings may cease communicating with one another because of their different positions with regards to their case. Or parents, fearful of losing their children, may turn into adversaries, vying for exclusive rights to their children. In one case observed, grandparents were forced to decide whether to kick out their adult son suffering from mental-health and substance-abuse problems or give up his child (their grandchild) to foster care due to the presumed risk the son's substance abuse posed to the child. Situations like this can be prevented by all counsel collaborating, focusing on the merits of the case, understanding and respecting the interests of all parties, and negotiating solutions that take into consideration the needs of all parties, rather than just the needs of their own client.

1. What's at Stake

The stakes in dependency court differ markedly for each party. Most parents would likely agree that no stakes are greater than the risk of losing a child. In fact, because of the severity of termination adjudications, the Supreme Court has referred to the power “to destroy permanently all legal recognition of the parental

52. DOGBOOK, *supra* note 23, at F-121.

relationship” as an “awesome authority of the State.”⁵³ Other courts have referred to the severance of parental rights as “the family law equivalent of the death penalty.”⁵⁴ Often in dependency cases, there is more than one child at risk of being removed from the parent, making the stakes even greater. The stakes for children are also great: children risk losing their family, having to enter the foster-care system, or being placed in guardianship or for adoption. Children also suffer the risk of future abuse and neglect not just from the return to their household but as a result of out-of-home placement that bears its own risks.⁵⁵ The disruption in children’s lives also has long-term impacts, even when a child is promptly returned home.

In addition, the stakes are high for DCFS, whose priority is child welfare and who face potential liability with every case it evaluates out. In 2013, DCFS faced severe public scrutiny when eight-year-old Gabriel Fernandez died as a result of injuries from abuse and torture by his mother and her boyfriend.⁵⁶ Numerous reports of abuse and neglect had been made to the agency to no avail.⁵⁷ Two social workers and two supervisors were charged with child abuse and were all fired from DCFS.⁵⁸ Based on conversations with CLC and LADL attorneys, Gabriel’s death had a significant impact on the work of DCFS: case workers are more thorough and cautious and file cases against families more often. Considering Vicki Lens’s insight into implicit bias against this backdrop of heightened scrutiny suggests that case workers may be even more inclined to substitute stereotypes when making subjective judgments about the families they assess.⁵⁹

2. *The Goals of Each Party*

The goals of parents and children vary case to case and may change during the life of the case. Some parents actively seek to keep their child(ren) or reunify with them, while other parents decide that their child would be better off with another parent or relative. Similarly, some children may want to remain in the home of their parent, while others are satisfied to be placed with relatives or with a nonrelative caregiver. The goals of parents and children also evolve as the case progresses. Children who initially wanted to return to the home of their parents may form an attachment to their caregiver and thrive away from their parents. This can lead to

53. *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (citing *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

54. *Wallace & Pruitt*, *supra* note 11, at 103 (citing *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991)).

55. *See, e.g.*, Dawn Post, *Why Human Traffickers Prey on Foster-Care Kids*, CITY LIMITS (Jan. 23, 2015), <https://citylimits.org/2015/01/23/why-traffickers-prey-on-foster-care-kids/> [<https://perma.cc/XA3J-5ULR>].

56. Mahita Gajanan, *The Heartbreaking Story Behind Netflix’s Documentary Series The Trials of Gabriel Fernandez*, TIME, <https://time.com/5790549/gabriel-fernandez-netflix-documentary/> [<https://web.archive.org/web/20200303043751/https://time.com/5790549/gabriel-fernandez-netflix-documentary/>] (Mar. 3, 2020).

57. *Id.*

58. *Id.*

59. *Lens*, *supra* note 34.

the children, and even their parents, deciding that reunification is not the best outcome for the family.

One issue observed during dependency hearings is the substitution of attorney goals for the goals of their client. Many children in dependency proceedings are not able to make meaningful statements due to their young age and therefore cannot provide direction to their attorney.⁶⁰ These children must rely on the judgment of their attorney to identify and advocate for their goals. Without direction from their client, CLC attorneys must rely on their own analysis of the evidence provided by DCFS and independently collected by CLC and LADL investigators to craft a position for their client. The goals of children who can communicate their wishes can still be trumped by the concerns of their attorney. Under Welfare and Institutions Code section 317(e)(1), counsel appointed to represent children may not advocate for the wishes of the child if those wishes would pose a threat to the child's safety or protection.⁶¹ Therefore, if a CLC attorney believes that their client could be harmed if returned to their parent, the CLC attorney may not advocate for the return of the child to the home of the parent even if that is the stated goal of the child.⁶² Similarly, DCFS's primary goal is to ensure child health and safety. This goal relates directly to what is at stake for them—liability and their reputation. Each time a child is not returned home to a potentially abusive or neglectful parent, County Counsel has limited the risk of liability to DCFS.

3. How Party Goals and Stakes Impact Negotiations

The differing goals of counsel and represented parties impact negotiations. Typically in negotiations, an attorney's goal is to adequately represent their client and attain their client's goals. However, as noted above, CLC attorneys are statutorily required to advocate a position aligned with the goal of child safety even if that position conflicts with their clients' stated goals. Because parents have the most at stake and nothing to leverage, LADL attorneys are the weakest players at the negotiation table. For instance, while LADL attorneys advocate for manageable case plans for their clients at disposition, ultimately parents who are desperate to keep or get back their children are forced to accept the conditions proposed by DCFS and ordered by the court. County Counsel has the dominant position in negotiations, which has led some County Counsel to engage in "hard negotiating." Tactics employed by County Counsel that were observed include demanding parents to accept all of the terms proposed by social workers, refusing to make accommodations for parents, and insisting on their position, even if all

60. Of the 36,876 children receiving child welfare during fiscal year 2019–2020, 20% were two years old or younger, and 12.6% were between the ages of three and four years. DEPT OF CHILD. & FAM. SERVS., *supra* note 2.

61. CAL. WELF. & INST. CODE § 317(e)(1) (Deering 2016); *see also In re Alexis W.*, 83 Cal. Rptr. 2d 488, 493 (1999) (“[C]ounsel [for minor dependents] may not advocate a position [they have] reason to believe might endanger the child.”).

62. *See* WELF. & INST. § 317(e)(1); *In re Alexis W.*, 83 Cal. Rptr. 2d at 493.

parties—and the judge—disagreed with the position. In order to reach the goal of reunification and child safety, parents' well-being must be fostered since the dependency system is designed to support families and protect children through services that address the conditions that brought the family under the jurisdiction of the court.⁶³ Incorporation of collaborative negotiation practices can lead to more reasonable demands of parents, less suspicion with regards to child welfare, and better outcomes for families.

B. The Information Imbalance

An information imbalance also exists in the dependency system that differs from typical arrangements with represented parties. Parents first interact with the dependency system through a DCFS social worker who usually visits them at their home to investigate a report of child abuse or neglect.⁶⁴ The parent is instructed to be honest and relay all of the details of an incident to the social worker.⁶⁵ Parents are not “Mirandized”—they are not told, as criminal defendants are, that they have the right to remain silent.⁶⁶ By the time a parent sees their attorney for the first time, they have already incriminated themselves by relaying information to the social workers that they did not know would be used against them.⁶⁷

Unlike in negotiations with represented parties where attorneys can engage in informational calculus—identifying which pieces of information to reveal and when to reveal them⁶⁸—LADL attorneys are not afforded this opportunity. Social workers prepare detailed reports that provide extensive information about parents, including past interactions with DCFS, criminal and substance-abuse history, and testimony about incidents of child abuse and neglect. This testimony may include statements by family members, friends, doctors, police officers, and anyone else the social workers have contacted to obtain information about the parents.⁶⁹ Information about the parents is also continually gathered and revealed between hearings, as parents are often required to participate in services, such as parenting

63. WELF. & INST. § 362(d) (“The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court’s finding that the child [was dependent].”).

64. *DCFS Investigations*, L.A. CNTY. DEP’T CHILD & FAM. SERVS., https://dcfs.lacounty.gov/youth/investigations/#What_to_Expect [<https://perma.cc/BZM3-UBTP>] (last visited Jan 28, 2022).

65. Reports prepared by the Department of Child and Family Services for hearings include summaries of CSW interviews of and conversations with parents. It was observed that parents were often instructed to be honest and forthcoming with information.

66. See Black Lives Matter—Los Angeles, *supra* note 4.

67. *Id.*

68. Peter Reilly, *Was Machiavelli Right? Lying in Negotiations and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 529–30 (2009).

69. Under section 355(b) of the California Welfare and Institutions Code, a social worker’s reports and hearsay contained in them are admissible at jurisdiction hearings under the social-study exception. CAL. WELF. & INST. CODE § 355(b) (Deering 2016). The preparer must be available for cross-examination and parties must be given an opportunity to subpoena and cross-examine hearsay declarants. *Id.*

and substance-abuse classes, and submit to regular drug testing. Parents do not have the opportunity to strategically limit information being revealed⁷⁰ or to seek out information about the other side to leverage in favor of their position.⁷¹ Information gathering is one-sided in dependency cases, with DCFS and County Counsel able to gather information to discern weaknesses and vulnerabilities in parents' position.⁷²

LADL attorneys also do not have the opportunity to characterize information that their client reveals outside of their presence to social workers. This information is then relayed to County Counsel who use their own filters, stereotypes, and "mental shortcuts" to interpret the information.⁷³ By the time LADL attorneys have an opportunity to attempt recharacterizing the information, the damage is done; County Counsel has already formed their own impression. LADL attorneys do obtain information from clients that they can withhold from County Counsel and children's counsel; however, there is always the risk that a parent or a family member will reveal this information inadvertently to a social worker. Moreover, this is not information that can be leveraged, as it is typically damaging to the parent's case, such as a parent's homelessness or drug use.

C. The Impact of Race and Class in Negotiations

A central problem with negotiations in dependency is the subconscious framing used when considering the family. As discussed by Akhila L. Ananth, "the body of law practiced inside [dependency court is] built upon and reif[ies] a model of [W]hite, hetero-patriarchal family that has material impacts for the [B]lack and non-[W]hite families being processed through the dependency system."⁷⁴ Similarly, in an article by Janet L. Wallace and Lisa R. Pruitt, the authors discuss that "dominant society does not view poor families as 'real' families" as they do not fit the "[W]hite, married, middle-class" cultural paradigm.⁷⁵ Class also plays a role in framing families. "Class is . . . one . . . anchor of personal identity like gender, race, and ethnicity."⁷⁶ It "describes an individual's position with respect to the central economic and cultural institutions of society and, in turn, relates that position to the

70. See Reilly, *supra* note 68. While a parent's attorney may timely object to specific hearsay in a social worker's report under section 355(c)(1)(A)–(D) of the California Welfare and Institutions Code, *Id.* § 355(c)(1)(A)–(D), the hearsay is still admissible but simply cannot be "sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based." *Id.* The only exception is for hearsay statements of a minor under the age of twelve if the "objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence." *Id.* § 355(c)(1)(B).

71. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 69–70 (2000).

72. See *id.* at 79–80.

73. Lens, *supra* note 34.

74. Ananth, *supra* note 3, at 190.

75. Wallace & Pruitt, *supra* note 11, at 116.

76. Seron & Munger, *supra* note 32, at 188.

social resources available to the individual.”⁷⁷ The negative impacts of this framing are reflected in the statistics on disproportionality and disparity in the juvenile-dependency system discussed at length above.

Imposing White, middle-class expectations on poor families of color entering the juvenile-dependency system sets families up for failure. Specifically with regard to negotiations, parents oftentimes do not have the resources to meet the demands of DCFS. Based on personal observations, parents struggle to pay for the numerous courses they must participate in to reunify with their children. Substance-abuse classes, individual counseling, and domestic violence classes for perpetrators can take numerous months and hundreds of dollars to complete. Poor families often do not have the disposable income to finance these classes and struggle to find the time to complete the programs in between jobs and caring for their family. The resources available through the Edelman Court are generally insufficient for low-income families. Moreover, regardless of what lengths families go through to regain their children—therapy, substance-abuse courses, etc.—a poor, single mother of color will never be able to “engineer” her family into the one DCFS and County Counsel may imagine when they think of a “real family.”⁷⁸

As discussed by Geneva Brown in *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, “[a]n African American woman walks into a courtroom not as an individual but as an assemblage of racial and gender stereotypes. The stereotypes work to her detriment.”⁷⁹ During courtroom proceedings at the Edelman Court, it is hard not to imagine how narratives, attitudes, and outcomes would have been different if the mother before the court was White rather than Black. In order to address any disparity in treatment, DCFS and County Counsel must acknowledge that many of their demands during negotiations and perceptions of parents are grounded in a “[W]hite, married, middle-class” cultural paradigm.⁸⁰ Rather than simply acknowledging on paper that many parents appearing in children’s court are of lower socioeconomic means, case plans must factor in the realities of parents’ lives. As discussed earlier, socioeconomic status is the strongest predictor of maltreatment rates.⁸¹ Recognition of parents’ lack of resources must be part of negotiations to ensure the long-term success of families.

77. *Id.*

78. Some dependency attorneys refer to DCFS as trying to “engineer families.” As discussed in *In re J.M.*, 263 Cal. Rptr. 3d 687, 699 (2020), “[t]he goal of dependency court proceedings is not to engineer perfect parents, but to protect children from harm.” As suggested by the court, if the trial court’s analysis simply rests on comparing the household and upbringing offered by the natural parent with that of the caretakers, any case involving more resourced foster parents would result in children remaining in foster care and out of the home of their natural parents.

79. Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 150 (2012).

80. Wallace & Pruitt, *supra* note 11, at 116.

81. See *supra* text accompanying note 41.

IV. CASE STUDIES

The following three stories illustrate some issues observed in the juvenile-dependency system. Names of clients have been changed, and stories do not include personally identifiable information about any client. Stories incorporate details from multiple cases for the purpose of describing common issues observed in negotiations between attorneys.

A. David: The Need for a Problem-Solving Orientation

David suffered from mental-health issues that led him to start using methamphetamine. He wanted to get better and sought help through what he believed was a confidential substance-abuse program. Because David's son was living with him, the substance-abuse program contacted DCFS to inform it about a possible danger to David's child due to his substance abuse. When a social worker came to David's house unannounced, David was cooperative. He explained the period of time he used methamphetamines, that he always used the drug outside of his home, and that no one in his household was aware of his substance abuse. David and his son lived in an extended-family household with David's parents and adult siblings who all helped to care for David's son. None of the family members, including David's son, had any suspicion that David was using drugs, and they all confirmed that his child always had an adult present with him at home.

A petition was filed by DCFS alleging that David's substance abuse endangered the physical health and safety of his child. County Counsel demanded that David move out of the home and threatened that if he did not, his child would be removed and placed in foster care or with another relative. David, not wanting his child to be removed from the home, was forced into homelessness. David worked night shifts and therefore slept during the day. It was very challenging for him to participate in his substance-abuse program and also work his night job, all while living in his car. The LADL attorney assigned to David proposed a safety plan to County Counsel where David could return home with the minor detained from David and released to the grandparents. County Counsel held to their position and David was not allowed to return home until the judge ordered the minor released to David.

B. Jasmine: The Need for Cultural Competency Training and the Use of Objective Criteria

Jasmine was a teenage mom who parented her baby with the help of her boyfriend and parents. Despite her young age and struggles, she was committed to being a good mom and improving her situation. Because of the abuse she experienced as a child, Jasmine and her parents had a history of involvement with DCFS. Jasmine and her family were visited one day by a social worker with whom Jasmine was unfamiliar. Jasmine was triggered by threats made by the social worker to remove Jasmine's baby, which resulted in Jasmine threatening self-harm. The social worker filed a petition against Jasmine, alleging mental-health concerns, and

had Jasmine's baby placed in foster care. Jasmine and her family were distraught but continued to cooperate with DCFS to get her baby returned. Despite successfully completing her case plan and developing an adequate safety plan for her child, at trial County Counsel focused on incidences that occurred in Jasmine's childhood that were not part of the case. County Counsel also minimized the positive progress report from Jasmine's therapist, instead relying on Jasmine's attitude towards certain case workers as evidence of Jasmine's mental instability and unfitness to parent. At disposition, Jasmine's baby remained placed in foster care.

C. Sheila: The Need for Mediation and Racial-Bias Training

Sheila was a single Black mother of four daughters. DCFS was notified that Sheila may have been physically abusing her children. From the initial encounter with the social worker until adjudication, Sheila maintained that she never inappropriately disciplined any of her children. Of the four daughters, three repeatedly stated to their attorneys, social workers, and health care workers that their mother never physically abused them. Those three daughters also stated that they never observed their mother physically abuse any of their siblings. The fourth daughter, however, stated that she was physically abused and alleged that her mother also physically abused her siblings. Even though this child's story changed during the juvenile proceedings, her social worker and attorney maintained their belief about the alleged abuse. Theories were proffered that the daughter wanted to move in with a relative; however, this possible motivation was never investigated. County Counsel's intractable position was that the mother could not reunify with her children if she refused to admit to the alleged physical abuse. All four daughters were removed from Sheila.

V. REFORMS

Dependency court is not the best institutional setting for resolving multiparty disputes steeped in emotions.⁸² However, this is the current framework in which child abuse and neglect cases are resolved. Therefore, reorientation at the minimum is required. Although the stated goal of the dependency system is family reunification, there are many aspects, as discussed above, that actively work to undermine this goal. This is not the case across all courtrooms and among all attorneys and judges in the system. Many attorneys and judges bring empathy and cultural competency to the courtroom. They focus on the underlying interests of parents and children and the merits of the case, and collaborate with all counsel to develop reasonable plans that first attempt to reunify and strengthen the family and then move on to the next best alternative if family reunification is not possible. Reforms suggested here include (1) attorneys committing to using objective criteria in evaluating and negotiating cases and not allowing emotions to influence

82. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996).

decisions; (2) attorneys employing a problem-solving, rather than an adversarial, approach to cases; (3) cultural competency and racial-bias training for judges and attorneys; and (4) expanding the availability of mediation.

A. Using Objective Criteria

Achieving principled negotiation within juvenile dependency requires the use of objective criteria.⁸³ As discussed above in the case study about Jasmine, negotiations in dependency court are not always based on fair standards, especially in highly emotional cases. Like in Jasmine's case, rather than focusing solely on facts pertaining to whether Jasmine's baby had suffered, or if there was a substantial risk that the baby would suffer, serious physical harm from Jasmine's actions,⁸⁴ County Counsel may choose to focus on a parent's attitude towards social workers or discuss details from a parent's distant past that do not have bearing on the allegations. While these details should not influence the trajectory of a parent's case, as they do not bear on a parent's failure or inability to adequately supervise or protect their child,⁸⁵ the information may influence a judge's decision of whether or not to return a child home.

Evidence on disproportionality and disparity in the juvenile-dependency system also highlights the need for objective criteria. As discussed earlier, outcomes of dependency cases involving families of color are tied to poverty, racial bias, and access to services. A case plan that requires a parent to take numerous classes they cannot afford or cannot access due to transportation difficulties or other issues should never be the reason a parent loses their child. It is cruel, punitive, and at odds with the objective of family reunification. As discussed by Professor Dorothy Roberts in *Shattered Bonds: The Color of Child Welfare* about reunification plans,

The issue is no longer whether the child may be safely returned home, but whether the mother has attended every parenting class, made every urine drop, participated in every therapy session, shown up for every scheduled visitation, arrived at every appointment on time, and always maintained a contrite and cooperative disposition.⁸⁶

Attorneys for parents must negotiate with counsel to craft terms that are attainable by their clients. Discussion of case plans and expectations of parents should be grounded in research on disproportionality and disparity in juvenile dependency. Including parents in the conversation about case plans—rather than case plans being developed *for them*—can also lead to better outcomes when parents

83. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 83–84 (Bruce Patton ed., 3d ed. 2011).

84. At the jurisdictional hearing, DCFS has the burden “to prove by a preponderance of the evidence that the allegations in the petition are true and that the child is therefore described by section 300.” DOGBOOK, *supra* note 23, at H-51. In the case of Jasmine, mental-health allegations were pled as a b-count.

85. See CAL. WELF. & INST. CODE § 300(b)(1) (Deering 2016).

86. Wallace & Pruitt, *supra* note 11, at 107 (quoting DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 80 (2002)).

feel like they were involved in the process. Having more reasonable case plans also can lead to better objective criteria that can be used later during evaluations of a parent's progress.

The more "standards of fairness, efficiency, or scientific merit" that are brought to "bear on [the] particular problem, the more likely [it is] to produce a final package that is wise and fair."⁸⁷ Moreover, standards can also help attorneys move away from their emotions, which hinder fair agreements from being achieved in dependency court.⁸⁸ As noted by Daniel Shapiro, emotions can divert attention from substantive matters, can open people up to being manipulated, can subordinate thinking to feeling, and, if not careful, "will take charge of us."⁸⁹ Emotions are expected in juvenile dependency; however, by focusing the merits of cases on objective criteria, rather than allowing cases to be influenced by emotions, more results that are fair could be achieved for families. For example, in Jasmine's case, County Counsel insisted that Jasmine was not stable enough to have her child returned to her even though these statements were in direct conflict with the expert opinion of a trained therapist.

Allowing for a broader range of programs could also assist with ensuring fairer criteria for parents to be evaluated against. Currently, parents who do not complete "DCFS approved" programs (e.g., DCFS approved substance-abuse and domestic violence programs) do not receive credit for the course. Frequently, social workers do not inform parents that they must enroll in a course approved by their social worker. Well-meaning parents attempting to complete their case plan enroll in a course they find online, but after paying for and completing the course, they are belatedly told by their social worker that they must take another twelve-week course that meets certain standards set forth by their social worker. At times, parents receive a referral list only to discover after calling the various programs that there is no availability or the provider is out of business, delaying the completion of their case plan. Ideally, steps should be taken to minimize fruitless efforts and frustration for all sides. Parental efforts should also be incorporated into a metric that is used in evaluating their progress.

B. Moving from Adversarial to Problem-Solving in Dependency Cases

Attorneys representing parties in juvenile-dependency proceedings need to move away from an adversarial approach and towards a problem-solving orientation where they consider themselves "counterparts" rather than "adversaries."⁹⁰ As noted by Rebecca Hollander-Blumoff and Tom R. Tyler, "[l]awyers are . . . steeped in the adversary system," which "encourages attorneys to exalt their client's interests

87. FISHER ET AL., *supra* note 83, at 84.

88. Daniel L. Shapiro, *Emotions in Negotiation: Peril or Promise?*, 87 MARQ. L. REV. 737, 738 (2004).

89. *Id.*

90. Jonathan R. Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution*, 20 CONFLICT RESOL. Q. 433, 435 (2003).

while ignoring or denigrating those of their opponent.”⁹¹ The authors discuss “four factors that typically play an important role in assessment of procedural justice: input, neutrality, respect/politeness, and trust.”

First, it is important to allow parties opportunities to state their arguments and to make clear that those arguments are being listened to by acknowledging them. Second, people value having an unbiased and factual decision-making process in which the rules are applied in a consistent manner. Third, they want to be treated with dignity and courtesy and to have their rights acknowledged. Finally, people want to deal with people whose motives they trust. That is, they value people who act in good faith.⁹²

There are numerous procedural safeguards in the the juvenile-dependency system.⁹³ Yet, after observing juvenile-dependency proceedings, it is hard to believe that real justice is being served. Proceedings lack the four factors discussed by Hollander-Blumoff and Tyler. Moving away from an adversarial approach can help parties in attaining procedural justice during the court process by allowing parties to be heard, using objective criteria to ensure that proceedings are unbiased, moving away from emotions to treat parties with respect, and eliminating cultural and racial bias from the system to ensure participants in the system are acting in good faith.

Moving towards problem-solving will also integrate parties’ “corresponding, not necessarily conflicting, needs and interests”⁹⁴ and also help attorneys move away from the concept of “winning,” allowing them to advance cooperative means for better outcomes for families.⁹⁵ As discussed in David’s case study above, all parties wanted to ensure that David’s son was safe, including David. This could easily have been achieved by detaining David’s child at home with any one of the multiple adults living with David. With multiple adult eyes on David’s child, and all parties confirming that David did not use drugs at home, it was clear—even to the judge—that there was no need for David to move out of the home while working on his substance-abuse problem. However, County Counsel was focused on “winning” and on positions that prevented cooperation, limiting County Counsel’s ability to help David’s family, and ultimately his child, succeed.

One reason people bargain competitively is because “they do not trust the other party.”⁹⁶ The distrust in the juvenile-dependency system pertains to all parties. On several occasions, parents discussed their distrust of “the System” because of

91. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 474 (2008).

92. *Id.* at 492.

93. See *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982); see also DOGBOOK, *supra* note 23, at I-42. California due process procedures require the availability of social worker’s report at status reviews, compelling child’s testimony, cross-examination of social worker, notice of hearings, parent’s right to testify, and numerous other procedural protections.

94. CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM SOLVING* 117–18 (2d ed. 2014).

95. See Leonard Greenhalgh, *The Case Against Winning in Negotiations*, 3 NEGOT. J. 167, 167 (1987).

96. Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 342.

their prior experiences with DCFS or because of the experiences of their family or friends. And it was often apparent that County Counsel did not trust parents either. For example, parents who did not “admit” to abusing their child, such as in Sheila’s case, were presumed to be lying, even in instances of conflicting evidence or a paucity of facts. Parents often do withhold information from social workers—such as drug abuse—that later comes to light from drug testing. Conversations with parents and with dependency attorneys revealed that this withholding of information is in part due to parents’ inherent distrust of social workers and the dependency system or to their previous negative interactions with the system. “Where parties are non-trusting, they are non-disclosing and withhold information, which leads to further distrust and defensive or self-protective moves.”⁹⁷ As withheld information comes to light, this leads to further distrust by County Counsel. Using information as a tool to develop solutions for families—rather than as a weapon to attack a parent’s ability to parent—could lead to more trust and more disclosure of information in negotiations.

C. Attorney and Judicial Cultural Competency: Acknowledging Disproportionality and Its Sources

Attorneys need to be aware that parents’ race and socioeconomic status are primary reasons why they are in the juvenile-dependency system. Training should be adopted that includes information about “disproportionality and disparity, institutional racism, . . . and identifying personal biases and their impact.”⁹⁸ Cultural competency can contribute to more effective attorney-client conversations by enhancing the attorney’s sensitivity to their clients’ needs, which can lead to improved advocacy on behalf of the client.

Anti-racist training and programs on implicit bias have been developed for judges and child-welfare workers, and attorneys working in the dependency system should have similar training. Implicit biases, which include “unconscious attitudes and beliefs,” can lead to discriminatory behaviors by any practitioner in the juvenile-dependency system.⁹⁹ Explicit bias can also manifest in juvenile dependency. “Explicit bias is the traditional conceptualization of bias [I]ndividuals are aware of their prejudices and attitudes toward certain groups. Positive or negative preferences for a particular group are conscious.”¹⁰⁰ Both implicit and explicit bias can drive decision-making in the juvenile-dependency system.

97. *Id.*

98. CHILD’S BUREAU, *supra* note 34, at 15.

99. Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, A.B.A. (Dec. 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/ [<https://perma.cc/WKK4-XHC9>].

100. CMTY. RELS. SERV., U.S. DEP’T OF JUST., UNDERSTANDING BIAS: A RESOURCE GUIDE 2, <https://www.justice.gov/crs/file/836431/download> [<https://perma.cc/TZE9-BZAD>] (last visited Jan 29, 2022).

One example of implicit bias is a study from a Philadelphia hospital that suggested that African-American and Latino toddlers hospitalized for injuries were evaluated for child abuse at a rate over five times greater than White children with similar injuries.¹⁰¹ These children were also reported to child protective services at a rate more than three times greater than White children.¹⁰² Attorneys and judges in the juvenile-dependency system, therefore, need to not only acknowledge their own implicit biases but also recognize all of the explicit and implicit biases that led to the family entering the dependency system. Recognizing these biases during negotiations can help parties reevaluate the merits of the case by taking into consideration the different perspectives of the people—such as police officers, social workers, and health-care workers—who interacted with the parents involved in the case.

As discussed above, biases also “lead us to believe all families should be just like our families.”¹⁰³ Ellis notes that “[d]ue to high caseloads and the need for triaging, child welfare practitioners often make quick, in-the-moment, decisions. These off-the-cuff decisions are usually biased because individual facts may not be considered. Our brains often fill the gaps with stereotypes or prior cases we have encountered.”¹⁰⁴ This is similar to what Vicki Lens describes as “mental shortcuts” that child-welfare workers may take to process a large number of complex cases.¹⁰⁵ These “mental shortcuts” will undoubtedly contain negative stereotypes. One strategy that attorneys can employ during negotiations is to not only relay decisions, preferences, or demands but also incorporate justifications for those choices.¹⁰⁶ This can lead to greater deliberation by counsel and greater understanding among counsel about each other’s perspective, and potentially uncover biases impacting decisions.¹⁰⁷

Another tool that has been implemented and evaluated around cultural competency that could be applied to juvenile dependency courtrooms is the Courts Catalyzing Change Initiative (CCC) Benchcard process, developed by the National Council of Juvenile and Family Court Judges (NCJFCJ).¹⁰⁸ The CCC Preliminary Protective Hearing (PPH) Benchcard was the first Benchcard to be developed and was intended to address disproportionality the first time a family appeared in

101. Ellis, *supra* note 99.

102. *Id.*

103. *Id.*

104. *Id.*

105. Lens, *supra* note 34.

106. Ellis, *supra* note 99.

107. *Id.*

108. The NCJFCJ is a judicial membership organization. Its Permanency Planning for Children Department developed the CCC to develop and distribute courtroom tools to reduce disproportionality and disparate treatment. CARLENE GONZALEZ & ALICIA SUMMERS, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, RESEARCH REPORT: ASSESSING THE LONG-TERM EFFECTS OF COURTS CATALYZING CHANGE PRELIMINARY PROTECTIVE HEARING BENCHCARD 1 (2014).

court.¹⁰⁹ Like the many other Benchcards developed by NCJFCJ, the PPH Benchcard includes internal self-reflection questions about assumptions judges may make about the cultural identity and background of the family appearing before them.¹¹⁰ The process was aimed at reducing biases and having a fairer hearing.¹¹¹ Judges who used the Benchcards “engaged parents better than judges not using the Benchcard” and “had more thorough hearings,” resulting in “more children being placed more often with family.”¹¹² While Los Angeles County was one of the juvenile-dependency-court systems to pilot the program, there is no indication that judges are continuing to use this tool.¹¹³

It is possible that if this strategy had been employed in Sheila’s case, the outcome would have been different. As discussed in Part IV, Sheila was a single Black woman with four children—a convenient “group stereotype . . . to perform a legal construction of identity.”¹¹⁴ If counsel and the presiding judge were required to reflect on possible biases impacting their perception of Sheila, would they have still believed that Sheila had physically abused her children?

D. Expansion of Mediation Services

The unsatisfactory outcomes of juvenile dependency’s adversarial approach can be addressed through offering mediation to more families and earlier on in proceedings. The purpose of this section is not to critique the current mediation efforts within the Los Angeles County dependency system or to recommend a particular mediation approach. The discourse on types of mediation styles (such as facilitative, evaluative, and transformative), and on which is the best to employ in juvenile-dependency hearings, is voluminous.¹¹⁵ Rather, this section simply argues that families should be made aware of the availability of mediation services, as well as the benefits and disadvantages to using mediation, at the outset of juvenile-dependency proceedings. All parties and counsel should also regularly

109. NANCY B. MILLER & CANDICE L. MAZE, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, RIGHT FROM THE START: THE CCC PRELIMINARY PROTECTIVE HEARING BENCHCARD 4 (2010).

110. Duarte & Summers, *supra* note 34, at 14.

111. Examples of questions judges are prompted to ask themselves at each decision point are as follows: “[1] What assumptions have I made about the cultural identity, genders, and background of this family? [2] What is my understanding of this family’s unique culture and circumstances? [3] How is my decision specific to this child and this family? [4] How has the court’s past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings? [5] What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?” MILLER & MAZE, *supra* note 109, at 9.

112. Duarte & Summers, *supra* note 34, at 15.

113. *Id.* at 4. See generally *Bench Cards*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/bench-cards/> [https://perma.cc/N4Y9-BLWR] (last visited Jan 29, 2022).

114. Brown, *supra* note 79, at 151.

115. See, e.g., Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873 (2016); Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246 (1998); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTS. TO HIGH COST LITIG. 111 (1994); Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CTR. FOR FAMS., CHILD. & CTS. 57 (2004).

assess cases throughout the juvenile-dependency proceedings to evaluate the merits of providing mediation services to a family and have the opportunity to bring cases to mediation early on in proceedings.

Mediation services should be used as a means to move cases out of the courtroom. Free mediation services are provided by Southern California Family Mediation (SCFM), which serves the Edelman Courthouse and the Alfred J. McCourtney Juvenile Justice Center in the Antelope Valley.¹¹⁶ The Los Angeles Superior Court Local Rules provides that confidential mediation may be ordered by the court or may be scheduled by counsel through the juvenile-court mediation department's secretary after the agreement of all participating counsel, in the absence of a court order.¹¹⁷ Moreover, Rule 7.23(a)(2) states that a "case may be referred to mediation at any stage of the dependency court process."¹¹⁸ Based on conversations with LADL attorneys, mediation is typically requested and/or ordered by judges during initial proceedings to reduce the number of counts on a parent's petition and towards the latter part of proceedings to deal with matters such as custody. For example, SCFM advertises its mediation services as helping families with peacefully "co-parenting" as they exit the court system.¹¹⁹ Moreover, one attorney who has requested mediation at other points in cases noted that they never made a request at the jurisdiction/disposition stage of proceedings. Unfortunately, attorney caseload makes it impractical to regularly use mediation at the pre-disposition phase.

Mediation should also reach more families. Notably, SCFM reports serving more than 300 co-parenting families in 2020, a number that represents a fraction of the total cases heard each year in the Los Angeles County juvenile-dependency system. As discussed earlier, a LADL or CLC attorney has a caseload of approximately 250 clients at any given time. Mediation trainer Bernie Mayer notes that child protection mediation programs

tend to commit to the use of mediation at only one stage of the process and tend to express a clear preference for its use at that particular stage (e.g., during the treatment planning, placement review, or at the stage of permanency planning or termination of parental rights), but the evidence from program evaluations suggests that it can be useful at any stage.¹²⁰

116. *Our Story*, S. CAL. FAM. MEDIATION, <https://dependencymediation.org/our-story> [<https://web.archive.org/web/20210518042312/https://dependencymediation.org/our-story>] (last visited May 18, 2021).

117. L.A. SUPER. CT. R. 7.23(a)(2).

118. *Id.*

119. *Home*, S. CAL. FAM. MEDIATION, <https://dependencymediation.org/> [<https://perma.cc/UQZ8-2BU4>] (last visited Jan 29, 2022).

120. Bernie Mayer, *Reflections on the State of Consensus-Based Decision Making in Child Welfare*, 47 FAM. CT. REV. 10, 14 (2009).

While it may be more feasible to bring cases to mediation during the reunification and maintenance phases, based on observations of juvenile-dependency proceedings, many families could benefit from mediation earlier on in their case.¹²¹

In Pamela L. Airey's article, *It's a Natural Fit: Expanding Mediation to Alleviate Congestion in the Troubled Juvenile Court System*, Airey discusses the usefulness of mediation in the area of family law.¹²² Mediation relies upon a neutral third party "whose sole purpose is to guide the parties in reaching an agreement of their own" and who does not focus on "who is right and who is wrong."¹²³ Mediation benefits both the parent and child "[b]y allowing [] parties to take control of their lives."¹²⁴

While being heard in court may be advantageous—or even necessary—for some parties,¹²⁵ adjudication can be unpredictable. Mediation can offer families "the possibility of acceptable conclusions, ones they have crafted themselves."¹²⁶ Juvenile-dependency proceedings also provide little to no opportunity for families to be heard. The "self-determination" available to families through mediation could lead to more successful long-term outcomes for families as parents, children, and other interested parties, such as social workers, collaborate to identify solutions that the parties are invested in, rather than being ordered to participate in by a judge.¹²⁷

121. The stated purpose of Superior Court Los Angeles Local Rule 7.23(a)(1) seems at odds with the realities of the Los Angeles juvenile-dependency system, especially the crushing caseloads of attorneys. The purpose of dependency mediation, as defined by the rule, is "early and fair resolution of disputes for families involved in the court system." L.A. SUPER. CT. R. 7.23(a)(1). Moreover, the mediation process is intended to "involve family members and other parties in a confidential, non-adversarial process to understand and, where possible, resolve some or all of the issues, including the language of the petition, disposition, and questions of fact and law." *Id.* While acknowledging that the volume of juvenile-dependency cases and nature of proceedings (e.g., the speed at which cases move through hearings) undermine the stated purpose of the Local Rule 7.23, this Note does not attempt to offer solutions for how this tension could be resolved.

122. Pamela L. Airey, Comment, *It's a Natural Fit: Expanding Mediation to Alleviate Congestion in the Troubled Juvenile Court System*, 16 J. AM. ACAD. MATRIM. L. 275, 279–80 (1999).

123. *Id.* at 280–81.

124. *Id.* at 281.

125. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 61 (1984) (explaining that mediation in domestic-abuse cases fails to protect women from subsequent violence and perpetuates victimization); JENNIFER CRAWLEY, LAURA COLLIER, ELIZABETH DUNN, DEANA FAROLE, JUAN PALOMARES, KRISTINE VAN DORSTEN & DON WILL, JUD. COUNCIL OF CAL., JUVENILE DEPENDENCY MEDIATION CURRICULUM (2013), https://www.courts.ca.gov/documents/JDM_Unit_A_-_E_010914.pdf [<https://perma.cc/AGC3-KH4Q>] ("While there is evidence that mediation at all stages of the court process and with all case types is effective and beneficial, sometimes programs opt to not mediate certain cases. For example, the most frequently excluded case types are sexual abuse cases, cases involving domestic violence allegations, and cases with pending criminal charges.").

126. MENKEL-MEADOW ET AL., *supra* note 94, at 546.

127. *Id.* Superior Court Los Angeles Local Rule 7.23(a)(6) provides that "[i]n addition to counsel, the persons attending the mediation conference shall include as decision makers the parents, children (when appropriate), the assigned CSW or DCFS liaison, any appointed guardian *ad litem*, and any other person identified by the court as a party. At the discretion of the mediator, other persons may be permitted to participate, including family members, therapists, program representatives, caregivers, domestic violence support persons, and CASA volunteers appointed for the children." L.A. SUPER. CT. R. 7.23(a)(6).

While courts can order parties to appear in good faith for mediation, it is the parties who control if there will be an agreement.¹²⁸

There is a great imbalance of power in the formal courtroom setting where parents are unable to share their stories, ask questions, and advocate for themselves. The current setting also places families in adversarial roles. Mediation could help with the balance of power across the numerous actors in the courtroom and improve the family relationship. Returning to Sheila's case from earlier, had mediation been used prior to the jurisdiction and disposition hearings, Sheila may still have her children today. During a mediation session, Sheila's daughters would have had a safe space to express their feelings and goals. Sheila's daughter may have expressed her dissatisfaction with certain aspects of homelife and shared the reasons why she wanted to live at her relative's house. A mediator could have made recommendations to Sheila on how to improve life at home for her daughter. Unfortunately, the adversarial approach employed in Sheila's case pitted family members against one another, further breaking down familial relationships rather than repairing them.

CONCLUSION

This Note examined negotiations in juvenile-dependency proceedings to shed light on the power inequities involved in negotiations and how race and class are major contributing factors throughout a family's involvement within the juvenile-dependency system. The current adversarial approach in juvenile dependency undermines the goal of family reunification. However, with reforms aimed towards using objective criteria, employing a problem-solving approach, acknowledging racial and class biases, and expanding mediation services to all families, juvenile-dependency proceedings can result in better outcomes for families.

128. See S. CAL. FAM. MEDIATION INC., MEDIATION AND CONFIDENTIALITY "MAC" AGREEMENT, <https://dependencymediation.org/resources> (click "MAC (Mediation and Confidentiality) Agreement rev 03-2021 (pdf)") [<https://perma.cc/H44A-BTR7>] (last visited Jan 29, 2022).

