

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

2016–2017 EDITORIAL BOARD

Editor-in-Chief
JORGE F. GÓMEZ

Managing Editor
GREG TOLBERT

Managing Articles Editors
ANNEMARIE CARUSO
KATY NAPLES-MITCHELL

Community Engagement Editor
KATHERINE GROOT

Special Events Editor
CORINTHIA A. CARTER

Symposium Editor
KATHRYN JOSEPH

Public Interest Practitioner Section Editors
ROSEMARY ALMONTE
NORA HIROZAWA

Executive Articles Editors
KITTY AUSTIN
NAVID KHAZANEI

Notes & Comments Editors
DORIEN EDIGER-SETO
MARIE B. HAHN

Footnote Forum Editors
NICK BOURLAND
SAHIBNEET (SAHIBA) NANDA

Senior Staff Members
MAGGIE GRIBBEN
VANESSA HEMENWAY
JENNIFER KATZMAN

ROSE NISSEN
MATTHEW PORDES
CASSIE VEACH

SHOSHANA BROWN
LILIANA CANELA MAGARIN
ASIMA CHAUDHARY

Staff Members
KYL A KUVACH
CHRIS KOVALSKI
JONATHAN LANGER
MY LE
ERICA LEFF
MAYA LESZCZYNSKI
MACKENZIE LEW
EFRAIM LIPSCHUTZ
SHAINA LOW
JENNIFER MAGARINOS
SUSANNAH MALTZ
PRINCESS MASILUNGAN
POPPY MARKOU
CONNOR MEALEY
CHELSEA WILSON MILLER
REID MILLER

CHRISTINA PEÑA
MICHAEL PEREZ
JP PERRY
NATASHA POORAN
CHRYSI PRAKAS
JAMSHID SALOOR
CLAIRE STOTTLEMYER
SANDRA TAKAMI
KAREN UNGER
KALEIGH VANCE
KEVIN VARELA
APRIL WHITEHEAD
RANDOLPH YANG
NAOMI YOUNG
SAMARA YOUSIF

AMINA ABDULRAZZAK
MARIA AMOR
LOVELY BONHOMME
MARIA BRINKMANN
MELISSA BRITTON
STEPHANIE CABRERA
JACOB CHIN
AMANDA DELGROSSO
ALANNA DOHERTY
ABIGAIL DOWNS
ZUNIRA ELAHI
JULIE GILGOFF
ANNA GOYZUETA
JELLISA GRANT
LELIA JAMES

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

CONTENTS

Introduction *Angela Olivia Burton* 1

Public Interest Practitioner Section

However Kindly Intentioned: Structural Racism
and Volunteer CASA Programs *Amy Mulzer
& Tara Urs* 23

Healthy Mothers, Healthy Babies: A
Reproductive Justice Response to the
“Womb-to-Foster-Care Pipeline” *Emma S. Ketteringham,
Sarah Cremer &
Caitlin Becker* 77

Safeguarding the Rights of Parents with
Intellectual Disabilities in Child Welfare Cases:
The Convergence of Social Science and Law *Robyn M. Powell, MA, JD* 127

Ambivalence About Parenting: An Overview for
Lawyers Representing Parents in Child
Welfare Proceedings *Lisa Beneventano &
Colleen Manwell* 151

Articles

Family Defense and the Disappearing Problem-
Solving Court *Jane M. Spinak* 171

Inequity in Private Child Custody Litigation *Dale Margolin Cecka* 203

Afterword *Matthew I. Fraidin* 237

Direct communication about advertising, sponsorships, reprints, or back orders can be sent via email. Manuscripts should be double-spaced and use footnotes, not endnotes. We prefer electronic submissions, which can be sent to us either through the Berkeley Electronic Press's expresso service <<http://law.bepress.com/expresso>> or our email address, CUNYLR@mail.law.cuny.edu.

Volume Twenty

Winter 2016

Number One

INTRODUCTION

Angela Olivia Burton[†]

I. FAMILY DEFENSE IN CONTEXT: THE EVOLUTION OF THE RIGHT TO COUNSEL FOR POOR PARENTS IN CHILD WELFARE PROCEEDINGS.....	6
II. IMPEDIMENTS TO HIGH QUALITY FAMILY DEFENSE	12
III. REIMAGING FAMILY DEFENSE: ENHANCING PARENTAL REPRESENTATION	15
A. <i>Standards of Practice for Parents’ Attorneys</i>	15
B. <i>Examples of Parent Representation Models</i>	17
CONCLUSION	20

“Parents’ fundamental liberty interest in the companionship, care, custody, and control of their children ‘does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . [P]arents retain a vital interest in preventing the irretrievable destruction of their family life.’”

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

Parents’ fundamental liberty interest in the care and custody of their children is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.¹ Despite the United States Supreme Court’s ruling that states are not required, in every case, to provide a publicly funded lawyer for a parent whose rights to family integrity and autonomy are threatened by coercive government intervention,² most states do provide a right to appointed counsel for parents who cannot afford

[†] Angela Olivia Burton is the Director of Quality Enhancement, Parent Representation at the New York State Office of Indigent Legal Services (“ILS”), a state agency created in 2010 “to monitor, study and make efforts to improve the quality of” legal representation to persons eligible for free legal assistance in criminal cases and certain family court cases. N.Y. EXEC. LAW § 832(1) (McKinney 2016). She formerly served on the faculty of New York University School of Law as a Lawyering Professor (1995-1998), at Syracuse University College of Law as Director of the Children’s Rights and Family Law Clinic (1998-2003), and as an Associate Professor at the CUNY Law School (2003-2012), where she founded and directed the Family Law Concentration, an externship program in which students had the opportunity to work with institutional providers of parental defense in New York City.

¹ *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“[There is a] fundamental liberty interest of natural parents in the care, custody, and management of their child . . .”).

² *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18 (1981).

to hire their own lawyer.³ Yet even with widespread recognition of the need for counsel for child-welfare involved indigent parents, serious obstacles to competent, high quality parental representation persist.

On April 8, 2016, the City University of New York (CUNY) Law Review hosted a Symposium entitled *The Other Public Defenders: Reimagining Family Defense*. The event highlighted the need for robust advocacy for parents at risk of losing their children to state custody through allegations of child abuse or neglect. In their call for papers, Symposium organizers noted that despite expanded access to legal representation for parents in New York City⁴—home to the CUNY School of Law—“the punitive underpinnings of the child welfare system remain fundamentally unchanged for the vast majority of poor families and families of color.”⁵ In the face of deep-seated structural and practice issues that undermine parents’

³ See John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763, 781, 781-82 n.76 (2013) (identifying forty-four states providing a right to counsel in State-initiated termination of parental rights cases); see also *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

⁴ Beginning in 2007, the New York City Mayor’s Office of Criminal Justice has continuously entered into multi-year contracts with several organizations to provide representation to the majority of parents who are respondents in child protective proceedings in New York City Family Courts. Heather Appel, *New Influx of Lawyers Coming to Family Court*, CITY LIMITS (Apr. 16, 2007), <http://citylimits.org/2007/04/16/new-influx-of-lawyerscoming-to-family-court> [https://perma.cc/7448-7HVT] (discussing New York City’s shift from using appointed counsel to represent parents in abuse and neglect cases to using institutional providers); *Oversight—Child Welfare and Increased Demands on New York City Family Courts: Hearing Before Comm. on Gen. Welfare*, 2007 Sess. 12-14 (N.Y.C. Council Jan. 11, 2007) (statement of John Feinblatt, N.Y.C. Criminal Justice Coordinator), <http://legistar.council.nyc.gov/View.ashx?M=M/ID=75074&GUID=E3FCAB40-A5B7-4FDC-8749-E9F0AED90670> [https://perma.cc/HS88-L695] (noting New York City’s issuance of an RFP and its awards to legal services providers of contracts requiring both legal and social services for parents). Through these contracts, New York City has established a parental defense system that requires the use of “a multidisciplinary service model, including social workers, paralegals, investigators, experts and parent advocates.” City of New York Criminal Justice Coordinator’s Office, Request for Proposals for Indigent Family Court Legal Services for Respondents in Article 10 Cases (Nov. 1, 2013) (on file with CUNY Law Review). Currently, the Center for Family Representation, Inc., Brooklyn Defender Services, the Bronx Defenders, and the Neighborhood Defender Service of Harlem are the primary providers for the majority of state intervention cases in New York City. See N.Y.C. COUNCIL, REPORT ON THE FISCAL YEAR 2015 EXECUTIVE BUDGET FOR THE MAYOR’S OFFICE OF CRIMINAL JUSTICE (2014), <http://council.nyc.gov/downloads/pdf/budget/2015/15/eb/cjc.pdf> [https://perma.cc/39GP-5KMQ]. Conflict providers of parental representation in New York City are the Bronx Defenders, New York County Defender Services, Brooklyn Defender Services, and Queens Law Associates. *Id.*

⁵ Call for Papers, CUNY Law Review, *The Other Public Defenders: Reimagining Family Defense* (Nov. 15, 2015) (on file with CUNY Law Review).

ability to prevent the “irretrievable destruction” of their families, the organizers stressed the urgent need for a “multidisciplinary strategy aimed at ensuring family unity and well-being . . . for indigent families forced to interact with child welfare agencies and family court systems throughout the country.” Eminent advocates from around the country heeded the call, and convened at the CUNY School of Law in Long Island City, New York to share innovative strategies and approaches for reforming child protective and family court practices.⁶ The articles in this Symposium issue are packed with transformative insights and practical guidance for advocates working to achieve justice for parents and families involved with the child welfare system.

It has been 35 years since the United States Supreme Court’s 5-4 decision that, as a matter of federal constitutional law, indigent parents are not categorically entitled to free legal representation when facing termination of their parental rights⁷—called by some the “civil death penalty.”⁸ At the time of that much-maligned decision, over 30 states and the District of Columbia provided a

⁶ The plenary panel was moderated by Professor Marty Guggenheim, Founder and Co-Director of the Family Defense Clinic at New York University School of Law, and featured contributions from Professor Kara Finck, University of Pennsylvania Law School; Diane Redleaf, Esq., Founder and Executive Director of the Chicago-based Family Defense Center; and Lauren Shapiro, Director of the Brooklyn Family Defense Project. The event included breakout discussions on (1) *Structural Racism and Family Defense* with discussants Amy Mulzer, Professor, New York University School of Law; Tara Urs of the King County Department of Public Defense (Seattle, Washington); Keston Jones, Center for Health Equity, NYC Department of Health and Mental Hygiene; and Erin Cloud, Attorney, The Bronx Defenders Family Defense Practice; moderated by Professor K. Babe Howell, CUNY School of Law; (2) *Interdisciplinary Approaches to Family Defense* with discussants Robyn Powell, Esq., Heller School of Social Policy & Management at Brandeis University; Emma Ketteringham, Managing Director, The Bronx Defenders Family Defense Practice; and Sarah Cremer, Social Worker, The Bronx Defenders Family Defense Practice; moderated by Professor Julie Goldscheid, CUNY School of Law; and (3) *Problem-Solving Courts and Family Defense* with discussants Jane Spinak, Clinical Professor of Law, Columbia Law School; Stacy Charland, Managing Attorney, Neighborhood Defender Services Family Defense Practice; and Marcelle Brandes, Arbitrator, Mediator, and retired New York City Family Court Judge; moderated by Professor Ann Cammett, CUNY School of Law. The University of the District of Columbia’s David A. Clarke School of Law Professor Mathew Fraidin’s keynote address concluded the event.

⁷ *Lassiter*, 452 U.S. at 33-34.

⁸ See *C.S. v. Dep’t of Children and Families*, 124 So.3d 978, 981 (Fla. Dist. Ct. App. 2013) (Warner, J., dissenting); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 824 (Mo. 2011) (Stith, J., concurring in part and dissenting in part); *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989); *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991) (“A termination of parental rights is the family law equivalent of the death penalty in a criminal case.”); *In re FM*, 163 P.3d 844, 851 (Wyo. 2007) (“Termination of parental rights is the family law equivalent of the death penalty in a criminal case.”).

right to counsel for indigent parents at some stage of a child welfare case;⁹ today that number has risen to over 40 states.¹⁰ With the increased recognition of the benefits associated with high quality parental representation,¹¹ a vibrant community of advocates dedicated to protecting the integrity and autonomy of child-welfare involved families—almost all of whom are poor and a disproportionate number of whom are Black and Native American—is also growing in visibility and influence. These “family defenders”—lawyers and other advocates working together with parents threatened with the temporary or permanent loss of a child to state custody—are at the forefront of a new national movement to improve the quality of representation for parents so as to effectively guard against the misuse and abuse of the government’s coercive powers of state intervention into family life.¹²

Despite its constitutional and societal significance, as poignantly illuminated at the Symposium by a group of parent leaders from *Rise Magazine*, when it comes to poor families and families of color, the right to family integrity is often disrespected and devalued when child protective services (CPS) comes knocking. “Drawing on interviews with dozens of parents with open child welfare cases and stories published in *Rise’s* parent-written magazine over the past 10 years, Piazadora Footman, Robbyne Wiley, Bevanjae Kelley, and Nancy Fortunato described common themes in parents’ experiences” in the child welfare and court systems and “gave recommendations for reform.”¹³ Central to their

⁹ *Lassiter*, 452 U.S. at 33.

¹⁰ See Pollock, *supra* note 3.

¹¹ See, e.g., Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 140 (2012) (“Although a large-scale and reliable national study on the impact of parent representation has yet to be completed, data from regional programs show the potential benefits, both financial and human, that quality parent representation can provide.”).

¹² REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS XIX (Martin Guggenheim & Vivek S. Sankaran eds., 2015) [hereinafter REPRESENTING PARENTS]. Publication of this comprehensive guide represents a significant milestone in the evolution of family defense, which, according to its editors, “is still in its infancy in establishing itself as an important legal field.” *Id.* at xxiii. The book includes chapters written by lawyers (some of whom also have articles in this Symposium issue) who “practice daily in court fighting to ensure that the law is faithfully followed.” *Id.* at xvii. The book is “the field’s coming out statement: we exist and we do important work. . . . This book is devoted to persuading the best lawyer in town to become a family defense lawyer and we hope the book will help lawyers become excellent in their practice.” *Id.* at xxiii.

¹³ *Rise Parent Leaders Present Reform Recommendations at CUNY Law Symposium on*

presentation was *powerlessness*. The presentation began:

The main thing we want you to hear today is that parents come into court feeling powerless. Our life experiences have often made us feel powerless. Our experiences with courts and other authorities—schools, police—have *also* made us feel powerless. Just being people of color in this society makes us feel powerless. When our children are removed, we feel the ultimate in powerlessness. To regain our children, we need to find the power inside of us. We need to have the feeling that we are powerful enough to fight these charges, or change our lives. . . . No one does well in their job or their life if they feel powerless. Too often, courts are places where parents feel small and unheard. We hope our stories and recommendations today show you how you can be part of changing that.¹⁴

The testimony of these courageous women underscores the Symposium organizers' exhortation to *Reimagine Family Defense*. The parent leaders' stories of voicelessness, powerlessness, redemption, strength, and overcoming made a powerful impression upon all in attendance, and reinforced the need for family defenders to vigorously challenge the destructive, disempowering, and unjust practices of the child welfare system.¹⁵ They urged vigilance against complacency and complicity in the face of injustice. And that is just what the articles in this Symposium issue do: they challenge the "punitive underpinnings" of the child welfare system; explain what is necessary for zealous, effective legal representation for parents; encourage empathetic connection with clients, creative and innovative problem-solving, and balancing of problem-solving approaches with fierce advocacy.

The authors in this Symposium issue—experienced, highly respected family defenders from across the country—address some of the most challenging issues faced by parents and advocates as they seek to protect and preserve what the Supreme Court of the United States has called "perhaps the oldest of the fundamental liberty interests"—a parent's right to raise his or her child without

Family Court, RISE MAGAZINE (Apr. 8, 2016), <http://www.risemagazine.org/2016/04/cuny-court-presentation/> [<https://perma.cc/KG6V-QAWC>].

¹⁴ Nora McCarthy, Dir., Rise Magazine, Opening Remarks at the City University of New York Law Review's Symposium: Reimagining Family Defense (Apr. 8, 2016).

¹⁵ See Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters*, MICH. CHILD WELFARE L.J., Fall 2007, at 11, 13-15. This article discusses "the ways in which the procedures used by the child protective system disconnect and alienate parents from the decision making process involving their children." *Editor's Note—Summer 2007*, MICH. CHILD WELFARE L.J., Fall 2007, at i.

unwarranted state interference.¹⁶ To frame their insights, this Introduction provides a brief overview of the history and achievements in family defense. The Introduction starts with a short summary of the Supreme Court's decision in *Lassiter v. Department of Social Services*¹⁷—the ground-zero of the right to counsel for child welfare-involved indigent parents. Part II discusses some of the major obstacles that hinder parents' access to meaningful and effective assistance of counsel. Part III highlights some of the significant advances in the ongoing struggle to improve the quality of parental representation in child welfare proceedings.

I. FAMILY DEFENSE IN CONTEXT: THE EVOLUTION OF THE RIGHT TO COUNSEL FOR POOR PARENTS IN CHILD WELFARE PROCEEDINGS

The Supreme Court of the United States has variously characterized a parent's interest in the companionship, care, custody, and management of his or her child as "fundamental,"¹⁸ "essential,"¹⁹ and "far more precious than property rights."²⁰ Nevertheless, as Professor Peggy Cooper Davis, a former New York City family court judge has observed, "[i]n the real world, where parents have limited means and state officials have imperfect judgment, realization of [this] . . . right[] is not automatic. . . . Without diligence, advocacy, and a thoughtfully structured procedural context, parents can easily be overwhelmed and rendered voiceless" in child welfare proceedings.²¹ The much-maligned 1981 United States Supreme Court case of *Lassiter v. Department of Social Services*²² brings into sharp relief this critical need for access to counsel for poor parents in child welfare proceedings.²³

¹⁶ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹⁷ 452 U.S. 18 (1981).

¹⁸ *Id.* at 39-40.

¹⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁰ *May v. Anderson*, 345 U.S. 528, 533 (1953).

²¹ PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 140 (1997).

²² 452 U.S. 18 (1981).

²³ For examples of scholarly writings critiquing various aspects of the case, see Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1060, 1060 n.18 (2010) ("In the intervening years since *Lassiter*, there

A mother of four at the time her case began in Durham County, North Carolina, Abby Gail Lassiter “was fourteen years old when she had her first child. She was uneducated, poor, and black. Her only support was her mother, Lucille, and the community in which she lived.”²⁴ Notations in court records insinuated that Ms. Lassiter had “rather low intelligence and might well [have been] mentally retarded.”²⁵ In June of 1976 Ms. Lassiter’s youngest child, eight-month-old William, was adjudicated to be a neglected child in need of protection, remanded to the custody of the Durham County Department of Social Services, and placed into foster care.²⁶ Ms. Lassiter was not present at that hearing, nor was she represented by counsel in her absence.²⁷ When her parental rights to William were terminated two years later, she was present at the hearing, but not represented by counsel.²⁸ After terminating Ms. Lassiter’s parental rights, the trial judge informed her of her right to appeal his decision, but only at the urging of the attorney representing the child welfare agency.²⁹

The issue at the Court of Appeals of North Carolina was whether the trial judge committed reversible error in failing to appoint counsel for Ms. Lassiter.³⁰ While acknowledging that “[t]here is no question but that there is a fundamental right to family integrity protected by the U.S. Constitution[,]” the appellate court concluded that due process did not require the state to appoint and pay for lawyers to represent indigent persons in state-initiated proceedings to sever the family bonds of poor parents and their children.³¹ Despite clear evidence that Ms. Lassiter was unable to effectively defend herself in the absence of a trained, competent legal advocate,³² the court held that the failure of the trial court to

has been a steadily increasing crescendo of criticism of the Court’s decision by legal scholars and poverty lawyers, along with an increasing number of organized efforts around the nation directed at establishing a civil right to counsel either through state judicial decision or by legislative action.”)

²⁴ Brooke D. Coleman, *Lassiter v. Department of Social Services: Why Is It Such a Lousy Case?*, 12 NEV. L.J. 591, 592 (2012) (footnotes omitted).

²⁵ Lowell F. Schechter, *The Pitfalls of Timidity: The Ramifications of Lassiter v. Department of Social Services*, 8 N. KY. L. REV. 435, 446, 446 n.35 (1981) (citing Petitioner’s Brief for Rehearing at 9-10, *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18 (1981) (No. 79-6423)).

²⁶ See *id.* at 437-38, 447, 449-50, 449 n.44 (1981).

²⁷ *Id.* at 438.

²⁸ *Id.* at 447; *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18, 21-22 (1981).

²⁹ Schechter, *supra* note 25, at 453.

³⁰ *In re Lassiter*, 259 S.E.2d 336, 337 (N.C. Ct. App. 1979).

³¹ *Id.*

³² See Brief for National Center on Women & Family Law, Inc. et al. as Amici Curiae Supporting Petitioner at 31-43, *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18

appoint counsel for her was not error because she “had ample notice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine” the county’s witnesses.³³ The North Carolina court apparently did not appreciate the irony in its further reasoning that Ms. Lassiter wasn’t entitled to a lawyer because “the evidence brought forward by the Department of Social Services demonstrated a pattern of neglect” of William by Ms. Lassiter, and “no evidence of any rehabilitation of respondent or amelioration of her attitude towards her child was adduced.”³⁴ The court concluded that “[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.”³⁵

In a sharply divided 5-4 vote, the United States Supreme Court declined to apply the rights-based, categorical approach to court-appointed counsel for poor persons accused of crimes that it had adopted in the landmark 1963 case of *Gideon v. Wainwright*.³⁶ Instead, after creating a presumption against counsel in cases where “physical liberty” is not at stake,³⁷ the Court adopted what Justice Blackmun in dissent called the “thoroughly discredited” ad hoc approach,³⁸ allowing courts to determine, on a case-by-case basis, whether appointment of counsel would be constitutionally required for a particular indigent parent when the government seeks to permanently terminate his or her parental rights.³⁹ Despite acknowledging that application of the *Mathews v. Eldridge*⁴⁰ analysis used to assess the constitutionality of a procedure affecting due process⁴¹ would *generally* favor appointment of counsel in parental

(1981) (No. 79-6423), 1980 WL 340037 (discussing how counsel for Ms. Lassiter could have developed and presented defenses, ensured the state’s burden of proof was met and supported by reliable evidence, and protected Ms. Lassiter against bias and impropriety); *Lassiter*, 452 U.S. at 54 (Blackmun, J., dissenting) (“[S]he apparently did not understand that cross-examination required questioning rather than declarative statements.”).

³³ *Lassiter*, 259 S.E.2d at 337.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 372 U.S. 335 (1963).

³⁷ *Lassiter*, 452 U.S. at 26-27.

³⁸ *Id.* at 35 (Blackmun, J., dissenting).

³⁹ *Id.* at 31-32 (majority opinion) (“[N]either can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore . . . leave the decision 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 . . .”).

⁴⁰ 424 U.S. 319 (1976).

⁴¹ *See id.* at 335 (1976) (“[I]dentification of the specific dictates of due process

termination cases,⁴² the majority reasoned that the case-by-case approach was appropriate in termination cases because the *Eldridge* factors would not be met in *every* termination case, and because due process does not always require that “the significant interests [of the government] in informality, flexibility and economy must always be sacrificed[.]”⁴³ While holding that the United States Constitution does not mandate an absolute right to court-appointed counsel in termination cases, the Court nevertheless noted that the policy—supported by numerous national organizations—of providing counsel to poor persons in *all* child welfare proceedings was “enlightened and wise,” and urged, but did not mandate state courts to follow that policy.⁴⁴

Two dissents were filed, one by Justice Stevens writing for himself, and the other by Justice Blackmun, joined by Justices Brennan and Marshall. Justice Stevens rejected the majority’s reliance on the *Eldridge* analysis, arguing that while it was appropriate for analyzing “what process is due in *property* cases. . . . [T]he reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind.”⁴⁵ He pointedly observed that although incarceration and termination of parental rights are both serious deprivations of liberty, “often the deprivation of parental rights will be the more grievous of the two.”⁴⁶ Parents should be entitled to a categorical right to counsel in termination proceedings, said Justice Stevens, even if the costs to the State were “just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings,” because “the value of protecting our liberty from deprivation by the State without due process of law is

generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

⁴² *Lassiter*, 452 U.S. at 31 (“[T]he parent’s interest is an extremely important one . . . the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest . . . and the complexity of the proceeding and the incapacity of the uncounseled parent could be . . . great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high.”).

⁴³ *Id.* (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)).

⁴⁴ *Id.* at 33-34.

⁴⁵ *Id.* at 59-60 (Stevens, J., dissenting) (emphasis added).

⁴⁶ *Id.* at 59.

priceless.”⁴⁷

Although he used the *Mathews v. Eldridge* analysis, Justice Blackmun rejected outright what he called the majority’s “insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel[.]”⁴⁸ He stressed that “‘the interest of a parent in the companionship, care, custody, and management of his or her children.’ . . . occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility[.]”⁴⁹ and, as such, “there can be few losses more grievous than the abrogation of parental rights.”⁵⁰ Analyzing the *Eldridge* factors, Blackmun observed that termination proceedings, like criminal prosecutions, are “distinctly formal and adversarial,” with “an obvious accusatory and punitive focus.”⁵¹ Moreover, there is an added layer of complexity in termination proceedings given the reliance on the imprecise “best interests of the child” standard, with its open invitation to judges to rely on their own subjective, personal values,⁵² and the inability of an indigent parent, untrained in the law, to handle tasks associated with formal litigation.⁵³ Justice Blackmun declared:

Faced with a formal accusatory adjudication, with an adversary—the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a

⁴⁷ *Id.* at 60.

⁴⁸ *Lassiter*, 452 U.S. at 42 (Blackmun, J., dissenting).

⁴⁹ *Id.* at 38 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

⁵⁰ *Id.* at 40.

⁵¹ *Id.* at 42-43 (“The State initiates the proceeding by filing a petition in district court, . . . and serving a summons on the parent A state judge presides over the adjudicatory hearing that follows, and the hearing is conducted pursuant to the formal rules of evidence and procedure. . . . In general, hearsay is inadmissible and records must be authenticated.” (citations omitted)).

⁵² *Id.* at 45, 45 n.13 (“This Court more than once has adverted to the fact that the ‘best interests of the child’ standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.” (citing *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in judgment); *Smith v. Org. of Foster Families*, 431 U.S. 816, 835 n.36 (1977))).

⁵³ *Lassiter*, 452 U.S. at 45-46 (Blackmun, J., dissenting) (“The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses.”). Addressing the majority’s assertion that counsel would not have made a difference in Ms. *Lassiter*’s termination proceeding, Justice Blackmun found “virtually incredible” the majority’s conclusion that Ms. *Lassiter*’s “termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant’s obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases.” *Id.* at 57.

court to apply subjective values or to defer to the State's "expertise," the defendant parent plainly is outstripped if he or she is without the assistance of the "'guiding hand of counsel.'" . . . When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable.⁵⁴

In conclusion, Justice Blackmun asserted that

where, as here, the threatened loss of liberty is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.⁵⁵

Notably, *Lassiter* was decided during a period in which the federal government had increased its influence in state child welfare systems and practices through legislation that made funding to the states contingent on their adherence to specific regulations and policies. The most influential federal legislation affecting child welfare was the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).⁵⁶ CAPTA's major focus was on child safety. Notably, CAPTA required states to appoint a representative (not necessarily, but possibly, a lawyer) to protect the interests of the child in child welfare proceedings;⁵⁷ it did not and still does not contain a similar provision requiring representation of parents. The *Lassiter* case was thus decided in the context of a sustained period in which the national focus had been on removing children from what were considered unsafe homes and "bad parents" with what many critics regarded as little to no appreciation for the devastation that separation from their parents and families would have on the child.⁵⁸

Despite the Supreme Court's reluctance to recognize a right to court-appointed counsel for child-welfare-involved indigent parents, over half the states and the District of Columbia had already recognized such a right, either as a matter of statute or of constitu-

⁵⁴ *Id.* at 46 (1981) (footnote omitted) (citations omitted).

⁵⁵ *Id.* at 48.

⁵⁶ Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5119 (2012)). For a description of the law, its legislative history, and subsequent amendments, see CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ABOUT CAPTA: A LEGISLATIVE HISTORY (2011), <https://www.childwelfare.gov/pubPDFs/about.pdf> [<https://perma.cc/K694-N7XG>].

⁵⁷ 42 U.S.C. § 5106(a)(B)(ii) (2010).

⁵⁸ See, e.g., John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 454-62 (2008).

tional law.⁵⁹ New York's Court of Appeals was the first state high court to recognize the right to counsel for indigent parents in a state-initiated removal proceeding when it decided the case of *In re Ella R.B.* in 1972.⁶⁰ Three years later in 1975 the New York State legislature codified the right to counsel for parents in all child-welfare-related proceedings, as well as in various other family court proceedings.⁶¹ Notably, three years before the *Lassiter* decision Congress had passed the Indian Child Welfare Act of 1978,⁶² requiring the appointment of counsel for indigent Indian parents or custodians "in any removal, placement, or termination proceeding."⁶³ Failure to provide counsel is deemed a *per se* violation of the Act, with the possibility of invalidation of a removal, foster care placement, or termination of parental rights.⁶⁴

Although most states now provide free counsel for parents in state-initiated termination of parental rights cases,⁶⁵ it is questionable how often, and at what stage of the proceedings litigants actually receive counsel.⁶⁶ As discussed in the next section, the ongoing legacy of *Lassiter's* limitation on access to counsel for indigent parents is further exacerbated by the widespread lack of conditions and resources necessary for high quality parental representation.⁶⁷

II. IMPEDIMENTS TO HIGH QUALITY FAMILY DEFENSE

In addition to the lack of an absolute constitutional right to counsel for parents, access to justice for child-welfare involved parents and families is severely hampered by inadequate legal representation. Prominent entities such as the federal Administration for Children and Families, the American Bar Association, the National Association for Children's Counsel, and the National Council of Juvenile and Family Court Judges have recognized the necessity of competent parental representation.⁶⁸ Despite the rec-

⁵⁹ *Lassiter*, 452 U.S. at 34.

⁶⁰ *In re Ella R.B.*, 30 N.Y.2d 352 (1972).

⁶¹ See N.Y. FAM. CT. ACT §§ 261, 262 (McKinney 1975).

⁶² Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963).

⁶³ 25 U.S.C. § 1912(b) (1978).

⁶⁴ *Id.* § 1914.

⁶⁵ See *supra* note 3.

⁶⁶ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, CLEARINGHOUSE REV., July-Aug. 2006, at 186, 186 ("Without a detailed analysis of trial court minute orders, records, and perhaps even transcripts, how often *pro se* litigants request counsel, much less how courts handle such requests in the vast bulk of unappealed cases, is impossible to tell.").

⁶⁷ See generally Pollock, *supra* note 3.

⁶⁸ See, e.g., PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE:

ognition that parents' attorneys contribute to appropriate child welfare outcomes—by protecting due process and statutory rights, presenting balanced information to judges, and promoting the preservation of family relationships—and mounting evidence that strongly correlates improved parental representation with better outcomes for children,⁶⁹ parents' attorneys are “typically underpaid, under-resourced, carry high caseloads, and are sometimes disrespected as being on ‘the wrong side’ in a system designed to protect and serve children.”⁷⁰ Numerous studies have exposed wide variation in the quality of parental representation across the country.⁷¹ For example, the Permanent Judicial Commission for

SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 18 (2004) http://www.pewtrusts.org/~media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf (“To safeguard children’s best interests in dependency court proceedings, children *and their parents* must have a direct voice in court, effective representation, and the timely input of those who care about them.”) (emphasis added); DONALD N. DUQUETTE & MARK HARDIN, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN VII-1 (1999) (recommending that all States guarantee legal representation of parents or legal guardians at all court hearings, including at the preliminary protective proceeding, at government expense when the parent or guardian is indigent); NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (1998); NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995). Although unsuccessful, a bill was twice introduced in Congress (in 2011 and 2013) proposing that federal funding be provided to the states to improve parental representation. Enhancing the Quality of Parental Legal Representation Act of 2013, H.R. 1096, 113th Cong. (2013); Enhancing the Quality of Parental Legal Representation Act of 2011, H.R. 3873, 112th Cong. (2012). The bill cited analyses of data from New York, Michigan, and Washington showing reduced rates of foster care placement and increased rates of reunification when parents receive high quality legal representation.

⁶⁹ See generally Thornton & Gwin, *supra* note 11.

⁷⁰ NAT’L CTR. FOR STATE COURTS ET AL., COLORADO COURT IMPROVEMENT PROGRAM RESPONDENT PARENTS’ COUNSEL TASK FORCE STATEWIDE NEEDS ASSESSMENT: FINAL REPORT (2007), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Court_Improvement/CORPCFinalNeedAssstReptApp.pdf [<https://perma.cc/X8S9-SJD6>].

⁷¹ See, e.g., CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF NORTH CAROLINA PRACTICE (2013) [hereinafter NORTH CAROLINA STUDY] http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/NorthCarolinaReport_full.pdf [<https://perma.cc/XR7M-TMW2>]; CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: AN ANALYSIS OF WYOMING PRACTICE (2011) http://www.americanbar.org/content/dam/aba/administrative/child_law/wyolegalrep.authcheckdam.pdf [<https://perma.cc/M64U-7HT9>]; PERMANENT JUDICIAL COMM’N FOR CHILDREN, YOUTH & FAMILIES, SUPREME COURT OF TEX., LEGAL REPRESENTATION STUDY: ASSESSMENT OF APPOINTED REPRESENTATION IN TEXAS CHILD-PROTECTION PROCEEDINGS (2011), <http://texaschildrenscommission.gov/media/1356/lrs.pdf> [<https://perma.cc/NA8W->

Children, Youth and Families of the Supreme Court of Texas found representation provided under that state's parental right to counsel statute to be "perfunctory and so deficient as not to amount to representation at all."⁷² Rigorous studies of parental representation systems in various jurisdictions across the country have identified numerous impediments to high quality parental representation, including excessive caseloads; inadequate compensation; lack of supportive services and resources, such as expert witnesses, social workers, parent partners, investigators, psychologists, and evaluators; lack of practical and role-specific training, education, and standards; and insufficient or nonexistent monitoring and supervision.⁷³ Also contributing to inadequate legal representation are "poor customs and low expectations of representation The old reputation of juvenile and family courts as a lesser 'kiddie court' persists in some places, despite the increased sophistication and complexity of both the law and the underlying interdisciplinary perspective required to handle these cases effectively."⁷⁴

As recently noted by the American Bar Association assessment team for the North Carolina parental representation system,
 [b]etter representation for parents can decrease unnecessary re-

7Z4Z]; MELINDA MOORE & ALLISON MCWILLIAMS, GOVERNMENTAL SERVS. & RESEARCH DIV., UNIV. OF GA., A STATEWIDE ASSESSMENT OF GEORGIA PARENT REPRESENTATION IN CHILD WELFARE PROCEEDINGS (2010), <http://cj4c.georgiacourts.gov/sites/default/files/cj4c/publications/Final%20PA%20Merged%20Report.pdf> [https://perma.cc/X328-8YH8]; CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN PRACTICE (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/michigan_parent_representation_report.authcheckdam.pdf [https://perma.cc/74VY-MB55]; MINN. JUDICIAL BRANCH, REPORT OF CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP TO MINNESOTA JUDICIAL COUNCIL (2008), <https://www.leg.state.mn.us/docs/2009/other/090151.pdf> [https://perma.cc/ZT24-WZ5G]; WILLIAM BOWEN ET AL., THE JEROME N. FRANK LEGAL SERVS. ORG. & CONN. VOICES FOR CHILDREN, GIVING FAMILIES A CHANCE: NECESSARY REFORMS FOR THE ADEQUATE REPRESENTATION OF CONNECTICUT'S CHILDREN AND FAMILIES IN CHILD ABUSE AND NEGLECT CASES (2007), <http://www.ctvoices.org/sites/default/files/welf07reformsforrep.pdf> [https://perma.cc/LU7Q-5EWK]; NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70.

⁷² PERMANENT JUDICIAL COMM'N FOR CHILDREN, YOUTH & FAMILIES, *supra* note 71, at 59.

⁷³ See, e.g., NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70, at 1; NORTH CAROLINA STUDY, *supra* note 71, at 48-57.

⁷⁴ DUQUETTE & HARDIN, *supra* note 68, at VII-1; see also STEERING COMM. ON THE UNMET LEGAL NEEDS OF CHILDREN, AM. BAR ASS'N, AMERICA'S CHILDREN STILL AT RISK 199-210 (2001); see also NAT'L CTR. FOR STATE COURTS ET AL., *supra* note 70 at 5 ("[There is a] misguided view that attorneys working on these cases are relieved of the traditional rigors of the practice of law.").

movals of children from their families, ensure parents receive necessary and quality services, increase the frequency and quality of visitation between children and their parents, foster the use of kinship placements, decrease the amount of time until a child is safely returned to her parent, and generate cost savings at the local, state and federal levels.⁷⁵

Fortunately, the message is spreading, and more and more efforts to improve the quality of parental representation are taking root locally and nationally.

III. REIMAGING FAMILY DEFENSE: ENHANCING PARENTAL REPRESENTATION

Despite the obstacles hindering quality representation of parents, over the past decade or so there have been significant developments aimed at improving the quality of parental representation. Two major developments are standards of practice for parents' attorneys and the creation of innovative parent representation models. An overview of those efforts follows.

A. *Standards of Practice for Parents' Attorneys*

The lack of standards of practice to guide attorneys for parents in child welfare proceedings has been cited as a main contributor to poor quality representation. In 1999 the federal Administration for Children and Families urged states to adopt standards to guide attorneys in this complex field.⁷⁶ Eight years after adopting standards for attorneys who represent children in child welfare proceedings (in 1996),⁷⁷ and two years after adopting standards for attorneys representing child welfare agencies (in 2004),⁷⁸ in 2006 the American Bar Association (the "ABA") adopted standards for parents' attorneys.⁷⁹ Today, numerous states and localities have adopted formal practice standards for lawyers representing parents in these cases, and the list is growing.⁸⁰

⁷⁵ NORTH CAROLINA STUDY, *supra* note 71, at 13.

⁷⁶ DUQUETTE & HARDIN, *supra* note 68, at VII-1.

⁷⁷ STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (AM. BAR ASS'N 1996).

⁷⁸ STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES (AM. BAR. ASS'N 2004).

⁷⁹ STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (AM. BAR ASS'N 2006).

⁸⁰ See, e.g., QUALIFICATIONS AND STANDARDS FOR ATTORNEYS APPOINTED TO REPRESENT CHILDREN AND PARENTS (ARK. SUPREME COURT 2016); STANDARDS FOR PARENTAL REPRESENTATION IN STATE INTERVENTION MATTERS (N. Y. STATE OFFICE OF INDIGENT LEGAL SERVS. 2015), <https://www.ils.ny.gov/files/Parental%20Representa>

Substantively, standards adopted by many jurisdictions generally track the ABA's *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*.⁸¹ Key themes include required education and training, caseload and workload caps, the attorney-client relationship, and vigorous preparation and advocacy at all stages of the case.⁸² The standards also address the obligations of attorneys to work cooperatively and collaboratively with other professionals on the case, to advocate for the client's continued exercise of parental rights and obligations while a child is in foster care, and to advocate for and assist the client in accessing appropriate treatment, therapy, services and/or benefits.⁸³ Key provisions of the ABA Standards emphasize timely appointment of counsel, multidisciplinary representation, out-of-court client communication and advocacy, and awareness of and sensitivity to cultural and socioeconomic issues.⁸⁴

In addition to its practice standards, the ABA has undertaken a number of influential projects to improve the quality of parental representation. In 2007, it established the National Project to Improve Representation for Parents Involved in the Child Welfare System. The Project has been a singular force in driving national and state efforts to improve the quality of parental representation. In 2013 and in 2015, the ABA published the Parent Attorney National Compensation Survey. The survey reported on parent attor-

tion%20Standards%20Final%20110615.pdf [https://perma.cc/Z4QA-N83Y]; PRACTICE GUIDELINES FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE, NEGLECT, AND TERMINATION OF PARENTAL RIGHTS CASES (WYO. SUPREME COURT 2015), https://www.courts.state.wy.us/Documents/CJP/Publications/Practice_Guidelines_for_Attorneys_Representing_Parents_in_Abuse_Neglect_and_TPRs.pdf [https://perma.cc/9FDY-7LT6]; IOWA STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN JUVENILE COURT (IOWA SUPREME COURT 2013); PARENTS REPRESENTATION PROGRAM STANDARDS FOR ATTORNEYS (WASH. STATE OFFICE OF PUB. DEF. 2012), http://www.opd.wa.gov/documents/0061-2012_PR_P_Attorney_Standards.pdf [https://perma.cc/UC2V-BTDB]; PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING INDIGENT PARENT RESPONDENTS IN ABUSE, NEGLECT, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL (N.C. COMM'N ON INDIGENT DEF. SERVS. 2007), http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Parent_Atty_guides_1-08.pdf [https://perma.cc/UXN2-DDJE]; STATE OF ME., REPRESENTING PARENTS IN CHILD PROTECTION CASES: A BASIC HANDBOOK FOR LAWYERS (1999), http://www.courts.maine.gov/maine_courts/family/rep_parents.pdf [https://perma.cc/U45W-96FM]; see also SOCIAL WORKER PRACTICE STANDARDS (WASH. STATE OFFICE OF PUB. DEF. 2008), http://www.opd.wa.gov/documents/0062-2008_PR_P_SW_Standards.pdf [https://perma.cc/Q88N-WZC8].

⁸¹ STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (AM. BAR ASS'N 2006).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

ney pay structures, rates and supports, and noted obstacles to fair compensation such as inadequate compensation for out-of-court time, a lack of coverage for travel, even to see clients in some jurisdictions; lack of multi-disciplinary support (parent mentors, social workers, investigators); lack of caseload caps; and restrictive funding caps.⁸⁵ The ABA found that “these obstacles result in parents not always receiving the high quality representation they need to ensure the best outcomes for their children and families.”⁸⁶ Also in 2015 the ABA issued two significant publications: *Indicators of Success for Parental Representation*, providing first-ever guidance for states to measure and improve the quality of parental representation,⁸⁷ and the first-ever practice manual aimed exclusively at family defenders, *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders*.⁸⁸

B. Examples of Parent Representation Models

Around the country, a wide variety of parental representation models exist.⁸⁹ Most states have placed on their counties the responsibility for providing legal representation to impoverished child-welfare-involved parents, with little to no centralized or state-level oversight or funding.⁹⁰

However, there is a growing trend toward implementation of programs with some level of structure and accountability to ensure better organized and resourced parental representation. The American Bar Association’s Center on Children and the Law’s *Summary of Parent Representation Models* describes different representation models:

- *institutional parent representation organizations*—offices with a

⁸⁵ MIMI LAVER, ET AL., CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, PARENT ATTORNEY NATIONAL COMPENSATION SURVEY – 2015 (2015), https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1_102815/National/Parent_representation/2015_Parent_Attorney_Compensation_Survey.pdf [https://perma.cc/QDS5-BU9F].

⁸⁶ *Id.*

⁸⁷ CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, INDICATORS OF SUCCESS FOR PARENT REPRESENTATION (2015), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf [https://perma.cc/KAY5-H4NY].

⁸⁸ REPRESENTING PARENTS, *supra* note 12.

⁸⁹ See CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, SUMMARY OF PARENT REPRESENTATION MODELS (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/summary-parentrep_model.authcheckdam.pdf [https://perma.cc/W75G-VQQC].

⁹⁰ See *supra* note 3 for sources collecting state statutory provisions that govern appointment of parents’ attorneys.

full time staff of attorneys, social workers, peer parent advocates, and investigators;

- *contract or panel systems of representation*—a panel of contract attorneys who have education requirements, mandated practice standards, resources for social workers, investigators and experts, and compensation for out-of-court work; and
- *hybrid state or county parent representation offices and contract/panel systems*—a panel or list of contract attorneys who handle the majority of the parent representation and a state or county office with a full time staff who may handle some direct parent representation, oversee admission onto the panel, provide and oversee attorney education, and administer attorney review process.⁹¹

These models have shown promise toward ensuring that parents involved with the child welfare system have quality legal representation. The number of state funded and administered parental representation systems is growing. In addition to Arkansas,⁹² Massachusetts,⁹³ North Carolina,⁹⁴ New Jersey,⁹⁵ Utah,⁹⁶ and the State of Washington,⁹⁷ Colorado recently established the state Office of Respondent Parent's Counsel upon recommendations by a gubernatorial task force.⁹⁸

Washington State's Public Defender's Office is one example of a state-wide enhanced parent advocacy model that has achieved dramatic improvements in outcomes for children and families. Key elements of Washington's Parent Representation Program include

⁹¹ CTR. ON CHILDREN & THE LAW, *supra* note 87, at 2.

⁹² *Parent Counsel*, ARK. JUV. DIVISION CTS., <http://www.arjdc.org/parent-counsel.html> [<https://perma.cc/K6PJ-8XKH>] (last visited Nov. 27, 2016).

⁹³ *Children and Family Law Division*, COMMITTEE FOR PUB. COUNSEL SERVICES, <https://www.publiccounsel.net/cafl> [<https://perma.cc/N3GC-8Q3M>] (last visited Nov. 27, 2016).

⁹⁴ *Office of Parent Representation*, N.C. INDIGENT DEF. SERVICES, <http://www.ncids.org/ParentRepresentation/index.html> [<https://perma.cc/6LFN-B2HZ>] (last visited Nov. 27, 2016).

⁹⁵ *Office of Parental Representation*, N.J. OFF. PUB. DEFENDER, <http://www.state.nj.us/defender/structure/opr> [<https://perma.cc/6YM3-WBRU>] (last visited Nov. 27, 2016).

⁹⁶ See UTAH CODE ANN. §§ 63a-11-101 to -204 (LexisNexis 2011) (describing the Child Welfare Parental Defense Program).

⁹⁷ *Parents Representation*, WASH. ST. OFF. PUB. DEF., <http://www.opd.wa.gov/index.php/program/parents-representation> [<https://perma.cc/E5EN-RW6D>] (last visited Nov. 27, 2016).

⁹⁸ *About the Office of Respondent Parents' Counsel*, COLO. OFF. RESPONDENT PARENTS' COUNSEL, <https://www.coloradoorpc.org/about-us> [<https://perma.cc/YK86-FNUC>] (last visited Nov. 27, 2016); see also RESPONDENT PARENTS' COUNSEL WORK GROUP, FINAL REPORT TO THE STATE COURT ADMINISTRATOR (2014) https://www.coloradoorpc.org/wp-content/uploads/2016/11/RPC_Work_Group_Final_Report-1.pdf [<https://perma.cc/M89G-AY56>].

caseload limits for attorneys allowing a maximum of eighty open cases per attorney; attorney standards of practice; attorney training and support; Office of Public Defense oversight of attorneys; and attorney access to social workers and expert services.⁹⁹ Studies of the program document major financial savings to the state in foster care and court costs: children whose parents were represented by attorneys participating in the parent representation program had an 11 percent higher reunification rate, a 104 percent higher adoption rate, and an 83 percent higher guardianship rate.¹⁰⁰

In 2007, New York City adopted an institutional, multidisciplinary team model of representation when it contracted with several non-profit organizations to provide legal services to parents with open child protective cases. This approach, based on the Center for Family Representation, Inc. ("CFR"), is viewed nationally as an exemplary parental representation model.¹⁰¹ CFR and the other primary providers that contract with New York City (Brooklyn Defender Services, the Bronx Defenders, and the Neighborhood Defender Service of Harlem) all use a multidisciplinary team approach to serving child-welfare-involved parents. Parents served by these organizations are represented by an advocacy team of a social worker, attorney, and a parent advocate. The attorneys have access to in-house investigators and regularly use expert services to assist in the defense of their clients.

CFR's record of success is impressive. In 2014, about 50% of their clients' children never went into foster care. For children who did enter foster care, the median length of stay was less than 5 months, in comparison to the New York City median of 11.5 months before CFR began operations. Three times as many cases were dismissed as compared to prior to CFR's involvement. Also, in 2014 CFR's foster care reentry rate within one year was 7% compared to a statewide reentry of 15% percent. CFR's services cost an average of \$6,500 per family, regardless of the number of children, while the minimum cost to keep one child in foster care for a year in New York City is \$30,000. CFR estimates that its services have generated taxpayer savings of more than \$42.5 million since 2007.¹⁰²

Other notable local programs include the California Depen-

⁹⁹ CTR. ON CHILDREN & THE LAW, *supra* note 87, at 15-16.

¹⁰⁰ Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. & YOUTH SERVICES REV. 1337, 1340-42 (2012).

¹⁰¹ See Thornton & Gwin, *supra* note 11, at 142-44.

¹⁰² *Id.* at 144. CTR. FOR FAMILY REPRESENTATION, 2014 REPORT TO THE COMMUNITY 1

dency Representation, Administration, Funding and Training Program (“DRAFT”);¹⁰³ the Family Advocacy Unit of Community Legal Services, Inc. of Philadelphia;¹⁰⁴ the Detroit Center for Family Advocacy;¹⁰⁵ and the Vermont Parent Representation Center,¹⁰⁶ to name just a few. Additionally, a number of law schools have well-established programs that include parental representation in child welfare cases, including the New York University Family Defense Clinic,¹⁰⁷ the Mitchell Hamline School of Law Child Protection Clinic,¹⁰⁸ the CUNY School of Law Family Law Practice Clinic,¹⁰⁹ the University of Michigan Child Welfare Appellate Clinic,¹¹⁰ and the University of the District of Columbia David A. Clarke School of Law General Practice Clinic.¹¹¹

CONCLUSION

The need for robust, diligent, and creative defense of families is urgent. Reimagining family defense lawyering means working to ensure that every parent affected by the child welfare system has the kind of representation and advocacy exemplified in the following articles—client-centered, innovative, fierce. Professor Martin

(2014), <https://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2014-FINAL.pdf> [<https://perma.cc/GN94-R9KT>].

¹⁰³ *Dependency, Representation, Administration, Funding and Training Program*, CAL. CTS., <http://www.courts.ca.gov/15577.htm> [<https://perma.cc/JN9W-YTQL>] (last visited Nov. 27, 2016).

¹⁰⁴ *About CLS*, COMMUNITY LEGAL SERVICES OF PHILA., <https://clsphila.org/about-cls> [<https://perma.cc/5D85-75XR>] (last visited Nov. 27, 2016).

¹⁰⁵ *The Detroit Center for Family Advocacy*, U. MICH. DETROIT, <http://detroit.umich.edu/centers-initiatives/highlights/promoting-safe-and-stable-families-detroit-center-for-family-advocacy> [<https://perma.cc/F3FP-5XQ3>] (last visited Nov. 27, 2016).

¹⁰⁶ VT. PARENT REPRESENTATION CTR., <http://vtprc.org> [<https://perma.cc/7TSE-4C58>] (last visited Nov. 27, 2016).

¹⁰⁷ *Family Defense Clinic with NY Defenders*, N.Y.U. SCH. L., <http://www.law.nyu.edu/academics/clinics/familydefense> [<https://perma.cc/F935-LWJL>] (last visited Nov. 27, 2016).

¹⁰⁸ *Child Protection Clinic*, MITCHELL HAMLINE SCH. L., <http://mitchellhamline.edu/child-protection-program/courses-and-curriculum/child-protection-clinic> [<https://perma.cc/G98L-M9BB>] (last visited Nov. 27, 2016); see also Mimi Laver, *Rethinking Parent Representation in Minnesota: Law Clinic Steps Up*, 32 A.B.A. CHILD L. PRAC. 33 (2013); Wendy Haight et al., *The Child Protection Clinic: A Mixed Method Evaluation of Parent Legal Representation*, 56 CHILD. & YOUTH SERVICES REV. 7 (2015).

¹⁰⁹ *Family Law Practice Clinic*, CUNY SCH. L., <http://www.law.cuny.edu/academics/clinics/family.html> [<https://perma.cc/DC7G-UF3Z>] (last visited Dec. 17, 2016).

¹¹⁰ *Child Advocacy Law Clinic*, U. MICH. L. SCH., <https://www.law.umich.edu/clinical/calc/Pages/default.aspx> [<https://perma.cc/U578-KFNL>] (last visited Nov. 27, 2016).

¹¹¹ *General Practice Clinic*, UDC/DCSL, <http://www.law.udc.edu/?page=genPracticeClinic> [<https://perma.cc/AXW5-3PUS>] (last visited Nov. 27, 2016).

Guggenheim has noted that as a field of practice, family defense “is an outlier field, barely known to most lawyers and law school professors, let alone among Americans more broadly.”¹¹² The good news, however, is that around the country the visibility and recognition of the importance of this neglected area of civil rights practice is growing.

The articles in this Symposium issue help to advance the work of family defenders who zealously guard against the benevolent intentions of those who, in their eagerness to help, instead trample upon the personal rights and human dignity of impoverished parents and children.¹¹³ The authors illuminate some of the historical underpinnings of contemporary child welfare practices that weaken and destroy vulnerable and marginalized families and communities. Firmly grounded in their intimate engagement with the parents, families and communities they serve, the authors critique prevailing narratives about the child welfare system, thereby elevating and reframing our understanding of the uses and abuses of state power to intervene into families in the name of child protection. And their concrete suggestions for recognizing, naming, confronting and combatting destructive child welfare practices and policies contribute tremendously to on-going efforts to improve the quality of parental representation and to advance the cause of justice for families.

¹¹² REPRESENTING PARENTS, *supra* note 12, at xix.

¹¹³ See, e.g., THE D.C. CITIZEN REVIEW PANEL, AN EXAMINATION OF THE CHILD AND FAMILY SERVICES AGENCY’S PERFORMANCE WHEN IT REMOVES CHILDREN FROM AND QUICKLY RETURNS THEM TO THEIR FAMILIES: FINDINGS AND RECOMMENDATIONS FROM THE CITIZENS REVIEW PANEL 2 (2011), http://www.dc-crp.org/Citizen_Review_Panel_CFSA_Quick_Exits_Study.pdf [<https://perma.cc/V9CG-764U>] (examining District of Columbia Child & Family Services Agency cases and finding that it had “been at times removing children from their homes and putting them in foster care unnecessarily”).

HOWEVER KINDLY INTENTIONED:
STRUCTURAL RACISM AND VOLUNTEER CASA
PROGRAMS

Amy Mulzer & Tara Urs†

“A Judge McClellan in Lansing had authority over me and all of my brothers and sisters. We were ‘state children,’ court wards; he had the full say-so over us. A white man in charge of a black man’s children! Nothing but legal, modern slavery—however kindly intentioned.”

The Autobiography of Malcolm X

INTRODUCTION 23

I. CHILD WELFARE AND THE ROLE OF THE CASA 26

 A. *Race, Class, and Child Welfare*. 26

 B. *Life of a Child Protective Case* 30

 C. *Court Appointed Special Advocates*. 37

II. CASA PROGRAMS AND THE PRIVILEGING OF WHITE
MOTHERHOOD 45

 A. *Women’s Work, Power, and the Charitable Class* 47

 B. *The Rescue Fantasy* 51

 C. *Racial Hierarchies*. 54

 D. *Intertwining of the Charitable Class and the Court* 57

III. THE QUESTIONABLE ADVOCACY OF THE CASA. 58

 A. *Conflict Between the Role of a CASA and Fairness
Principles*. 59

 B. *The Power of the CASA*. 66

 C. *Structural Racism and Volunteer CASA Programs*. 69

CONCLUSION 73

INTRODUCTION

The question of racial disproportionality in the child welfare

† Amy Mulzer is a Staff Attorney and Clinical Instructor of Law in the Disability and Civil Rights Clinic, Brooklyn Law School. Many thanks to Annette Appell, Matt Fraidin, Marty Guggenheim, Chris Gottlieb, Nora Hirozawa, Kim Pearson, Hannah Roman, Jocelyn Simonson, Jane Spinak, and participants in both the 2016 Family Law Scholars and Teachers conference and the CUNY Law Review Symposium for their very helpful comments.

Tara Urs is an Attorney for The Defender Association Division of the King County Department of Public Defense. This article is dedicated to my clients—you know who you are.

system has, in recent years, generated a heated debate within the relatively small world of child welfare policy and scholarship. This paper is focused on that same question from a different angle. Rather than examining the disproportionately bad outcomes experienced by Black and Native American children, this paper looks at the system itself, and in particular, one central feature of child welfare decision-making in many parts of the country: volunteer child advocates. Volunteer child advocates, or “CASAs” (Court Appointed Special Advocates), are lay volunteer guardians ad litem appointed by the family court to represent the “best interests” of children who enter the child welfare system. This paper turns attention away from discussions of the race and economic poverty of the families most affected by the system, and instead looks at the impact of the race and privilege of these volunteer child advocates on child welfare decision-making.

Although CASA programs are a relatively new development, emerging as an experiment of one judge in Seattle in the 1980s¹ they are part of the larger historical story of child welfare. The demographic make-up of CASA programs—mostly middle-class white women over the age of 30²—easily recalls the women who, after the Civil War, played the primary role in establishing the modern child welfare system.³ The ability of white women to speak for the best interests of poor children of color, to advocate for their removal from their families, and to receive deference and praise from legal systems, comes to our modern legal system with deep roots. Understanding the role of race, gender, and power in forming the structure of the child welfare system explains in part why our legal system so comfortably tolerates a volunteer advocate whose role, in any other context, would not survive even a half-hearted due process challenge. And a full picture of the racist underpinnings of the modern child welfare system helps develop a fuller view of CASA programs.

The term structural racism can call to mind invisible forces that shape the world in a discriminatory way. But what is particularly striking about the proliferation of volunteer CASA programs is just how visible, and visibly racist, they are. When a CASA is ap-

¹ See Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1002 (2006).

² CALIBER ASSOCIATES, EVALUATION OF CASA REPRESENTATION: FINAL REPORT 2-3 (1999) [hereinafter EVALUATION OF CASA REPRESENTATION], <http://www.nccpr.org/reports/casa.pdf> [<https://perma.cc/GMM6-WQBT>].

³ See *infra* Part II. A-D.

pointed to speak for a child in family court, the child's parents lose one of the most cherished responsibilities any person can have—the power to decide what is best for their own children and speak on their behalf. This power is not transferred to the child, but rather to the CASA herself; once appointed, it is the CASA who voices “the child's” position, based on the CASA's own assessment of what the CASA thinks is best for the child.⁴ When that power—not just the power to determine a child's fate, but the power to even speak one's own opinion on the matter—is distributed away from poor families and children of color and given to a group of middle-class white volunteers, the racial bias in the system—the structural racism—is not just clearly visible, but is actually given a seat at the table in court for all to see.

And that power works real, tangible harms on families who encounter the child welfare system. The simple act of having a CASA assigned increases the chance that a parent's rights to her child will be terminated,⁵ an outcome that has been called the “civil death penalty.”⁶

CASA programs have carved out a unique and in some ways untouchable role in child welfare decision-making nationwide. Because CASAs are volunteers, by custom they receive gratitude for their service. But the praise CASAs receive goes beyond mere politeness. A recent edition of the National CASA Association's newsletter highlighted comments by family court judges about local CASA volunteers.⁷ One judge, R. Michael Key, a former President of the National Council of Juvenile and Family Court Judges, wrote that “on an average day,” CASAs “change for the good the lives of children with whom they had no previous connection and, on many extraordinary days, literally save children's lives.”⁸ Another former President of the National Council, Judge Leonard Edwards, wrote that a CASA is “a gift, the gift of an important person in a child's life.”⁹

Yet the unexamined praise that CASAs receive deserves a more thorough assessment. There is reason to question the power that

⁴ See *infra* Part I. C.

⁵ EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 43, 48.

⁶ See, e.g., *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989) (“[T]ermination of a parent's rights to her child is tantamount to imposition of a civil death penalty . . .”).

⁷ J. Dean Lewis, *The Roles and Responsibilities of the CASA/GAL Volunteer From a Judicial Perspective*, NAT'L CASA ASS'N: JUDGES' PAGE (Spring 2016), http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.9371787/k.99BB/JPW16_3_Lewis.htm [<https://perma.cc/838M-SS5L>].

⁸ *Id.*

⁹ *Id.*

CASAs have been given to influence the course of children's lives, and even more reason to question the unhesitating acceptance of this state of affairs by the majority of those working within the system. Why does the legal system assume that a group of volunteers—mostly middle-class white women—will make better decisions for a low-income child of color than her own family, community, or the child herself could make? What is it about CASAs that makes them not only acceptable, but practically untouchable? However kindly intentioned their work may be, this paper posits that CASAs essentially give voice to white supremacy—the same white supremacy that permeates the system as a whole and that allows us to so easily accept the idea that children in the child welfare system actually require the “gift” of a CASA, and do not already have an abundance of “important people” in their lives.

I. CHILD WELFARE AND THE ROLE OF THE CASA

A. *Race, Class, and Child Welfare*

By now, it is well known that the child welfare system disproportionately touches the lives of families of color, particularly Black and Native American families. The child welfare system separates more children of color from their families and communities, keeps them separated for longer periods of time, and more often permanently ends those families by terminating disproportionately more of their legal relationships.¹⁰ It is also well cataloged that, even

¹⁰ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 7 (2007) (“The HHS National Incidence Study has shown since the early 1980s that children of all races and ethnicities are equally likely to be abused or neglected; however, African American children, and to some extent other minority children, have been significantly more likely to be represented in foster care, according to HHS data and other research.”); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 1 (2005) (reporting that in 2003, American Indian children represented about 3% of the total number of children in foster care in the United States but only 1.8% of total population under 18); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (describing and assessing the disproportionate representation of Black children in the foster care system); Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 223-25 (2013) (discussing the disproportionate representation of African American and Native American children in the foster care system); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 110 (2008) (“There have been a disproportionate number of African-American children in the child welfare system for the last several decades. . . . Although African-American children make up 15% of the children in this country, they comprise 37% of the children in the child welfare system. . . . There is wide-

more than race and Tribal affiliation, poverty is the single greatest predictor of a child welfare case.¹¹ The child welfare system is fully focused on the lives of poor families, and especially focused on poor families of color. The flip side is that families with financial means and white families are far more likely to be left alone by the system despite experiencing the very same concerns that lead to child welfare intervention for low-income families of color, such as mental illness, alcoholism, recreational or habitual drug use, or domestic violence.¹² People of means are less likely to be touched by the system or to know people touched by the system.

In the literature, a variety of reasons for this disproportionality have been proposed, ranging from poorly substantiated claims that poor families and families of color actually mistreat their children at a higher rate¹³ to detailed accounts of the structural racism un-

spread agreement that compared to white children and families in the child welfare system, children of color and their families have less access to services and their outcomes are poorer.”). Cf. Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NAT’L PUB. RADIO (Oct. 25, 2011, 12:00 PM), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [https://perma.cc/68YL-53QT] (reporting the results of National Public Radio’s yearlong investigation into cultural bias and disproportionate removal rates in South Dakota’s foster care system).

¹¹ “Poverty is the leading reason children end up in foster care. Studies show that families earning incomes below \$15,000 per year are twenty-two times more likely to be involved in the child protective system than families with incomes above \$30,000. Lindsey concludes not only that ‘inadequacy of income, more than any other factor, constitutes the reason that children are removed,’ but that ‘inadequacy of income increased the odds for placement by more than 120 times.’” MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 192-93 (2005) (quoting DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 65-66 (1994)).

¹² “Poor parents often cannot afford to pay others to care for their children when they are unable to because they have to go to work, they are distraught, or they are high on drugs or alcohol. Nor can they afford to pay professionals to cover up their mistakes. They cannot buy services to mitigate the effects of their own neglectful behavior. Affluent substance-abusing parents, for example, can check themselves into a private residential drug treatment program and hire a nanny to care for their children during their absence. The state never has to get involved.” ROBERTS, *supra* note 10, at 36. See also Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 588 (1997) (footnotes omitted) (“[S]tudies have shown that although African American and white women of all income levels use drugs and alcohol at similar rates (with higher rates for white women), African American women are drug tested during delivery more often than white women, and when both are tested, black women are reported to child welfare authorities for prenatal drug use at a significantly higher rate than their white sisters.”); Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (explaining that private obstetricians and hospitals may be less likely to diagnose prenatal drug use “for fear of adverse patient reactions and the loss of future referrals”).

¹³ See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare*:

derlying both the system as a whole and individual decisions within it.¹⁴ As many have noted, not only are families of means able to access private resources to address personal and familial crises that might otherwise result in intervention by the child welfare system, but they are also under significantly less day-to-day scrutiny.¹⁵ While some families of means might send their children to public school, they do not apply for public benefits, live in public shelters, or rely on public health clinics, allowing them to keep their private lives truly private. They are disproportionately less likely to be stopped by the police and, if stopped, less likely to be arrested. Low-income families and families of color have lives that are significantly more entangled with the state, through no choice of their own, and every interaction between a poor family and the myriad of state systems with which they come into contact on a day-to-day basis is another opportunity for someone to make a call to child protective services.¹⁶ This issue has only been exacerbated by the

False Facts and Dangerous Directions, 51 ARIZ. L. REV. 871, 874 (2009) (“Black parents are disproportionately characterized by risk factors for maltreatment, such as extreme poverty, serious substance abuse, and single parenting; therefore, there is good reason to believe that black parents actually commit maltreatment at higher rates than whites.”).

¹⁴ See, e.g., ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972); KEESHA DUNBAR & RICHARD P. BARTH, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, RACIAL DISPROPORTIONALITY, RACE DISPARITY, AND OTHER RACE-RELATED FINDINGS IN PUBLISHED WORKS DERIVED FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (2007); ROBERTS, *supra* note 10; Sandra T. Azar & Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN’S L. REV. 533 (2007); Dorothy E. Roberts, Child Welfare and Civil Rights, David C. Baum Memorial Lecture in Civil Rights and Civil Liberties at the University of Illinois College of Law (Oct. 2, 2001), in 2003 U. ILL. L. REV. 171 (2003); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012) [hereinafter Roberts, *Prison*].

¹⁵ The Supreme Court has spoken approvingly of just this sort of disproportionate scrutiny of low-income families, rejecting a Fourth Amendment challenge to New York’s system of mandatory home visits for welfare recipients in part because such a visit allowed the case worker to check on the children residing in the home. *Wyman v. James*, 400 U.S. 309, 318-19, 322-23 (1971). Unsurprisingly, this line of reasoning provoked a sharp dissent from Justice Marshall: “Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?” *Id.* at 342 (Marshall, J., dissenting).

¹⁶ “The mothers and children ‘served’ by the public protective system are overwhelmingly poor and disproportionately of color. Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies. For example, the state must have probable cause to enter the homes of most Americans, yet women receiving aid to families with dependent children (AFDC) are not entitled to such privacy. In addition

widespread passage of broad mandatory reporting statutes that require a wide—and growing—range of professionals to report any suspicion of child abuse or neglect.¹⁷

That said, the disproportionate scrutiny placed upon certain families in our society is not, in and of itself, enough to explain the wildly different levels of involvement with the child welfare system. Just as important is the discretion embedded in every stage of the child welfare system, from the initial decision that the presenting situation requires a call to child protective services to the determination that there was, in fact, neglect to the assessment that it is in the best interests of a particular child to remain in the care of and eventually be adopted by her foster family.¹⁸ While the peculiar set-up of dependency court—the low standard of proof, lack of procedural protections, and ambiguous substantive standards, discussed below—may not be the direct or only cause of the disproportionate impact borne by low-income families and families of color, these factors are what allow it to occur. Working in an ambiguous, comparatively informal setting where the stakes are high and the perceived risk of getting it wrong is enormous, including responsibility for the death of a child,¹⁹ decision-makers—from mandated reporters to child protective workers to the agency attorneys who

to receiving direct public benefits (like AFDC and Medicaid), poor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.” Appell, *supra* note 12, at 584 (footnotes omitted).

¹⁷ Every state has a statute that requires members of certain professions and other specified individuals to report suspected abuse or neglect. *See, e.g.*, N.Y. SOC. SERV. LAW §§ 413-414 (McKinney 2015) (requiring members of nearly fifty specified professions—including alcohol and substance abuse counselors, dental hygienists, and assistant district attorneys—to report suspected abuse or neglect); 23 PA. CONS. STAT. §§ 6311-6312 (2015) (requiring medical professionals, medical examiners and funeral directors, school employees, child-care workers, religious leaders, social services workers, law enforcement officers, employees at public libraries, independent contractors, attorneys affiliated with organizations serving children, and foster parents to report suspected abuse or neglect). For a discussion of the development and expansion of mandatory reporting requirements and the resulting bias towards over-reporting and over-labeling of child abuse and neglect, see, for example, GUGGENHEIM, *supra* note 11, at 193-94; Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society’s Response*, 36 OHIO N.U. L. REV. 819 (2010); Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9 (2005).

¹⁸ *See* ROBERTS, *supra* note 10, at 55-59 (describing the degree of discretionary decision-making involved in the initial stages of a child protective proceeding).

¹⁹ For a detailed and eloquent description of the peculiar combination of ambiguity, informality, and life-or-death pressure involved in child welfare decision-making, see Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 928-35 (2013).

screen cases and draft petitions to the judges themselves—are relatively free to rely on their own opinions about what situations require intervention, complete with their own conscious or unconscious biases.²⁰

The next sub-section will describe the life of a typical child protective case, both as foundation for readers who are not familiar with the system and to highlight the degree of discretion present throughout.

B. Life of a Child Protective Case

Not all child protective investigations result in court involvement. When an agency receives a report of suspected abuse or neglect, it assigns a social worker (or case manager) to investigate the allegation and determine whether there is any possible basis for concluding that abuse or neglect has occurred.²¹ Even if the investigating worker determines that a child has been harmed or is at risk of harm, the agency may leave the children in the home and provide services to the family to ameliorate the problem. So long as the family “voluntarily” accepts the services and does what the agency asks, the agency may not need to file a petition with the family court.²² However, if the agency wants to require the family

²⁰ Dorothy Roberts describes a training exercise carried out by the National Child Welfare Leadership Center that asked a group of caseworkers to make decisions about “the level of risk and agency intervention required after reading descriptions of possible child maltreatment in a series of vignettes.” ROBERTS, *supra* note 10, at 52. Half of the vignettes involve families of color, and half involve white families; the participants are not told that there are two sets of vignettes, and in each set the race of the characters is “reversed and counterbalanced to reduce experimental error.” *Id.* As Roberts explains, the exercise “always uncovers the participants’ racial biases. ‘Without exception, the results of the exercise conducted in all sessions revealed that decisions about the level of risk and intervention were influenced by the race of the child and family described in the vignette, independent of all other factors[.]’” *Id.*

²¹ See, e.g., N.Y. SOC. SERV. LAW § 424(6)(a) (McKinney 2015). The standard for this initial investigation is often quite low: in order to “indicate” a report of suspected abuse or neglect in New York State, the investigating agency need only find “some credible evidence” to support the report. *Id.* § 422(5)(a). A few jurisdictions, including Washington, have a slightly higher standard. See WASH. REV. CODE § 26.44.020(11) (2013) (defining “founded” as “the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur”).

²² Of course, many “voluntary” agreements are not in fact voluntary, as the parent knows that if they refuse, the agency can and likely will file a petition in court. By using the threat of family court, child welfare workers can save the hassle of actually going to court—and may even get parents to agree to do services or accept other restrictions that the family court would not actually order—by convincing parents to sign a voluntary agreement. See, e.g., Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 663-

to engage in services, thinks the family is not sufficiently “cooperative,” or seeks to remove the child from the home, it will bring the case into court by means of a petition alleging neglect or abuse.²³

Once a child protective case enters family court, it proceeds on multiple tracks at the same time. If the agency seeks to remove the child from her parents’ care, the family is entitled to a separate hearing regarding the necessity of the removal—variously called a “shelter care hearing,” “72-hour hearing,” or, in New York, a “1027 hearing,” among other things.²⁴ Accordingly, during the pendency of the child welfare case, the child who is the subject of the case may remain in her own home, in the care of her parents, or she may be removed and temporarily placed in foster care with a relative or with strangers.²⁵

The family is also entitled to a full trial on the merits of the abuse or neglect allegations, which progresses much like any other civil case. The first step is fact-finding,²⁶ where the court will either dismiss the petition or, more commonly, enter a finding of abuse or neglect against the parents. The court then enters an order of

79 (2012); Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and A Proposal for Change*, 65 TENN. L. REV. 835 (1998); see also *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 834 (1977) (internal citations omitted) (“The extent to which supposedly ‘voluntary’ placements are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many ‘voluntary’ placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent.”).

²³ See, e.g., N.Y. SOC. SERV. LAW § 424(11) (McKinney 2016); WASH. REV. CODE § 13.34.040(1) (2011).

²⁴ See, e.g., N.Y. FAM. CT. ACT § 1027 (McKinney 2016); WASH. REV. CODE §§ 13.34.060-.065 (2013). There are exceptions to the hearing requirement: workers in New York, for example, may seek an ex parte removal order when there is “not enough time to file a petition and hold a preliminary hearing,” N.Y. FAM. CT. ACT § 1022(a)(i)(C) (McKinney 2005), or may remove a child without going to court at all where there is “reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child’s care presents an imminent danger to the child’s life or health” and “there is not time enough to apply for an [ex parte] order,” N.Y. FAM. CT. ACT § 1024(a)(i)-(ii) (McKinney 2009). Like the provision for voluntary placement, these exceptions are susceptible to abuse and have, at times, been applied so broadly as to swallow the rule. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002) (evidence demonstrated that New York City’s Administration for Children’s Services had an “agency-wide practice of removing children from their mother without evidence of a mother’s neglect and without seeking prior judicial approval”).

²⁵ See, e.g., N.Y. FAM. CT. ACT § 1027(b)(i)(A)-(C) (McKinney 2016); WASH. REV. CODE § 13.34.060 (2007).

²⁶ See, e.g., N.Y. FAM. CT. ACT § 1051 (McKinney 2016); WASH. REV. CODE § 13.34.110 (2007).

disposition, indicating what services the parents must complete to correct the issues on which the finding of abuse or neglect was based.²⁷ The dispositional order will also indicate where the child should live pending full resolution of the case: the child may remain in or return to her parents' care under supervision from the agency, or she may be placed out of home on an ongoing basis.²⁸ While the issue at fact-finding is whether the agency has established that the parents abused or neglected the child as alleged,²⁹ the issue at disposition is what result would be in the child's best interests.³⁰

If the child has been removed from her parents' care, there will also be a series of federally-mandated "permanency hearings" at six-month intervals to address the family and agency's progress towards reunification and, theoretically, to determine if the child can return home.³¹ Ultimately, if the family is not successfully reunited, the agency will move to establish some other form of "permanency" for the child, usually through termination of the parents' rights and placement of the child for adoption.³² The agency will file a petition seeking termination of the parents' rights to their child; the parents have the right to a full trial and a dispositional hearing on this petition as well.³³ As with the original petition alleging abuse or neglect, the issue at the termination trial will be whether the agency has established sufficient grounds for termination, while the issue at the disposition is what is in the child's best interests.³⁴

²⁷ See, e.g., N.Y. FAM. CT. ACT § 1052 (McKinney 2016); WASH. REV. CODE § 13.34.130 (2013).

²⁸ See, e.g., N.Y. FAM. CT. ACT § 1052(a)(i)-(vii) (McKinney 2016); WASH. REV. CODE § 13.34.130(1)(a)-(b) (2013).

²⁹ See, e.g., N.Y. FAM. CT. ACT § 1051(a) (McKinney 2016); WASH. REV. CODE § 13.34.110(1) (2007) ("The petitioner shall have the burden of establishing by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030.").

³⁰ See, e.g., N.Y. FAM. CT. ACT § 1052 (McKinney 2016); WASH. REV. CODE § 13.34.130(3) (2013) ("The department or supervising agency may only place a child with a person not related to the child as defined in RCW 74.15.020(2)(a), including a placement provided for in subsection (1)(b)(iii) of this section, when the court finds that such placement is in the best interest of the child.").

³¹ 42 U.S.C. § 671(a)(15) (2015); N.Y. FAM. CT. ACT § 1089 (McKinney 2016); WASH. REV. CODE § 13.34.145(1) (2015).

³² Under 1997's Adoption and Safe Families Act (ASFA), state agencies must file a petition to terminate the rights of parents whose child has been in care for fifteen of the previous twenty-two months, unless the court finds good cause exists not to file such a petition. See 42 U.S.C. § 675(5)(E) (2016).

³³ See, e.g., N.Y. SOC. SERV. LAW § 384-b (McKinney 2016); WASH. REV. CODE § 13.34.132 (2013).

³⁴ See, e.g., N.Y. SOC. SERV. LAW § 384-b (McKinney 2016); WASH. REV. CODE

Finally, in addition to everything occurring in court, there are various out-of-court obligations: visitation for parents separated from their children, service planning meetings, evaluations, service review meetings, and participation in the services themselves, ranging from once-a-week evening parenting classes to all day, full-time drug treatment and mental health services.³⁵ While a family cannot be ordered to participate in any services or work with the agency prior to the court making a finding of abuse or neglect, parents can agree to participate in services, even without a finding of abuse or neglect, as part of an agreement to keep or bring their child home or to improve the likelihood of a favorable resolution.³⁶ The reality of child welfare proceedings is that a parent's participation in recommended services, "cooperation," and "compliance"—or the caseworker's assessment thereof—are often the key to everything else: visitation, reunification, and a favorable settlement.³⁷

The reason that the agency has to bring the case into court if it seeks more than voluntary engagement with services is, of course, because parents have a fundamental constitutional right to make decisions about the care and custody of their children.³⁸ The fundamental right to family integrity has the strongest, most continuous presence in our constitutional tradition of any non-

§ 13.34.132 (2013). Although the Washington Statute does not define the "best interests" inquiry as a dispositional issue, case law has made clear that it is a separate inquiry from whether the statutory termination elements have been met. *In re Welfare of A.B.*, 232 P.3d 1104, 1113 (Wash. 2010) (describing the "best interests" inquiry as the second step in a two-step process).

³⁵ This is the experience of the authors, who have represented parents in New York City and Seattle, as well as others familiar with the child welfare system. *See, e.g.*, Appell, *supra* note 12, at 583; GUGGENHEIM, *supra* note 11, at 206-07; *see also* WASH. DEP'T OF SOC. & HEALTH SERVS., CHILDREN'S ADMIN., POLICIES AND PROCEDURES GUIDE, §§ 1710, 1720 (2016) (describing, respectively, "Shared Planning Meetings" and "Family Team Decision Making Meetings").

³⁶ *See, e.g.*, WASH. REV. CODE § 13.34.065(4)(j) (2013) ("At the shelter care hearing the court shall . . . inquire into . . . [w]hether any orders for examinations, evaluations, or immediate services are needed. The court may not order a parent to undergo examinations, evaluation, or services at the shelter care hearing unless the parent agrees to the examination, evaluation, or service . . .").

³⁷ For a valuable discussion of this phenomenon and the problems with it, see Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339, 343-55 (1999). *See also* Appell, *supra* note 12, at 598 (describing the "elevation of form over substance" in the system's emphasis on "cooperation" and "compliance" as a measure of good parenting).

³⁸ *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

enumerated right.³⁹ Parents are ordinarily assumed to act in their children's best interests, and are permitted to make a wide range of decisions on behalf of their children, even if others might disagree with their choices.⁴⁰ In the context of a child welfare proceeding, the ostensible role of the family court is to ensure that this fundamental right is respected, and that the state only intrudes into the private sphere of the family when absolutely necessary.

Nevertheless, in child welfare cases the burden of proof is low—at fact-finding, only a preponderance of the evidence, or fifty-one percent certainty—and procedural protections are largely absent.⁴¹ For example, there is no right to a trial by jury,⁴² no right to a speedy trial, and while many states have established a statutory right to counsel for parents in child welfare proceedings,⁴³ there is no federal constitutional right to an attorney or to effective assistance of counsel.⁴⁴ At fact-finding, some states allow broad exceptions to the hearsay rule for, among other things, out-of-court

³⁹ “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel*, 530 U.S. at 65.

⁴⁰ “A parent has a constitutional right to direct his/ her child's care and upbringing, absent proof that the parent is abusing or neglecting the child Parental rights doctrine protects parental decisions by presuming that parental choices regarding or affecting children are sound. . . . The constitutional liberty interest . . . in the parent-child relationship cabins the state's ability to legislate regarding child welfare and child rearing. Thus, the state can coercively intervene in, or interfere with, family governance in order to protect the child, i.e., if the parents have fallen below minimum parenting standards. The state, however, cannot intervene merely because it has a difference of opinion with the parent about what is best for the child.” Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 703-04 (2001).

⁴¹ The evidentiary standard is higher for termination trials—“clear and convincing evidence” at the least, “beyond a reasonable doubt” for proceedings covered by ICWA—but by the time the family's case gets to the point of termination, the damage resulting from the prior lack of procedural protections has already been done. See generally Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457 (2003); Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13 (2010) (describing the almost complete lack of procedural protections between the initial fact-finding and the termination trial, and the effect of this lack of protections on families' ability to successfully reunify).

⁴² See generally James L. Buchwalter, Annotation, *Right to Jury Trial in Child Neglect, Child Abuse, or Termination of Parental Rights Proceedings*, 102 A.L.R.5th 227 (2002).

⁴³ See, e.g., N.Y. FAM. CT. ACT § 262(a) (2012); WASH. REV. CODE § 13.34.062(2) (b) (2009).

⁴⁴ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (finding no constitutional right to the appointment of counsel for indigent parents in every parental status termination proceeding and that trial courts should make this determination on a case-by-case basis).

statements by children.⁴⁵ Hearsay is generally admissible at disposition and at pre-trial hearings regarding the possible removal of children.⁴⁶ The substantive legal standards are frequently vague and subject to wildly varying interpretations, permitting intervention “when a child has been ‘abused’ or ‘neglected,’ and sometimes when the child is ‘at risk’ of abuse or neglect.”⁴⁷

Moreover, by the time a family appears in court, its members’ right to family integrity—the very right the dependency court is supposed to protect—has already been compromised.⁴⁸ In some cases, the child already may have been physically removed from her parents’ care on an emergency basis without a court order, or upon an *ex parte* application to the court.⁴⁹ And even in those cases where the state waits to physically remove the child, or never removes the child at all, the mere existence of a child protective proceeding divides the child’s interests from the interests of the parents. Even before any finding of maltreatment has been made, the constitutional assumptions described above are turned on their head, and the child’s parents are no longer presumed to be able to speak for the child or, often, to provide any valuable information about her at all.⁵⁰

Instead, in many jurisdictions, the child is appointed someone

⁴⁵ See, e.g., ME. STAT. tit. 22, § 4007(2) (2013) (making hearsay statements of children admissible in child-protection and parental-termination proceedings); N.Y. FAM. CT. ACT § 1046(a) (vi) (McKinney 2009) (making hearsay statements of children admissible in fact-finding hearings regarding alleged neglect or abuse, though the statements must be corroborated to be sufficient to make a finding of abuse or neglect).

⁴⁶ See, e.g., N.Y. FAM. CT. ACT § 1046(c) (McKinney 2009); WASH. REV. CODE § 13.34.065(2)(c) (2013).

⁴⁷ Appell, *supra* note 12, at 604-05 (“In their exact language, these statutes permit protective intervention when a child has been ‘abused’ or ‘neglected,’ and sometimes when the child is ‘at risk’ of abuse or neglect. These grounds are imprecise and difficult to apply. Neglect and risk of harm are particularly nebulous and subjective concepts. The lack of clarity leaves the state without sufficient guidance as to the reason for and scope of its involvement and results in needless disruption of families.”).

⁴⁸ See Chill, *supra* note 41, at 460-61 (discussing the propensity of interim decisions of any kind to become self-reinforcing and focusing on the powerful influence that an initial removal exerts on subsequent child protective proceedings).

⁴⁹ See sources cited *supra* note 24.

⁵⁰ See, e.g., Christine Gottlieb, *Children’s Attorneys’ Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1263-64 (2006). This would seem to go against the underlying reasoning of the Court’s decision in *Santosky*, where the Court held that the child’s interests and those of the child’s parents are presumed to coincide until the parents’ conduct has been proven deficient. See *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“At the factfinding, the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”).

else to speak for her—a stranger who will be treated as her advocate throughout the length of the proceeding. Although parents have no federal constitutional or statutory right to an attorney to represent them in child welfare proceedings,⁵¹ certain federal funding for state child protective services is contingent upon states' compliance with a statutory requirement to appoint a "guardian ad litem or court-appointed special advocate" to represent the child's interests.⁵²

The titles used for these advocates vary from jurisdiction to jurisdiction—in addition to guardians ad litem and CASAs, there are children's attorneys, "law guardians," and VGALs (voluntary guardians ad litem).⁵³ More significantly, the role of the child's advocate is unclear and varies from state to state, court to court, and case to case.⁵⁴ In some jurisdictions, children are appointed an attorney who is supposed to advocate for or at least express the child's stated position before the court. In other jurisdictions, children are instead represented by an attorney or other individual who is supposed to advocate for whatever result the advocate concludes is in the child's best interests; these advocates may or may not be required to inform the court of the child's stated position if it differs from the advocate's.⁵⁵ And of course, what the attorneys or advocates actually do in any given case may or may not line up with what they are supposed to be doing; individual courts, offices, and even courtrooms have their own cultures and accepted practices.⁵⁶

There are a number of issues with the entire concept of appointing advocates—of whatever form—to speak for children in

⁵¹ See *supra* note 44 and accompanying text.

⁵² 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016); see *infra* notes 59-62 and accompanying text.

⁵³ See Peters, *supra* note 1, at 1001 (describing the range of titles and roles for advocates for children in child protective proceedings in the U.S.).

⁵⁴ Even though lawyers (and other representatives such as guardians ad litem) have been representing children in child protective proceedings for more than twenty-five years and are currently serving that function in every jurisdiction in the United States, there is no uniform definition of a lawyer's role and responsibilities in this context. As a result, lawyers have been remarkably free—or remarkably burdened—to figure this out for themselves. Even worse, "in almost any state . . . one will encounter within the state a deep disagreement about one's role." Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488, 1488 (1999) (reviewing JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997)); see also Peters, *supra* note 1, at 1011-14 (describing and attempting to systematically categorize the various roles assigned to advocates for children in child welfare proceedings in the U.S.).

⁵⁵ Peters, *supra* note 1, at 1011-14.

⁵⁶ *Id.* at 1013.

child welfare proceedings, and there is an extensive literature addressing these issues.⁵⁷ While some of the concerns raised in this article may be applicable to other forms of child advocacy, the article is focused on the use of volunteer CASAs as the child's primary "voice" in the court case. As is discussed below, CASAs, unlike children's attorneys, are often themselves a party to the child protective case, with counsel, notice, and a right to be heard. And unlike children's attorneys, CASAs are not professionals with enforceable standards for their conduct. While many CASAs may feel a moral duty to the children for whom they speak, they owe them no professional, fiduciary, or other obligation. Yet CASAs have outsized influence with the court: in great part *because* they are volunteers, performing charitable good deeds, CASAs are treated with deference, and the court gives the opinion of the CASA extra weight. CASAs' "benevolence" has so far served as a buffer or a smokescreen, limiting questions about the impact CASA programs actually have on the fairness of child welfare proceedings.⁵⁸

The next sub-section explores the creation and rise of the CASA as a particular form of child advocacy in child welfare proceedings.

C. Court Appointed Special Advocates

The first CASA program in the country was established in 1979 by King County Superior Court judge David W. Soukup as a local experiment.⁵⁹ The CASA program quickly "became a significant

⁵⁷ See, e.g., Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008); Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protective Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) [hereinafter *Represented But Not Heard*].

⁵⁸ Justice Brandeis famously took the opposite view when he said, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Less famous but equally apt was the opinion of the Second Circuit in *Duchesne v. Sugarman*, noting that "of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . Those who torment us for our own good will torment us without end for they do so with the approval of their own conscience." *Duchesne v. Sugarman*, 566 F.2d 817, 828 n.24 (2d Cir. 1977) (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953)).

⁵⁹ Peters, *supra* note 1, at 1002.

force within the child advocate community.”⁶⁰ Soukup’s “local experiment” led to the creation, in 1982, of a national CASA organization. In 1996, the national organization “successfully lobbied for the inclusion of court appointed special advocates by name in the amendment to [the Child Abuse Prevention and Treatment Act],”⁶¹ so the statute, which used to mandate only that states appoint a guardian ad litem to represent children involved in child welfare proceedings, now specifies that states must appoint a “guardian ad litem . . . , who may be an attorney or a court appointed special advocate.”⁶² Currently, there are roughly 950 CASA programs in 49 states and over 70,000 individual CASA volunteers.⁶³

The concept behind Soukup’s initial experiment—and behind the hundreds of CASA programs currently operating across the country—is that lay volunteers can adequately represent the best interests of children in the child welfare system. Soukup’s underlying concern, as he described it, was information—he felt that he simply did not have enough information about the children in his courtroom to make fully informed decisions.⁶⁴ To address this, Soukup began to use lay community volunteers as guardians ad litem who could investigate the children’s circumstances and make recommendations regarding what result was in their best interests. The volunteers were supervised by a social worker and represented by legal counsel in court proceedings.⁶⁵

There are a number of variations in the way that CASA programs operate. In some CASA programs, like the one in King County, Washington, the CASAs are a separate party to the child welfare case, serving as guardians ad litem, with their own legal representation.⁶⁶ In other programs, CASAs merely supplement the work of children’s attorneys, who either represent children directly or serve as guardians ad litem.⁶⁷ For the purposes of this arti-

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Child Abuse Prevention and Treatment Act Amendments of 1996 (CAPTA), Pub. L. No. 104-235, 110 Stat. 3063 (1996) (codified at 42 U.S.C. § 5106a(b)(2)(B)(xiii)).

⁶³ *About Us*, NAT’L CASA Ass’n, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm [<https://perma.cc/2DYF-VYF9>] (last visited May 2, 2016).

⁶⁴ Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CTR. FOR CHILD. & CTS. 63, 64 (1999).

⁶⁵ *Id.*

⁶⁶ WASH. REV. CODE § 13.34.100 (2014).

⁶⁷ Piraino, *supra* note 64, at 64-66. See also Donald N. Duquette & Sarah H. Ramsey,

cle, our focus will be on those CASAs, like King County's, who serve directly as volunteer guardians ad litem.

As guardians ad litem, CASAs are not completely unprecedented. Guardians ad litem have long been appointed to direct the legal representation of litigants who are deemed unable to do so on their own. The guardian, "acting as a fiduciary, is empowered to decide what is in the best interests of his ward and to determine what position should be taken in the litigation; in carrying out his duties, the guardian may ignore even his ward's express wishes."⁶⁸ As other scholars have addressed, there are a myriad of issues with the appointment of guardians ad litem generally, ranging from autonomy concerns to potential procedural due process violations.⁶⁹ Many of the issues raised in this article regarding the use of voluntary guardians ad litem in child welfare proceedings may apply to the use of guardians ad litem in other contexts as well.

When it comes to child welfare proceedings, however, the role of the guardian ad litem becomes especially muddled: while all guardians ad litem are supposed to determine what result would be in their ward's best interests and direct the litigation accordingly, in child welfare proceedings the question of the child's best interests is not only an extremely complicated one—requiring countless predicate conclusions about the value of a particular sort of family, home, and community—but also frequently "the very issue being litigated."⁷⁰ Essentially, "in order to play an active role in the litigation, the guardian first must determine who ought to prevail on the merits," as if the guardian were the judge.⁷¹ As will be discussed below, these concerns are only exacerbated by the particular nature of volunteer CASA programs, including their demographics, the lack of standards governing the CASA's role, and the wide latitude CASAs are given on account of their role as charitable actors.

CASAs who function as voluntary guardians ad litem have a complicated role; they are charged with investigating the child's

Using Lay Volunteers to Represent Children in Child Protection Court Proceedings, 10 CHILD ABUSE & NEGLECT 293, 294 (1986) ("The role of CASAs and other lay volunteer child advocates varies greatly from community to community. The volunteer may operate independently or may be paired with an attorney and become the 'eyes and ears' of the child's legal representative, doing separate investigations and independent advocacy for the child."). Cf. *supra* notes 41-45 and accompanying text.

⁶⁸ *Represented But Not Heard*, *supra* note 57, at 94.

⁶⁹ See, e.g., Donna S. Harkness, "Whenever Justice Requires": Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity, 8 MARQ. ELDER'S ADVISOR 1 (2006).

⁷⁰ *Represented But Not Heard*, *supra* note 57, at 94.

⁷¹ *Id.*

circumstances, making decisions about what is best for the child, and directing the CASA's legal representation on behalf of the child. The CASA's first task is investigatory—in theory, the CASA meets with the child, her family, relevant community members, teachers, doctors, and the child's foster parents in order to gather information about her situation.⁷² This fits with Soukup's concern that he simply did not know enough about the children who came before him: if the CASA conducts a full investigation, she can obtain information about the child's life, community, schooling, and needs that the overworked social workers and attorneys on the case do not have time to gather.

Yet the CASA does not simply transmit that information to the court. As a guardian ad litem, the CASA's information-gathering is directed at a specific end, namely, to determine what result or set of results is in the best interests of the child to whom she is assigned.⁷³ With the child's parents stripped of their ability to speak on their child's behalf by the mere existence of the child protective proceeding against them, the CASA's role is to stand in their stead and to determine not what the child wants, but what is, in the CASA's own estimation, best for the child. The CASA then relies on this determination in two ways.

First, she will direct the child's legal representation accordingly, “just as” a parent would direct the attorney in any other kind of case brought on behalf of their child.⁷⁴ Should the CASA's attorney support the parent's motion to dismiss the dependency petition or put on evidence to support a finding of neglect? Should the CASA direct her attorney to support expanded visitation between the child and her parents or oppose it? Are three months of successful drug treatment enough, or should the attorney file a motion to require the parents to complete a year of drug treatment? Again, in making these decisions, the CASA need not seek to

⁷² WASH. REV. CODE § 13.34.105(1)(a) (2013) (listing the first duty of the guardian ad litem as “[t]o investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child”). Though advocates are encouraged to develop a relationship with the children they work with, they are not mentors as much as investigators. *Id.*

⁷³ CAPTA specifically requires that the “attorney or court-appointed special advocate” appointed to represent the child both “obtain first-hand, a clear understanding of the situation and needs of the child” and “make recommendations to the court concerning the best interests of the child.” 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016).

⁷⁴ “Regardless of the program model, lay volunteers do not participate in the case as legal counselors to the child,” but instead as “individuals appointed to represent the child's best interest, just as a parent would in a case not involving parental child abuse or neglect.” Piraino, *supra* note 64, at 66.

achieve the result preferred by the child herself, or the result deemed desirable by any (or all) of the important people in the child's life with whom the CASA ideally will have consulted; it is the CASA's own view of the child's best interests that controls.

Second, the CASA reports to the court not only about her impressions of the child's circumstances and the information gathered through her investigation and her interactions with the child, but also about her conclusions regarding the child's best interests.⁷⁵ Unlike the typical guardian described above—the guardian who determines what is in her incapacitated ward's best interests solely so that she is able to direct the legal representation to that end⁷⁶—CASAs themselves regularly become witnesses in the child protective proceedings, and one key piece of their testimony is their ultimate conclusion regarding the result or set of results that is in the best interests of the child. Thus, on the question of visitation, for example, the CASA may offer testimony regarding her determination that a move to overnight visitation is not in the child's best interests, while in a fact finding proceeding to determine whether the child was in fact abused or neglected, she may testify that entry of a finding of neglect against the child's parents is in the child's interests. Again, what the child herself wants—to have overnight visits, or to have the case dismissed so that she can go home—is not controlling. It is the CASA's own determination of the child's best interests that matters.

Who are CASAs, and how do they make these extremely important determinations about children to whom they have no prior connection? First, CASAs are not only volunteers; they are, by design, lay volunteers. According to the national CASA training curriculum, CASAs are recruited “not for their legal knowledge but for their ‘unique qualities, community perspective, [and] common sense approach[.]’”⁷⁷ Thus, while all CASA volunteers undergo training to prepare them for their roles—and while a professional lawyer or social worker with the requisite free time and flexibility in

⁷⁵ WASH. REV. CODE § 13.34.105(1)(e) (2013) (“Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties”). *Id.* § 13.34.105(1)(f) (“[t]o represent and be an advocate for the best interests of the child”).

⁷⁶ *Represented But Not Heard*, *supra* note 57, at 94. *See also, e.g.*, *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (describing the role of a guardian ad litem appointed under the Federal Rules of Civil Procedure in directing the litigation on her ward's behalf).

⁷⁷ Piraino, *supra* note 64, at 67 (quoting NAT'L CASA ASS'N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989)).

their schedule might be accepted as a CASA if they were to volunteer—CASAs are not expected to be any more expert in child welfare practice, child development, psychology, or social work than your average community member or parent would be.

Moreover, either by design or omission, there are few-to-no standards to guide the CASA in applying their “community perspective” and “common sense” to the situations before them. While federal law requires that an advocate be appointed, there are no uniform rules describing the role of these advocates, their minimum level of education or training, or their ethical or professional duties in the case. As noted above, all CASAs must be trained—federal law requires that the appointed advocate have “training appropriate to the role”⁷⁸—and the national CASA organization has standards for local chapters and a recommended training curriculum, but adoption of the curriculum by local chapters is strictly voluntary,⁷⁹ and adherence to the national standards is monitored by means of a “self-assessment tool.”⁸⁰ Ultimately, individual CASAs can do as much or as little investigation as they want, and can rely on anything from a therapist’s recommendation to their own “gut reaction” or initial impression of the quality of the underlying parent-child relationship to decide what is best for the child.⁸¹

⁷⁸ 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016).

⁷⁹ EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 1-3. Notably, while the standards developed by the national CASA organization require volunteers to complete 30 hours of pre-service training each year and 12 hours of in-service training, the actual length of time spent in training “depends on the specific training program, but it may range from 3 hours (with continued training throughout the program) to 40 hours, with many programs falling somewhere in between.” *Id.* at 3. See also JENNIFER LAWSON ET AL., COURT APPOINTED SPECIAL ADVOCATES (CASA) AS AN INTERVENTION FOR IMPROVING CHILD WELFARE CASE OUTCOMES: A SYSTEMATIC REVIEW 4-5 (2015), <http://www.campbellcollaboration.org/lib/project/295/> [<https://perma.cc/B8QP-P4WC>] (describing variation in structure, training, standards, and activities of CASA programs).

⁸⁰ EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 1.

⁸¹ In the world of child welfare, Congress has repeatedly endorsed particular principles to curb arbitrary state interference with private family life. One of those, first raised in 1977 in response to evidence that children were being needlessly separated from their families, is the requirement that no child will be placed in foster care “unless services aimed at preventing the need for placement have been provided or refused by the family.” H.R. REP. NO. 95-394, at 8 (1977). See also H.R. REP. NO. 96-136, pt. 1, at 23, 24 (1979) (“such services have been made available but refused by the family”). Congress has repeatedly affirmed this requirement such that even today, in most cases agencies are tasked with making “reasonable efforts” to make it possible for the child to return to her family. 42 U.S.C. § 671(a)(15)(B)(ii) (2015). Therefore, social workers are tasked with making at least “reasonable efforts” to reunify the family, subject to judicial oversight. Unlike the assigned social workers, the amount of effort the CASA exerts is not a legal issue in the case because they are not bound by any requirement to make reasonable efforts. A CASA can make a “reasonable effort”

Finally—last but far from least—the demographics of CASA volunteers could not be more distinct from the demographics of families entangled in the child welfare system. While families of color are overrepresented in the child welfare system, they are almost completely unrepresented in the ranks of CASA volunteers. Eighty to ninety percent of CASAs are white.⁸² Surveys of local CASA programs show that the typical volunteer is a white woman between 40 and 59 years of age who has had college or post-graduate education.⁸³

There is not a lot of good research on the effectiveness of CASA programs, in part because it is hard to get reliable numbers or to accurately compare data from individual CASA programs, given the variation in standards, training, role definition, and requirements for appointment of a CASA.⁸⁴ It is also hard to know what the results of the few existing studies mean. For example, does the fact that children who are assigned CASAs receive more services than those who are not⁸⁵ mean that CASAs are particularly effective at identifying and accessing the services the children need, that CASAs are disproportionately assigned to more complicated cases where the children involved require more services, or that CASAs are quicker to refer children to services even when those services may not be necessary?

While studies have indicated that CASA programs may have some positive results—including increased access to services,⁸⁶ as described above, and fewer placements within care⁸⁷—there are

or a minimal effort or no effort to reunify a family, but that will not be an issue subject to judicial oversight. And unlike social workers, CASAs are under no legal obligation to use their efforts to keep the family together at any point. In fact, a CASA can actively thwart reunification and still be operating within their role.

⁸² LAWSON ET AL., *supra* note 79, at 2 (“Research on CASA volunteer demographics consistently shows that they are overwhelmingly (80-90%) White, in contrast to the foster care population, in which children of color are distinctly overrepresented.”).

⁸³ See EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 2-3.

⁸⁴ See LAWSON ET AL., *supra* note 79, at 8-11 (discussing recurring problems with empirical studies of CASA programs).

⁸⁵ See, e.g., EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 7 (“Although the literature suggests that children with CASA volunteers receive more services than children without CASA volunteers, there is little known about the types of services that CASA volunteers are acquiring for children or the level of need for these services.”).

⁸⁶ See, e.g., EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 5, 7, 37-39; Pat Litzelfelner, *The Effectiveness of CASAs in Achieving Positive Outcomes for Children*, 79 CHILD WELFARE 179, 190 (2000).

⁸⁷ “In addition to the type of placement for the child, the number of placements the child experiences is also important. It can be very disruptive for a child to be

other troubling findings. In one recent study commissioned by the national CASA organization itself, CASA volunteers were found to spend less time on cases involving Black children than those involving white children.⁸⁸ The same study also found that volunteers spent an average of only 3.22 hours on each of their cases per month.⁸⁹

Most significantly, CASA volunteers were found to *reduce* the likelihood of a successful reunification between children and their parents.⁹⁰ In other words, CASA volunteers confound the stated purpose of the dependency system: to mend families.⁹¹ Indeed,

moved from one place to another, so minimizing the number of placements is important. A study by Litzelfelner (2000) found that children with CASA volunteers had fewer placements (3.9 on average) than those without CASA volunteers (6.6 on average). Calkins and Millar (1999) found similar results: children with CASA volunteers had significantly fewer placements (3.3 on average) than children without CASA volunteers (4.6 on average). A study by Leung (1996), however, does not support these findings. Leung found no significant differences in the number of placements experienced by children with and without CASA volunteers.” EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 5-6. On the other hand, another recent study found that there were significantly more out-of-home placements when CASAs were involved. Laurie J. Tuff, Court Appointed Special Advocates: Is Their Impact Effectively Evaluated by Current Research Methodology? 21, 23 (July 2, 2014) (unpublished M.A. thesis, University of Washington), <https://www.uwb.edu/getattachment/policystudies/why-policy-studies/student-work/tuff-capstone.pdf> [<https://perma.cc/WF77-UPU8>].

⁸⁸ EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 22; *see also* Barbara White Stack, *An Evaluation of Volunteers Courts Controversy*, YOUTH TODAY (July 1, 2004), <http://youthtoday.org/2004/07/an-evaluation-of-volunteers-courts-controversy> [<https://perma.cc/VC9E-GS4T>].

⁸⁹ EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 15.

⁹⁰ *Id.* at 43, 48; Davin Youngclarke et al., *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 109, 119 (2009) (finding CASA assigned cases were more likely to end in adoption, equally likely to result in reunification, and equally likely to result in long-term foster care placements); U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 07-04, NATIONAL COURT APPOINTED SPECIAL ADVOCATE PROGRAM 19 (2006), <https://oig.justice.gov/reports/OJP/a0704/final.pdf> [<https://perma.cc/ZAN5-2K7F>] (finding that children in CASA assigned cases were “more likely to be adopted and less likely to be reunified with their parents”); KATHY BRENNAN ET AL., UNIV. OF WASH. SCH. OF SOC. WORK & WASH. STATE CTR. FOR COURT RESEARCH, WASHINGTON STATE COURT APPOINTED SPECIAL ADVOCATE PROGRAM EVALUATION REPORT 30, 53 (2010), <https://www.courts.wa.gov/wscsr/docs/CASA%20Evaluation%20Report.pdf> [<https://perma.cc/3AT4-LLXZ>] (finding of reunification was forty-eight percent for children assigned to CASA staff, forty-six percent for those assigned contract GALs, forty-four percent for those assigned neither a CASA nor a GAL, and forty-one percent for those assigned a CASA, but only twenty-nine percent of CASA assigned cases resulted in reunification, compared with thirty-six percent for contract GALs and thirty-eight percent for CASA staff).

⁹¹ The purpose of the dependency system is to mend families. “The primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties.” *In re Dependency of Schermer*, 169 P.3d 452, 460 (Wash. 2007) (quoting *In re Dependency of T.L.G.*, 108 P.3d 156, 168 (Wash. Ct. App. 2005)).

preventing reunification between a parent and child, and advocating for the termination of parental rights, is entirely consistent with a CASA's role even as it cuts against the larger stated goal of the system. In that way, a CASA differs significantly from the social worker assigned to the family by the state. The social worker has a duty to make reasonable efforts to reunify the family before pursuing termination.⁹² But a CASA is free to advocate and press for termination of parental rights, even if the state and the child disagree, if, in her lay opinion, termination is in the child's best interests. Therefore, it is significant but not entirely surprising that having a CASA assigned decreases the chance of reunification.

Lastly, though counterintuitive, CASA programs actually cost a significant amount of money. A 2014 study of the CASA program found that CASA programs reported a total revenue of 304 million dollars in 2014, more than half of which came from public sources.⁹³ Though based on the work of volunteers, CASA programs require managers to assign cases, supervisors to advise the CASAs, lawyers to represent them in court, administrative assistants, not to mention a physical space and other operating costs.

In sum, CASAs have been granted a wide ranging role to influence the outcome of child welfare cases even though they are governed by few standards and have not been demonstrated to be particularly effective; they are granted enormous deference though they rely on tax payer dollars, expend less effort on Black children, and reduce the likelihood that families can remain together. One might wonder how a system of CASAs came to exist in a legal system that, theoretically, aims to protect a parent's fundamental constitutional right to family integrity. The next section will begin to situate CASA programs within a larger historical story.

II. CASA PROGRAMS AND THE PRIVILEGING OF WHITE MOTHERHOOD

Choose your favorite adage: what's past is prologue, or Faulkner, "The past is never dead. It's not even past." The history of child welfare is no different; it sets up themes that repeat over and over. As described above, CASA volunteers are predominantly white, middle-class women. Child welfare-involved families are disproportionately families of color, and are overwhelmingly low-in-

⁹² See *supra* note 81.

⁹³ NAT'L CASA ASS'N, ANNUAL LOCAL PROGRAM SURVEY REPORT 11 (2014), http://nc.casaforchildren.org/files/public/community/programs/Statistics/2014_Local_Survey_Report.pdf [<https://perma.cc/7WC4-L66S>].

come. This is nothing new. The decision to include a CASA's voice in child welfare proceedings represents a decision to endorse a particular set of values that have been part of the debate for as long as child welfare policy has existed.⁹⁴ The race and gender make-up of volunteer CASA programs is one manifestation of the long historical trend linking volunteerism, child welfare, and white privilege.

The creation of the child welfare system in America is inextricably linked to the themes discussed in this paper.⁹⁵ It was during the period after the Civil War that white women embraced a role as benevolent reformers, capitalizing on their presumed moral au-

⁹⁴ This paper starts looking at child welfare policy beginning in the 1880s, although that is a somewhat arbitrary choice. Typical history of child welfare policy begins by describing the "bad old days" when a "man's home is his castle," and moves on to address the "discovery" of child maltreatment in 1874, with the "Mary Ellen" case. See, e.g., ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 33-34 (1999). It then jumps to the "rediscovery" of child maltreatment in 1962, with C. Henry Kempe's work on "battered child syndrome." See, e.g., *id.* at 34; John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2009). The "typical" history casts an uncritical look at the charitable institutions that emerged in a limited way during the antebellum period and became a major force for social change after the Civil War. This paper highlights some of the more critical scholarship which identifies problems with the work. If space were not an issue and the goal were simply to give a more thorough accounting of the development of modern child welfare, this paper could have easily started at the point of slavery, and the systematic use of family destruction as a form of social control. For all the good that *has* come out of the child-saving movement, it is no less a part of that history than of the alternative history presented by scholars like Bartholet. "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care." Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 146 (1995). In fact, it might even be said that "until 1865 slavery was the major child welfare institution for Black children in this country, since that social institution had under its mantle the largest numbers of Black children." BILLINGSLEY & GIOVANNONI, *supra* note 14, at 23.

⁹⁵ Linda Gordon made this point explicitly when she wrote, "[i]n most respects, though certainly not all, the perspective and structures that child-protection work developed by 1920 remain today." LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 61 (1988). There are many interesting themes worthy of an entire paper that are beyond the scope of our inquiry here, including the ongoing push-pull between upper-class charitable volunteers and middle-class professional social workers. The professionalization of social work and the attempts to develop more scientific methods for the so-called helping professions have historically led to conflicts among women regarding who was best positioned to do good. See generally REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945* (1993). Although these debates remain relevant today, particularly in those courtrooms where a professional social worker and a volunteer CASA sit before the same judicial officer and can give competing views of the case, this dynamic is largely beyond the scope of this paper.

thority over family matters and extending that authority to “rescue” work on behalf of poor women and children. From the beginning, these movements used systems of child welfare to reproduce and maintain racial hierarchies. Notions of pure, good, white motherhood were used to set the bar for what was deemed safe and appropriate parenting, and formed the basis for an expansion of the intrusion into the private family life of those whose parenthood did not conform to that ideal. And, although the work was ostensibly benevolent, white women used the power they claimed over poor families as a foothold to lift their own standing in society, while actors within the legal system simultaneously relied on white women’s judgment to rationalize state control over poor families.

The following sections briefly review the historical roots of the child welfare system in an attempt to provide context for modern-day volunteer CASA programs. Today’s child welfare system, just like its antecedent a hundred years ago, relies disproportionately on the views of white women to define appropriate parenting to the detriment of those who are the objects of the system’s intervention.

A. *Women’s Work, Power, and the Charitable Class*

Middle-class white women have long asserted their own influence by claiming specialized authority over matters of the family: as far back as the Revolutionary War, white middle-class urban elites claimed their “moral motherhood” as the virtuous moral agents who would bring up the next generation of George Washingtons.⁹⁶ Historically, these claims have been tied to highly gendered notions of women’s “natural” affinity for caring and for children. Yet the authority claimed eventually went far beyond the private sphere of the home, as women sought to use their “moral motherhood” as a basis for real social and political power. In the face of ideologies that deemed women’s role to be in the home, white women often justified their political reform activity by asserting the need for their traditional feminine values and skills as mothers to be extended beyond the home into society to uplift women and children of other races and classes whom they characterized as oppressed.⁹⁷

⁹⁶ SHARON HAYS, *CULTURAL CONTRADICTIONS OF MOTHERHOOD* 29 (1996). See also Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 11 (Gerald P. Mallon & Peg McCartt Hess eds., 2d ed. 2014).

⁹⁷ Margaret D. Jacobs, *The Great White Mother: Maternalism and American Indian Child Removal in the American West, 1880-1940*, in *ONE STEP OVER THE LINE: TOWARD A*

Some women's benevolent projects to aid widows and orphans began to emerge as early as the turn of the nineteenth century,⁹⁸ culminating in mid-century efforts by the Children's Aid Society to remove more than forty thousand children from New York City "slums" and send them to farm families in the West.⁹⁹ Indeed, it was during this time that the phrase "best interests of the child" emerged as a legal standard, as a way to sanction the "broad discretionary authority" of private and public actors to determine the interests of children when parents were deemed to have failed.¹⁰⁰ But it was not until the 1870s that a "new burst of Protestant evangelicalism, . . . strongly flavored by American nationalism," led to the expansion of this work beyond a few major urban centers.¹⁰¹

As the country came out of the Civil War, massive social changes were underway that would fundamentally alter the relationship between the state, charitable organizations, and the family. In particular, the large-scale economic growth of the country after the Civil War helped to free funds for the development of private philanthropies.¹⁰² Women's groups founded during the war were looking for outlets for the skills they had honed organizing the relief effort,¹⁰³ and new benevolent groups formed around a

HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS 191, 195 (Elizabeth Jameson & Sheila McManus eds., 2008). There is a different story, grounded in feminist theory that is beyond the scope of this paper, which would tease out which "feminisms" have historically established solidarity with other groups and which "feminisms" have been used as a tool of white supremacy. See generally, e.g., ANGELA Y. DAVIS, WOMEN, RACE & CLASS (1981); cf. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (discussing the way in which certain contemporary feminist legal theorists fall into the trap of a "gender essentialism" that silences the voices of Black women, among others). The role of feminist movements in shaping child welfare is a topic deserving of further attention—according to at least one scholar, from the mid-nineteenth century on, "it was the women's-rights movement that . . . opened the family to scrutiny." GORDON, *supra* note 95, at 80.

⁹⁸ PEGGY PASCOE, RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874-1939 4-5 (1990).

⁹⁹ McGowan, *supra* note 96, at 14 (describing the plan of Loring Brace and the Children's Aid Society in New York to save poor children from the evils of urban life); Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in A CENTURY OF JUVENILE JUSTICE 3, 19 (Margaret K. Rosenheim et al. eds., 2002) (describing the purpose of Brace's work as to "disassemble slum families").

¹⁰⁰ Grossberg, *supra* note 99, at 8.

¹⁰¹ PASCOE, *supra* note 98, at 5 ("This city-by-city extension of benevolent work created a firm foundation for the national expansion that took place after the Civil War.").

¹⁰² McGowan, *supra* note 96, at 12.

¹⁰³ GORDON, *supra* note 95, at 33; DAVIS, *supra* note 97, at 34, 39; see generally David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351, 364 (2005) (discussing the social and political climate following the Civil War and the extent to which advocates for children pressed

variety of issues including providing “rescue homes” for unmarried mothers, prostitutes, and women “fleeing” polygamy.¹⁰⁴ It was at this time that child-saving gathered steam as a major subject of public concern. The “wave of humanitarian reform” following the end of the war changed the nature of civil society as it “expanded the boundaries of individual and collective moral responsibility,”¹⁰⁵ and this enlarged sense of responsibility propelled charitable groups to “save the nation’s young.”¹⁰⁶

What resulted was a massive effort by philanthropic organizations to identify child maltreatment and rescue children—specifically, poor and working-class immigrant children—from their families.¹⁰⁷ Some of the first child welfare agencies were called Societies for the Prevention of Cruelty to Children (SPCC).¹⁰⁸ Although the SPCCs were originally created in response to publicized cases of physical brutality against children,¹⁰⁹ the societies eventually “adopted expansive definitions of cruelty that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households.”¹¹⁰ And while

the notion that the new era warranted reconsideration of the rights of children, arguing that children “like the freed people, possessed civil rights”).

¹⁰⁴ PASCOE, *supra* note 98, at 5-6 (footnotes omitted) (“Protestant women formed so many organizations in these years that one twentieth-century commentator labeled the 1870s ‘the church women’s decade.’”).

¹⁰⁵ Michael Grossberg, “A Protected Childhood”: *The Emergence of Child Protection in America*, in AMERICAN PUBLIC LIFE AND THE HISTORICAL IMAGINATION 213, 214 (Wendy Gamber et al. eds., 2003). The “persistent American embrace of antistatism” was challenged during this period by a reevaluation of the need for “governmental action . . . to police families more vigorously.” *Id.* at 218. *See also* McGowan, *supra* note 96, at 16 (describing the subsequent efforts of middle-class reform groups in Chicago, led by Julia Lathrop and Jane Addams, to advocate for law reform that would enable them to remove children “from corrupting influences”).

¹⁰⁶ Grossberg, *supra* note 105, at 218.

¹⁰⁷ Grossberg, *supra* note 99, at 10.

¹⁰⁸ The historical record of early meetings of these societies indicate that the founders “saw their primary function as prosecuting parents,” and though they were spurred to act by concerns about child abuse, they “quickly turned their interests to all forms of child neglect and exploitation.” McGowan, *supra* note 96, at 17. *See also* GORDON, *supra* note 95, at 2-3, 27-58; Grossberg, *supra* note 105, at 219-24; BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 7-9 (1984) (describing the development of the SPCCs). Initially these organizations were staffed by men, with quasi-police powers, though they worked for private agencies. But by the 1920s the work of these groups was dominated by women. *See* GORDON, *supra* note 95, at 14.

¹⁰⁹ Child saving claimed widespread attention when a young girl in New York City named Mary Ellen was found starving and severely abused; she described severe beatings and being locked in a closet by her stepmother. As Grossberg writes, “the story burst like a thunderstorm on the city and the nation, forcing the knowledge of a particular social evil onto a shocked society.” Grossberg, *supra* note 105, at 219. *But see* *supra* note 94, addressing the limitations of this story.

¹¹⁰ Grossberg, *supra* note 99, at 27.

child abuse did occur, many cases of “cruelty” arose from the conditions of poverty itself: “disease and malnutrition, children left unattended while their parents worked, children not warmly dressed, houses without heat, bedding crawling with vermin, unchanged diapers, injuries left without medical treatment[.]”¹¹¹ Parents came to fear these privately organized but state-sanctioned societies that had the power to take their children. Boston’s SPCC, for example, became known to the poor who experienced it as “the Cruelty,” a nickname that “did not seem regrettable to its agents.”¹¹²

It was at this same time, beginning about 1880, that the United States government began to promote boarding schools for Native American children as a primary means to “assimilate” them. “By 1900, the government had established . . . boarding schools . . . for about 21,500 Native American children. Officials sought to remove *every* [Native] child to a boarding school for a period of at least three years.”¹¹³ As with the child-saving efforts of the SPCCs, white middle-class women were “integrally involved in the removal of American Indian children to boarding schools”¹¹⁴: “[w]hite women comprised the majority of boarding school employees and acted as the primary day-to-day contacts with indigenous children who had

¹¹¹ *Id.* (quoting Linda Gordon, *Family Violence as History and Politics*, RADICAL AMERICA, July-Aug. 1987, at 21, 26). These allegations will likely read as familiar to anyone currently practicing child welfare law. *See also* Tanenhaus, *supra* note 103, at 370-71 (describing the plan of states in the Midwest to remove children from “almshouses” and “poorhouses” where children were surrounded by adults, presumably including their parents, who were “degrading and vicious influences,” in particular the “Michigan Plan” which was the creation of a state central school in Coldwater where children “lived in congregate housing and were groomed for placement in private homes”); McGowan, *supra* note 96, at 13-15, 18-19 (discussing the rise in orphanages as a response to the conditions of almshouses, and noting that prior to the Civil War, black dependent children who were not sold as slaves were cared for in almshouses, but as orphanages came to predominate, black children were explicitly excluded from private orphanages, leading to the creation of a few separate facilities for black children, which were ultimately destroyed by white mobs and riots). Interestingly, in finding that children deserved better quality of life than was available to their parents in an almshouse, it is easy to see how poverty alone has historically formed a basis for removing children from their parents. Eventually, “neglect . . . replaced poverty as the legal basis for depriving parents of . . . their children, but for the most part, poverty was simply equated with neglect.” Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 13 (2001) (quoting Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 435 (1983)).

¹¹² GORDON, *supra* note 95, at 52.

¹¹³ Jacobs, *supra* note 97, at 192-93 (emphasis added) (citation omitted). *See also* MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940* 87-148 (2009).

¹¹⁴ Jacobs, *supra* note 97, at 192.

been removed and institutionalized.”¹¹⁵ While the women’s efforts were experienced as acts of extreme violence by many of those affected by them—many of whom resisted the women’s attempts to remove their children by hiding them in the bushes, pretending that they were ill, and even drugging them so that they were too sick to be taken off to school¹¹⁶—these “reformers,” like their “child-saving” counterparts in the east, “employed a rhetoric of humanitarianism in justifying their policies of Indian child removal.”¹¹⁷

B. *The Rescue Fantasy*

Gordon and Pascoe describe the “rescue fantasy” of the benevolent women’s groups as grounded in their view of themselves as superior to the objects of their charity.¹¹⁸ The sincerity of these early reformers’ desire to help poor families was matched only by their condescension towards them; the concern was sincere, but was also “a concern already shaped by confidence in their own advantages[.]”¹¹⁹ “If the early child protectors were insensitive to the power relations in their work, if they saw their clients as helpless and grateful, that very ignorance left them a clear emotional path on which to follow their kind and helping impulses.”¹²⁰ The fact that these women genuinely thought that they were helping the recipients of their interventions kept them from questioning the propriety of even the most extreme of activities.

Writing about the efforts of white women to remove Native American children to boarding schools, historian Margaret Jacobs notes that “many white women reformers claimed for themselves the role of a ‘Great White Mother’ who would save her benighted

¹¹⁵ *Id.* at 197 (footnote omitted).

¹¹⁶ *Id.* at 204.

¹¹⁷ *Id.* at 199.

¹¹⁸ “Because they believed that women were the proper moral guardians of society, home mission women assumed it was their duty to extend middle-class moral standards everywhere.” PASCOE, *supra* note 98, at 9. “Like the female moral reform societies that had been their clearest predecessors, they preached Victorian female values of piety and purity in an attempt to set moral standards for their communities, their regions, and their nation.” *Id.* at 6. Although women’s groups originally articulated their positions as against male-dominated social orders, that changed over time. As Pascoe explains, “as the institutions developed, middle-class women expressed their quest for authority less often in relation to men and more in relations with rescue of home residents.” *Id.* at 31. See also Jacobs, *supra* note 97, at 208 (“A steadfast belief in the superiority of white womanhood and a desire to reform and control Indian women permeated white women’s pronouncements about rescue work.”).

¹¹⁹ PASCOE, *supra* note 98, at 51.

¹²⁰ GORDON, *supra* note 95, at 48.

Indian ‘daughters.’”¹²¹ For example, “Victorian observers making comments about Indian women were inclined to shake their heads in disapproval and count their blessings as members of a superior society.”¹²² These women “were aware that Navaho women were property owners and family heads, but they were unable to see these positions as indicators of authority.”¹²³ Similarly, “in identifying the problems in need of correction, early child protectors saw the mistreatment of children through their own cultural lenses” and “their sense of mission was more powerful because it came from a feeling of unquestioned superiority to the masses among whom neglect and abuse were so widespread.”¹²⁴

This feeling of superiority was used to justify state policies of indigenous child removal.¹²⁵ Equating “indigeneity with backwardness, poverty, immorality, and parental neglect[,]”¹²⁶ white female reformers and government officials saw removal as the only way to “civilize” Native communities and protect their children.¹²⁷ For example, reformers expressly condemned the use of cradle boards by Native American women, “queer little canopied baskets” used to carry swaddled babies.¹²⁸ One missionary wrote derisively, “I found a woman with a sick baby not yet three weeks old; of course it was strapped upon a board; and it was moaning with fever.”¹²⁹ Reformers also implied that Native homes simply could not be suitable for the upbringing of children. “What a contrast!” a reformer exclaimed, describing her visit to a reservation:

The smoking fire in the centre of the tepee, and on it the pot of soup stirred by the not over-clean squaw . . . a few blankets the only furnishing . . . and then to think of the neat, comfortable home at the mission, with the uplifting of its daily prayer . . .

¹²¹ Jacobs, *supra* note 97, at 192 (footnote omitted). “Some white women played an active role in Indian child removal—not just as caregivers of removed Indian children but as their actual *recruiters*, the euphemistic term reformers used.” *Id.* at 197.

¹²² PASCOE, *supra* note 98, at 56.

¹²³ *Id.* at 57 (“Wrapped up in their own notions, home mission women did not recognize sources of women’s power apart from the Victorian ideals of female moral purity and the Christian home.”).

¹²⁴ GORDON, *supra* note 95, at 46.

¹²⁵ As Jacobs explains, both reformers and officials “routinely characterized the removal of American Indian children as an act of benevolence aimed at ‘rescuing the children and youth from barbarism or savagery.’ This rhetoric rested on a racialized discourse that deemed indigenous peoples to be lower on the scale of humanity than white Anglo-Saxon, middle-class Protestants.” Jacobs, *supra* note 97, at 199 (footnote omitted).

¹²⁶ *Id.* at 200.

¹²⁷ *Id.*

¹²⁸ *Id.* at 201.

¹²⁹ *Id.* (footnote omitted).

We realized what a blessed work these faithful missionaries . . . were doing in giving to these poor, neglected children . . . some of the light and blessing that had been given to them.¹³⁰

Here, it is easy to see the underside of charity work: it is not only propelled by feelings of superiority among the charitable class, but it represents the exercise of real power. Gordon notes that, “[t]he rescue fantasy reflected not only [the benevolent women’s] class condescension but also their search for an area in which to feel powerful[.]”¹³¹ As “well-intentioned” as they may have been, women benefitted from their charitable work, which allowed them to occupy public positions of leadership and power,¹³² the exercise of which led to the destruction of other women’s families. In the case of Indian Boarding Schools, Jacobs observes that the government’s need for personnel to carry out assimilation policy “dovetailed with white women’s own ambitions.”¹³³ That was how it came to be that white women became the majority of boarding school employees.¹³⁴

The “rescue fantasy,” therefore, is the expression of two separate ideas: that non-white children and children from poor and working class families were in need of rescue and that economically privileged white women were naturally well suited to the task of saving those children. The effect was self-reinforcing: white women used their moral purity as a basis for large-scale intervention in other families, and, in both demonizing and “helping” those

¹³⁰ *Id.* at 201-02.

¹³¹ GORDON, *supra* note 95, at 32-33 (“Child saving drew heavily on women’s reform and philanthropic energy, and was influenced by feminist interpretations of social ills. . . . These early child-saving efforts were characterized by what psychiatrist John Bowlby has called the ‘rescue fantasy.’ The reformers saw themselves as gracious, privileged big sisters, not only of children but of adult women of the lower classes. . . . The rescue fantasy reflected not only their class condescension but also their search for an arena in which to feel powerful, and, as has often been the case with women, their religious conviction justified their stepping out of their domestic sphere.”)

¹³² Women took a prominent role in these reforms. Grossberg, *supra* note 99, at 24 (“The gendered reality of American civil society thus provided a way for women to increase their sphere of influence.”). And, the philanthropic organizations that these women created became “ever more powerful actors in the discussion and implementation of vital public policies.” *Id.*; PASCOE, *supra* note 98, at 4 (“Benevolent activity provided women with an opportunity for moral stewardship roughly parallel to the commercial leadership exercised by local merchants.”). Although charity work became increasingly professionalized over the years, opportunities for volunteers continued. The “professionalization” of social work had class connotations, bringing in more middle-class rather than upper-middle-class women. See GORDON, *supra* note 95, at 65-67.

¹³³ Jacobs, *supra* note 97, at 197.

¹³⁴ *Id.*

families, further ensured their own superior status.¹³⁵ Of course, “they carried off this balancing act partly by directing their sharpest critiques at families outside [their own] Victorian middle-class culture”¹³⁶: working class and poor families, immigrant families, and Native American families.

C. *Racial Hierarchies*

As is evident, the parenting standards by which families were judged were not value-free, but rather part of a race-and-class contingent set of knowledge. “What child-neglect cases have in common is that they must by definition project an inverse standard, a norm of proper child-raising.”¹³⁷ Historically, the dominant narrative of good mothering was (and continues to be) predicated on the parenting ideals of white, native-born, middle-class women—“the most powerful, visible, and self-consciously articulated” set of parenting norms.¹³⁸ These principles are so firmly ingrained that it is hard to notice that they are not obviously correct.¹³⁹ As Elisabeth Badinter writes in a different context, “[w]hether or not they are aware of it, all women are influenced by [the prevailing] ideal [of good motherhood]. They might accept or avoid it, negotiate with or reject it, but ultimately their choices are made in relation to it.”¹⁴⁰

Thus, the SPCCs’ “images of good and bad child-raising were deeply influenced by the sensibility of [the] upper-class women” who headed those societies: concerned with “cleanliness, fine dress, good food, order, and quiet,” they sought to save children who were “improperly dressed or excessively dirty,” children who worked alongside their parents by begging or peddling in the streets, children who were not in school, and children who became

¹³⁵ PASCOE, *supra* note 98, at 51 (“Thus, while Protestant women entered into ‘woman’s work for woman’ with sincere concern for the women they hoped to welcome to their rescue homes, it was a concern already shaped by confidence in their own advantages, and that concern was combined with a determination to retain a line between moral and immoral women, to ensure their own status.”).

¹³⁶ *Id.* at 34.

¹³⁷ GORDON, *supra* note 95, at 7.

¹³⁸ HAYS, *supra* note 96, at 21.

¹³⁹ The impact of notions of “ideal” parenting on child welfare go beyond the CASA program. “[T]he ideology of the ideal family is a pillar of American legal consciousness that has sidelined nonconforming policy proposals and has had an untold and profound impact on the lives of foster children.” Adler, *supra* note 111, at 4 (footnotes omitted).

¹⁴⁰ ELISABETH BADINTER, *THE CONFLICT: HOW MODERN MOTHERHOOD UNDERMINES THE STATUS OF WOMEN* 115 (2011).

injured while playing outside.¹⁴¹ Similarly, during the Progressive Era, the identification of children who lacked a middle-class childhood was considered a problem—“[i]t encouraged the conclusion that a proper childhood must be imposed if it was not voluntarily embraced.”¹⁴² Child protection was invoked to ban children from entering dance halls or skating rinks or joining the circus.¹⁴³ The child savers simply could not see or value family difference or account for the variations in families’ circumstances, blinded as they were by the dominant ideas of good motherhood. When mothering “was not done well, according to the standards of the child protectors, that inadequacy was not a sign of obstacles, resistance, or inadequate resources, but of character flaw.”¹⁴⁴

Yet the racial aspect of the child-saving movement was—and is—more than just a subtext or a “mere” side effect of the correlation between race and class in American society. White womanhood has been long associated with purity, refinement, and correctness—characterizations that hold racial meaning.¹⁴⁵ White women’s self-conception “came to be intimately tied to idealized images of ‘true womanhood’ through which the virtues of piety, purity, submissiveness, and domesticity were extolled”—images that evolved in contrast to depictions of Black and Native women as “degraded, immoral, and sexually promiscuous others.”¹⁴⁶ And these contrasting visions of womanhood did more than just enhance white women’s power as morally virtuous agents of proper domesticity. Rather, the “concept of white womanhood was essential to . . . galvanize support for white supremacy[,]”¹⁴⁷ a symbol used to justify countless racist acts, including the widespread lynching of Black men.¹⁴⁸ Similarly, “as white women articulated a sense

¹⁴¹ GORDON, *supra* note 95, at 36-38; Grossberg, *supra* note 99, at 27 (“The societies adopted expansive definitions of cruelty that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households.”).

¹⁴² Grossberg, *supra* note 99, at 23.

¹⁴³ Grossberg, *supra* note 105, at 222.

¹⁴⁴ GORDON, *supra* note 95, at 99.

¹⁴⁵ “White evangelical reformers invoked racial representations of themselves as sexually pure and refined and their predominately white charges as redeemable, even as their declarations of a cross-class sisterhood obscured the racial homogeneity of that proposed sorority.” KUNZEL, *supra* note 95, at 13.

¹⁴⁶ Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 339 (1996). See generally Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood Through Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1 (2008); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

¹⁴⁷ Walker, *supra* note 146, at 33.

¹⁴⁸ Victorians were “eager to defend the purity of white womanhood, the cultural

of difference between themselves and native women as mothers, they helped to construct racial ideologies that deemed Indian peoples to be in need of 'civilization' by their white benefactors."¹⁴⁹

Because the work of the charitable class was explicitly founded on notions of white women's moral, racial, and sexual purity, it is not surprising that the work itself was necessarily interwoven with efforts to maintain and reproduce race and class hierarchies; while the work was justified as an attempt to help individual families correct problems within their households, only certain types of families had those "problems." Writing about Societies for the Prevention of Cruelty to Children in Massachusetts, Gordon observes that the clients "of children's protective agencies were mainly poor immigrants of non-elite ethnic and racial backgrounds."¹⁵⁰ Notes from the Societies describe Italian women as, "contriving still, in the crowded rooms, to roll their dirty macaroni, and all talking excitedly; a bedlam of sounds, and a combination of odors from garlic, monkeys, and most dirty human persons."¹⁵¹ MSPCC records "called clients shiftless, coarse, low type, uncouth, immoral, feeble-minded, lazy, and worthless (or occasionally, positively, good or sober) [...]"¹⁵² Black women were seen as "'primitive,' 'limited,' 'not nearly as talkative as many of her race, but apparently truthful,' 'fairly good for a colored woman.'"¹⁵³

Just as often, of course, white supremacy justified ignoring the needs of Black families altogether.¹⁵⁴ Black children were systematically excluded from child welfare services in the late nineteenth and early twentieth centuries.¹⁵⁵ During this time, "[e]vangelical women and social workers argued that the supposed lack of stigma surrounding illegitimacy in [B]lack communities justified the segregation of their homes [for unwed mothers]."¹⁵⁶ This is unsurpris-

symbol used to justify, among other things, the widespread lynching of blacks in the American South." PASCOE, *supra* note 98, at 134. See also DAVIS, *supra* note 97, at 172-201 (discussing the myth of the Black rapist); KUNZEL, *supra* note 95, at 12-13 (discussing the intersection of gender ideology and anti-Black racism in the concept of "true womanhood").

¹⁴⁹ Jacobs, *supra* note 97, at 192.

¹⁵⁰ GORDON, *supra* note 95, at 8. See also Jacobs, *supra* note 97, at 199.

¹⁵¹ GORDON, *supra* note 95, at 40.

¹⁵² *Id.* at 15.

¹⁵³ *Id.* at 14.

¹⁵⁴ See ROBERTS, *supra* note 10, at 7; BILLINGSLEY & GIOVANNONI, *supra* note 14, at 45-86.

¹⁵⁵ McGowan, *supra* note 96, at 25.

¹⁵⁶ KUNZEL, *supra* note 95, at 71. So early evangelical maternity homes, "strived to be racially homogeneous. The NFCM [National Florence Crittendon Mission] noted that 'the handling of girls of mixed races in the same institution is difficult' and de-

ing seeing as, in the Post-Reconstruction Era, the child welfare system was not needed to enforce white supremacy on Black communities—Jim Crow, “the legal system of segregation and the reign of lynch law were already well established.”¹⁵⁷ It was only in the mid-twentieth century, with the collapse of de jure segregation and the opening of the welfare rolls to Black families, that the need to “protect” Black children was discovered.¹⁵⁸

D. *Intertwining of the Charitable Class and the Court*

Ultimately, the power of the charitable class was dependent on the recognition they were afforded by government, and in particular, by legal systems. The power of a Society for the Prevention of Cruelty to Children, “of course, depended upon the Society’s influence in court.”¹⁵⁹ But, fortunately for those charitable workers, “judges usually accepted the agency’s advice.”¹⁶⁰ As Gordon explains, “[w]hile the MSPCC did lose criminal assault cases at times, in the legally noncriminal cases of neglect, it was virtually a judge’s private advisor.”¹⁶¹ Similarly, “[m]aternity home workers valued an alliance with the court for several reasons, not least of which was the legitimacy that such an alliance conferred upon their homes.”¹⁶² In New York, the Florence Crittenton Mission employed an “all-night missionary, who sat in on the night court sessions regularly to ‘see what service she can render to any of the cases.’ ‘Frequently,’ the mission reported, ‘she is called upon by the Judge to advise as to the proper disposition to make of the case,’” and judges would sometimes sentence women to the Mission itself.¹⁶³ The trend was for benevolent women’s groups to become ever more closely intertwined with the police and the government in general—but their “first important liaison was with the court

clared it ‘wise to restrict admission to girls of one color.’ This color, with very few exceptions, was white.” *Id.* at 29-30.

¹⁵⁷ DAVIS, *supra* note 97, at 112, 116.

¹⁵⁸ See, e.g., Dixon, *supra* note 10, at 133-34. This article does not address the transition to contemporary child welfare policy, but if it did the same patterns would become clear: by 1999, less than forty years after passage of the Civil Rights Act of 1964, six out of ten children in foster care were Black, a situation that led white child advocates like law professor Elizabeth Bartholet to call for an increase in the transracial adoption of Black children by “nurturing” white middle-class families. See, e.g., BARTHOLET, *supra* note 94, at 176-83.

¹⁵⁹ GORDON, *supra* note 95, at 51.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² KUNZEL, *supra* note 95, at 15.

¹⁶³ *Id.*

system.”¹⁶⁴

III. THE QUESTIONABLE ADVOCACY OF THE CASA

As described above, the child welfare system was founded on notions of superiority among a charitable class of white women, who used their presumed authority over the domestic sphere as a basis to intervene and “protect” poor children of color. That presumed authority—the unearned sense of respectability and correctness that accompanies white women’s charitable work—continues into the present. It should go without saying that “America’s racial hierarchy continues to accord automatic benefits and privileges to people who are born white and automatic disadvantages to others.”¹⁶⁵ This section is concerned with the manifestation of those benefits and privileges in modern child welfare proceedings, in particular, in the work of CASAs: a group of predominately middle-class, white women engaged in charitable works on behalf of poor children and children of color.

This section begins with an exploration of how the advocacy of a CASA conflicts with bedrock principles of fairness in our legal system, including notions of justiciability and standing, the role of expert witnesses and opinion testimony, and “fair cross-section” requirements for community participation. After establishing that the CASA occupies a completely unique role in the American legal tradition, one that flouts long-standing fairness rules, the paper then looks at the kinds of things CASAs have said in actual child welfare cases as examples of how that role shapes, and often misshapes, the outcome of individual cases. Finally, this section concludes by offering an explanation for how CASA programs have

¹⁶⁴ PASCOE, *supra* note 98, at 186-87 (describing the transformation of Mission Home work into government work and noting the reliance of Mission Homes on the power of the Society for the Prevention of Cruelty to Children to remove Chinese children from their parents and “assign” them to the Mission Home).

¹⁶⁵ ROBERTS, *supra* note 10, at 230-31. In fact, as discussed above, child welfare is just one of many areas where the presumption of respectability that accompanies white women did not end in the Progressive Era, and indeed its roots go much further back. See generally BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981). The idealization of white women has roots in slavery, as does the need to rationalize the differential treatment afforded to enslaved women. See generally Thavolia Glymph, *OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD* (2008). Cf. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 869 (2013) (considering the differences in how white women and Black women are perceived in a courtroom setting and discussing how rape shield laws, which are theoretically race neutral, in fact allow jurors to fill in the blanks about what they don’t know about the victim’s sexual history with stereotypes that are likely to consider black women to be sexually promiscuous and white women to be morally pure).

been allowed to flourish in a legal system that is ostensibly dedicated to fairness and individual rights.

A. *Conflict Between the Role of a CASA and Fairness Principles*

As described above, the CASA's role in court is a strange one. First, as guardians ad litem, they decide what result they think is in the best interest of the child, and direct the child's representation accordingly: Should the attorney join in the parent's request for return of the child, or oppose it? Should the attorney file a motion to dismiss the petition, or put on evidence to support a finding of neglect? Second, as per Soukup's original concern,¹⁶⁶ they report to the court about the child's circumstances and their own conclusions regarding the best interests of the child—in many cases, the very issue the court is trying to decide. In this dual role, CASAs have no analogue within our system. Moreover, CASAs are—by design—lay volunteers with no real accountability. Because of these unique factors, which are unlike any other legal party in our system, there is good reason to question the impact of volunteer CASAs on the overall fairness of the child protective proceedings in which they appear.

First, and perhaps most fundamentally, there is the issue of standing. By design, the CASA does not represent the child as an attorney would. She does not have a client—she *is* the client, a party to the case with all of the rights that entails, from notice and the right to be heard to the right to be represented by counsel.¹⁶⁷ CASAs have “standing” to participate as parties in child welfare proceedings because state statutes give them standing.¹⁶⁸ But the CASA's advocacy is effectively unmoored from any connection to the actual child for whom she is supposed to speak. Ultimately, the CASA speaks only for herself, although she will not live with any of

¹⁶⁶ See *supra* notes 59-65 and accompanying text.

¹⁶⁷ See, e.g., WASH. REV. CODE § 13.34.100(5) (2014) (“A guardian ad litem through an attorney, or as otherwise authorized by the court, shall have the right to present evidence, examine and cross-examine witnesses, and to be present at all hearings. A guardian ad litem shall receive copies of all pleadings and other documents filed or submitted to the court, and notice of all hearings according to court rules. The guardian ad litem shall receive all notice contemplated for a parent or other party in all proceedings under this chapter.”) See also *supra* notes 66-67 and accompanying text (discussing the various roles of CASAs in different jurisdictions).

¹⁶⁸ See, e.g., WASH. REV. CODE § 13.34.100(1), (5) (2014) (requiring the appointment of a GAL for a child who is subject to a dependency action, unless a court for good cause finds the appointment unnecessary, and granting that GAL all notice contemplated for any other party, as well as the right to present evidence, examine witnesses, and the right to be present at all hearings.)

the consequences of the court's decision. She need not advocate for what the child wants, or what the child's parents or therapist or teachers or community think is best for the child.¹⁶⁹ She advocates for what *she* thinks is best for the child, based on her investigation of the child's circumstances and her own "common sense."¹⁷⁰ That is precisely the job for which the CASA is recruited, not only something she is permitted to do but what she is expected to do.¹⁷¹

Given this, it is hard to see how reliance on CASAs in child protective proceedings does not violate basic principles of justiciability, principles that are designed to promote fairness in our legal system. A fundamental aspect of justiciability is that, for a party to have standing, the party must have a stake in the outcome of the case.¹⁷² Standing doctrines are designed to ensure fairness of process because our legal system relies on the expectation that people will effectively represent their own interests. After all, parties to litigation typically stand to gain or lose something, and will invest effort to serve their own ends. The Supreme Court has explained that "concrete adverseness" between the parties is essential because it "sharpens the presentation of issues upon which the court so largely depends for illumination[.]"¹⁷³

Yet the CASA, by definition, has absolutely no stake in the proceeding. The CASA, unlike the agency or its employees, has no accountability for the result of the case—she won't lose her job or be disciplined if she fails to build a proper case or to testify effectively.¹⁷⁴ And unlike the parent or the child herself, the CASA does

¹⁶⁹ Piraino, *supra* note 64, at 66; *see also Represented But Not Heard*, *supra* note 57, at 100-08 (describing the common formulation of the child advocate as "champion" for the child).

¹⁷⁰ Piraino, *supra* note 64, at 67 ("[V]olunteers . . . are recruited not for their legal knowledge but for their 'unique qualities, community perspective, [and] common sense approach . . .'" (quoting NAT'L CASA ASS'N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989))).

¹⁷¹ *Id.*

¹⁷² *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 498-99 (1975) ("As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."); Branson v. Port of Seattle, 101 P.3d 67, 73-75 (Wash. 2004) (explaining that, in Washington state courts, a party has standing to pursue an action when she is within the zone of interests protected by a statute and has suffered an injury in fact).

¹⁷³ *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker v. Carr*, 339 U.S. 186, 204 (1962)).

¹⁷⁴ A recent scandal involving Washington State's Snohomish County Voluntary Guardian Ad Litem ("VGAL") program highlights the problems inherent in a system that grants so much power to individuals who have so little accountability. The scandal came to light because a VGAL lied to get access to a confidential defense attorney

not have to live with the result of the proceeding: she does not have to move homes or change schools or lose her connection to her siblings or parents, or her connection to her own child. To take the Court's framing above, it is hard to see how a CASA's involvement could in fact "sharpen" the presentation of the actual issues at stake in the child protective proceeding to which she is assigned any more than any other randomly-selected individuals could. Why, then, is the CASA not only allowed to participate—given notice and a right to be heard throughout the case—but also listened to so attentively? What is the CASA expected to add?

One way to answer this question is to turn, again, to Soukup's concern about information. As discussed above, the CASA is not only expected to direct the child's representation in their parents' place, but also to investigate the child's circumstances and report to the court with her own conclusions regarding the child's best interests. In this role, the CASA is less of a guardian and more of a witness, the designated "expert" on the child. If the CASA does her job well—if she spends more than 3.22 hours on her case¹⁷⁵—she will be the one who speaks to all of the important people in the child's life, from the child's parents, siblings, and foster parents to her teachers, religious leaders, therapists, extended family, and the

listserv on which parents' attorneys discuss parent defense strategies. The scandal quickly escalated when the program sought to cover up that misconduct and submitted false declarations. Ultimately, Snohomish County Judge Anita Farris made clear, shocking findings of misconduct. Judge Farris found: "VGAL Cynthia Bemis's first sworn declaration to this Court about how she got on to the LISTSERV is perjury. I've only used the 'P word' once in 23 years on this bench and it applies in this situation. That declaration is filled with lies. The GAL who submitted it, Walker and the VGAL Program that submitted it, had reason to know the witness was lying and they had the ability to verify that many of those lies were lies, but instead chose to just submit a lying witness's declaration." Verbatim Report of Proceedings at 8-9, *In re Termination of Alijanea Hayes*, No. 14-7-00499-7 (Wash. Snohomish Cty. Super. Ct., Feb. 25, 2016). Judge Farris also found that Snohomish County was not complying with their own complaint procedures, which should allow litigants to raise questions about a VGAL's conduct, and that the complaint procedure was structured and applied in a way that would fail to protect those who filed a grievance from retaliation by the VGAL. *Id.* at 19-21. Judge Farris's clearest findings have to do with the program's almost pathological interest in maintaining the perception that they were good actors. Judge Farris found that "[t]he VGAL Program was so vested in saying that a VGAL could never do any wrong, it chose to just, like some ostrich, stick its head in the sand and submit perjury rather than take the slightest effort to check obviously questionable facts." *Id.* at 84-85. "This program, in the way that it responded to this motion, has made it clear that it does not believe that it is subject to any rules of the State of—in the law of the State of Washington." *Id.* at 130. Parents' attorneys in that case went to extraordinary lengths to expose the misconduct of the VGAL, and once exposed the misconduct was obvious. But the difficulty those attorneys had piercing the layers of secrecy and discretion built into the system ensures rulings like this are rare.

¹⁷⁵ See EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 15-16.

child herself.¹⁷⁶ She can then share what she learned about the child with the court, along with her opinion about the decision or decisions that would be in the child's best interests.

But the CASA program does not claim any particular expertise. CASAs are not experts. Rather, they primarily offer what can only be considered lay opinion testimony. The opinion the CASA provides about the child's best interests is not based on reliable principles and methods, something ordinarily required of an expert opinion. In fact, there is probably no precise measure available. What is in the best interests of any child is not an "objectively determinable absolute," but rather an "extremely malleable and subjective standard"¹⁷⁷ that contains countless predicate questions. For example, making a best interests determination requires the CASA to assign value to the parent-child relationship. How important is a parent-child relationship, how strong is that relationship here, and how strong is this child's relationship with her extended family, community, and Tribe? What do those people have to offer this child? And how do we value her current caregivers? When assigning these values, what measure is the CASA expected to use? It doesn't end there. Best interests asks: Who is the best therapist for this child, the one nearby, the one with better credentials, or the one who shares the child's culture? What is the best school for this child, the one where she went and where her friends go, the one closer to her mother's new home, or the one closer to the foster home? The questions go on and on.¹⁷⁸ But the CASA is free to offer her opinion, in the way an expert ordinarily would, even when those opinions are based solely on her own impressions.

The CASA is not even limited to opining on matters related to the child. As a party to the case, the CASA can ask the family court

¹⁷⁶ Although, as discussed above, there is no obligation for a CASA to report to the Court how many hours were spent on a particular report or what factors motivated the CASA's conclusion. See *supra* notes 78-81 and accompanying text.

¹⁷⁷ Sinden, *supra* note 37, at 354; see also, e.g., Appell, *supra* note 12, at 608 (discussing the "subjectivity and indeterminacy" of the best interests standard); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 74-82 (1995) (describing the impossibility of ever determining a child's "best interests" in any sort of definitive way); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 503 (1984) ("[T]he [best interests] test is so general and vague that it provides no standard at all, and thus no guidance for decision-making.").

¹⁷⁸ Leah Hill has written on a similar issue of indeterminacy and bias in the use of child welfare investigators to produce court-ordered reports for private custody cases in New York City. See generally Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court - the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007).

to order the parents to engage in particular services, including drug treatment or mental health counseling, and can demand reports or information about a parent's participation in those services, including matters as personal as a domestic violence victim's trauma counseling.¹⁷⁹ The CASA can then testify as to her opinions about the parent's progress in services, while having no obligation to rely on professional judgments about that progress. For example, a CASA may determine that although a parent is engaged in drug treatment and giving consistent random negative urine screens, the fact that the parent missed two appointments and did not offer a reason suggests that the parent has relapsed. The court then can accept and rely upon the CASA's opinion even though it is not directly related to the best interests of the child nor based on any actual expertise in chemical dependency.

Frequently, the CASA's testimony not only touches upon but goes directly to the ultimate issue being litigated. "Best interests of the child" is the standard at many points in a child protective proceeding, from certain visitation disputes¹⁸⁰ to disposition after the initial fact-finding¹⁸¹ and after the fact-finding regarding termination.¹⁸² If the best interest of the child is what the parties are litigating and what the court must decide, why is the CASA asked to offer her opinion on the matter? By allowing the CASA to testify as to the ultimate issue in the case—and by so often taking that testimony to heart, as described by the former family court judges quoted at the beginning of this article—the judge is essentially abdicating her role to a volunteer who has been neither elected nor appointed to fill it.

¹⁷⁹ In the experience of the practitioners, while it is unclear how this is allowed under the relevant statutes, this is a commonly accepted practice that some practitioners in King County have begun to push back against.

¹⁸⁰ See, e.g., WASH. REV. CODE § 13.34.130(6) (2013) ("If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child's best interest to be placed with, have contact with, or have visits with siblings."); *Id.* § 13.34.136(2)(b)(i)(A) ("If the parent is incarcerated, the plan must address how the parent will participate in the case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available at the facility where the parent is confined. The plan must provide for visitation opportunities, unless visitation is not in the best interests of the child.").

¹⁸¹ See, e.g., N.Y. FAM. CT. ACT § 1052 (2016).

¹⁸² See, e.g., N.Y. SOC. SERV. LAW § 384-b (2016); WASH. REV. CODE § 13.34.132 (2013). Although the Washington Statute does not define the "best interests" inquiry as a dispositional issue, case law has made clear that it is a separate inquiry from whether the statutory termination elements have been met. *In re Welfare of A.B.*, 232 P.3d 1104, 1113 (Wash. 2010) (describing the "best interests" inquiry as the second step in a two-step process).

What happens where “best interests” is not the standard—for example, at fact-finding, where the court must determine whether the state has put forth sufficient evidence to establish by a preponderance that the parent abused or neglected the child? At that point in the proceeding, it does not seem to violate any fundamental principles of the adversary system to permit a CASA to testify that a finding of neglect should be entered because such a finding is “in the best interests” of the child—that is not the ultimate issue, at least not yet. But is it at all relevant? And even if it were relevant, isn’t it extremely prejudicial? How is the court supposed to weigh a close case fairly where, despite the state potentially having failed to establish neglect under the law, the individual assigned to speak “for” the child has testified that a finding of neglect would benefit that child? Even if, in her role as a guardian ad litem, a CASA is supposed to determine what legal position is in the child’s best interests at every step in the case in order to direct the child’s representation—itself a questionable prospect, as discussed above—allowing the CASA to testify about that determination distorts the legal process, regardless of whether that is the question at issue in the proceeding or not.

A different possible justification for the CASA’s anomalous role in our legal system could be the one implicitly given by the national CASA organization itself, when describing the qualities for which CASA volunteers are recruited: the CASA is there to bring a “community perspective” into the courtroom.¹⁸³ This *is* something we value—this is the aspect of fairness represented by the Sixth and Seventh Amendments—and it would seem particularly important in child welfare proceedings, given the cultural aspect of nearly all parenting standards.

Yet when we want to bring a “community perspective” into court proceedings, we do it by means of a jury—something that is rare in child welfare proceedings¹⁸⁴—and we do it according to

¹⁸³ See Piraino, *supra* note 64, at 67.

¹⁸⁴ “Jury trials are not constitutionally required in termination of parental rights cases. However, five states guarantee the right to a jury trial in involuntary termination proceedings. In addition, Arizona allowed jury trials for a three-year experimentation period, although it does not currently allow jury trials in termination of parental rights proceedings. Every other state specifically prohibits jury trials in termination of parental rights cases.” Cary Bloodworth, Comment, *Judge or Jury? How Best to Preserve Due Process in Wisconsin Termination of Parental Rights Cases*, 2013 WIS. L. REV. 1039, 1041 (2013) (footnotes omitted). See generally Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 36 (2006) (examining the history of the jury trial in relation to family court proceedings and recommending that jury trials be an option in “the

carefully calibrated procedures, in order to enhance the likelihood that the jury will fairly represent the community: parties cannot use race as a basis for striking jurors;¹⁸⁵ the jury pool must represent a “fair cross-section” of the community;¹⁸⁶ and, although a jury of six members is sufficient to satisfy constitutional requirements, a jury of five is unconstitutional, because “any further reduction . . . promotes inaccurate and possibly biased decisionmaking . . . and . . . prevents juries from truly representing their communities[.]”¹⁸⁷

Even if CASAs did provide the “community perspective” for which the national CASA organization says they are recruited,¹⁸⁸ that perspective is offered in a way that violates the first principles of community participation in our legal system. If the “community perspective” is offered by a single individual—the CASA—it can never represent the community. The CASA, no matter how connected to “the community” she is, is not a “fair cross-section” of that community. She is one person, representing her race and gender alone.

In fact, the situation is far worse than that. As discussed above, most CASAs are from an entirely *different* community than the children for whom they are supposed to speak and the parents whose voices they replace. Eighty-to-ninety percent of CASAs are white,¹⁸⁹ and the majority are middle-to-upper class and educated,¹⁹⁰ while the children for whom they advocate are overwhelmingly low-income and disproportionately Black or Native American.¹⁹¹ CASAs

adjudicative portion of family offense proceedings and child protective proceedings addressing allegations of family violence”).

¹⁸⁵ *Batson v. Kentucky*, 476 U.S. 79, 99 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400 (1991) (footnotes omitted) (“By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”).

¹⁸⁶ *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (holding that the Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community); *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (“[T]he goal of the Sixth Amendment is representation of a fair cross section of the community on the petit jury”); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

¹⁸⁷ *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

¹⁸⁸ Piraino, *supra* note 64, at 67 (“[V]olunteers . . . are recruited not for their legal knowledge but for their ‘unique qualities, community perspective, [and] common sense approach’” (quoting NAT’L CASA ASS’N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989))).

¹⁸⁹ See *supra* note 82 and accompanying text.

¹⁹⁰ See *supra* note 83 and accompanying text.

¹⁹¹ See *supra* note 10 and accompanying text.

are pretty much the polar opposite of “community” representation, at least if one assumes that the community to be represented is the community whose lives and rights are at stake in the legal proceeding.

Parents in child welfare cases sense this lack of legitimacy when they ask their attorneys “why does that woman get a say in the outcome of my case?” The answer they are likely to get will be unsatisfying: because that’s just the way it is. Thereafter, parents are free to fill in the blank with their own experiences of racism and discrimination to explain why a white woman of means is appointed by the court to speak for their child. Considering the history of child welfare, and the long-standing role white women have played in the destruction of poor families of color, parents are right to be skeptical about the benefits of this charity.

B. The Power of the CASA

The disconnect between the backgrounds of most CASAs and the children for whom they speak creates questionable advocacy on the part of many CASAs. CASAs in King County, Washington, have expressed concerns about reunification based on the location of a parent’s new home, because it is on a “dark street” or because it is in Federal Way, a low-income neighborhood outside of Seattle.¹⁹² According to one practitioner familiar with the case one CASA testified at a trial to terminate the parental rights of a father who had purchased an RV as a home for himself, his partner, and eventually his children to live in, that she “hardly considered an RV a stable environment.” The CASA found the father’s choice to purchase the RV, when he could have used the money for something else, to be a parental deficiency. Yet before the father bought the RV, he was camping on the street or living in shelters.

In another case, without ever having met one of the four children for whom she was speaking, another CASA advocated that dependency should be established for four Native American siblings because, in the CASA’s opinion, the mother could “benefit” from “services,” though the CASA’s report did not indicate what services she thought were needed. Another testified at a termination trial that, among other things, the parents put too much Desitin on their child’s diaper rash. A third expressed “concern” about whether the Black mother in her case was sufficiently bonded to daughter when the mother allowed the girl to unbuckle herself

¹⁹² All documents regarding cases discussed in this section are on file with the authors.

from her car seat and get out of the car on her own rather than doing these things for her.

The situation is even more problematic when the child in question has been removed from her home and placed in a foster home that is more racially and economically familiar to the CASA, as the CASA is then likely to identify with the foster parents and base her assessment of the child's best interests at least in part on the instinct that the foster home is simply "better" than the child's own home. For example, one CASA expressed concern about returning two girls to their single Black father—who had completed every service asked of him and obtained a sought-after spot in a transitional housing program for himself and his daughters—because the move would be disruptive to the "quality of life" the girls were experiencing in their two-parent white foster home. And the same CASA who testified about the RV also repeatedly compared that father's home in the RV to the foster home, indicating that the foster home had "lots of toys" and that they "read to [the child]."¹⁹³

Although racial bias is rarely the topic of explicit discussion in dependency court, it often lies just below the surface and at times becomes painfully obvious. One CASA volunteer, during the course of a dependency case, made an unannounced visit to the mother's home and found a man in the home; it later turned out that the man was not allowed to be there, although the volunteer didn't know who the man was at the time of her visit. The child was removed from the mother and the case eventually went to a termination trial. At trial, the volunteer testified that the unapproved individual was a Black man approximately in his 20s or early 30s, and that when she encountered him he was wearing only a pair of shorts. The volunteer then testified that upon seeing him, she feared for her life and that she believed he could have been carrying a weapon.

In all of the examples just discussed, the dependency court gave great weight to the CASA's recommendation. For example, in the case in which the mother failed to unbuckle her daughter's seatbelt for her, the judicial officer was sufficiently concerned by the CASA report that she granted the CASA's request for a new, more searching evaluation of the family. The evaluation ultimately recommended that the case be dismissed. And even a judge who ultimately ruled against the CASA's position—dismissing the de-

¹⁹³ This same CASA also testified that, although she did not know whether the Department had actually offered services to the parents, it was her opinion that the parents did not comply with the services and that termination was therefore appropriate.

pendency petition against the mother the CASA believed would “benefit” from unspecified services—nevertheless took time before ruling to praise the CASA’s “good intentions” in advocating as she did.

This is not surprising. As described above, in a proceeding without many of the “standard trappings of the traditional adversarial model of dispute resolution[,]”¹⁹⁴ the CASA is a “neutral” anomaly—a party with a right to be heard but no stake in the case. More to the point, however, the CASA’s seeming neutrality gives her an enhanced voice in comparison to the two parties who are not neutral, who *do* have a stake in the outcome, and whose positions are therefore presumed to be less trustworthy. Not only will the judge pay particular heed to what the CASA has to say, but, often, the other parties are reluctant to “go all out” in their opposition to her, lest they come off as too aggressive. After all, the CASA is a volunteer, a “friend of the court,” appearing in the case out of the goodness of her heart and speaking for the best interests of the child rather than for her own benefit; she does not deserve to be “attacked.”¹⁹⁵

Of course, CASAs do sometimes support expanded parental visitation or parent-child reunification, and there are CASAs who make a real effort to understand the families and communities of the children for whom they are advocating. But even if those CASAs were the norm, it would not eliminate broader issues stemming from the very fact of a CASA’s role in the first place. Because CASAs have the authority to weigh in at all stages in the case, the legal standards are so vague, guidelines for CASAs are practically nonexistent, and because CASAs are regularly granted deference by the courts, parents and their attorneys have to constantly position their litigation with an eye on the CASA.¹⁹⁶

The CASA presents an extremely challenging set of choices for the parent in a child welfare case who is fighting to keep their family together. For each case, the attorney and client need to size up the individual CASA assigned: What is her position likely to be?

¹⁹⁴ See Sinden, *supra* note 37, at 348 (explaining that the proceedings are conducted at an intermediate level of formality but that parents lack many of the procedural rights which criminal defendants enjoy).

¹⁹⁵ Cf. *id.* at 354 (“Mothers are supposed to be nurturing, loving, and above all protective of their children. Conflict is viewed as harmful to the child, and therefore the mother accused of child abuse who creates conflict . . . harms her child a second time.”).

¹⁹⁶ Cf. Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2006 (1995) (discussing the importance of getting the child’s law guardian “on one’s side” when representing a parent in family court).

How will she view the parent? The attorney and client need to decide whether it makes sense to cooperate with the CASA and try and “sell” the parent to the CASA as a good parent, or keep the CASA at bay until the parent can get on stronger footing. The attorney and client need to decide whether the particular CASA is likely to understand the complexities of a parent’s life or whether it is better to keep her in the dark entirely. Attorneys and clients wonder: Is this a CASA that can be educated about race and poverty, mental illness or drug addiction? Should the parent disclose facts about trauma she has suffered in her own life? Or will the CASA take any concession of weakness to use later at a termination trial?

Keeping the CASA at arms-length—refusing to speak to her or sign releases of information for her to speak with “service providers”—has risks because the CASA is likely to be resentful and distrustful of the parent as a result. She will then almost certainly oppose whatever relief the parent seeks in the future (e.g., additional visitation, a decreased level of supervision), but on the plus side she may have less information to use in support of her opposition. At the same time, openly communicating with the CASA has significant risks as well, not unlike talking to the police in a criminal case—everything you say can and will be held against you—except the parent has no right to a warning in advance.

C. Structural Racism and Volunteer CASA Programs

So, if CASA programs really are set up so as to undermine established principles of fairness, why are they not just tolerated, but praised? If CASAs have inordinate influence—swaying decisions and forcing the other parties to shape their strategies with the CASA in mind—why have CASA programs failed to engender more scrutiny or suspicion? The answer folds back to the history of our child welfare system: CASA programs draw on traditions that feel comfortable, traditions that enhance rather than challenge existing structures of power.

A CASA need not establish her expertise on the best interests of a child because, as a white, middle-class woman, she benefits from the assumption that such expertise is one of her natural attributes. Her views on parenting are presumed to be correct, so there is little reason to doubt her ability to pass quality judgment on matters of parenting and children.¹⁹⁷ In addition, the CASA

¹⁹⁷ See *supra* Section II. For an important discussion of the ways in which this country views—and values—white and Black motherhood differently, see Odeana R. Neal,

benefits from the assumption that because her work is charitable, there is no need to examine her motives. Her good intentions make her opinions more valuable, even as they shield her work from scrutiny. The benefits she receives from her participation in the system are not the subject of the case and, therefore, her reasons for taking up this charitable work will go unquestioned. The CASA need not justify her seat at the table—her standing—because courts have long relied on the opinions of white women when making decisions about the lives of poor children.¹⁹⁸ That is to say, the CASA is valued for the reasons the charitable class has historically been valued.

And while the CASA's formal role in the courtroom is one of "neutrality"—simply looking out for the interests of the child and assisting the court in making an informed decision—she does not have a neutral perspective. Like the early child savers, the CASA necessarily views the best interests of "her" child through the lens of her own experience, an experience that is nearly always different than the experiences of the child for whom she speaks. The CASAs described above—the ones who were concerned about children living with their father in an RV or unbuckling their own car seats or having to leave their foster home to reunite with their father in transitional housing—had those concerns because what they saw happening did not match their understanding of a proper middle-class childhood. Yet, the job of the dependency court is not to give every child a proper middle-class childhood, nor should it be. The job of the dependency court is to determine when state intervention in the family is necessary to prevent serious harm to the child.¹⁹⁹ If we wanted to give every child a middle-class childhood, there would be much better—and more constitutional—ways to do it than by the removal and redistribution of children via the child welfare system.

As with the child-saving movements of decades past, the racial aspect of this system is not accidental, nor a mere subtext. Rather, the violence imposed by the child welfare system is a violence specifically imposed on low-income families of color as well as white

Myths and Moms: Images of Women and Termination of Parental Rights, 5 KAN. J.L. & PUB. POL'Y 61 (1995); see also Roberts, *supra* note 94; Roberts, *Prison*, *supra* note 14, at 1486.

¹⁹⁸ See *supra* Section II.

¹⁹⁹ See *Stanley v. Illinois*, 405 U.S. 645 (1972) (parents are constitutionally entitled to a hearing on their fitness); see also N.Y. FAM. CT. ACT § 1011 (1970) ("[The Family Court Act] is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.").

families who, because of their poverty, are unable to meet middle-class standards of living and parenting.²⁰⁰ The choice to not only rely on the assistance of a CASA to provide information about the child's best interests during the course of a child protective proceeding but to actually make her a party to the case, with representation and a right to be heard, is a choice that mirrors and enhances existing structures of white supremacy. A CASA's power to speak for the child is not merely a net gain in authority to the CASA herself, it is a net loss to the parent whose fundamental rights are at stake and whose family is threatened with permanent destruction. It is also a net loss to the child, who may or may not have their stated interests represented or advocated for in court.

In fact, the choice to rely on a system of volunteer, middle-aged white women to give direction in child welfare cases illuminates the racist underpinnings of the entire system. Ultimately, CASAs are afforded so much deference because the system views them as superior. A CASA is entitled to deference precisely *because* she has nothing in common with the poor families of color whose children are removed. And so it is with no irony, or historical perspective, that the child welfare system offers the CASA as an expert on other people's children and the lone spokesperson for the "community's" perspective on parenting.

The problem of the CASA is the problem of family court. There are three primary ways in which racism is embedded in the child welfare system. First, as discussed above, the discretionary standards and the need for constant judgment calls allow racial and class bias on the part of decision-makers all the way through the life of a child protective case, from the initial call that starts an investigation to the decision whether it is in a child's best interests to give his parent a "second chance" to regain her rights with a suspended judgment after a termination trial.²⁰¹ Second, the interrelation between the child welfare system and other systems that affect the lives of low-income families and families of color—including the criminal justice system, employment, and housing—means that the racism present in those areas comes already "baked in" to the standards employed by child protective workers and fam-

²⁰⁰ See generally Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM 317, 318-19 (2014) (describing the ways in which the relationship between social support and poor communities is "hyperregulatory," in that "its mechanisms are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities").

²⁰¹ See *supra* notes 18-20 and accompanying text.

ily courts: which parents are most likely to have a criminal record, to be unemployed or homeless, or to live in substandard housing?²⁰²

Finally—and this is what an analysis of the role of the CASA helps show us—conscious or not, racism is a key part of what allows those working in the system to see what they are doing as fair and just, despite all indications to the contrary. As Robert Cover has famously observed, while “[l]egal interpretive acts signal and occasion the imposition of violence upon others[,]”²⁰³ our “evolutionary, psychological, cultural, and moral” inhibition against the infliction of pain on others requires that this exercise of violence be tied up with “cues that operate to by-pass or suppress the psycho-social mechanisms that usually inhibit people’s actions causing pain and death.”²⁰⁴ In the child welfare system, these cues are present in the system’s emphasis on “helping,” “fixing,” and providing needed “services” to poor families. By framing the work of child welfare in the language of helping and fixing, rather than in the language of rights, the value of those legal standards which do exist is further diluted, and the pain experienced by families is obscured. This framing—the same framing that has been used since the mid-nineteenth-century advent of the child-saving movement—obscures the violence actually dealt by the system, and “suppresses rights talk,”²⁰⁵ creating pressure on parents to work within the system, to “comply,”²⁰⁶ and to be grateful for the assistance of the modern “charitable class.”²⁰⁷

But these cues wouldn’t work—they would not be able to obscure the real harm that is caused to so many families by the operation of the child welfare system—if not for the underlying

²⁰² See *supra* notes 10-17 and accompanying text.

²⁰³ Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

²⁰⁴ *Id.* at 1613.

²⁰⁵ Sinden, *supra* note 37, at 350.

²⁰⁶ *Id.* at 353.

²⁰⁷ Jane Spinak describes this phenomenon well: “Individuals and families whose conduct is regulated by the state are often expected to act in prescribed ways. Welfare recipients, for example, are supposed to be grateful for their income despite Supreme Court decisions which pronounce such payments to be an entitlement. Biological parents who are forced by circumstance or unfitness to place their children in foster care are then required, while the state acts as guardian, to solve their problems of poverty, illiteracy, homelessness or drug addiction while developing a thorough understanding of child development and family dynamics. They are expected, furthermore, to be resolute, even cheerful, when they are permitted to visit their children for an hour every other week and to troop off steadfastly to any and all programs that their caseworker has identified as necessary for return of the children.” Spinak, *supra* note 196, at 2000.

assumption that the families involved in the system are in fact families that are deficient and need help, and the corresponding assumption that those in the child welfare system are the ones who are best positioned to provide that help. And we would not make either of those assumptions—we would not be so comfortable thinking that low-income Black and Native children lack “important people” in their lives—but for the powerful racism and classism that permeates our society and devalues families of color. As Dorothy Roberts explains, “The cherished icon of the mother nurturing her child is . . . imbued with racial imagery . . . ‘Americans expect[] Black mothers to look like Aunt Jemima, working in somebody else’s kitchen. American culture reveres no Black madonna; it upholds no popular image of a Black mother nurturing her child.’”²⁰⁸ If it did, it would be obvious that what we are doing in dependency court each day is the furthest thing from kindness.

CONCLUSION

This paper need not define what child representation should look like in order to argue what it should not. The ongoing, nationwide experiment with volunteer CASAs has caused some of the most troubling parts of child welfare’s history to resurface. Considering these programs in the clear light of day reveals that they deprive families of a fair and neutral adjudication of their child welfare case. CASAs are impermissibly allowed to define and judge families against the benchmark of a white middle-class childhood, or whatever arbitrarily determined benchmark the CASA brings with her into the courtroom. And while CASAs are given enormous power to speak “for” children, their claim to authority is based on little more than race-, class-, and gender-based assumptions about middle-class white women’s inherent ability to recognize good and bad forms of parenting. A critical examination of CASA programs suggests we adopt a deep skepticism when the views of privileged white people are allowed to dominate over the views of the families most directly impacted by the system, however well-intentioned those voices seem.

In fact, there are a myriad of other solutions which could have been adopted to address Judge Soukup’s original concern that he lacked information about children in child welfare cases. The most obvious would be to support and professionalize the role of the assigned social worker from the children’s services agency, to adopt

²⁰⁸ Roberts, *supra* note 94, at 146.

low caseload standards, and to give those individuals the resources they need to fully inform the court. Providing information about a family, whether good or bad, is their role and the law already requires them to prepare reports to court about the parents and children. Judges similarly have the power to hold those social workers accountable for failing to provide the necessary investigation, to schedule new court dates, ask for more detailed reports, or hold them in contempt, if necessary. In fact, if one views the resources of the child welfare system as a limited pool, one could argue that the CASA program is actually pulling money out of the system that could otherwise be directed to improving the social work itself.

And what about the need for someone to advocate for the best interests of the child? First off, there is no reason why a parent in a dependency case, who is statistically likely to reunify with their child eventually, could not retain this power—a power to which they are constitutionally entitled—subject to the decisions of the court and ongoing supervision of the child welfare agency. Involving the parent in decision-making about her child furthers the goal of the dependency system to minimize intrusion into private family life and prepare the family for a safe reunification. Allowing parents to continue to speak for the best interests of their children would recognize that reunification is possible in the majority of cases and would send a message to parents that, even though they may have lost custody of their child, the legal system continues to see their value as parents.

Such an argument may seem absurd to those who work outside the field of family defense, but it is less absurd in reality. Parents may, by virtue of their poverty, suffer from homelessness, instability, drug addiction, depression, or anxiety; they may be victims of domestic violence; or they may suffer from PTSD. As a result, they may not be able to offer a safe home for their families. Our society has elected to prosecute those parents for their deficiencies and to pay other people to care for their children. But whatever the parent's deficiencies may be, the mere fact of poverty, illness, or a drug addiction does not mean that a parent cannot provide meaningful input about the child's needs and interests. Many upper-middle-class parents have made appropriate decisions for their children despite an ongoing addiction to narcotics or alcohol, and many low-income parents could do the same.

But, sadly, there are cases in which parents do not participate in the dependency case and are therefore not available to advocate for their child. Also, in a small minority of cases, the dependency

charges stem from allegations of serious physical or sexual abuse and criminal protection orders may prohibit contact or information-sharing between parent and child. In those cases, some might suggest that the need for a CASA is strongest, in order to be, as Judge Edwards suggested, an “important person” in the child’s life. But that assumes that the child comes from a vacuum and has no important people in her life already, no aunts or uncles, teachers, neighbors, friends, friends’ parents, pastors, grandparents, or others who have the child’s interests at heart.

The vast majority of children have a community available to them beyond their parents. Why could those people not be invited to participate in decision-making regarding the child? Assuming for the sake of argument that there is a need for someone other than the social worker, the parent, or—assuming the child is old enough to develop a stated interest—the child to speak for the child, it would be worthwhile to explore options that do not rely on the input of strangers, however well-meaning those strangers may be. It would further the child’s sense of connectedness and community to identify an advocate or advocates who already know the child and family who can offer an informed perspective on her interests.

Whatever system a jurisdiction ultimately adopts, whether it is one of these suggestions or something else, the lessons of the CASA experiment offer one clear message: the integrity of the legal system is compromised when the law invites voices of privilege to dominate. Given our nation’s long struggle with racial discrimination, it is particularly troubling to allow the voices of white people to speak loudest in a system disproportionately focused on families of color. And given the racism and the layers of discretion already built into the system, the fairness of the child welfare system will inevitably suffer when even well-meaning attempts to help children obtain a “better” childhood are allowed to take precedence over judicial decision-making based on established legal rules and standards.

Assuming that CASAs mean well, assuming their kind intentions, should not blind observers to the racial oppression inherent in the child welfare system. Parents in child welfare proceedings are not fooled. A legal system that allows middle-class white women to speak for the children of poor families of color is not hiding its bias if you only take a moment to look behind the “therapeutic” veneer. This exercise of white supremacy is out in the open, obvious, direct. It is a part of the case—a *party* to the case. Allowing

CASAs to stand in the place of child-welfare-involved parents and speak for child-welfare-involved children is to take the structural racism underlying the child welfare system and give it a seat at the table. It is to ask it directly what it thinks is best.

HEALTHY MOTHERS, HEALTHY BABIES: A REPRODUCTIVE JUSTICE RESPONSE TO THE “WOMB-TO-FOSTER-CARE PIPELINE”

Emma S. Ketteringham, Sarah Cremer & Caitlin Becker†

† Emma S. Ketteringham is a graduate of Northeastern University School of Law. Upon graduation, she clerked first in the U.S. District Court for the District of Maine and then at the U.S. Court of Appeals for the Second Circuit. Emma started at The Bronx Defenders as a criminal defense attorney and is now Managing Director of the Family Defense Practice. Emma supervises attorneys, social workers, and parent advocates who represent parents accused of child abuse and neglect and facing possible termination of parental rights. She participates in numerous court-based and independent coalitions to develop pro-family policies and practices in New York City, including the committee devoted to reducing racial disproportionality in foster care. In her career, Emma has worked as the Director of Legal Advocacy for National Advocates for Pregnant Women where she was counsel and strategist on criminal and civil child welfare cases at the intersection of the wars on women and drugs. She has also worked as a litigation associate at Lansner & Kubitschek, where she represented parents and children in civil rights actions in state and federal court.

Sarah Cremer, LMSW, is the Director of *Healthy Mothers, Healthy Babies* at The Bronx Defenders, where she runs a weekly support group and provides advocacy, case management, and educational services to pregnant women who are at risk of losing their children to foster care. Sarah received her Master's in Social Work and minor in Law from Columbia University, where she concentrated in program design and evaluation. While at Columbia, Sarah was an Executive Editor of the Columbia Social Work Review and Chair of the Columbia University Partnership for International Development, while also working on a schizophrenia-focused research project. In 2011, Sarah graduated from the University of Michigan, majoring in Psychology and Spanish.

Caitlin Becker earned her M.S.W. from Fordham University's Graduate School of Social Service in 2010. Her internships at both Abraham House, a community-based alternative to incarceration program, and Covenant House, a shelter for homeless teens and young adults, fueled her interest in working with individuals and families affected by both the criminal justice and family court systems. Prior to joining The Bronx Defenders, Caitlin worked with undergraduates at Fordham University's Dorothy Day Center for Service and Justice, where she connected students with volunteer opportunities in community-based organizations in the Bronx, and collaborated with her colleagues and students to advance the social justice mission of the university. She served as a Jesuit volunteer and worked with homeless youth in San Diego, California, following her graduation from Boston College in 2005 with a degree in English and Communication Studies.

The efforts of many made this article possible. We would like to thank the *Healthy Mothers, Healthy Babies* team, both past and present, for their dedication to both our clients and the reproductive justice movement. The HMHB team includes Assistant Program Coordinator Melissa Madan, Social Worker Morgan Hill, and founding Program Director Jennifer Bronson. A special thank you to Robin Steinberg, Executive Director of The Bronx Defenders, for her commitment to *Healthy Mothers, Healthy Babies'* vision, and to both Rachel Maremont, Assistant to the Director, and Cathren Cohen, Legal Intern, for their invaluable research, feedback and editing of this article. Finally, the *Healthy Mothers, Healthy Babies* team thanks the Child Welfare Fund for their generous support.

I. THE REPRODUCTIVE JUSTICE MOVEMENT'S CALL TO INTERROGATE THE CHILD PROTECTION SYSTEM	82
II. THE CHILD PROTECTION SYSTEM REFLECTS AND REINFORCES REPRODUCTIVE STRATIFICATION IN AMERICAN SOCIETY	84
A. <i>The Child Protection System is a Dystopia Reserved for Poor Families of Color</i>	85
B. <i>The Child Protection System Devalues the Childrearing of Poor, Mostly of Color, Parents by Treating Poverty and Its Social Disadvantage As A Personal Failing</i> . . .	92
C. <i>The Child Protection System's Reliance on Removals and Foster Care Hurts Children and Families and Weakens the Community</i>	97
III. CHILD SAFETY ALERT 14: THE CREATION OF A WOMB-TO-FOSTER-CARE PIPELINE THAT DEVALUES THE REPRODUCTIVE DECISIONS OF WOMEN WHO HAVE CHILDREN IN FOSTER CARE AND PERPETUATES REPRODUCTIVE STRATIFICATION	103
IV. HEALTHY MOTHERS, HEALTHY BABIES: FAMILY DEFENSE WITH A REPRODUCTIVE JUSTICE VISION	112
A. <i>HMHB Employs an Integrated Holistic Response</i>	113
B. <i>HMHB Advocates Seek to Counter the Dominant Child Protection Narrative by Employing A Client-Centered, Strengths-Based Approach</i>	116
C. <i>HMHB is Informed by Social Science Research that Emphasizes the Importance of Early Attachment and Bonding and Strives to Provide Education and Information to Other Players in the System</i>	118
D. <i>HMHB Connects Clients to Empowering Resources and Supports to Assist in Making Helpful Decisions for One's Family</i>	119
E. <i>HMHB Provides Isolated Pregnant Women With Children in the System with a Supportive Community</i> .	120
F. <i>HMHB Seeks To Provide Child Protection System-Involved Pregnant Women with Birth Dignity and Doula Support</i>	121
G. <i>HMHB is Able to Address Emergency Material Needs of Parents in Crisis</i>	121
H. <i>HMHB Has Succeeded In Keeping Children Out of Foster Care and Home with Their Parents</i>	122
V. A CALL TO ACTION	122

Jennifer¹ was 20 years old and had a three-year-old son in foster care. Her son had been removed from her care after Jennifer had a violent fight with his father in a city homeless shelter and both parents were arrested. It had taken months, but Jennifer's criminal case had been dismissed, she had separated from her son's father, and she had begun to fulfill the onerous requirements the Administration for Children's Services ("ACS") had said were necessary before her son returned home. These included submitting to a mental health evaluation and individual therapy, completing anger management and parenting classes, and locating suitable housing. She saw her son just once a week for two hours in a small, joyless room at the same foster care agency where she had once visited her own mother. Now it was her every move that was judged by the watchful eyes of a caseworker.

Then she learned she was pregnant. Jennifer was terrified that the ACS caseworkers would discover she was expecting a baby. Having grown up in foster care herself and with one child already in state care, she was terrified to lose another. She considered an abortion. Fearing her pregnancy would be reported if it was discovered, she avoided prenatal care, missed several of her service appointments, and wore baggy clothing to the visits with her son. When her pregnancy was detected, her reproductive choice to have a child was met mostly with scorn and disdain by ACS caseworkers. Jennifer spent her pregnancy riddled with anxiety and dread about what would happen after she delivered her baby.

Her fears were not unfounded. When her daughter was born, the hospital placed her on a "social hold," not allowing Jennifer to take her home. ACS convened an automatic meeting pursuant to its policy Child Safety Alert 14,² where they told Jennifer that because she had not completed her service plan for her son and was at risk of entering another volatile relationship, her baby would be removed. As is common at meetings held after a baby is born to a woman with children in foster care, caseworkers referred to Jennifer, not by name, but as the "bio mom" and her baby as the "afterborn,"³ to define her birth as being after Jennifer's child

¹ The names and some of the salient facts of the examples in this article have been changed to protect the privacy of our clients and their stories.

² Memorandum from John B. Mattingly, Comm'r, N.Y.C. Admin. of Children's Servs., Safety Planning for Newborns or Newly Discovered Children Whose Siblings Are in Foster Care: Child Safety Alert #14 (Revision) (June 5, 2008) [hereinafter "Child Alert 14"], https://nycfuture.org/images_pdfs/pdfs/NewbornsPolicy.pdf [<https://perma.cc/L2CZ-Z64X>].

³ THE CHILD WELFARE ORG. PROJECT ET AL., THE SURVIVAL GUIDE TO THE NYC

protection case had commenced. At no time during her pregnancy did anyone meet with Jennifer to plan for the birth of her expected child. No one supported Jennifer's parenting by asking her what she needed so that she could prepare to care for her arriving child. No one advised her of housing options for pregnant women or helped her find a GED program so she could get her degree. No one considered that Jennifer's relationship with the father of her son was over or spoke to Jennifer's therapist. No one considered the ways in which Jennifer's newborn would be at a disadvantage in state care, having lost the opportunity to nurse, bond, and be held by her mother. No one advocated or supported Jennifer in her negotiations with ACS. Instead, ACS summarily devalued Jennifer as a mother and took her newborn from the hospital, sending Jennifer to heal on her own.

The research is clear that removing children from their parents and all that is familiar has devastating consequences.⁴ Yet the child protection system⁵ rarely seriously considers the high likelihood of trauma and long-term emotional and psychological harm to newborns when they are removed from a parent and placed in foster care. This is true even where there is scant evidence that they are unfit to raise their children; the fact that they are already child-protection-system-involved (hereinafter also referred to as "system-involved") is considered reason enough to take the new baby away, even if a mother's situation has changed. It is no wonder pregnant women who have children in New York City's child protection system, like Jennifer, are terrified that their newborn will be removed and cast into the perilous foster care system.

The Bronx Defenders,⁶ a community-based holistic public defense organization established in 1997, has long recognized that the prison, deportation, and foster care systems are punitive

CHILD WELFARE SYSTEM: A WORKBOOK FOR PARENTS BY PARENTS 39 (2d ed. 2007), <http://advocatesforpregnantwomen.org/survivalguide2007english.pdf> [<https://perma.cc/P98T-F2HX>].

⁴ See, e.g., Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70 (2008).

⁵ This article is about child protection as a system rather than about the specifics of protecting children. The use of "child protection system" rather than "child welfare system" reflects the belief that today's system, in its daily operations, fails to comprehend child abuse and neglect appropriately as a social problem rooted in poverty and thus fails to improve the well-being or welfare of children or their families.

⁶ *Our Mission and Story*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/> [<https://perma.cc/L52U-5U9W>] (last visited Nov. 20, 2016).

mechanisms to monitor and regulate the residents of low income neighborhoods with few public or private resources. In communities like the South Bronx, where child protection system involvement is concentrated and high rates of child removals exist,⁷ the degree of state supervision over parents facilitates the reproductive oppression of the entire community. Indeed, for babies born to women involved in the child protection system in the South Bronx, there exists a virtual “womb-to-foster-care” pipeline. Much like the “school-to-prison” pipeline, a term used to describe the ways in which marginalized and at-risk schoolchildren are pushed out of the public education system into the juvenile and criminal justice systems,⁸ the womb-to-foster-care pipeline refers to the policies and practice of the current child protection system that push impoverished newborns, especially babies born to system-involved families, who are predominantly low-income and of color, out of the womb and into the foster care system. This pipeline reflects the systemic inequality within which the child protection system operates and the disregard for the critical bond between a newborn and her mother. The fear of having one’s newborn taken often causes system-involved pregnant women, like Jennifer, to attempt to hide their pregnancies, thus thwarting their planning for the return of older children and seeking essential services, and ultimately making them even more vulnerable to family disruption and other adverse effects.

Armed with the understanding that parents in the South Bronx, the majority of whom are low income people and people of color, are disproportionately vulnerable to the dissolution of their families, and that high quality legal representation for parents could prevent the unnecessary and traumatic removal of children from their homes and families, we have, for more than a decade, provided family defense advocacy and fought for the rights of parents in this community to raise their children. This article discusses the *Healthy Mothers, Healthy Babies* (“HMHB”) project,⁹ a project developed by and contained within the Family Defense Practice at The Bronx Defenders, created in 2013 in response to a

⁷ Bree Akesson et al., *Parental Involvement with the Criminal Justice System and the Effects on Their Children: A Collaborative Model for Researching Vulnerable Families*, 27 Soc. WORK PUB. HEALTH 148, 152, 155 (2012).

⁸ *School-To-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline> [<https://perma.cc/QD79-DG2Z>] (last visited Nov. 20, 2016).

⁹ *Healthy Mothers Healthy Babies*, BRONX DEFENDERS, <http://www.bronxdefenders.org/programs/healthy-mothers-healthy-babies> [<https://perma.cc/C8FR-WFDC>] (last visited Nov. 20, 2016).

specific policy of New York City's child-protection-system called Child Safety Alert 14 ("CSA 14"). CSA 14, detailed in Section III, is an ACS policy that determines the fate of children born to women with older children in foster care.¹⁰ This policy, and the agency practices driven by CSA 14, provides for very little family preservation planning with a system-involved pregnant woman prior to birth and strongly favors the baby's automatic removal and separation from his or her mother. And just as when a mother's older child or children were removed, the child protection system will use assessments based in misconceptions and assumptions about poverty, race, disability, and history with the child protection system, rather than those based upon the risk actually posed by the mother to her newborn or how her living conditions could be improved with meaningful material support, to determine whether the newborn can stay in the care of her mother. Rooted in contemporary reproductive justice ideology, HMHB seeks to disrupt the womb-to-foster-care pipeline by responding specifically to the inequalities perpetuated by the child protection system, and to the coercive operation of CSA 14 that further entrenches our clients and their families in the system by virtually ensuring each newborn's placement in foster care.

I. THE REPRODUCTIVE JUSTICE MOVEMENT'S CALL TO INTERROGATE THE CHILD PROTECTION SYSTEM

The law-focused reproductive rights movement has not traditionally concerned itself with the child protection system. Reproductive justice ("RJ") is a term coined by feminists of color who sought to place a discussion about reproductive rights within a broader conversation about social and racial justice.¹¹ The RJ movement is distinct from the dominant reproductive rights movement, which focuses specifically on improving women's access to reproductive health care and advocating for legal reproductive

¹⁰ See Child Alert 14, *supra* note 2.

¹¹ See Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS, no. 4, 2006, at 14, 14-19; see also Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328-30 (2013) (discussing the reproductive justice movement and its relationship to law, academic scholarship, and social movements); see generally ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE (2005), <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf> [<https://perma.cc/6QZW-E7K6>] (discussing the organization's role in the Reproductive Justice movement and discussing the movement's placement within a social justice framework).

rights.¹² Although increasing access to health care and legal rights are also important aspects of the RJ vision, the movement has demonstrated the limitations of the popular narrative of “choice,” which has come to mean the choice to have an abortion.¹³ RJ advocates have moved beyond the narrow focus on abortion¹⁴ and advocated for the realization of the full range of reproductive decisions, placing equal importance on the right to have a child, the right not to have a child, and the right to parent the children one has with dignity.¹⁵

The RJ framework specifically requires us to “integrate analysis of race, class, and immigration status into analysis of reproductive politics, thereby better illuminating multiple power structures that prevent[] the realization of reproductive rights and the achievement of broader reproductive justice.”¹⁶ RJ thought leaders recognize that when the reproductive and parenting experiences of women of color are considered, a history of targeting, surveilling, discouraging, and regulating the reproductive decisions of such women in the United States is revealed. For example, read together, Dorothy Roberts’s books *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*¹⁷ and *Shattered Bonds: The Color of Child Welfare*¹⁸ offer an unflinching analysis of the historical regulation of black women’s reproduction and its modern day vestiges. Starting with slavery and continuing through our country’s shameful history of sterilization programs and birth control laws, Roberts demonstrates how efforts designed to curtail black reproduction and the mythology of black mothers’ unfitness has cast black childbearing as a “dangerous activity.”¹⁹

The RJ movement calls upon those committed to reproductive justice to “interrogate the lasting consequence of the racist (and classist and sexist) ideology that these programs have legitimated

¹² See, e.g., *Our Mission*, CTR. FOR REPRODUCTIVE RIGHTS, <http://www.reproductive-rights.org/about-us/mission> [<https://perma.cc/47XC-2BU2>] (last visited Sept. 27, 2016).

¹³ Luna & Luker, *supra* note 11, at 328.

¹⁴ Numerous texts and books offer an able analysis of the history of reproductive politics and questioning of the mainstream reproductive movement’s consistent reliance on the market logic of choice that is beyond the scope of this article. See, e.g., *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000* (Rickie Solinger ed., 1998).

¹⁵ Ross, *supra* note 11, at 14; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997).

¹⁶ Luna & Luker, *supra* note 11, at 335.

¹⁷ ROBERTS, *supra* note 15.

¹⁸ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2003).

¹⁹ *Id.*

and perpetuated long after laws were struck down or programs formally dismantled.”²⁰ Accordingly, the RJ movement has effectively focused on issues that concern the rights of disenfranchised women to reproduce and raise one’s children, such as the empowerment of teen mothers, the shackling of incarcerated women giving birth in jails and prisons, and the termination of parental rights of incarcerated women.²¹ Although Roberts, in her study of the Chicago child protection system, as well as other leaders in the movement, have effectively argued that the child protection system punishes and devalues black motherhood,²² less attention has been paid by the national RJ movement to reforming or resisting the daily operation of the system in this country. Heeding the call of the ideals that underlie the RJ movement that fully incorporate the rights of all women to give birth to and raise their children, HMHB was designed to concern itself with advocating on behalf of low-income mothers of color who are systematically disadvantaged by the operation of the child protection system in their lives.

II. THE CHILD PROTECTION SYSTEM REFLECTS AND REINFORCES REPRODUCTIVE STRATIFICATION IN AMERICAN SOCIETY

If an RJ framework calls attention to the need to support a broader range of nurturing activities than those covered by the traditional conception of choice, the term “stratified reproduction” gives us a way to talk about the underlying structural power imbalances that impede this support.²³ The concept of stratified reproduction posits that certain categories of people in a society are encouraged to reproduce and parent, but others are not.²⁴ In other words, an individual’s position within other social hierarchies such as race or class results in the valuation of some people’s repro-

²⁰ Luna & Luker, *supra* note 11, at 337 (summarizing ROBERTS, *supra* note 15).

²¹ *Id.* at 328-29.

²² See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 768 (2001).

²³ See Shellee Colen, “*Like a Mother to Them*”: *Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, in CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION 78 (Faye D. Ginsburg & Rayna Rapp eds., 1995), <http://n.ereserve.fiu.edu/010007385-1.pdf> [<https://perma.cc/7HXJ-YMWS>]. Stratified reproduction is a term coined by Shellee Colen in her classic 1986 study of West Indian nannies and their (female) employers in New York City, which found inequalities of race, class, gender, culture, and legal status played out on a domestic and transnational field. *Id.* at 97-98.

²⁴ Harriet M. Phinney et al., *Obstacles to the ‘Cleanliness of Our Race’: HIV, Reproductive Risk, Stratified Reproduction, and Population Quality in Hanoi, Vietnam*, 24 CRITICAL PUB. HEALTH 445, 446 (2014).

duction and the devaluation of others.²⁵ The RJ movement requires us to examine and seek to eradicate the way systems create and perpetuate reproductive stratification by devaluing the reproductive choices of some. We view the child protection system, as a whole, as a system that reflects and reinforces a system of reproductive stratification. The disruptive formula of CSA 14, which almost guarantees that newborns born to system-involved mothers will also have child-protection-system-involvement, is best understood when viewed through a reproductive justice lens and in the context of this system.

A. The Child Protection System is a Dystopia Reserved for Poor Families of Color

It is a widespread misconception that parents lose their children to foster care because they have abused or abandoned them. Many people outside and inside the system believe that the parents whose children have been taken and placed in foster care have done harm to their children and that foster care is necessary positive protection. In fact, the child protection system is unequally applied to poor families, mostly of color, for allegations related to child neglect, not abuse. More than 60% of the allegations made against parents in New York City in 2013 were for charges of neglect.²⁶ This pattern holds across the country, with over 78% of maltreated children in the U.S. experiencing neglect rather than some form of physical or mental abuse.²⁷

Even more telling about the system is that allegations of neglect—such as failing to provide adequate food, shelter, or medical care to a child—often reflect conditions of abject poverty, rather than parental failure or ill will. Studies have shown that families who are “below the poverty line are twenty-two times more likely to be involved in the child protective system than families with incomes slightly above it.”²⁸ This means that despite the myriad studies showing that children are better off staying with their parents,

²⁵ See *id.*

²⁶ *New York City: Allegations of Abuse and Neglect*, CITIZENS’ COMMITTEE FOR CHILD. N.Y.: KEEPING TRACK ONLINE, <http://data.cccnewyork.org/profile/location/1/city#1/new-york-city/1/1193,1194/a/a> [<https://perma.cc/VW88-NZ67>] (last visited Nov. 20, 2016) (listing “educational neglect,” “lack of medical care,” and “neglect” as accounting for 60.6% of all allegations).

²⁷ DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICAN’S MOST VULNERABLE CITIZENS* 14 (2016).

²⁸ Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, in *REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS* 1, 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

discussed *infra* Section IVC,²⁹ mothers and fathers are at risk of losing custody of their children merely because of the effects of their economic and social deprivation, including lack of access to health and prenatal care, inadequate or unstable housing, unemployment, mental health issues or cognitive disabilities, and substance abuse or dependence. Although the parents in the child protection system are overwhelmingly poor and have faced structural hardship throughout their lives, not all people who are poor neglect their children and not all people who harm their children are poor. The point is that poverty—not the kind or severity of child mistreatment—is the leading predictor of both placement into foster care and the amount of time that children spend separated from their parents.³⁰ Thus, rather than serve to protect all children equally from parents who abuse them, the child protection system, with its power of child removal and reliance on foster care, is the system designated to address the social disadvantages of poor families.

Multiple theories exist for why low-income families are disproportionately represented in the child protection system, with many possible risk factors acting together to make less privileged communities particularly vulnerable to system involvement. Some scholars argue that the correlation between poverty and child maltreatment exists because of the stress on parents caused by the relentless and exhausting circumstances of poverty and limited support.³¹ Others argue that poor families are simply more susceptible to reports of

²⁹ See, e.g., Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POLITICAL ECON. 746, 760-61 (2008) (comparing young adults who had been in foster care to a group of adults who had been similarly neglected but remained with their families and finding that, compared to the group who stayed with their birth families, those placed in foster care were more likely to be arrested).

³⁰ See Leroy H. Pelton, *The Continuing Role of Material Factors in Child Maltreatment and Placement*, 41 CHILD ABUSE & NEGLECT 30, 35 (2014) (“Children in foster care have been and continue to be placed there from predominantly impoverished families.”); see also ROBERTS, *supra* note 18, at 27, 29 (noting that “[p]overty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there” and describing the “high and well-established correlation between poverty and cases of child abuse and neglect”); MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, 192-93 (2005) (“[O]nly a very small percentage of children in foster care have suffered serious forms of maltreatment.”); cf. Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE CHILD., Spring 1998, at 88, 100 (“The political debate over how poor children will be protected in the postreform era has often betrayed a poor understanding of the interdependence of the child welfare system with the welfare system.”).

³¹ ROBERTS, *supra* note 18, at 31.

child neglect because of their daily interactions with government services.³² Women living in low-income communities are more likely to use public services like schools, hospitals, and public benefits than women of relatively greater privilege, which increases their visibility and exposes them to increased government scrutiny and surveillance.³³ Still others argue that neglect and poverty are conflated, and conditions such as inadequate housing, lack of child-care, or an ability to get quality effective services for mental health and addiction problems are simply labeled child neglect by authorities and wrongfully treated as a failure of will rather than a product of poverty and social inequality.³⁴ Indeed, state laws, including New York's, also make the confusion of poverty with neglect almost inevitable by including conditions of poverty in the statutory definition of child neglect.³⁵

Regardless of why the child protection system is reserved almost exclusively for families of low wealth, families living in the Bronx are particularly vulnerable to child protection involvement. The neighborhood of the South Bronx, where The Bronx Defenders is located, is in the heart of the poorest congressional district in the United States and home to some of the most disenfranchised people in New York City.³⁶ The Bronx has the highest rates of eviction, unemployment, public benefits enrollment, and child-protection-system-involvement in the state. Here, according to the 2014 American Community Survey, 43.3 percent of children under 18 and 27.5 percent of adults live below the poverty line.³⁷ Community District 1, encompassing much of the South Bronx where our

³² Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997).

³³ See ROBERTS, *supra* note 18, at 173; TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 80-83 (2016).

³⁴ See generally Julia Krane & Linda Davies, *Mothering and Child Protection Practice: Rethinking Risk Assessment*, 5 CHILD & FAM. SOC. WORK 35 (2000); see also generally KAREN J. SWIFT, MANUFACTURING "BAD MOTHERS": A CRITICAL PERSPECTIVE ON CHILD NEGLECT (1995).

³⁵ See, e.g., N.Y. FAM. CT. ACT § 1012(f) (McKinney 2016).

³⁶ Lee A. Daniels, *The Talk of the South Bronx; South Bronx Residents Try to Change the Odds*, N.Y. TIMES (Apr. 11, 1981), <http://www.nytimes.com/1981/04/11/nyregion/the-talk-of-the-south-bronx-south-bronx-residents-try-to-change-the-odds.html> [<https://perma.cc/EMU2-Z98P>]; Foster Kamer, *The Poorest Congressional District in America? Right Here, in New York City*, VILLAGE VOICE (Sept. 30, 2010, 5:00 PM), <http://www.villagevoice.com/news/the-poorest-congressional-district-in-america-right-here-in-new-york-city-6725868> [<https://perma.cc/2YQX-5KNP>].

³⁷ N.Y.C. DEP'T OF CITY PLANNING, DP03: SELECTED ECONOMIC CHARACTERISTICS, 2014 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES NEW YORK CITY AND BOROUGHES (2015), http://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/acs/econ_2014acs1yr_nyc.pdf [<https://perma.cc/M243-Z8S2>].

office is situated, has a median income of just \$16,800 per year,³⁸ with 60 percent of residents receiving some form of public assistance.³⁹ Bronx County has the highest rates of both high school non-completion and unemployment in the state.⁴⁰ Families in the Bronx experience homelessness at higher rates than in any other borough: in 2010, more than one-third (37%) of all family shelter applications in New York City came from the Bronx, and nearly all applicants (92.8%) were either black (52.8%) or Hispanic (40%).⁴¹

Each year, thousands of children whose families are suffering from the confluence of these structural issues are taken from their parents and placed in foster care. In 2015, Bronx County had a total of 1,219 foster care placements, more than 30% of the total foster care placements for all of New York City.⁴² Because of its critical absence of resources, mothers and fathers living in the South Bronx are particularly vulnerable to the interventions of the child protection system. While it's necessary to have a mechanism for investigating reports of maltreatment and protecting children who are, in fact, being abused, the overwhelming over-representation of poor families in the system reflects that this mission has been abandoned. Rather than protecting children who are truly in need of protection by the state, the current child protection system reflects the social hierarchy of reproduction that exists in American society.

Not only are the families that populate the child protection system almost exclusively low income, they are also disproportion-

³⁸ N.Y.C. DEP'T OF CITY PLANNING, COMMUNITY DISTRICT NEEDS: FISCAL YEAR 2013 FOR THE BOROUGH OF THE BRONX 27 (2012), http://www1.nyc.gov/assets/planning/download/pdf/about/publications/bxneeds_2013.pdf [<https://perma.cc/HJN4-ALV6>].

³⁹ *Id.* at 8.

⁴⁰ For the cohort of children entering high school in 2011, Bronx County had a 13.1% dropout rate, compared with 8.3% for Kings County, 7.7% for New York County, 7.9% for Queens County, and 7.5% for Richmond County. N.Y.C. DEP'T OF EDUC., COHORTS OF 2001 THROUGH 2011 (CLASSES OF 2005 THROUGH 2015) GRADUATION OUTCOMES, http://schools.nyc.gov/NR/rdonlyres/EA0009CA-63C4-42AC-BFCA-9DE083DE779F/0/2015Graduation_Rates_Public_Borough.xlsx [<https://perma.cc/NW5J-PVCW>]; N.Y. STATE DEP'T OF LABOR, COUNTIES RANKED BY UNEMPLOYMENT RATE (2016), https://labor.ny.gov/stats/ur_rank.xls [<https://perma.cc/2PV9-RAH3>].

⁴¹ RALPH DA COSTA NUNEZ ET AL., INST. FOR CHILDREN, POVERTY, & HOMELESSNESS, A BRONX TALE: THE DOORWAY TO HOMELESSNESS IN NEW YORK CITY 1-2 (2012), http://www.icphusa.org/PDF/reports/ICPH_brief_ABronxTale.pdf [<https://perma.cc/A6ET-E8RB>].

⁴² N.Y.C. ADMIN. FOR CHILDREN'S SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2015 (2016), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/CityCouncilAnnualReport.pdf> [<https://perma.cc/FV5C-HBXQ>].

ately families of color. The racial disparity of children in foster care mirrors the far more publicized and criticized racial disparity in our nation's prison population.⁴³ For more than a decade, black children have made up the majority of children in the United States child protection system, despite making up a relatively small portion of the nation's population.⁴⁴ A national study of child protective services by the U.S. Department of Health and Human Services reported that "minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children[.]"⁴⁵

While racial disproportionality exists in foster care nationally, statistics from New York City illuminate the extent to which foster care placements are concentrated in poor communities of color:

In 2008, African American children accounted for 27 percent of the children under the age of eighteen in the city but comprised a staggering 57.1 percent of the foster care population. In contrast, 24 percent of the children under age eighteen in New York City were white, but white children comprised only 4 percent of the foster care population.⁴⁶

Dorothy Roberts's description is on point: "[i]f you go into dependency court in . . . New York . . . without any preconceptions, you might conclude that the child welfare system is designed to monitor, regulate, and punish black mothers[.]"⁴⁷ causing her to rightfully conclude that "[t]he fact that the system supposedly designed to protect children remains one of the most segregated institutions in the country should arouse our suspicion."⁴⁸

While the fact that black children are more likely to live in poor families than white children could account for, in part, the

⁴³ See, e.g., Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477 (2012) (footnote omitted) ("About one-third of women in prison are black and most were the primary caretakers of their children. About one-third of children in foster care are black, and most have been removed from black mothers who are their primary caretakers.").

⁴⁴ See, e.g., Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS.ORG: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> [<https://perma.cc/K3U3-VJZJ>] (last visited Sept. 27, 2016) ("Black children make up more than two-fifths of the foster care population, though they represent less than one-fifth of the nation's children.").

⁴⁵ JAMES BELL ASSOCS., BRIDGING THE GAP BETWEEN CHILD WELFARE AND COMMUNITIES 3 (2002), http://www.acf.hhs.gov/sites/default/files/opre/bridg_gap.pdf [<https://perma.cc/EN7P-QLNS>].

⁴⁶ LEE, *supra* note 33, at 5-6.

⁴⁷ Roberts, *supra* note 43, at 1483.

⁴⁸ ROBERTS, *supra* note 18, at vi.

disproportionate representation of black children in the child protection system, there is also evidence that racial bias plays a role in decision-making practices throughout the child protection system.⁴⁹ Social science and medical research reveals a disturbing prevalence of race and class disproportionality with respect to when and how alleged child abuse and neglect claims are reported to and handled by child protection authorities. For example, in 2006, the Casey-CSSP Alliance for Racial Equity in the Child Welfare System undertook a comprehensive review of existing research studies regarding race and class disproportionality in the child welfare system.⁵⁰ It found that “[m]ost of the studies reviewed identified race as one of the primary determinants of decisions of child protective services at the stages of reporting, investigation, substantiation, placement, and exit from care.”⁵¹ Among other things, it found (1) that most research studies suggest that race alone or race interacting with other factors is strongly related to the rate of child welfare investigations; (2) that African American women were more likely than white women to be reported for child abuse when their newborns had tested positive for drug use; (3) that child maltreatment is reported more often for low-income than middle- and upper-income families with similar presenting circumstances; and (4) that hospitals over report abuse and neglect among African Americans and under report maltreatment among whites.⁵² Studies also indicate that African American women are more likely to experience intrusive child welfare interventions because their newborn children are more likely to be screened for drugs than children of other races,⁵³ despite the lack of any evi-

⁴⁹ *Id.* at 47.

⁵⁰ ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 1 (2006), <http://www.cssp.org/reform/child-welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf> [<https://perma.cc/JDP4-SWAR>].

⁵¹ *Id.*

⁵² *Id.* at 18-20; see also Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (comparing results of universal testing with the number of cases reported to child welfare authorities, and concluding that pursuant to discretionary testing “a significantly higher proportion of black women than white women were reported,” even though their rates of substance use during pregnancy were similar).

⁵³ See Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1379 (2010) (finding that providers seemed to have used race, in addition to recognized risk criteria, as a factor in deciding whether to screen an infant for maternal illicit drug use); see also Troy Anderson, *Hospital Staff More Likely to Screen Minority Mothers*, L.A. DAILY NEWS (June 30, 2008, 12:01 AM), <http://www.dailynews.com/article/zz/20080630/NEWS/>

dence-based research supporting race or any other factor as a basis for screening some women and not others.⁵⁴ African American women also experience disproportionate state interventions because they lack access to maternal health services, leading to greater rates of health problems among African American infants.⁵⁵ Racial disproportionality in reporting certainly is not limited to cases involving the use of illegal drugs.⁵⁶ One retrospective study showed that doctors failed to detect abusive head trauma twice as often in white children as in minority children,⁵⁷ showing that physicians more often referred black children for child abuse investigation than white children. Another study showed that black and Hispanic toddlers hospitalized for fractures between 1994 and 2000 were more than twice as likely to be evaluated for child abuse and more than twice as likely to be reported to authorities than white children.⁵⁸

In addition to being more likely to become ensnared in the child protection system, families of color tend to fare much worse than white families once a case has been opened. Studies have shown that minority children are more likely than white children to be placed in foster care, even when they have the same characteristics as white children.⁵⁹ An initial placement in foster care

806309944 [<https://perma.cc/MAA6-7ZNG>] (“There is very strong evidence that hospital staff are more likely to suspect drug use on the part of black mothers and these mothers are more likely to have their children removed and put in foster care . . .”); Brenda Warner Rotzoll, *Black Newborns Likelier to be Drug-Tested: Study*, CHI. SUN-TIMES, Mar. 16, 2001, at 18 (“Black babies are more likely than white babies to be tested for cocaine and to be taken away from their mothers if the drug is present, according to the March issue of the Chicago Reporter.”).

⁵⁴ See Marylou Behnke et al., *Multiple Risk Factors Do Not Identify Cocaine Use in Rural Obstetrical Patients*, 16 NEUROTOXICOLOGY & TERATOLOGY 479, 481-83 (1994) (finding that criteria established by a hospital for testing certain women were not effective in predicting which women were more likely to have used an illegal drug).

⁵⁵ See AMNESTY INT’L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA 19-20, 25-26 (2010), <https://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf> [<https://perma.cc/96LB-RTDW>]; ROBERTS, *supra* note 15, at 172.

⁵⁶ See Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 117 (2008) (finding that there may be racial and economic differences in who reports, who gets reported, and the types of maltreatment that are reported, resulting from discrimination, including from the top sources of reports to CPS hotlines: educational staff, law enforcement officials, social service employees, and medical personnel).

⁵⁷ Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 282 JAMA 621, 623 (1999).

⁵⁸ Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1606 tbl. 2 (2002).

⁵⁹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 8 (2007) [hereinafter GAO-07-816]; ROBERTS, *supra*

greatly increases the risk that parents will have their custodial rights permanently terminated.⁶⁰ Once in foster care, black children suffer worse consequences—they remain in foster care longer, are moved from home to home more often, and receive less desirable placements than white children.⁶¹ Black children who are removed from their homes stay in care for an average of nine months longer than white children do.⁶² Increased lengths of stay in foster care are particularly significant because the chances a child will reunify with his or her parent begin to decrease rapidly after the first five months of placement.⁶³ Although the intention of the child protection system may not be to dissolve poor families and, in particular, poor families of color, the families most surveilled and most often destroyed by the system are almost always poor and disproportionately African American,⁶⁴ reflecting the disenfranchised status of their reproduction.

B. The Child Protection System Devalues the Childrearing of Poor, Mostly of Color, Parents by Treating Poverty and Its Social Disadvantage As A Personal Failing

Regardless of whether family poverty causes, reflects, or reveals child abuse or neglect, parents in the child protection system face numerous real barriers and material disadvantages in raising their children that the system cannot and does not address. Almost all of the parents in the system lack safe, adequate, and permanent housing, meaningful employment, quality child care and schools, safe neighborhoods and sufficient income and resources—all things relied upon by the more privileged to raise

note 18, at 17 (discussing that African American children are less likely to receive family preservation services and are more likely to be removed from their families than white children in similar situations).

⁶⁰ Guggenheim, *supra* note 28, at 17 (“When children are placed in foster care, children and parents face a very high risk of having their relationship permanently severed. Once children are removed from the custody of their parents, the functional—if not legal—burden of proof often shifts to the parents to show that the return of the children to their custody is both appropriate and consistent with the best interests of the children. When parents do not have custody of their children, it is difficult to show that under the current conditions in the home the parents can care adequately for them.”).

⁶¹ ROBERTS, *supra* note 18, at 19.

⁶² GAO-07-816, *supra* note 59, at 26; see also Ruth G. McRoy, *Acknowledging Disproportionate Outcomes and Changing Service Delivery*, CHILD WELFARE, Mar./Apr. 2008, at 205, 205.

⁶³ ROBERTS, *supra* note 18, at 19.

⁶⁴ Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 602-04 (2011).

their children. As Tina Lee observes in her recently published, in-depth exploration of Bronx Family Court and child protection services,

[t]he child welfare system is asked to deal with the profoundly detrimental effects of social inequalities with few resources and practically no ability to confront the roots of family problems: lack of income and meaningful jobs, lack of decent housing, the stress of living in poverty and parenting under difficult circumstances, and few services to deal with issues such as drug abuse and domestic violence.⁶⁵

The system is not designed or equipped to “make the lives of families better.”⁶⁶ Jennifer A. Reich, in her book *Fixing Families: Parents, Power, and the Child Welfare System*, similarly observes that, while well intentioned, those charged with child protection who confront the very real problems faced by system-involved families are able to “do little more than provide proverbial Band-Aids to gaping wounds.”⁶⁷ For example, a study of “lack of supervision” cases in New York City by the Child Welfare League of America found that in 52 percent of the cases studied, the service needed most was child care, but the “service” offered most was foster care.⁶⁸ Other studies have found that families are kept apart solely because they lack decent housing, yet the system is unable to ensure that entire families are stably housed.⁶⁹

Unable to address the roots of the problems that system-involved families experience, the system locates responsibility for child neglect with individual parents, rather than with the failure of multiple social service safety nets or racial and economic inequality.⁷⁰ As Lee observes, tying help for parents struggling with poverty, drug addiction, domestic violence, and mental illness so closely to investigation, surveillance, child removal, and the ultimate dissolution of the family undermines the system’s ability to

⁶⁵ LEE, *supra* note 33, at 183.

⁶⁶ *Id.* at 184.

⁶⁷ JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* 4 (2005).

⁶⁸ See MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 29, 40 (1987).

⁶⁹ See Deborah S. Harburger & Ruth A. White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanent Supportive Housing*, CHILD WELFARE, Sept./Oct. 2004, at 493, 502-05.

⁷⁰ The history of the transformation of the US child welfare system from one that focused on rescuing children from poverty to one focused on rescuing children from their parents is ably told by child welfare scholars. See, e.g., ROBERTS, *supra* note 18; LEE, *supra* note 33; BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS (1984).

provide meaningful support and assistance.⁷¹ Instead, the system further perpetuates reproductive stratification by drawing lines between fit and unfit parents, while not providing the real support necessary to truly honor the reproductive decisions and child-rearing of the families in the system.⁷² The toxic intervention of the child protection system is analogous to what we see in the criminal legal system, which deals punitively with problems that also have their roots in poverty and racism.⁷³ In the child protection system, however, parents are asked to meet unreachable standards of proper parenting and child-rearing while the children, rather than the parents, serve the time away from their families.

Over the last few decades, the challenges that low-income families experience in the child protection system have grown even more acute. As social services and substantive supports for poor families have become scarcer, the child protection system has grown to increasingly focus on family dissolution and adoption as the resolution of child neglect. In the same decade that the federal government reconfigured welfare and transformed Aid to Families with Dependent Children ("AFDC") into today's Temporary Aid to Needy Families ("TANF"),⁷⁴ a time-limited program replete with sanctions and work requirements and a life-time ban on welfare and food stamps eligibility for anyone convicted of a felony drug offense, Congress also transformed child protection by passing the Adoption and Safe Families Act ("ASFA").⁷⁵ ASFA defined categories of parents who should not be provided an opportunity to regain custody, shortened the window of time in which parents who are eligible for services can regain custody, and articulated a greater preference for adoption whenever possible.⁷⁶ This combined reform resulted in increased scrutiny of parenting by low-income people, added new hurdles for parents to overcome, and shortened the timelines by which parents must meet the expecta-

⁷¹ See LEE, *supra* note 33, at 183.

⁷² See *id.* at 80.

⁷³ Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322, 329-31 (Hazel Rose Markus & Paula M.L. Moya eds., 2010), http://scholar.harvard.edu/files/bobo/files/2010_racialized_mass_incarceration_doing_race.pdf [<https://perma.cc/2AUZ-AKKF>].

⁷⁴ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601) (eliminating the AFDC program and creating TANF in its place).

⁷⁵ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305).

⁷⁶ *Id.*

tions of the state in order to maintain their parental rights, all while shrinking their support and making it harder and harder for them to find what they need.⁷⁷

In a culture in which poverty is attributed to individual deficits, parents are blamed, their disadvantage and stress pathologized, and their children removed when material assistance for the entire family might provide an effective remedy for the same issues.⁷⁸ In a system ill-equipped to address social inequalities, stereotypes of lazy and “deadbeat” parents who require re-socializing inform service plans and decision-making around removals and parental fitness.⁷⁹ The expectation that parents subordinate and show compliance comes with no alleviation from any material deprivation they might experience, even as the resources available for poor families shrink.⁸⁰ The intervention of the child protection system does not provide the material support, the parenting assistance, and the hope for a safer and better future that more-privileged parents take for granted. Rather than value and support the reproduction and child rearing of poor parents, it focuses on child removal, foster care, and the provision of services aimed at rehabilitation and the “normalization” of the parent.⁸¹ The services offer little in the way of real help, but instead “attempt to instill proper attitudes and test to see which parents are committed and ‘together’ enough to regain custody.”⁸²

Embedded in these expectations are ideals of family life that reflect specific visions of an “optimal” parent, often inextricably re-

⁷⁷ The worsening circumstances for poor families in the United States over the past decade cannot be understated. Government data show that by 2012, circumstances for low-income families were worsening. More than 70 percent of cities reported increases in family homelessness, and almost two-thirds of cities were turning away homeless families with children from emergency shelters due to lack of resources. By 2013, family homelessness again increased, emergency food assistance requests increased, and the percentage of the total food assistance requests coming from families increased to almost 60 percent. Almost one out of four children under six years of age were living in families under the poverty threshold. See HATCHER, *supra* note 27, at 13.

⁷⁸ Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 61-64 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ There is nothing new about this approach. It dates back to the inception of the system in the mid-nineteenth century when Charles Loring Brace, a Protestant clergyman in New York City, removed children from urban immigrants he believed to be morally and genetically inferior in the hope that their children would be removed from their “evil influence.” See Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 130 (2001).

⁸² LEE, *supra* note 33, at 80.

lated to race, class, and gender. Complicating it further, unlike in the criminal legal system where crimes and infractions are defined by specific elements, the “child maltreatment” and “best interests of the child” concepts that are addressed in the child protection system have no fixed, universal meanings.⁸³ The child protection system is a complex bureaucracy of individual social workers, attorneys, therapists, children’s advocates, and judges who are tasked with evaluating parental behavior and determining, based on no consistent standards, whether it is in a child’s best interest to live with their parents or to live somewhere else. It seeks to draw lines between those who are fit to raise their children and those who are not, without the ability to improve children’s lives by keeping their families intact. Where there are no fixed standards or definitions, absent a child’s obvious physical injury, the system’s players base their decisions and judgment in no small part on their own perceptions of adequate parenting and risk to a child.⁸⁴ This invites judgment, subjective interpretations of cultural standards and norms, and an exercise of almost unbridled discretion when players make the critical decisions that impact the families in the system, such as a caseworker’s choice to bring a case or remove a child, a judge’s finding of maltreatment, or a child’s advocate’s determination to support parent-child reunification.⁸⁵

Even worse, the child protection system’s flawed emphasis on locating failures within individual parents rather than in larger systemic inequalities means it fails to address what poses the greatest risk to the wellbeing of children: poverty. The health consequences of poverty during pregnancy and early childhood are often severe, and can set a newborn child on a life-long course of disparities in health outcomes. These adverse outcomes include greatly increased risks for preterm birth, intrauterine growth restriction, and neonatal or infant death.⁸⁶ Poverty has consistently been found to

⁸³ See Elizabeth D. Hutchison, *Child Maltreatment: Can It Be Defined?*, 64 SOC. SERV. REV. 60, 62 (1990) (discussing the vagueness in legal definitions of child maltreatment); Stephen Parker, *The Best Interests of the Child – Principles and Problems*, 8 INT’L J.L. & FAM. 26, 26-27 (1994) (discussing the indeterminacy of the best interests standard).

⁸⁴ Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation?*, FAM. ADVOC., Winter 2009, at 34, 34-35; see *Graci v. Graci*, 187 A.D.2d 970, 972 (4th Dep’t 1992) (finding that the wife was entitled to primary physical custody of the parties’ children where it was shown, inter alia, that she took the children to church while the husband did not).

⁸⁵ A. Chand, *The Over-Representation of Black Children in the Child Protection System: Possible Causes, Consequences and Solutions*, 5 CHILD & FAM. SOC. WORK 67, 72-73 (2000).

⁸⁶ Charles P. Larson, *Poverty During Pregnancy: Its Effects on Child Health Outcomes*, 12 PAEDIATRICS & CHILD HEALTH 673, 674 (2007).

be a powerful determinant of delayed cognitive development and poor school performance.⁸⁷ These effects are compounded for mothers of color and their children, who experience disparities due to race, in addition to those caused by lower socioeconomic status. “[A]lthough poverty is a significant contributor to racial/ethnic disparities in pregnancy outcome, higher socioeconomic status does not confer the same protection for African American women as for white women.”⁸⁸

It is clear that the child protection system is almost exclusively reserved for poor families of color and that its interventions are not only largely futile, but also an effective red herring for the true culprits that pose a risk to our society’s children. Even more disturbing, however, is that involvement with the child protection system often exacerbates already-difficult situations, rendering marginally stable economic situations even more precarious.⁸⁹ The focus on personal transformation, without equal attention to material conditions almost always makes things worse for system-involved families. Many of the parents with whom we work become homeless, have their efforts to secure permanent housing or housing with family derailed, or lose their employment or public benefits simply by having their children removed or trying to comply with the services required by ACS and the Family Court. For women who become pregnant while involved in this system and plan to give birth, they are often in a worse place socially, economically, and emotionally than they were when they first came under its purview. As Tina Lee forcefully concludes, “[d]aily practices in child welfare are an outcome of stratified reproduction, but they also help to reproduce it.”⁹⁰

C. The Child Protection System’s Reliance on Removals and Foster Care Hurts Children and Families and Weakens the Community

The reproductive justice movement requires social systems to be analyzed not just in terms of their harm to the individual, but also their harm to families and the community as a whole. Although it is tasked with improving the welfare of children, the child protection system’s inability or unwillingness to address the

⁸⁷ *Id.* at 675.

⁸⁸ Briggett C. Ford et al., *Racial Disparities in Birth Outcomes: Poverty, Discrimination, and the Life Course of African American Women*, AFR. AM. RES. PERSPECTIVES, Fall 2005, at 1, 2, <http://www.rcgd.isr.umich.edu/prba/perspectives/fall2005/ford.pdf> [<https://perma.cc/BC66-YC7B>].

⁸⁹ See LEE, *supra* note 33, at 82.

⁹⁰ *Id.* at 200.

real struggles of impoverished families and its overreliance on child removal and foster care as its primary intervention are misguided. While the state must remove a child who is at risk of serious harm, the child protection system's interventions hurt children and families and weaken entire communities in both short- and long-term ways. In so doing, these interventions further reinforce a system of reproductive stratification.

Although many people who foster a child are well-intentioned and provide a safe and loving environment, research shows that the state makes a poor parent: children in foster care have worse outcomes both while in care and after they leave the foster care system. Placement in foster care has been linked to an increase in behavioral psychological, developmental, and academic problems.⁹¹ Children placed in foster care are more likely to experience psychopathology than children who are not in foster care,⁹² with children in foster care being between 2.7 and 4.5 times more likely to be prescribed psychotropic medication than children not in foster care, according to one study.⁹³ Most problematically, studies in jurisdiction after jurisdiction have found that rates of safety are actually worse for children in foster care than for those in family preservation programs.⁹⁴ One study shows that children are actually twice as likely to die of abuse in foster care than in the general population.⁹⁵ New York State ranks the third worst for rates of substantiated or indicated reports of maltreatment of children in foster care.⁹⁶ However, statistics of such rates are likely underes-

⁹¹ Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 57 (2006).

⁹² K. Chase Stovall & Mary Dozier, *Infants in Foster Care: An Attachment Theory Perspective*, 2 ADOPTION Q. 55, 55-56 (1998).

⁹³ Children in foster care in Florida, Massachusetts, Michigan, Oregon, and Texas were prescribed psychotropic medications 2.7 to 4.5 times more often than children who were not in foster care. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS 7 (2011), <http://www.gao.gov/assets/590/586570.pdf> [<https://perma.cc/HTQ8-QXLM>].

⁹⁴ NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING (2015), <http://www.nccpr.org/reports/01SAFETY.pdf> [<https://perma.cc/ZA34-S646>].

⁹⁵ Wexler, *supra* note 81, at 137, 137 n.51.

⁹⁶ Amended Class Action Complaint for Injunctive & Declaratory Relief at 78, *Elisa W. v. City of N.Y.*, No. 15 Civ. 5273 (LTS) (HBP) (S.D.N.Y. Dec. 28, 2015), http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/amended_complaint_12.28.2015.pdf [<https://perma.cc/4XNH-XRMY>] ("Based on the most recent federal data available, New York State ranks 46th out of 48 states and territories for instances of substantiated or indicated maltreatment of children while in foster care. Put simply, children in New York are more likely to be harmed while under the state's protection than children in virtually every other state.").

timations, as “[a]buse or neglect by foster parents often is not even reported, because . . . agencies tolerate behavior from foster parents which would be unacceptable by birth parents.”⁹⁷

System-involved children tend to exit foster care with more problems than they had when entering. Children leaving foster care have significantly more behavioral problems when compared with their own pre-placement measures of adaptation.⁹⁸ Former foster children experience additional negative life outcomes, including having higher teen birth rates and lower career earnings⁹⁹ and being disproportionately likely to experience homelessness compared to the general population.¹⁰⁰

Children who are on the margin of placement tend to have better outcomes when they remain home as opposed to in out-of-home care. In one study, a researcher looked at case records for more than 15,000 children, pulling out only the in-between cases where a real problem existed in the home, but the decision to remove could go either way.¹⁰¹ Despite the fact that the children left at home did not get extraordinary help, only typical assistance, on measure after measure the children left in their own homes fared better than comparably maltreated children placed in foster care.¹⁰² When children on this border are removed from home, they experience adverse outcomes compared to children left in their homes.¹⁰³ Children who are removed have higher levels of internalizing problems compared to similarly situated children reared by “maltreating” caregivers.¹⁰⁴ Children who have spent time in foster care are also three times more likely to be involved with the juvenile justice system than comparably maltreated children left in their homes.¹⁰⁵ All of this evidence demonstrates that keeping children together with their parents, even within homes that are not perfect, is usually preferable to placement in foster care.

⁹⁷ Complaint for Declaratory and Injunctive Relief ¶ 245, *Marisol v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996) (No. 95-Civ.-10533).

⁹⁸ Lawrence et al., *supra* note 91, at 72.

⁹⁹ Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007).

¹⁰⁰ See generally Patrick J. Fowler et al., *Pathways to and From Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453 (2009).

¹⁰¹ See Doyle, *supra* note 29.

¹⁰² *Id.* at 766-67.

¹⁰³ See Doyle, *supra* note 99, at 1607.

¹⁰⁴ Lawrence et al., *supra* note 91, at 66.

¹⁰⁵ Doyle, *supra* note 99, at 1599.

Some of the adverse consequences of removal can be decreased by placing children who have been removed from their homes with relatives rather than in foster care with strangers. Children fostered by relatives—known as “kinship care”—have fewer behavioral problems,¹⁰⁶ better development, and better mental health functioning than children in non-kinship foster care.¹⁰⁷ Additionally, children cared for by relatives in foster care experience fewer disruptions and a better quality of life while in care: they have fewer placement moves,¹⁰⁸ are more likely to remain in their own school,¹⁰⁹ and are more likely to report liking their placement and wanting it to become permanent.¹¹⁰ However, most foster children do not receive these benefits; ACS reports that, as of August 2016, only about one third of children in foster care in New York City were placed in kinship care.¹¹¹ An approach that does not recognize how critical one’s family and home life are to healthy human development, even when troubled or full of challenges, harms rather than improves the welfare of children and families.

While foster care is likely to be a traumatic experience for children at any age, a child-protective regimen that presumptively places newborns in care is particularly ill-advised. Babies are most vulnerable to the effects of being separated from their families, whose caregivers serve as an extension of their own regulatory systems.¹¹² Infants have an innate predisposition to form an attachment to their caregivers and this relationship is vital to promoting infant mental health.¹¹³ When babies are placed in foster care,

¹⁰⁶ David Rubin et al., *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162 ARCHIVES PEDIATRICS & ADOLESCENT MED. 550, 552-53 (2008).

¹⁰⁷ MARC WINOKUR ET AL., THE CAMPBELL COLLABORATION, KINSHIP CARE FOR THE SAFETY, PERMANENCY, AND WELL-BEING OF CHILDREN REMOVED FROM THE HOME FOR MALTREATMENT: A SYSTEMATIC REVIEW 7 (Geraldine Macdonald et al. eds., 2014).

¹⁰⁸ Mark F. Testa, *Kinship Care and Permanency*, 28 J. SOC. SERV. RES. 25, 25-26 (2001); see NANCY ROLOCK ET AL., CHILDREN & FAMILY RESEARCH CTR., MULTIPLE MOVE STUDY: UNDERSTANDING REASONS FOR FOSTER CARE INSTABILITY 5 (2009), <http://www.centerforchildwelfare.org/kb/oohpublications/MultipleMoveReport2009.pdf> [<https://perma.cc/J2Y9-ZF7J>].

¹⁰⁹ PEW CHARITABLE TRS., TIME FOR REFORM: SUPPORT RELATIVES IN PROVIDING FOSTER CARE AND PERMANENT FAMILIES FOR CHILDREN 5 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/supportingrelativespdf.pdf [<https://perma.cc/5F5B-QD42>].

¹¹⁰ WINOKUR ET AL., *supra* note 107, at 217.

¹¹¹ N.Y.C. ADMIN. FOR CHILDREN’S SERVS., FLASH 16 (2016), <http://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/FlashIndicators.pdf> [<https://perma.cc/2SBF-6EQJ>].

¹¹² See generally Beatrice Beebe et al., *A Systems View of Mother-Infant Face-to-Face Communication*, 52 DEV. PSYCHOL. 556 (2016).

¹¹³ See generally JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND

there is a major disruption in the primary attachment relationship. Failure to form an attachment with a primary caregiver because of a disruption in the caregiver-infant relationship results in affective, behavioral, and social difficulties for the infant,¹¹⁴ such as failure to contain and manage emotion, persistent difficulty with regulating behavior, distortions in the capacity to develop healthy relationships, heightened vulnerability to stress, and increased risk of psychopathology.¹¹⁵ Babies with disrupted attachments are at a greatly increased risk of developing lifelong disorganized attachments, which are associated with often-disastrous long-term outcomes, including internalizing disorders, externalizing disorders, and dissociation.¹¹⁶ Disruption of primary attachment is also linked to developing impaired stress response systems, abnormal levels of cortisol¹¹⁷ and even a higher risk of mortality.¹¹⁸

Far too often in New York City's child protection system, newborns are removed from homes and placed in foster care with multiple caretakers and no services in place to promote a close attachment between a newborn and any caregiver. Connections to evidence-based, attachment-oriented services, or even an immediate and frequent visitation plan that allows for consistent time between mother and child, are often not pursued with any sense of urgency.

The reproductive justice praxis requires us to examine the impact on an individual of a right being abrogated as well as the potential harm to entire communities.¹¹⁹ The decision to remove children from the home not only discounts the centrality of the parental role, but also damages both the family and neighborhood

HEALTHY HUMAN DEVELOPMENT (1988); John Bowlby, *Attachment and Loss: Retrospect and Prospect*, 52 AM. J. ORTHOPSYCHIATRY 664, 668-69 (1982).

¹¹⁴ Stovall & Dozier, *supra* note 92, at 56.

¹¹⁵ See generally ROBERT KAREN, BECOMING ATTACHED: FIRST RELATIONSHIPS AND HOW THEY SHAPE OUR CAPACITY TO LOVE (1998).

¹¹⁶ Barbara J. Burns et al., *Mental Health Need and Access to Mental Health Services by Youths Involved with Child Welfare: A National Survey*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 960, 961 (2004); see also Laurel K. Leslie et al., *Outpatient Mental Health Services for Children in Foster Care: A National Perspective*, 28 CHILD ABUSE & NEGLECT 697, 710 (2004) ("[C]hildren in foster care have high rates of need but . . . multiple non-clinical factors—age, group care setting, race/ethnicity, and maltreatment history—serve to either facilitate or hinder access to mental health services.").

¹¹⁷ Philip A. Fisher et al., *Effects of Therapeutic Interventions for Foster Children on Behavioral Problems, Caregiver Attachment, and Stress Regulatory Neural Systems*, 1094 ANNALS N.Y. ACAD. SCI. 215, 222 (2006).

¹¹⁸ See Hee-Soon Juon et al., *Childhood Adversity and Later Mortality in an Urban African American Cohort*, 93 AM. J. PUB. HEALTH 2044, 2044-46 (2003).

¹¹⁹ Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 76-80 (2011).

community. Relationships between parents and children placed in foster care are often permanently damaged by child-protection-involvement: studies show that children placed in foster care often lose respect for their parents, who no longer have custody of them, and that foster care placement inhibits parents' ability to discipline or effectively parent their child going forward.¹²⁰

In neighborhoods like the South Bronx, where child-protection-involvement is sweeping, the social cohesion of the community is devastated by the system's wide-scale involvement, which "interferes with community members' ability to form healthy connections and to participate fully in the democratic process."¹²¹ Mistrust between neighbors is one common result of high levels of child removal, with state supervision "encourag[ing] neighbors to gossip about families in the system, to handle grudges by threatening to report one another to the department, and to otherwise turn to destructive means for resolving neighborhood conflicts[.]"¹²² In addition, a high rate of child protection involvement harms the community's strength in other areas. "Collective efficacy," defined by Dorothy Roberts as the community's "shared belief in their ability take joint action on behalf of their children's welfare[.]" is associated with "fewer incidents of violence, personal victimization, and homicide."¹²³ In New York City, African American and Hispanic populations are overrepresented in "high loss" communities, characterized as those who lose a higher than average number of community members to systems, including foster care.¹²⁴

The child protection system unequally applies to poor families of color, fails to address the true material disadvantage and poverty of those families, and its primary interventions of child removal and foster care further weaken families and entire communities. Its punitive focus on judging, blaming and punishing individual parents, rather than helping entire families and communities does further harm. When the reproductive experiences of women in the system are considered, it is revealed as a power structure that prevents the achievement of broader reproductive justice and one that should be of great concern to the RJ movement. An approach that

¹²⁰ Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, CHILD WELFARE, Mar./Apr. 2008, at 125, 133-34.

¹²¹ Mimi Abramovitz & Jochen Albrecht, *The Community Loss Index: A New Social Indicator*, 87 SOC. SERV. REV. 677, 689 (2013).

¹²² *Id.* at 688.

¹²³ Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 27 (2005).

¹²⁴ Abramovitz & Albrecht, *supra* note 121, at 711.

truly values child well-being must address the underlying, intersecting forces of racism and poverty that affect mothers in low-income communities rather than focusing exclusively on issues or deficiencies located within individual parents. The RJ framework calls on us to recognize these disparities not by taking children away from their homes and families, but by defending the right of system-involved parents to raise their children and by addressing the inequalities that exist in poor communities. In the context of this system and while it continues to exist, women who become pregnant and plan to give birth require skilled advocates, who understand their work as part of a movement for social and reproductive justice, and are both willing to challenge the system's dominant narrative and prepared to zealously defend women's rights to raise their children.

III. CHILD SAFETY ALERT 14: THE CREATION OF A WOMB-TO-FOSTER-CARE PIPELINE THAT DEVALUES THE REPRODUCTIVE DECISIONS OF WOMEN WHO HAVE CHILDREN IN FOSTER CARE AND PERPETUATES REPRODUCTIVE STRATIFICATION

When The Bronx Defenders became the institutional provider of legal defense for parents in Bronx Family Court child protective proceedings in 2007, our attorneys, social workers, and parent advocates¹²⁵ noticed a recurring phenomenon: clients who had previously been or were currently involved with the child protection system and planning to reunify with their children would disappear when they became pregnant. Many women did not seek prenatal health care or medical treatment during their pregnancy; they stopped attending their court appearances and services like mental health or substance abuse treatment programs that were required for the return of their older children; and they often abruptly, without explanation, stopped visiting their older children in foster care. The fear of child apprehension by the child protection system not only impeded their prospects of regaining custody of their children, it drove them away from the health services best for their pregnancy and expected child, compromising their maternal and fetal health.¹²⁶

¹²⁵ Parent Advocates are non-attorney advocates, some of whom have had a child protection case, who attend meetings and conferences with parents with ACS and provide support to parents through the process of a child protection case. *Parent Advocate*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/how-we-work/parent-advocate/> [https://perma.cc/4H42-3LCK] (last visited Nov. 25, 2016).

¹²⁶ This is consistent with research of Sarah Roberts who found that fear of being reported to the child protection system drives drug-using pregnant women away from

If they remained involved with the system, like Jennifer, they expressed ambivalence, fear, and anxiety about what would happen after they delivered their baby. Oftentimes when a system-involved woman learned she was pregnant, a first stop was to see her lawyer, rather than a doctor, for counsel on a profoundly personal decision: whether she should continue her pregnancy or have an abortion. Rarely did she have anyone at the foster care agency offering to assist her in preventing the removal of her baby when born or preparing for birth. None of the forms of “assistance” offered by ACS acknowledged the social inequality or material disadvantage the mother continued to experience despite her continued involvement with the system. We knew that we had to address this recurring phenomenon and the system’s response to our pregnant clients to better serve them.

The system’s power to dismantle families exists alongside—and in direct contradiction to—its stated task and legal obligation to preserve them.¹²⁷ When New York State decides it must interfere to protect the safety of a child, the preservation or reunification of families is required to be the paramount goal whenever possible. Not only does federal law require it,¹²⁸ New York law expressly provides that “the state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home[.]”¹²⁹

prenatal care and drug treatment. See, e.g., Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 *MATERNAL & CHILD HEALTH J.* 333 (2010); Sarah C.M. Roberts & Amani Nuru-Jeter, *Women’s Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 *WOMEN’S HEALTH ISSUES* 193 (2010). Women’s fear of engaging in services has an adverse impact on maternal fetal health. That is why the American College of Obstetricians and Gynecologists opposes laws that require universal testing and reporting of women to child protection authorities who give birth despite having used an illegal drug. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 473, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co-473.pdf?dmc=1&ts=20161113T1552564675> [https://perma.cc/4jXU-WNDJ] (opinion reaffirmed in 2014).

¹²⁷ REICH, *supra* note 67, at 4-5.

¹²⁸ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115, 2116 (codified at 42 U.S.C. § 671(a)(15)(B)) (“[E]xcept as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families . . .”).

¹²⁹ N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2016); see also *id.* § 384-b(1)(a)(ii) (“[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child’s need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered . . .”).

To fulfill its legal obligation as to children born to parents already involved in the system, ACS has adopted CSA 14 to govern planning for and decisions regarding the removal of babies born to system-involved families.¹³⁰ Under CSA 14, upon learning that a mother with a child in foster care is pregnant, the case worker from the foster care agency that is assigned to oversee the siblings' placement is asked to do a "safety assessment" to determine if it would be safe for the newborn to reside in the home.¹³¹ The policy directs the assigned foster care agency case worker to hold a case conference or meeting with the family and the family's service providers to consider the reasons the older children remain in care, discuss the upcoming birth, and review the family and agency's safety plan for the baby.¹³² This conference is commonly called the "pre-birth conference." In practice, agencies routinely fail to hold pre-birth planning conferences with pregnant women unless a client or her legal team advocates for or requests the court to order its convening.

When they do happen, the discussion and recommendation from the pre-birth conference is, in reality, largely irrelevant to whether the baby will be taken after delivery. Representatives from ACS, who ultimately determine whether to remove the newborn, are not required to be present at the pre-birth conference.¹³³ Nor is information from the pre-birth conference shared with ACS in a timely or meaningful way.¹³⁴ The services discussed at the pre-birth conference are those traditionally offered by the child protection system, like parenting and anger management classes, aimed at addressing personal failings and the underlying crisis that caused the siblings to be placed in care. The system fails to focus on or even attempt to address the underlying disadvantage and stress that might have caused the crisis, the right of the system-involved mother to parent her child, or any particular material barriers to the infant going home after birth. Even if the foster care agency recommends to ACS that the baby remain home, because ACS has

¹³⁰ See Child Alert 14, *supra* note 2.

¹³¹ *Id.* at 1, 3.

¹³² *Id.* at 1.

¹³³ After years spent attempting to reform this aspect of CSA 14, ACS continues to refuse to require its case workers to attend pre-birth conferences. *Id.*

¹³⁴ Information from the pre-birth conference is entered by the agency case worker into Connections, the ACS casework database, as a progress note. ACS can refer to the case notes for the discussion and recommendations at the conference or speak to the agency case worker directly. There is no formal pre-birth planning conference with ACS, the primary decision maker. A parent is at the mercy of what the case worker decides to include and what level of detail is provided.

less familiarity with the family and is largely focused on the original allegations regarding the older children and strict compliance with the original service plan, that recommendation is often ignored when the baby is born. Rather than being valued, a woman's decision to have a baby when older children are in foster care is often met with contempt and disrespect by the system. When a woman shares with her agency case worker that she is pregnant, the threat of child apprehension begins to loom large. Without regard for the emotional impact of their words, case workers frequently warn expectant mothers of the likelihood that their infants will be removed at birth by virtue of their older children's placement in care. One of our parent advocates recalls a caseworker commencing a pre-birth planning conference by stating, "[w]e're here because once you give birth, we're going to remove your child. That's what happens when you have kids in care." The pre-birth planning conferences, far from fulfilling the law's mandate to preserve a family whenever necessary,¹³⁵ leave parents feeling hopeless and anxious about what will happen when their child is born.

Even regardless of whether the foster care agency believes a newborn to be at risk of harm, CSA 14 requires that the foster care agency automatically make a report of a neglected child to the State Central Registry ("SCR") once the child is born.¹³⁶ Even when there is no reasonable cause to suspect abuse or neglect of the newborn child, CSA 14 instructs the SCR to accept the information about the birth of a child with a sibling in care as "additional information" for the first case.¹³⁷ The call to the SCR empowers ACS to commence a second full investigation and assessment of the safety of the new child.¹³⁸ After the report is received, a child safety conference is scheduled to determine whether the newborn shall be removed.¹³⁹ The purpose of the child safety conference, a conference that is held in every case prior to ACS filing a petition in Family Court, is to determine whether the child must be removed to foster care or remain with the parent under supervision.¹⁴⁰ The policy contemplates that, at the child safety conference, the ACS case worker and the foster care agency case worker will share and discuss information with each other, including the family's current service needs and their ability to care for

¹³⁵ N.Y. SOC. SERV. LAW § 397(2)(a) (McKinney 1997).

¹³⁶ Child Alert 14, *supra* note 2, at 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 2.

¹⁴⁰ *Id.*

the child, coupled with the family's history and the progress the family has made towards addressing those safety concerns.¹⁴¹

The disrespect and insensitive treatment that system-involved pregnant women are often subjected to at CSA 14 child safety conferences is indicative of the system's disregard for the families it serves and its lack of urgency in preserving them. For example, the players in the system, including the caseworkers, often use child-protection jargon that masks the enormity of the decisions they are making and the emotional investment parents have in their children. In the conferences and in court, in line with the long tradition of referring to a mother as "bio mom," the family's new baby is routinely referred to as an "afterborn," rather than by his or her given name. CSA 14 child safety conferences are often held in the hospital at a mother's bedside, just a short time after she has given birth. Sometimes, new mothers are asked to leave their newborns at the hospital to attend a conference at an ACS office, sometimes far away, without any indication of whether they will be able to return to the hospital to bring their babies home. Women are also required to come to court just days after giving birth, even before they have fully recovered, and are asked to wait for hours while ACS prepares its paperwork.

Often there is inexplicable delay after the child is born before ACS conducts its investigation and convenes the CSA 14 child safety conference, even when the approximate timing of a baby's birth is known. This leads to unnecessary disruptions in parental-child bonding even before ACS has made a decision as to whether the newborn can remain safely in her parent's care. Our client Donna had moved into a residential mother-child substance abuse program when she gave birth to her daughter. Her intention was to have her baby reside with her in the program when she was born. Donna's daughter's birth was a planned delivery by cesarean surgery and the foster care agency was informed of it months in advance. No one from ACS came to visit Donna at the hospital to determine its position as to whether the baby could reside with Donna in mother-child inpatient treatment. When she was discharged from the hospital four days later, she had still not heard from ACS and was told that her baby was on a "social hold"¹⁴² at

¹⁴¹ *Id.* at 1.

¹⁴² The practice of placing a baby on social hold in a hospital is illegal. Under the family court act, a physician has the power to remove a child who is at imminent risk of serious harm. The law, however, requires the physician to seek a court order within 24 hours of removing the child. N.Y. FAM. CT. ACT § 1026(c) (McKinney 2005). A hospital cannot hold a baby who is otherwise ready for discharge without a parent's

the hospital until ACS could investigate. Two days later, ACS conducted the child safety conference and recommended that the baby be released to Donna under court-ordered supervision. The days without her newborn permanently disrupted Donna's ability to nurse and deprived her and her newborn of days of mother-infant bonding critical to forming a securely attached relationship.

Delays in investigation and conducting the child safety conference then lead to further delay in the judicial review of ACS's decision to place a child in foster care. The law requires that ACS go to court within 24 hours of removing a child from his parent without her permission.¹⁴³ ACS's policy requires case workers to hold a child safety conference prior to filing a case in court. Before that conference is convened, ACS conducts a safety assessment and investigation. The investigation may include speaking with foster care agency case planners, reviewing records, and speaking with doctors and service providers. ACS investigative workers then coordinate with other parties to plan a child safety conference, to discuss the agency's potential safety concerns. Once the conference is scheduled, mothers who have very recently given birth often wait hours at an ACS office or in the hospital for these conferences to begin; there is often little sense of urgency to identify and discuss the information relevant to a child safety determination. The delays in gathering information and convening child safety conferences mean that the initial court appearance is often unnecessarily delayed. Babies routinely remain in the hospital on a "social hold" after they have been medically cleared for discharge, until ACS coordinates and conducts a child safety conference. Delays in gathering information and holding these conferences frequently means that ACS misses the 24-hour deadline to file in court, resulting in the routine violation of a parent's rights and babies spending more time separated from their parents without court review.

consent without a court order. Routinely, however, hospitals refuse to allow mothers to take their newborns out of the hospital based on the fact that ACS is investigating or might investigate.

¹⁴³ *Id.* ("If the child protective agency for any reason does not return the child under this section after an emergency removal pursuant to section one thousand twenty-four of this part on the same day that the child is removed, or if the child protective agency concludes it appropriate after an emergency removal pursuant to section one thousand twenty-four of this part, it shall cause a petition to be filed under this part no later than the next court day after the child was removed. The court may order an extension, only upon good cause shown, of up to three court days from the date of such child's removal. A hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this part.").

Because there are older children in foster care, the chances that ACS will remove the new baby are increased exponentially. Child Safety Alert 14 encourages investigating child protective workers to err on the side of removing newborns, explicitly warning them:

If the decision is to seek court ordered supervision (or in exceptional circumstances not to take court action on behalf of the new child), there needs to be clear documentation from the conference that explains why the older children have not yet been reunified, while it would be safe for a new child, especially when that child is a more dependent and fragile newborn, to remain safely in the home.¹⁴⁴

As per the policy, child safety conferences for newborns always highlight prior ACS involvement as a primary safety concern.¹⁴⁵ No matter how much progress a parent has made in addressing the allegations that originally brought her to the attention of child protection authorities, or how much time has passed and the myriad of ways her circumstances have changed, CSA 14 often operates as a self-fulfilling prophecy. For example, at the time of her newborn's birth, our client Ana's older children were in kinship care in New Jersey while she resided in New York City. When she learned she was pregnant, Ana immediately entered a mother-child residential treatment program to address her cocaine addiction, which had spiraled out of control after her older children were removed from her care and placed out of state. Ana's program counselor and advocate were at her bedside while ACS called her into the child safety conference by phone. Ana tearfully explained the circumstances that led to her cocaine addiction, the ways in which she was benefitting from treatment, and the reasons she should be given an opportunity to care for her newborn baby in residential treatment. Despite five months of success in inpatient mother-child treatment without a relapse, ACS refused to agree that Ana's baby could remain with her while she continued on her road to recovery, citing her "history." ACS placed the baby on a "social hold" and Ana had to leave the hospital without her newborn daughter. In court, after her attorney from The Bronx Defenders requested a hearing, the Judge ordered that the baby be released to Ana's care in the mother-child treatment program, noting that a mother's his-

¹⁴⁴ Child Alert 14, *supra* note 2, at 2.

¹⁴⁵ *Id.*; Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS L. REP. 107, 130 (2002).

tory alone is not enough to prove that a baby would be in imminent risk of harm in her care.

Rather than conduct an individualized, strengths-based analysis of the circumstances under which the new baby came in to the world, CSA 14 virtually guarantees that ACS will file a petition alleging that the newborn is a neglected child and recommend foster care placement with little analysis of the current circumstances. Child protective workers place incredible weight on a mother's history in the system without sufficient regard for the progress a parent has made to address the issues that led to the older children's removal. Its emphasis on "history" rather than current circumstances perpetuates the view that the parents in the system are fundamentally flawed and the sum of their problems, rather than individuals asked to overcome extreme disadvantage with little assistance.

The focus of the CSA 14 conference also perpetuates the misguided focus of the child protection system on compliance with personal corrective service plans, rather than the material issues that truly pose a risk to the family and child's welfare. One Bronx Defenders client, Lauryn, gave birth to a baby girl after she had completed her service plan, which included drug treatment, counseling, and a parenting class, but before her three-year-old son had returned home. Her son was trapped in foster care because Lauryn would lose her priority status on a waitlist for an apartment in New York City Public Housing if he came home. It did not matter that the reason she lacked housing was no fault of her own, but rather a failure of coordination and cooperation between city agencies. Rather than provide Lauryn with help addressing the bureaucratic snarl that resulted in her homelessness, ACS offered foster care for her newborn. Although ACS's decision was ultimately reversed by the Family Court and Lauryn's daughter was released to her care, ACS missed an opportunity to address the actual material disadvantage causing harm to the family. Lauryn's housing issue was not addressed, Lauryn lost faith and trust in the agency purportedly interested in her child's welfare, and Lauryn's newborn was needlessly separated from her for days after birth.

In line with the system's expectation of contrition and deference by parents to the system, decisions by ACS regarding the removal of newborns are often based on a mother's compliance with original service plans required to address the neglect of her older children, rather than actual risk to the newborn. As Dorothy Roberts observed about Chicago's system, often

[t]he 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.¹⁴⁶

One client, Emily, gave birth to a baby boy. The original allegations that resulted in her older children being placed in foster care were marijuana use and a fight with her brother that had resulted in an assault charge. When her son was born, Emily enjoyed liberal unsupervised visitation with her older children, was actively engaged in a substance abuse program, and had enrolled in a home-based parenting program for parents with newborns. The ACS caseworker who attended the child safety conference cited no safety concern and recommended that the baby be released to Emily. Her supervisor's supervisor, the deputy at ACS, who has ultimate decision-making power but who did not attend the conference or ever meet or work with the family, summarily reversed the decision and recommended instead that the infant enter foster care because Emily had not yet completed her substance abuse program for marijuana use. Given the widespread use of marijuana by parents of privilege and the dearth of social or scientific research that shows a parent's marijuana use (or prior use in Emily's case) causes risk of harm to the life or health of her child, this decision showed a blind adherence to compliance even while forsaking the needs of an infant.¹⁴⁷

ACS has even gone so far as to remove children in cases where complete compliance with services is impossible for medical reasons. In one such case, our client Tina had unsupervised visits with her older children when her new baby was born. She had numerous complications during her pregnancy, including a hospitalization for her gallbladder and a surgery. ACS removed her son at birth because Tina missed several psychotherapy appointments after her surgery and, upon the advice of her doctor, was not taking psychotropic medication during her pregnancy. Although she was not exhibiting any signs or symptoms of her mental illness and planned to resume treatment after birth, ACS focused on Tina's noncompliance with services rather than actual risk posed to her

¹⁴⁶ ROBERTS, *supra* note 18, at 80.

¹⁴⁷ See, e.g. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html?scp=1&sq=marijuana%20case%20child%20neglect&st=cse> [<https://perma.cc/6VXZ-X66R>].

child. Tina's son was not returned until ACS's decision was reversed by the Bronx Family Court after her Bronx Defenders attorney requested and won a several-day-long hearing for his return.

The gross inequality that accompanies the functioning of the child welfare system is further reinforced when ACS, under CSA 14, systematically removes newborns from system-involved families without attempting to meaningfully plan and prevent such a removal. Both in policy and in practice, CSA 14 plays a role in reinforcing the disadvantage of families already involved in the child protection system and recreating the very inequalities inherent in the system. The system's approach to pregnant women with children in foster care perpetuates the view that system-involved parents are fundamentally flawed individuals in need of constant state supervision, ignoring their individual strengths and the positive things happening in their families' lives in favor of focusing exclusively on the worst thing that has happened: the removal and placement of their older children in foster care. The child protection system, having failed to address the deprivation and material conditions that the crisis involving the older children revealed, over-relies on foster care as the preferred intervention for the newborn. In such a system, the reproductive decision to give birth despite having older children in foster care is not adequately supported, is treated with little value, and further entrenches reproductive stratification.

IV. HEALTHY MOTHERS, HEALTHY BABIES: FAMILY DEFENSE WITH A REPRODUCTIVE JUSTICE VISION

The fundamentally flawed approach of the child protection system and CSA 14's failure to meaningfully support pregnant system-involved women and its presumption in favor of removal means that a woman's decision to continue a pregnancy when she has older children in foster care comes with great risk that her baby will be removed at birth. The Bronx Defenders set out to develop a response to this coercive function of the system that would support and respect our clients' reproductive decisions and increase the likelihood that mothers would keep their newborns home at birth. With the help of an independent grant, HMHB was born. At the core of HMHB is the recognition that raising one's children is fundamental to one's humanity. By firmly advocating for the right to parent one's children with dignity and provide support during pregnancy and advocacy the moment the child is born, HMHB seeks to curb the womb-to-foster care pipeline by providing

targeted client-centered, holistic advocacy to system-involved pregnant women in the South Bronx from the moment they say that they are pregnant.

A. HMHB Employs an Integrated Holistic Response

Grounded in an RJ framework, HMHB seeks to honor the full range of reproductive decisions made by our clients. If our client determines she would like to continue her pregnancy and bear her child, HMHB provides a combination of high-quality legal representation and social work advocacy before the baby is born to maximize the likelihood that our client's newborn will not be removed and placed in foster care after delivery. HMHB connects expectant mothers with a dedicated social worker or parent advocate (depending on the client's particular needs) who works collaboratively with the client's attorney as part of a legal team. Driven by a client-centered, strengths-based approach, the legal team works with expectant mothers to help them identify what supports, if any, they need to prepare for their newborns and ensure that their babies can remain safely at home.

The location of HMHB in a public defender office is critical to its mission to provide expecting women with what they need. Our lawyers, social workers, and parent advocates have a duty of loyalty to no one but their client, the expectant parent.¹⁴⁸ Unlike ACS caseworkers who have the dueling and conflicting obligations of investigating and surveilling the expectant mother while also offering services deemed necessary to keep her family intact, HMHB is loyal only to the expectant mother herself.¹⁴⁹ Unlike the ACS caseworker, HMHB does not, by definition, approach our client with the ability to destroy her family. Nor does HMHB tie its assistance to the parent's prosecution. HMHB also is not interested in our client's subordination to dominant ideals of parenting in order to achieve reunification. Rather, HMHB aims to empower our clients to fulfill their goals in regard to their children, while also assisting them in addressing the challenges and barriers that exist in their lives. All interactions between HMHB advocates and our pregnant clients are governed by the duty of confidentiality. This means that clients can honestly confide with their advocates and openly

¹⁴⁸ Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 699-701 (2007) (discussing the duties of nonlawyers, such as social workers and mental health professionals, to report when working with lawyers).

¹⁴⁹ See *About ACS*, N.Y.C. ADMIN. FOR CHILDREN'S SERVS., <http://www1.nyc.gov/site/acs/about/about.page> [<https://perma.cc/VJ9R-NSDS>] (last visited Nov. 25, 2016).

discuss their greatest challenges, worries, anxieties, and problems. They can openly share their needs for themselves, their pregnancy, and their children, without fear that the content of these conversations will appear in reports to a court and be used against them in favor of removing their child. Because of the duties of loyalty and confidence owed to our clients, the HMHB team is uniquely situated to identify the true needs of the family and effectively provide the supports necessary to achieve social stability.

Legal teams at The Bronx Defenders collaborate through our innovative holistic model¹⁵⁰ to advocate with ACS and the court for what our clients want for their families and what they feel they need in order to address issues in the home. The social worker can advise the attorney of what services the family needs and what material needs the family has, while the attorney can advise the social worker of how the legal goals identified by the client, such as the return of her older children or her infant remaining home, can be achieved. Together, the attorney and the advocate work with each woman to secure the assistance she feels she needs to prepare for her baby's birth. For example, a client might reveal to her HMHB team that she has relapsed and is using drugs again, but fears telling anyone because she will be drug tested and that her baby will be taken at birth. Rather than struggling alone and testing positive for an illegal drug at birth, the client's lawyer and advocate can assist her in finding an opening at a mother-child treatment program that would allow her to reduce the harms of drug use during pregnancy and allow her newborn to remain with her at birth. Likewise, a client might share with her HMHB team that she would like to stop her mental health medication because of potential harm to her pregnancy, but she fears speaking to her physician alone. The HMHB team can assist the client in identifying the information she needs to make an informed decision and developing the questions she has for her physician and will accompany her to a visit with her physician. Likewise, if a client needs an order of protection against a violent partner or is interested in a support group for domestic violence survivors, HMHB can assist the client in connecting to those services without using the threat of child apprehension to force her to go. HMHB's location in a public defender office, by definition and by design, provides system-involved pregnant women with a legal safe haven during one of the most anxious and stressful times in their lives.

¹⁵⁰ See *Holistic Defense*, BRONX DEFENDERS, <http://www.bronxdefenders.org/holistic-defense/> [<https://perma.cc/W2XH-NBWS>] (last visited Nov. 25, 2016).

HMHB also recognizes that poverty, not individual failing, is the single most important predictor of losing one's children to foster care. Rather than exacerbate the class and race disparities that exist in today's child protection system by prescribing generic solutions like parenting and anger management classes that do not fit the family's problems, HMHB seeks to directly address poverty-related issues such as housing, child care, public assistance, and unemployment. HMHB advocates connect system-involved pregnant women with civil advocates in the office to assist with litigating fair hearings for benefits wrongfully turned off as well as acquiring Medicaid, public assistance, and vouchers for childcare. HMHB also connects our clients with attorneys who practice in housing court to defend against evictions, force landlords to fix dangerous housing conditions, and advocate for access to safe, affordable, permanent housing. Civil advocates also assist clients in identifying and obtaining benefits such as social security and supportive housing during pregnancy so that ACS will not remove a baby for the weeks or months it takes to secure these benefits after a baby is born. Although unable to dismantle the fundamental racial and economic inequality experienced by our clients, HHMB's location in a holistic office with civil legal advocates is able to address many of the material disadvantages mistaken by the system for the inability to care for a child or child neglect. Thus, HMHB improves the material circumstances of our clients by securing housing and income, greatly increasing the chance that the newborn will not be removed.

By providing system-involved pregnant women with legal teams that include social workers and parent advocates as well as civil attorneys and legal advocates who can assist with accessing housing and benefits, HMHB does what the child protection system should do: ask a parent what they need to address or overcome in order to take good care of their child and then work hard to provide that assistance. Indeed, the parent advocates and social workers who work as part of HMHB are a good match to any team of caseworkers at a foster care agency. Their approach to the client, commitment to families, understanding of the social and economic issues faced by parents in the South Bronx, and around-the-clock work ethic are a formidable force. Moreover, because HMHB often does what agency caseworkers claim is impossible, they pose a challenge to the million-dollar-budget city and private agencies that could be so much more effective if they focused less on prosecution and more on prevention. If ACS does not agree at the child

safety conference that the baby goes home even with all of the supports in place, HMHB often succeeds in laying the groundwork for the client to prevail in court. Although unable to completely alleviate the fundamental unfairness of the child protection system, the existence of HMHB counters its coercive function and increases the chance that a system-involved parent's newborn will not follow her siblings to foster care.

B. HMHB Advocates Seek to Counter the Dominant Child Protection Narrative by Employing A Client-Centered, Strengths-Based Approach

In the context of child welfare, the accepted narrative is one of terrible parents who make irresponsible reproductive choices. It is filled with harsh, inaccurate beliefs about parents of children in foster care that are rooted in racial, gender, and class-based stereotypes. As Marty Guggenheim observes, “[t]he poor families exposed to judicial and agency scrutiny in the child welfare system are reviewed through a lens that looks at the worst thing that has happened.”¹⁵¹ By contrast, in families of privilege “the bad things are invariably framed against the wonderful things that happen in families every day.”¹⁵² Because of the dominant child welfare narrative of selfish, ignorant, and bad parents, more often than not, the news of our clients’ pregnancies is met by caseworkers with disdain and viewed as irresponsible choices.¹⁵³ HMHB advocates assist clients in overcoming “the stereotypes, assumptions and false expectations that smother them, and . . . pervade child welfare decision-making processes.”¹⁵⁴

As discussed previously, most of our clients have not committed an inhumane act against a child. The vast majority of our cli-

¹⁵¹ Guggenheim, *supra* note 28, at 18.

¹⁵² *Id.*

¹⁵³ The assumption that becoming pregnant is always a choice is easily challenged. According to the Guttmacher Institute, 45% of pregnancies were “unintended” (defined as pregnancies that were either mistimed or unwanted) in 2011. Low-income women, as well as young women and minority women, are more likely to experience unintended pregnancy than higher income and white women. “The rate of unintended pregnancy among poor women (those with incomes at or below the federal poverty level) was 112 per 1,000 women aged 15-44 in 2011, more than five times the rate among women at the highest income level (20 per 1,000).” GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES 1 (2016), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/FB-Unintended-Pregnancy-US.pdf> [<https://perma.cc/PPH7-ZCZ8>].

¹⁵⁴ Matthew Fraidin, *Changing the Narrative in Child Welfare Cases, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS*, *supra* note 28, at 19.

ents are charged with neglect, rather than abuse. Some are charged with a single act of neglect and some for neglect that has developed over time. Many are there because of allegations that they failed to protect their children from harm inflicted by someone else, but have never hurt their children themselves. Others are in the system because they suffer from addiction to illegal drugs or have symptoms of mental illness, pathologies also suffered by privileged people who are fortunately able to address their problems with private resources. Our clients are invariably low-income and many have faced significant social issues in their lifetime such as violence, poverty, homelessness, hunger, incarceration, and foster care. Many of them have had their children removed from their homes for unjustifiable reasons and their cases demonstrate ACS errors in removing children from loving, caring homes. Many of them have done the thing, or some variation of the thing, of which they were accused. Save for a tiny few, they are also parents who love their children, who care for their children, and who cherish their identity as parents. Just like all humans and all other parents, they have aspirations, complex emotions, poor luck, better luck, lapses in judgment, moments of embarrassment and shame, and sometimes self-destructive impulses. They often have overcome incredible odds and personal challenges and would inspire anyone who stopped long enough to listen to the story of what they have overcome. And in child protection proceedings, “they face the loss of one of the few precious things in their lives.”¹⁵⁵

Advocates at HMHB resist the dominant child welfare narrative about parents in the system and do not view system-involved parents as simply a sum of problems, of which a new baby is one more. In their interactions with ACS or in court, they are devoted to revealing our clients’ humanity, resilience, and strength. They seek to support and empower our clients to lend their voice to the proceedings about them and their children. They challenge the system’s view of them and its actions. They seek to frame the issues our clients face and the things they have done in the context of their lives and what is available to them, and in light of everything else they have done. Most importantly, HMHB advocates, whether in conferences with ACS or the foster care agencies or in a court hearing, are skilled at assisting the system players in locating fault in the systemic inequality and disadvantage experienced by our clients, rather than in the individual parent. In so doing, we give

¹⁵⁵ Guggenheim, *supra* note 28, at 17.

voice to our clients and challenge the popular uninformed misconceptions of the parents in the system.

C. *HMHB is Informed by Social Science Research that Emphasizes the Importance of Early Attachment and Bonding and Strives to Provide Education and Information to Other Players in the System*

The HMHB model is driven by the body of research that demonstrates that children fare better when they are able to remain at home with their families, in their communities.¹⁵⁶ The HMHB team recognizes that the removal of a child from all he or she knows and loves should be a last resort and only after less harmful alternatives are explored. Prior to placing a baby outside of his or her home, intensive clinical services within and outside the home environment should be availed to the family to prevent the trauma of unnecessary removal. Transforming the system's over-reliance on child removal and foster care to address the problems of poor families requires educating its players regarding the harm and trauma of foster care to a child. The system is more likely to support alternatives to removal and not act impulsively out of an urge to punish a parent of whom they disapprove if it understands the critical importance of parent-child attachments and the harm of foster care. HMHB participates in and provides multiple trainings on the social science and research regarding attachment and the harms associated with foster care. HMHB advocates use this information to strengthen their clients' cases against the removal of their newborns by presenting it at conferences, in court, and at trainings attended by all players in the system.

¹⁵⁶ The fact that infants are better off when allowed to remain with their parents remains true even for drug-exposed infants who are often removed as a matter of course. In one study of babies born to mothers who used cocaine during pregnancy, one group of the newborns was placed in foster care while the other group was allowed to remain with their mothers. After six months, the researchers studied the babies for developmental milestones and consistently found that the babies placed with their mothers did better. Kathleen Wobie *et al.*, *Abstract: To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, 43 *Pediatric Res.* 234 (1998), <http://www.nature.com/pr/journal/v43/n4s/full/pr19981518a.html> [<https://perma.cc/Y2UQ-P566>]. Another study found that "rooming-in"—the practice of caring for the mother and her newborn together in the same room after birth—directly benefited drug-exposed infants, decreasing the rate at which such infants were admitted NICU as well as how long they remained there once admitted. Ronald R. Abrahams *et al.*, *An Evaluation of Rooming-in Among Substance-Exposed Newborns in British Columbia*, 32 *J. OBSTETRICS & GYNECOLOGY CAN.* 866, 866 (2010). In addition, rooming-in increased the likelihood of maternal custody of the infant once discharged from treatment.

D. HMHB Connects Clients to Empowering Resources and Supports to Assist in Making Helpful Decisions for One's Family.

HMHB recognizes that one way to preserve families is to prevent child maltreatment and avert the need for foster care placement before it arises. Although significant eradication of child neglect and maltreatment requires redressing racial and social inequality and poverty with generous social support, HMHB seeks to provide some necessary, non-coercive support to system-involved pregnant women to avoid foster care placement for their newborn. Pregnant women in resource-deficient neighborhoods like the South Bronx often have limited options for support and guidance throughout their pregnancy. Many of our clients grew up in foster care themselves and may not have support on which they can rely as they prepare for their baby's arrival. The womb-to-foster-care pipeline inherent to vulnerable communities creates a justifiable sense of fear and mistrust in the very institutions tasked with providing guidance during this time. Thus, these same women are often hesitant or completely avoidant of reaching out to agencies, all of which are child-protection-affiliated or mandated reporters to the child protection system, for support.

Rather than coerce mothers into services and treatment with the threat of child apprehension, HMHB lawyers, social workers, and clients participate in collaborative strategic planning to identify community resources available to parents with newborns and young children. HMHB aims to connect pregnant clients to the prenatal care and community-based services that they identify themselves as ones they desire. For example, we provide access to infant and early childhood mental health providers in the community to ensure our clients' access to quality, evidence-based, family-strengthening services before the child is born. The community-based service referrals are driven by our clients' goals and individually tailored to the needs they identify. Services include child care, play groups, respite care, mother-child dyadic therapy, individual counseling, homemaker services, domestic violence counseling, and substance abuse treatment, including family-based care. HMHB prioritizes connecting clients to attachment-based services that benefit all parents and children, rather than services that are focused more on "teaching" a person believed to be deficient how to parent. Parent-child-attachment-based interventions have been demonstrated to promote secure attachment.¹⁵⁷ Reducing the

¹⁵⁷ Barry Wright & Elizabeth Edginton, *Evidence-Based Parenting Interventions to Promote Secure Attachment: Findings From a Systematic Review and Meta-Analysis*, GLOBAL PEDI-

harm of substance abuse, mental illness, and domestic violence prior to birth or removal can also promote attachment and allow parents to be more psychologically available to engage in reflective functioning and understanding.

Clients are counseled that these services are “voluntary” and that neither ACS nor the court has required them, but that participation in self-identified services during pregnancy before the baby is born will optimize the chance that the baby will not be removed. It is important to acknowledge that the “voluntariness” of the client’s decision to participate is qualified due to the coercive nature of the system. We have found, however, that our clients who feel that they need services willingly participate in services prior to birth and before ACS has required them and are much more likely to report getting something out of the services and succeed in completing them. HMHB also provides material support to overcome the all too common barriers to engaging in services such as clothing, transportation assistance, and advocates who can accompany our clients to the intake and appointments.

E. HMHB Provides Isolated Pregnant Women With Children in the System with a Supportive Community

Our clients often express feelings of shame and embarrassment about their involvement in the child protection system. HMHB helps empower pregnant women with older children in foster care and provide space for community, connection, and positivity. HMHB facilitates a weekly support group for pregnant and postpartum system-involved women. The participants drive the agenda and suggest topics for discussion including nutrition, reducing the harm of drug use, domestic violence, job searching and resume building, and tips for negotiating with aggressive caseworkers. We partner with organizations like Ancient Song Doula Services¹⁵⁸ and Planned Parenthood¹⁵⁹ to conduct workshops focused on reproductive planning, nutrition, and postpartum health. Many of the participants have remained connected outside of the group and provide continued support to one another after their babies are born.

ATRIC HEALTH, June 22, 2016, at 1, 2-3, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4995667/pdf/10.1177_2333794X16661888.pdf [<https://perma.cc/D8N3-9C7A>].

¹⁵⁸ ANCIENT SONG DOULA SERVICES, <http://www.ancientsongdoulaservices.com/> [<https://perma.cc/B8V2-MGUB>] (last visited Nov. 25, 2016).

¹⁵⁹ PLANNED PARENTHOOD, <https://www.plannedparenthood.org/planned-parent-hood-new-york-city/who-we-are> [<https://perma.cc/6ZZU-VTKA>] (last visited Nov. 25, 2016).

F. HMHB Seeks To Provide Child-Protection-System-Involved Pregnant Women with Birth Dignity and Doula Support

When a woman makes the difficult choice to terminate her pregnancy, the HMHB team honors that choice and connects her with community-based supports if she is interested in receiving them. For women who choose to continue their pregnancies, the HMHB team honors that choice as well. HMHB partners with Ancient Song Doula Services,¹⁶⁰ which seeks to empower women, especially low-income women of color, to make healthful, informed decisions about their lives. For parents who decide to carry their pregnancies to term, the HMHB team views the child's birth as a reason for motivation, rather than a moment of judgment and anxiety. Too often, our clients experience a total lack of control over their birth experience. Doulas assigned to clients assist in developing personal birth plans and informing the hospital of the plan. Doulas also support clients in engaging in self-care during pregnancy and postpartum periods, provide education on a range of birthing options, offer breastfeeding support, and serve to ensure the emotional health of our clients during the difficult experiences they face. When our clients give birth, HMHB ensures that they have a team of advocates available to assist them in creating a supportive environment in the hospital and advising them through the anticipated child protective investigation.

G. HMHB is Able to Address Emergency Material Needs of Parents in Crisis

The state's mistrust of poor mothers is undeniably clear; the child protection system is unwilling to provide actual material support to parents, instead providing all available resources to children and foster parents even when supporting parents might allow for the best outcomes for many vulnerable children. Given this context, HMHB intentionally provides direct material assistance to parents when it would aid them in keeping their child in their custody. HMHB participates in The Bronx Defenders Client Emergency Fund,¹⁶¹ a fund created, managed, and run by dedicated individuals on staff and used for clients in need. Direct assistance, even in small amounts, can be the difference between a child being removed or remaining at home. Through the Client Emergency

¹⁶⁰ ANCIENT SONG DOULA SERVICES, *supra* note 158.

¹⁶¹ *Client Emergency Fund*, BRONX DEFENDERS, <http://www.bronxdefenders.org/programs/client-emergency-fund/> [<https://perma.cc/SN3R-CQGY>] (last visited Nov. 25, 2016).

Fund, HMHB has provided clients in need with groceries, strollers, diapers, cribs, school uniforms, cleaning supplies, breast pumps, minutes on a phone to stay in touch with case workers, transportation costs, beds so that children can visit, and the fees for licensing exams. Although HMHB's Client Emergency Fund cannot, in any long-lasting way, improve the economic status of our clients, the provision of direct support expresses trust in the responsibility of its recipients and can go a long way in preventing the kind of emergency that can result in further child-protection-involvement. In this way, HMHB resists the notion that the hardships faced by families in the child protection system are due to maternal, rather than material, deprivations.

H. HMHB Has Succeeded In Keeping Children Out of Foster Care and Home with Their Parents

Since its inception, HMHB has worked with more than 224 pregnant women and 54 parents of children ages zero to three, with the goal of providing an oppressed and targeted community of women with choices regarding their families. With the support and advocacy provided by HMHB, 86 percent of the newborns were able to remain with their immediate family (66 percent with the mother and 20 percent with the father or other relative), and only 14 percent were placed in non-kinship foster care. In contrast, in the last fiscal year, of the 328 babies born to mothers with children in foster care city-wide, 65 percent of those newborns entered foster care.¹⁶²

HMHB advocates provide linkages to supportive services aimed at assisting our clients in achieving their goals; in the last fiscal year alone, our team provided 123 referrals to quality, community-based providers. More broadly, we advocate for our clients' rights to bear and raise their own children without undue government interference. By aligning our mission with the reproductive justice movement, we seek to connect our work defending parents to a broader conversation about child welfare and reproductive freedom.

V. A CALL TO ACTION

Family defense and advocacy on behalf of pregnant women in the child protection system are fairly understood as worthy work

¹⁶² Memorandum from N.Y. State Admin. for Children's Servs. Office of Research & Analysis, Safety Alert 14 Outcomes 10 (Sept. 16, 2015) (on file with author).

that is part of the movement for reproductive justice. The system is unequally applied to poor families of color. Rather than targeting systemic reasons for family hardship to prevent maltreatment, it blames individual parents after a crisis has already occurred. It is too punitive, relying on child removal, foster care, and family dissolution, rather than providing the material resources that would actually assist struggling families and better the welfare and well-being of society's children. By separating children from their parents, placing them in foster care, and legally dissolving their families, the system does further harm to the individuals, families, and communities it seeks to serve. Unwilling to honor poor families and unable to adequately address their real problems, the system seeks to draw lines between those "deserving" parents who should retain custody of their children and those who should not. These lines are based not in fair analysis of risk to the child or a parent's ability to care for their child, but in assumptions about race, class, and gender and on ability to comply with and meet the expectations of the system. If a baby is born to a woman who is already system-involved, these same forces are at play, almost guaranteeing the placement of the newborn in foster care as well.

In addition to providing the high-quality legal defense owed to all clients who are accused by the state of wrongdoing, family defense advocates also play an important role in challenging the presumptions and misconceptions about system-involved parents and the policies and practices that target and devalue their reproductive decisions. Implementing HMHB, a reproductive-justice-informed, advocacy-based program in a holistic public defender office, with its hallmark duties of loyalty and confidentiality, is such an attempt. At its core, it seeks to secure the right to parent for women in the city who are most vulnerable to losing their children. In so doing, HMHB demonstrates respect for their reproductive decisions and challenges the central presumption of the child protection system, steeped in racist and classist values, that the majority of parents caught up in that system cannot raise their children. Programs like HMHB are necessary because of the very fundamental inequalities of the system that the RJ movement calls on us to eradicate. With its holistic advocacy and reproductive justice approach, HMHB has been successful at curbing the womb-to-foster-care pipeline for many system-involved women in the South Bronx by ensuring that they raise their newborns from birth.

While a strong family defense model and innovations that focus on challenging specific coercive functions of the system (like

CSA 14) are critical, improving legal resources for system-involved parents is not the fundamental change necessary to improve the welfare of families in the South Bronx. Despite its success on behalf of individual parents, HMHB's location within a legal system means it is limited in its impact.¹⁶³ The very real power of the child protection system over families, and the consequences for parents if they fail to meet the system's demands, are real and devastating and borne alone by the client and her family. To the degree that one can turn to the court to challenge an injustice or unfair decision by ACS, decades of research finds that the more powerful parties continue to win over the less powerful.¹⁶⁴ This means that the rights and goals of our clients are continually contested and negotiated and more direct challenges to ACS authority and decisions are often conceded in order to meet the client's goal of retaining or regaining custody of her child. A client may justifiably choose not to challenge ACS's view of her family, even if it is blatantly incorrect or steeped in racist and classist ideology, and bend to its demands, so that ACS's intervention in her life will end more quickly. Because so much is at stake for our clients, HMHB is limited in its ability to challenge the system's structural inequality and address the systemic reasons for our families' hardship. System-involved pregnant women and their newborns fare better within the existing system with HMHB, but the system's structural inequality remains.

The RJ movement seeks comprehensive, long-term solutions to social justice issues with the goal of achieving complete physical, mental, spiritual, political, and economic well-being of women and girls.¹⁶⁵ While a system to protect children who are seriously abused and unsafe in their homes is necessary, addressing the problems of poor families through a punitive child protection regime perpetuates stratified reproduction in this country.¹⁶⁶ An RJ vision requires the restructuring of public welfare so that all families have real economic and social support and the need for such support is not tied to a system of child removals and foster care. It must pose a challenge to the fundamental flaws in the child protection system, which include, but are not limited to, its unequal application to poor families and families of color and its conflation of poor parents with poor parenting. We must work to transform this unpopular and dreaded system into one known for its fairness, its

¹⁶³ See Luna & Luker, *supra* note 11, at 329.

¹⁶⁴ *Id.*

¹⁶⁵ Ross, *supra* note 11, at 14; ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, *supra* note 11, at 2.

¹⁶⁶ LEE, *supra* note 33, at 4.

respect and support for the families it serves and their decisions regarding whether and when to bear children, and its willingness to truly help and work tirelessly to keep families together.

SAFEGUARDING THE RIGHTS OF PARENTS WITH INTELLECTUAL DISABILITIES IN CHILD WELFARE CASES: THE CONVERGENCE OF SOCIAL SCIENCE AND LAW

Robyn M. Powell, MA, JD[†]

INTRODUCTION	127
I. PARENTING WITH AN INTELLECTUAL DISABILITY: A HISTORY OF DISCRIMINATION	130
A. <i>From Sterilization to Marriage Restrictions</i>	130
B. <i>Parenting with an Intellectual Disability Today: The Eugenics Movement’s Backdoor?</i>	132
II. IMPLICIT AND EXPLICIT BIAS: THE NEED FOR INFORMED POLICIES AND ADJUDICATION	134
A. <i>Bias within the Child Welfare System</i>	135
B. <i>Termination of Parental Rights Statutes</i>	137
C. <i>Judicial Decision-Making</i>	139
III. OVERVIEW OF THE SOCIAL SCIENCE ON PARENTS WITH INTELLECTUAL DISABILITIES AND THEIR CHILDREN	141
A. <i>The Effect of Intellectual Disabilities on Parenting</i>	142
B. <i>Supports and Services for Parents with Intellectual Disabilities and their Children</i>	143
C. <i>Limitations of Research</i>	
IV. USING SOCIAL SCIENCE TO ADVANCE FAMILY DEFENSE ..	145
A. <i>Leveraging Social Science Inside and Outside of the Courtroom</i>	145
B. <i>Areas of Future Research and the Need for Collaboration</i>	147
CONCLUSION	148

INTRODUCTION

In November 2012, Sara Gordon, a then 19-year-old woman with an intellectual disability, gave birth to her daughter, Dana.¹

[†] Lurie Institute for Disability Policy Fellow and Ph.D. Candidate, Heller School for Social Policy and Management, Brandeis University.

¹ This narrative is adapted from Elizabeth Picciuto, *Mom with Disabilities and Daughter Reunited After Two-Year Court Battle*, DAILY BEAST (Mar. 16, 2015, 5:15 AM), <http://www.thedailybeast.com/articles/2015/03/16/mom-with-disabilities-and-daughter-reunited-after-two-year-court-battle.html> [https://perma.cc/9YUE-T5MR]. See Letter from U.S. Dep’t of Justice, Civil Rights Div. & U.S. Dep’t of Health & Human Serv., Office for Civil Rights, to Erin Deveney, Interim Comm’r, Mass. Dep’t

Two days after giving birth, while still in the hospital, the Gordon family was referred to the Massachusetts Department of Children and Families (hereinafter “DCF”) due to allegations of neglect. During an emergency investigation, DCF observed that Sara experienced difficulties with feeding and diapering her newborn. Thereafter, DCF asserted that Sara was not able to adequately care for her daughter owing to Sara’s intellectual disability. Dana was then placed in foster care.

Sara’s battle to be reunited with her daughter ensued for two years, three months, and 12 days. During this time, Sara was only allowed to visit with Dana one time per week for one hour. Trying to demonstrate her fitness to raise her daughter, Sara successfully completed numerous parenting education classes. Sara was also evaluated by a psychologist skilled at assessing the capabilities of parents with intellectual disabilities, who determined that with appropriate supports, including Sara’s family, which was committed to supporting the mother and daughter, Sara could safely care for Dana. Nonetheless, DCF changed the permanency goal, which determines whether the family will be reunited or permanently separated, from reunification to adoption. In January 2015, the Department of Justice and Department of Health and Human Services issued a joint letter of findings, holding that DCF violated both Section 504 of the Rehabilitation Act (hereinafter “Section 504”)² and Title II of the Americans with Disabilities Act (hereinafter “ADA”)³ by (1) acting based on assumptions about Sara’s ability to care for her daughter rather than conducting an individualized assessment of her needs; (2) failing to provide Sara supports and services toward reunification; (3) refusing to recognize Sara’s continued engagement and progress; and (4) failing to develop and implement appropriate policies and practices concerning the agency’s legal obligations vis-à-vis disability civil rights laws.⁴ Two months later, Sara and Dana were reunited.

Tragically, the heartbreaking story of Sara and Dana is not unique or uncommon. Each day, parents with intellectual disabilities contend with prejudicial child welfare policies and practices that are based on the presumption that they are unfit to raise their children.⁵ According to the National Council on Disability, an in-

of Children & Families (Jan. 29, 2015) [hereinafter Letter of Findings], http://www.hhs.gov/sites/default/files/mass_lof.pdf [<https://perma.cc/7GPB-ARUP>].

² Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2014).

³ Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (1990).

⁴ Letter of Findings, *supra* note 1.

⁵ NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF

dependent federal agency that advises the President and Congress on policies affecting people with disabilities, “the rate of removal of children from families with parental disability—particularly psychiatric, intellectual, or developmental disability—is ominously higher than rates for children whose parents are not disabled. And this removal is carried out with far less cause, owing to specific, preventable problems in the child welfare system.”⁶

In his groundbreaking Harvard Law Review article, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, Professor Hayman posited that the presumption that parents with intellectual disabilities are unfit “is both unjust and empirically invalid.”⁷ To argue his assertion, Hayman used the extant scientific studies—which at the time, were scarce—to demonstrate that parents with intellectual disabilities are not inherently unfit.⁸

As Sara Gordon’s story illustrates, more than two decades since Hayman authored his article, little has changed in terms of how the child welfare system or law treats parents with intellectual disabilities. Nonetheless, there now is a sizable and growing body of scientific evidence relative to parents with intellectual disabilities and the wellbeing of their children.⁹ Indeed, today, there are more than 450 published studies examining these families.¹⁰

This article explores how legal scholarship, advocacy, and policymaking can be better informed by social science. Part I provides a brief historical perspective on how the rights of parents with intellectual disabilities have evolved over time. Thereafter, analyzing the language in state dependency statutes and child welfare adjudications, Part II examines the implicit and explicit bias that exists and the need for informed policies and decisions. Part III considers how the law can learn from social science by highlighting findings from contemporary social science research concerning these families. Finally, Part IV concludes by highlighting how decision-

PARENTS WITH DISABILITIES AND THEIR CHILDREN 43 (2012) [hereinafter ROCKING THE CRADLE], http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/R7RB-RTXS].

⁶ *Id.* at 43.

⁷ Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1202 (1990).

⁸ *Id.* at 1204 (“[T]here is no empirical support either for the proposition that mentally retarded parents are definitionally or presumptively unfit, or for the proposition that mentally retarded parents are definitionally or presumptively incapable of remedying deficiencies in their parenting.”).

⁹ See, e.g., *Library of References and Abstracts*, HEALTHY START, <http://www.healthystart.net.au/index.php/for-professionals/explore-the-database> [https://perma.cc/DXJ4-PVBV] (last visited May 12, 2016).

¹⁰ *Id.*

making in dependency cases as well as public policy can and should benefit from social science research.

I. PARENTING WITH AN INTELLECTUAL DISABILITY: A HISTORY OF DISCRIMINATION

“History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again.”

Maya Angelou¹¹

The belief that people with intellectual disabilities are unfit to raise children has persisted over time and across jurisdictions. Forced sterilizations—initially grounded in eugenics ideology—grew in popularity across the United States and provided a legal mechanism by which to restrict people with intellectual disabilities from procreating.¹² As time progressed, and compulsory sterilizations lessened, the curtailment of the rights of people with intellectual disabilities to form families evolved into restrictions on marriage.¹³ Although neither practice has been completely eradicated, today the belief that people with intellectual disabilities should not have children is manifested through discriminatory child welfare practices that presume unfitness.¹⁴ This Part explores how the rights of people with intellectual disabilities to form and maintain families have evolved over time and how eugenics-based ideologies continue to inform contemporary policies and practices.

A. *From Sterilization to Marriage Restrictions*

The United States has a dark and shameful history of restricting people with intellectual disabilities from having families. Beginning in the early twentieth century with the eugenics movement, those considered “socially inadequate,”¹⁵ and especially women with intellectual or psychiatric disabilities, were routinely subjected

¹¹ Maya Angelou, Poem Delivered at the Inauguration of President William J. Clinton: On the Pulse of Morning (Jan. 20, 1993), in MAYA ANGELOU, *ON THE PULSE OF MORNING* (1993).

¹² See generally Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 *FRONTIERS L. CHINA* 53 (2016) (analyzing how restrictions on sexual, reproductive, and parenting rights for people with disabilities have evolved over time and across jurisdictions).

¹³ Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 *DEV. MENTAL HEALTH L.* 1, 1-2 (1997).

¹⁴ See generally *ROCKING THE CRADLE*, *supra* note 5, at 71-108.

¹⁵ J.H. Landman, *The Human Sterilization Movement*, 24 *AM. INST. CRIM. L. & CRIMINOLOGY* 400, 400 (1934).

to forced sterilizations.¹⁶ Grounded in the supposition that the “human race [could] be gradually improved and social ills simultaneously eliminated through a program of selective procreation,”¹⁷ eugenics targeted “the mentally defective, the mentally diseased, the physically defective, such as the blind, the deaf, the crippled and those ailing from heart disease, kidney disease, tuberculosis and cancer.”¹⁸

The eugenics movement centered on precluding those who society viewed as “unfit for parenthood” from reproducing¹⁹ and the belief that their offspring would be onerous to society.²⁰ In 1927, involuntary sterilization gained the support of the United States Supreme Court in the infamous *Buck v. Bell* decision.²¹ Carrie Buck was a purportedly “feeble-minded” woman institutionalized in Virginia.²² She was also the daughter of a feeble-minded mother committed to the same institution.²³ At age seventeen, Buck became pregnant after being raped; her daughter Vivian ostensibly also had an intellectual disability and was deemed feeble-minded as well.²⁴ Following Vivian’s birth, the institution sought to sterilize Buck in accordance with Virginia’s sterilization statute. In upholding Virginia’s statute that permitted institutions to condition release on involuntary sterilization, the Court posited that the law served “the best interest of the patients and of society.”²⁵ Appallingly, in reaching this reprehensible decision, Justice Oliver Wendell Holmes, Jr. declared:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the

¹⁶ See generally PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND Buck v. Bell* 91 (2008).

¹⁷ Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 1 (1996).

¹⁸ Landman, *supra* note 15, at 402.

¹⁹ See Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 948 (1992) (“The purpose of these laws was to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior.”).

²⁰ Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 865 (2004); Lombardo, *supra* note 17, at 1-2.

²¹ *Buck v. Bell*, 274 U.S. 200 (1927).

²² *Id.* at 205; see also Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61 (1985) (asserting that Buck was actually not “feeble-minded” but rather institutionalized as a way to hide her rape).

²³ Lombardo, *supra* note 17, at 53.

²⁴ *Buck*, 274 U.S. at 205.

²⁵ *Id.* at 206.

State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, *society can prevent those who are manifestly unfit from continuing their kind*. . . . Three generations of imbeciles are enough.²⁶

Consistent with other compulsory sterilization laws, Virginia's statute was premised on the belief that "many defective persons . . . would likely become by the propagation of their kind a menace to society[.]"²⁷ Disgracefully, the eugenics movement led to the passage of forced sterilization laws in more than 30 states,²⁸ with over 65,000 Americans sterilized by 1970.²⁹

The eugenics movement also inspired a number of states to pass laws that banned people with disabilities from marrying.³⁰ Indeed, the language used in one Connecticut statute was emblematic; it prohibited "epileptics, imbeciles, and feebleminded persons" from marrying or having extramarital sexual relations before the age of forty-five.³¹ In 1974, a study found that nearly 40 states had laws forbidding people with disabilities, mostly intellectual or psychiatric disabilities, from marrying.³² Nearly 20 years later, in 1997, 33 states still had statutes limiting or restricting people with intellectual disabilities from marrying.³³ Three rationalizations, all which are akin to those raised during the eugenics era to support involuntary sterilization of people with intellectual disabilities, have been traditionally advanced to justify these restrictions: "the potential children must be protected; people with mental retardation themselves must be protected; and society at large must be protected."³⁴

B. Parenting with an Intellectual Disability Today: The Eugenics Movement's Backdoor?

On July 26, 1990, President George H. W. Bush signed the

²⁶ *Id.* at 207 (emphasis added).

²⁷ See Eugenical Sterilization Act, Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

²⁸ Lombardo, *supra* note 17, at 1-2, n.2.

²⁹ ROCKING THE CRADLE, *supra* note 5, at 15, 39.

³⁰ Pietrzak, *supra* note 13, at 35.

³¹ Robert J. Cynkar, Buck v. Bell: "Felt Necessities" v. Fundamental Values?, 81 COLUM. L. REV. 1418, 1432 (1981).

³² PRESIDENT'S COMM. ON MENTAL RETARDATION, SILENT MINORITY 33 (1974).

³³ Pietrzak, *supra* note 13, at 1-2.

³⁴ *Id.* at 35.

ADA into law, declaring “Let the shameful wall of exclusion finally come tumbling down[!]”³⁵ In passing the ADA, with the goal of reducing stigma and discrimination against people with disabilities, Congress stated that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]”³⁶

Today, 26 years since the passage of the ADA, people with intellectual disabilities are enjoying greater opportunities than ever before to live and work in their communities.³⁷ To that end, many are now choosing to have children—a natural desire for most people. Indeed, as people with intellectual disabilities continue to be increasingly integrated into their communities, the number of parents with intellectual disabilities is expected to grow.³⁸

Notwithstanding many gains in civil rights for people with intellectual disabilities—and the growing number of people with intellectual disabilities who are becoming parents—policies and practices resembling eugenics ideologies endure that restrict them from forming families. Strikingly, although not as popular as previously, coercive sterilization of people with intellectual disabilities persists.³⁹ Moreover, several states still restrict people with disabilities, mostly intellectual or psychiatric disabilities, from marrying.⁴⁰

Most notably, as Sara Gordon’s aforementioned heartbreaking story illustrates, people with intellectual disabilities who become parents face significant discrimination based on pervasive stereotypes that view them as unfit to raise children, particularly within

³⁵ George H.W. Bush, U.S. President, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), <https://bush41library.tamu.edu/archives/public-papers/2108> [<https://perma.cc/6PST-P7FG>].

³⁶ Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (1990).

³⁷ See generally DAVID L. BRADDOCK ET AL., *THE STATE OF THE STATES IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES* (10th ed. 2015).

³⁸ ROCKING THE CRADLE, *supra* note 5, at 45 (“Millions of parents throughout the United States have disabilities, and this number is likely to grow as people with disabilities become increasingly independent and integrated into their communities.”); see also Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 401 (John R. Lutzker ed., 1998).

³⁹ ROCKING THE CRADLE, *supra* note 5, at 15 (“[S]everal states still have some form of involuntary sterilization law on their books.”).

⁴⁰ See, e.g., KY. REV. STAT. ANN. § 402.990(2) (West 1996) (“Any person who aids or abets the marriage of any person who has been adjudged mentally disabled, or attempts to marry, or aids or abets any attempted marriage with any such person shall be guilty of a . . . misdemeanor.”); TENN. CODE ANN. § 36-3-109 (1950) (“No [marriage] license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.”).

the child welfare system.⁴¹ Indeed, research has found that parents with intellectual disabilities have their children permanently removed by child welfare agencies at rates ranging from 30% to 80%.⁴² Hence, “[w]hile child protection authorities and the courts continue to respond to the stereotypical beliefs suggested by the label of intellectual disability rather than to each parent’s individual abilities and their unique circumstances, parents with intellectual disability are uniquely suffering disadvantage and discrimination.”⁴³

II. IMPLICIT AND EXPLICIT BIAS: THE NEED FOR INFORMED POLICIES AND ADJUDICATION

The child welfare system’s bias against parents with intellectual disabilities is “persistent, systemic, and pervasive[.]”⁴⁴ Commencing with the initial report of child maltreatment, parents with intellectual disabilities encounter prejudicial policies and practices throughout every step of their involvement with the child welfare system.⁴⁵ Indeed, parents with intellectual disabilities and their children “face multiple layers of discrimination throughout the parental rights termination process.”⁴⁶

This Part examines the many ways in which child welfare’s policies and practices perpetuate bias—both implicitly and explicitly—against parents with intellectual disabilities and their children. This Part begins with a discussion of the child welfare system broadly followed by an analysis of state dependency statutes and child welfare adjudications involving parents with intellectual disabilities. By considering the ongoing and pervasive bias against

⁴¹ See *supra* Introduction and note 1 for an overview of Sara Gordon’s story.

⁴² Tim Booth & Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1 J. POL’Y & PRAC. INTELL. DISABILITIES 179, 180 (2004); Tim Booth et al., *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD & FAM. SOC. WORK 353, 355 (2005); Feldman, *supra* note 38, at 401; Gwynnyth Llewellyn et al., *Prevalence and Outcomes for Parents with Disabilities and their Children in an Australian Court Sample*, 27 CHILD ABUSE & NEGLECT 235, 239 (2003); David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD & ABUSE NEGLECT 621, 624 (2011).

⁴³ David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 310 (2002). See also Hayman, *supra* note 7, at 1219 (“[T]here is no reason to believe that mentally retarded parents are inherently unable to meet the physical needs of their children.”).

⁴⁴ ROCKING THE CRADLE, *supra* note 5, at 15, 51.

⁴⁵ *Id.* at 71-107.

⁴⁶ Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1438 (1995).

parents with intellectual disabilities involved with the child welfare system, this Part will demonstrate the need for policies and judicial decisions that are reflective of the current state of knowledge concerning these families.

A. *Bias within the Child Welfare System*

The goal of the child welfare system is laudable: “to promote the well-being, permanency, and safety of children and families by helping families care for their children successfully or, when that is not possible, helping children find permanency with kin or adoptive families.”⁴⁷ Nonetheless, substantial empirical research has found these goals are carried out in ways that perpetuate bias against families from marginalized populations. For example, studies have consistently found that minority families are disproportionately involved with the child welfare system and disproportionately have children removed from the home.⁴⁸ Low-income families are also vulnerable to high rates of child welfare involvement.⁴⁹

Comparable to other historically oppressed groups,⁵⁰ parents with intellectual disabilities and their children also experience overrepresentation within the child welfare system. According to the Child Welfare Information Gateway, disproportionality occurs when there is “underrepresentation or overrepresentation of a . . . group compared to its percentage in the total population.”⁵¹ Although the prevalence of parents with intellectual disabilities is difficult to ascertain due to the lack of reliable data, the estimated number of parents with intellectual disabilities is generally re-

⁴⁷ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 7 (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/QR8L-LLRH>].

⁴⁸ See, e.g., Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2001) (“The disproportionate number of black children in America’s child welfare system is staggering.”).

⁴⁹ Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 218 (2013) (“The nation’s poorest children, not surprisingly, make up most of the foster care population.”).

⁵⁰ See Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (1990) (amended 2008) (“[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”).

⁵¹ CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 2 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/4NTF-QV4L>].

ported at approximately 0-3% of the total population.⁵² At the same time, a recent analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003) found that 27.3% of all child welfare court applications involved children of parents with intellectual disabilities.⁵³ Moreover, a recent study in the United States revealed that in 2012 at least 19% of children in the foster care system had a parent with a disability.⁵⁴

As Sara Gordon's story demonstrates,⁵⁵ bias pervades the child welfare system, and "[a]t any step in the process, societal prejudices, myths, and misconceptions may rear their heads[.]"⁵⁶ Indeed, removal of children born to parents with intellectual disabilities shortly after birth based on a presumption they will be unfit is routine.⁵⁷ In Sara's case, this bias first appeared during the intake when the child welfare worker read the hospital's report that she had difficulty feeding and diapering her newborn and decided that Sara "was not able to comprehend how to handle or care for the child due to the mother's mental retardation."⁵⁸ Of course, bias against parents with intellectual disabilities is not limited to

⁵² See, e.g., Susan McGaw, *Parenting Exceptional Children*, in HANDBOOK OF PARENTING: THEORY AND RESEARCH FOR PRACTICE 213, 214 (Masud Houghugh & Nicholas Long eds., 2004) (explaining that estimates across various countries have found that parents with intellectual disabilities comprise between .004% and 1.7% of parent population). According to data from the U.S. American Census Survey (ACS), 2.3% of parents have a cognitive disability. However, ACS data precludes further breakdown of parents with cognitive disabilities (e.g., psychiatric disability, intellectual disability, traumatic brain injury). *Number and Characteristics of Parents with Disabilities Who Have Children Under 18, 2008-09*, THROUGH THE LOOKING GLASS, <https://lookingglass.org/pdf/States-Data/TLG-Parents-with-Disabilities-US-Demographics.pdf> [<https://perma.cc/3PMZ-VQTQ>] (last visited June 5, 2016).

⁵³ David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 627 (2011); see also Carol G. Taylor et al., *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 394-95 (1991) (examining 206 child welfare court cases before Boston Juvenile Court and finding that 31 cases - roughly 15% - involved parents with low IQ).

⁵⁴ Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERV. REV. 22, 26 (2016).

⁵⁵ See *supra* Introduction and note 1.

⁵⁶ Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 402 (2000).

⁵⁷ Watkins, *supra* note 46, at 1438 ("[P]resumptions of unfitness are most apparent in cases where the parent has never actually had custody of the child. Intervention in these cases often takes place before birth, even though the parent has not done anything to harm or threaten to harm the child.").

⁵⁸ Letter of Findings, *supra* note 1, at 5 (quoting DCF's Intake Report in Gordon's case).

the initial investigation into a report of child maltreatment.⁵⁹ For example, parents with intellectual disabilities and their children are routinely denied—or proffered inappropriate—family reunification and preservation services.⁶⁰ Similarly, parents with intellectual disabilities are often denied their rights pursuant to disability civil rights laws, such as the provision of reasonable accommodations.⁶¹ Moreover, child welfare workers lack proper training on working with families that involve parents with intellectual disabilities.⁶² The following two sections examine the ways in which bias against parents with intellectual disabilities and their children is manifested through state dependency statutes and judicial decision-making.

B. Termination of Parental Rights Statutes

The law has a long and shameful history of trying to restrict people with intellectual disabilities from raising children. Today, this curtailment of parental rights is routinely carried out vis-à-vis

⁵⁹ See ROCKING THE CRADLE, *supra* note 5, at 76-84 (discussing the disparate impact of the child welfare system on parents with disabilities and their children). See generally Traci L. LaLiberte, *Are we prepared? Child Welfare Work with Parents with Intellectual and/or Developmental Disabilities*, 7 J. PUB. CHILD WELFARE 633, 635-36 (2013) (discussing how child welfare policies and practices are inherently discriminatory against parents with intellectual disabilities and their children).

⁶⁰ Watkins, *supra* note 46, at 1438 (“[P]arents labeled developmentally disabled are often not offered reunification services because they are presumed incapable of learning how to parent. Finally, when reunification services are offered, they often do not take into account the parent’s disability, so that the primary condition that led to state intervention is not addressed.”). This problem also exists for other populations that face discrimination in the child welfare system. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 16-20, 23, 24, 71 (2002) (asserting that inadequate family reunification services are offered to black children and parents in the child welfare system).

⁶¹ JENIECE SCOTT ET AL., UPENN COLLABORATIVE ON CMTY. INTEGRATION & JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, SUPPORTING PARENTS WITH PSYCHIATRIC DISABILITIES: A MODEL REUNIFICATION STATUTE 5, http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/A_Model_Reunification_Statute.pdf [<https://perma.cc/6UPY-R34F>] (last visited June 6, 2016) (“Although our society has afforded parents with [intellectual] disabilities legal rights to receive accommodations, these rights are routinely given short shrift in the child welfare system.”); ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS. & DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf [<https://perma.cc/D8XD-JEEC>] (describing the legal responsibilities of child welfare agencies and courts).

⁶² See generally LaLiberte, *supra* note 59, 636-37, 647-48, 653 (discussing the lack of training that child welfare workers receive concerning working with families that include parents with intellectual disabilities).

state dependency statutes that unjustly discriminate against parents with intellectual disabilities. This is particularly notable because “[t]he entire parental rights termination process, from initial intervention to final adjudication, is driven by statute.”⁶³

Strikingly, nearly two-thirds of dependency statutes (35 states) include intellectual disabilities as a factor for terminating parental rights.⁶⁴ For example, Nevada’s statute provides,

In determining neglect by or unfitness of a parent, *the court shall consider, without limitation*, the following conditions which may diminish suitability of a parent:

1. Emotional illness, mental illness or *mental deficiency of the parent* which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.⁶⁵

As noted by the National Council on Disability, “[s]uch statutes are examples of the oppression ADA proponents sought to eradicate, and they run entirely counter to the letter of the law, which prohibits state and local agencies, such as those in the child welfare system, from categorically discriminating on the basis of disability.”⁶⁶ Hence, “[i]f the label is not used to help, it is inevitably used to hurt.”⁶⁷ Moreover, while the majority of statutes require a nexus be shown between the parent’s disability and an actual detriment to the child, these statutes are typically interpreted to allow broad assumptions concerning the abilities of parents with intellectual disabilities to inform these cases.⁶⁸

⁶³ Watkins, *supra* note 46, at 1434.

⁶⁴ Elizabeth Lightfoot et al., *The Inclusion of Parental Disability in State Termination of Parental Rights Statutes: A State of the States*, CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, UNIV. OF MINN., <http://cascw.umn.edu/portfolio-items/disability-map/> [<https://perma.cc/J7N5-5V4F>] (last visited Sept. 19, 2016) (providing a state-by-state analysis of state dependency statutes and the inclusion of parental disability).

⁶⁵ NEV. REV. STAT. § 128.106(1)(a) (2015) (emphasis added). For other examples of statutes that allow the state to terminate parental rights based in part on a parent’s intellectual disabilities, see ALA. CODE § 12-15-319(a)(2) (2008); ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2014); N.J. STAT. ANN. § 9:2-19 (West 2013); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2016); N.C. GEN. STAT. § 7B-1111(a)(6) (2013).

⁶⁶ ROCKING THE CRADLE, *supra* note 5, at 84; *see also* Americans with Disabilities Act, 42 U.S.C. § 12132 (1990) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

⁶⁷ Hayman, *supra* note 7, at 1269.

⁶⁸ Watkins, *supra* note 46, at 1438 (“[M]any statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of individual parents; beliefs about the parenting abilities of the group labeled

In addition to the dozens of state laws that permit the consideration of parental intellectual disability as a factor for terminating parental rights, statutes in six states (Alabama,⁶⁹ Alaska,⁷⁰ Arizona,⁷¹ California,⁷² Kentucky,⁷³ and South Carolina⁷⁴) allow child welfare agencies to bypass the provision of reasonable efforts based on the premise that the parent's intellectual disability "renders him or her incapable of utilizing those services[.]"⁷⁵ Hence, "a parent's disability often serves as a dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child."⁷⁶

C. *Judicial Decision-Making*

Bias against parents with intellectual disabilities is perhaps most rampant once these cases reach the courtroom. Indeed, "[a]lthough the statutes generally require evidence of some connection between a parent's disability and her ability to parent, the level of proof required varies from state to state, and within many states, *from case to case*."⁷⁷ Hence, a judge's own preconceived notions about the ability of people with intellectual disabilities to raise children can color their judgment in these cases.⁷⁸

Analysis of termination of parental rights cases involving parents with intellectual disabilities reveals the great extent to which bias can inform these decisions.⁷⁹ Indeed, "[a]n inherent problem in this group [of cases] is that the termination is not simply based on the parent's past actions but on predictions about their future

developmentally disabled are assumed to hold true for all parents with developmental disabilities.").

⁶⁹ ALA. CODE § 12-15-312(c)(1)(e) (2008).

⁷⁰ ALASKA STAT. § 47.10.086(c)(5) (2013).

⁷¹ ARIZ. REV. STAT. ANN. § 8-846(D)(1)(b) (2014).

⁷² CAL. WELF. & INST. CODE § 361.5(b)(2) (West 2012).

⁷³ KY. REV. STAT. ANN. § 610.127(6) (West 2013).

⁷⁴ S.C. CODE ANN. § 63-7-1640(C)(7) (2010).

⁷⁵ Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 135, 168 (2008) (quoting CAL. WELF. & INST. CODE § 361.5(b)(2) (West 2006)).

⁷⁶ Watkins, *supra* note 46, at 1444.

⁷⁷ *Id.* at 1435 (emphasis added).

⁷⁸ For a thorough analysis of case law involving parents with intellectual disabilities, see generally Rachel L. Lawless, Comment, *When Love is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability*, 37 CAP. U. L. REV. 491 (2008).

⁷⁹ *But cf. In re Welfare of Children of B.M.*, 845 N.W.2d 558, 560 (Minn. Ct. App. 2014) ("The district court abused its discretion by terminating appellant-father's parental rights when it failed to find that the county undertook reasonable efforts to reunite parent and child.").

ones as well.”⁸⁰ In other words, judges across jurisdictions have based termination of parental rights on the speculation that neglect *may* occur in the future, particularly as the child ages.⁸¹ Another issue raised relates to supports available to the parent and family. Strikingly, some courts have found the availability or efficacy of these supports irrelevant in light of timelines set forth in the Adoption and Safe Families Act (ASFA)⁸² while others have expressed concern regarding reliance on services.⁸³ Moreover, courts may rely on the testimony of inappropriate court-appointed—and at times inconsistent—experts who harbor their own prejudices.⁸⁴ Finally, and perhaps most perplexing and prejudicial, courts have terminated parental rights because the parent’s disability persisted

⁸⁰ Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 554 (2005).

⁸¹ See, e.g., *In re D.W.*, 791 N.W.2d 703, 708-09 (Iowa 2010) (“As D.W. continues to grow and develop, his need for physical, mental, and emotional guidance will only become more challenging.”); *In re Adoption of Ilona*, 944 N.E.2d 115, 121 (Mass. 2011) (citations omitted) (“Two Juvenile Court clinicians issued reports that were considered by the trial judge. In a report dated June 20, 2007, a clinician who had twice interviewed the mother concluded that she had a cognitive impairment, with over-all intellectual ability in the low range. While he did not make a parenting evaluation, he noted that parents with her cognitive limitations ‘often experience significant difficulty in adequately caring for a child, especially as the child becomes older and the developing needs of the child become more complex.’”); *In re Welfare of A.D.*, 535 N.W.2d 643, 649 (Minn. 1995) (internal citations omitted) (“In a termination case, the court ‘relies not primarily on past history, but “to a great extent upon the projected permanency of the parent’s inability to care for his or her child.”’ Thus, we consider whether the inability to care for the child will continue indefinitely.”).

⁸² See, e.g., *In re Shirley B.*, 18 A.3d 40, 43 (Md. 2011) (“In addition to general parenting classes, the Department attempted to connect Ms. B. with services specifically tailored to meet her special needs through various State agencies and outside institutions. Yet, due to economic constraints, funding for these services was non-existent, leaving Ms. B. ineligible to receive them.”); *In re Melissa LL.*, 817 N.Y.S.2d 407, 409 (N.Y. App. Div. 2006) (citations omitted) (“While each respondent’s expert states that it is possible that he or she would be ‘able to properly parent the children in the future,’ it is settled law that ‘[t]he mere possibility that respondent[s]’ condition, with proper treatment, could improve in the future is insufficient to vitiate Family Court’s conclusion”).

⁸³ See, e.g., *In re D.W.*, 791 N.W.2d at 708 (“Furthermore, A.W. was unable to care for D.W. without relying heavily on service providers and her mother.”).

⁸⁴ *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 790 (Md. 2002) (noting that the lower court terminated the parental rights of a father with intellectual disability relying in part on the speculative testimony of a psychologist who was an expert for the state); *In re Melissa LL.*, 817 N.Y.S.2d at 409 (relying on the testimony of a court-appointed psychologist, the court held that clear and convincing evidence established mental retardation “for the foreseeable future,” rendering respondents unable to adequately care for their children). For a discussion on appropriate and accessible parenting assessments, see ROCKING THE CRADLE, *supra* note 5, at 129-38.

(i.e., the parent was not able to become un-disabled).⁸⁵ Thus, although “[a] parent’s right to parent should rarely, if ever, be terminated based upon conjectures and speculation[,]”⁸⁶ the reality for many parents with intellectual disabilities is that they will have their rights terminated based largely on bias and speculation.

III. OVERVIEW OF THE SOCIAL SCIENCE ON PARENTS WITH INTELLECTUAL DISABILITIES AND THEIR CHILDREN

Discrimination against parents with intellectual disabilities is predicated on two overarching assumptions. First, child welfare policies, practices, and adjudications are based—implicitly and at times, explicitly—on the postulation that parents with intellectual disabilities are inherently unfit because of their disability.⁸⁷ Second, parents with intellectual disabilities are often deprived access to adequate—or at times, any—reunification services owing to an assumption that they cannot benefit from supports and services.⁸⁸ As the science shows, however, both presumptions are factually incorrect and dangerous to families.⁸⁹

This Part considers how the law can learn from social science by highlighting findings from contemporary social science research concerning these families. In doing so, this Part examines two central questions: 1) Does a parent’s intellectual disability preclude them from parenting? and 2) Can parents with intellectual

⁸⁵ See, e.g., *In re D.W.*, 791 N.W.2d at 708 (“The case progress reports and DHS service providers’ testimony indicate A.W. has difficulty overcoming her intellectual impairment to adequately provide a safe and reliable home for D.W.”); *In re Adoption of Carlos*, 596 N.E.2d 1383, 1389 (Mass. 1992) (“A judge may properly be guided by evidence demonstrating reason to believe that a parent will correct a condition or weakness that currently disables the parent from serving his or her child’s best interests.”).

⁸⁶ *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d at 789 (Md. 2002).

⁸⁷ Watkins, *supra* note 46, at 1440 (“[T]he labels of developmentally disabled and mentally retarded are often misleading because they have little, if any, predictive value regarding individual capability. Nonetheless, statutes and courts often use a ‘diagnosis’ of developmental disability or mental retardation both to explain past behavior and to predict future behavior.”).

⁸⁸ *Id.* at 1444 (“Perhaps the most blatant element of discrimination in the entire termination process is the routine failure to offer reunification services to parents labeled developmentally disabled or mentally retarded solely on the basis of their disability.”).

⁸⁹ These discriminatory practices also run afoul of the ADA. See Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 275 (“The ADA’s unequivocal rejection of prejudicial stereotypes and inflexible policies that harm people with disabilities could provide an important basis for rethinking child welfare policy toward families in which at least one or more parent has a [disability].”).

disabilities benefit from supports and services? This Part concludes with a brief discussion on the limitations of existing research on these families.

A. *The Effect of Intellectual Disabilities on Parenting*

Despite the longstanding and far-reaching notion that people with intellectual disabilities are categorically unfit to care for their children, science says otherwise. Indeed, studies have consistently found no relationship between intelligence and parenting capabilities.⁹⁰ Nevertheless, some parents with intellectual disabilities and their children, particularly those without appropriate support, are vulnerable to multiple disadvantages, including deleterious health, social isolation, and low socioeconomic status as well as poor developmental outcomes, cognitive delays, and behavioral challenges.⁹¹ Parents with intellectual disabilities, especially mothers (upon whom the majority of studies have focused), are at increased risk of living in poverty, experiencing high parenting stress, and having histories of trauma and abuse.⁹² Yet, many children of parents with intellectual disabilities do not display any delays or worse outcomes than children of parents without intellectual disabilities.⁹³

In an effort to better understand how children of parents with intellectual disabilities are faring, researchers have increasingly sought to ascertain the extent to which contextual characteristics

⁹⁰ See, e.g., Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRIT. J. SOC. WORK 459, 463 (1993) (internal citations omitted) (“There is no clear relationship between parental competency and intelligence A fixed level of intellectual functioning is neither necessary nor sufficient for adequate parenting[,] . . . and the ability of a parent to provide good-enough child care is not predictable on the basis of intelligence alone”).

⁹¹ See generally Int’l Ass’n for the Sci. Study of Intellectual Disabilities Special Interest Research Grp. on Parents and Parenting with Intellectual Disabilities, *Parents Labelled with Intellectual Disability: Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities*, 21 J. APPLIED RES. INTELL. DISABILITIES 296 (2008) [hereinafter IASSID SIRG] (reviewing state of knowledge on parents with intellectual disabilities and their children).

⁹² See Marjorie Aunos et al., *Mothering with Intellectual Disabilities: Relationship Between Social Support, Health and Well-Being, Parenting and Child Behaviour Outcomes*, 21 J. APPLIED RES. INTELL. DISABILITIES 320, 327 (2008); Eric Emerson & Philip Brigham, *The Developmental Health of Children of Parents with Intellectual Disabilities: Cross Sectional Study*, 35 RES. DEV. DISABILITIES 917, 920 (2014); M. Meppelder et al., *Parenting Stress and Child Behaviour Problems Among Parents with Intellectual Disabilities: The Buffering Role of Resources*, 59 J. INTELL. DISABILITY RES. 664, 665 (2014).

⁹³ See generally MAURICE FELDMAN & MARJORIE AUNOS, COMPREHENSIVE COMPETENCE-BASED PARENTING ASSESSMENT FOR PARENTS WITH LEARNING DIFFICULTIES AND THEIR CHILDREN (2010); see also David McConnell et al., *Developmental Profiles of Children Born to Mothers with Intellectual Disability*, 28 J. INTELL. & DEV. DISABILITY 122, 131-32 (2003).

rather than parental disability has predicted child outcomes. For example, studies have shown that children of parents with intellectual disabilities are more likely to have behavioral and social challenges if the parents also have histories of childhood trauma or mental health diagnoses.⁹⁴ Moreover, children are more likely to have emotional, behavioral, learning, or physical disabilities if their parent has mental illness in addition to an intellectual disability.⁹⁵ Another study found that low socioeconomic status rather than a parent's intellectual disability predicted child behavior problems or frequent accidents and injuries.⁹⁶ Decreased social support for parents can also lead to worse intellectual, academic, and behavioral outcomes for children of parents with intellectual disabilities.⁹⁷ Notably, a recent study compared health and developmental outcomes of 9-month-old infants of mothers with and without intellectual disabilities and found no differences.⁹⁸ Hence,

[t]he practice implications of these findings are clear-cut. When working with parents, [child welfare workers and judges] must beware *the presumption of incompetence*; approach each case with an *open mind*; and avoid what might be called *the mistake of false attribution* or seeing all the problems parents may be having entirely in terms of their learning difficulties.⁹⁹

B. *Supports and Services for Parents with Intellectual Disabilities and their Children*

In addition to the misconception that parents with intellectual disabilities cannot care for their children, child welfare agencies and courts also often presume that they are unable to benefit from family preservation and reunification supports and services. In other words, there is a belief that parents with intellectual disabilities are unable to learn the necessary skills to safely parent. How-

⁹⁴ See, e.g., Sue McGaw et al., *Prevalence of Psychopathology Across a Service Population of Parents with Intellectual Disabilities and Their Children*, 4 J. POL'Y & PRAC. INTELL. DISABILITIES 11, 18-19 (2007); Sue McGaw et al., *Predicting the Unpredictable? Identifying High-Risk Versus Low-Risk Parents with Intellectual Disabilities*, 34 CHILD ABUSE & NEGLECT 699, 705-08 (2010).

⁹⁵ See Maurice Feldman et al., *Parental Cognitive Impairment, Mental Health, and Child Outcomes in a Child Protection Population*, 5 J. MENTAL HEALTH RES. INTELL. DISABILITIES 66, 83 (2012).

⁹⁶ See Emerson & Brigham, *supra* note 92.

⁹⁷ See Maurice A. Feldman & Nicole Walton-Allen, *Effects of Maternal Mental Retardation and Poverty on Intellectual, Academic, and Behavioral Status of School-Age Children*, 101 AM. J. MENTAL RETARDATION 352, 361 (1997).

⁹⁸ See G. Hindmarsh et al., *Mothers with Intellectual Impairment and Their 9-Month-Old Infants*, 59 J. INTELL. DISABILITY RES. 541, 548 (2014).

⁹⁹ Booth & Booth, *supra* note 90, at 463.

ever, "a number of studies have documented programs that have successfully taught parenting skills to cognitively delayed parents."¹⁰⁰ Indeed, "[a] consistent research finding is that many parents labelled with intellectual disability can learn, apply new knowledge and maintain new skills[.]"¹⁰¹ For instance, studies have found that if provided appropriate and accessible training, many parents with intellectual disabilities can learn how to complete a variety of tasks related to care for babies, such as bathing, diaper changing, and cleaning baby bottles.¹⁰² Parents with intellectual disabilities can also gain skills related to child health and home safety,¹⁰³ appropriate child interaction and play,¹⁰⁴ and completing household chores, such as menu planning and grocery shopping.¹⁰⁵

According to the International Association for the Scientific Study of Intellectual Disabilities, "[p]arents labelled with intellectual disability acquire parenting knowledge and skills when appropriate teaching methods are used[.]"¹⁰⁶ Such programs must be individually tailored to meet the parent's learning styles, taught in the home, and adapted to meet the needs of parents with intellectual disabilities.¹⁰⁷ Further, research indicates that training shall "incorporate modelling and simplified verbal and visual techniques and allow opportunities for practice with feedback and positive reinforcement" and additional training may be required periodically.¹⁰⁸

C. *Limitations of Research*

Surely, social science can and should be used to advance the rights of parents with intellectual disabilities. That said, the legal profession must understand the studies' limitations. Although there is a substantial base of knowledge, many of the earlier studies

¹⁰⁰ Collentine, *supra* note 80, at 555.

¹⁰¹ IASSID SIRG, *supra* note 91, at 301.

¹⁰² See, e.g., Maurice A. Feldman et al., *Effectiveness of a Child-Care Training Program for Parents At-Risk for Child Neglect*, 24 CAN. J. BEHAV. SCI. 14 (1992).

¹⁰³ See, e.g., Gwynnyth Llewellyn et al., *Promoting Health and Home Safety for Children of Parents with Intellectual Disability: A Randomized Controlled Trial*, 24 RES. DEV. DISABILITIES 405, 407, 425-27 (2003).

¹⁰⁴ See, e.g., Bette Keltner et al., *Effects of Family Intervention on Maternal-Child Interaction for Mothers with Developmental Disabilities*, 17 FAM. & COMMUNITY HEALTH 35 (1995).

¹⁰⁵ Richard E. Sarber et al., *Teaching Menu Planning and Grocery Shopping Skills to a Mentally Retarded Mother*, 21 MENTAL RETARDATION 101, 105-106 (1983).

¹⁰⁶ IASSID SIRG, *supra* note 91, at 301.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

used small samples, therefore limiting generalizability.¹⁰⁹ Even some extant studies with larger sample sizes may be skewed because they were drawn from clinical settings or families already involved with the child welfare system.¹¹⁰ In response, there has been a call for studies that use large, population-based data that allow for more robust analysis, greater generalizability, and comparisons between disabled and nondisabled parents.¹¹¹

IV. USING SOCIAL SCIENCE TO ADVANCE FAMILY DEFENSE

As this article demonstrates, the notion that people with intellectual disabilities are innately unfit to parent did not happen in a vacuum. Indeed, bias and speculation about the parenting capabilities of people with intellectual disabilities has driven law and policy for more than a century. Hence, in order to undo decades of prejudicial policies, practices, and adjudications, the legal profession must take a multi-pronged approach.

This Part considers how social science can be leveraged by the legal profession to advance parental rights for individuals with intellectual disabilities. Specifically, this Part suggests ways social science can be utilized both inside and outside of the courtroom. Finally, this Part concludes with recommendations for areas needing further inquiry. Collectively, this multidisciplinary approach can result in significant changes for families headed by parents with intellectual disabilities.

A. *Leveraging Social Science Inside and Outside of the Courtroom*

As attorneys, we have an ethical responsibility to be zealous advocates for clients.¹¹² In order to carry out this important mandate, we must use every “tool” in our “toolbox.” I contend that this toolbox must include social science research to advance the rights of parents with intellectual disabilities and their children.

According to the International Association for the Scientific Study of Intellectual Disabilities, “[s]tatutes and ‘expert opinion’ give legitimacy to the widespread, prejudicial and empirically invalid assumption that parents labelled with intellectual disability do

¹⁰⁹ Gwynnyth Llewellyn & Gabrielle Hindmarsh, *Parents with Intellectual Disability in a Population Context*, 2 CURRENT DEV. DISORDER REP., 119, 120 (2015).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2015) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”).

not have the capacity to raise children[.]”¹¹³ Indeed, “[i]gnoring methodologically sound social science research, the Court has based its opinions on such unreliable sources as the ‘pages of human experience.’”¹¹⁴

As this article demonstrates, child welfare decisions, whether at the agency or trial level, are driven by two overarching presumptions. First, policies, practices, and adjudications are based on the supposition that parents with intellectual disabilities are categorically unfit to raise children. Second, parents with intellectual disabilities are either denied family reunification and preservation supports and services because they are assumed unable to learn or are proffered one-size-fits-all supports and services that do not meet their individual needs, thereby setting the parents up for failure. In the courtroom, attorneys can combat bias and speculation about the capabilities of parents with intellectual disabilities through the use of longstanding research. Some judges appear more inclined to base decisions on “intuition” rather than scientific fact. However, as aptly stated by Dale Larson,

whether or not judges endorse the use of empirical social science, they nearly always apply social psychology in their decisions. However, the psychology actually applied is generally based on intuitive or common sense theories. The problem with this approach is that common sense theories “often turn out to be wrong” in behavioral science.¹¹⁵

Hence, “[s]ocial science research can make a valuable contribution . . . [by helping to] define problems, identify possible solutions, and challenge underlying normative assumptions.”¹¹⁶

Practically speaking, attorneys must leverage social science research throughout their representation of parents with intellectual disabilities. Attorneys should cite to empirical evidence, along with legal authorities, in every motion and brief filed. Research on parents with intellectual disabilities can also be used to bolster re-

¹¹³ IASSID SIRG, *supra* note 91, at 303.

¹¹⁴ Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court’s Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1594 n.137 (1992) (citations omitted).

¹¹⁵ Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 468 (2008) (footnotes omitted).

¹¹⁶ Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 632 (1994); see also John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 L. & HUM. BEHAV. 571, 571 (1991) (“American courts use social science research in three distinct ways: to make law, to determine facts, and to provide context.”).

quests for reasonable accommodations by child welfare agencies. Although social science in and of itself cannot determine the fate of cases, it can be used to strengthen cases by combating categorical assumptions about the capabilities of parents with intellectual disabilities as well as inform appropriate and effective supports and services aimed at keeping families together while ensuring parents have the necessary skills.

Furthermore, the legal profession must take a more prominent role in advocating for systemic change in child welfare policies and practices that unjustly separate families led by parents with intellectual disabilities based on antiquated and biased notions.¹¹⁷ I contend that our experiences litigating cases involving these families coupled with social science can be used to inform changes in policy, such as dependency statutes that currently allow for discrimination against parents with intellectual disabilities and their children. "Although the ultimate choice of a policy is a normative decision, and as such, not something any of these studies could determine, research can inform and improve the quality of the policy debate and public discourse that leads up to law reform."¹¹⁸

B. Areas of Future Research and the Need for Collaboration

As this article demonstrates, there is an urgent need for collaboration between the fields of law and social science. "As more legal scholars use social science and more social scientists become familiar with legal issues, it will become easier for the disciplines to interact."¹¹⁹ More importantly, I believe a multidisciplinary effort is vital to advancing the rights of parents with intellectual disabilities and their children.

First, a partnership between the disciplines can inform future social science. For example, according to Drs. Megan Kirshbaum and Rhoda Olkin,

Much of the research on parents with disabilities has been driven by a search for problems in these families. The pathologizing assumptions framing such research presuppose negative effects of the parents' disabilities on their children. The perennial pairing of parents with disabilities and problems in children perpetuates the belief in deleterious effects of parental

¹¹⁷ Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to do?*, 5 MICH. J. RACE & L. 201, 206 (1999) ("History reveals . . . that the most penetrating changes in society have occurred when litigation complemented a mass political movement . . .").

¹¹⁸ Ramsey & Kelly, *supra* note 116, at 632.

¹¹⁹ *Id.* at 684.

disability on children.¹²⁰

Although greater elucidation of the challenges these families face, particularly using population-based data, is needed to inform interventions to support these families, social science must be expanded to better understand other important topics. Indeed, research related to outcomes of older children of parents with intellectual disabilities would be useful to address concerns that parents with intellectual disabilities will eventually be unable to care for their children. Moreover, research on the strengths of these families is desperately needed. A collaboration will allow the legal field to play an important role in advising research on other areas that would help advance family defense, including further studies on effective family supports. Additionally, future research must examine strategies for preventing child welfare involvement by supporting parents with intellectual disabilities and their children earlier on.

Second, legal scholars and social scientists must collaborate to conduct empirical research related to the interaction between child welfare agencies and courts and parents with intellectual disabilities and their families. Such research should analyze case law to determine barriers to reunification for families headed by parents with intellectual disabilities. Research must also seek to quantify the effect of bias in these cases.

CONCLUSION

Not all parents with intellectual disabilities can safely care for their children; however, nor can all nondisabled parents. Strikingly, disability is the only instance in which it is acceptable—and legal—to terminate the parental rights of a group of people based on a condition rather than a behavior. Thus, I contend that we must urgently move beyond deciding the fate of families vis-à-vis broad-based presumptions about categories of families and instead act to ensure that decisions are based on sound evidence.

Representing parents with intellectual disabilities is unquestionably challenging work. In addition to the normal demands of representing parents in child welfare disputes, representing parents with intellectual disabilities often requires attorneys to dedicate further time to understanding disability law, interacting with numerous providers, and taking extra time to accommodate the

¹²⁰ Megan Kirshbaum & Rhoda Olkin, *Parents with Physical, Systemic, or Visual Disabilities*, 20 *SEXUALITY & DISABILITY* 65, 66 (2002).

client's disability-related needs. Nonetheless, if we are to truly carry out our duty to be zealous advocates, we must expand our work by constantly seeking and employing new ways to advance family defense, including leveraging social science research.

For far too long, parents with intellectual disabilities have had their rights to raise children restricted under the supposition that they are simply incapable. Indeed, "[t]oo often, in the realm of parental rights, legislators, social workers, psychologists, and judges have been unable to look beyond a parent's label."¹²¹ As this article demonstrates, by leveraging social science, the legal field can transform decision-making in dependency cases as well as public policy concerning parents with intellectual disabilities.

In the end, we need to shift the presumption that people with intellectual disabilities are unfit to raise families and instead we must assume they are capable and we need to support them. Although this will not hold true for all parents, it will for many. As research shows, this is a more logical viewpoint. Most importantly, it is more humane.

¹²¹ Watkins, *supra* note 46, at 1419.

AMBIVALENCE ABOUT PARENTING: AN OVERVIEW FOR LAWYERS REPRESENTING PARENTS IN CHILD WELFARE PROCEEDINGS

Lisa Beneventano & Colleen Manwell†

INTRODUCTION	152
I. PARENTAL AMBIVALENCE: THEORETICAL UNDERPINNING AND INTERPRETATION	154
II. PARENTAL AMBIVALENCE IN A FLAWED SYSTEM	156
A. <i>The Problem of Confiding in Child Protective Workers</i> .	156
B. <i>Explaining Child Protective Workers’ Negative Response to Ambivalence</i>	157
III. PARENTAL AMBIVALENCE IN A THERAPEUTIC SETTING ...	158
A. <i>How Parental Ambivalence is Expressed</i>	158
B. <i>Addressing Ambivalence Therapeutically</i>	159
IV. PRACTICE GUIDE FOR PARENTS’ ATTORNEYS	160
A. <i>Addressing Ambivalence in the Courtroom</i>	160
B. <i>Refocusing on the Law</i>	161
C. <i>Changing the Ambivalence Narrative Through Cross Examination</i>	162
D. <i>Addressing Ambivalence Through the Attorney-Client Relationship</i>	164
1. <i>Joining Theory and Practice</i>	164
2. <i>Use Counsel’s Unique Role to Affirm and Normalize Ambivalence</i>	165
3. <i>When a Parent Is Not Seeking Reunification as a Goal</i>	166
4. <i>Advise Clients on Self-Protective Behavior</i>	167
5. <i>Address Inconsistent Planning with the Client</i>	168
CONCLUSION	169

† Lisa Beneventano is an Associate Director of Chances for Children-NY (“CFC”), a 501(c)(3) organization that provides free parent-child play therapy in the Bronx. Prior to joining CFC in 2015, Lisa worked with parents involved in the child welfare system at a preventive agency and a public defender office. Ms. Beneventano is a licensed social worker (LMSW) and a graduate of Columbia University School of Social Work.

Colleen Manwell is a staff attorney with the Family Defense Team at the Neighborhood Defender Service of Harlem (NDS). Ms. Manwell joined NDS in 2012 as an Equal Justice Works mental health fellow. She is a graduate of the University of Michigan Law School.

INTRODUCTION

"I like my daughter, but I am not sure I love her."

"It took me a long time to have him [the baby] and it never occurred to me that I might not like him."

"I miss my kids when I am gone, but after being home for about 30 minutes, I want to turn around and leave again."

"My daughter needs to spend some time with her father right now. I need a break."

Each of these quotes is an expression of ambivalence—the co-existence of positive and negative feelings toward the same thing—expressed by actual parents. Most of these statements passed without notice, said for example while venting to friends over a meal. However, one of these statements landed the parent in New York Family Court, where she was accused of neglect and faced with the removal of her children from her care. Which statements belong to which parents? How do we feel reading them without knowing the context of each conversation or each family? Probing these questions and the consequences of such statements is vitally important to the work of family defense, especially since every parent has had feelings of frustration, fatigue, and even hostility when it comes to their children.¹ Parents who express these feelings publically risk facing cultural, social and moral contempt.² Some even risk losing their children.³

Often the child welfare courtroom can feel like a lawless place—a place where the focus is on “concerns” about a parent rather than the legal standards and protections at play, and where judges and practitioners are accustomed to a cooperative approach of everyone working together for the same goal rather than an adversarial legal contest.⁴ There are few bright-line rules to guide decisions and often the judge’s subjective opinion about what is safe, reasonable and acceptable prevails.⁵ The subjective nature of fam-

¹ Linda Davies, *Omnipotence in Child Protection: Making Room for Ambivalence*, 22 J. SOC. WORK PRAC. 141, 147 (2008).

² *Id.* at 148.

³ *Id.*

⁴ See Darice Good-Dworak & Diana Rugh Johnson, *The Adjudicatory Hearing*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 153, 153-54 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

⁵ David J. Lansner, Reply, *Abolish the Family Court*, 40 COLUM. J.L. & SOC. PROBS. 637, 642 (2007), <http://www.lans kub.com/docs/fc.pdf> [<https://perma.cc/PV8V-N8BG>].

ily court is particularly troubling when considering how child welfare involvement impacts poor families and families of color at a disproportionate rate.⁶ Children of color are disproportionately represented in child protective services and the foster care system.⁷ Founded incidences of maltreatment vary by income level, but not by race.⁸ Research has shown that not all families are subject to the same level of scrutiny and/or intervention.⁹

Parent defense attorneys serve an essential function in leveling the playing field in court and ensuring that our clients are not unfairly held to different standards than the rest of society. We argue the legal standards when the child welfare agency is trying to improperly separate children from their parents. We investigate and share vital information with the court when the child welfare agency has left it out of their paperwork. Yet for a client whose case involves expressions of parental ambivalence, it can feel like we are tasked with arguing common sense.

This article intends to lend scholarly support to such arguments; there is an entire field of scholarship supporting the argu-

⁶ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 2 (2011), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/T2PH-YSP9>] ("While the extent of this overrepresentation varies significantly across different regions of the country, it exists at some level in virtually every locality."); Frank Farrow et al., *Racial Equity in Child Welfare: Key Themes, Findings and Perspectives*, in CTR. FOR THE STUDY OF SOC. POLICY & THE ANNIE E. CASEY FOUND., DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 127, 129 (2011), http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf [<https://perma.cc/G7PC-MN4U>] ("African American children are in foster care at approximately twice the rate of their presence in the general population."); SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 4-5 (2003), <https://www.childwelfare.gov/pubPDFs/children.pdf> [<https://perma.cc/V9YG-ZCCS>].

⁷ JOSHUA PADILLA & ALICIA SUMMERS, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 1 (2011), http://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf [<https://perma.cc/ZU89-ZGGW>]. The rates for children by race in the population in general are as follows: African American/Black 14.5%, Caucasian/White 55.6%, Hispanic/Latino 20.1%, Asian 4.6%, American Indian/Alaskan Native .9%, and Multiracial 3.9%. *Id.* at 6. Rates for entry into foster care: African American/Black 25.1%, Caucasian/White 43.6%, Hispanic/Latino 18.3%, Asian 1.1%, American Indian/Alaskan Native 2.1%, and Multiracial 6.9%. Rates for in foster care: African American/Black 30.1%, Caucasian/White 39.5%, Hispanic/Latino 18.1%, Asian .8%, American Indian/Alaskan Native 2%, and Multiracial 2%. *Id.*

⁸ CHIBNALL ET AL., *supra* note 6, at 4.

⁹ *Id.* at 5 ("These findings suggest that the overrepresentation of African-American children in the child welfare system is not attributable to higher rates of maltreatment in this population, but to factors related to the child welfare system itself.")

ment that parental ambivalence is not by definition pathological, but rather a normal and widely experienced response to the stresses and challenges of parenting. Below is a brief introduction to understanding parental ambivalence and some of the scholarship on it. We introduce theoretical underpinnings of parental ambivalence, discuss how parental ambivalence can be expressed, and explain how it can be addressed therapeutically. Finally, we outline ways attorneys can challenge assumptions about ambivalence in the courtroom and talk about it with their clients.

I. PARENTAL AMBIVALENCE: THEORETICAL UNDERPINNING AND INTERPRETATION

For the purposes of this article, we define parental ambivalence as the simultaneous presence of the intense, conflicting feelings of affection and love of a child and feelings of rejection, dislike or hatred of a child. In addition, this article and much of the research addressed below focus on *maternal* ambivalence rather than *parental* ambivalence because female caregivers are more likely to be the respondents in child welfare proceedings, and are much more likely to be the subject of academic study and writing on the topic.¹⁰

Maternal ambivalence is considered an expected feeling for mothers.¹¹ In early psychoanalytic¹² and attachment writing, there is ample research, consideration, and discussion of maternal ambivalence.¹³ Pediatrician and psychoanalyst D.W. Winnicott's essay, "Hate in the Counter-Transference," lists reasons why a mother may feel distress about parenting, and indeed, even hate her

¹⁰ Christina Risley-Curtiss & Kristin Heffernan, *Gender Biases in Child Welfare*, 18 AFFILIA 395, 401-02 (2003).

¹¹ See generally D.W. Winnicott, *Hate in the Counter-Transference*, 30 INT'L J. PSYCHOANALYSIS 69 (1949), reprinted in 3 J. PSYCHOTHERAPY PRAC. & RES. 348 (1994).

¹² "Psychoanalysis" refers to a psychiatric treatment pioneered by Sigmund Freud, which explores conscious and unconscious psychological processes. See *Psychoanalysis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/psychoanalysis> [<https://perma.cc/24NU-QB26>] (last visited Nov. 20, 2016). Melanie Klein and D.W. Winnicott are two psychoanalysts whose work is particularly relevant to treatment of children and/or parents. See, e.g., Joseph Aguayo, *Reassessing the Clinical Affinity Between Melanie Klein and D. W. Winnicott (1935-51): Klein's Unpublished 'Notes on Baby' in Historical Context*, 83 INT'L J. PSYCHOANALYSIS 1133 (2002); see also Rozsika Parker, *The Production and Purposes of Maternal Ambivalence*, in MOTHERING AND AMBIVALENCE 17, 19 (Wendy Hollway & Brid Featherstone eds., 1997).

¹³ "Attachment" refers to attachment theory, a psychological model of the parent-child bond and how that bond can be created, damaged and repaired. John Bowlby and Mary Ainsworth have written extensively on attachment. See generally Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 DEV. PSYCHOL. 759 (1992).

child.¹⁴ In the 1950s and 1960s, Grete Bibring looked at the psychological processes in pregnancy and early motherhood.¹⁵ In addition to building on Winnicott's conception of maternal ambivalence, Bibring suggested that pregnancy and the path to becoming a mother was a form of crisis that women need to resolve.¹⁶ She saw the crisis as a fundamental shift in self-identity and a shift in how new mothers are perceived as individuals.¹⁷ In addition, there was a change in the expectant or new mothers' reactions to and attitudes toward their own mothers.¹⁸

Building on the idea of the psychic crisis brought on by motherhood, Daniel Stern introduced the concept of a "motherhood constellation."¹⁹ Stern proposed that upon having a baby, especially one's first child, a mother "passes into a new and unique psychic organization[.]"²⁰ This new organization is composed of four central themes: (1) Life-growth: Can I keep my child alive and growing? Will I be replaced by a "better" mother?; (2) Primary relatedness: Can I engage my baby in an emotionally authentic manner, and will this create the baby I want? Am I a "natural" at mothering?; (3) Supporting matrix: Can I "create" and "permit" the support systems necessary to accomplish all of these things?; and (4) Identity reorganization: Can I modify my "self-identity" to permit and create these functions?²¹ This psychic reorganization may take months for some women to complete and years for others.²²

Cultural factors also play a role in creating the motherhood constellation.²³ These factors include the high value society places on babies and their development; the commonly held notion that babies are supposed to be desired; the high value placed on the maternal role and the social judgment or measuring of a woman

¹⁴ See Winnicott, *supra* note 11, at 355 (including, among others "the baby is a danger to [the mother's] body in pregnancy and at birth," "[t]he baby is an interference with her private life, a challenge to preoccupation[.]" and "[the baby] is ruthless, treats her as scum, an unpaid servant, a slave").

¹⁵ Grete L. Bibring et al., *A Study of the Psychological Processes in Pregnancy and of the Earliest Mother-Child Relationship*, 16 *PSYCHOANALYTIC STUDY CHILD* 9 (1961).

¹⁶ *Id.* at 12, 14.

¹⁷ *Id.* at 15-18.

¹⁸ *Id.* at 18.

¹⁹ DANIEL N. STERN, *THE MOTHERHOOD CONSTELLATION: A UNIFIED VIEW OF PARENT-INFANT PSYCHOTHERAPY* 171-90 (1998).

²⁰ *Id.* at 171.

²¹ *Id.* at 173-80 (detailing the four themes of life growth, primary relatedness, supporting matrix, and identity reorganization).

²² *Id.* at 171.

²³ See *id.* at 174.

based on her participation in and success in the maternal role; the ultimate responsibility a mother has for the baby, even if she elicits the assistance of others; the expectation that a mother will love the baby; and the assumption a mother will receive family support.²⁴ All of these cultural factors combine with the last, contradictory reality: family, society, and culture do not adequately equip the mother with experience, training, or support to fulfill her role “easily or well.”²⁵

In today’s society, there is a romanticized notion that “good parenting” means no conflict; parents should not have (or should immediately squash) any aggressive, hostile, or ambivalent feelings toward and from their child.²⁶ In 2003, Leon Hoffman suggested that intolerance toward such feelings results in maternal guilt and anxiety that frequently leads to dysfunctional parenting behavior.²⁷ Similarly, Rozsika Parker found that the guilt and anxiety provoked by parental ambivalence, rather than the ambivalence itself, are problematic.²⁸ As such, Parker suggested that clinicians support the management of ambivalence rather than try to eliminate it entirely.²⁹ Mothering comes with a psychological reorganization that is complex and filled with memories of one’s own experience being parented and questions and fears about one’s ability to care for this new life. Ambivalence is born out of the tremendous meaning a child holds for a mother and from the physical, psychological and social demands that come with parenting.

II. PARENTAL AMBIVALENCE IN A FLAWED SYSTEM

A. *The Problem of Confiding in Child Protective Workers*

When parents communicate feelings of ambivalence toward their children to child protective workers, they risk child welfare or court involvement. The chief responsibility of child protective workers is to investigate.³⁰ As such, interactions with these workers

²⁴ *Id.*

²⁵ STERN, *supra* note 19, at 174.

²⁶ Leon Hoffman, *Mothers’ Ambivalence with their Babies and Toddlers: Manifestations of Conflicts with Aggression*, 51 J. AM. PSYCHOANALYTIC ASS’N 1219, 1220 (2003).

²⁷ *Id.* at 1232.

²⁸ Parker, *supra* note 12, at 35.

²⁹ *Id.* at 24-31; *see generally* Hoffman, *supra* note 26.

³⁰ Richard Cozzola & Lee Shevell, *Representing Parents at Disposition and Permanency Hearings*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 209, 219 (“The caseworker and the caseworker’s supervisor are usually responsible for arranging services for the parent and the parent’s children, supervising visits, evaluating the parent’s overall progress, informing the court and the attorneys about the parent’s progress, and making rec-

differ significantly from interactions with a therapist. Ideally, in the context of therapy, a clinician initiates discussion in which a parent can unburden herself and freely process such feelings.³¹ However, in the context of child welfare and child protective workers, the roles are much less clearly defined, potentially resulting in confusion for both caseworkers and parents. While it is comforting to think that child protective workers can fill both the role of clinician and the role of investigator, they are not treatment providers. They are there to investigate and report.³²

An investigation typically includes a home visit and interview, where the child protective worker asks the parent a structured set of questions including inquiries about how the parent is doing emotionally and if there is anything they need help with. Unfortunately, parents who share feelings like the examples above can find themselves standing in court, listening as things they said in their home among family are humiliatingly transplanted, read aloud in an antiseptic courtroom by government attorneys or a judge. For example, “Your Honor, *even the Respondent herself* says that she struggles to care for her children!” For lawyers representing parents in child welfare proceedings, expressions of ambivalence are sometimes presented as ‘smoking guns’ or ‘confessions’ made to child protective staff, which can severely undermine parents’ ability to retain or regain custody of their children.

B. *Explaining Child Protective Workers’ Negative Response to Ambivalence*

Child protective agencies and front line workers face a torrent of blame whenever a child is injured or dies.³³ In exploring child protection practices, Linda Davies discusses the unrealistic pressure on child welfare workers to guarantee the ultimate safety of children and explores how that expectation ignores the limitations of social work practice.³⁴ When a tragedy occurs, the public turns on caseworkers for failing at their (impossible) mandate. Fear of public backlash creates a sense of panic about “the potential disasters that lie within their caseloads.” Inevitably, this dynamic seeps

ommendations to the court concerning all of the above. Judges often call them the eyes and ears of the court.”).

³¹ See Parker, *supra* note 12, at 17-36; see also Joan Musitano & Alice Rosenman, *Separate and Connected: A Side-by-Side Model for Intervening with Mother-Child Dyads in Small Groups*, 11 J. INFANT CHILD & ADOLESCENT PSYCHOTHERAPY 96, 99 (2012).

³² See Davies, *supra* note 1, at 144-45.

³³ See *id.* at 143-44.

³⁴ See *id.* at 141-45.

into the relationship between the worker and the parents they investigate.³⁵

Ultimately workers can only monitor risk, as they are not omnipresent. They must rely on parents to protect their children. To avoid tragedy and backlash, workers are constantly trying to ferret out which parents are not capable of providing such protection and in this process may “split mothers into binary classifications of ‘good’ and ‘bad.’”³⁶ In a climate of panic around child abuse, there is little tolerance for workers to take any risk to explore the normal feeling of ambivalence that all mothers experience.³⁷ When caseworkers are facing high-pressure decisions with little background information, expressions of parental ambivalence unfortunately become the litmus test for whether a parent is “good” or “bad.”³⁸

III. PARENTAL AMBIVALENCE IN A THERAPEUTIC SETTING

A. *How Parental Ambivalence is Expressed*

What does parental ambivalence look like? It can be expressed both in words and in actions. Parents can make direct statements about disliking the child or complain about the child (e.g., he is so bad, he won’t sleep).³⁹ Parents can also say things directly to the child (e.g., you are a bad boy), or passively avoid the child through physical or emotional distancing (e.g., when child makes a bid for attention a parent is always busy or possibly leaves to go someplace else). A parent might reject a child (e.g., constant criticism, sending the child away to live with others), or engage in intrusive distancing interactions (e.g., teasing a child during play, constant bossiness with the child, eye rolling/tooth sucking at child’s attempts for interactions).⁴⁰

Whether such expressions of ambivalence are normative (natural and within social expectations) or pathological (unhealthy and signaling a deeper problem) depends on the frequency, duration, intensity, context, and impact on social and emotional functioning of parent and child.⁴¹ Distinguishing between normal and pathological ambivalence necessitates a thoughtful consideration

³⁵ See *id.* at 143.

³⁶ *Id.* at 145-48.

³⁷ See *id.* at 148-49.

³⁸ See Davies, *supra* note 1, at 148.

³⁹ The examples listed are based on clinical experience of the author.

⁴⁰ The examples listed are based on clinical experience of the author.

⁴¹ The examples listed are based on clinical experience of the author.

of the complete picture and the complete circumstances.⁴² It is a task best undertaken by an experienced clinician, armed with ample information about *and* involvement with the family. It is from this vantage point that a clinician can best assess whether or not ambivalence crosses the line from normative to pathological and, if so, how to best address the issue.

B. Addressing Ambivalence Therapeutically

It is the *denial* of the feelings of fury, boredom or even dislike towards children, all of which are part of motherhood, that makes the burden harder for women to bear, and can so often result in these feelings being expressed in secret and perverse ways.⁴³

For most parents it is the intolerable guilt and anxiety over feeling ambivalent and the cultural taboo of expressing such feelings that renders parental ambivalence unmanageable.⁴⁴ The ability to acknowledge and express those feelings and have them received in a supportive and affirming manner often lessens, and can even alleviate, what may be toxic about the ambivalence.⁴⁵ For those looking for additional support, potential resources include therapy for the parent or therapy that includes the parent-child dyad⁴⁶ or the greater family unit.

Individual therapy with a parent could focus on helping the parent articulate conflicting feelings, explore those feelings, and normalize them.⁴⁷ For parents with young children (typically birth to age five), there are a variety of programs that offer treatment for parent and child together.⁴⁸ These interventions can be structured

⁴² In the clinical experience of the author, whether any feeling, thought, or behavior is normative or pathological depends on the factors listed.

⁴³ Paddy Maynes & Joanna Best, *In the Company of Women: Experiences of Working with the Lost Mother*, in MOTHERING AND AMBIVALENCE, *supra* note 12, at 119, 126.

⁴⁴ See Parker, *supra* note 12, at 21.

⁴⁵ See Musitano & Rosenman, *supra* note 31, at 99.

⁴⁶ "Parent-child dyad" is a term used to describe the parent and child together. The term connotes the clinical understanding that the parent-child together are an entity unto itself. See, e.g., Robin C. Silverman & Alicia F. Lieberman, *Negative Maternal Attributions, Projective Identification, and the Intergenerational Transmission of Violent Relational Patterns*, 9 PSYCHOANALYTIC DIALOGUES 161, 178 (1999).

⁴⁷ See BARBARA ALMOND, THE MONSTER WITHIN: THE HIDDEN SIDE OF MOTHERHOOD 50 (2011) ("What sets *this* kind of ambivalence apart is the mother's denial of the possibility that she is struggling with mixed feelings. The first task of a therapist is to bring these feelings into the open. This may be a major undertaking, but the relief that may ensue can have a very positive effect on a mother and her whole family.").

⁴⁸ See, e.g., CHANCES FOR CHILDREN-NY, <http://www.chancesforchildren-ny.org> [<https://perma.cc/E8ZY-6RM7>] (last visited Nov. 25, 2016); see also *Child Trauma Research Program*, U. CAL., S.F., <http://childtrauma.ucsf.edu/> [<https://perma.cc/LP6E->

with a single dyad or in a group setting.⁴⁹ There are a variety of models and modalities.⁵⁰ One parent-child treatment option is Child-Parent Psychotherapy, pioneered by Alicia Lieberman.⁵¹ Lieberman describes the utility in working with the dyad in that it “offer[s] a window onto the mother’s internal world—a window that could remain inaccessible in individual treatment.”⁵² Furthermore, she believes “[i]n using this joint psychotherapy with high-risk mothers and young children, the therapist gains the opportunity to attend with immediacy and specificity to the ways in which the child is at risk and simultaneously to address the mother’s history and psychological experience.”⁵³

IV. PRACTICE GUIDE FOR PARENTS’ ATTORNEYS

A. *Addressing Ambivalence in the Courtroom*

As the petitioner initiating the proceeding, the child protective agency attorney has the first opportunity to frame the issue before the court, either through filing the petition with the allegations or through presenting its case first in a hearing or trial. The agency lawyer may use condemnatory language and a disapproving tone in discussing the parent’s statement of ambivalence. Such tone implies risk to the child, and taps into the judge’s predisposition to consider statements of ambivalence to be morally repugnant, as discussed above.

It is important not to adopt the language of the child protective agency attorney, or let a tone of negative judgment go unchallenged. The courtroom has long been compared to the stage: tone, body language, facial expression, and crafted word choice are essential tools.⁵⁴ Defense attorneys can use these tools to normalize parental ambivalence and promote the narrative that expression of

U8CE] (last visited Nov. 25, 2016); *Minding the Baby*, YALE SCH. MED., <http://medicine.yale.edu/childstudy/mtb/> [<https://perma.cc/Y79N-ABTB>] (last visited Nov. 25, 2016).

⁴⁹ See, e.g., *Child Trauma Research Program: Services*, U. CAL., S.F., <http://child-trauma.ucsf.edu/services-0> [<https://perma.cc/Y36R-RQU9>] (last visited Nov. 25, 2016).

⁵⁰ See, e.g., *Programs and Services*, CHANCES FOR CHILDREN-NY, <http://www.chancesforchildren-ny.org/services/> [<https://perma.cc/KQV5-9TTW>] (last visited Nov. 25, 2016).

⁵¹ See generally Silverman & Lieberman, *supra* note 46.

⁵² *Id.* at 164.

⁵³ *Id.*

⁵⁴ See generally LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 521-33 (1993); see also Peter W. Murphy, “*There’s No Business Like . . . ?*” *Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111 (2002).

such ambivalence is not inherently neglectful. The overarching goal is to convey that ambivalence is normal and statements of ambivalence should not be a litmus test as to whether or not someone can or should parent. Attorneys should also reiterate for the judge that the mother is there in court today because she wants to parent her children and she wants them in her custody.

B. *Refocusing on the Law*

The Supreme Court has recognized a substantive due process right to direct the upbringing of one's child.⁵⁵ The Supreme Court has further held that the parental liberty interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."⁵⁶ Among other protections, parents are generally given an opportunity to contest the emergency removal of a child and have an evidentiary hearing on neglect proceedings.⁵⁷

The state of New York defines a neglected child as "a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care[.]"⁵⁸ While there is not an abundance of case law addressing parental ambivalence specifically,⁵⁹ the plain language of the statute dictates that the government must demonstrate actual impairment or imminent danger of impairment caused by the parent to secure a finding of neglect.⁶⁰ Furthermore, New York state law holds that any removal of a child from her parent must be found

⁵⁵ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁵⁷ Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 68-69 (2009).

⁵⁸ N. Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2015).

⁵⁹ Perhaps this dearth of case law exists because these cases tend to start weak at filing, and then get bolstered by additional allegations "discovered" over the course of the investigation; or because most cases settle and thus are not challenged on appeal. See ABIGAIL KRAMER, IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3, 19 (2016), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/569e7d8bbfe8737de9301b71/1453227404613/CWW+%7C+Is+Reform+Finally+Coming%3F.pdf> [https://perma.cc/Y6GK-DUEH]; Good-Dworak & Johnson, *supra* note 4, at 153.

⁶⁰ FAM. CT. ACT. § 1012(f)(i); see also *id.* § 1022(B), (C)(iii), (C)(v).

“necessary to avoid imminent risk to the child’s life or health[.]”⁶¹ The landmark New York Court of Appeals case *Nicholson v. Scoppetta* further details that such imminent risk must be “near or impending, not merely possible” and is rife with further helpful language focused on harm and risk of harm.⁶²

Focusing on these standards and rules can be especially helpful in defending a case centered around expressions of ambivalence, where no actual harm or injury to the child is alleged. In cases based solely on a parent’s expression of parental ambivalence, the child protective agency is often missing an essential element of their case: proof the child faced *actual* harm or *imminent* risk of harm. Parent defense attorneys must strenuously remind the court of this requirement: absent such a showing, an expression of ambivalence—no matter how odd or unpleasant—simply cannot constitute neglect or justify a removal.⁶³ In this way, while the prevailing social norms around ambivalence may work against parents in the child welfare courtroom, the law itself does not.

C. *Changing the Ambivalence Narrative Through Cross Examination*

Cross-examination presents an opportunity to tell the parent’s story through short, organized, leading questions.⁶⁴ In cases about ambivalence, the approach to the cross-examination depends on the witness. With a psychiatrist or therapist witness, who has clinical experience and training in the subject area, cross-examination can include questions about the scholarship discussed above to help educate the court on ambivalence.

However, based on this author’s experience, the most frequent witness in child welfare cases is the child protective services caseworker, whose role is largely investigative.⁶⁵ This person is not likely to have the clinical experience necessary to answer questions about the theoretical and therapeutic underpinnings of parental

⁶¹ *Id.* § 1022(C)(iii).

⁶² *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 369 (2004).

⁶³ *See id.* at 368-69 (“[T]he Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior.”).

⁶⁴ *See* POZNER & DODD, *supra* note 54, at 1, 15.

⁶⁵ *See* Cozzola & Shevell, *supra* note 30, at 219; *see also* *Becoming a Child Protective Specialist*, N.Y.C. ADMIN. CHILD. SERVICES, <http://www1.nyc.gov/site/acs/about/becoming-cps.page> [<https://perma.cc/W2GW-G8Z9>] (last visited Nov. 18, 2016) (“Child Protective Specialists (CPS) respond directly to reports of child abuse and/or neglect. Using investigatory and social work skills, they engage and partner with families and community resources to ensure the safety and well-being of children throughout New York City.”).

ambivalence.⁶⁶ Cross-examination of the child protective caseworker, or any fact witness, can yield greater context surrounding the parent's statement or behavior, thereby demonstrating that ambivalence is normative and understandable.

When it comes to cross-examination, one helpful side effect of child welfare reform over the years is that child protective agencies produce an abundance of paperwork.⁶⁷ Gathering and reviewing all possible documents will allow the family defender to craft a detailed cross-examination that is supported by the documents. Even a caseworker who is hostile to the parent will have to capitulate to the new narrative if the facts are established in the documents.

The following are cross-examination topics to consider including:

a) Familiarity with the facts/documents/case: Tie the witness down to knowing the general facts of the case and have her confirm a new narrative as supported by the documents.

b) Setting: Provide further context to the allegations, consider having the client take photos of home and child's space.

c) Child's behavior/parenting challenges: Does the child have any special medical or behavioral needs?

d) Parent's responsibilities: Consider creating a weekly schedule. Include work, medical appointments, public benefits appointments, time and method of commute, and any other obligations

e) Lack of support: Where are the people who the court might expect the client to rely on? Are there geographic or bureaucratic barriers between the client and their support system?

f) Statement/action of ambivalence: Acknowledge and own the statement or behavior if it is not contested. In most instances, the question is not whether it occurred, but its significance. Does the ambivalence create sufficient risk to justify removing the child or make a finding of neglect? The goal is to reframe the state-

⁶⁶ See, e.g., N.Y.C. ADMIN. CHILD. SERVICES, *supra* note 65. New York City requires the following qualifications of applicants seeking to become Child Protective Specialists: "[a] baccalaureate degree from an accredited college, in specified discipline" that includes "[t]wenty-four semester credits in any combination of the following fields" with at least twelve credits in any one of them: "social work, psychology, sociology, human services, criminal justice, education (including early childhood), nursing or cultural anthropology" as well as "English language proficiency and basic typing skill," and successful completion of a "comprehensive drug screening." *Id.*

⁶⁷ See Kenneth Krekorian, *Discovery and Pretrial Proceedings*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 119, 127-28 (listing "frequently requested documents that greatly assist counsel" in parental defense).

ment/behavior in the context of the parent's situation, so there is no need to hide from it.

g) Keeping up with parental responsibilities despite statement or action of ambivalence: Is the child regularly attending school and medical appointments? Is the parent holding down a job, successfully managing a public benefits case? Highlight all the other things the parent is doing right.

After the cross-examination, the judge should have a mental image of the life of the parent, and an understanding of the context of the parent's statement or action. This pushes back against the child welfare agency's argument that a normal expression of ambivalence rises to the level of risk.

D. Addressing Ambivalence Through the Attorney-Client Relationship

Alongside courtroom advocacy, parents' attorneys also advise clients on legal strategy and serve as guides through a parallel process that takes place outside of the courtroom. This process can include working with service providers, visiting with children in foster care and undergoing home monitoring. Just as knowledge of ambivalence can be used to help mount a defense in the courtroom, that knowledge can also be helpful in advising the client and making strategic legal decisions. Below are skills counsel can use to keep normal parental ambivalence from prejudicing a client's legal case.

1. Joining Theory and Practice

A client's feelings about parenting can be especially complicated at the beginning of a neglect case, or upon the filing of a termination of parental rights petition ("TRP").⁶⁸ The client is facing the temporary or, in the case of a TPR petition, permanent loss of her children. It is a moment of crisis, and as such she is likely to feel any combination of anger, fear, despair or frustration at the loss of her children.⁶⁹ Similarly, the client may feel despair or hopelessness about her involvement with the child welfare system or some problem in her home or life—that she will never win in the system, will never be seen as a good parent, or never 'fix' some problem she is facing.

Remembering Stern's motherhood constellation, the parent

⁶⁸ Matthew Fraidin, *First Steps in Representing a Parent Accused of Abuse or Neglect*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 25, 28-30.

⁶⁹ *Id.*

who an attorney meets in court is facing questions and fears in the central themes; these feelings can be amplified by involvement with child welfare and family court systems. For example, a central question of the life-growth theme could surface: can she care for her children and help them grow?⁷⁰ At the moment counsel meets the client, she has been investigated, measured as a mother, and found wanting. She is in court because professionals think she cannot keep her children safe. She may wonder if her children will find another mother. The client is literally facing the State hiring someone, a foster mother, they believe will be a “better mother” for her children. The primary relatedness theme may also surface and includes questions around being a “natural mother,” including whether she can “read” her baby.⁷¹

System involvement touches many of the questions and concerns that underlie maternal ambivalence. Parents brought into family court are dealing with psychological and emotional stress at the loss or potential loss of their children that goes deeper than missing their children and worrying about their safety while in another’s care. The parent is facing a challenge that tears at the very fabric of being a mother and one’s concept of oneself as a mother. A mother facing a termination of parental rights proceeding has probably also been separated from her children for a long time and likely does not have the relationship she wants with her children. It may be hard for her not to internalize this as a personal failing as opposed to a product of system involvement. The court will likely inquire into if she can create a support system. A mother is often asked if there are kinship resources or other family or friends who can assist her or possibly take care of her children. What if there is nobody to take the children or if she has fears about how these supports may fare under the scrutiny of the child welfare system? An awareness of the theories underlying ambivalence and the internal questions clients may be facing can better equip family defense attorneys in navigating both ambivalence and the family court system.

2. Use Counsel’s Unique Role to Affirm and Normalize Ambivalence

Given the intensely personal nature of child welfare cases, parents’ lawyers inevitably give advice on topics outside of the strict parameters of the legal case. Counsel may be the first or only per-

⁷⁰ STERN, *supra* note 19, at 175.

⁷¹ *Id.* at 176.

son to whom a parent expresses feelings of ambivalence—dislike of a child, fear at being a parent, or uncertainty that they can care for their child. While no substitute for the therapeutic interventions described above, there is unquestionably a role for counsel in helping a client process feelings of ambivalence by affirming and normalizing such feelings. As noted above, for a parent to express feelings of ambivalence and have those feelings received in a supportive and affirming manner can significantly reduce anxiety and stress.⁷²

The parent defense attorney is unique in that they have an understanding of how the child welfare and family court systems can humiliate and demoralize parents. These attorneys have met hundreds of parents in times of crisis, consulted with those parents, and guided those parents through difficult situations. Further, the parent defense attorney is familiar with feelings and topics most parents only discuss in private. This offers a unique lens through which the parent can view her own situation. Speaking from this standpoint, the parent defense attorney carries great weight when it comes to defining what is “normal.” Counsel can tell a parent, in general terms, about the countless other parents who have expressed similar feelings of ambivalence; this helps chip away at the parent’s sense that she is an outlier, or that feeling ambivalence is a personal failure.⁷³ In a small way, counsel can connect the parent to a larger group of people, thus reducing the shame and anxiety that comes with feeling ambivalence.

3. When a Parent Is Not Seeking Reunification as a Goal

What should counsel do when a parent says she doesn’t want visits, or doesn’t want her child to return home? In a client-centered legal practice, it is a lawyer’s duty to pursue the client’s goals without paternalistic judgment.⁷⁴ Sometimes a client’s goal, for any number of reasons, is to forgo parenting temporarily or permanently. In such cases, the client likely faces harsh judgment from others; it is essential that counsel not collude in such judgment and remain committed to pursuing the client’s goals. Yet in seeming conflict with this mandate is counsel’s knowledge of parental am-

⁷² See Davies, *supra* note 1, at 147-48; see also ALMOND, *supra* note 47, at 50.

⁷³ See generally Musitano & Rosenman, *supra* note 31, at 99.

⁷⁴ Fraidin, *supra* note 68, at 25-26 (“What the client needs above all else at this moment in life is a respectful professional who avoids all prejudice and shows proper respect for the parent by listening carefully to what she has to say and demonstrating a commitment to working on her behalf going forward.”).

bivalence: that feelings of dislike, frustration, or despair are normal and can be fleeting.

A good rule of thumb is to exercise caution when taking legal action in this direction. The client should be advised that parents foregoing visitation or reunification can face strong disapproval—or hostility, even—from the court, the child’s lawyer, and the child welfare agency, which could prejudice future applications.⁷⁵ Ask the client if they are willing to take some time to consider the matter and ensure this is what they want. Counsel can explain that it may be better to err on the side of having the court issue an unused visitation order than to unnecessarily expose the client to harsh and prejudicial judgment that is not easily erased.

4. Advise Clients on Self-Protective Behavior

Sometimes parents express parental ambivalence in front of agency workers. Unfortunately, due to the pressures and biases described in Part I, agency workers will often treat parental ambivalence as pathological and problematic.⁷⁶ Workers are trained to record and catalogue such moments, after which they are presented to judges as proof to support the agency’s position that the parent is not able to care for their child.⁷⁷

One reflexive response to this situation is to impress upon parents how such statements hurt their legal case and to potentially coach a client on what things they should not say. In this response, an unintended message is “Good parents don’t say that, or feel that way.” This can add to guilt or self-doubt. A better alternative is to have a conversation with the client about self-protective behavior.

The aim of advising clients on self-protection is to help them make well-informed decisions about who to trust and confide in when feeling ambivalence. Counsel must explain that agency workers’ job is to investigate and monitor. As a result, things said to the agency worker are not private, and will be shared in the courtroom with other lawyers and the judge.⁷⁸ Instead, advise the client to stay focused on big-picture goals when talking with the child welfare worker. If the client needs an outlet to process complex feelings, counsel can redirect the client to therapeutic services where they can safely express ambivalence without having it used against

⁷⁵ Based upon the professional experience of the authors.

⁷⁶ See Davies, *supra* note 1, at 148.

⁷⁷ Krekorian, *supra* note 67, at 127.

⁷⁸ Cozzola & Shevell, *supra* note 30, at 219 (“Judges often call [caseworkers] the eyes and ears of the court.”).

them.⁷⁹

5. Address Inconsistent Planning with the Client

One of the more difficult conversations counsel may have with a client is when the client is close to reunification with her children and has a sudden setback. It can be particularly difficult when it becomes a pattern—sudden backward movement just as a case is about to reach a new stage of progress. Examples include suddenly missing visits with the child or abruptly dropping out of a required program.

In these situations, the easiest path is to focus on logistical or external forces that could be inhibiting progress. However it is also worth initiating a conversation with the client about whether they are having any feelings of ambivalence. This conversation may well feel unnatural to parent's counsel—after all, most of counsel's job is fighting against seemingly endless suspicion about the client's ability to and desire to parent. To suggest that a parent may feel ambivalence can feel disloyal. Additionally, clients may worry that if they express ambivalence, the attorney may be upset with them or not advocate as strongly for reunification. If broaching the topic of ambivalence, it is important that the attorney first reassure the client neither will happen.

If counsel is right and the client is feeling ambivalence, inviting the client to express it aloud can provide relief to anxiety, while also clearing the way for proactive planning.⁸⁰ Counsel could ask the client if they have any worries about the current plan for reunification—does the parent think the current plan will keep the kids home once they are returned? Counsel could highlight how hard the client has worked towards reunification and, in a non-judgmental way, express curiosity about the setbacks. This is an admittedly difficult conversation; it may be helpful to reference experiences working with other parents. Counsel could reflect that

⁷⁹ It should be noted that every jurisdiction has different rules for whether and to what extent child welfare agencies can circumvent federal HIPAA privacy rules to access parents' protected mental health records. See generally Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 325 (2002). Speaking directly with a client's therapist is a useful practice for determining if treatment notes will be kept confidential. Policies may vary even among clinical practices in the same jurisdiction.

⁸⁰ Barbara Almond, *Ambivalence in Pregnancy and Childbirth*, PSYCHOL. TODAY (Sept. 28, 2010), <https://www.psychologytoday.com/blog/maternal-ambivalence/201009/ambivalence-in-pregnancy-and-childbirth> [<https://perma.cc/QX4A-GNLV>] ("These issues are not easy to get to in psychotherapy, but if a woman does not wait until it is too late, she may be able to resolve them and undertake motherhood, successfully.").

the prospect of reunification is exciting but also can be anxiety-provoking for many parents. What if the children were removed again? It was traumatic for the children and parent the first time; the thought of it happening again could seem insurmountable.

In addition, counsel already knows the main issues in the case, and so can consider how the client's concerns might fit into the themes underlying maternal ambivalence. For example, if there has been a particularly adverse relationship with the agency (per Stern's constellation, an issue with "parent's support system"), an attorney could ask if it is difficult to imagine how a trial discharge will work given the contentious relationship with the foster care agency. In such a situation, counsel is likely to have some private anxiety that the bad relationship will affect the plan. Consider, then, the experience of the parent, who knows she may only have one chance to make the trial discharge work.

Or, if a young mother has had her parenting decisions scrutinized and criticized throughout the case (an issue with the "life growth" and "primary relatedness" themes), counsel can acknowledge how it's difficult to have confidence in parenting and to figure out who one is as a parent when one is constantly feeling criticized and told what to do.

Once the client's feelings are verbalized, counsel can help arm the client with a plan for how to deal with such a situation. In short, it is worth the discomfort of raising the issue. When counsel is correct that ambivalence is a factor, clients can greatly benefit from expressing such feelings, making contingency plans, and generally confronting their anxiety.

CONCLUSION

When decision makers in the child welfare system assume statements of parental ambivalence are pathological and indicative of actual risk to children, children are unnecessarily removed from their parents or needlessly remain in foster care. Professionals in the child welfare system need to engage in thoughtful and reality-based consideration and dialogue about what is creating risk, or the specter of risk, to a family. The current consideration and treatment of statements of parental ambivalence belie efforts to critically think about a child's safety at home. This process creates a "conspiracy of silence" that serves no one.⁸¹ The often unspoken truth of the child welfare system is that poor parents are punished

⁸¹ Davies, *supra* note 1, at 148.

for actions that are ubiquitous and unnoticed in middle class homes.⁸² Parents who are brought into the child welfare system are held to a separate, unreasonable standard where they are expected to deny any feeling of parental ambivalence.

The status quo is completely at odds with what is known about parental ambivalence: expressing ambivalence in a supportive and therapeutic environment leads to improved parental functioning, whereas repressing ambivalence results in guilt and anxiety that only add to a parent's burden.⁸³ However, there is hope for improvement. Greater education about parental ambivalence, including thoughtful clinical treatment and strong legal advocacy, has the potential to make the child welfare system both more just and more effective.

⁸² See generally PADILLA & SUMMERS, *supra* note 7.

⁸³ See Hoffman, *supra* note 26, at 1226, 1233; see also ALMOND, *supra* note 47, at xi ("[I]t became increasingly clear to me that the shame and guilt that my ambivalence engendered had made it extremely hard for me, as a young mother, to come to terms with my limits. And I began to see that this was true for most mothers.").

FAMILY DEFENSE AND THE DISAPPEARING
PROBLEM-SOLVING COURT

Jane M. Spinak†

INTRODUCTION 171

I. FAMILY COURT AS PROBLEM-SOLVING COURT 174

II. LIMITS OF PARENT REPRESENTATION IN FAMILY COURT . 178

III. CREATION OF FAMILY COURT TREATMENT PARTS 185

IV. THE EFFECTIVENESS OF FAMILY COURT TREATMENT
PARTS..... 190

V. CREATION OF FAMILY DEFENSE PRACTICE IN NYC..... 194

VI. IMPACT OF FAMILY DEFENSE ON FAMILY COURT
TREATMENT PARTS 196

VII. LESSONS 200

INTRODUCTION

The juvenile court was the original problem-solving court, where the role of the judge was to be a leader of a team that included other helping professionals, especially social workers and probation officers, to address the underlying reasons that the child was brought to court. The purpose was not so much to determine innocence or guilt but to help the child who had gotten into trouble through court-based interventions. While the Supreme Court in 1967 ultimately determined that children brought to court had due process rights that included the right to counsel, the role of the court as a place to solve problems remains a central tenet of this court system.¹

As the juvenile court evolved into a family court where child maltreatment was adjudicated separately from delinquency, the core judge-driven and problem-solving model was applied to these subsequent proceedings. What was best for the child permeated the determinations of neglect or abuse even as the adjudication process became more structured and adversarial. Nevertheless, unlike the determination that children had a constitutional right to

† Edward Ross Aranow Clinical Professor of Law, Columbia Law School. Thanks especially to Michele Cortese, Kara Finck, and Emma Ketteringham for assisting me in this project. Thanks to Sarah Gledhill Deibler for her extraordinary research assistance. This article is dedicated to Sue Jacobs, the founding Executive Director of the Center for Family Representation.

¹ *In re Gault*, 387 US 1, 41 (1967); Jane M. Spinak, *Family Court*, in *THE CHILD: AN ENCYCLOPEDIC COMPANION* 344, 344-45 (Richard A. Shweder et al. eds., 2009).

counsel in delinquency matters, the Supreme Court has never held that parents have a concomitant right to counsel in child protective proceedings or even in termination of parental rights cases, perhaps the most drastic civil court outcome imaginable.² Without this constitutional mandate to provide counsel to indigent parents, states were not compelled to develop effective family defense legal practices and they did not. Even states, like New York, which statutorily require counsel for parents,³ never embraced an institutional model of parental defense that mirrored either the institutional criminal defense or child advocacy systems that were developed and funded by state and county governments.⁴

Problem-solving courts began to flourish in the early 1990s with the creation of criminal drug courts as alternatives to standard criminal court practices.⁵ In the drug courts, defendants would receive treatment rather than incarceration and be monitored closely within the court.⁶ Family Court Treatment Parts (FCTPs) were developed in the late 1990s in New York State, fully embracing the three key components of the problem-solving drug court model: (1) an activist judge who helps to fashion, and then closely monitor, dispositions; (2) a team of lawyers, social workers, and court personnel who try to identify and then work toward common goals with the family; and (3) frequent and meaningful court appearances by relevant parties.⁷ This team model has, at various times and in various FCTPs, challenged the attorneys for the parents (and sometimes the child) in fulfilling several of their ethical responsibilities to their clients, including preserving confidentiality, maintaining client-centered advocacy, and protecting due process rights.⁸

² *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

³ N.Y. FAM. CT. ACT § 262 (McKinney 2012); *see also infra* text accompanying notes 33-35.

⁴ For example, the Legal Aid Society of New York has been the primary institutional provider for criminal defense contracts with New York City since 1965. *See* Robert F. Wagner, Jr., Mayor, N.Y.C., Exec. Order No. 178 (1965). The Juvenile Rights Division (now Juvenile Rights Practice) of the Legal Aid Society was established in 1962—concurrently with New York Family Courts—and began contracts with New York State to represent children in child protective proceedings soon thereafter. *See* Merrill Sobie, Practice Commentary, N.Y. FAM. CT. ACT §§ 243, 245 (McKinney 2010); *see also* FAM. CT. ACT § 248.

⁵ *See* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503 (2003).

⁶ *Id.* at 1506.

⁷ *See infra* Part III. I am using the term Family Court Treatment Part (FCTP). These parts are also called Family Treatment Court or similar types of names. For consistency, I will use only FCTP.

⁸ *See infra* Part III.

In the last decade, New York City has embraced multi-disciplinary, institutional family defense practice by contracting with institutional providers to represent the vast majority of parents in child welfare proceedings.⁹ The ability of these practitioners to improve the process and outcomes for families has begun to be proven and felt. Vigorous, sustained advocacy has challenged previous court practices that often failed to protect the procedural and substantive due process rights of parents and permitted often-unfettered judicial discretion. Social work staff employed by these family defense offices have proven just as adept at assisting parents in finding and sustaining treatment as staff employed by the FCTPs.¹⁰ The development of this advocacy also challenges the problem-solving approach to resolving family concerns that characterizes the court in general but especially in the FCTPs that have incorporated a new generation of problem-solving court practices.

The rise of multi-disciplinary, institutional family defense practice has generated an unanticipated consequence: the diminishment and even disappearance of FCTPs in New York City. While the overall number of FCTPs has decreased in recent years across New York State for several reasons, including the lack of resources to sustain the courts, in New York City their disappearance can be attributed in significant part to the development of rigorous family defense practice where advocates counsel their clients about the meaning and impact of FCTPs in far more informed and nuanced ways and social work staff can effectively support parents addressing substance use.¹¹ This essay traces the trajectory of both the FCTPs and these practitioners to analyze this outcome. Part I introduces the Family Court as a problem-solving court and includes my concerns about the court as a place to solve problems. Part II discusses the limits of parent representation through a discussion of the Supreme Court decision in *Lassiter v. Department of Social Services* and subsequent litigation in challenging the effectiveness of the assigned counsel system in New York. Part III discusses the creation of FCTPs in New York and Part IV reviews what is currently known about the effectiveness of FCTPs. Part V traces the creation of family defense practice in New York City and Part VI discusses the impact that practice has had on FCTPs. Part VII discusses the lessons that can be learned from the creation of an effective system of parent representation.

⁹ See *infra* Part V.

¹⁰ See *infra* Part V.

¹¹ See *infra* Part VI.

I. FAMILY COURT AS PROBLEM-SOLVING COURT

The founders of the juvenile court movement believed that the adversarial and punitive criminal court was unsuited to meet the needs of the young people coming into the court.¹² Rather, these reformers sought to address the underlying issues that the child faced: youthful antisocial behavior and family dysfunction. These issues were heightened—if not directly addressed—by poverty, immigration status, and racism. The adult criminal court was considered unable to distinguish the special developmental needs of children in order to treat them differently than adults.¹³ The juvenile court, by contrast, would organize around these developmental and treatment needs, creating a rehabilitative ideal that was not rooted in the particular acts of the child or parent but focused instead on the potential outcome of appropriate practices on behalf of the youth.¹⁴

Judges of this early court saw themselves as the equivalent of doctors: not confined to the offense the youth committed, but more interested in the underlying causes in order to administer the right disposition.¹⁵ As Judge Harvey Humphrey Baker, the first judge of the Boston juvenile court, noted:

In determining the disposition to be made of the case . . . [t]he judge and probation officer consider together, like a physician and his junior, whether the outbreak which resulted in the arrest of the child was largely accidental, or whether it is habitual or likely to be so; whether it is due chiefly to some inherent physical or moral defect of the child, or whether some feature of his environment is an important factor; and then they address themselves to the question of how permanently to prevent the recurrence.¹⁶

The medical metaphor still resonates. One of the most distinguished family court judges in recent years, Judge Leonard Edwards of California, described the family court similarly: “We are the legal equivalent to an emergency room in the medical profession. We intervene in crises and figure out the best response on a

¹² Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008).

¹³ *Id.*

¹⁴ *Id.*; see also DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004).

¹⁵ Jane M. Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 TENN. J.L. & POL’Y 47, 51-52 (2014) [hereinafter Spinak, *A Cautionary Tale*].

¹⁶ Harvey Humphrey Baker, *Judge Baker on the Procedure of the Boston Juvenile Court*, in HARVEY HUMPHREY BAKER: UPBUILDER OF THE JUVENILE COURT 107, 114 (Judge Baker Found., 1921).

case-by-case, individualized basis.”¹⁷ While not employing the medical metaphor directly, the rationale for the modern problem-solving court movement is strikingly similar. One of the foremost proponents of problem-solving courts, Greg Berman, describes “the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of the communities.”¹⁸ Berman is speaking of the broad range of problem-solving courts that his organization, The Center for Court Innovation, has helped to launch across the country in the last two decades, but he could easily be speaking about the family courts that emerged out of the original juvenile court throughout the twentieth century.¹⁹ New York’s unified family court, for example, was created in 1962 as a problem-solving court to replace, in part, the Children’s Court, which was created as a problem-solving court at the beginning of the twentieth century.²⁰ The new unified family court—which would have original jurisdiction over child protective and delinquency matters as well as concurrent jurisdiction over issues of custody, support, and family offenses—was granted broad discretion to maintain the problem-solving approach:

[The Family Court Act] defines the conditions on which the family court may intervene in the life of a child, parent and spouse. Once these conditions are satisfied, the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it. The judges of the court are thus given a wide discretion and grave responsibilities.²¹

New York’s broad interventionist approach exists throughout most of the country and is reinforced by national organizations, like the National Council of Juvenile and Family Court Judges, which has

¹⁷ Hon. Leonard P. Edwards, Superior Court of Cal., Cty. of Santa Clara, Remarks on Receiving the William H. Rehnquist Award for Judicial Excellence at the U.S. Supreme Court (Nov. 18, 2004), in *JUV. & FAM. CT. J.*, Winter 2005, at 45, 45.

¹⁸ See Greg Berman, “What is a Traditional Judge Anyway?” *Problem Solving in the State Courts*, 84 *JUDICATURE* 78, 78 (2000); see also Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 *Wis. L. REV.* 331, 362 (2002) [hereinafter Spinak, *Adding Value*].

¹⁹ Berman, *supra* note 18, at 78; see generally ROBERT V. WOLF, *CTR. FOR CT. INNOVATION, BREAKING WITH TRADITION: INTRODUCING PROBLEM SOLVING IN CONVENTIONAL COURTS* (2007), <http://www.courtinnovation.org/sites/default/files/break%20with%20trad.pdf> [<https://perma.cc/Y27V-RHBE>] (discussing the emergence and purpose of problem-solving courts).

²⁰ See ALFRED J. KAHN, *A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN’S COURT* 31 (1953) (describing the creation and re-creation of Children’s Court jurisdiction from 1902 until 1933).

²¹ N.Y. FAM. CT. ACT § 141 (McKinney 1962).

championed the court as a place where a team of professionals led by the judge can provide a range of assistance and services for the families who find themselves in the court.²² Most recent family court reform efforts reinforce this paradigm, whether the reformers are pursuing a unified family court, which consolidates all the issues facing a family before one judge so that the judge can address the family's needs holistically, or the reformers are creating specialized family court parts, like FCTPs, where the judge similarly helps to create and monitor solutions to the family's problems.²³ Either way, three assumptions exist: that the court is capable of intervening in a family's life not just to resolve the legal dispute that brought the family to court but to improve the family's life by addressing the complex social, emotional or psychological issues underlying the dispute; that court intervention will improve outcomes for families, and, most centrally, that the court is a good place to resolve family problems.²⁴

As I have written elsewhere, I am deeply suspicious of an interventionist court whose primary purpose is to improve the lives of the children and families coming into the court.²⁵ This is for multiple reasons but can be summarized in this response to the unified family court movement:

A court is, at its core, an instrument of social control. What it does best is resolve disputed factual issues at a point when the litigants cannot resolve them by themselves. Courts gain control over these acrimonious situations only through the threat or reality of coercion. Thus, courts are generally seen as an option of

²² See generally NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, THE MODEL COURT EFFECT: PROVEN STRATEGIES IN SYSTEMS' CHANGE 2 (2009), http://www.ncjfcj.org/sites/default/files/Model%20Courts%20Brochure_Effect_2.pdf [<https://perma.cc/LU4C-LWGP>].

²³ Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 527 (1998); see Spinak, *supra* note 12, at 261, 262-63, 269-71 (2008) (giving an explanation of "one family, one judge" and describing the various challenges facing problem-solving courts and the judges presiding over them).

²⁴ Spinak, *A Cautionary Tale*, *supra* note 15, at 78-79.

²⁵ See generally Spinak, *supra* note 12 (questioning whether the court is actually the best place to address significant social problems and its impact on criminal activity and family functioning); see also generally Spinak, *A Cautionary Tale*, *supra* note 15 (challenging the "therapeutic justice" approach in judicial leadership, which shifts the judge's role into a healer, and advocating for a return to a more neutral approach); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE RELIG. GENDER & CLASS 113 (2010) [hereinafter Spinak, *Take 2*] (focusing on the potential disparate impact of problem-solving courts on minority families, and the difficulty supporters and critics involved in the problem-solving court movement have in talking and listening to each other).

last resort, somewhere for people to go to resolve serious disputes without resort to violence, and a place where society can assert its control over behavior that it considers too egregious to go unpunished. Most people who appear before a court do not wish to be there, and would have chosen another form of dispute resolution had it been possible.²⁶

If courts are not recognized as instruments of coercion and control but as places to solve problems, there is a domino effect on families, particularly vulnerable families. Situating assistance and services with the court can diminish the funding and use of community-based services, where public health and harm-reduction types of solutions are more likely to exist and where earlier intervention can prevent a crisis.²⁷ Instead, more families may be brought into the court because that is where access to services is located. This has certainly been the experience in some FCTPs, where access to faster and better treatment is available.²⁸ These courts also reduce the responsibility the state has for creating the problems that result in child protection proceedings. Both the standard Family Court and the current problem-solving variations on that standard, such as FCTPs, place accountability on the individual parent rather than on the predominant causes of neglect and abuse: poverty and its ensuing hardships.²⁹ Professor Eric Miller has noted this accountability shift in considering drug courts generally: “[t]herapy and responsibility disaggregate the problem of drug crime from social and governmental forces. They take the emphasis off the increasing racial segregation and class stratification of the inner city, and emphasize the personal characteristics of the addict.”³⁰ These multiple underlying causes of family stress and the broader societal and structural failures to address them are marginalized when problem-solving courts shift the burden of resolution onto the individual parent.³¹ Finally, due process protec-

²⁶ Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 440-41 (2002).

²⁷ See generally Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590 (2005) (discussing cost efficiency of community-based preventative programs); see also generally Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J. L. & POL’Y 73 (2012) (discussing effectiveness and value of community-based organizations in differential response programs).

²⁸ See *infra* Part III.

²⁹ Garrison, *supra* note 27, at 595-99, 612-16 (arguing for an empirically-based system of assistance to address the multiplicity of factors that produce child maltreatment and subsequent child welfare interventions, including foster care).

³⁰ Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 427 (2009).

³¹ Garrison, *supra* note 27, at 595-99 (outlining the various ways in which social

tions are diminished in a problem-solving court where greater emphasis is placed on collaboration, supervision, and monitoring. Professor Wendy Bach has called this form of increased control hyperregulation:

[W]e link support to punishment, and we structure these systems in a way that is highly coercive and that disproportionately harms poor families led by African American women. When it comes to poor families in general and poor families of color in particular, we have a penchant for control and degradation. At the end of the day, judges are judges and therefore have at their disposal a fundamentally coercive toolbox. They order, and they punish parties for failing to comply with their orders. Exposing more and more poor families to these coercive settings and making participation in such settings the price of support invites more hyperregulation. To make matters worse, not only do problem-solving courts involve these considerable risks but tying such courts to abandoning rights leaves families even more vulnerable.³²

If problem-solving courts are not the preferred solution for vulnerable families, the rights that they are holding onto have to be meaningful and productive. At base, this requires effective assistance of counsel, a right that remains elusive but, when provided, changes the very way we consider the options for vulnerable families.

II. LIMITS OF PARENT REPRESENTATION IN FAMILY COURT

Family court has never cottoned to lawyers, particularly lawyers for parents. If the court is constructed around a judge who can determine what is best for children through a problem-solving approach and put that plan into effect, the need for procedural due process protections feels less urgent. When New York created the unified family court in 1962, no provision for the assignment of counsel for indigent parents in child maltreatment cases was included in the new Family Court Act (FCA).³³ Ten years later, the New York Court of Appeals determined that the loss of a child's

policies and law have failed to understand, prevent, or address child maltreatment). The more the burden for addressing child welfare is placed on the individual through the court-based problem-solving paradigm, the less likely that Garrison's recommendations will be considered.

³² Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1073 (2015) (footnote omitted) (reviewing CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)); see also Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011).

³³ Merrill Sobie, Practice Commentary, N.Y. FAM. CT. ACT § 262 (McKinney 2012).

society in a neglect proceeding “involves too fundamental an interest and right” not to be protected by the procedural due process right of assigned counsel.³⁴ The FCA was subsequently amended in 1975 to codify the right of indigent parents to be apprised of and assigned counsel in child maltreatment proceedings.³⁵

Many states were far less committed to providing counsel for indigent parents and recognizing the fundamental right of family integrity involved in a court hearing that could result in children being removed from their parent’s care, either temporarily or permanently; many states provided no right to counsel and others only provided counsel on a case-by-case basis.³⁶ This led Abby Gail Lassiter to challenge the failure of Durham County, North Carolina, to provide her with counsel prior to terminating her parental rights.³⁷ Lassiter’s case reached the Supreme Court in 1981, where a divided Court determined that indigent parents were only entitled to counsel on a case-by-case basis, allowing the family court judge to resolve whether counsel was necessary to protect the parent’s right to fundamental fairness in the proceeding.³⁸

Lassiter was a single parent whose youngest son, William, had been declared neglected and placed in foster care a year before Lassiter was imprisoned for second-degree murder.³⁹ Her four older children lived with Lassiter’s mother.⁴⁰ Three years later, Durham County Department of Social Services filed a termination of parental rights case to free William for adoption.⁴¹ On the first day that Lassiter was produced from prison, the family court judge decided that she had received ample time to secure counsel despite being in prison and proceeded with the hearing.⁴² Lassiter appeared *pro se* and, as Justice Blackmun recounts in his dissent, failed miserably as her own counsel:

An experienced attorney might have translated petitioner’s reaction and emotion into several substantive legal arguments.

³⁴ *In re Ella B.*, 30 N.Y.2d 352, 356 (1972).

³⁵ Sobie, *supra* note 33.

³⁶ See Erik J. Foley, *No Money, No Lawyer—No Children: The Right to Counsel for Indigent Defendants in Nevada Termination of Parental Rights Proceedings*, 16 Nev. L.J. 313, 321-22 (2015).

³⁷ See generally *In re Lassiter*, 259 S.E.2d 336 (N.C. Ct. App. 1979) (rejecting the claim by incarcerated mother that she had a due process right to representation by appointed counsel).

³⁸ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 23.

⁴¹ *Id.* at 21.

⁴² *Id.*

The State charged petitioner with failing to arrange a “constructive plan” for her child’s future or to demonstrate a “positive response” to the Department’s intervention. A defense would have been that petitioner had arranged for the child to be cared for properly by his grandmother, and evidence might have been adduced to demonstrate the adequacy of the grandmother’s care of the other children. . . . The Department’s own “diligence” in promoting the family’s integrity was never put in issue during the hearing, yet it is surely significant in light of petitioner’s incarceration and lack of access to her child. . . . Finally, the asserted willfulness of petitioner’s lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action.⁴³

Lassiter attempted to cross-examine the only witness for the state, a social worker who had visited her in prison once and who referred repeatedly to the agency record that was not entered in evidence.⁴⁴ Lassiter testified herself under questioning by the judge.⁴⁵ The judge and the county attorney questioned Lassiter’s mother but Lassiter was never told she could also question her mother.⁴⁶ The county attorney made a closing argument and when the judge asked if Lassiter had anything to say, she responded: “Yes. I don’t think it’s right.”⁴⁷ The judge determined that Lassiter had “‘wilfully failed to maintain concern or responsibility for the welfare of the minor,’ and because it was ‘in the best interests of the minor,’ the court terminated Ms. Lassiter’s status as William’s parent.”⁴⁸

Justice Blackmun in his dissent notes the remarkable similarity between Justice Stewart’s *Mathews v. Eldridge* balancing test analysis for the Court and his own. Both find “the private interest [of the parent] weighty, the [case-by-case] procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial.”⁴⁹ Yet instead of reaching the same conclusion—that the *Mathews* test clearly supports providing counsel to indigent parents in every case—the Court found counsel was not

⁴³ *Id.* at 56 (Blackmun, J., dissenting) (citations omitted).

⁴⁴ *Lassiter*, 452 U.S. at 53-55.

⁴⁵ *Id.* at 54-55.

⁴⁶ *Id.* at 55.

⁴⁷ *Id.* at 56.

⁴⁸ *Id.* at 24 (majority opinion).

⁴⁹ *See id.* at 48-49 (Blackmun, J., dissenting) (describing the *Mathews* test, wherein the Court balances three distinct factors: the private interest affected; the risk of error under the procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure).

an inherent due process right in termination of parental rights cases.⁵⁰ In dissent, Justice Blackmun found “virtually incredible the Court’s conclusion today that her termination proceeding was fundamentally fair. . . . [T]he Court simply ignores the defendant’s obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases.”⁵¹ The majority was nevertheless troubled by its own determination that the case-by-case approach satisfies Constitutional due process requirements. In an awkwardly worded final sentence that embraces categorical representation instead, the opinion concludes: “The Court’s opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”⁵²

Despite the enlightenment exhibited by many states, there was concern that the Court’s imprimatur on case-by-case determinations would either encourage states to roll back their categorical approach to providing counsel or discourage states from abandoning the case-by-case approach. Legislatures or high courts mostly moved in the opposite direction. By 2015, forty-five states and the District of Columbia provided indigent parents with a categorical right to counsel in termination of parental rights proceedings.⁵³ Many states have also expanded the application of the right to counsel to other proceedings and stages of proceedings in the family court.⁵⁴ In one recent significant set-back, the New Hampshire Supreme Court held that the legislature’s decision to abolish the statutory right to counsel in every case as a cost-cutting mechanism did not violate the state or federal constitutions.⁵⁵

Acknowledging the role of counsel in protecting the fundamental right of family integrity has not yet resulted in effective representation nationally.⁵⁶ Serious limitations exist on the actual

⁵⁰ *Lassiter*, 452 U.S. at 31-32 (majority opinion) (“[W]e [cannot] say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision 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, of course, to appellate review.”).

⁵¹ *Id.* at 57 (Blackmun, J., dissenting).

⁵² *Id.* at 34 (majority opinion).

⁵³ Foley, *supra* note 36, at 322.

⁵⁴ *Id.* at 322-23.

⁵⁵ Martin Guggenheim & Susan Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. 44 (2013) (discussing the decision in *In re C.M.*, 48 A.3d 942 (N.H. 2012)).

⁵⁶ The substantive due process right of family integrity was most recently reaffirmed in *Troxel v. Granville*, where the Supreme Court concluded: “In light of this

provision and assistance of counsel for parents in child maltreatment and termination of parental rights proceedings across the country. Attorneys may not be appointed for all stages of the proceedings; they may be appointed after critical preliminary processes have begun; they may not be properly compensated.⁵⁷ An American Bar Association survey of parents' lawyers found that these attorneys may be paid as little as \$200 for an entire case.⁵⁸ These limitations have significant impact on attorneys embracing this difficult work. Michigan, for example, found that custodial parents were only represented at removal hearings 60% of the time and 50% of the time at non-removal preliminary hearings. In some counties, counsel is never appointed for preliminary hearings and parents may wait weeks for counsel after their children have already been removed.⁵⁹ Michigan has no standard state compensation rate so attorney compensation varies among counties, with few counties paying lawyers an hourly rate. Some counties pay by the hearing or stage of the case, even distinguishing payment by whether the client enters a plea or a hearing is conducted, regardless of the amount of work the lawyer must do to prepare.⁶⁰ The compensation is so low that these lawyers maintain caseloads in the hundreds, which severely limits their advocacy for any particular client. Lawyers rarely speak to their clients before court and, because of scheduling conflicts, substitute counsel is frequently required. And while Michigan is one of the few states that provides for a jury trial in child protection fact finding hearings, in 2005 jury verdicts occurred in 1% of the cases while parents pled to the allegations against them in close to 4000 cases.⁶¹

Michigan's experience was revealed because the state chose to study the issue.⁶² In New York, the experience of assigned counsel

extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000).

⁵⁷ Leonard Edwards, *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, JUV. & FAM. CT. J., Spring 2012, at 21, 23-25; Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 A.B.A. CHILD L. PRAC. 97, 102-04 (2009).

⁵⁸ Guggenheim & Jacobs, *supra* note 55.

⁵⁹ Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters*, MICH. CHILD WELFARE L.J., Fall 2007, at 11, 13-14.

⁶⁰ *Id.* at 14.

⁶¹ *Id.*

⁶² See *id.* at 14 n.27 (citing MUSKIE SCH. OF PUB. SERV. & AM. BAR ASS'N, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 134 (2005),

was the basis of a lawsuit in 2000—the *NYCLA* decision—to determine “whether New York State’s failure to increase the compensation rates for assigned counsel violates the constitutional and statutory right to meaningful and effective representation.”⁶³ At the time, counsel was paid \$40 per hour for in-court work and \$25 per hour for out-of-court work.⁶⁴ The court after a bench trial determined that the legislature’s failure “to increase the assigned counsel rates [results], in many cases, in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation.”⁶⁵ In considering the impact on parent representation in family court in New York City, Judge Lucindo Suarez found there were insufficient numbers of assigned counsel in all five boroughs to be available to represent parents.⁶⁶ In New York County, for example, assigned counsel did not staff 40% of intake shifts.⁶⁷ Large numbers of family court matters, including child protective and foster care placement and review proceedings, never had counsel assigned.⁶⁸ Half of the assigned counsel submitted vouchers indicating that they had worked fewer than five out-of-court hours on their cases.⁶⁹ At the time of the trial, the assigned counsel administrator testified that she had 65 attorneys available in Bronx and New York Counties and needed 325 to staff the intake parts.⁷⁰ Because of the size of their caseloads and their inability to do their jobs, most assigned counsel had stopped accepting new cases.⁷¹ The family court routinely proceeded with cases with no counsel present, causing Judge Suarez to determine irreparable harm to the litigants and unconscionable delay in court proceedings, resulting in children being removed from their homes and languishing in foster care, often without proper visitation orders, and more likely to be subject to termination of parental rights.⁷²

sess.pdf [<https://perma.cc/Z8XE-8QN2>]); see also JASON A. OETJEN, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION (2003), http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf [<https://perma.cc/ZSZ4-MY6Y>] (finding improved outcomes for families with enhanced parent representation).

⁶³ *N.Y. Cty. Lawyers’ Ass’n v. State*, 196 Misc.2d 761, 762 (N.Y. Sup. Ct. 2003).

⁶⁴ *Id.* at 764.

⁶⁵ *Id.* at 763.

⁶⁶ *Id.* at 764.

⁶⁷ *Id.* at 766.

⁶⁸ *Id.*

⁶⁹ *N.Y. Cty. Lawyers’ Ass’n*, 196 Misc.2d at 766.

⁷⁰ *Id.* at 767.

⁷¹ *Id.* at 776.

⁷² *Id.* at 772-73.

The court concluded beyond a reasonable doubt that the failure to raise the assigned counsel rate and to equalize the rate between in-court and out-of-court work was an unconstitutional violation of “the constitutional and statutory right to legal representation of children and indigent adults in New York City Family and Criminal Courts, and result in a constitutional imbalance among the branches of government impairing the judiciary’s ability to function.”⁷³ The court issued a mandatory injunction requiring assigned counsel to be paid \$90 per hour for all work until the legislature acted.⁷⁴

While the impact of the *NYCLA* decision was eventually realized—encouraging more lawyers to join the assigned counsel panel and for many to provide effective assistance of counsel through meaningful out-of-court and in-court work—improving the rates and structure of the assigned counsel plan remained a limited solution for the thousands of litigants entitled to counsel yearly in family court.⁷⁵ As Judge Suarez found, effective assistance of counsel includes certain basic tasks in all cases, such as interviewing and counseling clients, conducting independent investigations and developing evidence, actively participating in every stage of the proceedings, and timely assignment to be able to work with clients from the very beginning of a case.⁷⁶ To do this well required a solution beyond fixing the assigned counsel plan, a turn instead toward a system of institutional representation that already existed for adult criminal defendants and children in family court delinquency and child maltreatment cases in New York City. But that turn did not come immediately. Instead, the court system focused first on creating “model court” parts that would improve the quality of child maltreatment proceedings, particularly where allegations of substance abuse was present.⁷⁷ The FCTPs that resulted considered counsel to be less central to securing fundamental fairness than having a problem-solving team approach.

⁷³ *Id.* at 778.

⁷⁴ *Id.*

⁷⁵ See generally N.Y. STATE BAR ASS’N, NYSBA TASK FORCE ON FAMILY COURT FINAL REPORT 43 (2013), <https://nysba.org/TFFCFinalReport/> [<https://perma.cc/FZ5C-GF2L>] (“Testimony presented to the Task Force described determinations of inability to afford counsel that were inconsistent from jurisdiction to jurisdiction and in some instances involved a broad use of discretion that did not appear to fulfill statutory intent.”); see also Sheri Bonstelle & Christine Schessler, Comment, *Adjourning Justice: New York State’s Failure to Support Assigned Counsel Violates the Rights of Families In Child Abuse And Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151 (2001).

⁷⁶ See N.Y. Cty. Lawyers’ Ass’n, 196 Misc.2d at 778-82.

⁷⁷ See Spinak, *Adding Value*, *supra* note 18, at 350-55.

III. CREATION OF FAMILY COURT TREATMENT PARTS

New York State created its first FCTP in 1997 and was designated a “model court” site under the auspices of the National Council of Juvenile and Family Court Judges Model Courts Project in 1998.⁷⁸ The same year, the first FCTP was launched in New York City.⁷⁹ Parents accused of neglecting their children because of substance abuse could participate in an extensive alternative court conferencing and monitoring system.⁸⁰ Eligible parents were assessed by the FCTP clinical staff, were required to waive their right to a litigated hearing, and had to admit that neglect was caused by their addiction.⁸¹ The parent then entered into a negotiated treatment plan that had been created by the FCTP clinical staff, the parent and her counsel, the lawyer for the children, and the child protective agency’s attorney and caseworker; the plan was also approved by the presiding judge.⁸² The parent was then referred immediately to treatment providers who contracted with the court to have available treatment spaces.⁸³ What ensued was an intensive

⁷⁸ NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NEW YORK (2011), <http://www.ncjfcj.org/sites/default/files/NEW%20YORK%20STATE%20OUTREACH.pdf> [<https://perma.cc/6GLF-CQTD>]. “The National Council of Juvenile and Family Court Judges’ Permanency Planning for Children Department (NCJFCJ/PPCD) has created a web site that highlights the Child Victims Act Model Courts Project, which [was] funded by the U.S. Department of Justice’s Office of Juvenile Justice & Delinquency Prevention (OJJDP). . . . The model courts initiative is described by its funder, OJJDP, as ‘a nationwide effort to improve how courts handle child abuse and neglect cases, [that] is helping children spend less time in foster care and resulting in earlier resolution of cases in dependency courts.’ The model courts are part of the larger effort by the NCJFCJ/PPCD ‘to educate judges and other practitioners on the need to expedite secure safe permanent placements for all maltreated children, either by making it possible for them to safely stay with or return to their own families or by finding them safe adoptive homes.’ The model court description also includes other key elements seen as essential for success: interdisciplinary training and technical assistance for all youth-serving professionals using the NCJFCJ’s Resource Guidelines as a blueprint for improving court practice; identifying ‘lead’ judges to mobilize all the relevant players within their jurisdictions; developing programs that can be seen as easily replicable in other jurisdictions; piloting innovative alternative dispute resolution methods; and sharing information locally and nationwide through enhanced data systems.” Spinak, *Adding Value*, *supra* note 18, at 361-62 (footnotes omitted). The current version of the Project’s work is found at the NCJFCJ website. *See Model Courts*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, <http://www.ncjfcj.org/content/view/81/145/> (last visited Dec. 8, 2016).

⁷⁹ *See* Spinak, *Adding Value*, *supra* note 18, at 355.

⁸⁰ Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, 2 J. CTR. FAM. CHILD. & CTS. 5, 5, 15-16 (2000).

⁸¹ *Id.* at 11-12.

⁸² *Id.*

⁸³ *See* Gloria Sosa-Lintner, *Family Treatment Court*, in CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM; THE ATTORNEY’S ROLE AND RESPONSIBILITIES 609, 616 (David J. Lansner ed., 10th ed. 2000).

period of court supervision, with frequent in-court drug testing and appearances before the judge by the parent and other FCTP “team” members, including the lawyers and agency caseworkers.⁸⁴ Rewards for complying with the treatment plan could include longer periods of visitation and less supervision of the parent with her children.⁸⁵ Sanctions for positive drug tests or other lapses in plan compliance ranged from more frequent drug testing and court attendance to ultimate dismissal from the FCTP, sending the parent back to a regular child protective court part. Absconding from a residential program could be sanctioned by a warrant and jail time.⁸⁶

During the first two years of the FCTP, thirty parents and guardians were reunited with seventy-two children whose average length of stay in foster care was eleven months. Approximately sixty-eight percent of the parent participants were in compliance with court mandates at the start of the FCTP’s third year.⁸⁷ In New York City, where children then spent an average of four years in foster care, these numbers were impressive.⁸⁸ These were families, however, for whom the most serious allegations of neglect or abuse had been screened out, and thus were more likely to have faster reunification.⁸⁹ Thirty families also have to be seen in perspective. In 1999, during the second year of the FCTP, over 12,000 original child protective and voluntary placement proceedings were filed in New York City.⁹⁰ And as the *NYCLA* litigation established, parents in the late 1990s were unlikely to receive effective assistance of counsel in those proceedings. The enhanced staffing and resources of the FCTP for a small number of carefully chosen families should have had the anticipated results.

By 2009, the practices of this FCTP had become standardized—as revealed by conversations with parent advocates at the time. The FCTP staff would identify potential FCTP parent partici-

⁸⁴ John Courtney et al., *Gentler Justice: Family Treatment Court*, CHILD WELFARE WATCH, Winter 1999, at 12, 12-13 (“As the details are worked out—and shaped into a contract that the parent must sign—the court makes referrals to one of about 35 recovery agencies and assigns other services. Parents must come back to the court every two weeks for at least a year to update the court on their activities and submit to drug testing.”).

⁸⁵ Wolf, *supra* note 80, at 15-16.

⁸⁶ Sosa-Lintner, *supra* note 83, at 628-29.

⁸⁷ See Wolf, *supra* note 80, at 19.

⁸⁸ David Fischer et al., *A Statistical Snapshot: The Scoppetta Years*, CHILD WELFARE WATCH, Winter 2001, at 12, 12; David Fischer et al., *Watching the Numbers*, CHILD WELFARE WATCH, Winter 2001, at 15, 15.

⁸⁹ See Wolf, *supra* note 80, at 10-11.

⁹⁰ Spinak, *Adding Value*, *supra* note 18, at 331.

pants from the cases being filed by the Administration for Children's Services (ACS). After a petition was filed, the FCTP coordinator would discuss with the parent the possibility of entering the FCTP *prior* to the parent speaking to her attorney. The coordinator would explain how the FCTP worked but did not discuss any of the parent's legal rights. If the parent thought she might want to participate, she would agree to an assessment and sign an assessment waiver, which indicated that information in the assessment would not be used against her in the future. Only then would she have the opportunity to speak to her lawyer and learn that among the conditions of participation, she would have to make an admission of neglect and waive her statutory right to a preliminary hearing on the removal of her child from her care. Family visiting procedures with her children were often inflexible, the FCTP staff approved only certain treatment and service programs, and alternative programs and assistance identified by the parent or her counsel were not considered. The case would be monitored in court every thirty days or so. At the point where a decision would be made about whether the goals of the treatment plan had been met and the case should be ended, a meeting would be held with the FCTP staff, the ACS attorney, and the judge. Parent's counsel was not invited to participate in this meeting.⁹¹

While FCTPs around the state developed a range of diverse practices—and the New York County FCTP is only one example—there were no established state standards or guidelines for the creation and implementation of FCTPs for more than a decade after the first FCTPs were instituted. Finally, sometime in 2010, the New York State Office of Court Administration (OCA) issued a compendium of “Effective Practices” for FCTPs, which included guiding principles and practices for the courts as well as some of the limited information gathered about the FCTPs experiences across New York State since their implementation.⁹² An advisory committee to OCA had worked on these recommendations for about two years starting in 2007 but they were not published until long after the committee completed its work; the report remains difficult to

⁹¹ Spinak, *Take 2*, *supra* note 25, at 128 (describing conversations with parent advocates at the time). The requirement of admitting neglect and the inability to conduct a post removal hearing remained in effect even though some of the other practices began to change about the time that article was published. That will be discussed more in the text accompanying notes 102-06, *infra*.

⁹² See generally JUDY HARRIS KLUGER ET AL., ADVISORY COMM., NEW YORK STATE FAMILY TREATMENT COURTS: EFFECTIVE PRACTICES (2010), https://www.nycourts.gov/courts/problem_solving/drugcourts/pdfs/EffectivePracticesFINALSept.2010.PDF [<https://perma.cc/5FC5-WDWV>] [hereinafter EFFECTIVE PRACTICES].

access.⁹³ This is especially unfortunate because the ultimate report, which was guided to completion by the founder of the first FCTP in New York State, Judge Nicolette Pach, was indeed a blueprint for creating and sustaining these courts in ways that recognized both their advantages and their challenges.⁹⁴ Several aspects are worth exploring in analyzing the overall approach of FCTPs in the context of the discussion of parents' counsel.

The report was thorough and responsive to the concerns of the participants involved in creating and implementing a FCTP. The guiding principles of the report strove to balance the substantive and procedural due process rights of adults and children brought to court in a child maltreatment case with the underlying structure of a court focused on the effective provision of treatment to maintain or reunify families through a non-adversarial approach. This was done in several ways. First, every professional participant—judge, attorneys, child protective workers, and specialized court personnel—were recognized as first being dedicated to their own professional obligations and only second to the team in which they were being asked to join.⁹⁵ This is particularly important for parents' lawyers who have a duty of loyalty to their client who is being subjected to this court process. In recognizing the importance of this loyalty to encourage client trust and communication, the report urges the other participants to understand how the parent's lawyer's "inviolable confidential relationship" to the client may at times conflict with the purpose of the court and the expectations of the other members of the court team.⁹⁶ This certainly played out in practice when lawyers representing clients participating in a FCTP would refuse to reveal confidential information that the client did not want revealed.⁹⁷ The report recom-

⁹³ I served on the Advisory Committee and closely followed the issuance of the document. I made a public call for the issuance of the Effective Practices materials in a forum on problem-solving courts and again in a published article as well as through correspondence with appropriate officials. *See also Drug Treatment Courts*, NYCOURTS.GOV, https://www.nycourts.gov/courts/problem_solving/drugcourts/reports.shtml [https://perma.cc/483B-6T9H] (last visited Oct. 18, 2016).

⁹⁴ The New York County FCTP, described earlier, was the second. SARAH PICARD-FRITSCHÉ ET AL., CTR. FOR COURT INNOVATION, THE BRONX FAMILY TREATMENT COURT 2005-2010: IMPACT ON FAMILY COURT OUTCOMES AND PARTICIPANT EXPERIENCES AND PERCEPTIONS 10 (2011), http://www.courtinnovation.org/sites/default/files/documents/Full_Bronx_FTC.pdf [https://perma.cc/X986-ZFGT].

⁹⁵ EFFECTIVE PRACTICES, *supra* note 92, at 19.

⁹⁶ *Id.* at 105.

⁹⁷ Interview with Kara Finck, Practice Assoc. Professor of Law, Univ. of Pa. Law Sch. (Mar. 24, 2016) (notes on file with author). Professor Finck was the Managing Attorney for the Family Defense Practice at the Bronx Defenders from 2004-12.

mended that one way to achieve an understanding of divided loyalties is to engage parents' counsel (and all other relevant counsel, including the children's lawyers) in every aspect of the court's work, from the initial establishment to participation in all team and court meetings to reviewing and reorganizing court processes as needed.⁹⁸ In this way, parents' counsel is cognizant of every aspect of the court's workings and is able then to counsel her client fully on whether to choose to enter the FCTP, engage the client in a meaningful discussion about the advantages and disadvantages of submitting to FCTP jurisdiction, and discuss the likelihood of revealing otherwise confidential information. Several of the report's other principles offer parents' counsel additional reasons for recommending client participation: reminding FCTP team members and the judge that incentives and sanctions are intended to be consequences of parental actions and not punishments or rewards; that parent-child visiting should be driven solely by child safety and best interests and not as a sanction for program non-compliance;⁹⁹ that violations of court orders should rarely, if ever, result in incarceration and only after full compliance with due process mandates; that relapse is a component of recovery and needs to be considered in the context of everything else being achieved by the parent; and finally, that negotiated agreements for submitting to the court's jurisdiction should recognize a parent's right to contest removal of her children and the allegations of maltreatment and remain flexible beyond simply requiring a full admission to participate in a FCTP.¹⁰⁰ Even the report's extensive recommendations on data entry encourage analyzing the effectiveness of the FCTPs on achieving the court's primary goals of maintaining or reuniting children "with the recovering parent as long as the parent can sustain a safe, stable, and nurturing permanent home for her family."¹⁰¹

Perhaps if these *Effective Practices* had been created and utilized closer to the advent of FCTPs, attorneys for parents would have become full partners in developing the FCTP while also protecting their clients' rights.¹⁰² When the New York County FCTP was first

⁹⁸ EFFECTIVE PRACTICES, *supra* note 92, at 86.

⁹⁹ *But see* PICARD-FRITSCHÉ ET AL., *supra* note 94, at 19 ("[C]ourt observations revealed that a common FTC sanction is to reduce visitation privileges that a respondent has with his or her children.").

¹⁰⁰ EFFECTIVE PRACTICES, *supra* note 92, at 18-19, 71-74, 113-14, 152. *But see* PICARD-FRITSCHÉ ET AL., *supra* note 94, at 19.

¹⁰¹ EFFECTIVE PRACTICES, *supra* note 92, at 8, 11, 136; *see also id.* at 10, 44-45.

¹⁰² Remarkably, even today, across the country most states have yet to create rules, guidelines, and practices for FCTPs. Only 16 states have some form of statewide stan-

created, neither potential treatment agencies nor the attorneys who would be appearing on behalf of parents and children were initially included in the planning. Only after the institutional provider of children's counsel in neglect and abuse proceedings convened a meeting of treatment providers and family court lawyers to discuss the FCTP, did the court system agree to include other stakeholders in any aspects of the planning.¹⁰³ At the time, parents were represented by assigned counsel and, as the *NYCLA* case established, were unable to participate meaningfully in either planning or attendance in the FCTP. Nevertheless, significant resources were put into the FCTP and, as described earlier, initially resulted in better treatment and reunification outcomes for the small number of parents who participated.¹⁰⁴ By 2009, resources and staff had been cut and the parent's due process rights were diminished: parents did not speak to counsel before being assessed by the FCTP coordinator, admissions to neglect were always required, and parent attorneys were not routinely included in team meetings.¹⁰⁵ The Center for Family Representation had been created to represent parents in New York County and was challenging some of these FCTP practices and counseling clients about their concerns.¹⁰⁶ A parallel experience was occurring in the Bronx, where the Bronx Defenders had also started a family court practice in 2004.¹⁰⁷ The creation of this family defense representation tracks the diminishment of FCTP in New York City. Before examining the impact of these offices on FCTPs, it is worth understanding what is known about the effectiveness of FCTPs and how that informs counseling a client to participate in a FCTP.

IV. THE EFFECTIVENESS OF FAMILY COURT TREATMENT PARTS

FCTPs have proliferated since the late 1990s, reaching over

dards. See *Problem-solving Courts*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Problem-solving-courts.aspx> [<https://perma.cc/7D9D-6MLP>] (last visited Oct. 18, 2016) (follow "View table" hyperlink under AN OVERVIEW OF STATEWIDE EFFORTS BY PROBLEM-SOLVING COURT TYPE).

¹⁰³ The meeting was convened by the Juvenile Rights Division of the Legal Aid Society. At the time I was the Attorney-in-Charge of the division.

¹⁰⁴ See Wolf, *supra* note 80.

¹⁰⁵ See Spinak, *Take 2*, *supra* note 25; see also Interview with Michele Cortese, Exec. Dir., Ctr. for Family Representation (Apr. 1, 2016) (notes on file with author).

¹⁰⁶ A change of judges also impacted CFR's ability to challenge some practices. For example, some presiding judges were more open to considering ACDs or to holding removal hearings in the FCTP as well as communicating about court procedures more regularly with parents' counsel. Email from Michele Cortese, Exec. Dir., Ctr. for Family Representation (Dec. 2, 2016, 11:45 EST) (on file with author).

¹⁰⁷ Interview with Kara Finck, *supra* note 97.

300 across the country in the last two decades.¹⁰⁸ In an era when government is clamoring for “evidence-based” services, the effectiveness of FCTPs remains unproven for multiple, intersecting reasons. The first, and most important, is that none of the FCTP studies so far have been randomized. The best quasi-experimental studies conducted to date have mostly (but not entirely) provided promising outcomes, but the variability of their designs and size, and their inability to account for which variables in the FCTP lead to the more positive outcomes for families, are significant limitations acknowledged by all of the researchers.¹⁰⁹ The studies have generally measured two aspects of FCTPs: substance abuse treatment for parents and child welfare outcomes. Since the central purpose of submitting to FCTP jurisdiction is to address substance use affecting parenting, the likelihood of entering treatment, the time to treatment, days spent in treatment, and the likelihood of completing at least one treatment were identified as indicative of FCTP effectiveness.¹¹⁰ Successful treatment is intended to lead to better child welfare outcomes; these include the decreased likelihood of a child’s out-of-home placement, less time spent in out-of-home placement, less time needed to reach permanency (an outcome that prioritizes family reunification, a stable placement outside of foster care, or adoption), and family reunification.¹¹¹ With one significant exception discussed more fully below, on all of these measures (except time to permanency and with variation within the studies), participating in the FCTP had a positive impact. What none of the researchers have been able to answer is

¹⁰⁸ WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT’L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 19 (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> [<https://perma.cc/G84L-SVVE>].

¹⁰⁹ See, e.g., Eric J. Bruns et al., *Effects of a Multidisciplinary Family Treatment Drug Court on Child and Family Outcomes: Results of a Quasi-Experimental Study*, 17 CHILD MALTREATMENT 218, 226-29 (2012); Sonia D. Worcel et al., *Effects of Family Treatment Drug Courts on Substance Abuse and Child Welfare Outcomes*, 17 CHILD ABUSE REV. 427, 434-39 (2008); Beth Green et al., *How Effective Are Family Treatment Drug Courts? Outcomes From a Four-Site National Study*, 12 CHILD MALTREATMENT 43, 56-58 (2007). Other quasi-experimental studies have measured different or overlapping outcomes and are harder to use for comparison. See, e.g., PICARD-FRITSCHÉ ET AL., *supra* note 94; Suzanna Fay-Ramirez, *Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms Over Time*, 40 L. & SOC. INQUIRY 205 (2015).

¹¹⁰ See Bruns et al., *supra* note 109, at 226; see also Green et al., *supra* note 109, at 55-56; Worcel et al., *supra* note 109, at 429.

¹¹¹ See Bruns et al., *supra* note 109, at 226-27; see also Green et al., *supra* note 109, at 56; Worcel et al., *supra* note 109, at 439-40.

why.¹¹²

The why matters. As the authors of the largest quasi-experimental outcome study acknowledged:

[A]nalysis should address whether the positive reunification outcome is due simply to the [FCTP] model's influence on treatment, or whether the [FCTP] model, in and of itself, uniquely contributes to family reunification. This type of analysis, combined with a more thorough investigation of the features of [FCTPs] that may lead to parental success, can begin to unpack the 'black box' of [FCTPs] by building an understanding of the most important operational characteristics of successful [FCTP] programmes.¹¹³

The FCTP's influence on treatment could occur in several ways. The FCTP may have faster and better access to treatment providers; the FCTP may contract with specific treatment providers otherwise unavailable to parents; the FCTP may monitor the treatment provider services to ensure that it is the appropriate treatment; and the FCTP may have additional resources to accomplish some or all of these functions. These advantages in securing treatment that parents in other court parts may not currently have available would not be sufficient justification for creating and staffing a special court part if rationalizing these approaches and resources across all child protective cases involving substance abuse treatment could accomplish the same treatment goals. Instead, do FCTPs offer something beyond increased likelihood of successful treatment that may also be relating to increased likelihood of reunification?¹¹⁴ That is, do FCTPs add value to the substantive due process right of family integrity and, if so, what is it?

This is a difficult question to measure given the variables in the design and implementation of FCTPs. FCTPs have different criteria for parent participation, screening out parents for a range of reasons including physical and sexual abuse allegations, mental illness, previous involvement in child protection or termination of parental rights proceedings, domestic violence, and willingness or ability to enter residential treatment.¹¹⁵ FCTPs generally have additional resources available even beyond treatment opportunities

¹¹² See Bruns et al., *supra* note 109, at 228; see also Green et al., *supra* note 109, at 57; Worcel et al., *supra* note 109, at 440-41.

¹¹³ Worcel et al., *supra* at 109, at 441.

¹¹⁴ Green et al., *supra* note 109, at 44 ("Thus, two critical unanswered questions for [FCTPs] are whether they are successful in helping parents succeed in treatment and, if so, whether this makes a difference in terms of their child welfare outcomes.").

¹¹⁵ PICARD-FRITSCHÉ ET AL., *supra* note 94, at 7-8.

that may enhance the court's work, including additional staff, access to specialized child welfare resources, and funding for achievement incentives.¹¹⁶ FCTPs vary in their sanctions and incentives; the amount and intensity of attendance at team meetings and court hearings; the level and scope of the judge's involvement; and the role of parents and children's counsel and other stakeholders.¹¹⁷ They also vary in the stage of the child protective proceeding at which parents can enter the FCTP; whether parents must admit to neglect to be eligible; criteria for removal or visitation with children; and graduation requirements and legal dispositions available to parents, including ultimate dismissal of a case.¹¹⁸ Finally, during the period that FCTPs began, there were tremendous reform efforts going on simultaneously which could influence outcomes.¹¹⁹

These variables matter if FCTPs are to have legitimacy as a reasonable alternative to regular court practice. They matter for advocates counseling clients whether to submit to FCTP jurisdiction. If a parent cannot be shown the advantage of a court that requires them to waive many of their due process rights, to be closely monitored by court staff and the judge, to expect that their attorney may urge them to relate confidential information to the court team, to be subject to sanctions—including incarceration—that are otherwise rarely administered in family court for non-compliance with treatment requirements, and to be uncertain whether this process will have a greater likelihood of success, the lawyer's ethical obligation is to make clear that uncertainty.¹²⁰ Until recently, there were

¹¹⁶ Green et al., *supra* note 109, at 44.

¹¹⁷ *Id.*

¹¹⁸ ADELE HARRELL & ALICE GOODMAN, THE URBAN INST., REVIEW OF SPECIALIZED FAMILY DRUG COURTS: KEY ISSUES IN HANDLING CHILD ABUSE AND NEGLECT CASES 15-18 (1999), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410367-Review-of-Specialized-Family-Drug-Courts-Key-Issues-in-Handling-Child-Abuse-and-Neglect-Cases.PDF> [<https://perma.cc/8JH4-56EB>].

¹¹⁹ See *id.* at 13; see also Green et al., *supra* note 109, at 56-57.

¹²⁰ N.Y. RULES OF PROF'L CONDUCT r. 1.4 (2013). As the commentary to Rule 1.4 (Communication) explains: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. . . . In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation." N.Y. RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (2013).

few lawyers who were able to offer clients the kind of representation that could both analyze that uncertainty and offer instead an effective rights-based solution.

V. CREATION OF FAMILY DEFENSE PRACTICE IN NYC

The Center for Family Representation (CFR) was founded in 2002 to create the first multi-disciplinary institutional legal services provider intended to become a viable alternative to an assigned counsel system for parents in child welfare proceedings. Several legal services offices and law school clinical programs had represented parents in these proceedings over the years but none were created for the specific purpose of being routinely assigned by the court to represent parents.¹²¹ CFR's first multi-disciplinary team of a lawyer, social worker and parent advocate began practicing in 2004, the same year that Bronx Defenders hired its first lawyer to represent parents in these proceedings.¹²² Like CFR, Bronx Defenders hoped to create a family defense practice that would be the primary provider of legal services for parents in Bronx family court.¹²³ In 2007, New York City committed to institutional representation for parents by contracting with CFR, Bronx Defenders and the Brooklyn Family Defense Project to represent most of the parents in child welfare proceedings in Manhattan, the Bronx and Brooklyn.¹²⁴ CFR expanded its representation to Queens in 2011 and Neighborhood Defender Services (NDS) of Harlem was awarded an additional contract for Harlem neighborhoods in 2014.¹²⁵ These organizations share a belief that multi-disciplinary practice provides enhanced representation that results in improved

¹²¹ Guggenheim & Jacobs, *supra* note 55, at 44; *see, e.g., Clinics*, N.Y.U. SCH. L., <http://www.law.nyu.edu/academics/clinics> [<https://perma.cc/6REC-S2H4>] (last visited Dec. 1, 2016); *Clinics*, CARDOZO L., <http://www.cardozo.yu.edu/clinics-professional-skills/clinics> [<https://perma.cc/A3PF-M5X9>] (last visited Dec. 1, 2016); *About MFY*, MFY LEGAL SERVICES, <http://www.mfy.org/about/about-mfy/> [<https://perma.cc/H9QB-NCW8>] (last visited Dec. 1, 2016); *Brooklyn Legal Services*, LEGAL SERVICES NYC, <http://www.legalservicesnyc.org/our-program/brooklyn> [<https://perma.cc/Y5CQ-BY3B>] (last visited Dec. 1, 2016); *Bronx Legal Services*, LEGAL SERVICES NYC, <http://www.legalservicesnyc.org/our-program/Bronx> [<https://perma.cc/3UG7-HKSV>] (last visited Dec. 1, 2016).

¹²² CTR. FOR FAMILY REPRESENTATION, *EVERY FAMILY MATTERS: 10 YEARS OF THE CENTER FOR FAMILY REPRESENTATION 2* (2012), <http://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2012.pdf> [<https://perma.cc/N2AV-F8NX>]; *Kara Finck Named Director of Penn Law's Child Advocacy Clinic*, U. PA. L. SCH. (Apr. 10, 2012), <https://www.law.upenn.edu/live/news/2045-kara-finck-named-director-of-penn-laws-child> [<https://perma.cc/J76M-PGQK>] [hereinafter *Finck Director*].

¹²³ *Finck Director*, *supra* note 122.

¹²⁴ Guggenheim & Jacobs, *supra* note 55, at 45.

¹²⁵ CTR. FOR FAMILY REPRESENTATION, *supra* note 122; Email from Stacy Charland,

outcomes for families. Lawyers advocate for clients in court proceedings, ensuring that legal mandates are followed; social workers help clients identify and secure needed services and assistance; teams with parent advocates—parents who have personally experienced the child welfare system and are now trained professionals—have an additional resource to engage and support frightened and traumatized clients. All of these professionals create plans with their clients that will support children living safely at home.¹²⁶ Instead of the ineffective assistance of counsel experienced by parents across the country whose lawyers are unable or unwilling to provide this type of holistic representation, this advocacy ensures that the substantive due process right of family integrity is coupled with the procedural due process protections of fair proceedings that are actually convened and litigated. CFR's outcomes speak directly to this result. At the time the *NYCLA* lawsuit was filed in 2000, over 34,000 children were in foster care in New York City, staying on average over four years.¹²⁷ Those numbers declined steadily over the next decade for multiple reasons including overall federal policies that emphasized more timely permanency and family preservation;¹²⁸ steady progress by ACS to substitute preventive services for removal of children to foster care;¹²⁹ a temporary surge in adoptions;¹³⁰ large numbers of children exiting foster care in the first half of the decade;¹³¹ and the creation of institutional representation for parents.¹³² In 2007, the year that institutional prov-

Managing Attorney, Family Def. Practice, Neighborhood Def. Serv. of Harlem (Dec. 3, 2016, 16:12 EST) (on file with author).

¹²⁶ Guggenheim & Jacobs, *supra* note 55, at 45.

¹²⁷ RUDOLPH W. GIULIANI ET AL., MAYOR'S MANAGEMENT REPORT 128-29 (2001), <http://www.nycwebmail.com/html/ops/downloads/pdf/mmr/0901vol2.pdf> [https://perma.cc/M5SN-7EM6].

¹²⁸ ADMIN. ON CHILDREN, YOUTH & FAMILIES, DEP'T OF HEALTH & HUM. SERVS., RECENT DEMOGRAPHIC TRENDS IN FOSTER CARE 4-5 (2013), https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf [https://perma.cc/CBX6-E5L8] (noting that New York City had the second largest decline in the country between 2002 and 2012).

¹²⁹ MICHAEL R. BLOOMBERG ET AL., MAYOR'S MANAGEMENT REPORT 31-34 (2010), http://www1.nyc.gov/assets/operations/downloads/pdf/mmr/0910_mmr.pdf [https://perma.cc/336Z-KU2G].

¹³⁰ Kathleen R. DeCataldo & Karen Carroll, *Adoption Now: A Joint Initiative of New York's Courts and Child Welfare System*, CHILD WELFARE, Mar./Apr. 2007, 31, 47-48, <http://www.nycourts.gov/ip/justiceforchildren/NewContent/AdoptionNow.pdf> [https://perma.cc/YXN7-K8NC].

¹³¹ *Children Exiting Foster Care by Age Group: New York*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/line/6274-children-exiting-foster-care-by-age-group?loc=1&loct=2#2/34/false/869,35,18,17,16,15,14,13,12,11/asc/2619,122/13044> [https://perma.cc/LQZ9-2AL6] (last visited Dec. 17, 2016).

¹³² See *infra* text accompanying note 134.

iders were initially granted contracts, 17,000 children were in care for an average of 11.5 months.¹³³ By 2012, when institutional providers were representing clients in the four largest boroughs, the number of children had dropped to 14,000, with children averaging 6.8 months in care while children of CFR clients who entered care averaged only 2.5 months; half of the children in CFR cases never entered foster care at all.¹³⁴ In 2016, the number of children in foster care in New York City dipped below 10,000 for the first time.¹³⁵

This does not mean that all children are better off because the foster care population has declined; nor does it mean that the child welfare system in New York is now working as intended. Those are questions for another time. This essay, instead, is considering the intersection of significantly improved representation for parents with the purpose and meaning of FCTPs as problem-solving courts. The core legal goals of both the child welfare system generally and FCTPs are to keep children safe while seeking permanency for them and prioritizing permanency by keeping children safely at home and, if that is not possible, in alternative placements that will either lead to reunification or to another permanent resolution through guardianship or adoption.¹³⁶ But the methods of this multi-disciplinary representation may clash with the paradigm of the FCTP, calling into question both the purpose and the need of parents submitting to that far more intrusive paradigm.

VI. IMPACT OF FAMILY DEFENSE ON FAMILY COURT TREATMENT PARTS

Problem-solving courts have been identified as the better of

¹³³ Andrew White et al., *Homes Away From Home: Foster Parents for a New Generation*, CHILD WELFARE WATCH, Summer 2008, at 1, 2, <http://docslide.us/documents/child-welfare-watch-homes-away-from-home.html> [<https://perma.cc/E3K4-3XVH>]; see also BLOOMBERG ET AL., *supra* note 129, at 31-32 (noting that 16,854 children were in foster care in fiscal year 2007).

¹³⁴ Bach, *supra* note 32, at 1074; see also Guggenheim & Jacobs, *supra* note 55, at 46. The average length of stay has increased recently to closer to 5.5 months. This is, in part, because CFR has continued to be successful in keeping more children at home so that the children coming into care are more likely to require more assistance and, in part, because CFR's caseload has aged. Email from Michele Cortese, Exec. Dir., Ctr. for Family Representation (Dec. 2, 2016, 11:45 EST) (on file with author).

¹³⁵ #NYCFamilyStrong, N.Y.C. ADMIN. FOR CHILD. SERVICES, <http://www1.nyc.gov/site/acs/about/Events/2016/milestones/twenty.page> [<https://perma.cc/J6G9-7YRD>] (last visited Nov. 14, 2016).

¹³⁶ See generally Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305).

two bad options compared to the current family court, particularly the adversarial, winner-take-all mentality that can permeate family-related proceedings. Professor Claire Huntington has argued that they offer real support in a collaborative process that assists families if they are unable to secure that help before they reach the court.¹³⁷ Professor Wendy Bach has responded that turning to problem-solving courts to enhance the “autonomy-conferring support and . . . the right to be protected against inappropriate state action” that Huntington values is the wrong turn.¹³⁸ Providing multi-disciplinary representation instead will better accomplish these goals that Huntington identifies.¹³⁹ Bach uses CFR as an example of how each member of the multi-disciplinary team described in Part V works to secure the assistance a family needs while holding the state accountable for all of their duties to the family, including providing services that would prevent a child from being removed from her family or return her home sooner.¹⁴⁰ Bach posits that the rights-based approach to child protection proceedings can be the better option if done well.¹⁴¹ And doing it well in New York City has eliminated the need for FCTPs.

In preparing this article, I spoke to several current and former managerial attorneys in two of the institutional family defense practices in New York City. What follows is based on those conversations as well as a study of the Bronx FCTP from 2005-2010.¹⁴² I think the description captures both how the FCTPs in New York City might have remained a viable alternative for more parents if the recommendations of the *Effective Practices* report had been followed as well as how the FCTP became an unnecessary alternative when parents are provided with the type of family defense representation that is now afforded them in New York City.

One of the core principles of *Effective Practices* is to include all of the stakeholders in the planning and implementation of the FCTP from the beginning to permit everyone’s concerns to be aired and to ensure that everyone is in agreement on the structure

¹³⁷ Huntington, like Bach, would prefer they receive that assistance in a variety of ways that would eliminate the need for most court proceedings. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 137-41 (2014).

¹³⁸ Bach, *supra* note 32, at 1073. This duty reinforces family integrity by prioritizing family unity or reunification.

¹³⁹ *Id.* at 1075.

¹⁴⁰ *Id.* at 1073-76.

¹⁴¹ *Id.*

¹⁴² PICARD-FRITSCHÉ ET AL., *supra* note 94.

of the FCTP.¹⁴³ The Manhattan experience of non-inclusion described above in Part III was mirrored in the Bronx. When Bronx Defenders began its family practice, the first attorney requested to attend any meetings about FCTP; that request was denied.¹⁴⁴ As the family defense organizations grew—and especially after they received City contracts in 2007—the organizations in the Bronx and Manhattan began to have greater leverage and influence in the stakeholder meetings to shape the FCTPs. At the same time, the organizations were analyzing the process, benefits, and detriments to their clients participating in a FCTP, particularly when resources to the FCTPs were cut in the late 2000s.¹⁴⁵

Counseling clients to participate in FCTP began to turn on four intersecting factors: which judge was presiding, whether and to what extent clients would be able to retain their due process rights, whether the FCTP's treatment components—including providers and drug testers—were competent and appropriate for the clients, and whether the client would be better off in a regular court part with the family defense team working to secure treatment and services.¹⁴⁶ The judge's role, both the administrative judge and the FCTP judge, appeared to be central.¹⁴⁷ Some judges continued to adhere to some or all of the standard FCTP requirements: assessing the potential participant prior to the parent meeting with counsel; requiring an admission of neglect; declining to litigate issues of removal, visitation, or disposition; and rejecting the possibility of a parent receiving an alternative disposition like an adjournment in contemplation of dismissal (ACD).¹⁴⁸ The key issues in parent advocates' reluctance to recommend that their clients participate in FCTP were, first, that an admission precluded

¹⁴³ EFFECTIVE PRACTICES, *supra* note 92, at 39.

¹⁴⁴ Interview with Kara Finck, *supra* note 97; PICARD-FRITSCHÉ ET AL., *supra* note 94, at 11.

¹⁴⁵ Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105.

¹⁴⁶ Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, Managing Attorney, Family Defense Practice, The Bronx Defenders (Mar. 28, 2016); PICARD-FRITSCHÉ ET AL., *supra* note 94, at 44-45.

¹⁴⁷ Interview with Kara Finck, *supra* note 97; Interview with Emma Ketteringham, *supra* note 146; PICARD-FRITSCHÉ ET AL., *supra* note 94, at vi, 45 (determining that the presiding judge had more influence over the parent's perception of fairness than any other factor).

¹⁴⁸ Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; PICARD-FRITSCHÉ ET AL., *supra* note 94, at 13, 44 (noting changes in practices that began in 2011, including some judges permitting entrance to FCTP after a litigated fact-finding hearing and changing some of the eligibility criteria to broaden the qualifying types of parents).

the parent from requesting the immediate return of a removed child and, second, that the parent's successful completion of FCTP could not result in a disposition that dismissed the case.¹⁴⁹ Parents would be subjected to more frequent and greater court supervision without the opportunity of having their graduation from FCTP result in as good a legal outcome, such as dismissal of a case after an ACD, as in a regular part.¹⁵⁰ Even if some of these requirements were waived, counsel was still concerned about the accuracy of the drug testing (and the inability to challenge the tests), the availability and effectiveness of the treatment providers associated with the FCTP, the abstinence-only rather than harm-reduction approach to treatment, and the quality of the treatment reports being sent to the FCTP.¹⁵¹ Participating in FCTP also didn't improve parent's access to the instrumental services they needed, like housing, employment and public benefits.¹⁵² In fact, outcomes in the Bronx FCTP on child removal, time to permanency, and reunification were no better than in the regular child protection parts, with time to permanency taking considerably longer in FCTP.¹⁵³ And as resources were cut for the FCTPs over time, and the quality of the resource team diminished, there was greater turnover of dedicated staff who understood substance abuse and treatment, and the model began to be dismantled. Across the city, responsibility for the FCTPs was distributed among more judges; the central component of frequent and meaningful court monitoring was harder to maintain; in at least one New York City borough, FCTP staff were assigned to cases in the regular court parts rather than in a special court part; in another borough the court administers the FCTP only intermittently. The *Effective Practices* guidelines were never employed.¹⁵⁴

The role of the family defense organizations in the demise of the FCTP is apparent and significant. In creating effective multidisciplinary teams, these organizations combine successful litigation strategies with securing the treatment and resources their clients need without subjecting their clients to additional court

¹⁴⁹ PICARD-FRITSCHÉ ET AL., *supra* note 94, at 14.

¹⁵⁰ Interview with Kara Finck, *supra* note 97.

¹⁵¹ Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146.

¹⁵² PICARD-FRITSCHÉ ET AL., *supra* note 94, at 33. This appears to be different than in other FCTPs where services are more available and accessible. See Green et al., *supra* note 109, at 56.

¹⁵³ PICARD-FRITSCHÉ ET AL., *supra* note 94, at iii.

¹⁵⁴ Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; Interview with Kara Finck, *supra* note 97.

supervision and, in fact, securing better legal and permanency outcomes. The decision to stop recommending that most of their clients participate in FCTPs was consistent with their ethical duty of loyalty to their clients.¹⁵⁵ While family defense advocates were urged by the court to continue referring clients to participate, they couldn't justify counseling clients to participate because their primary loyalty was to their client and not to the FCTP. In the 2.5 years that NDS has represented parents in child welfare proceedings in Manhattan, three clients have participated in the Manhattan FCTP; the other organizations rarely identify a client who would be better off participating in the FCTP than in a regular court part.¹⁵⁶

VII. LESSONS

An FCTP that is created and managed according to the *Effective Practices* guidelines has greater likelihood of responding to the concerns of attorneys for parents who are reluctant to counsel their clients to participate in a FCTP. This is, in part, because the parent attorneys would have helped establish the rules from the beginning; would be deeply knowledgeable about the advantages or concerns for any particular client; would be fully participating in all aspects of the meeting and court processes by their client's side; and would have the opportunity to shape the FCTP going forward. That said, unless there are advantages to the client that outweigh the disadvantages, a robust parent defense bar adds greater value to maintaining family integrity than participating in a FCTP.¹⁵⁷ Family defense practices have their own professional teams supporting parents, securing treatment and other services, protecting due process rights, and keeping or reunifying families safely and more quickly with less court involvement and supervision. All this is done without putting into jeopardy the loyalty central to the attorney-client relationship that encourages parents to communicate freely and honestly with their confidential trusted advisors.

¹⁵⁵ Client loyalty requires careful adherence to confidentiality, diligence, and communication with clients. See N.Y. RULES OF PROF'L CONDUCT *IT.* 1.3, 1.4, 1.6 (2013).

¹⁵⁶ Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; Interview with Kara Finck, *supra* note 97; Email from Stacy Charland, *supra* note 125; PICARD-FRITSCHÉ ET AL., *supra* note 94, at 44.

¹⁵⁷ Several of the attorneys noted that some clients respond well to constant court monitoring and team supports but that often turns on the judge and the team. This is consistent with the "judge effect" finding that the presiding judge has more influence over the perceptions of the parent than whether the parent participates in the FCTP. PICARD-FRITSCHÉ ET AL., *supra* note 94, at vi, 4.

The New York court system continues to encourage FCTPs and FCTP practices. A committee was recently convened “to explore changes in [FCTP] policy or practice that might encourage more parents to engage in [FCTP]” as well as to provide new thinking to counties “that want to infuse their non-[FCTPs] with new routines targeted to families impacted by addiction.”¹⁵⁸ This committee included family defense counsel, attorneys representing state and county social services agencies and children, and court personnel. Their recommendations capture the tensions about FCTPs described in this essay. Members of the committee disagreed about whether an admission to neglect was necessary to participate in the FCTP; whether other due process rights, like litigating removals or dispositions, had to be waived; the quality of treatment and whether the best types of treatment were being considered; the appropriate role for the FCTP staff, especially their input into non-treatment issues like child development or domestic violence; and whether the FCTP team was trained and knowledgeable about a range of issues including trauma-informed practice, cultural and gender contexts, and the variety of approaches to substance use treatment. A key concern was that parents would not be forthcoming about their substance use if they did not make an admission to neglect and that the purpose of the FCTP to focus on treatment rather than legal issues would be undermined.¹⁵⁹ The core response from parents’ attorneys was that without the flexibility of having the ability to litigate child welfare legal issues like removal or return home—as well as the option of not making an admission to participate in the FCTP—and an overall reconsideration of types and appropriateness of treatment modalities, they could not counsel their clients to participate in FCTP.¹⁶⁰

The number of FCTPs in New York State has gone from a high of 50 to half that number currently.¹⁶¹ In New York City, the FCTPs are a skeleton of what they were, in large part because family defense counsel will not advise their clients to participate in a process that neither protects their due process rights nor provides them

¹⁵⁸ ENGAGEMENT OF COUNSEL AND PARTIES SUBCOMM., RECOMMENDATIONS (2015) (on file with CUNY Law Review).

¹⁵⁹ *Id.* These disagreements were not all role-based; some county attorneys, for example, were not opposed to FCTP participation without an admission.

¹⁶⁰ *Id.*

¹⁶¹ PICARD-FRITSCHÉ ET AL., *supra* note 94, at ii; Christine Kiesel, Coordinator, N.Y. Child Welfare Court Improvement Project, Statement at the Statewide Multidisciplinary Child Welfare Work Group (Apr. 18, 2016).

with better treatment or services than their own advocates secure for them without being subject to intrusive monitoring and supervision by the court. The quality of family defense is likely to continue to improve in New York State and across the country. The New York State Office of Indigent Legal Services has recently issued *Standards for Parental Representation in State Intervention Matters* and sponsored a statewide family defense conference in 2015.¹⁶² The ABA Center on Children and the Law has now embraced parent representation through its National Alliance for Parent Representation, which has sponsored four national conferences on parent representation and recently issued *Representing Parents in Child Welfare Cases*, written by the preeminent parent advocates and scholars in the country.¹⁶³ Innovative models of parent representation are being developed nationwide.¹⁶⁴

Previously a small number of scholars warned about the dangers of creating problem-solving courts like FCTPs; their warnings did not stop the proliferation of these courts.¹⁶⁵ Vigorous, multidisciplinary parent representation has protected the right of family integrity and improved outcomes for families and children while, in its wake, challenging the very existence of these courts.

¹⁶² STANDARDS FOR PARENTAL REPRESENTATION IN STATE INTERVENTION MATTERS (N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS. 2015), <https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf> [<https://perma.cc/QQ3B-J3EH>]; BECAUSE ALL FAMILIES MATTER: ENHANCING PARENTAL DEFENSE IN NEW YORK, N.Y. ST. DEFENDERS ASS'N, <http://us10.campaign-archive1.com/?u=9dc0582cbff834483f0bee296&id=5163aa54aa&e=85746d67b8> [<https://perma.cc/B5B5-LA64>] (last visited Dec. 8, 2016).

¹⁶³ REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

¹⁶⁴ CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, SUMMARY OF PARENT REPRESENTATION MODELS (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/summary_parentrep_model.authcheckdam.pdf [<https://perma.cc/Q974-WUL4>].

¹⁶⁵ See, e.g., JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205 (1998); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001).

INEQUITY IN PRIVATE CHILD CUSTODY LITIGATION

Dale Margolin Cecka†

INTRODUCTION	204
I. DEMOGRAPHICS OF MARRIAGE AND PARENTHOOD IN 2016.....	206
II. STRUCTURE AND CULTURE OF FAMILY COURT	208
A. <i>History</i>	208
B. <i>Current Structure</i>	211
C. <i>Common Themes</i>	212
1. Litigants in Family Court.....	213
2. Exploding Dockets	214
3. Status and Reputation in the Legal Profession	215
III. DISCRETIONARY NATURE OF CUSTODY MATTERS	218
A. <i>Best Interest of the Child</i>	219
B. <i>Unclear and Controversial Role of Guardians ad Litem</i>	220
IV. THE EFFECTS OF THE JURISDICTIONAL DIFFERENCES ON CUSTODY MATTERS	223
A. <i>New York</i>	223
1. Different Rules & Procedure	224
2. Use of Child's Attorneys in New York Family Court	225
3. Use of Court Ordered Investigations by ACS in Family Court	227
B. <i>Virginia</i>	229
1. JDR Is Not a Court of Record	229
2. Use of Guardians <i>ad Litem</i>	230
V. CONCLUSION	232

† Clinical Professor of Law and Director of the Jeanette Lipman Family Law Clinic, University of Richmond School of Law. J.D., 2004, Columbia Law School; B.A., 1999 Stanford University. The author would like to thank Roxanne Millan and Adam Rellick for their invaluable research and support. The author has practiced for over 14 years in trial courts in New York and Virginia. The author was a student attorney for Juvenile Rights Practice (JRP) of Legal Aid in Manhattan Family Court from 2002-2004, then an attorney for JRP in Bronx Family Court from 2004-2006, and then operated a legal clinic representing children in Queens Family Court and Nassau Family Court from 2006-2008. In Virginia, the author has practiced since 2008 in Juvenile and Domestic Relations District Courts and Circuit Courts in the City of Richmond, Chesterfield County, Henrico County, and Hanover County, and has made occasional appearances in the City of Petersburg, York County, and Clarke County.

INTRODUCTION

Woody Allen and Mia Farrow were never married. When they separated, Allen sought custody of their children. Because their custody dispute was not a matrimonial matter, it should have been heard in New York Family Court. Family Court hears child abuse and neglect, juvenile delinquency, paternity, and other matters such as Persons in Need of Supervision (i.e. “incorrigible children”¹). New York Family Court is the court of *pro se* clients, the court where people wait all day for their cases to be called, the court where there are no paper towels in the public bathroom. It is the court that most lawyers avoid even if someone can pay them to take their case. But Allen, through his Manhattan attorneys, actually filed his custody petition in Supreme Court.² In New York’s Supreme Court, he would have the opportunity to take depositions and to have a multi-day trial utilizing the rules of evidence. He would also be issued a written opinion, formally written by a judge, instead of one that is typed (or handwritten) on a boilerplate form at the end of the hearing. There would also be paper towels in the public restroom at Supreme Court.

How and why was Allen able to get his case in to Supreme Court, even though jurisdictionally, since it was not a matrimonial matter, it belonged in Family Court? The author is actually unable to find how, exactly, Allen achieved this procedural impossibility, because the file is sealed.³ The trial court’s 33-page opinion,⁴ as

¹ A Person in Need of Supervision (PIN) is defined by the Family Court Act as: “A person less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient[.]” N.Y. FAM. CT. ACT § 712 (McKinney 2014). Citywide in 2001, the most common allegations on PINS petitions were incorrigible behavior. ERIC WEINGARTNER ET AL., VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 8 (2002), http://archive.vera.org/sites/default/files/resources/downloads/159_243.pdf [<https://perma.cc/JWU3-2EWQ>].

² “Supreme Court” is the trial-level court of general jurisdiction in the New York State Unified Court System. It is vested with unlimited civil and criminal jurisdiction. See generally N.Y. Ct. R. §§ 202.1-70. In most states, this is known as “Circuit Court.”

³ See Bruce Weber, *Woody Allen Files Child-Custody Lawsuit*, N.Y. TIMES (Aug. 14, 1992), <http://www.nytimes.com/1992/08/14/nyregion/woody-allen-files-child-custody-lawsuit.html> [<https://perma.cc/RT9B-EW2K>] (“Details of the suit, which was filed in State Supreme Court in Manhattan, were not known, because the court ordered the papers sealed.”); see also *Farrow v. Allen*, 608 N.Y.S.2d 57 (App. Div. 1993) (Mem.) (“Motion to seal the records is granted.”). Opinions are available on Westlaw and Lexis, but not court filings. The original trial court opinion from Supreme Court is *Allen v. Farrow*, No. 68738/92 (N.Y. Sup. Ct. June 7, 1993). The appellate opinions are *Allen v. Farrow*, 626 N.Y.S.2d 125 (N.Y. App. Div. 1995); *Allen v. Farrow*, 611 N.Y.S.2d 859 (N.Y. App. Div. 1994).

⁴ *Allen v. Farrow*, No. 68738/92 (N.Y. Sup. Ct. June 7, 1993).

well as the appellate decisions,⁵ mention only that the matter came to Supreme Court as “a special proceeding.”⁶ But the reason he (and his attorneys) wanted to be in Supreme Court instead of Family Court is clear. By all measures, it is a higher status court.

This article explores the history and implications of a two-tiered system for adjudicating matrimonial—as opposed to non-matrimonial—custody matters. As the author uncovered by calling every clerk’s office in every major city in the country, matrimonial matters are under a different jurisdiction or part of court in nine states.⁷ This differential treatment has implications for the outcome of private custody cases. It also reflects a bias in the administration of justice, based on race and socioeconomic class. Perhaps most importantly, it causes the government and other outside parties (such as court appointed guardians *ad litem*) to be more involved in the private lives of poor families and families of color than they are with middle and upper-middle class families.

Part I of the article discusses the demographics of marriage rates, showing that the majority of unmarried parents with custody disputes are poor and/or are people of color. This is in contrast to married parents with custody disputes, who are more likely to be white and middle or upper middle class. Part II starts by exploring the history behind the two-tiered system for adjudicating matrimonial versus non-matrimonial custody matters, and then describes the current lay of the land. Part II also paints a picture of the cul-

⁵ *Allen v. Farrow*, 626 N.Y.S.2d 125 (N.Y. App. Div. 1995); *Allen v. Farrow*, 611 N.Y.S.2d 859 (N.Y. App. Div. 1994).

⁶ “In the underlying special proceeding herein, commenced in August of 1992, petitioner sought to obtain custody of, or procure increased visitation with, the infant children” *Allen v. Farrow*, 626 N.Y.S.2d 125, 126 (N.Y. App. Div. 1995). “In this special proceeding commenced by petitioner to obtain custody of, or increased visitation with, the infant children . . . we are called upon to review the IAS Court’s decision” *Allen v. Farrow*, 611 N.Y.S.2d 859, 860 (N.Y. App. Div. 1994). The author surmises that Allen was able to get the matter into Supreme Court by filing a writ of habeas corpus. See N.Y. DOM. REL. LAW § 70(a) (McKinney 1988). According to subsection (a) of the statute, “Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.” DOM. REL. LAW § 70(a). Prior to state laws regarding child custody and the development of the “domestic relations exception” in federal court, this was also a way to get a matter regarding custody of a child before a federal court. See Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIM. LAW. 1, 3-4 (1993).

⁷ See Appendix, *infra*.

ture of Family Courts throughout the country.⁸ Part III is an overview of the substantive nature of private child custody cases, including the best interest standard and the use of guardians *ad litem*. Part IV takes two states, New York and Virginia, to show how jurisdictional difference manifests itself in practice in private child custody cases. Part V concludes that our country's family law "system" is reflective of bias against poor families and families of color. The jurisdictional differences between matrimonial and non-matrimonial custody cases are not based on the best interests of the child and should be eliminated. All custody matters in every state should be heard by the same level of state court.

I. DEMOGRAPHICS OF MARRIAGE AND PARENTHOOD IN 2016

Marriage is a very different institution, in most respects, than it was less than a century ago. According to recent data from the Centers for Disease Control, 40.2% of all births in 2014 were to unmarried women.⁹ The percentage of non-marital births varies widely among ethnic groups; among black mothers, the non-marital birth rate is 70.9%, in contrast to the non-marital birth rate among whites, which is 29.2%.¹⁰ Among Hispanics it is 52.9%, and Native Americans, 65.7%.¹¹ Parents of color make up the vast majority of non-married parents.¹²

Among African American men, the differences are extreme. Of all male populations, a black father is the least likely to be married to the mother of his children.¹³ There are numerous institutional explanations for this, which are beyond the scope of this article. Black men are six times more likely than white men to be incarcerated,¹⁴ and Black men's underemployment may also de-

⁸ The term "Family Court" is used throughout the article to mean the courts that hear child dependency, delinquency, custody, paternity, Child/Person in Need of Supervision (CHINS/PINS) and other matters. As discussed throughout this article, some of these courts also hear divorce, but many family courts do not have jurisdiction over divorce matters.

⁹ Brady E. Hamilton et al., *Births: Final Data for 2014*, NAT'L VITAL STAT. REP. Dec. 2015, at 1, 2, 7, http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf [<https://perma.cc/XA4P-D5RD>].

¹⁰ *Id.* at 40.

¹¹ *Id.* at 40-41.

¹² *Id.* at 41.

¹³ *Id.* at 7.

¹⁴ THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [<https://perma.cc/V5ME-Q65C>].

crease their ability and desire to get married.¹⁵

The rate of marriage also varies across socioeconomic groups.¹⁶ It has been steadily declining among the less educated for decades, creating a class divide.¹⁷ A 2011 study by the Pew Research Center found that, although 64% of college-educated Americans were married, fewer than 48% of those with some college or less were married.¹⁸ “In 1960, the report found, the two groups were about equally likely to be married.”¹⁹

In other words, educated, high-income adults are still marrying at high rates, but lower income adults are not. In fact, only women in the top 10% of Americans in earnings saw their marriage rates increase between 1970 and 2011, whereas women in the bottom 65% in earnings saw their marriage rate declining by more than 20 percentage points.²⁰ In the words of economist Justin Wolfers, marriage has become “an indulgence” for the “well off.”²¹

Numerous other studies have shown that, after marriage, both women and men tend to be much better off financially than those who are unmarried.²² The median income for single-mother families is \$25,493, just 31% of the \$81,455 median income for two-parent families.²³ The poverty rate for children in single-parent families is triple the rate for children in two-parent families.²⁴ In 2011, 42% of single parent households experienced at least one “hardship,” such as unpaid rent or mortgage, phone disconnection, utility disconnection, and unmet medical and/or dental

¹⁵ See William Marsiglio & Mark Cohan, *Contextualizing Father Involvement and Paternal Influence: Sociological and Qualitative Themes*, in *FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES* 75, 79-80 (H. Elizabeth Peters et al. eds., 2000).

¹⁶ Andrew L. Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. TIMES: FIELD NOTES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/08/fashion/weddings/falling-marriage-rates-reveal-economic-fault-lines.html> [<https://perma.cc/E63C-P2N6>].

¹⁷ *Id.*

¹⁸ *Id.* (citing D’VERA COHN ET AL., PEW RESEARCH CTR., BARELY HALF OF U.S. ADULTS ARE MARRIED — A RECORD LOW 8 (2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf> [<https://perma.cc/F4LF-PTZ5>]).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Claire Cain Miller, *Marriage Rates Keep Falling, as Money Concerns Rise*, N.Y. TIMES: THE UPSHOT (Sept. 24, 2014), <http://www.nytimes.com/2014/09/24/upshot/for-the-young-money-is-increasingly-trumping-marriage.html> [<https://perma.cc/A6EU-39A5>].

²² Yarrow, *supra* note 16.

²³ LEGAL MOMENTUM, SINGLE PARENTHOOD IN THE UNITED STATES - A SNAPSHOT (2014 EDITION) 2 (2014), <https://www.legalmomentum.org/sites/default/files/reports/SingleParentSnapshot2014.pdf> [<https://perma.cc/B25U-BFUR>].

²⁴ *Id.*

needs.²⁵

All told, approximately 60% of children in this country living in single-mother homes are impoverished.²⁶ The Department of Children and Families further estimates that, as of 2013, at least one-third of all American children live without their biological fathers present in the home, up from 22% in 1997.²⁷ Moreover, the federal government reports that the many of the one million parents it serves through its Access and Visitation program are both low-income and unmarried.²⁸

Single parenthood is clearly on the rise, but only for those on the bottom of the economic ladder. When single parents cannot settle custodial matters on their own, they seek help from our justice system. They need custody, visitation, and child support orders, but not property settlement and divorce decrees. There are procedural and substantive implications to this difference which we cannot overlook any longer.

II. STRUCTURE AND CULTURE OF FAMILY COURT

A. *History*

Before the mid-twentieth century, it was very difficult to obtain a divorce in the United States.²⁹ Divorces were only granted if one of the parties was at “fault.”³⁰ Because the grounds were so hard to prove, case law regarding remedies developed slowly, if at all.³¹ The “innocent” spouse would usually just get everything: the children,

²⁵ *Id.*

²⁶ Jacqueline Kirby, *Single-Parent Families in Poverty*, HUM. DEV. & FAM. LIFE BULL., Spring 1995, at 1, 1, <http://www3.uakron.edu/schulze/401/readings/singleparfam.htm> [<https://perma.cc/KN5G-EVBD>].

²⁷ OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUM. SERVS., ACCESS AND VISITATION GRANT PROGRAM: FY 2013 UPDATE 2 (2014), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2013_av_final_0515.pdf [<https://perma.cc/NS2S-66F4>].

²⁸ *Id.* at 1.

²⁹ Jason L. Honigman, *What “No-Fault” Means to Divorce*, 51 MICH. ST. B.J. 16, 16-17 (1972); see generally Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces 2* (Fed. Reserve Bank of San Francisco, Working Paper No. 2007-03, 2007), <http://www.frbsf.org/publications/economics/papers/2007/wp07-03bk.pdf> [<https://perma.cc/GD6K-GHAN>] (noting that many states did not eliminate fault-based divorce until the mid-twentieth century).

³⁰ W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFF., Fall 2009, at 81, 81, http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf [<https://perma.cc/ZT3T-DAU6>] (explaining that Ronald Regan first enacted no-fault divorce in California, and that the other states in the Union followed suit over the next 15 years).

³¹ Honigman, *supra* note 29, at 21-24.

property, and alimony.³² The appellate courts had little need to address issues regarding the placement of children or parenting abilities under this “winner take all” result.³³

No-fault divorces, which emerged in 1970,³⁴ suddenly increased the number of divorces and opened up a Pandora’s box of legal issues.³⁵ The courts were now forced to separate “fault” from child custody, child support, alimony, and property disposition. Moreover, it quickly became clear that the issues of child custody and child support were substantively and procedurally different from dissolution of marriage, in that they required ongoing contact and possible modification, at least until the child reached age 18.³⁶ Principles of *res judicata* and contract law were upended.³⁷

Prior to the first no-fault divorce law, juvenile courts had already been established in all states to handle juvenile delinquency and status offenses.³⁸ In the early twentieth century, some states decided that other children’s issues, such as dependency, would be heard in juvenile courts as well.³⁹ By the 1970s, as divorce prolifer-

³² Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 288 (1998).

³³ *Id.* at 288-89.

³⁴ California’s Family Law Act of 1969—the first such statute—took effect in 1970. See Wilcox, *supra* note 30, at 81 (explaining that California was the first state to allow no-fault divorce).

³⁵ See, e.g., Wilcox, *supra* note 30, at 81-82.

³⁶ In all states custody and child support orders are modifiable until a child is 18. See, e.g., 24A AM. JUR. 2D *Divorce and Separation* § 899 (2016) (“Orders in divorce proceedings as to the custody of minor children are not final in the sense that they are not subject to change, but are, in their nature, interlocutory and subject to modification at any future time during the lives of the parents and the minority of the children . . .”).

³⁷ For example, in all states child custody orders can be modified based on a change in circumstance, up until a child is 18. See, e.g., VA. CODE ANN. § 20-108 (2011). Spousal support matters can also be modified based on new circumstances, e.g., VA. CODE ANN. § 20-109 (2001), and spouses retain the right to seek a new spousal support order even after a final decree of divorce, e.g., VA. CODE ANN. § 20-107.1(D) (2016).

³⁸ See generally Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777 (2002); Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135 (2003); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997).

³⁹ See, e.g., GREGORY J. HALEMBA ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, OHIO FAMILY COURT FEASIBILITY STUDY: SUMMARY OF MAJOR RECOMMENDATIONS 1 (1997), <http://www.ncjj.org/pdf/OhioFCFeasibilitySummary.pdf> [https://perma.cc/H5JQ-VR5E] (footnotes omitted) (“The first evidence of this is in a 1912 enactment of the New Jersey legislature which vested county juvenile courts with jurisdiction to hear and determine all domestic relations disputes. Ohio followed in 1914 with a court consolidation from the domestic relations side when their legislature passed a bill that

ated,⁴⁰ some states subsumed all domestic matters into one court.⁴¹ But other states kept divorce and its multiple issues separate from all of the other child-related causes of action.⁴² In those states, this meant, for example, that juvenile and Family Courts decided custody matters regarding unmarried parents, while the traditional trial courts decided matrimonial custody matters.⁴³

From the beginning, specialized Family Courts were different from other courts because they were so informal.⁴⁴ This is true even though family and juvenile matters are often “quasi-criminal.”⁴⁵ For example, civil “findings” of abuse and neglect against parents can strip a parent of physical and legal custody of a child; an order terminating parental rights is considered the “death sentence” of child welfare.⁴⁶ A child adjudicated a “delinquent” is subject to imprisonment. Progressive-era legal reformer Reginald Herbert Walker Smith reflected on the paradox:

[T]he domestic relations and juvenile courts . . . are rapidly eliminating the traditional forbidding aspects of a criminal trial

created a Division of Domestic Relations in the Hamilton County Court of Common Pleas with jurisdiction over divorce, alimony matters, delinquency, dependency, neglected and crippled children, adults contributing to or tending to cause delinquency or dependency, and failure to provide support. Although it was not labeled family division or family court, the Cincinnati court’s enhanced Domestic Relations Division of the early 20th Century is most commonly credited with achieving the nation’s first family court consolidation.”).

⁴⁰ See generally Wilcox, *supra* note 30, at 81-82 (explaining that divorce became much more common after the termination of fault requirements).

⁴¹ See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 13 (1998).

⁴² *Id.* at 9 (discussing that Pennsylvania does not have a unified family court).

⁴³ *Id.* at 17 (“When the state legislature created the [New York] ‘Family Court’ in 1962, it excluded matrimonial and probate matters, including guardianship of minor children, from that court’s jurisdiction. Matrimonial matters, including divorce, annulment and separation, are handled in Supreme Court, a higher status court than family court, while the family court handles numerous related matters such as child support and custody, visitation and domestic violence, as well as juvenile dependency and delinquency.”).

⁴⁴ See, e.g., Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 544-45 (2007).

⁴⁵ See, e.g., *How is a Juvenile Delinquency Case Different from a Criminal Case?*, SUPERIOR COURT OF CAL. CTY. OF L.A., <http://www.lacourt.org/division/juvenile/JV0056.aspx> [<https://perma.cc/LVE9-AAEC>] (last visited Nov. 13, 2016).

⁴⁶ Stephanie N. Gwillim, Comment, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 344, 344 n.13 (2009). See generally NAT’L DIST. ATT’YS ASS’N & NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, STATUTORY COMPILATION: PHYSICAL CHILD ABUSE PENALTIES (2013), [http://www.ndaa.org/pdf/Physical%20Child%20Abuse%20Penalties%20Compilation%202013%20\(3\).pdf](http://www.ndaa.org/pdf/Physical%20Child%20Abuse%20Penalties%20Compilation%202013%20(3).pdf) [<https://perma.cc/7U25-BYJ8>].

by informality of procedure, by using the summons instead of the arrest, by having the attending officers in plain clothes, and by having the parties sit around a table with the judge instead of standing in cages or behind bars, nevertheless the machinery of the criminal law is more and more being used.⁴⁷

Even as a proponent of specialized juvenile and family courts, Smith could see the conundrum of adjudicating fundamental rights, such as family integrity and liberty, using ambiguous standards of substantive and procedural due process.⁴⁸

B. *Current Structure*

Today each state's Family Courts use their own terms of art and follow their own rules.⁴⁹ There is also wide disparity in how Family Courts are organized and administered.⁵⁰ In many states, even localities have their own practices and lingo.⁵¹ These differences are very unclear from the information that is available to the public.⁵² In fact, the only way the author was able to get the answer to the simple question of whether unmarried parents file custody

⁴⁷ REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 75 (1919).

⁴⁸ The controversy over substantive and procedural due process in child-related matters is beyond the scope of this article, but much has been written on the subject. See, e.g., Jane M. Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 34-38 (2009).

⁴⁹ See Appendix, *infra*.

⁵⁰ See e.g., HALEMBA ET AL., *supra* note 39, at 3 ("There is wide diversity in the jurisdictional inclusion of family courts, their operations, and the management structure within which they exist.").

⁵¹ For example, in the Richmond, Virginia Juvenile and Domestic Relations (JDR) Courts, all petitions and motions are written on court forms, available online. In contrast, the bordering county of Henrico has an entirely different custody form, which must be obtained in person. In Henrico any motions after the first petition must be filed on Henrico's own "Miscellaneous Motion," also obtained at the courthouse. Unlike JDR Courts in Central and Eastern Virginia, Fairfax County and Prince William JDR in Northern Virginia use "Model Discovery." The examples of varied practices and terminology in Virginia JDR courts are endless.

⁵² For example, the webpage for the Superior Court for Indianapolis, Indiana, says that "[t]he Circuit and Superior Court exercise concurrent jurisdiction over all civil issues[.]" and only notes that the Superior Court Civil Division handles "domestic relations matters." *Circuit and Superior Courts of Marion County: Marion Superior Court*, CITY OF INDIANAPOLIS & MARION CTY., <http://www.indy.gov/eGov/Courts/Superior/Pages/Home.aspx> [<https://perma.cc/4R73-SBFA>] (last visited Nov. 13, 2016). The webpage for the Circuit Court specifies that it hears civil matters only. *Circuit and Superior Courts of Marion County*, CITY OF INDIANAPOLIS & MARION CTY., <http://www.indy.gov/eGov/Courts/Circuit/Pages/home.aspx> [<https://perma.cc/Z45C-KNLZ>] (last visited Nov. 25, 2016). Neither webpage notes a difference between matrimonial or non-matrimonial matters.

petitions in the same courthouse as married parents was by having a research assistant call clerks' offices in every major city in every state of the country.⁵³ The research assistant actually had to call two clerks' offices in most states, one in the "general" trial court and one in the family/juvenile court or division. The results were that in nine states—Alabama, Colorado, Connecticut, Indiana, New Jersey, New York, Ohio, Tennessee, and Virginia—non-matrimonial custody matters are separate from matrimonial matters.⁵⁴ In these nine states, this means that either the non-matrimonial matters are heard in a separate division of the same level of court, or they are heard in a juvenile/family court with an entirely different jurisdictional mandate and court rules.

C. Common Themes

Family Courts⁵⁵ are notoriously known as the "stepchildren" of the legal system.⁵⁶ Family Courts share many physical commonalities: they are often in crowded, dilapidated buildings with a pervasive sense of chaos.⁵⁷ They also have normative similarities. Courtrooms are informal; forms, instead of formal pleadings, are used.⁵⁸ There is also widespread use of non-legal professionals (social workers, psychologists) to "evaluate" and inform the court about families and children.⁵⁹ Lastly, civil and criminal issues and consequences are intertwined within Family Courts.⁶⁰ A significant

⁵³ For the results of these efforts, see Appendix, *infra*.

⁵⁴ *Id.*

⁵⁵ Again, in this article, the generic term "Family Court" refers to any court that hears dependency, delinquency, custody, paternity, CHINS/PINS, and other juvenile matters. Some of these "Family Courts" also hear cases involving divorce. But, as will be discussed in Part III *infra*, many "Family Courts" do not have jurisdiction over matrimonial matters.

⁵⁶ Ross, *supra* note 41, at 3. See also Michel Marriott, *Family Court Is Struggling with Caseload, Experts Say*, N.Y. TIMES (Nov. 15, 1987), <http://www.nytimes.com/1987/11/15/nyregion/family-court-is-struggling-with-caseload-experts-say.html> [<https://perma.cc/4JP8-MYZE>].

⁵⁷ *Id.* at 5 ("Family courts in most states conjure up overcrowded facilities lacking the veneer of civility, let alone majesty, whose chaotic site itself speaks volumes to the frequently downtrodden and almost always traumatized families that pass through them.").

⁵⁸ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 972 (2013) ("[T]he use of 'form orders' discourages reason-giving. These orders are primarily forms with check-boxes and fill-in-the-blank spaces. Where space is allowed for explanation and reason-giving, it is very limited.").

⁵⁹ See Hill, *supra* note 44, at 537-38.

⁶⁰ For example, aside from juvenile justice, there are numerous examples of criminal and civil intersection in the domestic relations realm. Family protective orders, which are "civil," are issued every day in family courts, but violations of them often

amount of literature has described these themes.⁶¹

1. Litigants in Family Court

Family Court litigants are generally poor.⁶² People of color make up a disproportionately high number of litigants in Family Court.⁶³ Many of these people are *pro se*.⁶⁴

In a survey conducted by the New York State Unified Court System, 84% of self-represented litigants in Family Court reported being people of color.⁶⁵ Significantly, only seven percent of the *pro se* litigants in the New York survey identified themselves as white, as compared to ninety-two percent that identified as African-Ameri-

result in jail time. *See* VA. CODE ANN. § 18.2-60.4 (2016). Non-custodial parents are also incarcerated on a daily basis for failure to pay civil child support orders. *See Child Support and Incarceration*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> [<https://perma.cc/VJ5E-UPE3>] (last updated Feb. 10, 2016).

⁶¹ *See, e.g.*, Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473, 487 (2015) (footnotes omitted) ("[T]oday there remain many variations among family courts in terms of organization and administration, there nonetheless exists a shared institutional history and culture among family courts. This includes a common origin and philosophy that manifest in three interrelated features: interventionism (e.g., use of social workers and medical and mental health professionals to conduct evaluations of litigants), informalism (e.g., simplification of procedures and forms, and efforts to resolve disputes outside of the litigation process), and intersecting systems, including the enduring interrelationship of criminal and civil procedures in family courts.").

⁶² In West Virginia in 2001, some estimate that 90-95% of family law litigants fell below the poverty level. Warren R. McGraw, *Family Court System Awarded \$1.3 Million Federal Grant to Help Families*, W. VA. LAW., Oct. 2001, at 8, 8; *see also* Joy S. Rosenthal, *An Argument for Joint Custody as an Option for all Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 132-33 (2007) (citing OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 3-4 (2005)) ("It is well documented that most people who appear in New York City's Family Courts are poor people of color. According to the New York State Unified Court System's Office of the Deputy Chief Administrative Judge for Justice Initiatives (DCAJ-JI), 84% of self-represented litigants in New York Family and Housing Courts are people of color, and 83% reported a household income of under \$30,000 and 57% reported household income of under \$20,000.").

⁶³ *See* Rosenthal, *supra* note 62, at 132 (explaining that a New York City Family Law study found that 84% of self-represented litigants in New York State Unified Courts are people of color).

⁶⁴ *Id.*; *see also* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) (footnotes omitted) ("The surge in *pro se* litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managers and in systematic studies."); Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 121, 121 n.152 (2005) ("The family court has invited the *pro se* litigant. The *pro se* litigant has accepted the invitation in droves.").

⁶⁵ Rosenthal, *supra* note 62, at 133.

can or Hispanic.⁶⁶ This explains why, according to family court lore,⁶⁷ while visiting a Philadelphia family court, a lawyer from Apartheid-era South Africa asked, “[w]here’s the white juvenile court?”⁶⁸

2. Exploding Dockets

Family Courts are also notorious for being overcrowded, underfunded, and understaffed, by both judges and support staff.⁶⁹ Each year a higher proportion of civil cases across the country involve family problems.⁷⁰ In the last few years, domestic relations cases alone made up between 25% and 30% of all state trial court filings.⁷¹ In 1995, the National Center for State Courts emphasized that domestic relations cases were the “largest and fastest-growing segment of state court civil caseloads.”⁷² In 2013, state trial courts heard approximately 5.2 million cases involving domestic rela-

⁶⁶ *Id.* at 131 n.10.

⁶⁷ This story was related to Martin Guggenheim, renowned family and child welfare scholar, by one of his colleagues, Bob Schwartz. *Id.* at 133-34. Professor Guggenheim repeated this story at CUNY School of Law’s 2003 Symposium. Symposium, *The Rights of Parents With Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 72-73 (2003) (“One cannot address the subject of children in foster care in the United States, and especially in New York City, without staring at a shocking truth of a system that a veritable Martian couldn’t help but recognize to be apartheid.”).

⁶⁸ Rosenthal, *supra* note 62, at 134.

⁶⁹ Ross, *supra* note 41, at 5.

⁷⁰ See Hill, *supra* note 44, at 544 n.64 (“Family Court caseloads are growing faster than caseloads of other courts; caseloads tripled between 1980 and 2000.”).

⁷¹ See, e.g., DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 90 (6th ed. 2013) (“Domestic relations cases account for about 30 percent of case filings. In recent years, the percentage of domestic relations cases has remained relatively unchanged.”); Patricia G. Barnes, *It May Take a Village. . . Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, 22, 22 (“Together, juvenile and domestic relations cases comprise more than 30 percent of the civil docket in state courts.”). In terms of aggregate caseload distribution, however, domestic relations cases make up between five and six percent of civil dockets. See ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 7 (2015), http://www.courtstatistics.org/~/.media/Microsites/Files/CSP/EWSC_CSP_2015.ashx [<https://perma.cc/L6AS-G6NS>] [hereinafter LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS]; see also ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 4 (2011), <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf> [<https://perma.cc/QF9B-N8VA>].

⁷² ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 38 (2004). But see LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS, *supra* note 71, at 4 (noting that state domestic relations caseloads have declined about 10% since 2004).

tions.⁷³ Judicial appointments lag behind.⁷⁴ Referees (attorneys who are *not* judges) are used to preside over cases across the country.⁷⁵ In other words, “[j]udges in such courts at best merely keep cases moving along[.]”⁷⁶ For example, “[i]n Chicago, each judge hears sixty cases a day.”⁷⁷ The average Brooklyn Family Court case receives “slightly over four minutes before a judge on the first appearance, and a little more than 11 minutes on subsequent appearances[.]”⁷⁸ Across the country, because of lack of staffing and turnover, record keeping is described as “primitive” and disorganized.⁷⁹ “Family courts in most states conjure up overcrowded facilities lacking the veneer of civility”⁸⁰

3. Status and Reputation in the Legal Profession

As discussed above, most litigants in Family Court are *pro se*. If they have representation, it is court-appointed, but very few jurisdictions appoint lawyers for indigent parties on private family matters.⁸¹ Moreover, family law and court appointments are not areas

⁷³ LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS, *supra* note 71, at 7.

⁷⁴ See Rosenthal, *supra* note 62, at 131 (footnotes omitted) (“Although filings have increased steadily, the number of Family Court judges in New York City (47) has not changed since 1991.”).

⁷⁵ See Hill, *supra* note 44, at 532 (“[In New York Family Court,] practices include officially sanctioned shortcuts like the ever-expanding use of court attorney referees to preside over cases”); *id.* at 532 n.12 (citing Merrill Sobie, Practice Commentaries, N.Y. FAM. CT. ACT § 121 (McKinney 2006)) (“The use of court-attorney referees to address exploding caseloads is not unique to the New York City Family Court. In part because of the legislature’s failure to authorize additional judges, family courts throughout the state have relied on these non-judicial employees.”).

⁷⁶ Ross, *supra* note 41, at 11.

⁷⁷ *Id.*

⁷⁸ John Sullivan, *Chief Judge Announces Plan To Streamline Family Court*, N.Y. TIMES (Feb. 25, 1998), <http://www.nytimes.com/1998/02/25/nyregion/chief-judge-announces-plan-to-streamline-family-court.html> [<https://perma.cc/HTJ8-B2VU>]; For more about the persistent problems of New York City’s Family Courts, see ANNIE E. CASEY FOUND., ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 44-48 (2000), <http://files.eric.ed.gov/fulltext/ED439189.pdf> [<https://perma.cc/4C46-XRKL>].

⁷⁹ Ross, *supra* note 41, at 11.

⁸⁰ *Id.* at 5; see also Hill, *supra* note 44, at 531 (“That the Family Court is ill-equipped to address the needs of the hundreds of thousands of cases handled therein is not news.”).

⁸¹ For example, in Virginia, parties in private civil custody matters are not entitled by statute or in practice to court-appointed lawyers if they are indigent. The only indigent parties who are entitled to court appointed lawyers for civil family matters in Virginia are non-custodial parents who are facing jail time as a result of failure to pay child support, and parents in termination of parental rights proceedings brought by the state. New York City is the only jurisdiction the author is aware of in which, by discretion (not statute), judges appoint counsel for indigent parents in private custody matters. However, in order to receive a court appointment, the party must be at

that elite law graduates pursue.⁸² Family Courts judges usually have limited prior judicial experience—appointment or election to Family Court is often the judge’s first judicial post.⁸³ Family Courts are “viewed as the ‘despised, entry-level “kiddie court”’ from which many judges wish to escape.”⁸⁴ Many lawyers, judges, and legal scholars dismiss cases involving child custody “as having little theoretical legal significance.”⁸⁵ This perception is not helped by the fact that, for various reasons,⁸⁶ the rules of evidence and ethical boundaries are ignored in Family Court.⁸⁷ As one Judge reports: “I try to make my courtroom informal. If I think it will help in reaching a settlement, I invite them to my office rather than staying in the courtroom.”⁸⁸ Scholar and practitioner Leah Hill perfectly summarizes the experience of this author,⁸⁹ and likely countless

or below the federal poverty line. See Rosenthal, *supra* note 62, at 137 (footnote omitted) (“Most working people are not entitled to court-appointed assistance. Although some unions offer Legal Assistance Programs, free legal services for custody and visitation cases are virtually non-existent for others. Thus, a large income gap separates people who are eligible for a free, court-appointed attorney, and those who can afford to pay normal attorney’s fees, which, at \$250-\$500 per hour, could add up to \$5,000 or \$10,000 per case.”). See also generally NATALIE ANNE KNOWLTON ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 2, 12-15 (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [<https://perma.cc/XF2R-KFT5>] (“Self-represented litigants in family court largely desire legal assistance, advice, and representation but it is not an option for them due to the cost and having other financial priorities. Attorney services are out of reach, while free and reduced-cost services are not readily available to many who need assistance.”).

⁸² See generally David Wilkins et al., *Urban Law School Graduates in Large Firms*, 36 Sw. U. L. REV. 433, 489-92 (2007).

⁸³ David J. Lansner, *Abolish the Family Court*, 40 COLUM. J.L. & SOC. PROBS. 637, 638 (2007) (“The Family Court is generally a place that people want to escape. Judges move from family court to supreme court and federal court, but almost never the other way.”).

⁸⁴ Ross, *supra* note 41, at 5; see also Lansner, *supra* note 83, at 637 (“The Family Court was established as an ‘inferior court,’ and it has lived up (or down) to its classification.”).

⁸⁵ Ross, *supra* note 41, at 4.

⁸⁶ Many judges employ techniques that skirt traditional rules of evidence with good intentions, trying to accommodate and understand the needs of *pro se* litigants. But the lack of decorum and procedure also has negative consequences, some of which are discussed below, and some of which are beyond the scope of this article. In any event, the informality of Family Court is striking to any lawyer who practices in other civil and criminal courts.

⁸⁷ See generally Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts To Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2706 (2014).

⁸⁸ Martha Delaney & Scott Russell, *Working with Pro Bono Clients*, BENCH & B. MINN., Aug. 2005, at 1, 6, http://www2.mnbar.org/benchandbar/2005/aug05/law_at_lrg.htm [<https://perma.cc/KX9U-76QS>] (quoting Hon. Bruce Peterson).

⁸⁹ The author was a student attorney for Juvenile Rights Practice (JRP) of Legal

other lawyers and social workers who tread the waters of the New York City Family Court System each day:

The New York City Family court is a unique breeding ground for informal practices that perpetuate the appearance of impropriety and undermine litigants' faith in the court. In addition to the frenzied pace and unimaginable caseloads, the casual familiarity that inevitably develops among institutional players and the legacy of closed proceedings, have shaped the court into a world unlike any other.⁹⁰

In many jurisdictions, family matters are heard on a lower "level" of court than other civil matters (for state-by-state jurisdictional differences see Appendix, *infra*). For example, in Virginia, custody and juvenile matters are heard on the same level of court as small claims and traffic tickets.⁹¹ But even in other states, such as New York, where Family Courts are on the same level as other trial courts, they are not given the same respect.⁹² The vivid words of Joy Rosenthal perfectly encapsulate the author's daily experience in the five boroughs of New York City.⁹³

Aid in Manhattan Family Court from 2002-2004, then an attorney for JRP in Bronx Family Court from 2004-2006, and then operated a legal clinic representing children in Queens Family Court from 2006-2008. During these six years, she also appeared frequently in Brooklyn Family Court and on occasion in Staten Island Family Court on Staten Island. The latter was remarkably less crowded and more "white."

⁹⁰ Hill, *supra* note 44, at 532 n.11. "[U]nofficially sanctioned practices like ex parte communications between certain judges and some institutional providers" are characteristic of the informality in Family Court. *Id.* at 532. The Author also experienced these practices on a daily basis in her six years practicing in NYC Family Courts. See generally ANNIE E. CASEY FOUND., *supra* note 78. For additional perspectives, see Andrew White, *A Matter of Judgment: Deciding the Future of Family Court in NYC*, CHILD WELFARE WATCH, Winter 2005-2006, at 1; Alyssa Katz, *Bringing Order to the Court*, CHILD WELFARE WATCH, Winter 2005-2006, at 9, both available at *Child Welfare Watch: A Matter of Judgment*, CTR. FOR N.Y.C. AFFAIRS, <http://www.centrernyc.org/publicationarchives/2014/8/21/child-welfare-watch-a-matter-of-judgement> [https://perma.cc/VC9Q-2ANS].

⁹¹ While both Courts are technically "District" courts by name, they are wholly different entities. One is a "General District Court" while the other is a "Juvenile and Domestic Relations District Court." See *Virginia's Court System*, VIRGINIA'S JUD. SYS., <http://www.courts.state.va.us/courts/home.html> [https://perma.cc/U26K-JNNS] (last visited Nov. 19, 2016).

⁹² Rosenthal, *supra* note 62, at 130-31 (noting the differences between Supreme Court and Family Court in New York, discussing the discrepancy between the two courts, calling family court the "poor person's court," and noting that Family Court judges hear more cases than supreme court judges).

⁹³ "New York City Family Court calendars are unbelievably congested. Nearly all litigants are told to come to court when the court opens at 9:30 A.M. They are not given specific appointments. It is not unusual for an attorney to appear on ten cases a day divided among different courtrooms on different floors of the courthouse. Nor is it unusual for judges to hear over 80 cases each day (sometimes just for administrative matters, sometimes for actual hearings). With calendars like that, judges must hear

III. DISCRETIONARY NATURE OF CUSTODY MATTERS

Child custody cases between private parties are known to be extraordinarily challenging for judges.⁹⁴ There are a number of reasons for this. Child custody litigants are emotional and acrimonious.⁹⁵ By the time they reach a trial, the parties have usually been battling over the most important issues of their lives for years. It is often said that “there are no winners in family court.”⁹⁶ With a stranger making personal decisions for them, and with hurtful or embarrassing things inevitably aired in court, parties are unlikely to be completely happy. On the judge’s end, there is fundamental distrust of the parties.⁹⁷ Judges do not feel that they can get an accurate depiction of the facts from anyone: “There is an almost knee-jerk reaction by the judges that parents cannot be trusted to provide the court with all the information necessary to reach the best resolution of disputes involving children.”⁹⁸ Just as most lawyers shy away from family law, many judges are adverse to custody

whichever case is ready, meaning having all of the litigants, attorneys and witnesses present and prepared to appear. As a result, litigants often must wait hours for their case to be heard, even if their case is only on the calendar for return of service. . . . [B]oth the Bronx and Manhattan courthouses are dilapidated, filthy and depressing. In the Bronx Family Court, for instance, litigants must often wait in line for hours to get into the building because the buildings’ elevators are routinely broken or being repaired. Often only one elevator is in use to carry roughly 3,000 people a day up to the court, where the courtrooms are on the 6th, 7th and 8th floors. If litigants are not present, their cases cannot be called. As a result, judges must adjourn cases, often for months at a time, delaying justice and litigants’ day in court. This all adds up to give the family courthouses the milieu of a welfare office rather than a representation of justice. Once inside the courtroom, cases are often rushed or adjourned, if they are heard at all. Cases may be adjourned for weeks or even months at a time, and litigants may be told to come back again and again. This is frustrating for those who have to work or have child-care responsibilities because they have to take a whole day off each time they must appear in court, and/or arrange for others to take care of their children. Parents have told me that they have used all of their vacation time for the year waiting in Family Court. One parent told me that she lost her job because of required Family Court appearances.” *Id.* at 135-36 (footnotes omitted).

⁹⁴ “[J]udicial decision-making in these cases is viewed as extremely difficult” Hill, *supra* note 44, at 534; *see also* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 373 (2008) (noting that the “best interest of the child” standard often does not give the judge any guidance for her ruling and therefore the judge’s decision making process is unbridled and subjective).

⁹⁵ Hill, *supra* note 44, at 534.

⁹⁶ *See, e.g., Preparing for A Family Court Hearing*, LAW OFFICES OF LYNDA L. HINKLE, <http://www.lyndahinkle.com/preparing-for-a-family-court-hearing> [<https://perma.cc/Z76Y-QL5R>] (last visited Nov. 26, 2016).

⁹⁷ Lidman & Hollingsworth, *supra* note 32, at 288.

⁹⁸ *Id.*

cases.⁹⁹ Indeed, the difficulty of custody cases was demonstrated in a 2005 Alabama custody ruling that had seven different opinions written by six judges.¹⁰⁰

A. *Best Interest of the Child*

In order to grapple with the exceedingly complicated issues of custody, in the mid-twentieth century states across the country developed “best interest of the child” (BIC) tests and incorporated them into statute.¹⁰¹ Every state now has a BIC statute.¹⁰² These statutes have been the subject of an enormous amount of literature. As described by Lidman and Hollingsworth:

[The best interest standard] was and still is a highly indeterminate test. It is often devoid of significant legislative guidelines and instead invites the court to explore the fullest range of the family’s prior history and philosophy of child-rearing. The courts [become] embroiled in the sifting and winnowing of a multitude of factors and [are] called upon to exercise exceedingly broad discretion on a case-by-case basis. At the same time this wide discretion has nearly exempted the trial court from appellate review. Many authors have argued cogently that the best interest standard should be revised.¹⁰³

Numerous scholars conclude that BIC statutes provide judges with little concrete guidance¹⁰⁴ and force judges to make inherently bi-

⁹⁹ Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 812, 812 n.31 (1984).

¹⁰⁰ *Ex parte G.C., Jr.*, 924 So.2d 651 (Ala. 2005). Justice Parker, in his dissent, noted: “neither the applicable child-custody laws nor the relevant legal precedents appear to be particularly unclear or inconsistent. . . . After considerable reflection, I have concluded that the primary cause of the Court’s varied and often conflicting opinions in this case is disagreement over foundational issues that underlie the more visible custody issues.” *Id.* at 674 (Parker, J., dissenting). His dissent quite competently proceeds to set out those foundations.

¹⁰¹ Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 117, 117 n.19 (2009); *see also* VA. CODE ANN. § 20-124.3 (2012); N.Y. DOM. REL. L. § 70 (McKinney 1988).

¹⁰² McLaughlin, *supra* note 101, at 117, 117 n.19.

¹⁰³ Lidman & Hollingsworth, *supra* note 32, at 289-90 (footnotes omitted).

¹⁰⁴ June Carbone, *Child Custody and the Best Interests of Children—A Review of From Father’s Property To Children’s Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 723 (1995) (book review) (“Even putting aside the possibility of judicial bias, judges lack a basis on which to evaluate the best interests of a particular child in the absence of guiding principles.”). For example, these are the factors Virginia’s statute lists, with no other guidance in how to use or rank them: “1. The age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs; 2. The age and physical and mental condition of each parent; 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child’s life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child; 4.

ased decisions.¹⁰⁵

B. *Unclear and Controversial Role of Guardians ad Litem*

Because of the gravity and difficulty of making custody decisions, in the mid-twentieth century family courts and legislatures developed another "tool": the guardian *ad litem* ("GAL").¹⁰⁶ Again, an enormous amount of literature has been written about the ambiguous and highly controversial role of the GAL in private child custody disputes,¹⁰⁷ which is beyond the scope of this article. Suffice it to say that no consensus exists on either the duties of the guardian *ad litem* or the form of advocacy one should use.¹⁰⁸ In

The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members; 5. The role that each parent has played and will play in the future, in the upbringing and care of the child; 6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child; 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child; 8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference; 9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and 10. Such other factors as the court deems necessary and proper to the determination." VA. CODE ANN. § 20-124.3 (2012). For other critiques of the factor-based BIC approach, see, for example, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 226-27 (1975).

¹⁰⁵ Kohm, *supra* note 94, at 337 (quoting MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 40 (2005)) ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out.").

¹⁰⁶ See generally Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109-12 (2002) (discussing the history and background of guardians *ad litem*).

¹⁰⁷ See, e.g., *id.*; Lidman & Hollingsworth, *supra* note 32; Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

¹⁰⁸ See, e.g., JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 40-41 (3rd ed. 2007) ("I had expected to find a discrete number of prevailing models on representing children and thought that I might be able to present sets of minority and majority views on how the role had spontaneously evolved in the different states as a result of the sudden requirement of guardians *ad litem* in CAPTA. In the end we could find no trends; not even two states matched in theory and practice."); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381,

some states a guardian *ad litem* is not even an attorney or advocate at all.¹⁰⁹

The guardian *ad litem* has been defined as any and all of the following: a court-appointed investigator who makes recommendations to the court about who should have custody; a lawyer who represents a child; an advocate for the “best interest” of the children; and a facilitator/mediator.¹¹⁰ The GAL is sometimes called the “eyes and ears of the court.”¹¹¹ In some states, GALs are allowed to provide facts and opinions to the court without taking the witness stand or being subject to cross-examination.¹¹² Consequently, everything they are asked to report to the court about their conversations with children and parents is hearsay. GALs serve “a quasi-judicial role . . . cloaked in judicial immunity.”¹¹³

Because of this role, parents’ attorneys advise their clients to be cooperative with GALs, as GALs’ recommendations carry a tremendous amount of weight.¹¹⁴ But many scholars consider it paradoxical that the court appoints a GAL because of the court’s inherent distrust of parents (discussed above),¹¹⁵ yet then the GAL invariably gathers most of her “facts” and forms her opinions based on interviews with parents.¹¹⁶

The GAL essentially serves as an expert witness without any expert qualifications and without having to be a witness. First of all,

386-403 (2011); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing To Do*, 27 PACE L. REV. 869, 876-85 (2007).

¹⁰⁹ See, e.g., CONN. R. SUP. CT. FAM. § 25-62 (2016) (“Unless the judicial authority orders that another person be appointed guardian ad litem, a family relations counselor shall be designated as guardian ad litem. The guardian ad litem is not required to be an attorney.”); OHIO REV. CODE ANN. § 2151.281(H) (LexisNexis 2016) (“If the court appoints a person who is not an attorney admitted to the practice of law in this state to be a guardian ad litem, the court also may appoint an attorney admitted to the practice of law in this state to serve as counsel for the guardian ad litem.”).

¹¹⁰ Lidman & Hollingsworth, *supra* note 32, at 256.

¹¹¹ *Id.* at 257.

¹¹² See, e.g., STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS *Ad Litem* for Children S-1 (VA. JUDICIAL COUNCIL 2003), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf [<https://perma.cc/PFX4-NBL2>].

¹¹³ Lidman & Hollingsworth, *supra* note 32, at 257.

¹¹⁴ *Id.* at 257-58 (“All attorneys will caution their clients to give *guardians ad litem* the utmost cooperation because this person’s recommendation carries much weight with the court.”).

¹¹⁵ See notes 97-98 and accompanying text, *supra*.

¹¹⁶ In the Author’s experience representing hundreds of parents in child custody cases where GALs are appointed, the parents are the primary source of facts and witnesses for the guardian *ad litem*-investigator. Rarely does the guardian *ad litem*-investigator seek out witnesses or information sources other than those identified for them by the parents.

a GAL cannot be qualified as an “expert” because there is no such thing as a lay or attorney “expert” in custody cases.¹¹⁷ And unlike child custody evaluators, who are frequently psychologists,¹¹⁸ GALs are not required to possess any specific credentials.¹¹⁹ There is not even a consensus on the appropriate “training” for GALs.¹²⁰ In most states, the way to get on the “list” for appointments is to attend a continuing education course,¹²¹ agree to accept assignments, and then continue accepting assignments.¹²² GALs become experts by default: “The more often a particular individual performs that role, the more likely that the trial court will rely on him [or her] as if he [or she] were an expert.”¹²³

¹¹⁷ See *Heistand v. Heistand*, 673 N.W.2d 541, 550 (Neb. 2004) (“Qualification cannot occur in guardian ad litem situations because no recognized area of general expertise with regard to ‘custody’ or ‘child placement’ exists.” (quoting Lidman & Hollingsworth, *supra* note 32, at 275)).

¹¹⁸ See Am. Psychological Ass’n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 863 (2010), <https://www.apa.org/pubs/journals/features/child-custody.pdf> [<https://perma.cc/E6W8-HJQ4>] (“Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the ‘psychological best interests’ of the child”); see also Lidman & Hollingsworth, *supra* note 32, at 275, 275 n.95.

¹¹⁹ Ducote, *supra* note 107, at 111, 138 (noting that Guardians have no training requirements and that Guardians are the least trained about domestic violence of any actors in the civil justice system). See also Hollis R. Peterson, Comment, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1083, 1083 n.4 (2006) (“Given the nature and importance of this role, it is disturbing that many guardians ad litem have very little training or education in children and families, receive little compensation for their work, and often are reported to provide substandard representation to their child clients.”).

¹²⁰ Ducote, *supra* note 106, at 111-16 (describing the many states that formed oversight committees to evaluate Guardians and how their recommendations diverged).

¹²¹ For example, in Virginia the only mandatory training is one seven-hour CLE course. See STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS *Ad Litem* Pursuant to § 16.1-266, Code of Virginia. § I(B)(1) (VA. JUDICIAL COUNCIL 2015), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf [<https://perma.cc/6CW9-U7C2>]. See generally Nat’l Council of Juvenile & Family Court Judges, *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, TECHNICAL ASSISTANCE BULL., Mar. 1998, 1, 70-75, <https://www.ncjrs.gov/pdffiles1/Digitization/194267NCJRS.pdf> [<https://perma.cc/V5LC-XTPS>].

¹²² This is the Author’s experience of “getting on the list” as a court appointed attorney in New York and Virginia, and has been reported to me by my colleagues in many other states.

¹²³ Coffey v. Coffey, 661 N.W.2d 327, 341 (Neb. Ct. App. 2003) (quoting Lidman & Hollingsworth, *supra* note 32, at 276-77).

IV. THE EFFECTS OF THE JURISDICTIONAL DIFFERENCES ON CUSTODY MATTERS

Because of the ambiguous and discretionary nature of child custody law and practice, what *type* of court decides a particular case truly makes a difference. This is not the same as saying it matters which judge you get. And this is not just because Family Courts have a different physical and cultural atmosphere, as described above, from other trial courts. There are statutory and common law differences between Family Courts and other trial courts. Two states, New York and Virginia, exemplify this.

A. *New York*

The contrasting cultures of New York Supreme Court and Family Court¹²⁴ have been described above and in countless articles by scholars and practitioners over the past thirty-plus years.¹²⁵ In fact, it has been almost twenty years since the revered Chief Justices of New York's highest court, the Hon. Judith Kaye and the Hon. Jonathan Lippman, published a scathing report on the state of New York's Family Court system and proposed vast improvements to Family Court, including streamlining all domestic relations matters.¹²⁶ Under Chief Justice Kaye's proposal, matrimonial matters would be heard in the same place as other family matters.¹²⁷ But nothing has happened in those twenty years, despite repeated calls for reform.¹²⁸

¹²⁴ New York's version of "circuit court" in other states is called Supreme Court. It is the trial-level court of general jurisdiction in the New York State Unified Court System. It is vested with unlimited civil and criminal jurisdiction. Despina Hartofilis & Kimberly McAdoo, Reply, *Separate But Not Equal: A Call for the Merger of the New York State Family and Supreme Courts*, 40 COLUM. J.L. & SOC. PROBS. 657, 657 (2007).

¹²⁵ See, e.g., *id.*; Hill, *supra* note 44; Caroline Kearney, *Pedagogy in a Poor People's Court: The First Year of a Child Support Clinic*, 19 N.M. L. REV. 175 (1989).

¹²⁶ Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 145 (1998) ("[We propose] a constitutional amendment that will fundamentally restructure the trial court system in New York and create a Unified Family Division . . ."). This proposal never moved forward.

¹²⁷ *Id.* at 145, 147.

¹²⁸ See, e.g., ANNIE E. CASEY FOUND., *supra* note 78, at 49-51; JULIA VITULLO-MARTIN & BRIAN MAXEY, VERA INST. OF JUSTICE, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES 20-21 (2000), <http://www.vera.org/sites/default/files/resources/downloads/nyfamilycourt.pdf> [<https://perma.cc/866F-M868>]; CTR. FOR COURT INNOVATION, NEW YORK CITY FAMILY COURT: BLUEPRINT FOR CHANGE EXECUTIVE SUMMARY 3 (2002), <http://www.courtinnovation.org/sites/default/files/blueprin1.pdf> [<https://perma.cc/RBZ2-GFQ7>].

1. Different Rules & Procedure

First of all, as discussed in the introduction, the rules of New York Family Court and Supreme Court are different.¹²⁹ This has been clearly stated and upheld by appellate courts.¹³⁰ One major difference between these two courts is the lack of requirement of a preliminary conference in family court.¹³¹ Therefore, non-marital families have fewer opportunities for settlement of their custody issues, increasing the probability that a judge (with the help of other outside parties, discussed further below) will make the ultimate decisions about a family's life.

There are also a number of other procedural differences. There are rarely depositions in New York family court,¹³² meaning all evidence is a surprise. Because there is no pre-trial opportunity to explore the evidence, it is more likely for traumatic and embarrassing things to be disclosed in open court.¹³³ The lack of deposi-

¹²⁹ Compare Uniform Civil Rules for the Supreme Court and the County Court, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.1-71, with Uniform Rules for the Family Court, N.Y. COMP. CODES R. & REGS. tit.22, §§ 205.1-86.

¹³⁰ See Lansner, *supra* note 83, at 642, 642 n.21 ("These due process violations are compounded by the lack of effective appellate review. The appellate courts have made review largely meaningless, often ignoring pervasive violations of the Constitution, New York statutory and decision law, and rules of evidence as harmless error."). For examples of appellate court case law on the role of law guardians, see Nancy S. Erikson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 FORDHAM URB. L.J. 817, 824-25, nn.32-35 (2000).

¹³¹ See Erikson, *supra* note 130, at 821.

¹³² This assertion is based on the Author's experience. Although discovery is permitted in New York Family Court custody proceedings, because the proceedings are designated special proceedings, discovery must be requested and the movant bears the burden of proving that "the requested discovery was necessary and that providing the requested discovery would not unduly delay [the] proceeding[.]" *Bramble v. N.Y.C. Dep't of Educ.*, 4 N.Y.S.3d 238, 240 (N.Y. App. Div. 2015); accord *In re Dominick R. v. Jean R.*, 2005 WL 1252573, *3 (N.Y. Fam. Ct. Feb. 14, 2005) ("Custody proceedings brought pursuant to the Family Court Act are 'special proceedings' rather than 'actions' and, as such, are governed by Article 4 of the CPLR. Unlike CPLR 3102(b), which provides for 'disclosure by stipulation or upon notice without leave of court,' CPLR 408 specifically provides that 'leave of court shall be required for disclosure' in a special proceeding.").

¹³³ The embarrassment may be compounded by the fact that matters regarding juveniles are open to the public in N.Y. Family Court. See Alan Finder, *Chief Judge in New York Tells Family Courts to Admit Public*, N.Y. TIMES (June 19, 1997), <http://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html> [<https://perma.cc/TGU9-GLMJ>]. But see William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/18/nyregion/at-new-york-family-courts-rule-for-public-access-isnt-heeded.html> [<https://perma.cc/ADP6-D62V>]. Even if these proceedings were not open to the public, there are still judges, caseworkers, and witnesses present to hear family intimacies. See *New York City Family Court Overview*, NYCOURTS.GOV,

tions further decreases the likelihood of settlement for families.¹³⁴ Written opinions are rare in Family Court,¹³⁵ aside from those drafted on forms immediately following a hearing.¹³⁶

2. Use of Child's Attorneys in New York Family Court

Another major difference is the appointment of "child's attorneys" (the rough equivalent of GALs, and previously called "Law Guardians") in New York Family Court, which does not occur in Supreme Court.¹³⁷ Although the Family Court Act does not expressly mandate appointment of child's attorneys in custody cases, judges in New York City assign them to every case.¹³⁸ The author is not personally aware of the practices in Upstate New York;¹³⁹ however, it is safe to assume that the child's attorneys are appointed in custody cases with frequency. This is because child's attorneys are present in almost every other case in New York Family Court¹⁴⁰ and

<https://www.nycourts.gov/courts/nyc/family/overview.shtml> [<https://perma.cc/6BDZ-T6UX>] (last visited Nov. 27, 2016).

¹³⁴ Without discovery or depositions, the parties must resort to trial.

¹³⁵ Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 *FORDHAM URB. L.J.* 875, 884 (2000).

¹³⁶ E.g., *Family Court Forms*, NYCOURTS.GOV, <http://www.nycourts.gov/forms/familycourt> [<https://perma.cc/FJH7-Q523>] (last updated Jan. 3, 2013).

¹³⁷ N.Y. Family Court Act section 241 states that "minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel." N.Y. FAM. CT. ACT § 241 (McKinney 2010). As a practicing attorney in New York, the Author was called a "law guardian" for many years, but the terminology was changed to "child's attorney" or "attorney for the child" in all statutes by a 2009 bill. Assemb. 7805, 2009 Leg., 232nd Sess. (N.Y. 2010). Prior court opinions and literature used the "law guardian" term, and the transition to the new terminology is still occurring in practice.

¹³⁸ This assertion is based on the Author's experience. The Children's Law Center ("CLC") in Brooklyn is contracted to take on custody cases in New York City. Legal Aid and Lawyers for Children also take some cases.

¹³⁹ The author did take occasional cases in Nassau County Court, and this was the practice there, too.

¹⁴⁰ See *Nolfo v. Nolfo*, 149 Misc.2d 634, 635 (N.Y. Sup. Ct. 1991) ("Historically, law guardians are appointed in Family Court abuse and neglect proceedings where the rights of children in delinquency proceedings (Article 3), supervision proceedings (Article 7) and child protective proceedings (Article 10) are at issue. Proceedings to terminate parental rights under Social Services Law section 384-b, and to place children in protective custody under Family Court Act section 158 and to continue children in placement or commitment under Family Court Act section 249(a) all require the appointment of a law guardian to protect the interests of the subject children."); see also *In re Orlando F.*, 40 N.Y.2d 103, 112 (1976) ("Consequently, although no statute currently so provides, we hold that, in the absence of the most extraordinary of circumstances, at the moment difficult to conceptualize, the Family Court should direct the appointment of a Law Guardian in permanent neglect cases to protect and represent the rights and interests of the child in controversy.").

can quickly be called to a case.¹⁴¹ Child's attorneys' offices are located inside New York Family courthouses.¹⁴²

This stands in stark contrast to Supreme Court, which is not subject to the Family Court Act.¹⁴³ Child's attorneys are also not part of the daily life in Supreme Court. In fact, courts have indicated that child's attorneys are unnecessary in matrimonial actions.¹⁴⁴ As one court concluded, "the appointment of law guardians in matrimonial actions is comparatively rare. Counsel cites but one reported case . . . in which a law guardian was appointed in a divorce action. . . . The court there found a clear danger to the children, which justified the appointment of a law guardian."¹⁴⁵

To be clear, the author is not necessarily opposed to appointing law guardians in private custody matters. This author, a former law guardian,¹⁴⁶ certainly endorses the appointment in child protective matters, using the New York standards of client-directed advocacy.¹⁴⁷ But appointing law guardians in private custody matters is an entirely different substantive issue.¹⁴⁸ In private custody matters, the state has not made any allegations against parents or intervened in family life against the will of the child and/or parents.¹⁴⁹ In private custody matters, the parents retain legal custody and therefore decision-making power over their children. Child preferences regarding parents are analyzed differently and

¹⁴¹ This is again based on the Author's experience. Note that CLC only represents children in custody cases.

¹⁴² This is true in all five boroughs of New York City and also in Westchester County, New York. In other parts of the country, the same is true: in Denver, Colorado, the Colorado Office of the Child's representative is located at 1300 Broadway Street, which is the courthouse in Denver. This is also true in Salt Lake City, Utah (450 State St, Salt Lake City, UT 84114), as well as in Fayetteville, North Carolina (117 Dick Street Fayetteville, NC 281348).

¹⁴³ Robert M. Elardo, *Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts*, 29 FORDHAM URB. L.J. 1125, 1125-27 (2002) (noting that the Family Court Act does not apply in supreme court and therefore that the right to counsel in the Family Court Act for indigent parents is unavailable in supreme court).

¹⁴⁴ *Nolfo*, 149 Misc.2d at 635 ("Family Court Act section 249 does not mandate such an appointment in divorce actions in which a custody dispute is but one of the elements in controversy.").

¹⁴⁵ *Id.* at 636.

¹⁴⁶ As noted, the Author was a law guardian in New York State from 2004-2006.

¹⁴⁷ *Rules of the Chief Judge*, N.Y. COMP. CODES R. & REGS. tit.22, § 7.2(d)(2) ("If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.").

¹⁴⁸ See Lidman & Hollingsworth, *supra* note 32, 293-94, 304-06.

¹⁴⁹ *Cf. id.* at 293-94 (describing the state's role in abuse and neglect proceedings).

given different weight than in child protective matters.¹⁵⁰

In any case, no matter what one's position on the use of law guardians in private custody matters, the bottom line is that law guardians are regularly appointed in New York Family Court on custody matters, but not in Supreme Court.¹⁵¹ Why should unmarried parents and their children be treated differently than married ones?

3. Use of Court Ordered Investigations by ACS in Family Court

Another enormous difference between New York Family Court and Supreme Court is the use of court-ordered, non-forensic evaluations,¹⁵² which are done, in the case of New York City, by the state's child protective agency.¹⁵³ The Family Court Act, again, authorizes this.¹⁵⁴ The practice is so common that it is explained to clients and the public on numerous law firm websites.¹⁵⁵ The par-

¹⁵⁰ Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 334, 341 n.179 (1998); see also Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1428-29 (1996).

¹⁵¹ See notes 137-145 and accompanying text, *supra*.

¹⁵² Non-forensic evaluations are those not done by a qualified "expert" such as a child custody evaluator. For details on child custody evaluators, see Alan M. Jaffe & Diana Mandeleew, *Essentials of a Forensic Child Custody Evaluation*, L. TRENDS & NEWS (Am. Bar Ass'n, Chicago, Ill.), Spring 2011, http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_spring/forensic_custody_evaluation.html [<https://perma.cc/2WYP-BJRU>].

¹⁵³ Hill, *supra* note 44, at 539.

¹⁵⁴ *Id.* at 539, 539 n.46 (citing N.Y. COMP. CODES R. & REGS. tit.22, § 205.56(a)(1) (2006) ("(a) The probation service or an authorized agency or disinterested person is authorized to, and at the request of the court, shall interview such persons and obtain such data as will aid the court in: (1) determining custody in a proceeding under section 467 or 651 of the Family Court Act[.]")).

¹⁵⁵ See, e.g., *Court Ordered Investigations in NY Family Court Cases*, SPODEK LAW GROUP: LEGAL BLOG (Aug. 5, 2013), <http://www.spodeklawgroup.com/court-ordered-investigations-in-ny-family-court-cases> [<https://perma.cc/YM7D-24JF>] ("In a litigated custody or visitation case, the parties are often subject to forensic investigations. These are mental health investigations of the parties to the litigation and their collateral contacts. In addition to the forensic reports, the parties might also be asked to submit to court ordered investigations ('COI'). These are court ordered investigations of the parties, and their homes [sic] and can be done by the Administration for Children's Services ('ACS'), the Probation Department and other third party agencies that are affiliated with the New York Family Court system."); Law & Mediation Office of Darren M. Shapiro, P.C., *How Are Child Custody Cases Affected by Abuse and Neglect Claims?*, LONG ISLAND FAM. L. & MEDIATION BLOG (May 31, 2014), <http://www.longislandfamilylawandmediation.com/2014/05/31/child-custody-cases-affected-abuse-neglect-claims> [<https://perma.cc/RL77-3N5P>] ("In a child custody or parenting time case, a referee or judge might ask Child Protective Services, for Long Island cases, or Administration for Children Services, for New York City cases to perform what is called a

ties are asked to consent to the investigation and allow the agency to report its findings to the court confidentially.¹⁵⁶ The reports are delivered directly to the judge and made a part of the court file *before* the hearing on the merits of the case.¹⁵⁷

This practice is shockingly “problematic on a number of fronts[,]”¹⁵⁸ particularly to anyone who has worked within the child welfare system and to any parent who has feared getting a visit from CPS. ACS is not a “neutral” investigator; its legal charge is to investigate abuse and neglect and “protect children.”¹⁵⁹ Not only could ACS investigations in private child custody matters lead to unnecessary interventions, which have not come about by proper protocol,¹⁶⁰ but this practice also implies fault¹⁶¹ and demonstrates lack of respect for Family Court litigants’ privacy. This is parallel to the cultural and physical atmosphere of Family Court, described in Section III, which gives Family Court litigants the impression that their family problems are not worthy of respect. Moreover, it is quite striking that, from the author’s experience,¹⁶² New York City Family Court judges are often highly dissatisfied with the investigations and services that ACS provides.¹⁶³ For Family Court judges to turn around and use ACS as a reliable and trustworthy gatherer of “facts” in a private case is ironic and further reinforces the message that Family Court litigants are not worthy of respect.

Court Ordered Investigation. The investigation’s purpose is to determine whether the children involved in a child custody case are being exposed to abuse or neglect. What happens in the case is that a CPS or ACS worker will visit and speak with the children and the parents and make a report back to the court.”).

¹⁵⁶ Hill, *supra* note 44, at 537 (citing *Kessler v. Kessler*, 10 N.Y.2d 445, 456 (1962)).

¹⁵⁷ *Id.* at 539-40.

¹⁵⁸ *Id.* at 540.

¹⁵⁹ See, e.g., N.Y. FAM. CT. ACT § 1011 (McKinney 1970); Hill, *supra* note 44, at 540, 540 nn.52-53; *Mission & Organization*, ADMIN. FOR CHILD. SERV., <https://www1.nyc.gov/site/acs/about/mission-organization.page> [<https://perma.cc/W98D-EQ5S>] (last visited Nov. 13, 2016) (“The Administration for Children’s Services protects and promotes the safety and well-being of New York City’s children, young people, families, and communities by providing excellent child welfare, juvenile justice, and early care and education services.”).

¹⁶⁰ For a discussion of proper child abuse reporting protocol, see generally Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 56-59 (2014).

¹⁶¹ See Hill, *supra* note 44, at 540-41 (“To be sure, this atmosphere of suspicion is not lost on Family Court litigants who understand all too well the power of ACS to disrupt family life.”).

¹⁶² This experience is echoed by Leah Hill. *Id.* at 543 (“As a group, Family Court judges have an inside view of the deficiencies at ACS and many have voiced their frustration with the agency’s sometimes inept handling of cases in Family Court.”).

¹⁶³ *Id.* at 543-44.

In Supreme Court there are no non-forensic evaluations.¹⁶⁴ A Supreme Court judge can order a forensic evaluation, but that is vastly different. A forensic evaluator first has to be qualified as an expert.¹⁶⁵ A forensic expert is also subject to rigorous cross-examination.¹⁶⁶ “This two-tier system begs the question, why do we need non-expert investigations in Family Court?”¹⁶⁷

B. *Virginia*

1. JDR Is Not a Court of Record

In Virginia, there are also statutory and practical differences between custody cases heard in Circuit Court (matrimonial actions) versus in Juvenile and Domestic Relations (“JDR”) Court (non-matrimonial actions). Interestingly, the Virginia Code provides the circuit court and JDR court with concurrent jurisdiction over custody disputes when the parents of the child are separated, but not divorced.¹⁶⁸ This means that unmarried parents must always go to JDR, but married parents have a choice when they also intend to file a divorce. In the author’s experience, if a party has an attorney, that party is almost always advised to file their custody

¹⁶⁴ *Id.* at 546 (“[T]here isn’t a supreme court rule that parallels the Family Court rule governing court-ordered investigations.”).

¹⁶⁵ See Law & Mediation Office of Darren M. Shapiro, P.C., *supra* note 155 (“Forensics is the word used for investigations and reports made by psychological professionals for the court which are then used to aid in deciding how to rule on the dispute.”). See also generally Meredith Kelly et al., *Best Practice Guide: Analyzing the Role of Forensic Evaluators in the New York State Court System*, JUST. ACTION CTR. STUDENT CAPSTONE J., May 2, 2012, 1, 8-10, http://www.nyls.edu/documents/justice-action-center/student_capstone_journal/cap12kellyetal.pdf [<https://perma.cc/NPP2-X4B9>] (“The authorizing court rule for the New York Supreme Court is the Uniform Rules for the New York State Trial Courts (‘Uniform Rules’), Part 202.18 titled, ‘Testimony of Court-Appointed Expert Witness in Matrimonial Action or Proceeding,’ which allows courts to ‘appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation.’”). N.Y. COMP. CODES R. & REGS. tit. 22, § 202.18 (2008). See also N.Y. COMP. CODES R. & REGS. tit. 22, §§ 623.1-.10, 680.1-.11 (outlining rules for mental health professional panels that certify expert witnesses in the First and Second Judicial Departments).

¹⁶⁶ Testimony given by experts in matrimonial actions or proceedings is subject to the rules of evidence, which allow for cross-examination. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 690.12 (“The applicant shall be given an opportunity to call and cross-examine witnesses and to challenge, examine and controvert any adverse evidence.”).

¹⁶⁷ Hill, *supra* note 44, at 546.

¹⁶⁸ VA. CODE ANN. § 16.1-244(a) (2003) (“[W]hen a suit for divorce has been filed in a circuit court, . . . the juvenile and domestic relations district courts shall be divested of the right to enter any further decrees or orders to determine custody, guardianship, visitation or support . . . and such matters shall be determined by the circuit court unless both parties agreed to a referral to the juvenile court.”).

petition(s) concurrently with their divorce (when possible) so that they can have their whole case heard in Circuit Court.

Like family courts in New York, JDR courts in Virginia are subject to entirely different rules than Circuit Court.¹⁶⁹ For example, discovery is only permitted in JDR court if a party makes a motion to a judge and shows “good cause.”¹⁷⁰ Even if discovery is granted, JDR prohibits depositions.¹⁷¹ In reality, the author finds that JDR parties rarely utilize *any* of the tools of discovery, besides subpoenas *duces tecum*. Moreover, there are no pre-trial settlement conferences in JDR, unlike in Circuit Court,¹⁷² and surprise witnesses are par for the course. A party is not even required to mail a copy of a witness subpoena to the opposing side.¹⁷³

Most shockingly to the author upon admittance to Virginia, JDR is not a court of record.¹⁷⁴ Whatever happens in JDR can be appealed “*de novo*” to Circuit Court.¹⁷⁵ A second trial subjects JDR litigants to one more layer of litigation and court intervention, and also requires them to prove their case, and air their troubles—twice. The numerous differences between courts of record and Circuit Court in Virginia are beyond the scope of this article. However, it is important to note that *pro se* parties rarely actually “appeal” their cases to Circuit Court because they either do not know it is an appeal of right, or they do not have the time or energy to do so.¹⁷⁶

2. Use of Guardians *ad Litem*

Another major difference is the use of guardians *ad litem*

¹⁶⁹ VA. SUP. CT. R. 8:1-22.

¹⁷⁰ VA. SUP. CT. R. 8:15(c).

¹⁷¹ *Id.* (“In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.”).

¹⁷² See, e.g., *Virginia Beach Divorce Pretrial Order*, CIR. CT. CITY VA. BEACH, <https://www.vbgov.com/government/departments/courts/circuit-court-judges/Documents/Divorce%20Pretrial%20Order.pdf> [<https://perma.cc/G8SR-B95P>] (last visited Nov. 13, 2016).

¹⁷³ In practice, the author always does this, but it is not required. VA. SUP. CT. R. 8:13(e) (“This Rule does not apply to subpoenas for witnesses and subpoenas *duces tecum* issued by attorneys in civil cases as authorized by Virginia Code §§ 8.01-407 and 16.1-265.”).

¹⁷⁴ Statutes governing the Juvenile and Domestic Relations District Courts are under Title 16.1, “Courts Not of Record.”

¹⁷⁵ VA. CODE ANN. § 16.1-296(A) (2009) (“From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken to the circuit court within 10 days from the entry of a final judgment, order or conviction and shall be heard *de novo*.”).

¹⁷⁶ Based off of author’s experience and interviews.

(“GALs”). In Virginia, guardians *ad litem* are statutorily obligated to investigate for the court and recommend what is in the child’s “best interest” in private custody cases.¹⁷⁷ They are not subject to cross-examination.¹⁷⁸ They may submit written reports prior to the hearing.¹⁷⁹ In fact, appellate courts uphold and sanction the role of GAL as a virtual court employee with *carte-blanche* to investigate,

It is the guardian *ad litem* who retains the ultimate responsibility and accountability to the court in carrying out his or her role in the manner required by the court, as well as the applicable statutory and judicial mandates. . . . [W]e find no error in the court’s order directing [parents] to permit the guardian *ad litem* and a member of his staff to visit their homes on an unannounced or announced basis, for the purposes stated in the court’s order.¹⁸⁰

Guardians *ad litem* are appointed by statute in JDR courts.¹⁸¹ In some JDR courts, GALs are appointed in every custody case.¹⁸² This is as opposed to Circuit Courts, where they are appointed infrequently.¹⁸³ And just as in New York, GALs are usually present in JDR courthouses all day long (in private offices and attorney workrooms) and are immediately available for appointment. GALs do not have such a presence in Circuit courthouses, where the entire range of civil and adult criminal matters are heard each day.

The practice of appointing GALs in what are more likely cases where the litigants are poor is essentially *codified* in Virginia law. Virginia Code section 16.1–266(F) provides that the JDR court may appoint a guardian *ad litem* for the child in contested custody cases,

¹⁷⁷ VA. SUP. CT. R. 8:6.

¹⁷⁸ STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS *Ad Litem* for Children S-1 (VA. JUDICIAL COUNCIL 2003), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf [<https://perma.cc/8UYL-ZWRL>].

¹⁷⁹ *Id.* at S-9, S-10.

¹⁸⁰ *Ferguson v. Grubb*, 574 S.E.2d 769, 775 (Va. 2003).

¹⁸¹ VA. CODE ANN. § 16.1-266(F) (2005) (“In all other cases which in the discretion of the court require counsel or a guardian *ad litem*, or both, to represent the child or children or the parent or guardian, discreet and competent attorneys-at-law may be appointed by the court. However, in cases where the custody of a child or children is the subject of controversy or requires determination and each of the parents or other persons claiming a right to custody is represented by counsel, the court shall not appoint counsel or a guardian *ad litem* to represent the interests of the child or children unless the court finds, at any stage in the proceedings in a specific case, that the interests of the child or children are not otherwise adequately represented.”).

¹⁸² This is consistent with the author’s experience, especially in the City of Richmond JDR Court.

¹⁸³ This is consistent with the author’s experience. The author also conducted interviews with family law attorneys in Fairfax, Norfolk, and Clarke Counties (on file with the author), which confirmed this practice.

with the caveat that, *if both sides are represented by counsel*, the court must first make a determination that the interests of the child are “not otherwise adequately represented.”¹⁸⁴ Therefore, if both parties have counsel (in other words, financial means), the court has to determine whether a GAL is necessary *before* appointing one. The judge cannot *automatically* appoint a GAL as she would when both parties are *pro se*.¹⁸⁵

Again, the debate over the appropriateness of the use of GALs in private custody cases in beyond the scope of the article. However, it is well documented that GALs are tasked to, and do, make judgments about families every day.¹⁸⁶ These “subjective opinions on the fitness of a parent” are often questionable, at best.¹⁸⁷ The reality is that subjective opinions about families are utilized much more often in JDR than in Circuit Court in Virginia.

V. CONCLUSION

For various cultural and historical reasons, our country has an extremely varied system for adjudicating matters of the family. As only uncovered by dozens of calls to clerks’ offices, the system is especially confusing regarding the differences between matrimonial and non- matrimonial custody matters.¹⁸⁸ These differences in jurisdiction may not have started out as intentionally biased against poor people of color, but the disparate impact is clear. Given the highly subjective and controversial methods for deciding private custody matters, adding one more layer of potentially biased judgment is unfair to poor families of color. The “best interest” of a child, however loose of a legal standard, is not different if the child’s parents are married or not. All custody matters in every state should be heard at the same level of state court.

¹⁸⁴ VA. CODE ANN. § 16.1-266(F) (2005).

¹⁸⁵ Under Virginia law indigent parties in JDR court are entitled to have counsel appointed only in cases brought by the state. *See* VA. CODE ANN. §§ 16.1-266(D)(2)-(3) (2005). However, there may also be persons who proceed *pro se* because they do not meet the indigence threshold, *see* VA. CODE ANN. § 19.2-159 (2008), but are nonetheless unable to afford private counsel. *See* note 81 and accompanying text, *supra*.

¹⁸⁶ *See, e.g.,* Lidman & Hollingsworth, *supra* note 32.

¹⁸⁷ *See, e.g.,* Jennifer Sumi Kim, *A Father’s Race to Custody: An Argument for Multidimensional Masculinities for Black Men*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 32, 34 (2014) (“The adjectives used to describe [Dad] (‘unassuming,’ ‘mild mannered’) and [Mom] (‘pushy,’ ‘difficult’) are striking and of little relevancy in a custody case.”). This is also the experience of the author with GALs and was recounted in interviews with family law attorneys, on file with the author.

¹⁸⁸ *See* notes 53-54 and accompanying text, *supra*, and Appendix, *infra*.

APPENDIX

State	City contacted	Separate part of court for matrimonial v. non-matrimonial cases?	Notes
Alabama	Birmingham	Yes	The Domestic Relations Division of the Circuit Court hears matrimonial cases. The Family Court Division of the Circuit Court hears non-matrimonial cases.
Alaska	Anchorage	No	The Superior Court hears both matrimonial and non-matrimonial cases. Contested cases are heard by judges, while uncontested cases are heard by magistrates.
Arizona	Phoenix	No	The Family Court Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Arkansas	Little Rock	No	The Domestic Relations Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
California	Los Angeles	No	The Family Law Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Colorado	Denver	Yes	The Domestic Relations Division of the District Court hears matrimonial cases. The Juvenile Division of the District Court hears non-matrimonial cases.
Connecticut	Bridgeport	Yes	The Family Division of the Superior Court hears matrimonial cases. The Family Support Magistrate Court hears non-matrimonial cases.
Delaware	Wilmington	No	The Family Court hears both matrimonial and non-matrimonial cases.
Florida	Jacksonville	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Georgia	Atlanta	No	The Family Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Hawaii	Honolulu	No	The Family Court hears both matrimonial and non-matrimonial cases.
Idaho	Boise	No	The District Court hears both matrimonial and non-matrimonial cases.
Illinois	Chicago	No	The Domestic Relations Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Indiana	Indianapolis	Yes	The Superior Court hears matrimonial cases. The Circuit Court hears non-matrimonial cases.
Iowa	Des Moines	No	The Civil Division of the District Court hears both matrimonial and non-matrimonial cases.

Kansas	Wichita	No	The Family Law Department of the District Court hears both matrimonial and non-matrimonial cases.
Kentucky	Louisville	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Louisiana	New Orleans	No	The Domestic Division of the Civil District Court hears both matrimonial and non-matrimonial cases.
Maine	Portland	No	The Family Division of the District Court hears both matrimonial and non-matrimonial cases.
Maryland	Baltimore	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Massachusetts	Springfield	No	The Probate and Family Court Department of the Trial Court hears both matrimonial and non-matrimonial cases.
Michigan	Grand Rapids	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Minnesota	St. Cloud	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Mississippi	Jackson	No	The Chancery Court hears both matrimonial and non-matrimonial cases.
Missouri	Kansas City	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Montana	Billings	No	The District Court hears both matrimonial and non-matrimonial cases.
Nebraska	Omaha	No	The District Court hears both matrimonial and non-matrimonial cases.
Nevada	Las Vegas	No	The Family Division of the District Court hears both matrimonial and non-matrimonial cases.
New Hampshire	Manchester	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
New Jersey	Newark	Yes	The Dissolution Section of the Family Division of the Superior Court hears matrimonial cases. The Non-Dissolution Section of the Family Division of the Superior Court hears non-matrimonial cases.
New Mexico	Albuquerque	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
New York	New York City	Yes	The Supreme Court hears matrimonial cases. The Family Court hears non-matrimonial cases.
North Carolina	Charlotte	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.

North Dakota	Fargo	No	The District Court hears both matrimonial and non-matrimonial cases.
Ohio	Columbus	Yes	The Domestic Relations Division of the Court of Common Pleas hears matrimonial cases. The Juvenile Division of the Court of Common Pleas hears non-matrimonial cases.
Oklahoma	Oklahoma City	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Oregon	Portland	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Pennsylvania	Philadelphia	No	The Domestic Relations Branch of the Family Division of the Court of Common Pleas hears both matrimonial and non-matrimonial cases.
Rhode Island	Providence	No	The Domestic Relations Division of the Family Court hears both matrimonial and non-matrimonial cases.
South Carolina	Charleston	No	The Family Court hears both matrimonial and non-matrimonial cases.
South Dakota	Sioux Falls	No	The Circuit Court hears both matrimonial and non-matrimonial cases.
Tennessee	Memphis	Yes	Both the Circuit Court and Chancery Court hear matrimonial cases. The Juvenile Court hears non-matrimonial cases.
Texas	Houston	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Utah	Salt Lake City	No	The District Court hears both matrimonial and non-matrimonial cases.
Vermont	Burlington	No	The Family Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Virginia	Virginia Beach	Yes	The Circuit Court hears matrimonial cases. The Juvenile and Domestic Relations District Court hears non-matrimonial cases.
Washington	Seattle	No	The Family Court Division of the Superior Court hears both matrimonial and non-matrimonial cases.
West Virginia	Charleston	No	The Family Court hears both matrimonial and non-matrimonial cases.
Wisconsin	Milwaukee	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Wyoming	Cheyenne	No	The District Court hears both matrimonial and non-matrimonial cases.

AFTERWORD

Matthew I. Fraidin[†]

That family defense lawyering has reached a stage of maturity at which it can be “reimagined,” is, well, hard to imagine. Our day together at CUNY School of Law, and this extraordinary volume, represent a vision of the future of family defense. The Symposium and the collection of articles in this volume give but a hint of the ever-growing strength and vitality of lawyers’ commitment to seeking justice for families.

Over the course of the day, more than one hundred attendees heard from more than a dozen speakers. Speakers included academics, practicing lawyers, and parents previously entangled in child welfare who now advocate for change. To fully appreciate the vision of the future conveyed by Symposium participants and the authors represented in this volume, we must look to the past to understand our trajectory and to the present for context. We see that clinical legal education, legal services, legal scholarship, policy, and activism all are covered in family defense fingerprints. Nowadays, no credible conversation can be had, in any realm of child welfare, without a family defense lawyer in the room. More and more, the needle is moved throughout child welfare by our respect for parents and families, and our insistence on justice.

In perhaps the clearest signal of a sea change in the field of family defense, CUNY’s was but one of two symposia centered on family defense held in the same city in the same week, NYU School of Law having celebrated just the day before its Family Defense Clinic’s 25th Anniversary Celebration Symposium.¹ Two separate symposia convened on the subject of parent representation. Enough scholars with something to say about family defense to fill two days’ worth of panels and events, hosted by two law schools renowned nationwide for their cutting-edge clinical education programs and pursuit of justice.

Indeed, developments in clinical legal education with respect to family defense have been instrumental in the development of

[†] Professor of Law, University of the District of Columbia David A. Clarke School of Law (UDC-DCSL). Thanks to the CUNY Law Review staff for convening the Symposium, and for excellent editorial assistance.

¹ *Family Defense Clinic Celebrates 25 Years Providing Interdisciplinary Family Representation*, N.Y.U. SCH. L. (Jan. 26, 2016), <http://www.law.nyu.edu/news/family-defense-clinic-25th-anniversary> [<https://perma.cc/YTV7-WQ5A>].

the field and augur well for the future. Establishment in 1991 of NYU's Family Defense Clinic was followed up by the University of the District of Columbia David A. Clarke School of Law—17 years later.² Since 2008, however, family defense practices have mushroomed throughout the world of clinical legal education. This volume alone includes important work by Professor Kara Finck of the University of Pennsylvania and Professor Amy Mulzer of Brooklyn Law School. Professor Mulzer's co-author, Tara Urs, previously served as a law professor and has published several important pieces in our field. In recent years, representation of parents in child welfare cases has become an important component of law clinics at the University of Michigan Law School, Howard Law School, Mitchell Hamline School of Law, and the University of Illinois College of Law. We are more than a handful (yes, in every sense of the term), and our ranks are growing.

Our law schools produce family defense civil rights lawyers: energetic, creative, and fierce warriors who admire their clients' strengths and who know that justice is their clients' due. The new lawyers minted in these clinical programs understand that something big can be brewed in family court and that family defense provides an important pathway for change. Change can be made in our courtrooms, and justice pursued. New York City alone is home to three institutional providers with city contracts to serve family defense clients. The Bronx Defenders,³ Brooklyn Defender Services,⁴ and Center for Family Representation⁵ are populated by ravenously justice-hungry family defense lawyers, whose fervent advocacy honors the vital nature of this practice. Many of those lawyers participated in the Symposium and a number are represented in this volume. Now, in addition to filling criminal defense courtrooms and pursuing racial and economic justice in education and through prison reform, servants of justice seek in Family Court—that most-reviled of venues, long-despised by judges and lawyers alike—opportunities to make change.

Law graduates looking to family defense as a route to creating lasting social change now can find a home in the American Bar

² Katherine S. Broderick, *The Nation's Urban Land-Grant Law School: Ensuring Justice in the 21st Century*, 40 U. TOL. L. REV. 305, 315 (2009).

³ See generally BRONX DEFENDERS, <http://www.bronxdefenders.org> [<https://perma.cc/L4G8-273Z>] (last visited Dec. 4, 2016).

⁴ See generally BROOKLYN DEFENDER SERVICES, <http://bfpd.org> [<https://perma.cc/3246-SFB6>] (last visited Dec. 4, 2016).

⁵ See generally CTR. FOR FAM. REPRESENTATION, <http://www.cfrny.org> [<https://perma.cc/CZR6-GSKR>] (last visited Dec. 4, 2016).

Association's National Alliance for Parent Representation.⁶ Celebrating its 10th anniversary in 2016, the Alliance is a safe harbor for lawyers across the country who have long known, individually, that too many families were being broken and too many children destroyed, too many communities ravaged and too-little justice done in dependency courtrooms.⁷ Our colleagues and friends nationally long have labored for little pay and with even less respect. The louder their cries about the emperors' nakedness, the more hostile the reaction.

Lawyers across the country who need the favor of trial judges to secure appointment to cases risk their very livelihoods by insisting that judges follow the law. They risk their livelihoods by insisting that their clients are three-dimensional humans, not inhabitants of the crass racist stereotypes assigned to them. Lawyers risk their livelihoods by asking for even a few moments to read court documents before responding, or a few moments to meet—let alone to counsel—their clients before helping their clients make the most important decisions of their lives. Our colleagues and friends are demeaned and derided for putting the government to its paces: how many times have we been scolded, in the very words rejected by the Supreme Court in *In Re Gault*, that these are not adversarial proceedings⁸ even though it sure felt adversarial when they took our client's children?

The ABA Alliance is the hub of a movement to turn the tide. It is a cozy clubhouse for family defense lawyers—small, but ever-expanding. We have a national listserv with hundreds of members, and we send emails asking each other questions and sharing stories of outrages and triumphs. Under the Alliance's auspices, we gather for national conferences every two years. The Alliance sponsors trainings and influences policy nationwide. The Alliance supports lawyers in states where we are still mistreated and disrespected—in

⁶ *Parent Representation*, AM. BAR ASS'N, http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html (last visited Dec. 4, 2016) [<https://perma.cc/3SWS-DK6E>].

⁷ See CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, ABA NATIONAL PROJECT TO IMPROVE REPRESENTATION FOR PARENTS (2013), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf [<https://perma.cc/4R8E-A7JC>].

⁸ *In re Gault*, 387 U.S. 1, 15-16 (1967) (“[T]he child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive. These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*.”). *Gault* concerned juvenile delinquency proceedings.

other words, just about everywhere—and shines a light on states who remain, in this day and age, still uncommitted to even appointing a lawyer for a parent faced with the permanent loss of her child.⁹ When we are disoriented and fatigued from—as Professor Martin Guggenheim put it in his 2006 keynote address at the first ABA parent conference—“being polite to people who do despicable things” to our clients and their children, the ABA Alliance helps us find each other.

Our role in seeking justice has not escaped the notice of the National Coalition for Child Protection Reform (NCCPR).¹⁰ Directed by a non-lawyer, the organization’s child-protection platform is built, perhaps improbably, on due process planks. In NCCPR’s “Due Process Agenda,” three of its “child protection” recommendations focus on the irreplaceable value of lawyers.¹¹

In contrast to the D.C. City Council member who once told me that lawyers have ruined child welfare, NCCPR argues that “[q]uality legal representation must be available to all parents who must face CPS.”¹² NCCPR agrees with us that lawyers should be appointed and start working as soon as a child is removed from a parent’s care, and that all lawyers should act like lawyers, instead of pretending, in the guise of law guardians and guardians ad litem, that we can guess at a child’s best interests.¹³ It is a new world when lawyers infiltrate child protection advocacy and are seen for the indispensable cleansing agents that we truly are.

More tangible, bricks-and-mortar evidence of our progress comes in the form of a book, *Representing Parents in Child Welfare*

⁹ See, e.g., MISS. CODE ANN. § 43-21-201(2) (2016) (“If the court determines that a parent or guardian who is a party in an abuse, neglect or termination of parental rights proceeding is indigent, the youth court judge *may* appoint counsel to represent the indigent parent or guardian in the proceeding.”) (emphasis added); *Joni B. v. State*, 549 N.W.2d 411, 417-18 (Wis. 1996) (“[A] circuit court should only appoint counsel after concluding that either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment.”).

¹⁰ See generally NAT’L COALITION FOR CHILD PROTECTION REFORM, <https://nccpr.info> [<https://perma.cc/F7AA-6M7L>] (last visited Dec. 4, 2016).

¹¹ RICHARD WEXLER, NAT’L COAL. FOR CHILD PROT. REFORM, CIVIL LIBERTIES WITHOUT EXCEPTION: NCCPR’S DUE PROCESS AGENDA FOR CHILDREN AND FAMILIES 5-7 (2015), <http://www.nccpr.org/reports/dueprocess.pdf> [<https://perma.cc/LKS8-PBG5>].

¹² *Id.* at 5.

¹³ *Id.* at 13; see also Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998).

*Cases: Advice and Guidance for Family Defenders.*¹⁴ But it's not just a book. It is a user's guide, a practice manual for family defense lawyers. What could be duller than a "how-to-lawyer" book? What could be less-exotic or more mundane than yet another practitioner's guide, with chapters and sections and sub-sections? The book is a veritable connect-the-dots collection of best practices. But in its mundanity, our book is everything. Most importantly, our standard-issue practice manual means that there is an audience. That there are lawyers who want to read the book. It means that there is a large-and-getting-larger community of lawyers who are a credible force for justice and change.

We have been out in the cold rain and snow for many years, underpaid and overburdened, victimized by case-appointments practices that deprive us of dignity and which seek to deprive our clients of humanity. Now we send a signal that we are real, that We Cannot Be Messed With. This is a field we *love*. This is where we want to be. The book serves notice to prosecutors, to judges, to other lawyers, to our clients, and even to ourselves, that far from "ruining" child welfare, we plan to fix it.

As family defense lawyers, we still face degradation and obstacles which pale only in comparison to those faced by our clients. Our clients are no-less-reviled than ever; the fuel of the "foster care-industrial complex," to use NCCPR's memorable phrase,¹⁵ remains poverty and racism.¹⁶ In this volume, Mulzer and Urs's indictment is succinct:

By now, it is well known that the child welfare system disproportionately touches the lives of families of color, particularly Black and Native American families. The child welfare system separates more children of color from their families and communities, keeps them separated for longer periods of time, and more often permanently ends those families by terminating disproportionately more of their legal relationships. It is also well cata-

¹⁴ REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

¹⁵ NAT'L COAL. FOR CHILD PROT. REFORM, ALL-PURPOSE DCYF/ FOSTER CARE-INDUSTRIAL COMPLEX EXCUSE CHECKLIST (2010), <http://www.nccpr.org/reports/RIexcusechecklist95472ri21.pdf> [<https://perma.cc/T5P2-8N5Z>].

¹⁶ See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 60-74 (2002); Tanya Asim Cooper, Commentary, *Race is Evidence of Parenting in America: Another Civil Rights Story*, in CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 103-12 (Austin Sarat ed., 2014); ORONDE MILLER & AMELIA ESENSTAD, CTR. FOR THE STUDY OF SOC. POLICY, STRATEGIES TO REDUCE RACIALLY DISPARATE OUTCOMES IN CHILD WELFARE: A NATIONAL SCAN (2015), <http://www.cssp.org/publications/child-welfare/alliance/Strategies-to-Reduce-Racially-Disparate-Outcomes-in-Child-Welfare-March-2015.pdf> [<https://perma.cc/DA9E-ETCH>].

logged that, even more than race and Tribal affiliation, poverty is the single greatest predictor of a child welfare case. The child welfare system is fully focused on the lives of poor families, and especially focused on poor families of color. The flip side is that families with financial means and white families are far more likely to be left alone by the system despite experiencing the very same concerns that lead to child welfare intervention for low-income families of color, such as mental illness, alcoholism, recreational or habitual drug use, or domestic violence. People of means are less likely to be touched by the system or to know people touched by the system.¹⁷

Subjugation remains the fundamental characteristic of child welfare. There is much work to do.

But in some states, we have slowed the rates of child-removals.¹⁸ We continue to fight against the Adoption and Safe Families Act's reckless, oppressive destruction of children, families, and communities.¹⁹ And yes, we publish law review articles and we gather for conferences and symposia. We have a listserv. We have that practice manual now, just like housing lawyers and bankruptcy lawyers and antitrust lawyers. There are jazzed-up lawyers across the country reading the book voraciously in unstinting effort to be better, run further, jump higher. Students dive into family defense in law school clinics, and, truly against all odds, see family defense as an inviting career choice. CUNY School of Law, with its grand legacy of service and justice-seeking, gathered us together for a day of celebration and to look to the future. That is a big deal.

But as we reflect on the past, cheer our progress, and charge ahead into the future, we must assess the present with hard heads and clear eyes. We see promise and see also that challenges remain.

Perhaps the most revealing and important depiction of the current state of child welfare law and practice can be found by see-

¹⁷ Amy Mulzer & Tara Urs, "*However Kindly Intentioned*": *Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 26-27 (2017) (in this volume).

¹⁸ NYC's foster care population was 16,701 in FY 2008 and had been reduced to 13,112 by FY 2013. MICHAEL R. BLOOMBERG ET AL., MAYOR'S MANAGEMENT REPORT 102 (2013), <http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/acs.pdf> [<https://perma.cc/XA2D-4F54>]; similarly, in the District of Columbia, 3,070 children were in out-of-home care as of September 30, 2003, and 1,085 on September 30, 2015. D.C. CHILD & FAMILY SERVS. AGENCY, CFSA FACT SHEET: CHILDREN AND YOUTH CFSA SERVES 1 (2016), http://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/page_content/attachments/Children%20and%20Youth%20CFSA%20Statistics%20July%202016_0.pdf [<https://perma.cc/7YFJ-HXES>].

¹⁹ See generally Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind It Harm Children*, 13 UDC/DCSL L. REV. 435 (2010).

ing through the eyes of judges. These, after all, are the decision-makers in our clients' lives. It is the judges who hear our clients or don't. It is judges who apply law capriciously or fairly, whose actions vindicate or degrade the Constitution, who resist or are captured by stereotypes of the low-income women of color who disproportionately are entangled by governmental interventions.²⁰ Are judges keeping up with the changing culture being built—surely, if slowly—by family defense lawyers allied with their clients?

Some of the evidence is positive. Only two months after the Symposium, the National Council of Juvenile and Family Court Judges (NCJFCJ) promulgated new “Enhanced Resource Guidelines” for use in child welfare court practice. Although a mixed bag, there is much to applaud in the Guidelines, which convey the NCJFCJ's most-current statement of goals, priorities, and recommended practices.²¹

On one hand, the “Key Principles” of these Guidelines are fundamentally flawed, arguing that judging in “juvenile and family court is specialized and complex, going *beyond the traditional role of the judge*. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being.”²²

Our experience as lawyers suggests to the contrary, namely that the best decisions can be made by judges who fulfill the traditional role of judges: hear evidence, find facts, apply the law—including by ordering social work agencies to fulfill their roles and holding them in contempt when they fail to do so. In addition, the Guidelines are far too sanguine about the purported benefits of “best interest” guardians ad litem and Court-Appointed Special Advocates.²³

Instead, our experience tells us that children and families would be best served by a genuine adversarial system, not the quarter- and half-measures that have long been the mark of family

²⁰ MILLER & ESENSTAD, *supra* note 16, at 15-17 (highlighting the need for comprehensive and multifaceted efforts to address racial disparities in the child welfare system, including by engaging judges).

²¹ See SOPHIE I. GATOWSKI ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ENHANCED RESOURCES GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (2016), <http://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Guidelines%2005-2016.pdf> [https://perma.cc/2E6G-P8AP].

²² *Id.* at 14 (emphasis added).

²³ *Id.* at 43.

courts. In *Ambivalence About Parenting* in this volume, Lisa Beneventano and Colleen Manwell point out that:

Focusing on . . . standards and rules can be especially helpful in defending a case centered around expressions of ambivalence, where no actual harm or injury to the child is alleged. In cases based solely on a parent's expression of parental ambivalence, the child protective agency is often missing an essential element of their case: proof the child faced *actual* harm or *imminent* risk of harm.²⁴

Would that Beneventano and Manwell's lament about the lawlessness of child welfare proceedings were an isolated phenomenon, limited to the consideration by judges and case workers of expressions of parental ambivalence. But we have heard countless warnings and complaints about the pervasive deviation in child welfare from the ordinary guideposts of procedural regularity, such as hearings closed to the press and public, underpaid lawyers, overburdened judges, lack of rules of evidence, lawyers and CASAs who purport to know what is "best" for a child—and judges who undertake activities, such as engaging families, professionals, organizations, and communities, that are outside their competence.²⁵

Nonetheless, the NCJFCJ has long supported process-oriented positions on some issues—they have supported open courts for many years, for example.²⁶ And fundamental to these Guidelines are pervasive strands of thought that are consistent with important principles of our work as lawyers for parents. If implemented widely, the Guidelines will minimize the harm inflicted on children and families by the administration of justice.

For example, the Guidelines recognize that, "[j]udicial determinations to remove children from a parent should only be made based on legally sufficient evidence that a child cannot be safe at

²⁴ Lisa Beneventano & Colleen Manwell, *Ambivalence About Parenting: An Overview for Lawyers Representing Parents in Child Welfare Proceedings*, 20 CUNY L. REV. 151, 162 (2017) (in this volume).

²⁵ See generally Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 435-52 (2002); see also Amy Sinden, "Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339 (1999).

²⁶ The NCJFCJ issued a 2005 resolution urging that "our nation's juvenile and family courts be open to the public except when the juvenile or family court judge determines that the hearing should be closed in order to serve the best interests of the child and/or family members." NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOLUTION IN SUPPORT OF PRESUMPTIVELY OPEN HEARINGS WITH DISCRETION OF COURTS TO CLOSE 1 para. 7 (2005), <http://www.ncjfcj.org/sites/default/files/resolution%2520no.%25209%2520open%2520hearings.pdf> [https://perma.cc/7AFT-JBBL].

home.”²⁷ And, further, it recognizes that “[j]udges are responsible for ensuring that parties, including each parent, are vigorously represented by well-trained, culturally responsive, and adequately compensated attorneys”²⁸

Moreover, in a chapter titled “Access to Competent Representation,” the Guidelines insist that:

Because critically important decisions will be made at the very first hearing, parents should be represented by counsel as early in the process as possible. Few parents will be able to afford to hire an attorney on their own. The court should work with counsel who practice before the juvenile and family court to develop a system for appointment sufficiently in advance of the preliminary protective hearing to permit meaningful consultation and preparation.²⁹

The Guidelines say that the “nucleus” of the document itself are “benchcards” for use prior to and during every child welfare hearing.³⁰ The rigor and routine imposed by benchcards can promote a constructive predictability. And a stunning innovation, with potentially dramatic significance, is that every benchcard includes a recommendation for pre-hearing preparation techniques designed to promote internal reflection to prevent bias:

As a measure of recommended practice, to protect against any institutional or implicit bias in decision-making, judges should make a habit of asking themselves:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family’s unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court’s past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as a preferred placement option as long as they can protect the child and support the

²⁷ GATOWSKI ET AL., *supra* note 21, at 14.

²⁸ *Id.* at 16.

²⁹ *Id.* at 42.

³⁰ *See id.* at 20.

permanency plan?³¹

The Guidelines' recognition that judges, like all of us, can be prisoners of our implicit biases, is especially important because of the same Guidelines' unfortunate doubling-down in the "Key Principles" and throughout³² on a vision of family court in which judges engage in so many non-judging tasks. When judges do more and less than simply apply the law—when they call social workers on the telephone to urge referrals, or contact housing providers to check on a litigant's housing prospects, or advocate with a drug treatment provider to find a bed for a litigant—they are doing so with big hearts and the very best of intentions. But those activities diminish the already-limited role that law plays in family court proceedings and erode the quality of information on the basis of which family court decisions are made.

As Beneventano and Manwell point out,³³ and as we have seen again and again, the less constrained judges and other humans are by law and process, the more that stereotypes and biases can creep in. When judges learn about cases via *ex parte* phone calls, "trainings," and without rules of evidence, the information generated is less-reliable than that generated the old-fashioned way. There is a reason that we still, in law school, repeat the hoary maxim that cross-examination is the greatest legal engine for truth ever invented.³⁴

Unreliable information and limited information are canvases on which assumptions, guesses, and implicit biases find a home. For that reason, the benchcards' express recommendations for methods judges can use to combat bias are a very welcome and very promising development.

We can find, then, in the past decades, unmistakable signs of progress. But challenges and outrages remain. On the front end of the child welfare system, the Constitution is flouted by the removal of thousands of children *not* in danger, churned in and out of foster care, removed for a few days and then returned home as if, like furniture moved from one room to another, no harm was done.³⁵ And on the back end, thousands of termination proceedings pro-

³¹ *Id.* at 67.

³² See generally *id.* at 14-17.

³³ Beneventano & Manwell, *supra* note 24, at 160-64 (in this volume).

³⁴ 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn et al. eds., rev. 1974).

³⁵ See generally Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE (forthcoming 2016) (on file with author).

duce “legal orphans,” whose birth parents’ rights are terminated but who are never adopted by new parents, and thus must live their lives without legal parents.³⁶

In this context, it is of no small moment that NCJFCJ cogently has articulated commitments to fundamental principles and practices that create possibilities for change. As family defense lawyers, it is our privilege and responsibility to work hand-in-hand with our clients to leverage those commitments.

The Symposium was an occasion to imagine a future. And as Professor Delgado tells us, we build the future we imagine: “We participate in creating what we see in the very act of describing it.”³⁷ The very convening of this Symposium signals that the newly-imagined future, so brilliantly-described in the pages of this volume, will be one in which family defense lawyers play an important role in ensuring that our courts live up to their promises.

³⁶ Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318, 326-27 (2010).

³⁷ Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416 (1989).