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WHY CHILDREN STILL NEED A LAWYER

Marcia Robinson Lowry*
Sara Bartosz**

Every day approximately 500,000 children across the United States wake up in foster care, most in foster family homes, though many others in group homes and institutions. These children entered the state foster care system as innocent victims of abuse or neglect occurring in their birth homes. As wards of the state, they depend completely on the government to provide for their essential safety and well-being and to reconnect them with a permanent family, hopefully their own.

Though state child welfare agencies possess fundamental legal obligations under the United States Constitution and federal and state statutes to provide adequate care to all children in foster care, they are all too often failing in this vital mission. High caseloads, insufficient caseworker training and compensation, a combination of unstable and ineffective agency management, and a lack of resources

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Her work at Children's Rights, which she founded in 1995, uses the power of the courts, combined with policy initiatives, to develop realistic, long-term solutions to improve the lives of abused and neglected children. These efforts have created concrete changes in child welfare systems such as more funding and resources, improved management, and better outcomes for children.

Formerly the director of the Children's Rights Projects of the New York Civil Liberties Union (1973–1979) and of the American Civil Liberties Union (1979–1995), Ms. Lowry pioneered the first body of law to protect kids dependent on child welfare systems, bringing increased attention and public scrutiny to systems that were all but ignored.

Ms. Lowry received her B.S. from Northwestern University and began her career as a journalist. She earned her J.D. from the New York University School of Law.

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Prior to joining the Clinton Administration, Ms. Bartosz was a partner in the Chicago Litigation firm, Cahill, Christian & Kunkle, Ltd., where she conducted a broad trial practice in commercial, environmental, civil rights, criminal, product liability, and shareholder disputes. She also served as a Special State's Attorney for DuPage County, Illinois in a lengthy criminal trial against former prosecutors and police officers.

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plague foster care systems from coast to coast. As a result, children who were removed from their homes for basic protection actually suffer continuing harm in state care.

The federal government has sought to improve the performance of state foster care systems through legislative reforms that have subjected these systems to the oversight of family court judges and federal auditors. Though well-intended, these federal reform efforts have not achieved the desired result. The same structural impediments that historically have prevented child welfare agencies from delivering quality services similarly have blunted the impact of federal reforms.

Child advocates have utilized class action litigation to ignite and sustain systemic reform. These class actions suits, typically involving claims for violation of substantive due process and statutory rights, have resulted in court enforceable consent decrees that have resulted in improved care, services, and permanency outcomes for children by obligating state agencies to undertake essential structural improvements. This Essay will present the disappointing history of the federal reform efforts and the promise that structural reform class actions hold for children in foster care.

INTRODUCTION

[This case is] about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the District to provide them with food, shelter, and day-to-day care. It is about beleaguered city employees trying their best to provide these necessities while plagued with excessive caseloads, staff shortages, and budgetary constraints. It is about the failures of an ineptly managed child welfare system, the indifference of the administration of the former mayor of the District of Columbia, Marion Barry, and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.¹

As compelling as their situations are, as pious as the public's expression of concern, and as clear as society's obligation to them should be, children in state foster care custody need lawyers. These children most assuredly possess legal rights under the U.S. Constitution and a variety of federal and state laws;² however, they also

1. LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.D.C. 1991).

2. See, e.g., *In re Gault*, 387 U.S. 1, 12-13 (1967) (holding that juveniles charged as delinquents are entitled to the same procedural due process rights as adults under the

generally lack the individual capacity and financial resources to enforce these rights on their own. Moreover, the voting public is not demanding accountability from the child welfare system or its political leadership, apparently satisfied to leave the task of caring for society's children to the overburdened and underpaid social workers who daily struggle to make a difference. The unfortunate reality is that our vulnerable children need lawyers to protect their rights when the rest of society has failed to do so, and these children need the power of the courts to ensure that our public policy of protecting children is more than empty platitudes.

Currently, about 800,000 children a year—this country's poorest and most vulnerable—are subject to the well-intentioned, but often destructive, care of the nation's child welfare system.³ The system was created in recognition of the sobering fact that some families either could not or would not do an adequate job of caring for their children.⁴ American society, therefore, has assumed the financial

Fourteenth Amendment); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (holding that foster children have a constitutional right to "adequate medical care, protection and supervision"); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992) (holding that foster children have a constitutional right to "reasonable safety while in foster care"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (holding that the state is constitutionally required "to take steps to prevent children . . . from deteriorating physically or psychologically"); *Meador v. Cabinet for Human Res.*, 902 F.2d 474,476 (6th Cir. 1990) ("[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (holding that foster children possess liberty interests in reasonably safe living conditions while in state-supervised foster care); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp.2d 941, 953 (M.D. Tenn. 2000) (finding that plaintiff's complaint stated a cognizable substantive due process claim based upon foster children's right "to be placed in the least restrictive, most appropriate, family-like setting while in state custody . . . [and] to receive care treatment and services consistent with accepted, reasonable professional judgment"); *Charlie H. v. Whitman*, 83 F. Supp.2d 476, 507 (D.N.J. 2000) (holding that a foster child's liberty interest includes "the right to treatment, which includes the right to receive care, treatment and services consistent with competent professional judgment . . ."); *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994) (holding that foster children have constitutional right to "reasonable care and safety"); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (finding that foster children have a constitutional right "to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being"); *Doe v. N.Y. City Dep't. of Soc. Servs.*, 670 F. Supp. 1145, 1175 (S.D.N.Y. 1987) ("Positive efforts are necessary to prevent stagnation, which, for children, is synonymous with deterioration.").

3. U.S. CHILDREN'S BUREAU, ADMIN. FOR CHILDREN, YOUTH & FAMILIES, TRENDS IN FOSTER CARE AND ADOPTION: FY 2000-FY 2005 (2007).

4. American law recognizes that parents possess broad discretion in choosing how best to rear their children. See *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 846 (1977) (holding that the Fourteenth Amendment provides biological parents with a "constitutionally recognized liberty interest" in maintaining the custody of their children "that derives from blood relationship, state-law sanction, and basic human right"). However, in the exercise of its *parens patriae* role, the state may act to place children in temporary foster care or with permanent adoptive families when natural parents are

and the actual day-to-day responsibility for protecting these youth, primarily through state-operated child welfare systems funded by federal, state, and local tax dollars. The hundreds of thousands of children in these systems represent both individual tragedies and societal opportunities.

Although child welfare systems are heavily funded by public tax dollars, a total of \$23.3 billion in federal, state, and local funds in 2004⁵ with the federal government alone putting up 50% or half of that sum,⁶ they remain extraordinarily unaccountable. The number of children in state foster care not long ago peaked and began to decline, from 565,253 in 1999⁷ to 513,131 in 2005.⁸ Yet it is entirely unclear whether this development is cause for optimism. No one truly knows whether this downward trend results from state child welfare systems collectively doing a better job of protecting children, of controlling the unnecessary removal of children from birth families, of speeding up the return of children to their homes once removed, and of ensuring the adoption of children who cannot be returned home. Nor does anyone know whether this downward trend results from at least some of the states deciding to cut their foster care populations without imposing adequate safeguards for children known to be at risk and without creating and monitoring programs that support families under stress.

I. FEDERAL LEGISLATIVE REFORMS HAVE NOT ASSURED THE PROTECTION OF CHILDREN'S RIGHTS

The principles on which the American child welfare system are based have evolved over time as legislators and policy-makers alike have learned from trial and error. Motivated by dissatisfaction with how children were being treated, Congress twice has enacted ma-

determined to be abusing, neglecting, or abandoning their children or have become incapacitated in their ability to act as parent. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

5. CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE *COST OF PROTECTING VULNERABLE CHILDREN IV: HOW CHILD WELFARE FUNDING FARED DURING THE RECESSION*, at v (2004), available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf.

6. *See id.*

7. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE FY 1999–FY 2003 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2005), available at http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2002.htm.

8. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE FY 2000–FY 2005 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2007), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2005.htm.

major reforms to the federal child welfare funding statutes and regulatory schemes, first in 1980, and then in 1997.⁹

When Congress passed the Adoption Assistance and Child Welfare Act ("ACWA") in 1980,¹⁰ the landmark legislation reflected a broad consensus that the states essentially were using federal monies to finance and sustain a national, custodial child welfare system that failed to place sufficient emphasis on the inherent need and desire of children to be raised by families, not by the state.¹¹ The primary goals of ACWA were to encourage the use of family preservation strategies that would maintain the integrity of families whenever appropriate, thereby reducing the number of unnecessary foster care removals, to assure more family-like, temporary foster care placements for children who had to be removed from home and to encourage the expeditious return of children to their natural families when possible.¹²

The ACWA reforms also entitled all children in foster care to periodic reviews before individual family court judges or a properly constituted administrative panel for purposes of monitoring executive agency decision-making regarding child placement, assessed services and permanency goals.¹³ The federal statute further required family court judges, as a condition of a child's eligibility for federal foster care funding, to make a preliminary finding that the child welfare agency had made "reasonable efforts" to maintain the child safely at home before electing to disrupt the family.¹⁴ These federally mandated periodic reviews and judicial findings essentially enlisted the family courts to provide a new layer of social work oversight because state child welfare agencies too often were failing to hold themselves sufficiently accountable.¹⁵ As would later become evident, however, additional family court oversight is not a

9. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 10, 14 (2003), available at <http://www.childwelfare.gov/pubs/otherpubs/fedlegis.pdf>.

10. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

11. See U.S. CHILDREN'S BUREAU, ADMIN. FOR CHILDREN, YOUTH & FAMILIES, ACYF-PR-82-02: PROGRAM REGULATION, Part I (1982), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pr/pr8202.htm.

12. See CHILD WELFARE INFO. GATEWAY, *supra* note 9, at 10.

13. 42 U.S.C. §§ 671(a)(16), 675(5)(A)-(C) (2007).

14. 42 U.S.C. § 671(a)(15)(A)-(F) (2007); see also 42 USC § 672(a)(1) (2007) (requiring that this judicial finding be made in order for a child to qualify for Title IV-E funding when the state has made an involuntary removal of the child from his or her home).

15. CTR. FOR THE STUDY OF SOC. POLICY, SUMMIT BACKGROUND PAPER #2: ACCOUNTABILITY AND OVERSIGHT IN STATE CHILD WELFARE SERVICES 4 (2002), www.cssp.org/uploadFiles/paper2.doc.

reliable path to systemic improvement under current circumstances. Family courts depend on the very child welfare agencies they review to diligently and timely execute their orders, an uncertain, and often impossible, task for systems that are mismanaged, underfunded, and understaffed.

Though well intentioned, the ACWA statute provided little by way of guidance or standards—on the grounds that states needed and deserved autonomy and flexibility to shape their own policy and make their own decisions—and many states took children into foster care custody without making the mandated “reasonable efforts” to strengthen families, thereby often forgoing thousands, if not millions, in federal funds.¹⁶ Children entered custody for a variety of reasons, including the harsh living conditions associated with poverty, the lack of suitable and dependable housing in urban centers, and parental problems, such as substance abuse or chronic unemployment, for which adequate responsive services were unavailable.¹⁷ Many of these children continued to grow up as wards of the state, sometimes far from families and communities. Often states placed children in restrictive or congregate foster care settings with little regard for the importance that families and family-like environments can and should play in children’s lives.¹⁸ Many of these children were housed in institutions,¹⁹ some clean and benign, others not, but in most instances providing a poor substitute for growing up in a nurturing family environment.²⁰

Consequently, many children were cast into a state of limbo, with the national foster care population rising from approximately 300,000 in 1980 to approximately 465,000 in 1995,²¹ and with average lengths of stay for children in state care, as of October 1, 1997, reaching 35.6 months in Illinois,²² 30 months in the District of Co-

16. Rick Thoma, *The Paper Tiger*, <http://www.liftingtheveil.org/reason01.htm>.

17. Emerich Thoma, *If You Lived Here, You'd Be Home Now: The Business of Foster Care*, 10 ISSUES IN CHILD ABUSE ACCUSATIONS (1998), http://www.ipt-forensics.com/journal/volume10/j10_10.htm (follow “The Confusion of Poverty with Neglect” hyperlink).

18. RICHARD P. BARTH, INSTITUTIONS *vs.* FOSTER HOMES: THE EMPIRICAL BASE FOR A CENTURY OF ACTION 25–26 (2002), available at <http://ssw.unc.edu/jif/events/Groupcare.pdf>.

19. See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2006), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report11.htm (stating that 19% of the children in out-of-home care are reported to be in group/institutional care in the United States).

20. See N. Am. Council on Adoptable Children, *Build Families, Not Orphanages*, <http://www.nacac.org/policy/orphanages.html>.

21. Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILDREN 75, 77 fig.1 (2004), available at http://www.futureofchildren.org/usr_doc/vol_14_no_1_no_photos.pdf.

22. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 1998: ANNUAL REPORT 5–82 tbl.C (1998).

lumbia,²³ and 32.1 months in New York State²⁴—a virtual lifetime for young children. Congress and Health & Human Services (“HHS”) went back to the drawing board.

In 1997, recognizing that states were still failing to implement adequate permanency plans for many children, were ill-advisedly returning others to dysfunctional families without furnishing the necessary supportive services or supervision, sometimes with tragic consequences, and also were failing to terminate parent-child legal relationships in time for children to have a chance at a new family through adoption, Congress again enacted new reform legislation,²⁵ the Adoption and Safe Families Act (“ASFA”),²⁶ as a modification to ACWA. By this time, ACWA was widely interpreted as having overemphasized the importance of birth families—even when that family existed in name only—to the detriment of ensuring a safe and permanent home for a child.²⁷ So the 1997 legislation reemphasized safety as the primary consideration in making decisions for children, and, in recognition of the fact that too many children were growing up in state custody, required the states to begin the process of legally freeing a child for adoption after the child had been in state custody for a fixed period of time, subject to certain exceptions.²⁸ Under ASFA, the federal government continued to rely upon state family courts to provide oversight and to inject accountability into poorly managed and under-resourced child welfare bureaucracies.²⁹

II. DEPARTMENT OF HEALTH AND HUMAN SERVICES OVERSIGHT OF FEDERALLY FUNDED CHILD WELFARE AGENCIES HAS NOT DELIVERED RESULTS

Notwithstanding the bold Congressional promises of systemic reform and improved child welfare practice across the land, the executive branch of the federal government has been less than rigorous in reviewing state performance and has fared no better in ensuring that inadequate performance is corrected. The federal government, through the Department of Health and Human

23. *Id.* at 5–52 tbl.C.

24. *Id.* at 5–196 tbl.C.

25. See CHILD WELFARE INFO. GATEWAY, *supra* note 9, at 14–15.

26. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. §§ 670–76 (2000)).

27. See CHILD WELFARE INFO. GATEWAY, *supra* note 9, at 14.

28. SCARCELLA ET AL., *supra* note 5, at 2.

29. See Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. §§ 670–76 (2000)).

Services (“HHS”), began conducting state-by-state performance reviews following the enactment of ACWA;³⁰ however, these federal audits emphasized procedural compliance over the substantive achievement of favorable outcomes for children³¹ and instituted a series of fiscal penalties³² that were unevenly and unfairly applied.³³ After widespread criticism of these monitoring and accountability efforts,³⁴ HHS suspended the review program in 1989 under Congressional mandate.³⁵

In 1994, Congress passed legislation calling for a new form of performance audit to be conducted by HHS based upon a set of quantifiable performance indicators.³⁶ The current system of Child and Family Services Reviews (“CFSR”) and Program Improvement Plans (“PIP”) are the result of this legislation.³⁷ Though the CFSR system, which completed its first round of state audits in 2004,³⁸ now places greater focus on the permanency goals and measurable outcomes actually achieved for children,³⁹ it too is failing to drive rigorous systemic reform.⁴⁰ All of the states have failed this audit.⁴¹ But because of (1) data collection and measurement discrepancies existing among state foster care systems; (2) the lack of clarity and official HHS guidance in relation to PIP development, approval and monitoring; and (3) resulting concerns over the difficulty of assuring evenhanded and fair application of the CFSR performance criteria, HHS has been slow to penalize states for their poor audit results and their subsequent failure to meet the improvement goals set in their PIP submissions.⁴²

30. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., STATE ACCOUNTABILITY AND FEDERAL OVERSIGHT, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/sec11gb/state.htm.

31. *Child and Family Services Reviews: States and HHS Face Challenges in Assessing and Improving State Performance: Hearing Before the Subcomm. on Human Resources, H. Comm. on Ways & Means*, 109th Cong. 3 (2004) (statement and report of Cornelia M. Ashby, Director of Education, Workforce, and Income Security Issues) [hereinafter Ashby report].

32. Children’s Bureau, *supra* note 30.

33. *The Final Rule of Federal Monitoring of State Child Welfare Programs: Hearing Before the Subcomm. On Human Resources, H. Comm. On Ways & Means*, 106th Cong. 3 (2000) (testimony of Olivia A. Golden, Assistant Secretary for Children and Families) [hereinafter Golden testimony].

34. *Id.*

35. Children’s Bureau, *supra* note 30.

36. See 42 U.S.C. § 1320a-2a (1994).

37. Golden testimony, *supra* note 33, at 3–6.

38. EMILIE STOLTZFUS, CHILD WELFARE: STATE PERFORMANCE ON CHILD AND FAMILY SERVICES REVIEWS 1 (Cong. Research Serv. Rep. 2005).

39. Golden testimony, *supra* note 33, at 3–4.

40. See Ashby report, *supra* note 31, at 2–3.

41. STOLTZFUS, *supra* note 38, at 1.

42. See Ashby report, *supra* note 31, at 17–19.

In sum, federal legislative and executive branch efforts to reform the child welfare system have been disappointingly pallid, and significant problems continue to affect the well-being of hundreds of thousands of children. This nonsuccess leaves the abused and neglected children in state custody with three possibilities for protection: (1) continued reliance on the states, which certainly vary in their performance, but each of which has failed the minimal standards set by the federal government, and most of which operate just below the level of press-worthy harm to children; (2) reliance on the individual protections envisioned by periodic family court case reviews mandated by federal law since 1980; and (3) reliance on the external pressure and accountability created by class action litigation. The first option is virtually non-existent given the sorry track record of state child welfare systems and the increasing constraints on state budgets. The second option has proven to be a mirage due to the lack of adequate representation for children in these proceedings and the practical inability of family courts to look and act beyond individual child cases so as to identify and deliver systemic reform. Class action litigation, however, has delivered proven results in many jurisdictions and has given voice to children whose rights have been lost in the noise of the democratic process at work.

III. PERIODIC REVIEW PROCEEDINGS FOR INDIVIDUAL CHILDREN

The periodic family court case reviews included in the federal statutory scheme as a safeguard for children have been emasculated by a lack of adequate representation for children and, in many states, by an inadequately staffed juvenile court system.⁴³ Dependency court lawyers for children are as overburdened as are the case workers who are responsible for supervising the children's care on a day-to-day basis. Children are represented by lawyers who may be employed by a non-profit organization, who may be court-appointed and paid a fee, or who may be volunteers from the local bar. These advocates, if functioning as intended, should be able to call family court and child welfare agency attention to circumstances in which the particular needs of a child are not being met by the assigned caseworker, the foster care provider, or the individual case plan. Theory and practice, however, very much diverge on the frontlines of the foster care system.

43. See *No Refuge: The Courts: Where Will Our Children Land? Fate Lies in Court's Hands*, S.F. CHRON., Dec. 4, 2005, at E4.

Family court systems across the country simply are not matching the statutory promise of a legal advocate for all foster children with the resources needed to assure competent legal advocacy. Thus, dependency court lawyers are frequently assigned patently unmanageable caseloads, very often well in excess of 150 or 200 child clients per lawyer,⁴⁴ while at the same time those private practice lawyers not employed by a non-profit legal services organization receive compensation from the court at a small fraction of the market rate for legal services in other areas of practice.⁴⁵ This combination of low pay and onerous caseload can drive competent practitioners away from the juvenile courts and, more importantly, seriously marginalize the effectiveness of those attorneys who still choose to serve the foster care population. Other lawyers may take fewer cases, on a volunteer or fee basis, but lack the training, support services, and staff (such as their own social workers) necessary to represent children adequately. In its 2005 Annual Report, the Foster Care Review Board in the state of Michigan noted:

[i]nformation provided to the review board by the caseworkers, foster care providers, and in some cases, the children themselves, would indicate that the L-GALs [lawyer-guardian ad litem] in many cases are not fulfilling their statutory responsibility. Reasons given to the Board by the L-GALs include inadequate financial compensation and large client caseloads.⁴⁶

Studies show that many dependency attorneys routinely do not make the periodic face-to-face visits with their clients that are a bedrock element of first determining and then representing the child's best interests and needs.⁴⁷ This fundamental gap in the quality of legal representation for foster children is in many in-

44. See Howard Davidson & Erik S. Pitchal, *Caseloads Must Be Controlled so all Child Clients May Receive Competent Lawyering 6-7* (Oct. 2006) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943059 (follow the "Email Abstract or Full Text Paper" hyperlink).

45. Compare OFFICE OF PROGRAM EVALUATION & GOVERNMENT ACCOUNTABILITY OF THE MAINE STATE LEGISLATURE, *Performance Audit of Guardians Ad Litem for Children in Child Protection Cases*: REPORT NO. SR-GAL-05 App. 6 (2006), available at www.maine.gov/legis/opega/reports/Guardians_ad_litem/GAL%20Final%20Report.pdf and UPDATED LAFFEY MATRIX, <http://www.sniderlaw.com/pages/matrix.html>.

46. MICH. FOSTER CARE REVIEW BD., MICH. SUPREME COURT, 2005 ANNUAL REPORT 7-8 (2005), available at <http://courts.michigan.gov/scao/resources/publications/reports/summaries.htm> (follow "Foster Care Review Board 2005 Annual Report" hyperlink).

47. GARY A. LUKOWSKI & HEATHER J. DAVIES, AM. BAR ASS'N. CTR. ON CHILDREN & THE LAW, *A CHALLENGE FOR CHANGE: IMPLEMENTATION OF THE MICHIGAN LAWYER-GUARDIAN AS LITEM STATUTE 44* (2002).

stances just the tip of the iceberg. The inability to make routine client visits often signals the attorney's additional inability or failure to conduct a thorough investigation into the reasons for the child's initial removal from home for purposes of assessing the likelihood of a safe reunification of the child with his or her parents. An overwhelmed and inadequately informed pool of family court attorneys delivers a foreseeable and unacceptable output—case services and permanency plans that too often are divorced from the actual desires and needs of the child.⁴⁸

The quality and preparedness of the legal advocates appearing at family court proceedings have an obvious impact on the ability of family courts to protect children. The decisions and orders of the family court judge are unlikely to be fully informed or tailored to meet individual needs if the caseworkers and attorneys presenting the background facts in court are themselves not adequately informed and prepared. Family court judges carry enormous case dockets of their own and must do so with limited administrative support.⁴⁹ These judges, therefore, must be able to rely on the competency and diligent preparation of the social workers and attorneys who appear before them to advocate for particular case services and permanency goals. In short, overburdened social workers, lawyers, and GALs result in court orders that are disengaged from actual circumstances and needs and that fail to meet the purposes of the federal statute.

Thus, the federal statutory reforms enacted in 1980 and 1997 requiring family courts to conduct periodic reviews of case plans and annual permanency hearings, though well-intentioned, are far from achieving the desired result. The effectiveness of these reforms is contingent on the ability of the family courts to undertake fully informed case reviews and thereafter to engage the cooperation of caseworkers and the foster care system at large in putting court orders into effect. These necessary conditions all too often do not exist, and many family courts are ill-equipped and hard pressed to remedy the situation given their own finite time and resources. The proof of this reality is revealed by the poor outcomes for children being achieved by child welfare systems nationwide even with federally mandated case oversight by juvenile courts.⁵⁰

48. Davidson & Pitchal, *supra* note 44, at 7–9.

49. See THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13–15, 34–47 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

50. See generally STOLTZFUS, *supra* note 38 (noting that the Eleventh Circuit affirmed the application of the *Younger* abstention doctrine to refuse the exercise of original federal jurisdiction in a foster care class action).

IV. PROTECTING THE RIGHTS OF CHILDREN THROUGH CIVIL RIGHTS CLASS ACTIONS

Though under attack by various attempts to limit federal jurisdiction, particularly in the area of institutional reform,⁵¹ class actions have a proven track record of producing measurable positive results in reforming large child welfare systems,⁵² on which so many fragile lives are dependent. In drafting the Constitution, the nation's founders foresaw significant shortcomings with unfettered majority rule.⁵³ The founders well understood that the majority might choose to enact laws that favor majority interests alone or that a less zealous majority might enact laws or social programs intended to benefit minority interests or the disenfranchised, but later fail to implement these laws with sufficient public funding and civil enforcement when other priorities occupy their attention.⁵⁴ To prevent these democratic ills, the founders placed counter-balancing power within a separate, but equal, judicial branch—a forum where majority power does not always win the day.⁵⁵

Class action litigation has proven to be a powerful and effective vehicle for securing reform of broken child welfare systems across the United States. Public interest attorneys, such as those working at Children's Rights, have brought statewide and county-based class actions across the country.⁵⁶ These Section 1983 civil rights actions seek to enforce the substantive due process rights of all children in state foster care custody to receive minimally adequate safety, per-

51. See Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005); 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003).

52. Marcia Robinson Lowry et al., *Class Action Litigation: Judicial Reform of Child Welfare Systems in the United States*, 26 ADOPTION & FOSTERING 50, 53–56 (2002).

53. THE FEDERALIST NO. 78 (Alexander Hamilton).

54. *Id.*

55. In The Federalist No. 78, Alexander Hamilton wrote:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id.

56. Children's Rights, <http://www.childrensrights.org>. CHILDREN'S RIGHTS is a national watchdog organization advocating on behalf of abused and neglected children in the U.S. *Id.* Since 1995, the organization has used legal action and policy initiatives to create lasting improvements in child protection, foster care and adoption. *Id.*

manency, and well-being. With few exceptions, the courts presiding over these cases have certified plaintiff classes comprised of all children in foster care.⁵⁷ The most recent such decision was issued in the Michigan federal district court for the Eastern District of Michigan in *Dwayne B. v. Granholm*.⁵⁸ These class actions have resulted in the entry of court-enforceable judgments, either as the result of settlement or a finding of liability, requiring fundamental restructuring of child welfare systems and their underlying case practice.⁵⁹

The class action vehicle serves multiple vital functions: (1) it amplifies the otherwise unheard voices of the plaintiff abused/neglected children by aggregating their claims in a single judicial forum that is publicly accessible and transparent; (2) through the discovery process, it brings to light the facts about how a child welfare system is operating, and the consequences for children; (3) it squarely places the rights of these children before a judicial officer who is duty bound to enforce the law; (4) it provides a mechanism for securing legal relief that is enforceable by the presiding judge, rather than depending on a conscientious public acting through legislative or executive action; and (5) it provides a platform for enforceable reform that lives beyond election cycles and enables a long term strategy for systemic improvement that looks beyond a particular administration or leadership. These unique attributes of the civil rights class action create the promise for reform where the democratic process has failed to act.

Significantly, the class action vehicle provides access to a menu of reform elements that, for practical purposes, are not available within the overburdened family courts. The family court is a judicial forum that has not been structured or staffed to address class litigation or even individual petitions for structural reform. Federal courts that have entered consent decrees in child welfare class

57. *Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 2372363 (E.D. Mich. Feb. 15, 2007); *LaShawn A. v. Fenty*, C.A. No. 89-1754 (D.D.C. Nov. 18, 1993).

58. *Dwayne B.*, 2007 WL 2372363.

59. Children's Rights collects many of these court documents on their website, including: Modified Settlement Agreement, *Charlie & Nadine H. v. Corzine*, No. 99-3678 (D.N.J. July 18, 2006); Consent Decree, *Kenny A. v. Perdue*, No. 1:02-CV-1686 (N.D. Ga. June 29, 2005); Stipulated Order of Dismissal, *Joseph A. v. Bolton*, No. 80-0623 (D.N.M. Feb. 24, 2005); Modified Settlement Agreement, *Jeanine B. v. Doyle*, No. 93-C-0547 (E.D. Wis. Nov. 14, 2003); Settlement Agreement, *Brian A. v. Sundquist*, No. 3-00-0445 (M.D. Tenn. July 27, 2001); Consent Decree, *G.L. v. Sherman*, No. 77-0242-CV (W.D. Mo. Jan. 30, 2001); Settlement Agreement, *Marisol v. Giuliani*, No. 95-Civ-10533 (S.D.N.Y. Dec. 1, 1998); Final Order, *LaShawn A. v. Fenty*, C.A. No. 89-1754 (D.D.C. Nov. 18, 1993); Consent Decree, *Juan F. v. Rell*, No. H-89-859 (AHN) (D. Conn. Jan. 7, 1991). Children's Rights, Legal Cases, <http://www.childrensrights.org/site/PageServer?pagename=cases> (last visited Aug. 29, 2007).

litigation have required reform in vital areas of systemic performance, such as: (1) the restructuring and monitoring of processes necessary to ensure the timely planning and delivery of services;⁶⁰ (2) the setting of outcome goals for children and holding the system responsible for achieving them;⁶¹ (3) the hiring and retaining of sufficient casework staff to meet reasonable caseload standards;⁶² (4) the development of training programs for casework and supervisory staff in essential social work and management skills;⁶³ (5) the creation, supervision, and training of an adequate number and adequate variety of foster care placements to serve the needs presented by the children in care;⁶⁴ (6) the development of a continuum of services with the capacity to address the range of children's mental health, dental, and medical needs;⁶⁵ (7) the development of performance-based contracting and a contract monitoring function that assures proper oversight of private foster care providers who are licensed and retained by the state agency;⁶⁶ (8) the development of data management and information systems;⁶⁷ and (9) the development of licensing and quality assurance functions within the child welfare agency that are structured to the appropriateness of children's treatment.⁶⁸ These elements of systemic relief fall beyond the narrow and individualized parameters of judicial relief customarily considered by family courts as they adjudicate and enforce custodial rights, even in instances in which individual children are aggressively represented by counsel.

For example, Children's Rights concluded a class action in Kansas City, Missouri that cut the average length of time that children were in custody before adoption nearly in half, resulted in the provision of adequate medical care (including dental and mental

60. Final Order, *LaShawn A. v. Fenty*, C.A. No. 89-1754, at 20–28 (D.D.C. Nov. 18, 1993), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

61. Consent Decree, *G.L. v. Sherman*, No. 77-0242-CV, at 16–21 (W.D. Mo. Jan. 30, 2001), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

62. Final Order, *LaShawn A. v. Fenty*, C.A. No. 89-1754, at 44–50 (D.D.C. Nov. 18, 1993), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

63. Consent Decree, *Juan F. v. Rell*, No. H-89-859 (AHN), at 11–23 (D. Conn. Jan. 7, 1991), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

64. Consent Decree, *Kenny A. v. Perdue*, No. 1:02-CV-1686, at 12–19, 26–27 (N.D. Ga. June 29, 2005), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

65. Consent Decree, *G.L. v. Sherman*, No. 77-0242-CV, at 15–16 (W.D. Mo. Jan. 30, 2001), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

66. Consent Decree, *Kenny A. v. Perdue*, No. 1:02-CV-1686, at 23–24 (N.D. Ga. June 29, 2005), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

67. Children's Rights, *Joseph A. v. Bolson*, <http://www.childrensrights.org/site/PageServer?pagename=cases> (follow "Joseph A. v. Bolson" hyperlink; then follow "Learn more" hyperlink).

68. Consent Decree, *Kenny A. v. Perdue*, No. 1:02-CV-1686, at 26–28, 42 (N.D. Ga. June 29, 2005), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

health) for ninety percent of the children in the system,⁶⁹ and also provided a host of other reforms.⁷⁰ The New Mexico class action resulted in the reduction of the average length of time that children spent in care by over two years and substantially increased adoptions.⁷¹ Consent decrees in other jurisdictions have eliminated over-reliance on institutions and have delivered more services for families.⁷² Consent decrees have also resulted in enforceable caseload standards and workforce increases; training for workers, supervisors, and foster and adoptive families; increased recruitment and engagement of foster families; development of additional therapeutic services and appropriate placements; and development of internal agency quality assurance functions to maintain system improvement and management capacity.⁷³ Class action litigation is a vehicle that has allowed tens of thousands of children to live better lives and to have more opportunities for a reasonable childhood than they otherwise would have.

Particularly in the absence of adequate treatment or protection from the state or adequate oversight by the federal government, children in state custody need more of these class action lawsuits to ensure that their official custodians, state governments, operate publicly funded systems in which they will be treated as the laws intended and in a manner that will ensure that they are benefited, rather than further damaged, while in state care. These children need adequate representation beyond the confines of their individual juvenile court proceedings to protect their individual rights.

“Lawyering up” may be these children’s most effective protection.

69. Children’s Rights, *G.L. v. Sherman*, <http://www.childrensrights.org/site/PageServer?pagename=cases> (follow “G.L. v. Sherman” hyperlink; then follow “Learn more” hyperlink).

70. Consent Decree, *G.L. v. Sherman*, No. 77-0242-CV (W.D. Mo. Jan. 30, 2001), available at <http://www.childrensrights.org/site/PageServer?pagename=cases>.

71. Children’s Rights, *Joseph A. v. Bolson*, <http://www.childrensrights.org/site/PageServer?pagename=cases> (follow “Joseph A. v. Bolson” hyperlink; then follow “Learn more” hyperlink).

72. See Davidson & Pitchal, *supra* note 44, at 7–9.

73. Children’s Rights, *G.L. v. Sherman*, (follow “G.L. v. Sherman” hyperlink; then follow “Learn more” hyperlink).

