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## Looking Ahead: A Personal Vision of the Future of Child Welfare Law

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## LOOKING AHEAD: A PERSONAL VISION OF THE FUTURE OF CHILD WELFARE LAW

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Donald N. Duquette\*

*The participants in the Thirtieth Anniversary Celebration of the Child Advocacy Law Clinic were all challenged to envision the future of child welfare and to address these questions: What should the law and legal institutions governing children's rights and child and family welfare look like in thirty more years? What steps are necessary to achieve those goals? After setting out the historical and optimistic circumstance in which the Child Advocacy Law Clinic was founded, this Article responds to the organizing questions by presenting the author's vision of the future of child welfare law and practice. When families fail children, what interventions and what process is appropriate? A premise is that our society expects too much of the child welfare system. If America adopted policies to support children and families far fewer children would enter the child welfare system and the courts, thus freeing up capacity to respond to children who really need the assistance.*

*This personal vision of the future of child welfare discusses nine interconnected dimensions of child welfare law and policy: 1) America will address child poverty and strengthen its policies supporting children's families and the institutions that help children grow and develop into healthy and productive citizens; 2) America will be better at preventing child abuse and neglect; 3) Child protective services, the entry point into the child welfare system, will rely more on a rehabilitative approach and less on the punitive, fault-based accusatory response of today; 4) Formal legal process, apart from adjudication, will rely more on problem-solving approaches that include the entire family; 5) There will be less reliance on the courts for routine management of cases, with rights-based application to the courts only where coercive, involuntary action is required to protect the child or to protect parents and children from an overzealous state intervention; 6) Dispositional orders will be based on a comprehensive assessment that includes the entire family, generally provide for more contact between parent and child, and rely more on a cadre of professional foster parents; 7) Permanency and stability for the child will remain a centerpiece of American law and practice, but, after the finding of parental unfitness at adjudication, more persons will participate in the permanency decisions and the range of acceptable permanency options will expand; 8) Legal services for children and families will be better organized and also more broadly conceived than today with private and preventive law playing a large role; 9) The education of lawyers and other professionals in child welfare will be more sophisticated and increasingly interdisciplinary.*

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## INTRODUCTION

In the following pages, I present my personal vision of the future of child welfare law, policy, and practice. Part I provides the historical context in which the Child Advocacy Law Clinic and many of the child advocacy organizations of today were developed. This is also the background for America's current child welfare law and policy. Part II contains my reflections on the future of justice for children. Drawing heavily from the presentations at the thirtieth anniversary symposium and the articles in this issue plus my own experience, I set out my own vision of what I hope child welfare law and policy will look like by 2036.

## I. FOUNDING OF THE CHILD ADVOCACY LAW CLINIC

In 1975, the Harry A. and Margaret B. Towsley Foundation of Ann Arbor challenged the University of Michigan with a three-year grant to develop an interdisciplinary program addressing the problems of child abuse and neglect and improving professional training and education in the field. The Law School, the School of Social Work, and the Medical School Departments of Pediatrics and Psychiatry were to collaborate in developing courses, clinical teaching programs, continuing professional education, and research and writing. Dr. Harry Towsley was himself a pediatrician. His awareness of and concern for the plight of abused children stemmed from the leadership of pediatricians such as Henry Kempe and Ray Helfer, who in those years led the way in raising consciousness about child maltreatment and urged a broad national response to the problem. The Towsley grant spawned substantial child-focused programs at the University of Michigan, including the University of Michigan Hospital's Child Protection Team, the School of Social Work's Family Assessment Clinic, and the Law School's Child Advocacy Law Clinic.

The Towsley Grant came in the context of a national movement that generated legislation and programs throughout the nation.<sup>1</sup>

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1. Many of the macro forces in child welfare came to bear on the development of the UM program. Take my personal story as an example. From 1969 to 1972, prior to attending law school, I worked as a child protection and foster care caseworker for the Michigan Department of Social Services in Muskegon County, where I was among the first child protection caseworkers in the State of Michigan. In law school I served as Robert Burt's research assistant for the Child Abuse and Neglect volume of the ABA/IJA Juvenile Justice Standards Project. After I graduated from UM Law School in December 1974, I took a position as an Assistant Professor of Human Development and Pediatrics at Michigan State

The Child Abuse Prevention and Treatment Act (“CAPTA”) was passed by Congress in 1974 to improve states’ responses to child abuse and neglect.<sup>2</sup> CAPTA created the National Center on Child Abuse and Neglect and provided funds to the states for child abuse prevention, mandatory reporting laws, and the appointment of guardians ad litem for children when judicial proceedings became necessary to protect the child. In 1975, the U.S. Children’s Bureau released regulations for child abuse reporting laws.<sup>3</sup> The ABA/IJA (Institute of Judicial Administration) Juvenile Justice Standards Project was underway during this period and its volume on child abuse and neglect was released in 1977.<sup>4</sup> Howard Davidson, Director of the ABA Center on Children and the Law, stated in his talk at the thirtieth anniversary symposium that the Child Abuse and Neglect volume was very controversial. The drafters were unhappy with the termination of parental rights section and asked Marty Guggenheim, another participant in the Thirtieth Anniversary, to draft a new version of that chapter. In the end, the Child Abuse and Neglect volume, while influential, was never passed by the ABA General Assembly.

In 1973, Marian Wright Edelman founded the Washington lobbying group for children, the Children’s Defense Fund. In 1974, adoptive parents founded the North American Council on Adoptable Children (“NACAC”), still a strong voice for foster care reform.<sup>5</sup> The Juvenile Law Center of Philadelphia was founded in 1975 as a non-profit legal service and is now one of the oldest public interest law firms for children and youth in the United States.<sup>6</sup>

In 1977, the ABA created the National Legal Resource Center on Child Advocacy and Protection, now known as the ABA Center on Children and the Law, the principal child welfare legal policy

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University School of Human Medicine. At the time of the Towsley grant I was working very closely at Michigan State with Dr. Ray Helfer, M.D. one of the pioneer pediatricians in child abuse and neglect. In August 1976, as a lawyer with a background in social work and medicine, I started work at UM Law School with the title of Director of the Child Advocacy Clinic, which really did not exist yet. Our first class of six students started in September 1976.

2. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (amended and reauthorized by the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (codified at 42 U.S.C. §§ 5101-5119 (2000 & Supp. 2004))).

3. 39 Fed. Reg. 43,937 (Dec. 19, 1974) (formerly codified at 45 C.F.R. § 1340.1-1 to 1340.3-8 (1976)).

4. ROBERT BURT & MICHAEL WALD, IJA-ABA JOINT COMM’N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT (1977).

5. See, e.g., Reform Foster Care Now, <http://reformfostercare.blogspot.com/> (last visited Aug. 28, 2007) (featuring NACAC blog postings and links to websites advocating for foster care reform).

6. Juvenile Law Ctr., About JLC, <http://www.jlc.org/index.php/about> (last visited Aug. 28, 2007).

center in the nation. The same year, my friend and colleague Don Bross, from the Denver-based C. Henry Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, started the National Association of Counsel for Children (“NACC”). Bross, like myself, was a lawyer working closely with pediatricians responding to child maltreatment. The NACC has been a considerable success. Growing to over 2000 members across the United States, it has become the premier membership organization for lawyers who represent children, parents, and state agencies in child welfare law cases. In 2001, the ABA recognized child welfare law as a formal legal specialty and in 2004 accredited the NACC to certify lawyers as specialists in the new field.<sup>7</sup> The program is an unapologetic and appreciative imitator of the American Academy of Pediatrics and other medical specialties. Also in 1977, Judge David Soukup of Seattle started a court-appointed special advocate program in his court that eventually spawned a national movement and the National Court Appointed Special Advocate (“CASA”) Association.<sup>8</sup>

Congress passed the Indian Child Welfare Act in 1978.<sup>9</sup> The Adoption Assistance and Child Welfare Act of 1980 established reimbursement to the states for the cost of foster care for poor children as an entitlement program and required states to make “reasonable efforts” to prevent the removal of a child from the home and reunify a child with her parent(s).<sup>10</sup> On the world stage, the United Nations Convention on the Rights of the Child (“CRC”) was adopted in November 1989.<sup>11</sup> The CRC is the most widely ratified human rights treaty in the history of the world, having been ratified by every recognized government in the world, save one—the United States of America.<sup>12</sup>

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7. Press Release, Nat’l Ass’n of Counsel for Child., Eighty-Five (85) Attorneys Become Nation’s First Certified Child Welfare Law Specialists (2006), <http://www.naccchildlaw.org/training/documents/NewsRelease6-9-06.pdf>.

8. Nat’l CASA, History of CASA, [http://www.nationalcasa.org/about\\_us/history.html](http://www.nationalcasa.org/about_us/history.html) (last visited Aug. 28, 2007).

9. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2000)).

10. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (amended by the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 671(a)(15)(A)–(B) (2000))).

11. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

12. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 162 & n.12 (2006) (noting that Somalia has signed but is unable to ratify the Convention because the United Nations does not recognize its government).

When the University of Michigan Child Advocacy Law Clinic ("CALC") began in 1976 in this rich period for child advocacy around the world, it became the first such law school clinical program to specialize in matters of child abuse and neglect. Our signature approach of representing children, parents and the government agency in different counties and with interdisciplinary consultation and advice, began very early in our history. CALC's goals included Towsley's charge to provide interdisciplinary education in child abuse and neglect but soon incorporated the goals and methodology of the clinical law movement that was also gathering strength during this period. One reason for our longevity is the happy coincidence that child advocacy not only addresses an important need in the larger community, but also provides excellent clinical legal education experiences.<sup>13</sup>

There is another aspect of the child advocacy clinic of which I am personally proud and which is regularly celebrated by students in their evaluations. The experience of serving underrepresented and generally sympathetic persons such as allegedly maltreated children nurtures the idealism and altruism with which many law students begin their legal studies. These forces for compassion and public service are scarce and fragile in any society. They can be nurtured and encouraged; or they can be smothered. One of the explicit goals of the Child Advocacy Law Clinic is to nourish and encourage students' natural altruism and commitment to public service.

The thirtieth anniversary symposium began with a talk by John E.B. Myers on the history of child protection in America that described steady progress in extending greater protection and justice for children.<sup>14</sup> Despite their missteps and mistakes, that history portrays people driven by idealism and altruism and by a commitment to improve the lot of children, and thereby, humanity. On the steps to the Michigan Union, the site of Professor Myers' talk, is a brass plate that marks the spot where, in 1960, John F. Kennedy first announced the idea of the Peace Corps. The Peace Corps, a manifestation of the best of the American spirit, is another example

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13. See generally Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997). For a fuller discussion of the education advantages of family violence clinics generally, see Melissa Breger & Theresa Hughes, *Advancing the Future of Family Violence Law Pedagogy: The Founding of a Law School Clinic*, 41 U. MICH. J.L. REFORM 167 (2007).

14. See generally JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT AND FUTURE (2006). Myers' talk is available through the JLR CALC Symposium website at <http://students.law.umich.edu/mjlr/prospectus/calc.html>.

of high idealism. This is an imperfect world with imperfect people. And it is a cynical world. But, in the words of Max Ehrmann, "the world is full of trickery. But let this not blind you to what virtue there is; many persons strive for high ideals and everywhere life is full of heroism."<sup>15</sup>

## II. PERSONAL REFLECTIONS ON THE FUTURE OF CHILD WELFARE LAW, POLICY AND PRACTICE

We challenged the thirtieth anniversary symposium participants to envision the future of child welfare. We asked them to take stock of the law and legal institutions governing children, their rights, and their welfare. *How does our society ensure that all children receive a full and fair start in life? How do we best support and strengthen families? What is the law's role in that? When families fail children, what interventions and what process is appropriate?*

In my personal vision of the future of child welfare:

1. Our nation will address child poverty and strengthen its policies supporting children's families and the institutions that help children grow and develop into healthy and productive citizens.
2. America will be better at preventing child abuse and neglect.
3. Child protective services, the entry point into the child welfare system, will rely more on a rehabilitative approach and less on the punitive, fault-based accusatory response of today, and interventions will be based on a comprehensive, coordinated assessment process that covers the entire family.
4. Formal legal process, apart from adjudication, will rely more on problem-solving approaches that include the entire family.
5. There will be less reliance on the courts for routine management of cases, with rights-based application to the courts only where coercive, involuntary action is required to protect the child or to protect parents and children from an overzealous state intervention.

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15. MAX EHRMANN, *DESIDERATA: A POEM FOR A WAY OF LIFE* (1995), available at <http://hobbes.ncsa.uiuc.edu/desiderata.html>.

6. Dispositional orders will be based on a comprehensive assessment, minimize the disruptions to a child's life, generally provide for more contact between parent and child, and rely more on a cadre of professional foster parents.
7. Permanency and stability for the child will remain a centerpiece of American law and practice, but, after the finding of parental unfitness at adjudication, more persons will participate in the permanency decisions and the range of acceptable permanency options will expand.
8. Legal services for children and families will be better organized and also more broadly conceived than today with private and preventive law playing a large role.
9. The education of lawyers and other professionals in child welfare will be more sophisticated and increasingly interdisciplinary.

*A. Our Nation Will Address Child Poverty and Strengthen its Policies Supporting Children's Families and the Institutions that Help Children Grow and Develop into Healthy and Productive Citizens*

1. It's All One; We're All One

In the child welfare system of the future, our nation will strengthen its support for children's families and the institutions that help children grow and develop into healthy and productive citizens. National policies that are family friendly and address health care, education, and persistent poverty will create conditions under which families can care adequately for their own children, and fewer children will enter the child welfare system. In our complex and free society, we will always have some percentage of parents unwilling or unable to care for their children adequately. But child and family-friendly policies could reduce the number of children entering foster care by as much as fifty percent.<sup>16</sup> With that reduction the system would have fewer children to serve, and thus would be better able to serve those in its care.

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16. This is my personal projection, extrapolating from some of the data that follows showing the link between poverty (which our nation could reduce) and child maltreatment



For this to happen, child advocates need to get involved and stay involved in politics—both national and local. Our keynote speaker, U.S. Senator Debbie Stabenow, with impressive child advocate credentials of her own, offered a view of the national scene and challenged us to put and keep children first. She encouraged the assembled, especially law students, to get involved in politics and community service. In order to put and keep children on the top of the political agenda, their advocates need to be present, capable, and articulate.

Child advocates also should get out of our “silos.” We should look more broadly at the forces that affect children and families. Consistent with the old parable about babies flowing downstream, we should go upstream and see who it is that is throwing the babies into the river. An expansive scope of public issues affect children most of all—from family support, health care, and education, to scientific research, the environment, and a balanced budget.

Consider the range of issues that affect a child’s successful passage to adulthood. First is a healthy pregnancy leading to a live birth. The United States now spends more money per capita on health care than any other nation,<sup>17</sup> yet our infant mortality rate, maternal mortality rate, and longevity are among the worst among the industrialized countries.<sup>18</sup> According to one journalist, if we had a child mortality rate as good as France, Germany, and Italy, we could save 12,000 children a year.<sup>19</sup> Child advocates should fight for the human right of all children to live healthy lives.

Beyond a successful birth, research shows that experiences in the earliest years of life play a critical role in a child’s ability to grow up healthy and ready to learn. Early childhood attachments and stability shape lifelong learning competence. The Zero to Three Policy Center, among others, says “[w]hen early experiences fail to support infants or toddlers, their ability to learn, grow, and succeed is compromised.”<sup>20</sup> Evidence shows that early childhood

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and the poor penetration of child abuse prevention measures such as home health visitors, parenting education, etc.

17. BUREAU OF LABOR EDUC., UNIV. OF ME., *THE U.S. HEALTH CARE SYSTEM: BEST IN THE WORLD, OR JUST THE MOST EXPENSIVE* 3 (2001), <http://dll.umaine.edu/ble/U.S.%20HCweb.pdf>.

18. UNICEF INNOCENTI RESEARCH CTR., *INNOCENTI REPORT CARD 7, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES* 14 figs.2.1a & 2.1b (2007), [http://www.unicef-irc.org/publications/pdf/rc7\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc7_eng.pdf) [hereinafter *REPORT CARD*]; Nicholas D. Kristof, *A Short American Life*, N.Y. TIMES, May 21, 2007, at A21.

19. Kristof, *supra* note 18.

20. Zero to Three Home Page, <http://www.zerotothree.org> (click on “Public Policy” or “Policy Center”) (last visited Aug. 28, 2007).

attachments shape lifelong learning competence.<sup>21</sup> Yet the requirements of children and toddlers are rarely addressed in public policy. As we address the needs of children and toddlers generally, we will attend to the needs of the poor and at-risk population who are most in jeopardy of family failure to the point of involuntary foster care.

Educators have told us for years that education begins in the home and that a child should enter school having already developed certain skills. Many interest groups are united on the importance of early childhood education, and it should be a topic of political discussion. In Britain, David Cameron of the Tory party has stated that love and attachment comprise the essential foundation for success in school.<sup>22</sup> This is not “mushy” and sentimental stuff but rather reflects the fact that family relationships matter, and matter greatly, in a child’s ability to learn. High school graduation rates in the U.S. are about seventy percent—a figure that reflects the poor starting place of many of our children.<sup>23</sup>

Working American families are stressed to the breaking point.<sup>24</sup> The workplace remains inflexible for parents, especially when compared with our European counterparts, and parents working full-time are stretched financially. America should make it possible for working families to support themselves and their children. When we have done so—when we have developed policies that allow families to care for themselves, to provide equal opportunities for their children to succeed, to spend more quality time together—we will have actualized the true family values in a way that harmonizes left and right. According to one columnist, “there’s no better antidote to the selfish individualism and empty materialism that Americans of all political stripes say is corrupting our country” than to encourage adults to spend more and better time with their

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21. See generally Robert Crosnoe, *Friendships in Childhood and Adolescence: The Life Course and New Directions*, 63 SOC. PSYCHOL. Q. 377 (2000).

22. See David Brooks, *A Critique of Pure Reason*, N.Y. TIMES, Mar. 1, 2007, at A21; see also David Cameron MP—Outside Parliament, <http://www.davidcameronmp.com/articles/outside-parliament-archive.php> (click on “David Cameron speech on the quality of childhood”) (last visited Aug. 28, 2007).

23. See JAY P. GREENE, MANHATTAN INST. FOR POLICY RESEARCH, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES (2002), [http://www.manhattan-institute.org/html/cr\\_baeo.htm](http://www.manhattan-institute.org/html/cr_baeo.htm). See generally Nat’l Ctr. for Higher Educ. Mgmt. Sys., Public High School Graduation Rates, <http://www.higheredinfo.org/dbrowser/index.php?measure=23> (last visited Oct. 10, 2007).

24. See generally SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA’S BELEAGUERED MOMS AND DADS* (1998). For information about the Families and Work Institute, which addresses such issues, see Families & Work Inst., About FWI, <http://familiesandwork.org/site/about/history.html> (last visited Aug. 28, 2007).

children.<sup>25</sup> Stronger families generally will reduce the number of failing families that fall into the child welfare system.

Importantly, we can support children and families without taking away the characteristic American incentive to work hard and earn greater rewards in doing so. Home health visitors, affordable child care, national standards for child care, universal voluntary public preschool, expanded Head Start, paid family leave, and incentives for businesses to make part-time and flex-time work financially viable are all policies on the political agenda that would support, rather than discourage, families' decisions to work. We can protect children by supporting families.

Children in the child welfare system are nearly always from poor families. This is not to say that poor people are necessarily poorer parents, but rather that they are under greater scrutiny than others in our society and that they lack the basic tools and resources to allow them to succeed as parents. The Third National Incidence Study of Child Abuse and Neglect found that forty-seven percent of children with demonstrable harm from abuse or neglect and ninety-five and a half percent of endangered children came from families whose income was less than \$15,000 per year.<sup>26</sup> A poor child is twenty-two to twenty-seven times more likely to be identified as harmed by abuse or neglect.<sup>27</sup> Sarah Ramsey began the thirtieth anniversary symposium with a discussion of child well-being that included documentation of the correlation between poverty and child maltreatment.<sup>28</sup>

Poverty is inexorably linked to child maltreatment. Impoverished communities lack the capacity to assist children. Professor Ramsey says, "[h]igh poverty rates indicate what may be insurmountable problems for the child welfare system. The child welfare system, in isolation, is unlikely to be able to demonstrate a positive impact on the well-being of the majority of children in its care."<sup>29</sup>

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25. Judith Warner, *The Family-Friendly Congress?*, N.Y. TIMES, Nov. 10, 2006, at A31; see also JUDITH WARNER, *PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY* (2005).

26. ANDREA J. SEDLACK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH & HUM. SERVS., *THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT 5-3 tbl.5-1, 5-11 tbl.5-2* (1996).

27. *Id.*

28. Ramsey's talk is available through the *JLR* CALC Symposium website at <http://students.law.umich.edu/mjlr/prospectus/calc.html>; see also Sarah H. Ramsey, *Child Well-Being: A Beneficial Advocacy Framework for Improving the Child Welfare System?*, 41 U. MICH. J.L. REFORM 9 (2007).

29. Ramsey, *supra* note 28 at 13.

In a recent study by UNICEF, America's child poverty rate was dead last among 24 developed countries.<sup>30</sup> According to the U.S. Census Bureau, America's child poverty rate remains just below eighteen percent.<sup>31</sup>

Child poverty is a terrific drag on the American economy. In January 2007, poverty experts testified before Congress that children who grow up poor cost the economy \$500 billion a year because they are less productive, earn less money, commit more crimes, and have more health-related expenses.<sup>32</sup> "The high cost of childhood poverty to the United States suggests that investing significant resources in poverty reduction might be more cost effective over time than we previously thought."<sup>33</sup>

Child advocates should pursue a "human capital agenda" in which our country invests in its people.<sup>34</sup> Capital, by its very nature, generates more capital. Likewise investment in human capital will generate even more human capital. The United States became the richest country in the world because in the nineteenth and twentieth centuries it had the most schooling and the best circumstances to help people develop their own capacities.<sup>35</sup> But this advantage is eroding, and unless we change our policies, the current work force will be replaced by a less-educated, less-capable work force, to the detriment of America's competitive position in the world.

A similar analysis can be applied to health care. Our country needs universal health care, and our businesses need a government-backed health care system in order to compete with foreign countries where employer-based health care is not the norm. It was recently reported that the average Fortune 500 company will spend more on health care that it earns in net income.<sup>36</sup> Child advocates should align with business. While it may be true that what is good for General Motors is also good for America, it is definitely true that what is good for American children is good for America and American business.

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30. REPORT CARD, *supra* note 18, at 6 fig.1.1.

31. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS SERIES P60-233, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, Report P60, 15 tbl.4 (2007) available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>.

32. *The Economic and Social Costs of Poverty: Hearing Before the H. Comm. on Ways & Means*, 110th Cong. (2007) (statement of Harry J. Holzer, professor and visiting fellow at the Urban Institute, Georgetown University Public Policy Institute), <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5804#Holzer>.

33. *Id.*

34. David Brooks, *A Human Capital Agenda*, N.Y. TIMES, May 15, 2007, at A19.

35. *Id.*

36. Kristof, *supra* note 18, at A21 (citing Steve Burd, CEO, Safeway Inc.).

Our society can develop child-friendly social policies for soft-hearted reasons, that is, out of sympathy or compassion for cute kids who cannot care for themselves or out of a sense of moral obligation to the next generation. Or we can develop child-friendly social policies out of old-fashioned, hard-headed self interest because these children are our future workers, our future tax base, and our future contributors to social security. In this increasingly competitive global market place, we need our children to grow up to be positive contributors to our society, rather than being drains on our society—poorly educated, in prison, using mental health services, and failing to support their own children and families. But, whatever our motivation, we should end up with child-friendly social policies.

### *B. America Will Be Better at Preventing Child Abuse and Neglect*

#### 1. An ounce of prevention is worth a pound of cure

In thirty years, America will be better at preventing child abuse and neglect. In the language of prevention, *primary prevention* is aimed at the whole population, addressing the underlying causes of child maltreatment.<sup>37</sup> The child-friendly policies discussed in the previous section are examples of *primary prevention* efforts because they are directed at all children in all families.

*Secondary prevention* supports families under special stress or with special needs prior to actual reports of suspected child abuse and neglect. Some programs target specific disadvantaged communities and neighborhoods with special services. Even specific zip codes can identify a population where children are at particular risk for child maltreatment and thus where additional voluntary service would be appropriate.

*Tertiary prevention* refers to treatment strategies aimed at people who have already abused or neglected their children to get them to stop child maltreatment and not repeat their previous behavior.

Because child maltreatment has a complex set of contributing causes, any approach to prevention must rely on multiple ways to enhance the functioning of parents and families.

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37. Anne Cohn Donnelly, *An Overview of Prevention of Physical Abuse and Neglect, in THE BATTERED CHILD* 579, 579 (Mary Edna Helfer et al. eds., 5th ed. 1997).

Dr. Ray Helfer . . . guides our thinking about the goals of prevention:

With very few exceptions, if one wishes to prevent something bad from happening, the development of something good must come first. Eliminating cholera and dysentery from our society required the development of sewers and clean water systems. Preventing polio required building polio antibody levels in the bodies of our children through vaccination. . . . Likewise, to prevent child abuse and other adverse outcomes of the breakdown in the interactional systems within our families, we must *enhance* interpersonal skills in those very folks.<sup>38</sup>

In the future, preventative child welfare services, including services beyond accusatory child protective services and foster care will be restored. These services have been eroded in the development of our existing child protection system with its emphasis on reporting and investigation of suspected child abuse and neglect. Earlier visions of child welfare services meant to *enhance* the development of children at risk have been “replaced by the expectation that the child welfare field should serve only those children for whom state intervention is essential” to ensure a minimum level of care in as cost-efficient and time-limited a manner as possible.<sup>39</sup>

For children and families with specific needs, our society will make services like infant mental health, child guidance counseling, behavior assistance, mental health services, and general health services widely available. These secondary prevention services will also divert significant numbers of children from the involuntary, coercive, and much more expensive child welfare system.

Perhaps one of the most promising public health responses to enhance early childhood and prevent child abuse and neglect is the home health visitor. Home visitation for parents is a widespread early-intervention strategy in most industrialized nations other than the United States. In these countries, it is free, voluntary, not income-related, and embedded in comprehensive maternal and child health systems. Although a causative link has not been demonstrated conclusively, countries with extensive home visitor programs generally have lower infant mortality than does the United States. This is despite per capita health spending

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38. *Id.* at 583 (quoting Ray E. Helfer, *An Overview of Prevention*, in *THE BATTERED CHILD* 425, 425–433 (Ray E. Helfer & Ruth S. Kempe eds., 4th rev. ed. 1987)).

39. Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *CHILD WELFARE FOR THE 21ST CENTURY* 10, 35 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

in the United States that far exceeds expenditures in other industrialized countries.<sup>40</sup> Denmark established home visiting by law in 1937 after a pilot program was successful in lowering infant mortality.<sup>41</sup> France provides free prenatal care and home visits by midwives or nurses to provide education about smoking, nutrition, alcohol and other drug use, housing, and other health-related issues.<sup>42</sup> In England, every prospective mother is visited at home at least once before birth, with six more visits typically occurring before the child is five years of age.<sup>43</sup> In the United States, "home visitation has been perceived by many as too costly and unnecessary for all new families."<sup>44</sup>

The U.S. Advisory Board on Child Abuse and Neglect recommended home health visiting in its 1991 report stating that no other single intervention shows the promise that home visitation does.<sup>45</sup> Home visitation programs offer an effective mechanism to ensure ongoing parental education, social support, and linkage with public and private community services. The efficacy of prenatal and early childhood home health visiting has been demonstrated in a number of studies. While we must be cautious in over-selling any social program,<sup>46</sup> such programs have been shown to reduce the number of subsequent pregnancies, the use of welfare, the incidence of child abuse and neglect, and criminal behavior.<sup>47</sup> This non-accusatory support service can increase the number of families providing good quality care for their children and decrease the number of children entering foster care.

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40. Gerard F. Anderson et al., *Health Spending in the United States and the Rest of the Industrialized World*, 24 HEALTH AFF. 903, 905 exhibit 1 (2005), <http://content.healthaffairs.org/cgi/reprint/24/4/903.pdf>.

41. Council on Child and Adolescent Health, Am. Acad. of Pediatrics, *The Role of Home-Visitation Programs in Improving Health Outcomes for Children and Families*, 101 PEDIATRICS 486, 486 (1998).

42. *Id.*

43. *Id.*

44. Am. Acad. of Pediatrics, *The Role of Home-Visitation Programs in Improving Health Outcomes for Children and Families*, 101 PEDIATRICS 486, 486 (1998), <http://pediatrics.aappublications.org/cgi/reprint/101/3/486.pdf>.

45. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH AND HUM. SERVS., *CREATING CARING COMMUNITIES: A BLUEPRINT FOR AN EFFECTIVE FEDERAL POLICY ON CHILD ABUSE AND NEGLECT* xlvii (1991).

46. DEBORAH DARO, *HOME VISITATION: ASSESSING PROGRESS, MANAGING EXPECTATIONS* (2006), [http://www.chapinhall.org/article\\_abstract.aspx?ar=1438](http://www.chapinhall.org/article_abstract.aspx?ar=1438) (click on "full report" and register for free to view a pdf of the full report).

47. David L. Olds et al., *Long Term Effects of Home Health Visitation on Maternal Life Course and Child Abuse and Neglect*, 278 J. Am. Med. Ass'n 637 (1997); David L. Olds et al., *Effects of Home Visits by Paraprofessionals and by Nurses*, 114 PEDIATRICS 1560, 1566 (2004).

*C. Child Protective Services, The Entry Point Into the Child Welfare System, will Rely More on a Rehabilitative Approach and Less on the Punitive, Fault-based Accusatory Response of Today, and Interventions Will be Based on a Comprehensive, Coordinated Assessment Process that Covers the Entire Family*

1. Putting Child Protective Services in its Place

In the child welfare world of the future, the primary and secondary prevention efforts described above will be widely available. Our country will have awakened to the long-term importance of investing in our children, which means supporting their families. Political leaders will accept the wisdom of the slogan, "to protect children, support families." I envision a decade during which the strong national interest in nurturing our children gains ascendancy and child-friendly policies are implemented. Child advocates will align with hard-headed business and political leaders to make America stronger and better positioned to compete in the global marketplace. The support system for families, with persons like home health visitors making direct contact with all newborns, will provide an early warning system for potential child maltreatment that can be responded to voluntarily.

This foundation of child-friendly and family supportive social policies is critical to the development of the other aspects of the future child welfare system. In the child welfare system of the future, child welfare will be broader than only crisis intervention, and where there is investigation and intervention, it will rely more on a rehabilitative approach and less on the punitive, fault-based accusatory response of today. Moreover, interventions will be based on a comprehensive, coordinated assessment process that covers the entire family.

There will always be a need for rigorous, careful, and skillful investigation of serious child maltreatment. There will always be some cases that warrant law enforcement investigation, and eventually, criminal prosecution. Part of our challenge is to define which cases are within the province of law enforcement and which cases are suited for the more rehabilitative child protective services. Some commentators have urged that *all* child welfare investigations be removed from the child welfare agency and turned over to the police.<sup>48</sup> Others have recommended a "bright

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48. LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 158 (1989).



line” between severe child abuse, including sexual abuse, and neglect, with the severe cases being the responsibility of law enforcement and the criminal process and neglect remaining the responsibility of social workers.<sup>49</sup> However, I believe our current system of a joint investigation including both law enforcement and child protective services will be the best arrangement for the future as well. These cases do fall on the line between the police and social workers, but there is no way to reliably predict which system, or both, should be engaged. John Myers gets it right when he says that, “[w]e are better off with the model in which social workers and police officers work together, pooling their different but overlapping perspectives and expertise.”<sup>50</sup>

There is a crying need, however, to put child protective services in its place. Child protective services cannot be the beginning and end of child welfare services in America. The growth of the child protection movement has sucked up all the resources of a true child welfare system. As Duncan Lindsey says, “Over time the child welfare system became a crisis intervention service where only the most seriously harmed children received attention. The needs of families that did not require the child to be removed would have to wait.”<sup>51</sup>

A decade and a half ago, the U.S. Advisory Board on Child Abuse and Neglect urged a broader view of child welfare and a broader ownership of the problem beyond the state child protective services. “The Board determined that the system was *fundamentally* flawed. . . . There was catastrophic failure in every part of the child protection system—a failure that resulted from errant design and that amounted in sum to a ‘moral disaster.’”<sup>52</sup> The U.S. Advisory Board thought that U.S. policy was focused too much on adversarial investigation and coercive intervention in families. U.S. policy was asking the wrong question. Rather than focusing on: “Under what circumstances is coercive government intervention justifiable to protect children?”; we should be asking, “What can government and social and neighborhood institutions

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49. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 26–27 (2d ed. 2003).

50. MYERS, *supra* note 14, at 179.

51. LINDSEY, *supra* note 49, at 26–27. Duncan Lindsey also criticizes the “residual perspective” of child welfare in which services are offered only after the problems arise. *Id.* at 4, 155.

52. Gary B. Melton, *Chronic Neglect of Family Violence: More than a Decade of Reports to Guide U.S. Policy*, 26 *CHILD ABUSE & NEGLECT* 569, 571 (2002).

do to prevent or ameliorate harm to children?"<sup>53</sup> This is the central theme of this Article. The law, by itself, is not an adequate response to the problems of child maltreatment. We need to build a context in which children generally are valued, protected, and nurtured to their fullest potential. One of the principles behind an interdisciplinary response to these problems is that no single discipline, no profession, no single system, can respond adequately to the challenge of child maltreatment. The police cannot do it alone. Physicians cannot do it alone. Social workers and their agencies cannot do it alone. Courts with all their power cannot do it alone. Yes, not even lawyers can provide the full and appropriate response to the challenge of child abuse and neglect. The best way to improve the child protection legal system for children and families is to strengthen the general social support for families, protecting more children by voluntary, non-coercive means and diverting large numbers of children who today would enter the child welfare system.

America relies on a system of mandatory reporting in which professionals are required to report when they have even a "reasonable cause to suspect" child abuse and neglect.<sup>54</sup> Other people *may* report.<sup>55</sup> The report launches a government investigation into the allegations.<sup>56</sup> Should the U.S. continue relying on our extensive system of mandatory reporting and investigation of suspected child abuse and neglect? Gary Melton is one of the most influential commentators calling for the abolition of mandatory reporting laws. "Vast human and fiscal resources that could be spent in prevention or treatment are instead expended in investigations that usually result in significant disruption of family life but little if any benefit."<sup>57</sup> Other countries do without mandatory reporting, but these are countries with a more extensive support system for families.<sup>58</sup> Another criticism made is that the current policy allows families, neighbors and the general community to

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53. U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 11 (1993) [hereinafter NEIGHBORS].

54. See generally Sue Badeau et al., *A Child's Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 213 (Marvin Ventrell & Donald N. Duquette Eds., 2005).

55. *Id.*

56. *Id.*

57. Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 14 (2005).

58. See generally JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* Chs. 2, 7 (1998).

merely pick up the phone and call a hotline when they are concerned and then wash their hands of the problem. Reliance on the formal system alone has proven faulty. The system is overwhelmed with a large number of cases, yet still misses many cases.<sup>59</sup> The current system is both over-inclusive and under-inclusive.

Complete abolition of mandatory reporting is probably not feasible in the next thirty years, even though it is a very attractive idea. However, once the United States has matched other industrial countries in family supports and child-centered policies, we may be able to reduce *mandatory* reporting to the most severe cases. Definitions of serious (and thus mandatorily reportable) cases will be clearer and more specific to achieve less subjectivity and greater uniformity and fairness in application of the laws. The child welfare system of the future should retain mandatory reporting only for the most severe physical abuse and for sexual abuse, but make it optional to report minor physical injuries or neglect that do not seriously threaten a child's life or well-being.

Strengthening support for children and families may be able to reduce the number of maltreated children, perhaps even dramatically, but there will always be some children whose safety and well-being is so much at risk that government should intervene. When that happens, how are we to maximize the effectiveness of child protective services intervention in the future? We want an intervention in which the child is protected and the family learns the skills or gains the supportive resources necessary to keep the child from extensive involvement with the child welfare system. We especially should divert the child and family from the courts if that can be done consistent with child safety.

One promising alternative to the more traditional child protective services ("CPS") investigation that expands child welfare beyond crisis intervention and minimizes the adversarial confrontation is referred to as Differential Response Systems and Community Partnerships. Jane Waldfogel first described this approach in her 1998 book, *The Future of Child Protection*.<sup>60</sup> In contrast to the traditional CPS response, where many reports are screened out providing some families no services while others receive a confrontational investigation, the differential response focuses on assessing the *needs* of individual families and responding accordingly with shared community response for any treatment or

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59. *Id.* at 84–86.

60. *See generally*, JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* (1998).

intervention. At least two states, Missouri and Minnesota, have piloted this new approach and expanded it state wide.<sup>61</sup> Loman points out that less than one percent of the reports in Missouri were for serious physical abuse. "Is it sensible," he asks, "that every report in each of these categories should be approached through the quasi-criminal procedure of a CPS investigation? The diversity [of alleged maltreatment] suggests that responses ought to be diverse as well."<sup>62</sup>

The differential response approach is summarized as follows:

1. Screen reports to determine the minority that should be investigated: clearly criminal or highly dangerous. Most families should receive a family assessment.
2. Approach families in a non-adversarial, family-friendly fashion soliciting full family participation.
3. Conduct a full safety assessment of the children and develop a safety plan if necessary.
4. Conduct a broader family assessment that examines the full range of family needs.
5. Make continuing work with families contingent on their choice and mutual agreement among the family.<sup>63</sup>

In Minnesota and Missouri, families are given a choice of the more traditional investigation or the "Alternative Response." The program seems to be working well and is a promising approach for the future of child protection. Minnesota's 2004 final report on the program states that:

1. Child safety was not compromised by the Alternative Response (AR) to child protection. No evidence was found that this approach led to a decrease in the safety of children. On the contrary, there was evidence that the safety status of children improved during cases in which AR was used and that this was related to increased service provision.

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61. L. Anthony Loman, Address at the ABA Center on Children and the Law-Harvard Law School Joint Conference: Promoting Children's Interests: Preparation, Practice and Policy Reform (Apr. 14, 2007) (papers and reports available at <http://www.iarstl.org>).

62. *Id.*

63. L. Anthony Lohman & Gary L. Siegel, *Alternative Response in Minnesota: Findings of the Program Evaluation*, 20 PROTECTING CHILD. 78 (2005), <http://www.iarstl.org/papers/ARinMNfromProtectingChildren.pdf>

2. Families who received the AR approach were less likely to have new child maltreatment reports than control families that received a traditional investigation.

3. While the initial cost of AR in services provided and worker time was greater than in traditional CPS interventions, it was less costly and more cost effective in the long term.<sup>64</sup>

When CPS opens a case, it is critically important that they engage in a careful assessment of the entire family. Too often the underlying problems, strengths, and weaknesses are not understood before a treatment response is recommended. The U.S. Department of Health and Human Services (“HHS”) Child and Family Service reviews found that agency risk and safety assessments in twenty-two of thirty-five states did not capture the underlying family problems.<sup>65</sup> Approximately one-third of cases are repeatedly referred to CPS, suggesting a revolving door exists for the most intractable of cases.<sup>66</sup> By the time there is decisive intervention by the child welfare system, the children are often significantly damaged such that reunification with their family is not possible. Arguably, earlier assessment and intervention is less costly financially.

Consistent with trying to *assess* a family’s strengths, weaknesses, and needs, rather than merely *investigate* them, is the recommendation that any intervention include “one comprehensive, coordinated assessment process that covers the entire family.”<sup>67</sup> This is one of five principles that guided the W.K. Kellogg Foundation’s Families For Kids (“FFK”) Initiative in the early 1990s. The goal of the FFK Initiative was to support and advocate system innovations to promote a more family-friendly child welfare system for children placed in foster care, with reform flowing from a broad, community-based leadership. The five FFK principles are relevant and still valid for today’s challenges and the recommendations of this Article:

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64. L. ANTHONY LOMAN & GARY L. SIEGEL, INST. APPLIED RESEARCH, MINNESOTA ALTERNATIVE RESPONSE EVALUATION: FINAL REPORT vi (2004), <http://www.iarstl.org/papers/ARFinalEvaluationReport.pdf>.

65. CHILD. BUREAU, U.S. DEPT. OF HEALTH & HUM. SERVS., GENERAL FINDINGS FROM THE FEDERAL CHILD AND FAMILY SERVICES REVIEW (2004), <http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/genfindings04/genfindings04.pdf>.

66. *Id.*

67. Donald N. Duquette et al., *We Know Better than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 98 (1997).

1. Comprehensive family support to help families (including birth, foster or adoptive families) stay together and meet the challenges of everyday life.
2. One comprehensive, coordinated assessment process that covers the entire family.
3. One consistent caseworker or casework team throughout the intervention and placement process.
4. One stable foster home placement in the child's community.
5. One year, at most, until placement in a permanent home.<sup>68</sup>

At the thirtieth anniversary symposium, Professor Kathleen C. Faller of the University of Michigan School of Social Work reported on the "glimmer of hope" that careful family assessments can offer to child welfare, even when dealing with the most difficult cases.<sup>69</sup> She described a model intervention program funded by the Hasbro Foundation in which careful assessments resulted in more targeted interventions and better results than the control groups.<sup>70</sup> In Dr. Faller's evaluation of the program, the early assessment and comparison groups had open CPS cases (thirty-three percent) and court involvement (thirty-three percent) at the same rate.<sup>71</sup> But termination of parental rights happened in thirty percent of the early assessment cases versus fifty-two percent of the comparison group. Re-reports to CPS happened in forty-four percent and 68.8% respectively. Thus, early and thorough assessment defining the underlying family problems can help stabilize, strengthen, and preserve the family. You must define and understand a problem before you can respond to it.

Interventions should focus in the first instance on removing the danger, not the child. The current policy privileges foster care and encourages out-of-home placements rather than encouraging more creative and more family-based solutions.<sup>72</sup> Federal funding must change to allow states to develop more careful assessments

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68. *Id.*

69. To listen to the audio, view the video, or download Dr. Faller's powerpoint slides, see the University of Michigan Journal of Law Reform, <http://students.law.umich.edu/mjlr/prospectus/panel1.html>.

70. *Id.*

71. *Id.*

72. See generally PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE (2004) available at <http://pewfostercare.org/research/docs/FinalReport.pdf>

and a broader range of interventions that protect and provide services to children at risk—but without removal. The Pew Commission on Children in Foster Care<sup>73</sup> and the North American Council on Adoptable Children, with other advocacy groups in the *Partnership to Protect Children and Strengthen Families*, are calling for a radical change in funding for child welfare to flexible, dedicated dollars rather than the vast majority of federal funds being an entitlement for out-of-home foster care.

In the future, the federal government will relax its grip on child welfare law and policy and allow for more local flexibility and innovation. Vivek Sankaran's article in this symposium issue, *Innovation Held Hostage*, argues that the federal government domination of child welfare law and policy is an aberrational involvement into the family law field traditionally the province of the states and that this domination has stifled states' flexibility and creativity to the detriment of the children we are trying to serve.<sup>74</sup> Federal control should be limited, he argues. Leaving the states with flexibility to respond to local conditions and resources with creative programs is the key to success.<sup>75</sup>

Finally, the child protection response of the future will depend on a high caliber workforce. The profession of social work should reassert its leadership in this dimension, after having abdicated it in the past three decades to doctors, lawyers, and judges.<sup>76</sup> The federal government, many states, and the Child Welfare League of America, among others, have recognized the need for a stable and sophisticated workforce if children are to be well served.<sup>77</sup>

#### *D. Formal Legal Process Will Rely More on Problem-solving Approaches that Include the Entire Family*

##### 1. Let's Work this out Together

Many commentators criticize the U.S. approach to child protection as too adversarial, encouraging conflict rather than

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73. Pew Commission on Children in Foster Care, <http://pewfostercare.org/> (last visited Aug. 29, 2007).

74. Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281 (2007).

75. *Id.*

76. MYERS, *supra* note 14, at 185–89.

77. U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO-03-357, CHILD WELFARE: HHS COULD PLAY A GREATER ROLE IN HELPING CHILD WELFARE AGENCIES RECRUIT AND RETAIN STAFF 1 (2003), <http://www.cwla.org/programs/workforce/gaohhs.pdf>.

collaboration and defensiveness rather than open cooperation.<sup>78</sup> Much of the adversarial tone comes from our reliance on mandatory reporting and confrontational investigation as our case-finding mechanism. No matter how skilled the child protection worker, the investigation comes across as a fault-based, blaming inquiry. Of course, the adversarial character increases as a case reaches the legal system. Our system also focuses narrowly on the immediate family in child welfare proceedings. There is a strong body of support for the proposition that the extended family should be encouraged, engaged, and empowered to provide for children at risk of foster care.

Professor Coupet's article criticizes our rights-based approach where children's interests are framed as a matter of competing rights of adults.<sup>79</sup> Clare Huntington also criticizes a rights-based approach and warns against the trap of ever-greater emphasis on competing rights.<sup>80</sup> "No amount of more careful calibration of those rights will solve the problems facing families in the child welfare system. We need to shift our focus away from rights and toward problems."<sup>81</sup> Huntington urges use of family group conferencing and similar approaches as more effective at protecting the legal interests of both children and parents and in resolving the underlying issues.<sup>82</sup>

In the future, the child welfare system will have changed to be less confrontational, employing a more therapeutic, problem-solving method that engages the entire family and other individuals in children's informal networks who could provide assistance to the child and family. People who know the child and who can be resources for him should be engaged in the problem-solving process so long as it is voluntary and agreeable to the legal parents. Attorneys would be available for parents to consult as to their rights so as to assure that cooperation at this stage is truly voluntary.

Further, the various experiments in non-adversarial case resolution ("NACR") will slowly make inroads to changing the paradigm in these cases to a more cooperative and positive approach. The approach will extend beyond innovative, pilot programs of the sort

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78. See, e.g., NEIGHBORS *supra* note 53; LINDSEY, *supra* note 49. See *supra* text accompanying notes 47–62.

79. Sacha M. Coupet, *Neither Dyad Nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77 (2007).

80. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

81. *Id.* at 699.

82. *Id.*



sponsored by pioneers such as the Casey Family Programs to become a mainstream method of child protection.<sup>83</sup> Rather than be seen as an add-on to child welfare practice, as it is still perceived in many places, it will be an accepted part of a sophisticated practice. The NACR processes will work better, achieve better outcomes faster, and divert cases from formal court processes, all at a reduced cost.

Even when the authority of the court is sought, the court will make use of NACR mechanisms in the first instance.<sup>84</sup> The trend in America away from trials and toward alternative approaches to resolving disputes will continue in child welfare cases. Only two percent of cases filed in the federal system actually go to trial.<sup>85</sup> The others are resolved through some companion process of negotiation, mediation, arbitration, or the like.<sup>86</sup>

*E. There Will be Less Reliance on the Courts, With Application to the Courts Only Where Coercive, Involuntary Action is Required to Protect the Child or to Protect Parents and Children from an Overzealous State Intervention*

1. Reserved for the Most Intractable Cases

With improved national policies supporting children and families and a problem-solving emphasis in child welfare, child welfare in thirty more years will see less reliance on the courts than today. Parties will apply to the courts only in circumstances where coercive, involuntary action is required to protect a child or to protect parents and children from an overzealous state intervention. The agency may file a formal child protection petition to protect the child, whether the child is removed or not. The family court, however, will not be relied upon for routine case monitoring as it is currently.

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83. Casey Family Programs, <http://www.casey.org/Home> (last visited Aug. 29, 2007).

84. For a description of the range of non-adversarial case resolution mechanisms commonly in use, see generally Donald N. Duquette, *Non-Adversarial Case Resolution*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES 349 (Donald N. Duquette & Marvin Ventrell eds., 2005).

85. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. of Empirical Legal Stud., November 2004, at 459-570, available at <http://marcgalanter.net/Documents/papers/thevanishingtrial.pdf>

86. *Id.*

A large percentage of cases will be resolved, and resolved better and less expensively, using these more expansive NACR mechanisms,<sup>87</sup> as urged by Coupet and Huntington. But, at some point in the process, due process and fairness require that a litigant be able to apply to authority—to the court—for resolution of issues that remain in conflict. The application to the court should remain “rights-based.” The adversarial system is well-suited to resolving conflicts when differences regarding the true facts of a child abuse or neglect case, or the differing views of the proper response to a family’s child protection problems, are irreconcilable. Due process will still require access to a full and fair and probably adversarial hearing when the non-adversarial approaches fail to resolve matters. The entire scheme presented in this paper favors a non-adversarial, problem-solving approach, but sometimes reasonable people differ and a knock-down, drag out fight over facts or the law, before a fair and objective judicial officer, is required.

Not now, but in a decade or two, the statutory definition of child maltreatment or parental unfitness, which sets the jurisdictional basis of the state court, will be more specifically and narrowly defined. Progress on reducing poverty, assuring minimal supports to families, and realizing a more supportive, less adversarial approach to child protection will be required to set up the conditions favorable to a more precise and less discretionary definition. Similar cases should be addressed in a similar fashion throughout a jurisdiction and more precise legal definitions are required to achieve that jurisprudential goal. A narrow definition will also ensure that court is resorted to only in limited circumstances.

Other elements of due process will continue to be refined by legislation and litigation. Outside of a court’s ability to enter short-term emergency protective orders for a child, specific findings of unfitness will be required as to each parent. Standing at the adjudication stage of the child protection proceedings will be limited to legal parents, the agency and the child. If the matter is adjudicated, that is, once there is a finding of parental unfitness, other concerned persons will be allowed to participate in the court process.

The child welfare court of the future will remain a specialized family court. However, it will address issues in a different way than is the case currently. Cases will be brought as they are today by petition to take temporary jurisdiction over a child in order to protect the child. They will also proceed as they do currently from petition

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87. *Id.*

to pretrial to adjudication to disposition to a review process. But the court will also entertain other legal actions related to the child's welfare, such as guardianships, alteration of divorce child custody orders, paternity, child support, adoption, and enforcement of legal rights of the child and family as to education, health care and government services. It will be extremely important that the concept "one family, one judge" be fully implemented since many of the legal actions in child protection will go well beyond the core child protection process as we know it.<sup>88</sup>

Notably, "therapeutic" or problem-solving courts in which the judge serves as a member of the case team are problematic and probably should not continue into the future. Professor Ramsey points out that in the so-called "therapeutic courts":

The judge's goal goes beyond effective management. The goal is "to make the emotional life of families and children better." Under this approach: "[t]he legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court's attention in the first place."<sup>89</sup>

Judges in problem-solving courts are expected to eschew the traditional judicial role of a "restrained and disinterested umpire" and instead be actively involved in identifying and permanently resolving the problems that caused court involvement.<sup>90</sup> The idea of regular and persistent attention with a team of interveners and an authority figure in charge may be a good one, but this approach could be implemented in another setting with an authority other than a judge. We are asking judges and courts to serve a function for which they are not suited. Courts should do what courts are set up to do and that which no other institution can. That is, courts should fairly adjudicate legal rights and interests.

Justice Bobbe Bridge challenges us to focus on the child in these proceedings, to keep their interests front and center.<sup>91</sup> Our system

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88. See *infra* Section 8 for a discussion of the breadth of legal actions that may be required in service of a child and her family.

89. Ramsey, *supra* note 28, at 25 (citing Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 *FAM. L.Q.* 333, 340 (2003)).

90. Donald J. Farole, Jr. et al., *Applying the Problem-Solving Model Outside of Problem-Solving Courts*, 89 *JUDICATURE* 40, 41 (2005).

91. Bobbe J. Bridge, *Reflections on the Future of Child Advocacy*, 41 *U. MICH. J.L. REFORM* 259 (2007).

should try its best to nurture and protect children in the more cooperative and less invasive ways discussed previously in this Article.<sup>92</sup> But once a child is involved in the court process, judges and others should focus closely on the child's legal rights and needs. Children should be present in court whenever possible and heard according to their age and maturity. The slogan we hear today, "Nothing about us, without us" will become the standard practice in the future.

Judge Eugene Arthur Moore uses the story of Nathaniel Abraham to frame the central debate in juvenile justice today—the tension between a "get tough" or a rehabilitation approach.<sup>93</sup> Consistent with the first four dimensions of the reflections in this Article, Judge Moore emphasizes that juvenile justice is not only a matter for the courts, but also for the entire community. The rehabilitative ideal of the original juvenile court will win out over the next thirty years but only if there is a successful partnership with the rest of the community. Otherwise, if troublesome kids are merely "sent off" to juvenile court with no significant investment in youth, we will continue the harsh and non-productive responses of the "get tough" movement.

Communication in child protection cases will continue to improve. In the future, agencies, courts, and all the professionals involved will rely on electronically-shared, but protected, information. As is the case with some jurisdictions now, all reports and pleadings will be electronically filed with the court and litigants. Some court hearings will require live appearance by the participants, but it will be common for persons to appear for some hearings via teleconference or web cam or its equivalent. All participants will be able to see one another and the court will be able to see and hear all. Travel time and waiting time will be reduced dramatically. The children too will appear sometimes live and sometimes electronically.

Courts will also be presumptively open to family, to neighbors, to the public and the media. The public needs to know about the important business conducted in family court, and the court, agencies, and other professionals need the accountability that transparency brings. There will be occasions in which the courtroom should be closed, such as during the testimony of a very young child, or when the specific identity of a child or family

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92. See *supra* Section 1, 2.

93. Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, 41 U. MICH. J.L. REFORM 215 (2007).

should be protected. But those would be exceptions to the general practice of open courts.

How does a court evaluate its effectiveness as an institution? Professor Ramsey cautions that the court's ability to assure child well-being is quite limited because well-being is a composite measure over which the court does not have control.<sup>94</sup> Professor Ramsey states that child well-being may not be a good measure of court performance, and warns that a focus on child well-being invites expansive monitoring and interference in the family.<sup>95</sup>

International norms will influence American law on the rights of the child. Bernardine Dohrn presents a view of integrating human rights norms with children's rights.<sup>96</sup> We will indeed see a union of the concept of a child's rights and human rights with the core concept being the dignity of every human person. Jaap Doek challenges the United States to join the rest of the international community by ratifying the UN Convention on the Rights of the Child.<sup>97</sup> America will indeed ratify the UN Convention on the Rights of the Child, albeit with some reservations and within a decade and a half of that, re-establish ourselves as the leading global force for children and their welfare.

*F. Dispositional Orders Will be Based on a Comprehensive Assessment, Minimize the Disruptions to a Child's Life, Generally Provide for More Contact Between Parent and Child, and Rely More on a Cadre of Professional Foster Parents*

1. Now what? Beyond Apples and Chicken Soup

Disposition is the heart of the child protection court process. Once the court has determined that it has the power to act, the disposition frames the remedy. In the future, dispositional orders, and agency case plans, will be based upon one comprehensive assessment that covers the entire family. The procedures identified above that would occur as part of the agency and community process and the more cooperative tone, will make effective dispositions much more likely.

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94. Ramsey, *supra* note 28, at 27.

95. *Id.*

96. See generally Bernardine Dohrn, "I'll Try Anything Once": Using the Conceptual Framework of Children's Human Rights Norms in the United States, 41 U. MICH. J.L. REFORM 29 (2007).

97. Jaap Doek, *The Eighteenth Birthday of the Convention of Rights of the Child: Achievements and Challenges*, 41 U. MICH. J.L. REFORM 61 (2007).

Generally, case plans will be less disruptive of a child's life. We will see child welfare as a surgical procedure that must leave as much of the healthy tissue intact as possible. In-home supervision and services, even though ordered by the court, will be much more common. If out-of-home placement is required, relatives and persons familiar to the child will still be favored for placement. Relative placement will be supported financially and with services by the agency social workers, however, and assistance provided as needed for child management, including, for example, health care and education.

Foster parents are the unsung heroes of the child welfare system. One of the great needs at present is to upgrade the quality of foster parents, the support and training they receive, and the quality of the experience that children have in foster care. A child of the future who requires foster placement is likely to have experienced serious trauma or have serious deficits. Great skill is required to parent such a child. The foster care experience should provide a secure and stable safe harbor for the months or years rehabilitation of the family of origin might take—or until another permanent plan is in place. The foster parents should be adequately paid to provide such care on a full-time basis and be closely supported by the agency. Specialized foster care with professional foster parents will be common, and foster parents will be considered part of the treatment team for the family. They will be selected more broadly and more carefully, trained, and paid accordingly. The child should be in “[o]ne stable foster home placement in the child's community” as the Kellogg Families for Kids Initiative recommended.<sup>98</sup>

When a child is in relative or foster care, the general practice for infants and toddlers will be to provide *nearly daily* contact between child and parent, unless the contact is harmful to the child. Children over age five will still see their parents three to four times per week. Visits will be in the most family-like setting possible and will be combined with hands-on parenting education when that is part of the treatment plan.

In the future, we will have even less reliance on congregate care, such as group homes and institutions. Research is beginning to show that specialized and professional foster parents can provide better results for even disturbed children and at a lower cost.<sup>99</sup>

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98. Duquette, *supra* note 67, at 98.

99. Personal Communication, Richard P. Barth, Dean of School of Social Work, U of Maryland. April 15, 2007.

Professional foster parents in home-like settings will care for children who are today are placed in group and institutional settings.

In an article that demonstrates the advantage of having the academy invested in the child welfare issues, Professor Herring draws from behavioral biology and social psychology and argues that the Multi-Ethnic Placement Act may present a threat to foster children.<sup>100</sup> Herring discusses research indicating that adults seem to favor children with similar facial features.<sup>101</sup> If we want to encourage personal commitment to children in care and cannot find suitable relatives, he argues that race and ethnic matching could be very important, to the level of a compelling state interest—for foster care, but not adoptive placements.<sup>102</sup>

An intense period of rehabilitation of about twelve to eighteen months will remain our policy and practice, but implemented far more efficiently and effectively, in part because of the more careful and comprehensive assessment of the original problems. At the end of the rehabilitation period, the law, enforced by the court, will require a permanency planning hearing, much as we have today, in which the permanent plan for the child is decided.

*G. Permanency and Stability for the Child Will Remain a Centerpiece of American Law and Practice, But More Persons Will Participate in the Permanency Decisions and the Range of Acceptable Permanency Options Will Expand*

1. We Are not Built like a Ship to be Tossed, but like a House to Stand<sup>103</sup>

In the future, there will be expanded permanency options. Stability and continuity of caretakers will remain central to our child welfare policy. Our law and policy will continue to favor the biological legal parents as the long-term placement of choice, but the permanency options and the persons participating in the decisions about permanent placement will expand beyond what is in place now. In addition, the changing realities of the American family will continue to challenge us as to the place of biology, continuity of

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100. David J. Herring, *The Multiethnic Placement Act: Threat to Foster Child Safety and Well-being?*, 41 U. MICH. J.L. REFORM 89 (2007).

101. Herring, *supra* note 100, at 103–09.

102. Herring, *supra* note 100, at 115–20.

103. RALPH WALDO EMERSON, NATURE 61 (Kenneth Walter Cameron ed., Scholars' Facsimiles & Reprints 1940) (1836).

caretaker, and psychological parentage. Long-term foster care will gain favor as other checks on foster care drift become more viable. Concurrent planning, in which an alternative long-term placement is identified early in case the parents fail to overcome the barriers to reunification will be in more widespread use. Our view of permanence will change and that change will be reflected in the law and practice.

Standing will be expanded at the permanency planning hearing and beyond to support this new approach to permanency. Adjudication is a finding of parental unfitness in most state jurisdictions, so, consistent with existing constitutional doctrine,<sup>104</sup> extending standing to other significant persons in the child's life should be permitted. That is, once the court adjudicates the matter, which is a finding of parental unfitness in nearly all states, state laws should permit a broader participation in the court proceedings to take into greater account the needs and interests of children rather than focusing singly on whether the fault and failures of the parents is serious enough to warrant termination of parental rights. From a child well-being perspective, the restorative ideal is a figure that will provide perfect "[c]ontinuity of relationships, surroundings and environmental influence," not necessarily the one whose due process claims over the relationship with the child trump all.<sup>105</sup> At this stage of the child welfare process, when reasonable efforts to rehabilitate the family have failed, it is wise to open the process to whoever is interested in the future of the child so that they might present alternative visions of permanency for a given child. The child will be well-served if the court, agency, and family consider the alternative permanency plan from as many perspectives as possible. Professor Coupet states that:

[I]t bears repeating that once the issue of children's relationship needs and interests is framed a priori as a matter of competing rights of adults, we miss out on an opportunity to maximize the relational richness of children's lives. Even more disturbing are the law's clumsy attempts to resolve the complex connections that children have with significant others that continue to miss the mark.<sup>106</sup>

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104. See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

105. Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 354 (1996) (quoting JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31 (1973)).

106. Coupet, *supra* note 79, at 84.



Today, if a child is not returned to a parent's custody or placed with a relative following a permanency planning hearing, the agency files a petition to terminate parental rights ("TPR"), which, if successful, would lead to possible adoption. In the future, that decision-point will become more complex. The agency may file for TPR, but a grandparent could also file for permanent guardianship or the existing caretaker could file for adoption or guardianship asserting priority of placement based on continuity of care and a concurrent planning agreement. A single judge would preside. Negotiations would be undertaken. If the parent's lawyer felt there was a good defense to TPR, the matter may be litigated. Perhaps permanency planning mediation would be invoked with competing caregivers participating. The child's lawyer will have a view based on the child's wishes, psychological relationship with the competitors, and the child's relationship rights. But there should be a much broader range of options available for the child and a more flexible legal process to get there.

Where the child has a relationship with the parents, an adoption with contact agreement will be an option if approved by the court as in the interests of the child. Most states will have adopted some form of "adoption with contact" in which the child is adopted by one parent or set of parents, but with agreed upon contact with the birth parents or other significant persons in the child's life.<sup>107</sup> The child then has a legally enforceable way to maintain contact with the persons who have been important to the child's life thus far. This could enable a voluntary release of rights. The adults involved in the child's life will also have a contracted right to contact.

Legally secure permanent guardianship would be an alternative to adoption with contact, especially for an older child placed with a relative. Termination of parental rights would not be required. The child could preserve relationships or the possibility of rebuilding a relationship with parents later in life, perhaps in adulthood. The movement toward subsidized guardianships may continue, which removes the child from supervision of the child welfare system and provides financial support.

The law and procedures of the future will reflect the changing reality of the American family and permit creation of legally and psychologically secure placements for a child exiting foster care. The number of recognized "parent figures" may increase in a

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107. Donald N. Duquette, *Establishing Legal Permanence for the Child*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 84, at 363, 367; *see also* CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

child's life.<sup>108</sup> TPR will decline from its place as a favored outcome and adoption will decline as the preferred option for exiting foster care if return to a parent is not possible.

*H. Legal Services for Children and Families Will be Better Organized and Also More Broadly Conceived than Today with Private and Preventive Law Playing a Large Role*

1. Lawyers we Need You. Even Lawyers, I Suppose,  
Were Children Once

The practice of law in child welfare will be dramatically different in the far future. "Child welfare law" will be more broadly conceived than it is today. Private and preventive law, nearly absent from the scene currently, will occupy a large place in the field. The role of the child's attorney will be settled. Legal representation of children and parents will be organized differently with an expansion of specialty offices as encouraged by the NACC Children's Law Office Project. But group practice will not totally supplant the individual practitioner who might do child welfare as part of a broader practice. The field will be more sophisticated with specialty certification in every state and a large number of lawyers in each jurisdiction who are certified or otherwise expert in the field. Each of these changes will be addressed in turn below.

There was a time when many conceived of child welfare law very narrowly, as framed only by the child protection court process, from the filing of a petition alleging child abuse or neglect through disposition and reviews. Today, most of us consider child welfare law as practiced at the present time to be vastly more expansive. Consider the broad range of issues and topics in the NACC "Red Book," mastery of which is required for child welfare law specialty certification.<sup>109</sup> The book covers topics ranging from sociological perspectives on child well-being, medical aspects of physical abuse and emotional abuse, child development, cultural issues, federal statutes and funding streams, constitutional law, ethics, trial practice, and more.

The trend to an even more sophisticated and challenging approach to child welfare law practice will continue. Legal practice in child protection and foster care will be less linear and less

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108. See, e.g., David D. Meyer, *The Constitutionality of 'Best Interests' Parentage*, 14 WM. & MARY BILL RTS. J. 857 (2006).

109. See generally CHILD WELFARE LAW AND PRACTICE, *supra* note 84.

mono-track. That is, it will not be limited to the public law forum of child protection proceedings in family or juvenile court. Even though the overall vision of this piece encourages less reliance on law and the courts, lawyers will still be required at various junctures of the social intervention. Consider some of the informal processes identified above, such as the "Alternative Response" to a child protection referral, or a family group conference or team decision-making process in which custody of a child could be changed or the parents could be asked to commit to invasive treatment or a certain level of government scrutiny. Legal rights of parents and children will be affected. Although as a matter of policy we might advocate for the cooperative and non-adversarial processes, the parties need to know and understand their rights and be prepared to resist an overreaching social agency when appropriate. Resolutions reached in a cooperative and collaborative forum may need to be formalized either by contract or by separate court action. Our delivery of legal services should adjust to these new needs.

Private law, where the government is not a party, will become more important in preventing children from entering foster care and in facilitating their release from care, by becoming more accessible to low-income families. A myriad of issues, including poverty, substance abuse, domestic violence, and mental illness are often the underlying causes of children's removal from their homes. In many of these situations, parents, provided with the right mix of legal advocacy and social work services, will be able to provide safe and healthy homes for children. Middle class people faced with a temporary absence (imprisonment, hospitalization or sabbatical) or otherwise unable to care for their children for a short period of time would make temporary legal provisions for the care of their children. For example, a parent with substance abuse problems may need to enter an in-patient treatment facility and delegate her parental powers to a relative who can temporarily care for her children while she is overcoming her addiction. An aunt caring for a child with serious emotional needs may need to obtain a legal guardianship so that she has the authority to make educational and medical decisions for him. A domestic violence victim may need to obtain a restraining order to keep her and her children safe, and in the interim, may need to locate emergency housing. In each of these examples, legal services, with supportive social work, could likely stabilize the family, eliminate the need for

government child welfare involvement, and prevent the child's removal from the home.<sup>110</sup>

Private legal advocacy of this sort is not currently provided by court-appointed counsel for parents and children but could expedite the exit of children already in foster care who have extended family members willing to provide them with a permanent home. Legal barriers often prevent these placements from becoming permanent and allowing the Family Court and state child welfare agency to close their case. Otherwise the court and agency case remains open and active requiring occurring and require costly monitoring of the family and ongoing court reviews. A grandmother may need an attorney's assistance to fill out paperwork to file for an adoption or guardianship. An aunt may require assistance in obtaining a divorce before the department will consider her as an option. An uncle may need advocacy to get his name expunged from the child protection registry based on an incident that occurred thirty years earlier.

Presently, for low-income families, these legal needs that could prevent foster care placement are rarely met. For parents, legal assistance is available only *after* children have been removed; very few organizations exist that offers parents legal assistance *before* a child is removed.<sup>111</sup> Prior to a crisis, parents and other caregivers, desperately seeking assistance to address their children's needs, are forced to navigate complicated bureaucracies and court systems alone. Relatives who may be important resources for children face similar obstacles. Very few can afford legal assistance and pro bono legal services to represent them in child protective proceedings do not exist. Court rules and practice often prevent them from participating meaningfully in the child's court proceeding. Instead, they are told by caseworkers to resolve complicated legal issues on their own prior to being considered as placement options. With very few resources at their disposable, many are unable to resolve these legal issues and children remain in care unnecessarily. The ability of relatives who are willing and available to help their kin leave foster care may hinge on the availability of legal assistance. The Children's Law Center in Washington, D.C. has a program

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110. Taken from a concept paper written by Vivek Sankaran and this author for a "Detroit Center for Family Advocacy" intended to divert children from the foster care system by providing legal services and thus empowering parents and extended family to take control of their own children (on file with the University of Michigan Journal of Law Reform).

111. At least two organizations have emerged recently with a similar preventive philosophy, the Center for Family Representation, Inc. in New York, (<http://www.cfrny.org>) and the Family Defense Center in Chicago (<http://www.familydefensecenter.net>).

representing relative caregivers in trying to secure long-term placements.<sup>112</sup> This new concept of preventive private law to empower families to protect and care for their own children outside the formal child welfare system will be piloted in Detroit in the near future as the Detroit Family Advocacy Center.

The seemingly intractable “best interests vs. client directed” debate may take another thirty years to resolve, but we will make progress on settling the role of the child’s attorney. Progress will rest on three prongs. First, lawyers will look to the 2002 version of the ABA Model Rule of Professional Conduct 1.14 for guidance on representing children.<sup>113</sup> Model Rule 1.14 provides helpful guidance if a client (a child or an adult) wants to take a position that is a safety risk or where the client’s capacity to make decisions is diminished.<sup>114</sup> Lawyers regularly represent persons of diminished capacity and the analysis for children would be similar to that for the adult mentally impaired. The lawyer’s duties would be the same for an adult with diminished capacity as for a child with diminished capacity. If the client has diminished capacity for one set of decisions or another, the Model Rule will guide the lawyer. The principle that the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client will continue. Lawyers representing children in the future will celebrate this maturing of the rules of professional conduct because it avoids having a separate kind of lawyer for children than for adults.

Second, within the next decade, more legislatures will follow the direction of New Mexico and set a bright line age above which the lawyer is mandated to represent the stated wishes of the child.<sup>115</sup> Many more children will direct their representation because rather than setting the age at fourteen as New Mexico did,<sup>116</sup> most states will set the age at ten or lower and this trend will continue to 2036.<sup>117</sup>

Third, most states will have devised statutes to accommodate the fact that the youngest children categorically lack the capacity to make significant judgments regarding their future. States will rec-

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112. The Children’s Law Center, <http://www.childrenslawcenter.org/content/view/11/8/> (last visited Nov. 5, 2007).

113. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2006).

114. *Id.*

115. N.M. STAT. § 32A-4-10(C), (E) (2006).

116. *Id.*

117. For the argument in support of a “bright line/two distinct roles” approach, see generally Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) [hereinafter *Bright Line Test*] and Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441 (2000).

ognize that as a scientific matter, infants, toddlers and children younger than five or six are clearly unable to act in their own interests. Here is where the crystal ball gets a bit dim. The possible mechanisms for identifying the interests of the youngest children in child protection litigation and thus for giving direction to their lawyer include: 1) regular appointment of two advocates for the child—a lawyer *and* a guardian ad litem or CASA to direct the child's lawyer (which could be expensive); 2) the much criticized but general practice today of appointing a lawyer as attorney and best interests advocate (guardian ad litem), or 3) no representation by counsel but only by a guardian ad litem or CASA.

Real progress will come in the more careful decision-making that will be required of the lawyer for a child with diminished capacity. Scholarship is called for to elaborate and provide guidance on ABA Model Rule 1.14 and its comments. This will remain a fertile area of inquiry in the near future, but will start from the premise that some children are unable to make judgments about their future and are unable to direct counsel—some after all cannot speak. The inquiry will focus on what should be the means and process for making substituted judgments for the youngest children.<sup>118</sup>

In another development in legal services for children and families, specialty children's law offices will be soundly established around the country, supported by the recently launched NACC Children's Law Office Project.<sup>119</sup> Given the specialized nature of this practice, it is difficult to provide high quality legal services without an institutional structure that allows attorneys to focus their full attention to the practice and gain the professional support available in an organized office. Specialty offices for representing children and parents will be much more common in the future. As modeled by KidsVoice and other groups, such offices will have multidisciplinary staff.<sup>120</sup> However, specialty offices will only be one means of delivery of legal services. Single lawyers, linked electronically and possibly part of a consortium or contract system, will represent children and parents, particularly in less populated and rural areas. Isolation of the solo practitioner will be a thing of the past with the continued improvement in communication and information technology.

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118. *Bright Line Test*, *supra* note 117, at 1249.

119. Nat'l Ass'n of Counsel for Children, NACC National Children's Law Office Program, <http://www.naccchildlaw.org/about/nclop.html> (last visited Aug. 29, 2007).

120. See generally Scott Hollander & Jonathan Budd, *KidsVoice: A Multidisciplinary Approach to Child Advocacy*, 41 U. MICH. J.L. REFORM 189 (2007).

Parent representation at present is generally more disappointing than representation of children. This will change dramatically in the future. Policy-makers, including enlightened state agency leaders, will appreciate the important check and balance function that good parent lawyers can provide. Lawyer training and state law and policy will gradually incorporate the ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases,<sup>121</sup> dramatically upgrading the quality of parent representation. Appellate cases will gradually produce jurisprudence identifying ineffective assistance of counsel in child welfare cases. Specialty law offices for parent representation will grow along with the specialty child law offices. Ideally those offices will represent both parents and children in protection matters, but not on the same case, of course. Delivery of legal services for parents will also be accomplished via solo lawyer appointment or a network of contract lawyers, although like the child's lawyers, the parents' lawyers will be connected and supported via an electronic network. Some will be contract lawyers connected by common data links for consulting and supporting one another.

*I. The Education of Lawyers and Other Professionals in Child Welfare Will Be More Sophisticated and Increasingly Interdisciplinary*

1. It Takes a Team to Safeguard a Child

In the future, our child welfare practice will remain interdisciplinary and collaboration will increase. No single discipline has the skills, wisdom, and expertise to respond to child maltreatment. Each of the professions will rely upon the others in service to children and their families. Scott Hollander of KidsVoice gives us a vision of what a multidisciplinary law practice for children could look like.<sup>122</sup> Other law offices of today rely extensively on other disciplines, particularly social workers.

Each profession will need to understand and appreciate the contributions of the other and the ways in which their various expertise intersect. University education of lawyers, social workers, psychologists, and physicians in thirty years will include the important interdisciplinary perspective on problems of parenting and intervention in the family. Development of truly interdisciplinary

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121. STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006), available at <http://www.abanet.org/child/legalrep-1.pdf>.

122. Hollander & Budd, *supra* note 120, at 191–97.

courses and processes are still quite primitive and need to become more sophisticated. Professional education in the future will impart some of the knowledge base of the other disciplines, but also an understanding of their philosophy and processes. Professionals will learn how to coordinate their discipline's process with the others.

Professionals must also know how to evaluate the competence of the other. Doctors can evaluate doctors and lawyers, lawyers. But it regularly happens that social workers need to gauge the professional competence of lawyers or doctors or psychologists and vice versa, all around. Those skills, generally involving cross-disciplinary consultation with a trusted colleague, will remain essential in our future practice.

Professor Vandervort and Dr. Kathleen Faller's article in this symposium issue models the university approach to imparting these skills to the next generation. Their curriculum sets out the shared history and goals of law and social work, but also the different approaches taken by the two closely aligned professions.<sup>123</sup> The different views and occasional clash of ethical principles should be respected, understood, and harmonized where possible.

Clinical training is the very best way in which the abstract theories of interdisciplinary collaboration can be taught to the professional. So much of the culture and traditions of the other field can be communicated by working on specific cases under supervision.<sup>124</sup> Joint projects requiring students from different professions to solve problems together also allow for socialization and familiarity across the discipline lines that facilitate future collaborations in practice.<sup>125</sup>

One temptation in interdisciplinary collaboration is to try to *become* the other. In our University of Michigan experiences we have had instances in which the law students wanted to do the play therapy with the children and the social work students wanted to parse the law. Each of the collaborating professions must internalize their central professional identity. Be the best lawyer, social worker,

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123. Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121 (2007).

124. Breger & Hughes, *supra* note 13.

125. See generally Melissa Breger et al., *Building Pediatric Law Careers: The University of Michigan Law School Experience*, 34 FAM. L.Q. 531 (2000).



psychologist you can be and do not blur the disciplinary roles. The skills of collaboration are built around that.<sup>126</sup>

A related temptation is to glory in our knowledge acquired from the other disciplines and perhaps to over-rely on the bits of psychology or medicine that we have picked up. Remember the ancient admonition "A little learning is a dangerous thing; Drink deep or taste not."<sup>127</sup> Freud, Goldstein, and Solnit, in the third of their foundational trilogy on child abuse and neglect (also produced in the 1970s), warn against relying on "acquired knowledge" if it would jeopardize a child's health, safety, or future well-being.<sup>128</sup>

Finally, there are significant challenges to the academic, whether a clinical professor or a research faculty, if he or she spends significant effort on interdisciplinary matters. Is s/he fish or fowl? That is, in a university setting where promotion and tenure generally depend upon in depth mastery of a fairly narrow area, knowing more and more about less and less, evaluating the interdisciplinary faculty member is a challenge to the home faculty. Faculties remain most comfortable in their "silos." Despite the strong supportive statements of many faculties about interdisciplinary work, this risk remains an inhibitor for the in-depth interdisciplinary research required, particularly with clinical or applied science faculty. The future requires us to be able to evaluate the quality of true interdisciplinary work and to encourage the younger generation to engage in it.

## CONCLUSION

America has come a long way in thirty years in developing an infrastructure to respond to child maltreatment. States have developed comprehensive child welfare statutes. Courts are more sophisticated. We know more about children and their development and how to guide them through a complex court process. And the lawyers and judges in child welfare law enjoy unprecedented status and sophistication, including a NACC certification

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126. We have had a good number of students over thirty years who switched teams, however, deciding to add a law degree to their psychology doctorate or vice versa, and deciding to attend social work graduate school or go from social work graduate school to law school.

127. Engraved at the north entrance to the UM Law Library Reading Room. See ALEXANDER POPE, *An Essay on Criticism* (Aubrey Williams ed., Houghton Mifflin Co. Riverside ed. 1969) (1711) ("A little Learning is a dang'rous Thing; Drink deep, or taste not the Pierian spring: There shallow Draughts intoxicate the Brain, and drinking largely sobers us again.").

128. JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 54-78 (1986).

available in a child welfare law specialty recognized by the ABA. Yet, from the vantage of today, some of the past policy choices have been missteps. Certainly the failure to invest in our children or to provide minimal supports to family life has been a monumental disappointment and tragedy for many. Are America's children better off? Nearly all commentators express disappointment in America's failing child welfare system. It is broke and we must fix it.

We face many challenges in child welfare over the next thirty years, but I am optimistic that we will meet them. Especially if the forces of child advocacy, education, business, and the national political leadership align to make America a stronger competitor in the global economy, we could see significant policy changes in the United States in the next decade. We could realize a dramatic reduction in the percentage of children that require child protection, thus allowing the system to respond more effectively to the children who still need it.

I am struck by a proverb in an article by my friend, Bernardine Dohrn. She quotes the Haitian novelist Edwidge Danticat who says, "*deye mon gin mon.*" "Beyond mountains, there are mountains."<sup>129</sup> We had huge challenges thirty years ago, we are facing huge challenges now, and we will confront huge challenges in thirty more years. Let's work hard on child welfare, and let's work together. Our future really does depend upon it.

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129. Bernardine Dohrn, Keynote Address at the Management Information Exchange National Fundraising Conference (July 13, 2006), in *Fighting for and Funding Justice for Children: Networks, Collaborations and Partnerships*, MGMT. INFO. EXCHANGE J., Winter 2006, at 15.

