

HOW CHILDREN'S LAWYERS SERVE STATE INTERESTS

Martin Guggenheim*

I. INTRODUCTION

Those familiar with my views on representing children know that I have long raised arguments against providing young children with lawyers in most kinds of legal proceedings. In what are undoubtedly too many law review articles, I have written about the dangers associated with providing children with lawyers.¹ These dangers include liberating lawyers to argue for results they prefer (whether or not such results comport with what the child would want, what the law expects, or what is best for the child). For the most part, I have tried to ground my opposition to providing lawyers for young children on theory.

Most prominently, I've argued that introducing a randomly assigned member of the bar who is free to determine for herself what position to advocate to a court threatens a balanced application of the rule of law and, at its worst, introduces a troubling degree of arbitrariness which raises profound questions about the rule of law. Many of these concerns are well-rehearsed by now and, in particular, were carefully examined in the important conference held at Fordham University School of Law in 1995, which serves as the foundation for this conference.

My writings have, to a limited extent, influenced the field. My ultimate view against relying on lawyers for children, however, has not only been rejected widely, it has been buried by an avalanche of caselaw, statutes, and

* Fiorello LaGuardia Professor of Clinical Law, New York University School of Law. I want to thank Chris Gottlieb for her careful read of an earlier manuscript and for providing me with the courage to write this article and Sarah Blanton, NYU Class of 2007 for providing excellent research assistance. I am grateful to the Florence D'Agostino and Max E. Greenberg Research Fund at New York University School of Law for financial support.

¹ Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488 (1999) (reviewing JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (1997)) [hereinafter Guggenheim, *Counseling Counsel*]; Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L. J. 299 (1998); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM. L. REV. 1399 (1996); Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIMONIAL LAW. 201 (1995); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Counsel for Children in Judicial Proceedings*, 59 N.Y.U. L. REV. 76 (1984); see also AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, *REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS* (1995).

scholarship. To put it bluntly, an overwhelming percentage of judges, legislators, and scholars disagree with me.²

I am pleased to be a part of this conference and to have this opportunity to expand my focus of concern over providing children with lawyers from the details of the role of lawyers to a consideration of the costs associated with providing them. This article is limited to the subject of representing children in child welfare cases.

I do not think it will surprise many people who are familiar with my work that I have long had an axe to grind concerning lawyers for children based on matters having little to do with theory. Given that one of the explicit inquiries for this conference is on the political impact which lawyers for children have had (and are having), I think this is the right time for me to reveal what I have thought for more than thirty years as a practicing lawyer: Far too often, I don't like the things children's lawyers do in child welfare cases. Even worse, I believe the very existence of a children's bar in child welfare cases has adversely affected poor families, including children. In this article, I want at a minimum to offer the possibility that state officials are enamored of a children's bar because it advances state's interests at the expense of the well-being of children and their families who are exposed to child welfare practice.

This is, I recognize, a strong indictment which will be met with derision and rejection. So, I hope it is possible to blunt this critique in two ways. First, I want to make clear that there are countless children's lawyers who have done important and valuable things for their clients. I also recognize that virtually all children's lawyers have good intentions. Good intentions, however, even good effects in individual cases, may be perfectly consistent with my belief that children's lawyers have advanced state interests at the long-term cost to children of vulnerable families.

Second, I ask the reader to consider my views, not in an accusatory tone, but as speculative. All I ask at this point is for the reader to accept the possibility that the children's bar has been used by state officials to advance interests which are not good for children. By suspending an ultimate assessment of the truth, I hope to make it possible for advocates of children's representation to embrace the possibility that their movement has been seized by those in power as a device to aggrandize state power over the lives of the poorest and most vulnerable families in American society.

In this article, I will recount the history of child welfare practice in New York City. I do this because it is a history I know best, having practiced there since I graduated from law school in 1971. I also believe this history is pertinent to developments in many other parts of the United States. Part II will recount a history of children's representation in child welfare cases in New York City which will be compared with the history of parental representation in the same city in Part III. In Part IV, I will explore the roles that state officials expect from lawyers for children. The final two sections will analyze how "child welfare" has come to be defined in the United States and, in Part VI, I

² My views have nonetheless had some impact to the extent there is now widespread agreement (at least in the theoretical literature) that there is reason to be concerned with lawyers having too much freedom to choose the positions to advocate.

will discuss what the state has to gain from being able to publicly proclaim its commitment to ensuring legal representation for children in child welfare cases.

II. THE HISTORY OF CHILDREN'S REPRESENTATION IN CHILD WELFARE CASES IN NEW YORK

Since the inception of the modern child welfare system in New York, the authorities responsible for designing the legal services delivery system have ensured that children in New York City are represented by a well-funded law office which employs full-time staff attorneys with expertise in child welfare practice. In particular, in the same year that New York overhauled its child welfare and juvenile delinquency statutes and created a state-wide Family Court with jurisdiction over virtually all children's related legal matters,³ state officials provided funds for Charles Schinitsky to open the first children's law office in the nation.⁴

Schinitsky founded the Juvenile Rights Division ("JRD"), a part of New York's Legal Aid Society, in 1962. JRD is among the best known offices devoted to representing children in child welfare proceedings and is well known in part because so many children's advocates around the country have worked there at one time or another. Few could disagree that it belongs on a short list of the most important offices of its kind in the country. Jane Spinak also has contributed to JRD becoming a familiar institution nationally because of her article in 2000 in the *Family Law Quarterly* which not only described the history and legacy of JRD but also catalogued her efforts for several years in the 1990s to reshape JRD when she was its Attorney-in-Charge.⁵

Like more than a thousand lawyers, I began my first job as a lawyer immediately after law school at JRD.⁶ I am proud to have worked there and consider the office as an important pioneer in advancing the rights of children accused of criminal wrongdoing.

JRD began five years before the Supreme Court held in *In re Gault*⁷ that indigent accused juvenile delinquents had a federal constitutional right to court-assigned counsel. Indeed, the fact that the office was successfully representing children in juvenile delinquency proceedings before the Court decided *Gault* directly contributed to the result in *Gault*. Schinitsky's pioneering work as JRD's founder and first Attorney-in-Charge, in creating the first juvenile defender law office in the country, was prominently cited in Justice Fortas's

³ See Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497, 498 n.4 (2000).

⁴ *Id.*

⁵ *Id.* This Article will, at times, be implicitly critical of the management at JRD after Charles Schinitsky retired as its founding attorney-in-charge in 1982. I want to make clear that I believe that Spinak, who briefly headed JRD while on leave from her teaching position at Columbia Law School, did an outstanding job trying to improve JRD. Any shortcomings in her efforts to radically reframe JRD's efforts were the result of the complexity, even impossibility, of the task. They were not due to any lack of desire or ability.

⁶ Spinak has called the office, with some justification, "one of the best law offices representing children in the country." Spinak, *supra* note 3, at 503-04.

⁷ 387 U.S. 1, 42 (1967).

majority opinion in *Gault*⁸ as important evidence that juvenile justice was compatible with accused delinquents being represented by dedicated defense lawyers. Schinitsky's *amicus curiae* brief successfully demonstrated that lawyers for children were compatible with a successful operation of juvenile court, countering the argument by the Ohio Association of Juvenile Court Judges, among others, that children's lawyers would interfere with the core purposes of juvenile court.

As Professor Spinak explained, the JRD organization that I joined in 1971 never used "[t]he guardian ad litem model pursued in some other jurisdictions."⁹ Instead, we were defense lawyers fighting what we conceived to be the state's efforts to interfere with the freedom of our clients to live the life they chose.¹⁰ Delinquency cases were not the exclusive work on our docket. We also handled incorrigibility cases ("Persons in Need of Supervision").¹¹ However, we did not actually distinguish these cases from delinquency matters. In both kinds of cases we were defense attorneys representing a client who was accused of engaging in offensive conduct. More than ninety percent of our caseload was comprised of a combination of delinquency and incorrigibility cases. The remaining number of cases involved child welfare matters in which we represented children who were the subject of the proceeding, but were not the accused party. Instead, the party accused of unfitness was the parent.

Changing times brought changing characteristics to practice at JRD. By the end of the 1970s, at around the time that Professor Spinak was a staff attorney at JRD, only about sixty percent of her cases were delinquency with the remainder involving child welfare matters.¹² The modern JRD statistics are almost the mirror opposite of those when I first worked there. Today, more than eighty percent of the cases involve child welfare and less than twenty percent are delinquency related.¹³ This change had a dramatic impact on the office.

When I began working at JRD, in the very early days after *Gault* reshaped the landscape of juvenile justice, the spirit in the office was of a defense office fighting to keep accused persons (who happened to be young) out of the tentacles of state power. "Winning" unambiguously meant getting cases dismissed, whether clients were guilty or not. I do not want to overstate this position. Not everyone in the office thought or felt this way. But most did. Moreover, the official policy of the office contributed to these sentiments. The required personal interview of applicants for an attorney staff position invariably included a question seeking to ascertain whether the applicant would submit a defense calculated to obtain dismissal of delinquency charges brought against a factually-guilty client, even if that meant that the client would escape help from the court. The correct answer was "yes," and applicants who gave a different answer had little prospect of being hired.

⁸ *Id.* at 41 & n.69; see also *id.* at 37 n.62.

⁹ Spinak, *supra* note 3, at 502.

¹⁰ See PETER S. PRESCOTT, *THE CHILD SAVERS: JUVENILE JUSTICE OBSERVED* (Simon & Schuster 1982).

¹¹ See N.Y. FAM. CT. ACT § 711 (McKinney 1999).

¹² Spinak, *supra* note 3, at 502-03.

¹³ Spinak, *supra* note 3, at 505-06.

But as the center of gravity in the office shifted from criminal defense to child welfare practice, a remarkable transformation of a different sort was taking place. The defense types were rapidly being crowded out by lawyers who saw coercive intervention by the state in the service of advancing children's needs as a good thing to be supported by them. This important shift in mentality played itself out in fascinating ways, at least as I saw behavior in the office changing.

In the early days of my practice there, it was energizing for me to observe my colleagues come back from court feeling beaten up and deeply angry at judges who saw fit to convict their clients and to order them placed out of their home. It was evident that this anger was evenly distributed across cases regardless of the guilt or innocence of their clients. We juvenile defenders took seriously our charge to defend our clients' rights from coercive intervention by the state. We took this seriously even when we recognized that our clients engaged in inappropriate behavior and reasonable people could conclude that they posed a risk to others and to themselves. With the imprimatur of *Gault's* still recent pronouncement that the state's intentions were irrelevant to the question whether young people had the right to vigorous representation,¹⁴ we children's rights advocates happily defeated the state's efforts to help our clients over their objection. Then began a palpable transformation that occurred over the next twenty years or more.

I began noticing how many of my colleagues responded radically differently to judges and court orders depending on the label of the proceeding. Many of the same lawyers who railed against the state's overreaching in their delinquent clients' lives, started considering decisions as victories when their allegedly neglected and abused children were placed into the state's custody. Quite remarkably, at least as it always seemed to me, these same children's lawyers who opposed state intervention when their clients were accused of wrongdoing often actively sought such intervention when their client's parents were accused of being inadequate. I even observed cases where lawyers were representing the same client before the court in two different cases: one a delinquency and the second a child protective case. In both cases, the client wanted only to go home and get away from the court. Nonetheless, the lawyer fought to keep his client out of custody in the delinquency and fought for custody in the second case.

Why is this remarkable? Isn't this exactly the landscape of children's rights advocacy in the United States? Perhaps so many years have gone by that this scheme is too familiar to raise any eyebrows. But I believe it deserves separate attention.

Plainly, the crucial factor that contributed to this rather different reaction is the label of the proceedings. In my experience, many lawyers take seriously the formal distinction involving which party is accused of wrongdoing. When children are accused of wrongdoing, lawyers tend to see their principal function to defend them. However, when the state labels children as 'victims,' their lawyers no longer see a need to protect their clients from the state. Instead,

¹⁴ 387 U.S. at 20-22.

they see a need to protect them from the people whom the state has identified as harmful to their clients.

As obvious and familiar as this goes, it is worth deeper inquiry. This differential set of reactions ignores a principal lesson of *Gault*. *Gault* rejected a jurisprudence based on the theory that children possessed or lacked rights depending on the state's purpose in seeking coercive intervention. It was the state's desire to intervene that mattered, whether for the purposes of helping children, rehabilitating them, or punishing them.

I recognize, of course, that *Gault* formally applies only to juvenile delinquency proceedings. Because of this, I do not make the claim that such differential treatment of cases conflicts with *Gault's* holding. Nonetheless, it remains to be seen why the same lawyer representing the same client behaves so differently when the title of the case changes and the state asserts different purposes in each case.

Gault explicitly rejected the state's claim that its intentions ought to control the degree of process due parties in court, reasoning that the goal of helping children is insufficient to change the nature of the intervention.¹⁵ *Gault's* principal conclusion was that children had the right to be free from state intervention even if such intervention would actually be good for them.¹⁶ That was the radical rule of *Gault*: the repudiation of the Progressive Era concept that the state's purposes were the bases upon which to calibrate due process.

Gault also made a "candid appraisal" of what the juvenile justice system actually does, as distinguished from what its formal qualities may include.¹⁷ This suggests that children's advocates ought to pay closer attention to whether children in foster care are better off than if they had been allowed to remain at home. Richard Wexler, among others, suggests they often are better off kept at home purely because of the harm to which they are exposed to in foster care.¹⁸ The problem with this observation, however, is the impossibility of knowing which children will be safe at home, if allowed to return there, and which would suffer child abuse or other unacceptable conditions in foster care.

Why should children have the right to be left at home, even if their parents may not be very good caregivers? This is the dilemma faced by children's lawyers. Children are inherently vulnerable and require proper care in order to thrive. Some theorists assert that children are always in state custody and we would do well to regard children as having been "assigned" by the state to their

¹⁵ *Id.* at 27-28.

¹⁶ *Id.* at 28-29.

¹⁷ *Id.* at 21.

¹⁸ Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001). ("National data on child abuse fatalities show that a child is more than twice as likely to die of abuse in foster care than in the general population.") (citing U.S. DEPT. OF HEALTH AND HUM. SERVICES, ADMIN. ON CHILD., YOUTH AND FAMILIES CHILD MALTREATMENT 1999, at viii, 41 (2001)). Wexler once warned a Senate committee in testimony that "[f]oster care is not a haven. Often it is not even safe. Most people assume that removing children from their parents means removing them from danger and placing them in safety. Often it is the other way around." S. REP. NO. 104-17, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492 (testimony of Professor Richard Wexler); see also Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 17 (2000).

parents at birth.¹⁹ Others suggest that parents are trustees of children and owe the state the duty of treating children well.²⁰ Under either of these concepts, once we have reason to suspect that parents are not meeting their duty to their children, children's lawyers serve them well by assisting the state in separating them from their parents. This has long been considered the crucial difference between delinquency and child protection matters.

When we are talking only about cases in which children really are at serious risk of harm from their parents, I fully appreciate the importance of protecting that child. The ordinary defense instinct that permits lawyers not to be bothered when assisting a young people win their delinquency cases even when they will likely continue engaging in illegal, dangerous behavior, is missing when representing a toddler whose parent has very likely broken the baby's arm and leg. But the problem is that children's lawyers commonly fail to do a good enough job distinguishing between these serious safety cases (including cases involving severe neglect that exposes children to serious harm), which are relatively rare, and the large majority of cases in which children are ordered into foster care even though they have not suffered, and there is no serious risk of suffering, serious harm.

When, as the record of children's entry into foster care indicates, so many children in child welfare cases are removed from their parents for reasons other than immediate safety, the child welfare system is being used to authorize coercive intervention to advance a child's best interests. Yet that is precisely what *Gault* repudiated. When the state seeks to take children into custody because it believes doing so will be in the children's best interests, the formal name given to the type of proceeding ought not make the kind of difference it has made for children's lawyers. Instead, children's lawyers should be considerably more alert in distinguishing among cases. Those in which children are actually at risk of serious harm may well justify children's lawyers supporting state intervention and removal. But most child welfare cases in which children are removed do not fit this category. When children's lawyers in these majority of cases fail to oppose their clients' removal from their homes, they are rejecting a core principle established by *Gault*.

I prefer to think of a child's right to live with his or her family of origin as something deeper than being about trying to guarantee that they will be raised as well as one might hope.²¹ When and how easily we tolerate state oversight of the parent-child relationship is a deeply political inquiry. For this reason, among others, I would avoid entirely the problematic inquiry of ascertaining the role of a child's lawyer in a child welfare case by the more straight forward argument that there should not be lawyers for children in the first place.

As Joseph Goldstein and his colleagues have explained,²² I would not permit the state to assign a lawyer for a child before the state has overcome the

¹⁹ JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* Ch. 2 (2006).

²⁰ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

²¹ See generally MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 174-212 (2005).

²² JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 139-41 (1996).

presumption of parental fitness that lies at the center of constitutional law of the family.²³ When the inquiry is limited to whether or not a parent is fit, children are merely the subject of the inquiry in much the way the putative victim is in a burglary, robbery or rape case. But putative victims, however much their rights have been insinuated into criminal matters over the past two decades, do not have the right to be represented at the trial phase of a criminal case.²⁴

In all events, to return to the JRD office, despite the changing statistics of the office, by the time Schinitzky retired in 1982, JRD still was primarily a criminal defense office, though a very substantial amount of the work done by the lawyers was in child welfare. By the end of the 1980s, however, the office had become primarily a child welfare office that handled some delinquency cases. A number of factors contributed to this shift. First, jurisdiction over crimes committed by persons under sixteen years old in New York changed dramatically in 1978. From 1962 through 1978, Family Court had exclusive jurisdiction over all categories of crime allegedly committed by persons under sixteen. In 1978, legislation was enacted that authorized the prosecution of the most serious crimes committed by thirteen to fifteen-year-olds as adults in criminal court.²⁵

Even more important changes took place in child welfare over this period. . As the percentages of cases I handled in 1971 attest, child welfare was still very much in its infancy in the mid 1970s. The 1974 federal Child Abuse Protection and Treatment Act ("CAPTA") greatly influenced the growth of child protection practice throughout the country.²⁶ Among the factors fueling this growth was the requirement that states create a child abuse reporting scheme, establish a hotline to which a large number of professionals were required to report all suspicions of child abuse, and create a new corps of professionals who were required to investigate claims of child abuse whenever they were made.²⁷

The amazing growth of the child protection field was also the conscious product of a political choice in the United States which made child abuse a national topic of importance. By the mid 1980s, not only had the number of child abuse prosecutions reached an all-time high in this country, the foster care

²³ *Troxel v. Granville*, 530 U.S. 57, 58, 65-66, 69-70 (2000); see also David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 *Geo. J. Legal Ethics* 103, 125-26 (2000).

²⁴ For the most part, victims play a direct role in criminal prosecutions only after the guilt phase is completed when courts are considering the sentence to impose. At that time, victim-impact statements may be introduced in many jurisdictions. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991).

²⁵ See 1978 N.Y. Laws, chs. 478, 481; N.Y. Penal Law § 30.00(2) (McKinney 2004); see also Alison Marie Grinnell, Note, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 *N.Y.L. Sch. J. Hum. Rts.* 635, 636 (2000); see generally SIMON I. SINGER, *RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM* 1-20 (1996).

²⁶ See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247 (codified as amended at 42 U.S.C. §§ 5101-5107 (1994)).

²⁷ *Id.*

population also soared to record numbers.²⁸ Not coincidentally, so did the number of lawyers assigned by the state to represent children whose parents were in record numbers being accused of raising them inadequately.²⁹

Much more than the caseload statistics changed at JRD from 1971 to 1991. The philosophy, behavior, and persona of the office also changed dramatically over this period. A personal experience in one of my own cases perhaps best captures this change. After working at JRD for several years, I began teaching at NYU in the Juvenile Rights Clinic and continued a very close working relationship with JRD by supervising clinic students that represented JRD's clients in delinquency cases. After representing children for more than fifteen years, I switched my teaching to representing parents in child protection cases. Thus, for the first time in my nearly twenty years of practice, the office in which I first was trained had now technically become an adversary. Although this was technically a characterization of the relationship between a parent's lawyer and the lawyer for the parent's child, I was quite unprepared to discover how literally I came to feel the adversity of the relationship.

One of my very first cases left me shaken over the degree to which the office of my origins had changed its focus. In the first year of the new clinic, we were handling a neglect case in which two children were placed in foster care. The agency directed that our client perform a number of tasks in order to obtain the return of her children. After a few months and considerable progress, we arranged for a meeting of the lawyers in the case to discuss the forthcoming court appearance in the hopes of reaching an agreement.

As is the method of my clinic, I attended the meeting merely as an observer. The student handled everything for the parent. In addition to the student and me, three other persons attended the meeting: the children's lawyer, a social worker and the agency lawyer. I joined the meeting shortly after it began, and watched with admiration as my student made a very strong case for court-ordered return of the children at the upcoming court appearance. One of the lawyers cooperated fully with the student and quickly was advocating for and with us. The other lawyer was opposed to the children's return and fought us long and hard. After about forty minutes, the meeting ended without any agreement, and the student and I left together to begin the process of debriefing the meeting. I began by telling the student how well I thought she performed

²⁸ Although only about 280,000 were in foster care in the United States in 1987, the national foster care population had risen to 491,000 by 1991. See Toshio Tatara, *Some Additional Explanations for the Recent Rise in the U.S. Child Substitute Care Population: An Analysis of National Child Substitute Care Flow Data and Future Research Questions*, in 1 CHILD WELFARE RESEARCH REVIEW 126, 130 tbl.6.1 (Richard P. Barth, et al. eds., 1994); see also Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 138 (1995); Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN 72 (1998) ("The substitute care population increased from 276,000 children in 1985 to approximately 494,000 children a decade later.").

²⁹ Guggenheim, *Counseling Counsel*, *supra* note 1. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247 (codified as amended at 42 U.S.C. §§ 5101-5107 (1994)), which created the first nationwide incentive for appointing representatives for children in all child protective proceedings.

and then commented that the children's lawyer was a terrific helper but that the agency lawyer was one of the most pugnacious prosecutors I had ever encountered. The student was not sure how to respond. But she found a way to politely let me know that I had gotten it backwards: the agency lawyer was the reasonable one; the children's lawyer proved to be our fierce enemy.

III. THE HISTORY OF PARENTAL REPRESENTATION IN CHILD WELFARE CASES IN NEW YORK

Over the forty plus years that JRD has been in existence, its operation has grown considerably. What began in 1962 as a tiny office with a handful of lawyers, became by 1995 an impressively large operation. In that year, JRD employed 130 staff attorneys, attorney supervisors, and attorney managers. In addition, forty-five social workers and seventy-seven support staff worked full-time at JRD.³⁰

JRD staff has always done more than represent individual clients in their cases in Family Court. It also provides training for staff before they are authorized to represent clients directly and seeks to influence developing law by using all of the tools of a strong law office, including taking appeals when necessary, challenging orders at the trial level through extraordinary writs and stays, and filing test case litigation in state and federal court. To accomplish this, at its height, JRD maintained an appeals unit, a writ and stay unit, a special litigation unit, a training unit, a social work unit, and a large pool of paralegals. In 2000, the budget for the New York City Juvenile Rights Division was in excess of \$13 million.³¹

But to appreciate the importance of these facts, this ambitiously funded agency needs to be compared with how state officials provide representation for parents. This contrast could hardly be greater. Although the very report primarily authored by Schinitzky which led to JRD's creation stressed equally the importance of providing adequate legal representation for parents as well as for children,³² New York City officials have, throughout this entire period, refused to create a comparable office for parents in child welfare cases.

Although the attorneys who prosecute child welfare cases and the children's lawyers who represent children in these cases each belong to well-funded offices with support staff and other features designed to ensure high quality lawyering, there has never been a comparable office for lawyers who represent parents. It is important to emphasize this is not for lack of trying.³³ Not only is the kind of service delivery different for parents and for children,

³⁰ Spinak, *supra* note 3, at 505 & n. 40.

³¹ Email to author from Tamara Steckler, Attorney-in-Charge of the Juvenile Rights Division, dated March 24, 2006.

³² Spinak, *supra* note 3, at 498 n. 6.

³³ I spent the better part of my career trying to persuade New York officials to invest in this operation. In 2002, a newly created not-for-profit organization named the Center for Family Representation was officially launched through funds provided by the Annie E. Casey Foundation. Its executive director, Sue Jacobs, and its president of the board, Jane Spinak, have devoted countless hours over the past many years trying to persuade lawgivers to shift its funding from the individual assigned counsel system to a staff law office arrangement. Despite these efforts, among many others, officials continue to refuse to change their ways.

the budget New York has allocated to parental representation is a fraction of what it spends on children's representation.³⁴ The legal delivery system employed in New York City has ensured that most parents are inadequately represented most of the time. Parents' lawyers in New York City have become, almost without exception, lawyers who practice exclusively in the Family Court with no law office of which to speak. . They belong to a panel of attorneys who accept assignment. They are in court virtually every day. But, they do very little out of court work. In particular, they are rarely available to meet with their clients.

In a 1996 New York Times editorial, the Times wrote:

Parents who are about to lose their children because of abuse or neglect are often at a legal disadvantage. Welfare authorities have the legal muscle of the city behind them. The children are generally represented by an experienced Legal Aid lawyer with a support network of social workers. But the parents are generally stuck with harried court-appointed lawyers who are juggling many cases, and who often show up unprepared and late for hearings.

Decisions about the future of abused or neglected children are made in Family Court. The court appoints lawyers for the parents, drawing from panels of lawyers who are screened and certified annually. But these lawyers are often not up to the task. Many meet their clients for the first time just before rushing into court. They know nothing of the family's background and often cannot speak the parents' language.³⁵

This has been true for more than forty years. In 2003, a New York state court summarized New York's failure to provide an adequate legal services delivery system for parents in child welfare cases by finding the

grim reality that . . . indigent adults in the New York City Family Court . . . are at unreasonable risk of being subjected to a process that is neither swift nor deliberate, and fails to confirm the confidence and reliability in our system of justice. This is a direct result of the Legislature's failure to provide adequate compensation to assigned counsel.³⁶

My criticism, however, goes well beyond New York's refusal to provide an adequate hourly rate for the few lawyers willing to join the assigned panel system. The rate was first set at fifteen dollars per hour for in-court work and ten dollars per hour for out-of-court work. The last raise before two lawsuits forced the legislature finally to increase the rates to a reasonable level was in 1985 which was set at forty dollars and twenty-five dollars. For the following nineteen years, that rate prevailed and parents suffered significantly as a result.³⁷ When the rate was finally raised in 2004 to seventy-five dollars per hour for both in- and out-of-court work, the raise was authorized by the legislature only after two courts, including a federal district court, demanded it.³⁸ My

³⁴ In 2001, the combined budgets of the Juvenile Rights Division and Lawyers for Children (which combined represent the overwhelming percentage of children in New York City's child protection system) was in excess of \$24,250,000. In the same year, New York City spent only \$11,370,000 for parents' lawyers, a figure which includes costs for paid experts and court reporters.

³⁵ Editorial, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14.

³⁶ N.Y. County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 399 (2003).

³⁷ *Id.* at 400.

³⁸ *Id.* at 399; *Nicholson v. Williams*, 203 F. Supp. 2d 153, 255-56 (E.D.N.Y. 2002), *question certified by*, *Nicholson v. Scopetta*, 344 F.3d 154 (2nd Cir. 2003).

greater criticism is focused on two features: the refusal to modify the attorney assignment system, despite efforts over many years to make clear why New York's system is inadequate, and the gross disparity between what has been provided for parents and for children.

The most consistent complaint parents in New York City make of the legal delivery system to which they are subjected is that they are unable to speak with their lawyers from one court appearance to the next. For the most part, their lawyers practice as if the courtroom is the most important forum in their cases. They are court-centric in a field which requires excellent lawyering to be focused in very different places.

As a result, what parents need by way of legal representation they are unable to obtain in New York City in all but a very few instances.³⁹ Indeed, state and local officials have refused to fund legal services offices with an operating budget that would permit expansion of their work from the courtroom to the administrative level. They have also refused to provide funds to ensure that special challenges such as writs, stays, emergency appeals, and affirmative litigation are ventured. Instead, New York City officials operate the attorney-assignment system for parental representation in child welfare cases so as to virtually ensure that parents are assigned an attorney who spends almost all of his professional time in court.

In the child welfare field, the really important lawyering activity takes place outside of the courtroom. Successful reunification of foster care children with their parents is rarely accomplished by effective examination of witnesses in the courtroom. Rather, these results are more commonly achieved by creating and developing plans designed to keep children safely at home or to return them home as soon as can safely be accomplished and by pushing hard for the plan's prompt implementation. These plans must be developed out of court in conjunction with, but not constrained by any limitations of, the state's child welfare caseworker. If the lawyer has done his or her job effectively, in many cases, the principal work to be done inside the courtroom is to present the plan to the judge, obtain judicial ratification, and advocate for timely implementation.

Lawyers for parents need to penetrate the administrative world of agency practice and try influencing case plans when they are being shaped. Both federal and state law require that within one month of a court order placing a child in foster care the agency with planning responsibility for the child must convene a planning meeting with the parents and the caseworkers.⁴⁰ The conference sets the stage for all that follows and often is the determinant of whether parental rights will eventually be terminated. The conference will result in the development of a case plan specifying the responsibilities of the parents and the agencies. Lawyers have much to contribute to these meetings. By specifying

³⁹ There are some excellent Panel lawyers who meet with their clients out of court as well as a small number of legal services offices in New York City that handle a tiny caseload of child welfare cases and provide outstanding legal representation. But they are a minority and handle too few cases to make a real difference in the overall picture.

⁴⁰ See, e.g., N.Y. Soc. Serv. Law § 409-e(2) (McKinney 2003) (mandating preparation of case plans by the social services district in active consultation with the child's parent or guardian).

the steps an agency must undertake to reunify a family, a lawyer can facilitate, and perhaps accelerate, the child's return home. If the plans remain vague or boilerplate, as they often do, agencies typically overlook or omit essential services.

Federal and state law also require that agencies conduct periodic case planning reviews.⁴¹ These reviews are essential to the success of reunification efforts.⁴² The case plan is supposed to be tailored specifically to the needs of the family and adjusted as the family's circumstances change. Effective intervention by a lawyer may prove instrumental in ensuring that the family receives the right amount and type of services. Leaving this choice to an overburdened agency all too often results in insufficient services and an inadequate reunification plan.

Given how infrequently courts overrule the agency's assessment of what services are appropriate, it is crucial that parents' attorneys be part of the discussion when that question is still being answered. That is the precise purpose of the agency conference. In my experience, parents' attorneys who participate in conferences commonly have a positive influence on service plans. Once the agency presents a plan to the court, however, it is generally a *fait accompli* because courts too often defer to the agency's social work expertise. Even in the rare cases in which courts are willing to revisit social work determinations, precious time in effectuating the more appropriate service plan has been lost. For this reason, attending agency conferences and actively representing a parent enmeshed in the foster care system is often essential lawyering work.

Despite laws that indisputably entitle parents to be accompanied to case planning and case review sessions by any person(s) of their choice,⁴³ including social workers and lawyers, it is virtually unheard of for parents represented by Panel attorneys to attend such sessions with professional assistance. Many agencies are even unaware that parents may bring lawyers with them, and some have gone so far as to establish informal policies prohibiting such representation.⁴⁴ As a result, parents know only as much about their rights and the level of services to which they are entitled as agencies choose to tell them.

⁴¹ New York State regulations require foster care agencies to periodically document a permanent goal for each child in care. A permanency planning goal must be identified for each child in foster care at each formal case assessment and service plan. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6; *see also* § 428.3(f)(4) (at the initial case assessment, which is to occur within thirty days of the case initiation date); § 428.3(f)(5) (at the time of the comprehensive assessment, which is to occur within ninety days from the case initiation date); § 428.3(f)(6) (at each case reassessment, which must occur every six months). The case initiation date is defined as the earliest of the first day foster care or preventive services are requested, the day a report to the statewide central register of child abuse and maltreatment is determined or indicated, or the date of placement of a child in foster care. § 428.2(a). Federal law requires states to have written case plans for every child in care in order to ensure that an appropriate long term plan is identified for each foster child. 42 U.S.C. § 675(1) (2002).

⁴² *See generally* Subha Lembach, Note, *The Right to Legal Representation at Service Plan Reviews in New York State*, 6 U.C. DAVIS. J. JUV. L. & POL'Y 141 (2002).

⁴³ N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12 (2006).

⁴⁴ It commonly happens that when students in the Family Defense Clinic seek to attend service plan reviews with their clients, the agencies react as if this is unacceptable to them and they delay conducting the conference until they get approval from the agency attorney.

Parents' lawyers also need to pay careful attention to their clients and maintain regular contact with them. Parents need to understand what is likely to happen in their case in the foreseeable future. They need to know what others are saying about them and what they will need to do to regain the trust of the child welfare agency and the court. Parents' lawyers in child welfare cases cannot achieve sustained success without working closely with parents outside of court. An important responsibility of a parent's attorney in child welfare cases often involves delivering what can sound like the same message that the caseworker and the judge have already told the parent: complete your drug treatment program; cooperate with child welfare workers; finish the parenting skills class; etc. Commonly, unless parents do these things, they will not achieve the results they want in court. To be successful, lawyers must find a way to deliver this message so that it sounds and is received differently than when it was delivered by the state agency or even the judge. It must be empathic. It must be heard as though it is being given because the lawyer cares about the client and wants the client to succeed. It must be based on a relationship of mutual respect and trust. This is not achieved easily or without sustained effort.

Most parents of children in foster care need specific services, such as counseling or housing. Yet agencies typically offer parents little help or guidance in obtaining these. Often, a state agency simply hands a parent an address and sends the parent off to find another agency, make an appointment, and wend her way through a maze of confusing requirements. Lawyers and other support personnel working with the parents can and must assist parents when agencies fail this way. This assistance can make the difference between children returning home promptly or never returning to their homes.

All of this means that, to be successful, parents' lawyers must spend many hours of hard work out of court to put together a plan. Unsurprisingly, however, as a consequence of New York's attorney assignment system, about half of the lawyers on the assigned panel submit vouchers in which they charge for less than five hours of out-of-court work.⁴⁵

IV. THE ROLE EXPECTED OF CHILDREN'S LAWYERS BY STATE OFFICIALS

In short, the legal delivery system New York City officials have insisted upon offering parents is blatantly inferior to that provided to children. One might wonder why this is so. After all, if the question were which party deserves the better lawyer, it would be difficult to justify answering that the child does. Parents are the accused, and it is their lawyers that are the defense lawyers with the huge responsibility of marshalling a defense.

If we were contemplating the creation of a legal services delivery system in a world in which none yet existed, one would expect, at a minimum, that officials would strive to ensure that the adult parties were represented by excel-

This occurs, despite unequivocal language in the regulations that parents have the right to attend with anyone they wish. But because the lawyers assigned to represent parents virtually never regard the service plan review as within their sphere of action, agencies almost never experience an attorney who comes to the service review with counsel.

⁴⁵ N.Y. County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 401-02 (2003).

lent counsel. There might be nothing inherently problematic with also providing lawyers for children. But this would likely be regarded as something extra nice, but not essential.

But New York insisted upon staffing attorney positions for children while permitting the parents to go without. An important question is why would this be so? Indeed, it is even fair to wonder how this could be so. The explanation I wish to advance is that providing children with strong legal representation furthers the state's interests in ways that are not advanced when parents are represented equally well. To support this thesis, we will now examine more closely the role the state expects children's lawyers to perform in child welfare cases.

What caused the kind of dramatic change in advocacy in the same JRD office over a fifteen year period as was described earlier in this article? Part of the answer is peculiar to JRD and New York City. But a large part of it is, I believe, an expected feature of children's lawyering in child welfare. This section will first discuss the particular details at JRD and then expand to the country as a whole.

A. How JRD Gradually Became An Office That Tended to Support Removals of Children into Foster Care

There are several prominent reasons we should expect a bias in children's advocacy which supports the state more often than the parent. The most obvious is the role the state expects children's lawyers to perform and will insist upon being carried out. It is, I believe, no accident that state officials and judges have been powerful advocates for lawyers for children in child welfare cases. They had every reason to expect a corps of lawyers who would support the state's interests above all else. For the most part, that is what they got.

A case decided in an intermediate appellate court in New York in the mid 1980s demonstrates the remarkable power courts have to influence the behavior of children's attorneys. In 1984 and 1985, an intermediate appellate court issued two opinions in *In re Jennifer G*⁴⁶ approximately six months apart which had a palpable impact on the behavior of children's lawyers in child welfare proceedings for many years that followed. In November 1984, the court decided an emergency appeal filed by the child welfare agency after a family court judge denied the agency's request to keep two children in foster care pending the trial on the merits. The appellate court reversed the trial court's order which had returned children who were removed on an emergency basis because they appeared at school with bruises.

According to the appellate court, two children were taken into temporary custody by the New York City child welfare agency in June 1984, after the principal of the children's school notified the agency that the children appeared abused when they arrived at the school. When the case came to court, the trial court conducted a mandatory hearing to determine whether to continue keeping the children in temporary custody pending the trial.

⁴⁶ *In re Jennifer G.*, 481 N.Y.S.2d 141 (1984) *appealed after remand* 487 N.Y.S.2d 864 (1985).

At the end of the hearing, the court granted the mother's request for the children's return and issued an order of protection. The trial court found that the evidence did not provide a sufficient basis for concluding that the statutory requirement of "imminent risk to the child's health" was established. The appellate court disagreed, declaring that the "safer course" was to keep the children in temporary emergency care.⁴⁷ The court remanded the case to the trial court with instructions "not to return the children to the mother until an immediate fact-finding hearing to determine whether the children are abused or neglected is held."⁴⁸

As a result, the children remained in foster care from their initial removal in June 1984 through the rest of the calendar year. On remand, the mother entered an admission to child neglect, admitting to having inflicted excessive corporeal punishment on her children. The trial court then heard testimony from two social workers indicating "that the mother is making progress and that she has attended guidance and training programs."⁴⁹ After hearing this evidence, and after the mother's admission to the facts in the petition, the trial court directed that the children be returned to their mother with on-going supervision and an order of protection not to inflict further corporeal punishment on them, pending the final order in the case.

Instead of the children being returned, however, the agency filed another appeal. For the second time, the children were not returned to their mother. Whenever a notice of appeal is filed by the prosecuting agency challenging a trial court order returning children to their parent(s) in New York, the appellate court automatically issues a stay of order pending further order by the appellate court.⁵⁰ In April 1985, the same appellate court reversed the trial court's return order.⁵¹ The appellate court took a dimmer view of the evidence concerning the mother's progress than did the trial judge. Such progress, the court wrote, "does not, without more, justify return of the children to her, pending final disposition of this child protective proceeding, especially since the mental health studies and investigation report have not yet been completed."⁵² Accordingly, the court remanded the case for further proceedings and removed the judge who had now twice erred in the same case, directing that the case be heard before a different judge.⁵³

Were that all there was to the case, it would deserve little comment.⁵⁴ Judges disagree about facts and conclusions of law every day of the week.

⁴⁷ *In re Jennifer G.*, 481 N.Y.S.2d at 142.

⁴⁸ *Id.*

⁴⁹ *In re Jennifer G.*, 487 N.Y.S.2d at 865.

⁵⁰ N.Y. FAM. CT. ACT § 1112(a) (McKinney 1999).

⁵¹ *In re Jennifer G.*, 487 N.Y.S.2d at 865.

⁵² *Id.*

⁵³ *Id.* at 866.

⁵⁴ The case is interesting for reasons beyond my purpose in discussing it. The court's reliance on its own created "safer course" doctrine prevailed in New York for more than twenty years before New York's highest court had its first opportunity to review the standard. (The highest court is virtually never in a position to review intermediate appellate court orders concerning temporary custody). In 2004, the Court of Appeals announced the "safer course" doctrine to be inconsistent with statutory requirements that children be returned home unless their return would expose them to "imminent risk" to their health. *Nicholson v. Scopetta*, 820 N.E.2d 840, 853 (N.Y. 2004) ("The term 'safer course' should not be used to mask a

Moreover, it is not my interest to address who was right. Surely there are cases in which it would be imprudent to return children to parents; and appellate courts exist to correct error.

But what makes this case discussion worthy for purposes of this article is that, in addition to remanding the case with instructions that it be heard by a different judge, the appellate court also removed the children's lawyer because he supported their return to their mother. After the mother's attorney applied for the children's return, the trial judge turned to the children's lawyer to inquire what position he was taking. He requested that the court return the children. Unfortunately (as it turned out), the precise words he used in support of his request deeply offended the appellate court. The children's lawyer told the trial judge that "there is certainly reason to take a risk here" by returning the children to their parent.⁵⁵ The appellate court condemned the children's lawyer for engaging in a "social experiment" which, it said, "should not be conducted at the cost of the well being of the children."⁵⁶ And, because the children's lawyer was willing to experiment in this manner, the court removed him from the case ordering that a new lawyer be appointed.⁵⁷ The removal of the child's lawyer was never challenged by JRD.

The very short opinion raises scores of questions. Was the children's lawyer's mistake acknowledging that there would be risk if the children were returned? Would he have been more effective as an advocate if he denied that there would be any risk if the children were returned? Surely the appellate court cannot imagine that there are many cases in which it would be false to say there would be some risk in returning the children. Or perhaps this was a substantive criticism. The court may have meant that whenever there is any risk (even though almost every case falls into this category), it is error to permit children to live with their parents. (My point here is not substantive. But it is impossible to ignore completely the substantive implications of the court's reasoning).

So, what might the children's lawyer have said instead? Perhaps he should have said, "there was insufficient risk of any danger to the children to warrant their continued removal." It is difficult to believe this would have made the appellate court feel better since the two statements mean the exact same thing. Surely, the court would have been even more upset with the children's lawyer had he argued that the children faced no risk if they were

dearth of evidence or as a watered-down, impermissible presumption." (citations omitted). This heavily skewed doctrine in favor of intervention, combined with the ease with which appellate courts stay trial court orders that return children home, meant that for most of the modern history of child welfare practice in New York City, the overwhelming occasions on which the agency requests a child's removal or opposes a parent's application for return, children remain in foster care. This helps explain why so many studies of New York's Family Court have consistently found that the judges "rubberstamp" agency requests. See, e.g., Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1726, 1729 & n.60 (2000) (reviewing ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999)).

⁵⁵ *In re Jennifer G.*, 487 N.Y.S.2d at 865.

⁵⁶ *Id.* at 866.

⁵⁷ *Id.*

returned. In light of the appellate court's ultimate order, it is clear that the court would have wanted to remove a lawyer who was so inept as to not recognize when there is risk.

In all events, my interest in this case is not in its holding or reasoning, but in its impact on the entire child welfare system. It does not require much of an imagination to consider what the new judge and the new children's lawyer understood their roles to be in the case. But, far more importantly, we should consider the impact of this ruling on the larger picture of child welfare practice in New York City.

First, it should be understood that there has never been a case in which a judge was criticized, let alone removed from presiding over a child protection proceeding, because the judge wrongfully ordered a child's removal. Nor has a child's lawyer ever been rebuked for advocating for the child's removal or continued removal. This, despite the obvious point that removals are "social experiments" commonly conducted "at the cost of the well being of the children."⁵⁸ From this perspective one fully understands that the bias against experiments only works in one direction.

Second, and more importantly for these purposes, consider the impact of this ruling on the office assigned the responsibility of representing children and on the more than 100 lawyers who work there. Unless management handles this matter very carefully and directly, a decision like this can permanently alter the way the lawyers conduct themselves.⁵⁹ Unless management takes a strong public position making clear to judges and lawyers alike that risk is an inherent feature of all child custody decisions⁶⁰ and that children are placed at risk whether they are removed from their parents' custody or permitted to remain there, the implicit substantive announcement by the appellate court will dominate everyone's way of thinking.

Suffice it to say that in the 1980s, the administration heading JRD after Schinitsky's retirement did not publicly challenge the unmentioned premises of *Jennifer G.* and felt little need to clarify with the staff the importance of children's lawyers arguing powerfully for the outcome in any particular case they thought would best serve their clients. As a consequence, rather predictably, JRD's lawyers during these years became ever more supportive of agency requests. (The scenario I described in the first year of my new clinic occurred in 1990).

⁵⁸ See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995).

⁵⁹ To her credit, this decision was condemned by Janet Fink in a Practice Note when she was part of the administration team at JRD. Fink criticized the decision because "the Court's action constituted a significant departure from legal principles regarding protection of the attorney-client relationship thus chilling the independence of the bar by undercutting the ability of attorneys to appropriately represent their clients." Janet R. Fink, Practice Note: *In the Matter of Jennifer G.*—Maintaining the Integrity of the Law Guardian-Client Relationship (unpublished memorandum prepared for the New York Legal Aid Juvenile Rights Division) quoted in Angela D. Lurie, Note, *Representing the Child-Client: Kids Are People Too, An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 223 n.142 (1993).

⁶⁰ See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995).

B. The New York City Experience Is Not Unique

Does the JRD experience indicate any kind of trend throughout the United States? No one, of course, can claim to know what lawyers for children actually do in their advocacy throughout the United States. One is necessarily limited by one's own experiences. Ordinarily, an admirable substitute for personal experience is familiarity with the literature. Regrettably, as is so often the case, those most central to the situation are not accurate reporters of what occurs. This is a phenomenon I've often experienced both with judges who work in children's court and with children's lawyers, many of whom I know personally and well. When I am on panels with them and hear them describe their work and the actions they routinely take, I am sometimes stunned at the dissonance between how they characterize their work and what they actually do.⁶¹ With particular regards to children's lawyers, the one accepted modern dogma is the importance of lawyers seeking the results their clients prefer. Ask most children's lawyers in a child welfare case what they understand their duties to include, and it is rare not to be told that advocating for the outcome desired by the client (at least one over a certain age) is very high on the list.

Yet, my personal experience continues to be very different. As I have previously expressed it:

In my experience, many adults connected with child protective cases treat children's expressed preferences quite differently, depending on what the child says. When children say they want to go home, that wish is often received by adults the same way editors treat a story about a dog biting a man—they aren't going to run with it. On the other hand, when children say they do not want to go home, adults frequently will invoke the child's preference as a crucial factor to take into account. In this sense, children are empowered in an odd ratchet-like manner. When, but only when, they do not want to go home, adults pay serious attention to their preferences.⁶²

Thus, you may forgive me for giving greater weight to what observers say about how the professionals with whom they interact behave than to what the professionals say about their own behavior. Recently, Andrew Hoffman, a lawyer who practices in Massachusetts's Children's Court, reported on practice in child welfare cases there. Writing in 2004, Hoffman observes not only that children's lawyers commonly ignore their client's wishes and advocate what the lawyer perceives to be the client's best interests, but that they demonstrate a powerful bias in favor of state intervention. Hoffman explains that "[t]oo many child advocates are blinded by [their own] preconceived notions" and driven by

⁶¹ Perhaps the most common claim I hear judges make when describing their judicial philosophy is the seriousness with which they consider requests to remove children from parents or to approve non-judicially ordered removals recently made by child welfare caseworkers. Stressing both their appreciation of the constitutional rights at stake and the dangers associated with overreaching by the state, these judges commonly emphasize that they remove children only when absolutely necessary and they return children as soon as things stabilize at home. When I first heard these claims, I could hardly wait to re-appear before the judges I thought I knew so well but who obviously had come to have a change of heart. Regrettably, almost invariably, I would be disappointed to realize that nothing had changed in the courtroom. Over time, I came to understand that professionals (and surely I am comfortable placing myself in this category), too frequently find the need to believe things about themselves which do not fit all that well with the facts.

⁶² Guggenheim, *Counseling Counsel*, *supra* note 1, at 1503 (1999).

the “[f]ear that presumptive reunification will result in wrongful reunification of children with dangerous parents.”⁶³ As a result, he reports in his experience that “[m]any attorneys cannot bear that their efforts might result in wrongful judicial decisions that subject children to neglectful or abusive parents. The potential for their advocacy to place children at risk convinces them to argue their conscience rather than clients’ desires.”⁶⁴

Hoffman recommends that the legal⁶⁵ and constitutionally⁶⁶ based rebuttable presumption in favor of family unification and reunification “should guide attorneys’ decisions regarding advocacy on behalf of child clients.”⁶⁷ He believes too few children’s advocates are guided by this presumption because fighting to keep children with their parents and insisting upon a child’s prompt reunification with her family of origin “demands attorneys’ courage,”⁶⁸ and poses “risk [to] their professional reputations.”⁶⁹

Jennifer G.’s lawyer’s simple advocacy for the return of children to their mother’s custody (advocacy grounded enough to persuade the trial judge) greatly damaged his reputation. From then on, he was branded as an attorney willing to risk the well-being of his clients preferring instead to engage in “social engineering.” He also was a powerful reminder to all of the other children’s advocates in New York City. The clear warning issued from the only appellate court paying attention to what goes on in children’s court was simply too strong not to be noticed:

Watch out how you advocate for your clients. You place yourselves and your reputations at risk if you do anything which appellate courts will construe as placing children at risk. Moreover, if you carefully read the decisions we routinely announce, we do not perceive any serious risk to children being removed from their parents, but we are quick to find substantial risk when children are permitted to remain at home. That is why we automatically impose a stay of all judicial orders denying an agency’s request to remove children or to keep them in foster care.⁷⁰ Even more, unhappy with the legislative language requiring a showing of ‘imminent risk’ of harm before approving removal orders, we prefer our own rule of a ‘safer course,’ by which we mean whenever there are doubts about what to do, the safer course is to separate children from parents until the proceedings are completed.

It is against this background that child welfare cases are prosecuted in most jurisdictions throughout the country. Apart from the advocacy we can expect from children’s lawyers in child welfare cases, however, it is important to recognize how the very fact that the state provides lawyers for children

⁶³ Andrew Hoffman, *The Role of Child’s Counsel in State Intervention Proceedings: Toward A Rebuttable Presumption In Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 356, 358 (2004).

⁶⁴ *Id.* at 356-57.

⁶⁵ *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b (McKinney 2003).

⁶⁶ *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

⁶⁷ Hoffman, *supra* note 63, at 342.

⁶⁸ *Id.* at 352.

⁶⁹ *Id.* at 356.

⁷⁰ It is plain that this insistence upon staying orders that result in children being returned to their parents is not the product of a desire to prevent needless disruptions in children’s lives. Stays are never issued in the rare cases that parents challenge orders removing children from their families. Instead, the practice is part of a mindset that the only kinds of mistakes which need to be prevented are mistakes that would keep children out of state custody.

advances the state's interests. The remainder of this article addresses these points. Section V reveals how "child welfare" as it has come to be defined in the United States serves as a cover for a rich country's refusal to provide support to vulnerable families at levels comparable to those which most other industrialized countries willingly expend. Part VI examines the degree to which the state gains by being able to brag about its commitment to children as evidenced by its insistence that they be represented in child welfare cases.

V. HOW "CHILD WELFARE" MASKS GOVERNMENT'S FAILURES TOWARDS CHILDREN

I have elsewhere recently described how the child welfare system in the United States serves many interests having little to do with children.⁷¹ At the risk of repeating these points, it is important to recognize the way "child welfare" has been defined in this country and how it serves the interests of politicians who are unwilling to support government spending that would meaningfully advance the interests of children.

The history of government's efforts to improve the lives of poor children in the United States over the past forty years has been a history of studiously refusing to do right by those children most in need of outside support. Beginning with the Reagan Administration in 1981 and extending to the ascendancy of the Moral Majority in the mid 1990s, recent Congresses have steadily eroded the basic infrastructure of the New Deal. Not in 100 years has the United States flirted as seriously with principles of small government, laissez faire politics, free market principles, and the associated (but unstated) concepts of social Darwinism. Much of this story is too well known to bother repeating. Congress's elimination of public benefits as an entitlement in 1996 is perhaps the leading example of the change in thinking at the federal level.⁷² The one aspect of this tale which deserves to be highlighted here is the role that child welfare has played in all of this.

The story of modern child welfare begins in the Nixon Administration in the early 1970s. When the modern child welfare system was created in 1974, through the enactment of the Child Abuse and Prevention Act, "child welfare" officially became the business of addressing individual failure in families identified to be failing. This narrowing of child welfare facilitated a shift from a means by which society upholds its responsibility to improve the lives of the least fortunate (children from poor families meet this definition perfectly) to a quasi-police function in which "bad" parents are reported, investigated, and prosecuted for their inadequacy. The point here is not that "bad" parents should be ignored. It is rather that the real story of child welfare has never had very much to do with bad parents. The overwhelming percentage of children who end up in foster care are placed not because their parents are very different from those who get to keep their children but because they proved unable to take care of their children within the difficult circumstances of their poverty.

⁷¹ GUGGENHEIM, *supra* note 21, at 174-212.

⁷² See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, and 42 U.S.C.)

If the proper measure of the effectiveness of lawyering for children in child welfare cases is the degree to which entry into foster care is limited to truly necessary cases involving abuse or other extreme conditions, children's lawyers would receive rather low marks. Even though the word "abuse" is invariably mentioned in connection with child welfare practice, the vast majority of entries into foster care are for reasons unrelated to abuse.⁷³

Entry into foster care is publicly celebrated as a measure of the state's concern for children. But entry into foster care better measures a very different kind of political will. The evidence makes clear that local agencies adjust the amount of removals and the length of time children stay in care based on factors having nothing to do with child protection. Sometimes, local politicians need to prove their toughness, or to show their concern for children. Frequently, they want to divert attention from some failing in a different department in their administration. Even more commonly, media attention on notorious cases creates intense pressure to "err on the side of safety." Furthermore, the disparity of placement rates across the United States can be explained more by looking at the agenda of local government than by looking at what parents are doing. Minnesota, for example, removes more than twice as many children from their families per capita than in Wisconsin.⁷⁴ New York City chose to raise the number of removals between 1995 and 1997 by nearly fifty percent.⁷⁵

The problem with child protection policy in the United States is that it has been used by forces uninterested in marshaling public forces for improving children's lives. The driving goal of child protection policy has been to divert attention from the failure of the state to serve children well. This has been accomplished by creating an aggressive public campaign of child protection, broadly announced by politicians at both the national and state level, as living proof of the enlightened child-centered policies of the United States. The diversionary tactics have been phenomenally successful. Child abuse is widely considered by most Americans as the most harmful and most serious problem

⁷³ Studies have consistently found that the great majority of children in foster care could remain safely at home. Partly, this is because agencies under use preventive and reunification services. Experts estimate that forty to seventy percent of children currently in foster care have not been abused and need not be separated from their families if society sufficiently assisted poor families in raising their children at home. Duncan Lindsey evaluated placements of children in foster care and found that forty-eight percent of the children did not require placement. See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 141, 155 (1994). Instead, poverty is the leading reason children end up in foster care. Studies show that families earning incomes below \$15,000 per year are twenty-two times more likely to be involved in the child protective system than families with incomes above \$30,000. See Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8 *THE FUTURE OF CHILDREN* 88, 95 (1998); LINDSAY, *supra*, at 153.

⁷⁴ See Guggenheim, *supra* note 54, 1725 & n.40 (quoting Richard Wexler, Spies in the Living Room (and other Problems with the Recommendations in "Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative") 16 (1999) (unpublished manuscript, on file with the Harvard Law School Library)).

⁷⁵ See Nina Bernstein & Frank Bruni, *Seven Warnings: A Special Report.; She Suffered in Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at A1; see also *Aggressive Prosecutions: Flooding the System*, CHILD WELFARE WATCH, Winter 1999, at 4.

facing America's youth. It's not just that this claim is false. It's that it is deliberately false.

Child welfare has become an extremely important component of modern government in the United States because it furthers the interests of those who generally oppose spending tax money on children but who need to deflect criticism that they are anti-child. There is an inverse relationship between the willingness of government to make children a prominent focus of attention and the importance of child welfare. The less government is willing to do, the more important child welfare becomes. It was because of the diversionary value of child welfare that it earned such a high place on the agenda of the Gingrich-led Congress in 1997 when the Adoption and Safe Families Act was enacted.

In many parts of the United States, it is very important to politicians to strongly advance a child welfare program focused on protecting children from bad parents. This permits forgiving, if not ignoring, the administration's recent decisions to cut food and after school programs in public schools.⁷⁶ When the administration's opposition to a well financed child care proposal is challenged in the local media, it helps enormously to hold a press conference devoted to safety at home and the efforts child welfare has undertaken to protect children from dangerous parents.

The United States compares very poorly with virtually all nations with which we generally like to be associated. Our infant mortality rate and our refusal to ensure universal health care for children are more commonly correlated with developing countries. Among the industrial nations worldwide, the United States ranks twelfth in living standards among our poorest one-fifth, fourteenth in efforts to lift children out of poverty, and eighteenth in the percent of children in poverty.⁷⁷ This is not simply an accident of fate. Many countries have developed a very different set of priorities and policies with respect to children and families than the United States. Britain, France, Sweden, and Canada, for example, each spend two to three times more on children and families than the United States.⁷⁸

Over the past thirty years, the United States has had a significant rise in the percentages on both ends of the economic scale. We now have unprecedented numbers of extremely rich Americans. But the figures at the bottom of the scale are very ugly. By the beginning of the twenty-first century, the child

⁷⁶ See GUGGENHEIM, *supra* note 21, at 200-01.

⁷⁷ Children's Defense Fund, *Where America Stands* (2004), <http://www.childrensdefense.org/data/america.aspx>.

⁷⁸ See RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 55 tbl.1 (1997).

poverty rate in the United States was seventeen percent.⁷⁹ Since 1969, even as the GNP has risen fifty percent, child poverty has increased by fifty percent.⁸⁰

We compensate for all of this by placing more than 500,000 children into state-supervised foster care, a frighteningly high number.⁸¹ Even worse, we then justify having so many children in foster care as the consequence of a pandemic child abuse problem due to the dangerousness of the homes into which too many children are born. Remarkably, this ignores the straightforward connection between our lack of investment in children and the rate of removal: we remove more children from their homes than other countries because we invest less in child-friendly practices that are universal in many industrialized countries.

This attempt to appear pro-children by removing children from “dangerous” homes also masks the extraordinary degree of social control which child welfare effects on the focused communities that interact with it. The racial disparities in some areas of the United States are so dramatic, they should be prima facie evidence of a flawed scheme. Yet, amazingly enough, those of us who work in the field have become so used to experiencing this that we accept it as just the way it is and as beyond any of our control. The sad fact remains that in both Chicago and New York City, statistically speaking the only families forced to endure the indignity of the child welfare system are brown and black families. Somehow or other, the white children in those cities are taken care of through means other than coercive intervention in their families.⁸²

⁷⁹ Henry Rose, *Retrospective on Justice and the Poor in the United States in the Twentieth Century*, 36 LOY. U. CHI. L.J. 591, 594 (2005) (“Despite these changes to the welfare system, America retains the highest child poverty rate (17.7%) among the nineteen wealthiest countries in the world.” *Id.* (citing Jeff Madrick, *Economic Scene*, N.Y. TIMES, June 13, 2002, at C2)); see also Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 431 n.104 (2005) (“Between 1995 and 1997, the United States’ average child poverty rate was 20.3 percent, compared to 15 percent in Canada and approximately 8.7 percent for all of Europe (which included such lows as 2.4 percent in Sweden and 5.6 percent in France).” (quoting CHILD WELL-BEING, CHILD POVERTY AND CHILD POLICY IN MODERN NATIONS (Koen Vlemminckx & Timothy M. Smeeding eds., 2000) available at http://www.maxwell.syr.edu/news/releases/child_poverty_table.html)).

⁸⁰ See GOLDEN, *supra* note 78, at 68.

⁸¹ According to the Pew Commission on Children, there were more than 523,000 children in foster care in the United States in 2003. See Ranking of Foster Care Population by State (2003), <http://pewfostercare.org/research/docs/Data102705a.pdf>.

⁸² In Chicago, more than ninety-five percent of the children in foster care are African-American. DOROTHY E. ROBERTS, SHATTERED BONDS 151 (2002). In New York City, of the 42,000 children in foster care in December 1997, only 3.1 percent were categorized as “non-hispanic white” by New York City officials. New York City Administration for Children’s Services, *Outcome & Performance Indicators* 81 (1998), http://www.nyc.gov/html/acs/downloads/pdf/stats_status_report1.pdf. In other words, somehow or other, New York City has found a way to maintain a child welfare system for its white population that treats placement in foster care as an extremely rare event. Even with a significant white immigrant population of poor families, New York City places non-hispanic white children in foster care at a rate of less than 3 in every 1000 children. For the rest of the population, the rate soars to 3 in every 100. “In Bushwick, Brooklyn, 20 out of every 1000 children have been removed from their homes and placed in protective custody. In Central Harlem, the rate is 1 out of every 10 children is in foster care. In the Upper East Side of Manhattan, less than one in 200 children are in care.” ROBERTS, *supra* note 82, at 45. New York City has a total population

VI. THE ROLE OF THE CHILD'S LAWYER IN ADVANCING THE STATE'S INTERESTS

What is especially regrettable about how "child welfare" has been misused by politicians in the United States is the degree to which the children's bar in child welfare has been complicit in all of this. Here is where the movement for children's lawyers meets with the regressive child protection practices in the United States over the past generation.

The defining characteristic of the child protection movement is its anti-parent stance. Parents have been cast as the enemy of children while the state becomes the child's greatest savior and protector. This fits very well with a political agenda of small government and a refusal to assist the undeserving poor. The most powerful way to influence the public into believing that children in foster care come from undeserving homes is to over-label their parents as abusers. That strategy began benignly enough in the 1970s, but by the 1990s it was turned against progressive causes.

It is important to acknowledge just how compliant courts (and children's lawyers) have been in all of this. For example, studies have consistently criticized the Family Court judges in New York City for their strong tendency to "rubber stamp" agency recommendations to remove children from their parents.⁸³ It would be odd, after all, to conclude that JRD's advocacy has been irrelevant to this record.

The child welfare and children's lawyer movements meet together because of the state's (and children's advocates') insistence that children be separately represented merely because a petition is filed alleging parental unfitness. Despite constitutionally based substantive rules that require presuming the fitness of parents and placing the burden on the state to prove otherwise, the appointment of separate counsel to the children seems unavoidably to negate this presumption. Consider the structural rules inherent in providing separate lawyers for different parties in the same proceeding. Ethical rules encourage lawyers to presume there is or at some point will be a conflict of interest between the parties.⁸⁴ It is, therefore understandable that many children's lawyers begin their work presuming that their clients' interests clash or will, at some point during the litigation, clash with their parents'. This, in turn, translates to mean that parents are prematurely deprived of the right to make decisions for their children before they have even been found unfit. Instead, those decisions are shifted to experts, agencies, judges, and lawyers. In the process, we lose sight of how opposite this way of thinking is from the rest of our laws and policies.

in excess of 7,300,000 people, of whom approximately fifty-two percent "white." Thus, in a city of nearly 4,000,000 people (speaking only of "whites"), New York has managed to maintain a foster care population of only 1300 (again, speaking only of "whites"). Statistics derived from New York City Administration for Children's Services, *Outcome & Performance Indicators* 81 (1998), http://www.nyc.gov/html/acs/downloads/pdf/stats_status_report1.pdf.

⁸³ See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD WELFARE LEAGUE OF AM., YOUTH LAW CTR. & NAT'L CTR. FOR YOUTH LAW, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 8 (1987).

⁸⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

The agency asks for the child's removal because of a fear that the parent will endanger the child if the child is permitted to return home. In the practical world of many children's lawyers' situations, the lawyer has little more information about the matter than what is presented in court at the time of the removal hearing. The children's lawyer is technically permitted to advocate against removal. But several things are almost certain to happen if the children's lawyer does so advocate. First, as we have seen, the lawyer will be exposed to considerable pressure from almost everyone involved in the case (other than the parent and her lawyer). Overall, the pressure can be overwhelming.

Second, the lawyer will gradually realize that her advocacy will be received differently, depending on which arguments she chooses to make. When she advocates for the result sought by the agency, the chances are considerably greater that the court will enter the order she asked for. When she advocates for the parent's position, she is far less likely to obtain that result. It is hardly a controversial idea that lawyers like to win their cases. Most lawyers, of course, do not get to choose their position once they have taken on a client and therefore do not face the temptation of choosing the position that is more likely to prevail. Lawyers for children are far more likely to feel as if they win most of the time by siding with the agency.

In addition, children's lawyers also get to perform a special role in our culture: that of "hero." Charged with a special duty to protect their "clients" from danger, children's lawyers are rewarded professionally and emotionally when they step forward and argue for intervention to prevent possible future harm. We have not designed or conceived of the children's bar as having been erected to prevent state overreaching. Quite the opposite. The children's bar exists to ensure that all children who need state protection receive it. And sometimes the children's lawyer gets to be the protecting hero.

Finally, the pressure to support the agency is driven by the structure of the relationship between the parties. Wholly apart from the understandable pressure brought to bear on children's lawyers to believe that the allegations against the parent are true, the child's prudent lawyer is also expected to presume there is a conflict of interest with the parent. Hence, the "safer course" is to act as if there is a conflict of interest. The problem, however, is that a substantive conflict between a parent and child exists under the law *only if* parents are unfit. If, on the other hand, the child's lawyer presumed, in accordance with substantive law, that the parent was fit and was in the best position to advocate for her child, then the ethical presumption of a conflict would make little sense. In this peculiar way, substance is impacted by process.⁸⁵

Because children are assigned counsel (even in the absence of proof, let alone a finding by a court of parental unfitness), children's lawyers tend to presume that the parent is unfit. This is why Goldstein, Freud and Solnit got it right in the first place when they argued that assigning a lawyer to represent a child over the parent's objection before a judicial declaration of parental unfit-

⁸⁵ Bring a lawyer into a case for a child and we add a professional who is trained to presume that the child's interests will be separate from those of the parents. This assumption may be semantically different from *concluding* that there is or was a conflict, but the practical effect of the assumption frequently amounts to the same thing as a conclusion that there was one.

ness violated the parent's right to control the upbringing of her child.⁸⁶ The point here is not to re-argue the wisdom of assigning lawyers for children. It is to help us see more clearly how the systematic assignment of such lawyers has impacted the larger field of child welfare.

Because the children's bar is behaving in precisely the way the state officials expect them to, they are embraced by state officials. Lawyers for children may be feisty in various dimensions of child welfare practice, but they rarely attack head-on the imbalances in the system. Lawyers for children rarely publicly oppose the removal of children as occurring too frequently or as being rubber stamped by judges. That kind of criticism seems to be out of bounds for children's lawyers.

Let us consider an important recent challenge to the practice in New York City of unnecessarily removing children from parents who were victims of domestic violence. Beginning sometime in the late 1990s in New York City, child welfare officials decided to charge all parents with neglect or abuse whenever they "allowed" their children to be eyewitnesses to domestic violence. As this played out in New York, countless mothers who were beaten up by men while their children were present ended up as respondents in child welfare cases. Moreover, the policy in most cases was to seek the removal of the children from the parent's home because the parent had demonstrated an inability to protect her children from the dangers associated with observing domestic violence.

After this practice had gone on for several years, a class action was filed by some of the leading parents' lawyers and domestic violence advocates in New York City. Even though the overwhelming number of children were removed from their mother's custody solely because their mother had been the victim of an assault, neither JRD nor any other children's advocacy group saw any reason to challenge this practice (either in individual cases or as a class action). Nonetheless, the federal district court judge assigned to the case saw fit to assign JRD and another office of children's lawyers to represent the class of children. After some internal discussion within JRD about what position to take in the federal lawsuit, JRD became a powerful advocate opposing the practice. JRD's advocacy in the federal case was very effective and clearly encouraged the federal court to declare that this removal practice violated both state and federal law.

After the federal district court judge declared that New York's practice violates the federal constitution and New York law, the Second Circuit Court of Appeals certified several questions to New York's highest court in order to clarify whether these practices violate New York statutory law.⁸⁷ Thus, the only question to be decided by New York Court of Appeals was whether this practice violated state law. I participated in a moot court to help the JRD lawyer who would be arguing the case in the Court of Appeals prepare for her court appearance. She is a long-time friend and is one of a small number of

⁸⁶ See GOLDSTEIN ET AL., *supra* note 22 and accompanying text.

⁸⁷ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 209 (E.D.N.Y. 2002), *question certified by*, *Nicholson v. Scoppetta*, 344 F.3d 154 (2nd Cir. 2003).

lawyers at JRD who have, over many years, spoken with me in critical terms about how JRD lawyers sometimes do their jobs.

She was particularly terrific in the moot court, persuasively arguing that the challenged removals were a clear violation of state law because they failed to meet the rigorous test of involving any "imminent risk" to the child's safety. She also included in her argument a strong condemnation of the "safer course" doctrine, which the intermediate appellate courts had created on their own. After hearing her persuasively explain why this practice is illegal, and why it so badly disserved the needs and rights of children, I thought I would have some fun and pose to her a question I was confident the Court of Appeals would not ask in the actual argument. I asked her to help me understand why, given that JRD was so strongly in opposition to this practice now, had JRD lawyers routinely supported the removals in the actual cases that were prosecuted in Family Court. Even though she had been so eloquent through this point in her presentation, she could do little more than grin at me and take a deep breath.⁸⁸

Children's lawyers who are known as fighters for their clients commonly engage in fights which state officials do not mind. They are far more likely to insist upon keeping siblings together in foster care than in opposing placement in foster care. They are more likely to insist on regular supervised visitation with parents than on pushing for return before the agency believes return is appropriate. They are also more likely to press for "permanence" and be equally comfortable with adoption as with reuniting children with their families of origin.

Even when children's lawyers do fight for children to be able to be returned home, they are far more likely to litigate to obtain reunification services for children already in foster care than to publicly condemn the rate of removals. It is safer for a child's lawyer to complain that the state is not doing enough to assist parents before children will be returned to them than it is to oppose efforts to separate children because of the failure to provide services to keep them there in the first place. Courts, like the appellate court in *Jennifer G.*, simply will not accept advocacy that it conceives as placing children at risk of harm by their parents. But, they do not mind efforts to get the agencies to work harder with parents, particularly when the children are already in foster care.

In addition to ending up with the kind of lawyers representing children which the state wants (lawyers who will not fight the core battles in child welfare), children's lawyers provide a wonderful cover for the unfairness of the system. Against a charge that New York City officials have designed an unfair system, these officials are able to point with pride to the vast resources it expends on children's lawyers. In this way, children's lawyers can be seen as enabling the easy placement of children in foster care ("even their lawyer wants them to be placed") and deflecting larger criticism of child welfare practice. ("We can't be doing things very badly. After all, we provide children lawyers in every case").

⁸⁸ For what I hope are, by now, obvious reasons, it is significantly easier for JRD to join a class action lawsuit challenging a pattern or practice of unnecessary removals of children from their parents than it is to expect JRD staff lawyers in individual cases to oppose particular removals.

These benefits to state officials served by providing lawyers for children have nothing to do with what happens in any given case. Indeed, New York officials have demonstrated very little concern with ensuring that children's lawyers are able to represent their individual clients well. New York officials have refused to impose a cap on the number of cases handled by staff attorneys and force JRD lawyers to handle every case that comes into court. The reason: state officials are not actually interested in children being represented.⁸⁹ Their primary goal is to be able to proclaim that each child has a lawyer.

Government gains from children's lawyers because their support of the system helps secure the state's control. Children's lawyers greatly contribute to the social control of their client's parents, which is too often what lies at the heart of child welfare cases. I have seen far too many instances of children's lawyers sanctimoniously opposing unsupervised visitation or return to a parent because the parent revealed that she smoked some marijuana or drank some beer within the recent past. The double standard by which poor and vulnerable parents are judged and treated is powerfully strengthened by the behavior of many children's lawyers. In my experience, children's lawyers are too comfortable judging and condemning parents for engaging in a lifestyle which has almost nothing to do with the safety of their children. Yet, these lawyers feel privileged to opine on the parents' behavior. As a consequence, social control over the lives of poor people is justified and advanced in the name of children's rights.

Who is better to justify this than a member of the bar assigned to uphold children's rights? In my experience, children's lawyers micromanage the lives of parents to an inappropriate degree, requiring them to prove themselves in ways that sometimes are simply unfair, that often take years, and that are insufficiently connected to children's safety.

The irony in the theoretical arguments over whether children's lawyers should advocate for what their client wants or for what is in their best interests is that were children's lawyers ever to truly become powerful voices for what their clients want, they would become deeply opposed to state intervention. And that would simply be unacceptable. Perhaps this helps explain why children's lawyers are especially defensive when charged with being interventionist or with advocating for the best interests for their clients.

Even when children's lawyers do advocate for what their clients want when their clients have been in foster care for a long time, it should not be ignored the extent to which the children's lawyers are culpable for the children having been in foster care in the first place. An important question is when do we begin to frame the issue around what children want? If we wait until they have been in a stable foster home for five years, although it makes sense to justify demanding a child-centered outcome based their client's experience, we are also papering over the story of how and why they were separated from their parents in the first place. And, on this subject, the children's bar has been remarkably—even if understandably—quiet.

⁸⁹ At any given time, the Juvenile Rights Division may be responsible for as many as 40,000 clients. See Spinak, *supra* note 3, at 505; see also *N.Y. County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 401 (2003).

So *Jennifer G.* helps us understand why children's lawyers tend to remain mute at removal hearings or shift their focus to where the child should live in foster care rather than whether the child should enter foster care in the first place. Again, my point is not that this separate inquiry is irrelevant or that we should not undertake it, it is to stress how statist the support really proves to be. Children's lawyers are remarkably helpful to state officials who wish to exercise broad control over the lives of the families enmeshed in child welfare. At their worst, children's lawyers are just another kind of state bureaucrat interfering with the freedom of poor parents to engage in what our formal laws recognize to be sacred constitutional rights.

I fully recognize that there are countless lawyers who represent children in child welfare cases who are deeply frustrated by a bias against parents and the relative ease with which children can end up separated from their families. I have been contacted over many years by JRD attorneys in New York City who complain to me privately that they wish their office were more aggressive in fighting removals and more pro-family. These lawyers worry about standing out within an organization that monitors their arguments and the reputations they obtain. These lawyers also quite sensibly worry about their effectiveness as children's advocates if they are revealed to the world (and thereby denigrated) to be stealth parents' lawyers titularly representing children.

This is, make no mistake about it, a very serious practical dilemma for many children's advocates throughout the country. These lawyers are concerned both about their colleagues' perception of them and about how judges will receive and respond to their arguments. They fully comprehend that their advocacy is greatly diminished if they are labeled as "political."⁹⁰ And, it goes almost without saying, "political" only runs in one direction. Children's lawyers who almost always side with the agency are regarded as responsible lawyers. Those who almost always side with parents are "political." As a result of all of this, the most effective pro-family children's lawyer must work very hard to avoid making it obvious that her advocacy is the result of any kind of bias in favor of parents.

VII. CONCLUSION

As we begin this conference, I am hopeful that we will question the degree to which providing lawyers to children comes at great cost to other things that should be of greater importance to children. I believe that the traditional understanding of what children's lawyers should do in child welfare cases has—however unintended this may have been—inadvertently contributed to the ever growing number of children in the state's care. Lawyers who really care about children should rethink at a core level who they are and what they are doing.

A separate objection to the proliferation of lawyers for children is the drain it has exacted on the limited pool of professionals interested in the area of children's rights. For reasons that are outside the scope of this article, law

⁹⁰ This again contrasts so strongly with defense lawyers' behavior in criminal cases. Their zealous advocacy on behalf of clients is easily accepted as a necessary component of fundamental fairness. But, again, the criminal defense lawyer is not choosing to be oppositional. The children's lawyer is.

schools have tended overwhelmingly to encourage law students to enter the field by representing children. Many law schools have child advocacy clinical programs focused on child welfare.⁹¹ A much smaller number devote their efforts to representing parents. These new law graduates are encouraged to go forth and spend their good efforts representing children in child welfare proceedings.

One might reasonably think that the rise in lawyers for children in child welfare cases was simply the consequence of this great rise in the number of foster children in the United States over the past generation. But what if it were actually the other way around? What if the rise in lawyers for children is what is actually responsible for the rise in the number of foster children in the United States? What would this tell us about the role of lawyers for children?

For many in government, it is those who are least interested in advancing children's welfare who push "child welfare" the hardest. "Child welfare" as it is practiced in the United States harms some children directly by mistreating too many who pass through it and harms an even greater number who are deprived of a political movement to advance the interests of children in more direct, but more politically difficult, ways. If children's lawyers took this political perspective into account, there would be far greater criticism of child welfare policy from the children's bar than one commonly hears today.

The rules of child welfare insist that all systemic explanations for deficiencies in marginal families' capacities to raise children safely at home are out of bounds for consideration or discussion. We enter child welfare within well defined limits of what is up for discussion. If families need certain basic goods such as income support, better housing, child care assistance, respite care, or the like, they are, for all practical purposes, outside of the field.

The ease with which children enter foster care and the needless time they are forced to endure in foster care should be among the highest concerns of the children's bar. Their clients are very poorly served when we refuse to condemn the true reasons so many children enter the foster care system: the lack of political will to do more to improve the lives of poor children.

The harsh conditions of poverty and despair into which millions of poor children are born are not immutable facts of life. Unfortunately, many of the best and brightest law school graduates who care deeply about children have been diverted from more direct ways to serve children and have been recruited to become part of the child welfare system that does so much harm to them.

⁹¹ I think this is problematic from a pedagogical perspective; but that is an argument better addressed to the clinical law faculty community and will not be expanded upon here.