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**THE OTHER "NEGLECTED" PARTIES IN CHILD  
PROTECTIVE PROCEEDINGS: PARENTS IN  
POVERTY AND THE ROLE OF THE LAWYERS WHO  
REPRESENT THEM**

*Kathleen A. Bailie*

INTRODUCTION

Lily Marlene Hernandez is a twenty-three year old Dominican native and a single mother struggling to raise her sons with child support and public assistance.<sup>1</sup> One evening in January, 1998, after she put her children to sleep, Ms. Hernandez carried her trash down her apartment's cement stairs to the dumpster in a courtyard behind her building.<sup>2</sup> A friend called to Ms. Hernandez from across the courtyard and Ms. Hernandez stopped by the friend's window to chat for a moment.<sup>3</sup> Standing in the courtyard, Ms. Hernandez could see into her kitchen window and, during the half an hour while she was outside, she glanced into her apartment every few minutes.<sup>4</sup> What she did not see, however, turned out to be a painful nightmare for Ms. Hernandez.

While she was outside of her apartment building, one of her sons must have woken up. He walked past a window in the front of the apartment building and caught the eye of a Boston Housing Authority police officer and his partner.<sup>5</sup> Seeing the child, the officers decided to run upstairs and knock on Ms. Hernandez's door.<sup>6</sup> Unable to get inside the apartment through the door, one of the officers retrieved a ladder and climbed into Ms. Hernandez's apartment through her front window.<sup>7</sup> The officers did not ask anyone about Ms. Hernandez or look too extensively for her, for if they had, they would have seen that she was in the courtyard. Instead, the officers called the Boston police and took the children from their home.<sup>8</sup>

Soon after, Ms. Hernandez returned to her apartment to find her children missing. At this point, she was understandably overwhelmed by fear and panic: "I thought I would die. My heart was pounding out of my chest and I couldn't stop shaking."<sup>9</sup> The police told Ms. Hernandez that her children were carted away to the hospital in an ambulance for a routine checkup and that she would not be allowed to

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1. Jordana Hart, *Mother Tells of "Mistake," Nightmare*, Boston Globe, Jan. 8, 1998, at B3.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (quoting Ms. Hernandez).

bring them back home.<sup>10</sup> She drove to the hospital in tears and found her boys; equally terrified, they cried wildly and hugged their mother.<sup>11</sup> Both boys were determined to be healthy and unharmed.<sup>12</sup>

Nevertheless, the police had already filed a neglect report with the Department of Social Services.<sup>13</sup> Accordingly, Ms. Hernandez was instructed to appear in court the next day.<sup>14</sup> Luckily, the court appointed an attorney to represent Ms. Hernandez.<sup>15</sup> Her attorney explained the situation to the judge and Ms. Hernandez was reunited with her children that day.<sup>16</sup>

Ms. Hernandez may have exercised poor judgment when she left her children unattended for thirty minutes while they slept. Nevertheless, this typical story raises questions concerning whether the Department of Social Services acts appropriately in these situations: Does such "poor judgment" justify the state's taking Ms. Hernandez's healthy and unharmed children in the middle of the night? This question is particularly important because most cases do not end as swiftly and painlessly as Ms. Hernandez's case fortunately did.<sup>17</sup> Furthermore, today, child welfare agencies' actions have even more dire consequences for families charged with neglect than ever before.

On November 19, 1997, the Adoption and Safe Families Act of 1997 went into effect across the nation.<sup>18</sup> This federal legislation significantly changed the goals of the child welfare system which, prior to this law, focused mainly on reuniting families. Rather than working to help families stay together or reunite after being separated, this new law directs child welfare agencies to focus primarily on "the child's health and safety,"<sup>19</sup> not on the family as a whole. While this may sound like a laudable goal, this new philosophy may serve to hurt families in poverty who are often the targets of neglect allegations and who may simply need supportive services from the state to help them care for their children. For example, even though Ms. Hernandez's

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* At this hearing, the court would determine whether the children would return to their mother. For a discussion of neglect proceedings, see *infra* part III.A.

15. Hart, *supra* note 1, at B3. Massachusetts has codified an indigent parent's right to court-appointed counsel in neglect proceedings in Mass. Gen. Laws Ann. ch. 119, § 29 (West 1994). If she had not been appointed an attorney, Ms. Hernandez probably would have been unable to adequately present her case to the judge: In court she was panicked and confused and "her limited English impede[d] her ability to follow the swift [court] proceedings." Hart, *supra* note 1, at B3.

16. Hart, *supra* note 1, at B3.

17. The Boston Globe reports that the Massachusetts Department of Social Services removes approximately 8000 children from their homes each year. *Id.* Most of these removals are for alleged neglect. *Id.* Further, unlike Ms. Hernandez and her sons, the vast majority of families are not reunited right away. *Id.*

18. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

19. *Id.* § 101(a)(A).

children were totally unharmed, were adored and cared for by their mother, and were terrified when the police took them from their beds, the Massachusetts Department of Social Services nevertheless reasoned that, “[g]iven that the children were alone, [the Department] clearly acted in their best interests.”<sup>20</sup> Thus, even Ms. Hernandez—who a judge determined should be reunited with her children immediately—is subject to potentially devastating state intervention under this new law.

This Note argues that, in light of the recent change in national child welfare policy away from a pro-family philosophy, parents in poverty who are involved in the child welfare system are in greater need than ever before of competent legal assistance to help them rebuild their families. Part I of this Note examines two pieces of federal legislation that affect families in the child protective system: The Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997. This part examines the different philosophies behind both laws and discusses their shortcomings. Part II introduces the legal doctrine of neglect as it is applied in the child welfare system. This part discusses the problems that families in poverty encounter in the child welfare system and suggests that charges of neglect against poor parents may actually have more to do with their economic status than with their fitness as parents. Part III explains the legal procedures in neglect proceedings. This part also reviews the legal representation currently afforded to indigent parents throughout the country and outlines some of the deficiencies in that representation. Part IV examines why indigent parents are in great need of competent, effective legal assistance in child protective proceedings. Finally, part V offers suggestions to states for how to provide indigent parents with adequate legal representation in neglect proceedings. This part argues that all states should provide indigent parents with a statutory right to counsel. In addition, this part proposes that states should establish and implement a certification program for their court-appointed attorneys to ensure that this right to counsel is a meaningful one. This part concludes by offering suggestions to parents’ lawyers to most effectively implement parents’ right to counsel, thereby ensuring that indigent families in the child protective system are best served throughout the legal process.

## I. FEDERAL LEGISLATION TO PRESERVE FAMILIES AND PROTECT CHILDREN

The state of our nation’s foster care system is among the most heavily-debated issues in the area of child protection. The nation’s interest in foster care is not surprising given that foster care spans so many

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20. Hart, *supra* note 1, at B3 (quoting a Department of Social Services spokeswoman).

widely discussed topics, including abused and neglected children,<sup>21</sup> state intervention,<sup>22</sup> race,<sup>23</sup> poverty,<sup>24</sup> government bureaucracy,<sup>25</sup> and taxpayers' dollars.<sup>26</sup> Most importantly, the foster care system directly impacts the nation's poor children.<sup>27</sup> Continued societal interest in the foster care system is necessary to promote the safety and quality of life of the most fragile of our nation's population.

Children, however, are not independent or isolated individuals but, rather, are members of families.<sup>28</sup> Therefore, any attempt to help children must attempt to help and to heal the entire family. Congress appropriately recognized children's important familial bonds when it passed the Adoption Assistance and Child Welfare Act of 1980 ("CWA").<sup>29</sup>

Congress passed the CWA in response to the mounting criticisms of the foster care system in the late 1970s.<sup>30</sup> At that time, the goal of

21. Not only do children sometimes enter foster care to escape abusive biological parents, but some foster children experience abuse at the hands of their foster parents. See A.B.A., *America's Children At Risk* 51 (1993) [hereinafter *America's Children at Risk*]. For example, recently in New York City, a foster mother was accused of "beat[ing] her two-year-old foster daughter until the girl's eyes were swollen shut." Michael Cooper, *Foster Mother Is Charged in Beating of a 2-Year-Old*, N.Y. Times, Mar. 10, 1998, at B5. The girl also had bruises on her back, arms, legs, and shoulders. *Id.* The foster mother was arrested on charges of second-degree and third-degree assault and for endangering the welfare of a child. *Id.*

22. See Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 Temp. L. Rev. 447, 452-61 (1997) (criticizing when states intervene in poor families' lives and harmfully remove children from their parents).

23. See *America's Children at Risk*, *supra* note 21, at 51 ("African-American children are overrepresented in foster care. In 1989, about 34% of all children in foster care were African-American, although only about 15% of all children in the general population are African-American.").

24. See Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 Ohio St. L.J. 519, 527-37 (1996) (arguing that families in poverty are more likely than other families to be involved in the child welfare system and criticizing states' treatment of poor families).

25. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. Rev. 577, 600-03 (1997) (discussing "child protection bureaucracies" and how overburdened state agencies exacerbate the problems that children experience in foster care).

26. See David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 Loy. U. Chi. L.J. 183, 195 (1995) (stating that taxpayers spend between \$10,000 and \$20,000 for one year of foster care for one child).

27. See *America's Children at Risk*, *supra* note 21, at 51 (stating that poor children are disproportionately placed into foster care).

28. See Appell, *supra* note 25, at 611 (asserting that the child welfare system must come to recognize children as "part and parcel of the family, not as . . . unattached and idealized entit[ies]").

29. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

30. See 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, 122-25 (1995) [hereinafter Guggenheim, *Children in Foster*

foster care was to remove children from any and all seemingly unsafe environments.<sup>31</sup> With this goal, the foster care system eventually grew to where more than 500,000 children were living apart from their families in 1977.<sup>32</sup> Unable to appropriately handle this many children, the foster care system simply shuffled children around from placement to placement.<sup>33</sup> In 1977, in *Smith v. Organization of Foster Families for Equality and Reform*,<sup>34</sup> the Supreme Court expressed concern over “foster care drift,”<sup>35</sup> noting that “many children apparently remain in this ‘limbo’ indefinitely.”<sup>36</sup> Three years later, Congress responded to this pressing concern by enacting the CWA.<sup>37</sup>

Congress passed the CWA to provide children with more permanent placements than foster care permitted.<sup>38</sup> It sought to prevent unnecessary foster care placements, to encourage permanency planning for children,<sup>39</sup> and to reunify families where possible.<sup>40</sup> “[H]eralded by child advocates across the country,”<sup>41</sup> the CWA was based on a “family preservation philosophy”<sup>42</sup> and, thus, actually promoted the rights of the entire family:<sup>43</sup>

This philosophy has as its starting point the belief that a child’s biological family is the placement of first preference and that “reasonable efforts” must be made to preserve this family as long as the child is safe. Where these efforts fail and the child must be re-

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Care] (noting the difficulties that children encountered in the foster care system in the 1970s and discussing federal legislation passed in response to critics of the system).

31. *Id.* at 122; see also Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 889 (1975) (noting that, because physical distance between parent and child prevents a child’s parent from beating her, the predominant approach to dealing with troubled families in the 1970s was to separate the child from the parent). This approach, however, has been criticized for failing to consider damage to the child’s emotional health when she is separated from her family. *Id.*

32. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223, 224 (1989/1990).

33. Guggenheim, *Children in Foster Care*, *supra* note 30, at 122.

34. 431 U.S. 816 (1977).

35. See, e.g., Guggenheim, *Children in Foster Care*, *supra* note 30, at 122 (“The term ‘foster care drift’ was coined to describe the plight of children who spent long periods of time in foster care ‘drifting’ from placement to placement.”).

36. *Smith*, 431 U.S. at 836.

37. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

38. S. Rep. No. 96-336, at 10 (1979), reprinted in 1980 U.S.C.C.A.N. 1448, 1459.

39. Permanency planning refers to the child welfare system’s desire to find stable, long-term, and safe homes for children. For an in-depth discussion of the concept of permanency planning, see generally Herring, *supra* note 26.

40. See Shotton, *supra* note 32, at 223-24.

41. *Id.* at 223.

42. *Id.* at 255.

43. See Guggenheim, *Children in Foster Care*, *supra* note 30, at 122-23 (noting the difference between the child welfare system of the 1970s, which had relatively no “pro family” features, and the goals of the Adoption Assistance and Child Welfare Act of 1980).

moved, the family preservation philosophy holds that reasonable efforts must still be made to reunify the child with the family.<sup>44</sup>

This pro-family sentiment was a great change from the child rescue philosophy of the 1970s which "neglected or failed to recognize the harm that separation can cause to both children and their parents."<sup>45</sup>

The cornerstone of the CWA is the "reasonable efforts" requirement placed on state child welfare agencies.<sup>46</sup> To receive federal funds for foster care and adoption assistance,<sup>47</sup> state child welfare agencies must "make 'reasonable efforts' to maintain children with their families or, if this is not possible, . . . make reasonable efforts to reunify the child with the family."<sup>48</sup> Although Congress created this requirement as a guide for child welfare agencies to help children and families, many agencies encountered difficulties in implementing the requirement.<sup>49</sup>

Perhaps due in part to the lack of a clear definition for reasonable efforts, or perhaps due to the bureaucratic difficulties which plague government agencies,<sup>50</sup> the goals of the CWA were never achieved.

44. Shotton, *supra* note 32, at 255.

45. *Id.* at 254-55. The "child rescue philosophy" sought "to insure that no child was left in an unsafe situation. While well-intentioned, this philosophy often doomed children to years of drift in foster care, with little or no hope of being placed in a permanent home." *Id.* at 255.

46. For an in-depth look at the reasonable efforts requirement, see Shotton, *supra* note 32.

47. See Guggenheim, *Children in Foster Care*, *supra* note 30, at 123 ("To be eligible for federal reimbursement under the Act, states are now required to provide preventive and reunification services geared to keeping families together before and after state intrusion."); Shotton, *supra* note 32, at 227 ("The only ramification that Congress intended was that the child welfare agency could not legally claim federal matching funds for the child's stay in foster care pursuant to Title IV-E for that period of time when a court found reasonable efforts to be lacking.");

48. Shotton, *supra* note 32, at 223.

49. *Id.* at 225. Some scholars attribute these difficulties to the lack of a clear definition of "reasonable efforts." See Braveman & Ramsey, *supra* note 22, at 453-54; Shotton, *supra* note 32, at 225. One author proposed the following three-step process so that the child welfare agency could improve reasonable efforts determinations in individual cases:

The steps include: (1) identifying the exact danger that puts the child at risk of placement and that justifies state intervention; (2) determining how the family problems are causing or contributing to this danger to the child; and (3) designing and providing services for the family that alleviate or diminish the danger to the child. If any one of these steps is missing, it is unlikely that the efforts made on behalf of the family will be reasonable.

*Id.* at 226. If implemented in this manner, it is clear that the reasonable efforts requirement places a great burden on the shoulders of state child welfare agencies.

50. Not only are the agencies overburdened, but because the early 1980s marked the beginning of the abuse of crack cocaine, the increase in drug abuse among poor adults led to an inordinate number of families being processed through the child welfare system. See Susan R. Larabee, *Representing the Government in Child Abuse and Neglect Proceeding*, in *Child Abuse and Neglect: Protecting the Child, Defending the Parent, Representing the State*, at 59, 64-65 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4183, 1988), available in WESTLAW, 148 PLI/Crim 59. This

Although the CWA sought to reduce dependence on foster care as a means of protecting children, in recent years, the number of children in foster care has increased rather than decreased.<sup>51</sup> In fact, approximately 600,000 children are currently part of the nation's foster care system.<sup>52</sup> Furthermore, the average length of stay in foster care is over two years<sup>53</sup>—well above many child welfare experts' goals.<sup>54</sup> The disappointing results of this much anticipated piece of legislation influenced Congress to pass the Adoption and Safe Families Act of 1997<sup>55</sup> ("ASF") which again aspires to achieve permanency for children where the CWA failed.<sup>56</sup>

Created partly out of a concern that "too many children in this country are spending the most important formative years in a legal

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sudden flood of cases was, most likely, more than Congress had bargained for when it enacted the CWA.

51. See 142 Cong. Rec. S5710 (daily ed. June 4, 1996) (statement of Sen. DeWine) ("Tonight . . . almost 421,000 children will sleep in foster homes. Over a year's time, 659,000 will be in a foster home for at least part of the year."). In New York City alone, the number of children admitted to foster care services was 7949 in 1995, 8912 in 1996, and 11,158 in 1997. *Watching the Numbers*, Child Welfare Watch, Winter 1997, at 11. Thus, in 1997, admissions to foster care rose twenty-five percent above the previous year's statistics in New York City. *Id.* Similarly, the foster care population in Illinois recently soared thirty percent above that in the previous year over a fourteen month period. Richard Wexler, *There is No Child Protection Without Family Preservation*, Tampa Tribune, Oct. 29, 1997, at 15, available in LEXIS, News Library.

52. Jill Sheldon, Note, *50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. Third World L.J. 73, 73 (1997).

53. 143 Cong. Rec. S3898 (daily ed. May 1, 1997) (statement of Sen. DeWine). In New York City, for example, the 1997 statistic for the average number of years that children spent in foster care was 4.28 years. *Watching the Numbers*, Child Welfare Watch, Winter 1997, at 11.

54. See, e.g., Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. Mich. J.L. Reform 93, 98 (1997) ("In 1991, the W.K. Kellogg Foundation . . . created its Families for Kids Initiative with a vision of obtaining a permanent home within one year for all children in foster care.").

55. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

56. Much of the talk surrounding the Adoption and Safe Families Act focused on the CWA's failure to adequately define reasonable efforts. See *supra* notes 46-49 and accompanying text. Disgusted with the family preservation philosophy that generally gives all families the benefit of the doubt, legislators blamed the murky "reasonable efforts" requirement for the courts' and the agencies' attempts to reunite even the most troubled families:

Why do [children] spend so many years in foster care? One reason is that, in some of these cases, the child protective services feel hemmed in by a misinterpretation of a Federal law, a well-intentioned Federal law that this Congress passed in 1980, a law that has done a great deal of good, but a law that contains one provision that I believe has caused a great deal of harm and has caused a great deal of confusion. . . . In other words . . . no matter what the particular circumstances of a household may be, the State must make reasonable efforts to keep that household, that family together, and then to put it back together if it falls apart.

143 Cong. Rec. S3898 (daily ed. May 1, 1997) (statement of Sen. DeWine).



limbo,"<sup>57</sup> the ASF seeks to speed up the entire child welfare process. Among other things, the ASF mandates that permanency hearings,<sup>58</sup> required by the CWA to be conducted no later than eighteen months after a child was placed into foster care, now must be held within twelve months of a child's placement.<sup>59</sup> This change is particularly significant for the child's parent, for permanency hearings determine "whether a child is to be returned to her parents in a relatively short period, or whether a petition to terminate parental rights will be filed."<sup>60</sup> Therefore, parents involved in child protective proceedings who wish to reunite with their children must now "fix" whatever situations triggered their families' involvement in the child welfare system even sooner than before.<sup>61</sup>

In addition to altering the time lines in child protective cases, the ASF also significantly changes the general philosophy under which Congress passed the CWA.<sup>62</sup> Rather than focusing on family preservation, this new legislation "emphasizes that the health and safety of children must be the paramount concerns in determining reasonable efforts to preserve and reunite the families of maltreated children."<sup>63</sup> Much of this backlash against family preservation stems from community outrage when news of horrible acts of child abuse hits the newspapers.<sup>64</sup> For example, lobbying for the passage of the ASF, one senate member told Congress the story of extreme abuse of an eight year old boy by his aunt in October 1997.<sup>65</sup> Using this tragedy as an example of the danger of the family preservation philosophy, the senator remarked: "Don't we have to ask . . . what on Earth was that woman doing taking care of that child? Why in the world was that

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57. 142 Cong. Rec. S5710 (daily ed. June 4, 1996) (statement of Sen. DeWine).

58. A permanency hearing is "a special type of review hearing that represents a deadline to determine the final direction of the case." Duquette et al., *supra* note 54, at 135.

59. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 302(2), 111 Stat. 2115, 2128.

60. Duquette et al., *supra* note 54, at 135. For a discussion of termination of parental rights proceedings, see *infra* note 132.

61. For a discussion of what parents need to do to regain permanent custody of their children, see *infra* notes 121-30 and accompanying text.

62. Highlighting the rationale behind the Adoption and Safe Families Act of 1997, one of the senators supporting this piece of legislation told Congress: "[I]t's time we recognize that some families simply cannot and should not be kept together." 143 Cong. Rec. S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee).

63. Douglas H. Reiniger, *Law Affecting Children and Families: 1997 Legislative Review*, N.Y. L.J., Feb. 13, 1998, at 1; see also Gail Vida Hamburg, *An Act of Compassion May Require Some Decisive Actions to Make it Work*, Chi. Trib., Jan. 4, 1998, § 13, at 1 ("The legislation deviates from previous national child-welfare policy, which had a goal of the ultimate reunification of abused and neglected children with their parents.").

64. To support the passage of the ASF, Senator DeWine of Ohio offered specific and graphic examples of six severe child abuse tragedies in large cities across the nation. 142 Cong. Rec. S5710 (daily ed. June 4, 1996) (statement of Sen. DeWine).

65. 143 Cong. Rec. S11,175 (daily ed. Oct. 24, 1997) (statement of Sen. DeWine).

child put back into that same home, put back with that abusive woman?"<sup>66</sup>

Accordingly, the ASF, which shortens the time that families have to work toward reunification and speeds up the termination of parental rights and adoption processes, was passed largely in reaction to the most terrible cases of child abuse in our nation.<sup>67</sup> While concern for the safety and well-being of the nation's children is a laudable goal, the ASF may actually harm some children in the process: Because this new piece of federal legislation mainly contemplates cases of severe child abuse and maltreatment,<sup>68</sup> poor families who are in the child welfare system because of suspected neglect may soon be ignored.<sup>69</sup>

Cases that involve poverty as neglect are perhaps the most compelling candidates for family preservation and reunification services.<sup>70</sup> Unfortunately, poverty is also a deeply-rooted problem and, thus, one that cannot be alleviated quickly.<sup>71</sup> As such, the ASF's new time-lines for child protective cases may actually work to tear apart families who would otherwise have succeeded in rebuilding their lives.<sup>72</sup>

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66. *Id.* The Senator went on to conclude: "[T]here are too many children in this country today being returned to the care of people who have already abused and battered them . . ." *Id.*

67. Throughout the debates over the passage of the ASF, proponents of the Act clearly articulated that the legislation aimed at the most abusive and harmful families. *See, e.g.*, 143 Cong. Rec. S12,669 (daily ed. Nov. 13, 1997) (recording Senator DeWine's disapproval of using the "reasonable efforts" requirement to reunite all families: "I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children").

68. As further evidence of Congress's focus on cases of severe child abuse, the ASF includes an exception to the "reasonable efforts" requirement when the child has been subjected to "aggravating circumstances." Such circumstances are to be defined by state law, but Congress suggests that they may include "abandonment, torture, chronic abuse, and sexual abuse." Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a)(D)(i), 111 Stat. 2115, 2116.

69. Critics of the new legislation argue that, although Congress has focused solely on relieving some of the suffering that children endure at the hands of abusive parents, actually "most children in foster care are there not because they were beaten, abused or abandoned, as many reports have stated, but for neglect, mostly lack of supervision." Hamburg, *supra* note 63, at 2. As a result, "[t]he legislation [which] appears to be a carefully deliberated and efficient solution to the plight of abused children . . . fails to address the larger social issues [like poverty] that cause child abuse and neglect in the first place." *Id.*

70. *See infra* Part II (discussing the problem of poverty as neglect).

71. *See* John Gibeaut, *Home For Keeps*, A.B.A. J., Dec. 1997, at 60, 60 (1997) (stating that, although Congress wants the child welfare system to arrive at permanency quickly, parents nevertheless need a reasonable time to correct their lives and to make their homes safe for their children); Daniel L. McCarthy, *Anticipated Effects of New Procedural Rules and Statutory Changes in Abuse and Neglect Cases*, W. Va. Law., July 1997, at 14, 14 (1997) (observing that one of the problems with narrowing the time periods during which parents may work to rebuild their lives is that it understandably takes time for parents to change their circumstances).

72. *See* Hamburg, *supra* note 63, at 2 (remarking that the ASF "will be most effective when applied to families that should very clearly not be reunited" and, as such,

Accordingly, poor parents involved in child protective proceedings are in more dire need of effective and competent legal representation today than ever before. With a philosophy throughout the child welfare system that is presumptively against their hopes of reuniting with their children,<sup>73</sup> with the media's watchful eye on incidents of child abuse and neglect,<sup>74</sup> and with less time in which to effect significant changes in their lives, parents in poverty need effective advocacy at all stages of child protective proceedings.

## II. FAMILIES IN NEED OF ASSISTANCE: POVERTY AS NEGLECT

Under the Adoption and Safe Families Act of 1997, families will need great assistance during neglect proceedings.<sup>75</sup> The great majority of cases that child welfare agencies address "involve charges of neglect against parents who have allegedly failed to care properly for their children."<sup>76</sup> Furthermore, families involved in neglect proceedings are overwhelmingly poor.<sup>77</sup> Knowing that the families who come

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critics "worry about the impact of the law on the huge class of children brought into the system for neglect").

73. See Dale Russakoff, *Against the Odds, a Failed Mother Returns to Her Children*, Wash. Post, Jan. 20, 1998, at A1 (reporting the successful story of a reunited family "that probably shouldn't even be a family under the new federal rules of child protection").

74. For example, one of the most highly publicized incidents of child abuse in Illinois was the story of three year old Joseph Wallace. See Phillip J. O'Connor & Zay N. Smith, *Woman Charged in Son's Hanging*, Chi. Sun-Times, Apr. 20, 1993, at 3, available in LEXIS, News Library. The young boy was hanged by his mentally ill mother after being returned to her custody for a third time. *Id.* Seriously mentally ill, Joseph's mother "ha[d] a history of beating her children, mutilating herself and setting fires." *Id.* As a result of this tragic failing of the child welfare system, many critics lashed out against the family preservation philosophy, arguing that violent and unstable parents should not regain custody of their children. See Editorial, "Family First" Policy Is a Failure at DCFS, Chi. Sun-Times, Apr. 21, 1993, at 31, available in LEXIS, News Library ("This tragic tale is further evidence of what we have been saying for some time: State law and practice, which puts 'families first,' ahead of a child's safety, must be changed.").

75. See, e.g., Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 130 (1997) ("[N]eglect tends to be the most deeply embedded and difficult [child protection case] to treat, so these parents need to get working as quickly as possible.").

76. *Myths and Facts: The Big Picture*, Child Welfare Watch, Winter 1997, at 7. In 1995, state child protective services' investigations determined that 52 percent of children in the child protective system for maltreatment were there due to allegations of parental neglect. National Clearinghouse on Child Abuse and Neglect Information, *In Fact . . . : Answers to Frequently Asked Questions on Child Abuse and Neglect* (visited Mar. 9, 1998) <<http://www.calib.com/nccanch/pubs/infact.htm>>.

77. See, e.g., Areen, *supra* note 31, at 888 ("Perhaps the most prevalent characteristic of families charged with neglect is poverty . . ."); Weinstein, *supra* note 75, at 130 ("[T]hese parents are often among the most unempowered people in our society. They tend to be poor, often on some kind of welfare . . . , relatively socially isolated, and often with no support system."); *Does Child Welfare Devalue the Family?*, Child Welfare Watch, Spring 1997, at 2 ("[The child welfare system] is a system for poor

through their doors are principally afflicted with poverty,<sup>78</sup> child welfare agencies—commissioned to help children and families—must begin to “address[] poverty as an underlying cause of family problems.”<sup>79</sup>

The agencies, however, are often criticized for confusing poverty with neglect. Rather than appreciating families’ hardships, child welfare agencies are sometimes accused of charging parents with neglect when, in fact, poverty is the real problem:<sup>80</sup>

First and foremost [parents accused of neglect] are poor. Food, jobs, and decent housing are elusive. Five sisters may live together with their fifteen children in a roach infested slum: their only other housing option being a roach infested apartment in a public housing high-rise where their children will be in daily danger of being shot or “shaken down.” Because they live where they do, the state charges these mothers with neglect for subjecting their children to an injurious environment.<sup>81</sup>

Thus, in order to effectively help families who come into the child protection system, child welfare agencies must be keenly aware of the many variables that affect a family’s particular circumstances.

Although a better appreciation of families’ situations on the part of child welfare officials could avoid the filing of some neglect petitions in the first instance,<sup>82</sup> statutory definitions of neglect may force agencies to file petitions where, perhaps, they otherwise would not.<sup>83</sup> For example, “[p]overty is associated with insufficient, unsafe housing and

families, single-parent families, families who are homeless or whose parents are substance abusers or infected with HIV.”)

78. One commentator notes that the parent’s lawyer in neglect proceedings must be keenly aware that her client’s poverty is her principal affliction and, as such, should focus the case more on the client’s need for services and support than on the underlying allegations of maltreatment. Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 *Fordham L. Rev.* 1621, 1646-48 (1996).

79. Weinstein, *supra* note 75, at 169.

80. See Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness, in The Social Context of Child Abuse and Neglect* 23, 35 (Leroy H. Pelton ed., 1981) (“[S]ome mothers are caught up in difficult and dangerous situations that have less to do with their adequacy and responsibility as parents than with the hard circumstances of their lives.”).

81. Appell, *supra* note 25, at 585 (citation omitted).

82. For an explanation of filing petitions against parents and commencing legal proceedings in child protective cases, see *infra* part III.A.

83. See Appell, *supra* note 25, at 605 (“[T]he line between neglect and poverty . . . is uncomfortably blurry . . .”). Definitions of neglect vary slightly from state to state. In New York, for example, a “neglected child” is defined in part as:

a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education . . . or medical . . . care, though financially able to do so or offered financial or other reasonable means to do so; or . . . (ii) who has been abandoned . . . by his parents . . .

N.Y. Fam. Ct. Act § 1012(f) (McKinney 1983). In Colorado, a child is neglected if:

even homelessness. Poverty is linked with poor nutrition, a lack of medical care, inadequate daycare, poor educational facilities, and psychological feelings of helplessness and stress. Any one of these conditions could support an allegation of specific harm."<sup>84</sup> Because the definition of neglect encompasses many circumstances that are a direct result of poverty,<sup>85</sup> child welfare agencies may have no choice but to intervene in poor families' lives. In fact, state intervention in a family's life where the supposed "neglect" actually stems from the family's economic situation may be necessary to help the family.<sup>86</sup> If intervention is focused on protective services rather than punitive measures, then the child welfare agency can make a positive difference in troubled families' lives.<sup>87</sup>

Even if the agency's intervention is sensitive to issues of poverty, though, poor families will still face significant challenges. The cycle of poverty, indeed, is difficult for any family to break.<sup>88</sup> Their economic situations make it incredibly hard for indigent parents to convince child welfare agencies that the conditions that led to the neglect charge will not continue once the family is reunited: Because there is much less room for error in poor families, virtually any small set-back can trigger another allegation of neglect.<sup>89</sup> Furthermore, the same de-

A parent . . . has abandoned the child or has subjected him or her to mistreatment or abuse or a parent . . . has suffered or allowed another to mistreat or abuse the child without taking lawful means to stop such mistreatment or abuse and prevent it from recurring; . . . The child's environment is injurious to his or her welfare; . . . The child is homeless, without proper care, or not domiciled with his or her parent . . . through no fault of such parent . . . .

Colo. Rev. Stat. § 19-3-102 (1997). In contrast to New York and Colorado's definitions which, at least in theory, prevent basing a finding of neglect on poverty alone, Indiana's statute does not make this concession for parents in poverty:

A child is [neglected] if before the child becomes eighteen (18) years of age: the child's physical or mental condition is seriously impaired or seriously endangered as a result of the *inability*, refusal, or neglect of the child's parent . . . to supply the child with necessary food, clothing, shelter, medical care, education, or supervision.

Ind. Code Ann. § 31-32-1-1 (Michie 1997) (emphasis added).

84. Braveman & Ramsey, *supra* note 22, at 461.

85. *Id.* at 462; Kindred, *supra* note 24, at 532.

86. For a discussion of state intervention into families' lives, see *infra* part IV.C.

87. *Cf.* Appell, *supra* note 25, at 610 (arguing for an approach to child welfare issues that focuses on strengthening and protecting the parent-child relationship); Boyer, *supra* note 78, at 1648-49 (noting the argument that public agencies should offer services that might avoid the need for placing children away from their families).

88. See generally Lisbeth B. Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* (1989) (explaining the risks associated with living in poverty and proposing solutions aimed at easing the difficulties families face when trying to lift themselves out of poverty).

89. Leroy Pelton observes:

Neglectful irresponsibility more readily leads to dire consequences when it occurs in the context of poverty than when that same behavior is engaged in by middle-class parents. In middle-class families there is some *leeway* for irresponsibility, a luxury that poverty does not afford. A middle-class

iciencies that initially led to the charges of neglect—such as poor housing, lack of child care, lack of transportation, and stress—can make complying with the child welfare agency's service plan extremely difficult.<sup>90</sup> Nevertheless, such compliance is critical to reuniting and preserving the family unit.<sup>91</sup>

Finally, charges of neglect effectively render poor parents powerless.<sup>92</sup> The strain of having one's children taken away is extremely distressing for parents in poverty, who are often undereducated and unworldly.<sup>93</sup> This stressful situation weakens parents and, therefore, further exacerbates the imbalance of power that already favors the state in child protection proceedings.<sup>94</sup> The state is clearly in control in neglect proceedings, for not only does it present the case to the court, but its "adversary," the parent, is unfamiliar with the intricacies of the legal proceedings.<sup>95</sup> As such, parents are often unable to effectively assert their rights.<sup>96</sup>

Given the imbalance of power in child protection cases, parents' inability to adequately represent their own interests, child welfare agencies' practical limitations, and all of the problems that poverty adds to this equation, it is clear that lawyers for parents are essential players in neglect proceedings. In addition to these difficulties that poor parents face, the passage of the Adoption and Safe Families Act of 1997<sup>97</sup> may make those parents' interactions with the child welfare system even more difficult. Without effective advocates, then, poor families in child protective proceedings are certainly at risk.

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mother can be careless with her money and squander some of it, but still have enough so that her children will not be deprived of basic necessities. Identical lapses in responsibility on the part of an impoverished mother might cause her children to go hungry during the last few days of the month. The less money one has, the better manager of money one has to be.

Pelton, *supra* note 80, at 34-35 (citations omitted).

90. Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 Ga. L. Rev. 1079, 1083 (1988).

91. See *infra* notes 121-30 and accompanying text.

92. *Parents on the Periphery*, Child Welfare Watch, Winter 1997, at 7.

93. The Supreme Court of the United States recognized the hardships that indigent parents face in court when it wrote: "The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident . . ." *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 30 (1981).

94. Weinstein, *supra* note 75, at 102.

95. See Kim Nauer, *Guilty Until Proven Innocent*, City Limits, Nov. 1994, at 20, 22 (quoting the director of an organization that helps families deal with the child welfare bureaucracy as saying, "[e]verybody [in family court] uses a lot of shorthand, lingo and court terms. By the end of the day, the parents are not really quite clear what has happened").

96. Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?," 64 Fordham L. Rev. 1917, 1949 (1996).

97. Pub. L. No. 105-89, 111 Stat. 2115.

### III. THE LEGAL PROCESS AND ITS SHORTCOMINGS IN NEGLECT PROCEEDINGS

This part reviews the procedures in most child neglect cases, discusses states' provisions of court-appointed counsel to indigent parents charged with neglect, and highlights some of the shortcomings in the legal representation currently afforded to such parents.

#### A. *Typical Steps In Child Protection Matters*

Because child protection matters are conducted similarly throughout the country, a discussion of these proceedings has widespread applicability.<sup>98</sup> Accordingly, the following explanation of the procedure in New York child protective cases can appropriately be generalized to most such systems.<sup>99</sup>

Article 10 of the New York Family Court Act governs the procedures in child protective proceedings. Its purpose is two-fold: (1) "to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being;" and (2) "to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child."<sup>100</sup>

Child protection proceedings are usually commenced when a report of suspected child abuse or neglect is called into the state central register.<sup>101</sup> Once a report is referred to a child protective agency, that office must immediately begin to investigate the allegations in the report.<sup>102</sup> This investigation by child protective services marks the be-

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98. See, e.g., Appell, *supra* note 25 (discussing procedures and failings of the child protection system in general); Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. Rev. L. & Soc. Change 311 (1996) (discussing the child dependency legal system in general and noting its shortcomings); Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. Chi. L. Sch. Roundtable 1 (1995) (focusing on problems in the Illinois child protection system and analogizing those problems to mothers in poverty in general); Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative to Foster Care*, Stan. L. & Pol'y Rev., Winter 1992-93, at 183 (discussing the California child welfare system and applying its discussion to systems in most other states); Garcia & Batey, *supra* note 90 (documenting findings of a study of the Florida child dependency system and applying them to other child protective systems throughout the country); Weinstein, *supra* note 75 (analyzing the problems and failings of child protection matters in general).

99. Referring to the New York Family Court Act, current Family Court Judge Susan R. Larabee stressed that: "New York's statute has been a model for other states and other countries." Larabee, *supra* note 50, at 69.

100. N.Y. Fam. Ct. Act § 1011 (McKinney 1983).

101. Larabee, *supra* note 50, at 103.

102. New York Social Services Law provides that the child protective service shall: commence or cause the appropriate society for the prevention of cruelty to children to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination

ginning of the state's intervention into a family's life.<sup>103</sup> Generally, the investigation may have three possible outcomes. First, the report of alleged child maltreatment may be deemed "unfounded."<sup>104</sup> Second, if the child protective agency determines that the family is truly in need of assistance, the agency must offer appropriate services to the family.<sup>105</sup> These services are designed, at least in theory, as protective and preventive measures to lift a troubled family out of a difficult situation.<sup>106</sup> And third, if the agency determines that preventive services will not suffice to help a family, then the agency may remove a child from her home and place her in protective custody.<sup>107</sup>

A child may be removed from her family upon the written consent of her parent,<sup>108</sup> upon an order from the family court directing her temporary removal,<sup>109</sup> or, in an emergency situation, without a court

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of the . . . nature, extent and cause of any condition enumerated in such report . . . and, after seeing to the safety of the child or children, forthwith notify the subjects of the report . . . of the existence of the report and their respective rights . . . .

N.Y. Soc. Serv. Law § 424(6) (McKinney 1992); *see also* Cal. Welf. & Inst. Code § 328 (West 1984) (providing that a probation officer shall immediately commence an investigation to determine whether child welfare services should be offered to the family or whether court proceedings should be commenced); Colo. Rev. Stat. § 19-3-312(1) (1997) (providing that the court must immediately investigate reports of abuse to determine whether a child needs further protection and whether to authorize the filing of a petition); Vt. Stat. Ann. tit. 33, § 4903(1) (1991) (providing that the department of child welfare services shall investigate all complaints of neglect, abuse, or abandonment of children).

103. Experts in child welfare, however, note that the government's involvement in poor families' lives is not limited to when it acts on reports of supposed maltreatment. For example, one commentator writes:

[P]oor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.

Appell, *supra* note 25, at 584 (citation omitted).

104. N.Y. Soc. Serv. Law § 424(7) (McKinney 1992); *cf.* Colo. Rev. Stat. § 19-3-501(1)(a) (1997) (allowing the option that no further action be taken).

105. N.Y. Soc. Serv. Law § 424.10 (McKinney 1997); *see* W. Va. Code § 49-6A-9 (1996); Wis. Stat. Ann. § 48.57(1)(a) (West 1997); *cf.* Vt. Stat. Ann. tit. 33, § 4903(2) (1991) (providing that Human Services *may* provide aid and services to allow children to remain in their homes).

106. *See generally* *The Assault on Preventive Services*, Child Welfare Watch, Spring 1997, at 4 (stressing the importance of offering preventive services to families in need and criticizing some of the shortcomings in administering appropriate and effective services to families).

107. *See* N.Y. Fam. Ct. Act §§ 1021-29 (McKinney 1983); *see* Cal. Welf. & Inst. Code § 361(c) (West 1984); D.C. Code Ann. § 16-2309 (1997); Utah Code Ann. § 78-3a-301 (Supp. 1997).

108. N.Y. Fam. Ct. Act § 1021 (McKinney 1983); *see* Wis. Stat. Ann. § 48.63(1) (West 1997).

109. N.Y. Fam. Ct. Act § 1022 (McKinney 1983); *see* S.C. Code Ann. § 20-7-736 (Law Co-op. Supp. 1997); Wash. Rev. Code Ann. § 13.34.050 (West 1993); Wis. Stat. Ann. § 48.19(1)(c) (West 1997).



order.<sup>110</sup> After a child is removed from her family, the child protective agency will file a petition with the family court reporting the facts surrounding the parent's alleged neglect or abuse.<sup>111</sup> From this stage forward, three different parties are involved in the proceedings and are represented individually by separate lawyers: The government,<sup>112</sup> the child,<sup>113</sup> and the respondent parent.<sup>114</sup> The family court will then preside over a "fact-finding hearing,"<sup>115</sup> during which the court will determine if the child has been abused or neglected. This hearing is the family court equivalent of a trial: It is the most adversarial stage of the proceedings<sup>116</sup> and, therefore, one of many times throughout the proceedings when an attorney's presence is clearly necessary to ensure that the parent's rights are adequately represented.

At the fact-finding hearing, if the court finds that the facts in the petition are insufficient to sustain the allegations made against the parent, then the court must dismiss the petition.<sup>117</sup> If, however, the court makes a finding of abuse or neglect, then the court will decide what will happen to the child at a dispositional hearing.<sup>118</sup> At the dis-

110. N.Y. Fam. Ct. Act § 1024 (McKinney Supp. 1997-1998); see Colo. Rev. Stat. § 19-3-401 (1997); D.C. Code Ann. § 16-2309(3) (1997); S.C. Code Ann. § 20-7-610 (Law Co-op. Supp. 1997). An emergency situation only exists when an authorized individual:

has reasonable cause to believe that the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent . . . presents an imminent danger to the child's life or health; and there is not enough time to apply for an order under section one thousand twenty-two [of the Family Court Act].

N.Y. Fam. Ct. Act § 1024 (a)(i) & (ii) (McKinney Supp. 1997-1998).

111. N.Y. Fam. Ct. Act § 1031(a) (McKinney 1983); see Cal. Welf. & Inst. Code § 325 (West 1984); Colo. Rev. Code § 19-3-501(2) (1997); Wis. Stat. Ann. § 48.25 (West 1997).

112. See generally Larabee, *supra* note 50 (exploring the attorney's duty in representing the government in these situations).

113. N.Y. Fam. Ct. Act §§ 241-49(a) & 1016 (McKinney 1983 & Supp. 1997-1998); see S.C. Code Ann. § 20-7-110(1) (Law Co-op. Supp. 1997); Va. Code Ann. § 16.1-266(A) (Michie Supp. 1997); Wis. Stat. Ann. § 48.23(1) (West 1997).

114. See N.Y. Fam. Ct. Act § 262(a)(i) (McKinney Supp. 1997-1998) (establishing the indigent parent's right to court-appointed counsel in child abuse and neglect proceedings); see also *infra* Part III.B (describing court-appointed counsel offered to indigent parents in various states). The word "respondent" refers to "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." N.Y. Fam. Ct. Act § 1012(a) (McKinney 1983).

115. N.Y. Fam. Ct. Act § 1044 (McKinney 1983); see Cal. Welf. & Inst. Code § 334 (West 1984); Colo. Rev. Stat. § 19-3-505 (1997); Wis. Stat. Ann. § 48.31 (West 1997).

116. Lisa A. Granik, *Representing Parents in Child Protection Cases* 7 (1988).

117. N.Y. Fam. Ct. Act § 1051(c) (McKinney Supp. 1997-1998); see Cal. Welf. & Inst. Code § 356 (West 1984); Colo. Rev. Stat. § 19-3-505(6) (1997); Tenn. Code Ann. § 37-1-129(a)(1) (Supp. 1997).

118. See Cal. Welf. & Inst. Code § 361.5(b)-(c) (West 1984); Colo. Rev. Stat. § 19-3-507 (1997); Tenn. Code Ann. § 37-1-129(c) (Supp. 1997); see also Granik, *supra* note 116, 8-10 (explaining the goals of the dispositional hearing and the crucial role that the lawyer for the respondent parent plays at this point in the proceedings).

positional hearing, the court will frequently place the child away from her parents, either with a relative<sup>119</sup> or into foster care.<sup>120</sup>

After a child has been placed into foster care, the child's parent must work diligently and assume great responsibility in order to regain custody of her child. A child may be placed into foster care for an initial period of up to one year.<sup>121</sup> Once a child is in foster care, an authorized agency must assess the family's situation and establish and maintain a family service plan based on this assessment.<sup>122</sup> This service plan will require that the parent obtain specific services and complete specific programs<sup>123</sup> and will provide for the parent's visitation with her child. Although social services officials are required to consult with the parent in preparing the family's service plan,<sup>124</sup> in reality very few parents attend service plan meetings<sup>125</sup> because they do not know their rights.<sup>126</sup> A parent's failure to participate in these meetings is both unfortunate and contrary to her interests: The parent's

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119. For a discussion of kinship foster care, see generally *Kinship Foster Care in Steep Decline*, Child Welfare Watch, Spring 1997, at 3.

120. N.Y. Fam. Ct. Act § 1055(a) (McKinney 1983); see Cal. Welf. & Inst. Code § 361(e) (West 1984); Tenn. Code Ann. § 37-1-130(a)(2)(c) (1996); Vt. Stat. Ann. tit. 33, § 4903(4) (1991). New York Social Services Law defines foster care as: "care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, health care facility or any combination thereof." N.Y. Soc. Serv. § 392(1)(a) (McKinney 1992).

121. N.Y. Fam. Ct. Act § 1055(b)(i) (McKinney Supp. 1997-1998); see Utah Code Ann. § 78-3a-312(1) (Supp. 1997); W. Va. Code § 49-6-8 (Supp. 1997). Beyond that initial first year, the court may conduct a hearing to further extend the child's placement in foster care. N.Y. Fam. Ct. Act § 1055(b)(i)-(ii) (McKinney 1983 & Supp. 1997-1998); see Utah Code Ann. § 78-3a-312(1) (Supp. 1997); W. Va. Code § 49-6-8 (Supp. 1997). At these extension of placement hearings, the court looks to, among other things, whether the respondent parent complied with the child services plan. N.Y. Fam. Ct. Act § 1055(b)(iv)(3) (McKinney Supp. 1997-1998).

122. N.Y. Soc. Serv. Law § 409-e(1)-(2) (McKinney 1992); see W. Va. Code § 49-6D-3 (1996).

123. N.Y. Soc. Serv. Law § 409-e(2) (McKinney 1992); see W. Va. Code § 49-6D-3(a) (1996).

124. N.Y. Soc. Serv. Law § 409-e(2) (McKinney 1992); see W. Va. Code § 49-6D-3(b) (1996).

125. See *Parents on the Periphery*, Child Welfare Watch, Winter 1997, at 6 (noting that, although New York social services regulations require that caseworkers seek parental input in their children's service plan, these regulations are rarely adhered to and, in fact, nonprofit foster care agencies concede that agency caseworkers frequently resist parent participation). Child Welfare Watch also notes:

According to a May 1994 audit of case records by the New York State Comptroller's Office, parents did not participate in 79 percent of semi-annual service plan review meetings . . . even though this is specifically required by state regulation. In the majority of these cases, parents were not notified of these meetings.

*Id.*

126. Martin Guggenheim, Proposal for a Family Advocacy Project 4-5 [hereinafter Guggenheim, Proposal] (on file with the *Fordham Law Review*).

active participation in this process and frequent visitation with her child are crucial to her child's expedient return home.<sup>127</sup>

At all times throughout these proceedings, the child welfare agency asserts great power and control over the parent: The agency seeks to convince the family court judge that the parent has mistreated her child, is fully responsible for creating the service plan imposed upon the family, and has the ultimate ability to authorize a child's return home.<sup>128</sup> As such, child protective proceedings place the parent in a delicate position: She is both pitted against the agency as its adversary in court and forced to comply graciously and cooperatively with whatever plan the agency sets forth.<sup>129</sup> Clearly, then, the parent is in great need of effective assistance of counsel after the dispositional phase of the case in order to overcome these systemic hurdles that stand in the way of regaining custody of her children.<sup>130</sup>

### B. *The Lawyer For The Respondent Parent*

Although the Supreme Court has acknowledged that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and . . . protection,'"<sup>131</sup> it has also ruled that indigent parents have no constitutional right to court-appointed counsel in non-criminal proceedings.<sup>132</sup> Nevertheless, many states grant parents

127. See, e.g., Beyer, *supra* note 98, at 336 ("Visitation constitutes a crucial element of reunification. Arranging immediate and frequent visits for children, beginning in the first weeks after removal, appears to be the best way to ensure successful reunification."). For further discussion of the importance of visitation between parents and their children while they are in foster care, see *infra* notes 293-95 and accompanying text.

128. See Nauer, *supra* note 95, at 23.

129. See Boyer, *supra* note 78, at 1648.

130. See Garcia & Batey, *supra* note 90, at 1090-91 ("[T]he representation of parents by legal services attorneys is crucial in order to put a 'damper' on [the child welfare agency] which would otherwise 'ride roughshod over parents.'").

131. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27 (1981) (citations omitted).

132. In *Lassiter*, the Supreme Court refused to hold that the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel for indigent parents in all termination of parental rights proceedings. *Id.* at 31-32. Termination proceedings have more severe and permanent consequences than the child protective proceedings considered in this Note. The connection between the two, however, is very important. If a child welfare agency finds that, despite its diligent efforts to encourage and strengthen a parent's relationship with her child, the parent nevertheless has failed repeatedly to improve her relationship with her child, then that agency may file a petition to terminate parental rights. See, e.g., N.Y. Fam. Ct. Act § 614 (McKinney 1983) (stating that a petition for permanent termination of parental rights may be filed if the parent "has failed . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child"). Once a court terminates parental rights, guardianship and custody of the child is committed to the child welfare agency, thereby freeing the child for adoption. See, e.g., *id.* § 634. Thus, to avoid the filing of a termination petition and potentially losing custody of her child permanently, a respondent parent in child protective proceedings must work quickly and

a statutory right to counsel in child protective proceedings.<sup>133</sup> Some states, however, provide for only a limited right to counsel.<sup>134</sup> The duration, scope, and quality of the court-appointed representation afforded to indigent parents, therefore, varies greatly from state to state.

In many states, the court appoints counsel to indigent parents once they appear in court on neglect petitions.<sup>135</sup> In these states, the respondent parent will not have met her attorney before she has to appear in court for the first time. Other courts may appoint counsel for parents before their first court appearances.<sup>136</sup> This early appointment may give the parent the opportunity to speak to her attorney prior to meeting the judge.

Court-appointed counsel will typically represent an indigent parent "at all critical stages of the proceedings."<sup>137</sup> What states consider "critical," however, varies greatly. For example, in New York, the duties of an indigent parent's court-appointed attorney end after the dis-

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deliberately to maintain continual contact with her child and to plan for the future of her child. Importantly, the passage of the Adoption and Safe Families Act of 1997 increases the speed at which respondent parents must work to rebuild their lives. Under this new law, a termination of parental rights petition must be filed, except in certain cases, when a child had been under the state's supervision for fifteen months out of the most recent twenty-two months. Children's Defense Fund, Summary of the Adoption and Safe Families Act of 1997, H.R. 867, at 2 (1997).

133. See, e.g., Cal. Welf. & Inst. Code § 317 (West 1997); D.C. Code Ann. § 16-2304 (1996); Mass. Ann. Laws ch. 119, § 29 (Law. Co-op. 1997); N.J. Stat. Ann. § 9:6-8.43 (West Supp. 1996); N.Y. Fam. Ct. Act § 262 (McKinney Supp. 1997-1998).

134. See, e.g., Ind. Code Ann. § 31-32-4-3(b) (Michie 1997) ("The court may appoint counsel to represent any parent in [non-termination of parental rights proceedings]." (emphasis added)); Mo. Ann. Stat. § 211.211(4) (West 1997) (providing that counsel may only be appointed to parents in child protective proceedings if the court finds three prerequisites: "(1) That the [parent] is indigent; and (2) That the [parent] desires the appointment of counsel; and (3) That a full and fair hearing requires appointment of counsel for the [parent].").

Similarly, in *J.S.S. v. Department of Health and Rehabilitative Services*, 680 So. 2d 548, 549 (Fla. Dist. Ct. App. 1996), a Florida court held that an indigent parent is only entitled to appointed counsel in child protective proceedings on a case-by-case basis. Relying on factors from *Potvin v. Keller*, 313 So. 2d 703 (Fla. Sup. Ct. 1975), the court found that indigent parents in Florida have only a limited right to counsel in non-termination of parental rights and non-criminal cases.

135. See, e.g., Cal. Welf. & Inst. Code § 353 (West 1997); Iowa Code § 232.89(1) (West Supp. 1998); Miss. Code Ann. § 43-21-201(2) (1997); N.Y. Fam. Ct. Act § 1033-b (McKinney Supp. 1997-1998).

136. See, e.g., Ark. Code Ann. § 9-27-316(e) (Michie 1998) ("Appointment of counsel shall be made at a time sufficiently in advance of the court appearance to allow adequate preparation by appointed counsel and adequate consultation between the appointed counsel and the client."); Mass. Ann. Laws ch. 119, § 29 (Law. Co-op. 1994) (providing that the court must appoint counsel for indigent parents within fourteen days of the filing of the petition against the parent); Va. Code Ann. § 16.1-266(C) (Michie Supp. 1997) (providing that indigent parents must be informed of their right to counsel prior to the initial hearing by the court).

137. D.C. Code Ann. § 16-2304(b)(1) (1997); see also Cal. Welf. & Inst. Code § 317(d) (West 1997) ("The counsel appointed by the court shall represent the parent . . . at the detention hearing and at all subsequent proceedings before the juvenile court.").

positional phase of the proceedings.<sup>138</sup> Accordingly, once the family court makes a finding of neglect against the respondent, the court-appointed attorney's responsibilities cease, leaving the parent to rebuild her family's life on her own. Alternatively, in California, a court-appointed attorney must continue to represent her indigent client throughout the proceedings.<sup>139</sup> Thus, while an indigent parent in New York must negotiate and cooperate with the child welfare agency on her own,<sup>140</sup> indigent parents in California are assisted by counsel at every step in the process.

Finally, the compensation afforded to court-appointed attorneys differs from state to state.<sup>141</sup> Some states pay court-appointed attorneys a flat rate. In California, for example, attorneys appointed to represent indigent parents are compensated at a rate of \$760 per appointment.<sup>142</sup> In other states, court-appointed attorneys are paid by the hour. For example, New York<sup>143</sup> and Hawaii<sup>144</sup> both set hourly rates that distinguish between in-court time and out-of-court time. In states that make such distinctions, then, court-appointed attorneys are often paid more for sitting in the courthouse and waiting for their cases than they are paid for preparing for those court appearances.<sup>145</sup>

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138. N.Y. Fam. Ct. Act § 1052-b (McKinney Supp. 1997-1998) (providing that, after disposition, counsel's only remaining duty is to advise the respondent parent of her right to appeal).

139. Cal. Welf. & Inst. Code § 317(d) (West 1997) ("Counsel shall continue to represent the parent . . . unless relieved by the court upon the substitution of other counsel or for cause."). California courts have interpreted this statute very strictly and have found that indigent parents have an enforceable statutory right to counsel in all proceedings. For example, in *Tanya H. v. Toby B.*, 21 Cal. Rptr. 2d 503 (Ct. App. 1993), the court considered a California juvenile court's policy memorandum which provided that, due to fiscal difficulties, court-appointed attorneys were generally to be relieved following the first review of the child's permanency plan. Finding that the child protective process contemplates active involvement of counsel for parents, the court held that the policy memorandum was inconsistent with the statute that explicitly provides for appointed counsel for indigent parents in all proceedings. *Id.* at 505-06.

140. See *supra* notes 121-30 and accompanying text (describing the many tasks for parents after the dispositional phase of the case).

141. For a critique of the very low rates paid to court-appointed attorneys, see *infra* part III.C.4.

142. See *Amarawansa v. Superior Court of Los Angeles*, 57 Cal. Rptr. 2d 249, 251 (Ct. App. 1996) (noting the change in compensation rates for court-appointed attorneys representing indigent parents from an hourly rate to a flat rate).

143. See N.Y. County Law § 722-b (McKinney 1991) (providing that court-appointed counsel for respondent parents in New York County will be paid a rate not to exceed forty dollars per hour for time spent in court and twenty-five dollars an hour for time spent out of court).

144. See Faye T. Kimura, *Paradise in the Making*, A.B.A. J., Jan. 1994, at 79, 79 (noting that court-appointed attorneys representing respondent parents in Hawaii are paid a "nominal" fee of sixty dollars an hour for in-court time and forty dollars an hour for out-of-court work).

145. The Association of the Bar of the City of New York voiced its concern about the inadequate compensation rates paid to court-appointed attorneys:

C. *Deficiencies In The Current Legal Representation Afforded To Indigent Parents*

This part highlights some of the ways in which states' court-appointed counsel statutes can actually harm indigent parents' neglect cases.

1. Many States Model Their Court-Appointed Representation For Indigent Parents On Representation In The Criminal Defense Context

In contrast to the popular discussion about the scope and adequacy of the legal representation of children in child protective proceedings,<sup>146</sup> relatively little attention has similarly been paid to what constitutes adequate and effective representation for the respondent parent. Indeed, the states that do provide counsel for indigent parents in neglect proceedings model this legal representation on criminal defense practice rather than considering the unique aspects of child protective law.<sup>147</sup>

[T]he courts and legislatures have unreflectively adapted the model commonly used for representing accused criminal defendants. That model is not well-suited to the special needs of families in crisis and does not take into account the dramatically different ways in which child protection cases are resolved in the legal system.<sup>148</sup>

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The "in-court"/"out-of-court" differential is particularly ironic in that much "in-court" time may be spent waiting for a case to be called. Although such passive "waiting" time does nothing to advance the indigent client's [case], an attorney is better compensated for it than for time spent in even the most significant out-of-court research and preparation.

Report of the Criminal Advocacy Committee of the Association of the Bar of the City of New York Concerning Compensation of Counsel Assigned to Represent Indigent Criminal Defendants in New York 7 n.3 (March 21, 1997) [hereinafter Compensation of Counsel].

146. For example, from December 1-3, 1995, Fordham University School of Law hosted a symposium titled "The Conference on Ethical Issues in the Legal Representation of Children." At the Conference, "more than seventy lawyers, judges, legal scholars, and representatives of other professions worked together to develop and adopt Recommendations to improve professional practices of lawyers who serve on behalf of children." Bruce A. Green & Bernadine Dohrn, *Foreward: Children and the Ethical Practice of Law*, 64 *Fordham L. Rev.* 1281, 1283 (1996).

147. For example, the statute in New York that provides court-appointed counsel to indigent parents in child protective proceedings was created in direct response to the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that indigent criminal defendants have a federal constitutional right to court-appointed counsel. See Jacob L. Isaacs, *The Role of the Lawyer in Child Abuse Cases, in Helping the Battered Child and His Family* 226 (C. Henry Kempe & Ray E. Helfer eds., 1972); N.Y. County Lawyers' Ass'n, Task Force on the Representation of the Indigent 3 (1997) [hereinafter Representation of the Indigent].

148. Guggenheim, Proposal, *supra* note 126, at 2.

For example, many states provide for their counties' public defenders to represent indigent parents in neglect proceedings.<sup>149</sup> Though public defenders certainly can provide excellent representation for criminal defendants, the issues in child protective proceedings are extremely different from those in criminal cases. Thus, representation by public defenders may not be sensitive to the unique interests in neglect proceedings.

Perhaps the greatest difference between criminal cases and child protective cases is the relative goal of each proceeding.<sup>150</sup> In criminal cases, the focus is on what happened in the past. The goal, therefore, is mainly to punish the defendant for her past wrongdoing.<sup>151</sup> In family court, on the other hand, the proceedings are focused toward the future.<sup>152</sup> Rather than being concerned with blaming parents,<sup>153</sup> child protective proceedings should focus on remedying the family.<sup>154</sup> If states began to reconsider the role of the lawyer in the child protective

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149. See, e.g., Md. Code Ann. Cts. & Jud. Proc. § 3-821(c) (1995) (providing that the Office of the Public Defender shall represent indigent parents in neglect proceedings); N.J. Stat. Ann. § 9:6-8:43(a) (West Supp. 1996) ("The court shall advise the respondent [parent] that if he is indigent, he may apply for an attorney through the Office of the Public Defender."); N.Y. County Law § 722(1) (McKinney 1991) (providing that public defenders may represent indigent parents in child protective proceedings); Wis. Stat. Ann. § 48.23(4) (West 1997) ("[T]he court shall refer the [indigent parent] to the state public defender"). But see N.C. Gen. Stat. § 7A-587 (1997) (stating that, in providing for counsel for indigent parents in neglect proceedings, "[i]n no case may the judge appoint a . . . public defender.").

150. See Isaacs, *supra* note 147, at 226 (noting the differences between criminal cases and child protective cases and writing: "The avowed purpose [of child protective proceedings] . . . is not to adjudge and punish but rather to protect the child, provide treatment for the parent and, ultimately, rehabilitate the family if possible.").

151. Comparing the criminal and the child protective systems, Jacob Isaacs notes: "Normally in a criminal case, once the judge or jury had determined the issue of guilt or innocence, the function of defense counsel ends . . . . In [child protective proceedings], however, the finding of culpability may only be the beginning of the opportunity for effective legal representation." *Id.* at 236.

152. Janet Weinstein states:

In the usual criminal or civil case, the court makes a finding about something that has already occurred in order to decide who was "right," and thus, who wins. Child protection [proceedings] . . . are about the *future* welfare of the child. Although past acts may provide some help in thinking about the welfare of the child, they are not determinative. The family is a living entity, dynamic in nature, involving personalities and relationships which will change depending upon how the family is reordered. . . . The traditional legal approach requires a snapshot judgment of the family structure which does not serve the best interest of the child.

Weinstein, *supra* note 75, at 98 (emphasis added).

153. See *id.* at 130; Dohrn, *supra* note 98, at 4-5.

154. Of course, many critics of the current child protective scheme argue that family court matters are too adversarial and too often blame parents for their circumstances. See, e.g., Beyer, *supra* note 98, at 314-18 (arguing that child welfare agencies too often emphasize families' deficits and shortcomings rather than focusing on their strengths and needs); Garcia & Batey, *supra* note 90, at 1087 (noting that child welfare agencies too often misperceive their goal in child protective cases which should be "to reunite, not to wreck families").

context instead of plugging criminal defense lawyers into child protective cases, then perhaps lawyers for indigent parents could better serve families and work to protect children.<sup>155</sup>

## 2. The Time At Which Courts Appoint Counsel To Indigent Parents Often Leads To Unnecessary Delays In The Court Proceedings

Because some states do not provide indigent parents with court-appointed counsel until the first court date,<sup>156</sup> lawyers often have no opportunity to meet with their clients beforehand to discuss their cases.<sup>157</sup> As a result, lawyers typically request adjournments to give themselves time to get acquainted with their clients and their particular circumstances.<sup>158</sup> Such adjournments, however, may have a detrimental effect on the outcome of the case, thereby hurting families.<sup>159</sup> By placing court-appointed lawyers in difficult situations where they are forced to seek adjournments, state statutes that do not appoint counsel until parents appear in court essentially force lawyers to stray from Congress's stated goals of expedited cases and quicker permanency for children.

## 3. Under Some States' Assigned Counsel Statutes, Attorneys Abandon Indigent Parents When They Are Perhaps Most In Need Of Advocacy

Some states determine that the appointment of the indigent parent's lawyer is complete after the court enters a finding in the case.<sup>160</sup> In cases where the court makes a finding of neglect, then, court-appointed counsel is relieved at the moment when the indigent parent is

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155. Although the Adoption and Safe Families Act of 1997 moves away from a pro-family philosophy, supporters of the legislation nevertheless acknowledge that the best way to protect a child is to keep her with her family: "There are some families that need a little help if they are going to stay together, and it is right for us to help them. Not only is it right—it is also clearly in the best interests of the child to reunite families when we can." 142 Cong. Rec. S5711 (daily ed. June 4, 1996) (statement of Sen. DeWine).

156. See *supra* note 135 and accompanying text.

157. Guggenheim, Proposal, *supra* note 126, at 5-6.

158. In an editorial arguing that the child welfare system keeps children in "limbo" for too long and needs to be overhauled, one Connecticut paper writes: "[I]f lawyers were appointed to represent the parents before the hearing instead of on the day of the hearing, it could reduce the number of cases that are postponed to give counsel time to prepare." Editorial, *Children in Limbo*, Hartford Courant, Oct. 15, 1997, at A14, available in 1997 WL 14671265.

159. Noting that drawn-out delays in child protective proceedings may inappropriately lead to a petition to terminate parental rights, the Chicago Tribune notes: "[F]requent continuances that move cases through the labyrinthine child-welfare system at a snail's pace may mean that cases come up for termination before all avenues to rehabilitate parents have been explored." Hamburg, *supra* note 63, at 2.

160. See, e.g., N.Y. Fam. Ct. Act § 1052-b (McKinney Supp. 1997-1998).



most vulnerable.<sup>161</sup> After disposition, parents are at the mercy of the child welfare agency.<sup>162</sup> Parents must cooperate with the agency by obtaining services, thereby proving to the agency that their children may be safely returned home.<sup>163</sup> In light of Congress's renewed desire to shorten the time during which a child is in foster care, parents will need to obtain such services and to improve their lives more expediently than ever before if they hope to have their children returned to them. Lawyers for parents are essential in this effort.<sup>164</sup> Accordingly, without the assistance of an advocate to navigate through the overburdened bureaucracy of the country's child welfare agencies,<sup>165</sup> parents have less of a chance of complying with new federal guidelines and goals.

#### 4. The Rates Of Compensation For Court-Appointed Counsel Are Often Inadequate

Critics of current assigned counsel programs argue that the low rates paid for the services of court-appointed attorneys reflect the legal profession's indifference toward providing appropriate and effective advocacy for the indigent.<sup>166</sup> Many argue that failing to pay court-appointed attorneys well, or at least fairly, is one of the predominant reasons why indigent clients do not always receive effective assistance of counsel:<sup>167</sup>

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161. See Garcia & Batey, *supra* note 90, at 1100 (contending that the lawyer for the parent in child protective proceedings has a crucial role to play after the court enters a finding of neglect); Nauer, *supra* note 95, at 22 ("Parents lose their court-appointed representation after the trial is over and have no one to turn to if they want to challenge agency actions while their child is in foster care.").

162. See Emily Buss, *Parents' Rights and Parents Wronged*, 57 Ohio St. L.J. 431, 439 (1996) (stating that children who are unfortunately hauled through the child protective system must have "a perception of their parents as the victims of an aggressive bureaucracy"); Nauer, *supra* note 95, at 22 ("[Parents] have little or no hope of seeing their children returned without [the child welfare agency's] nod.").

163. See Buss, *supra* note 162, at 433-34.

164. See Granik, *supra* note 116, at 9-10; Editorial, *Of Parental Rights*, Indianapolis Star, Jan. 11, 1997, at A12.

165. Noting that parents have little choice but to work within the overburdened and sometimes unresponsive child welfare agency, Kim Nauer writes: "Generally speaking, a good advocate must find out what [the child welfare agency] wants and help the parent meet these expectations." Nauer, *supra* note 95, at 23. The lawyer for the parent must "just keep on negotiating [with the agency] until there's no further opposition to returning the child." *Id.* (quoting Martin Guggenheim).

166. See, e.g., Representation of the Indigent, *supra* note 147, at 7 (arguing that current low rates paid to court-appointed attorneys "are an insult to our professed commitment to equal justice for all"); Appell, *supra* note 25, at 581-87 (observing the marked difference in how the child welfare system treats rich and poor families and noting that poor individuals are likely to be further disadvantaged by the burdens placed on their appointed counsel).

167. See Buss, *supra* note 162, at 437; Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 Harv. C.R.-C.L. L. Rev. 397, 458 (1984); Shepherd & England, *supra* note 96, at 1953.

[P]ayment formulas in several observed jurisdictions that rely on court appointments [for indigent clients] *guarantee ineffective representation*, . . . [because] under such a scheme, the only way an attorney can break even is to do nearly nothing and do it in volume. Naturally, it follows that "you get what you pay for."<sup>168</sup>

The low rates paid to court-appointed attorneys reflect the minimal importance that the legal profession places on family law.<sup>169</sup> By appointing poorly compensated attorneys to represent indigent parents who are accused of neglect and faced with losing their children, the child welfare system unfairly handicaps the respondent parent, who is already powerless and outcast in the process.<sup>170</sup>

In addition, the compensation differential between in-court and out-of-court time paid to some court-appointed attorneys is similarly inappropriate in the child protective context. Paying attorneys more for their time spent in court sends the message that the courtroom is the place where the most important advocacy occurs.<sup>171</sup> In neglect proceedings, however, the time spent in court is only a small fraction of the work that needs to be done in order to reunify families and protect children.<sup>172</sup> "Once a child has been adjudicated [neglected], advocacy [in the courtroom] is replaced by mediation and negotiation as the primary strategy for restoring children to their families."<sup>173</sup>

In order to create and maintain a restorative environment for families, lawyers for parents should concentrate on the unique and fragile relationships involved.<sup>174</sup> Such involvement with families, however, must be built on communication and sharing rather than in an adversarial courtroom setting.<sup>175</sup> Thus, by providing financial disincentives for court-appointed attorneys to spend quality time working on cases out-of-court, some states inappropriately discourage lawyers from effectively advocating for their clients and, as a consequence, hurt needy families.

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168. Catz & Firak, *supra* note 167, at 458 (footnote omitted).

169. See Weinstein, *supra* note 75, at 107. The legal profession's treatment of family law is particularly distressing considering that the child welfare system disproportionately affects poor families.

170. See generally Buss, *supra* note 162 (noting that, partly as a result of the overburdened and cynical courts, the powerful and unrelenting child welfare agencies, and the underpaid and under-qualified court-appointed attorneys, the child protective system treats indigent parents with enormous disrespect).

171. See Gary Spencer, *Legislators Seek Raises for Assigned Counsel*, N.Y. L.J., June 7, 1990, at 1.

172. For a description of the work that needs to be done after disposition in order to reunite families, see *supra* notes 121-30 and accompanying text.

173. Garcia & Batey, *supra* note 90, at 1100.

174. See Weinstein, *supra* note 75, at 86-88 (contending that the adversarial process is ill-suited to the child protective system where family relationships must be preserved and protected).

175. See *id.* at 82-84 (noting that because relationships are at the heart of all child protective proceedings, more conciliatory models of representation must replace the current adversarial model).

#### IV. WHY EFFECTIVE LAWYERS FOR INDIGENT PARENTS ARE CRITICAL ACTORS IN THE CHILD WELFARE SYSTEM

This part outlines a handful of problems that families in poverty face in the child protective system and notes where effective counsel for indigent parents could help alleviate some of these difficult situations.

##### A. *The Gross Inequality In The Parties' Legal Representation*

Three different attorneys represent the parties—the parent, the child, and the state—in child protective proceedings.<sup>176</sup> The presence of three lawyers representing three allegedly distinct interests adds to the adversarial nature of child protective proceedings.<sup>177</sup> Perhaps even more detrimental to the process, however, is the great disparity in legal representation among the three parties.<sup>178</sup> Arguing that indigent parents are legally out-matched in child protective proceedings, one commentator notes: “The most striking thing about the practice of law in [the child protective] area is the gross inequality of representation. This is the only area of law in which the party most in need of effective assistance of counsel is least likely to obtain it.”<sup>179</sup>

The role of the attorney for the child welfare agency is fairly well-settled: She must provide effective and competent legal support while the child welfare agency that she represents works to protect children from injury and to safeguard children’s well-being.<sup>180</sup> This includes filing petitions against parents suspected of neglect, investigating allegations of wrongdoing, meeting with caseworkers to understand a family’s particular situation, and being well-versed in the state’s laws governing child protection proceedings.<sup>181</sup> Though this task is great,

176. See Areen, *supra* note 31, at 890.

177. See generally Weinstein, *supra* note 75 (discussing the shortcomings of the adversarial process in the child protective context).

178. Kim Nauer explains the current disparity in New York City:

Parents who want to fight removal are outgunned. [The child welfare agency] and the child each have institutional lawyers and support staff. Indigent parents are almost always appointed “18b” attorneys. These private practitioners, supported by a meager pool of court funds allocated under article 18b of the New York State County Law, are underpaid and lack the time and staff needed to deal with [the child welfare agency’s] allegations.

Nauer, *supra* note 95, at 21-22.

179. Testimony of Martin Guggenheim Before the Assembly Standing Committee on Children and Families Family Preservation: Preventive Services, Adoption and Foster Care (Dec. 1, 1993) 5-6 [hereinafter Guggenheim, Testimony] (on file with the *Fordham Law Review*).

180. Gene D. Skarin, *The Role of the Child Protective Agency’s Attorney in Family Court Child Protective Proceedings*, in *Child Abuse, Neglect and the Foster Care System*: 1995, at 431, 434 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4210, 1995), available in WESTLAW, 171 PLI/Crim 431.

181. See Larabee, *supra* note 50 (providing a step-by-step guide to effectively representing the child welfare agency in child protective proceedings); Skarin, *supra* note 180 (same).

agency lawyers have at their disposal a wide variety of investigative and social services assistance.<sup>182</sup>

The lawyer for the child welfare agency also shapes the substance and form of all child protective cases that come before the court.<sup>183</sup> Accordingly, the agency's lawyer exercises a great deal of power over the other parties involved. Noting this imbalance in power, one critic writes: "[P]arents have few rights in Family Court. Once [the child welfare agency] has removed a child, the agency, through the courts, wields such power that even parents with legitimate claims for the return of their children have little or no recourse in the judicial system."<sup>184</sup>

Though their role may not be as clearly defined as that of the agency's lawyer, lawyers who represent children nevertheless enjoy support from the legal and political world.<sup>185</sup> For example, in February 1996, the American Bar Association House of Delegates formally adopted the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* ("Standards").<sup>186</sup> The *Standards* attempt to more clearly define the role of the law guardian, thereby easing the jobs of lawyers for children.<sup>187</sup> Although "[a]mbiguity of role and lack of clear practice standards is . . . also a challenge for attorneys who represent parents,"<sup>188</sup> national attention has not been similarly focused on the lawyer-parent relationship.<sup>189</sup> In fact, the attention paid to the representation of children has noticeably ignored the role that parents play in child protective proceedings.<sup>190</sup> This unwillingness to include parents in discussions concerning the welfare of their children inappropriately, and perhaps harmfully, ignores children's special ties to their families.<sup>191</sup> Thus, although the interests of the parent and the child are often aligned in neglect cases,<sup>192</sup> legal

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182. Guggenheim, Proposal, *supra* note 126, at 2.

183. Larabee, *supra* note 50, at 62.

184. Nauer, *supra* note 95, at 21.

185. See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in the Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 Fam. L.Q. 765, 774 (1997) (describing the growing concern across the nation with the quality and quantity of legal representation for children).

186. Duquette et al., *supra* note 54, at 122.

187. *Id.* at 123.

188. *Id.* (footnote omitted).

189. See *id.* ("National standards for legal representation . . . of parents accused of child maltreatment are not available currently, but their development may be very important to improve professional practices.").

190. For example, in 1993 the American Bar Association wrote a report on the unmet legal needs of children and their families. *America's Children at Risk*, *supra* note 21. Although the 78-page report closely examines legal reforms to help children and families in poverty, there is no mention of the role of parents or parents' attorneys in child protective proceedings. Instead, the ABA focused solely on enhancing advocacy for children. *Id.* at 3-8.

191. See Weinstein, *supra* note 75, at 87-88.

192. See *id.* at 85 ("Ultimately, proceedings which pit children against parents . . . are antithetical to the best interests of those children.").

scholarship and society in general have consistently refused to treat the two parties with the same degree of concern and respect.

Both the lawyer for the child welfare agency and the law guardian have the advantage of being recognized as important actors in the protection of children. In contrast, the dearth of legal scholarship devoted to the role of the lawyer for parents most likely reflects society's unease and unwillingness to work with parents charged with neglect.<sup>193</sup> These negative attitudes find their ways into systems of legal representation which, in return, fail to fully assert parents' interests.<sup>194</sup>

In theory, however, this inequality in legal representation should not negatively affect families. All three parties are ostensibly working toward the same fair, swift, and appropriate resolution that protects the best interests of the child.<sup>195</sup> Unfortunately, the agency's lawyer is often overworked and unable to spend the appropriate amount of time on any one case.<sup>196</sup> In addition, she may have reservations about cooperating with a parent whom her client has accused of neglect.<sup>197</sup> Similarly, the law guardian may be wary of the respondent parent. Because parents and children are pitted against each other in the current legal system,<sup>198</sup> and because parents are portrayed as the enemies in neglect proceedings,<sup>199</sup> law guardians may feel that it is inappropriate to trust respondent parents. Therefore, the lawyer for the parent is the only representative out of the three who is willing to put faith and energy into the outcast parent. Furthermore, the parent is the

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193. See Garcia & Batey, *supra* note 90, at 1083-84 ("Negative attitudes toward accused parents and the behavioral manifestations of these attitudes reflect both individual and societal biases, as well as a misreading or ignoring of the relevant child protection laws. The intent of these laws is to help reconstitute affected families.").

194. See, e.g., Appell, *supra* note 25, at 582 (noting that appointed counsel for indigent parents "are likely to have few resources, little training, and high caseloads"); Weinstein, *supra* note 75, at 102-03 (noting that counsel is not universally appointed to parents in child protection cases and, "where lawyers are appointed, they are often underpaid, have high caseloads, and work in a system which has low expectations about what they can do").

195. See Nauer, *supra* note 95, at 21 ("[T]he primary mission of [the child welfare agency] is to keep families together whenever possible. And that means supporting the parents as well as protecting their children."); see also Catz & Firak, *supra* note 167, at 420 (analyzing the Supreme Court's decision in *Lassiter* and noting that "[t]he Court recognized that since the adversary system results in fair and accurate outcomes when both parties are represented by counsel, the state's interest are potentially maximized by providing counsel to indigent parents").

196. Larabee, *supra* note 50, at 66 ("Working as an attorney . . . for a public agency means, among other things, that you will have a high caseload, less than palatial working conditions, and that you will never have enough time to do the kind of job on each case that you'd like.").

197. Cf. *id.* at 63-64 (noting that the lawyer for the child welfare agency must learn to recognize situations in which parents charged with abuse or neglect should not be trusted and must be questioned and investigated thoroughly).

198. See Garcia & Batey, *supra* note 90, at 1081-84.

199. See Buss, *supra* note 162, at 433-35.

actor who is best-suited to reunite the family.<sup>200</sup> Considering Congress's recent backlash against family preservation, however, poor parents charged with neglect are likely to begin to have an increasingly difficult time achieving reunification. Thus, in order to help families and their children, the child protection system must begin to re-evaluate the importance of competent and effective advocates for parents.<sup>201</sup>

### B. *Presumptions Against The Respondent Parent In The Child Welfare System*

In neglect proceedings, which are held in a chaotic family court and decided by an over-burdened judge,<sup>202</sup> the judge's neutrality and open-mindedness are essential to the parent's quest for expedient reunification. In reality, though, some judges may find it difficult to face a new case with complete objectivity.<sup>203</sup> This difficulty most likely stems from the frustrations of being responsible for an unmanageable number of cases.<sup>204</sup> With such huge caseloads, judges may eventually stop seeing respondent parents as individuals.<sup>205</sup> In this overburdened system, then, an effective lawyer for the parent is essential to making her client's circumstances fully known to and understood by the court.<sup>206</sup>

In addition to facing an overwhelming docket each day, judges are held accountable to the public for their sometimes difficult rulings in child protective cases.<sup>207</sup> As a result of this public scrutiny, some

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200. See *infra* Part V.C.2 (discussing the importance of parents' involvement throughout child neglect proceedings).

201. See Shepherd & England, *supra* note 96, at 1953 ("Competent professional representation in proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided.").

202. See Garcia & Batey, *supra* note 90, at 1092 (noting family court judges' "severely overcrowded dockets").

203. Annette Appell finds that some judges harbor negative attitudes toward indigent parents. She attributes this problem in part to the racial and class disparities between the judges and the respondents: "In contrast to the largely poor and disproportionately African American families [involved in the] child protection [system], the judges . . . are mostly middle-class and white." Appell, *supra* note 25, at 585. As a result, some judges who "monitor these families see them as pathological, incompetent, and less worthy of preservation." *Id.*

204. For example, "[j]udges hearing child protection matters in Chicago carry up to 3000 cases." *Id.* at 602 n.116.

205. Dohrn, *supra* note 98, at 5.

206. Cf. Weinstein, *supra* note 75, at 102 (stating that where the system appears to be the parent's "enemy," the parent's attorney may be the only trusted voice who can help the parent). Individual advocacy is arguably more important now than it ever had been in the past in light of the Adoption and Safe Families Act of 1997. By changing the general philosophy in the child welfare system from one of family preservation to one of child protection, courts today may be even less inclined to recognize sympathetic family circumstances.

207. See Boyer, *supra* note 78, at 1621-24. For example, in the controversial and highly publicized case of the child abuse murder of seven year old Elisa Izquierdo, the

judges may be reluctant to return children to allegedly neglectful parents.<sup>208</sup> Watchful of the media, some judges may “rubber-stamp” the child welfare agency’s determination in place of making more impartial decisions.<sup>209</sup> For example, to the detriment of families, some argue that “judges have tended to either ignore [the reasonable efforts] requirement or to make unwarranted findings that ‘reasonable efforts’ had been made.”<sup>210</sup> In fact, although the child welfare agency is legally mandated to make reasonable efforts to keep most families together,<sup>211</sup> in practice the presumption is actually against the family unit and in favor of removal.<sup>212</sup> Without adequate legal representation throughout the proceedings, indigent parents will continue to be victims of the current system.<sup>213</sup>

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media frequently mentioned the name of the judge who sent the child home to her mother. See David Van Biema, *Abandoned to Her Fate*, Time, Dec. 11, 1995, at 32, 35 (discussing the role of the family court judge involved in the case). Elisa’s mother admitted to killing her child by throwing her against a concrete wall. *Id.* at 33. She also confessed that she had made Elisa eat her own feces and that she had mopped the floor with the child’s head. *Id.* Hounded by the press after this tragic death, the judge who awarded custody of Elisa to her mother stated: “It is any judge’s worst nightmare to be involved in a case in which a child dies.” *Id.* at 35.

208. Nauer, *supra* note 95, at 21. Nauer writes:

[N]o one—including the judges—wants to be blamed later for putting a child back into an abusive or neglectful home. This position is so pervasive that [child welfare agency] lawyers used it to brace their legal arguments in the case. They called it the “safer course doctrine.” No such doctrine exists in legal precedent; it would be antithetical to the due process protections in Family Court law.

*Id.* at 22; see also Weinstein, *supra* note 75, at 113 (“[J]udges are likely to skew their decision-making based on the fear of harming a child by placing him with parents who could hurt him.”); *Restoring the Community Connection*, Child Welfare Watch, Winter 1997, at 1, 5 (observing that the recent increase in improper removals by the state reflects a misguided yet widespread attitude of “better safe than sorry”).

209. Nauer, *supra* note 95, at 21 (“[Judges] have become arbiters for the child welfare system . . . unwilling to come down on the parents’ side in a decision, even when the evidence is in their favor.”).

210. Braveman & Ramsey, *supra* note 22, at 468.

211. Though the supporters of the Adoption and Safe Families Act of 1997 criticized the reasonable efforts requirement, this requirement nevertheless remains a part of federal law. The ASF did, however, explain the requirement further: “[I]n determining reasonable efforts to be made with respect to a child . . . the child’s health and safety shall be the paramount concern.” Pub. L. No. 105-89, § 101(a)(A), 111 Stat. 2115, 2116.

212. Guggenheim, *Testimony*, *supra* note 179, at 4. Professor Guggenheim notes that, in the current child protective system, which is pitted against parents, the question that is asked in practice is: “How will I fare if we don’t remove the child and there is trouble in the future?” *Id.*

213. Garcia & Batey, *supra* note 90, at 1093 (“[B]ut for the intervention of [effective parents’ lawyers], the widespread violation of parents’ and children’s rights by judges would continue unchecked.”).

C. *Overreaching State Intervention Too Often Acts To The Family's Detriment*

Critics of state intervention into families' lives argue that child welfare agencies disproportionately target families in poverty.<sup>214</sup> Many argue that "[p]oor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies."<sup>215</sup> In addition, some critics charge that the scrutiny and state involvement in poor people's lives are not the only reasons why families accused of neglect are disproportionately poor.<sup>216</sup> Specifically, institutional biases against parents in poverty can influence state intervention.<sup>217</sup> By ignoring the larger conditions of poverty in which families live and blaming parents for their families' misfortunes,<sup>218</sup> the state sometimes intervenes in poor families' lives with the idea of "fixing" their situations.<sup>219</sup> Instead of assisting parents to rebuild their lives and their relationships with their children, state intervention of this sort can unfortunately fail to directly address the root causes of the families' difficulties.<sup>220</sup>

Thus, the more crucial issue surrounding state intervention should be whether the state's intervention serves to better the family as a whole.<sup>221</sup> Although the state may intervene with good intentions of protecting children and helping families, the danger certainly exists

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214. Annette Appell remarks that, historically, there are two systems of family law: "The private system adjudicates custody among relatively wealthy parents . . . [and] the public system adjudicates custody among the state and predominately poor mothers in child protection courts." Appell, *supra* note 25, at 581. She continues: "A key difference between the private and public systems . . . is that the former is more deferential to parental rights and family autonomy, whereas the latter is more tolerant of . . . state usurpation of custody." *Id.*

215. *Id.* at 584; *see also* America's Children at Risk, *supra* note 21, at 51 ("[F]amilies of color, and poor families, are more likely to be identified and coerced into accepting interventions by the child welfare system.").

216. *See* Pelton, *supra* note 80, at 23 (arguing that poor families are in fact disproportionately involved in issues of child neglect not because the state intervenes more frequently, but because the real problems underlying neglect are closely tied to the problems of living in poverty). For a further discussion of the connection between poverty and neglect, *see supra* part II.

217. *See* Appell, *supra* note 25, at 587-89 (stating that states may target mothers based on a number of factors, including race).

218. *See* Dohrn, *supra* note 98, at 2.

219. Appell, *supra* note 25, at 587.

220. *See, e.g., id.* at 589-600 (telling the stories of three families in need and how the state's intervention in all three cases failed to address, and in fact worsened, the real issues the families faced).

221. *See* Braveman & Ramsey, *supra* note 22, at 463.



that families will be hurt in the process.<sup>222</sup> In fact, sometimes state intervention does act to a family's detriment.<sup>223</sup>

[T]here is substantial evidence to suggest that, except in cases involving very seriously harmed children, a child's situation is rarely improved through coercive state intervention. This is particularly true when, as is most frequently the case, intervention takes the form of removal from the parental home, often placing a child in a more detrimental environment.<sup>224</sup>

Whether the state intervenes by removing a child from her parent's home or whether the state seeks to provide a family with services, once a state has intervened in a family's life it is responsible for ensuring that the family's quality of life improves.<sup>225</sup> The parent's lawyer, then, plays the crucial and much needed role of ensuring that the state agency does not infringe upon powerless families but, rather, fulfills its obligations to help them.

### 1. Removing Children From Their Families

State child welfare agencies have been heavily criticized for intervening too often,<sup>226</sup> too soon,<sup>227</sup> and without procedural safeguards<sup>228</sup> in poor families' lives. Such practices can lead to "needless or unwarranted separation of children from their families [and] can have severe consequences for [the entire family]."<sup>229</sup> Many experts in the child protective field are well aware of the psychological harm to children

222. See Donald N. Duquette, *Liberty and Lawyers in Child Protection*, in *The Battered Child* 316, 317 (C. Henry Kempe & Ray E. Helfer eds., 3d ed. 1980). This danger mounts when confounded with the fact that families in the child welfare system are often poor and powerless. *Id.* at 318. Thus, the connection between poverty and state intervention not only affects the number of poor families in whose lives a state intervenes, but also influences the quality of the state intervention.

223. See, e.g., English & Tritz, *supra* note 98, at 187 (noting that between 35% and 70% of children whom the state places in foster care "should not be there and can be severely damaged by the experience").

224. Kindred, *supra* note 24, at 529-30 (footnotes omitted).

225. English & Tritz, *supra* note 98, at 189.

226. For example, in New York City, the number of children removed from their families by child welfare officials increased twenty five percent between 1996 and 1997. *Restoring the Community Connection*, Child Welfare Watch, Winter 1997, at 1.

227. The introduction to the second issue of Child Welfare Watch, an issue devoted to exploring community-based child welfare services, reads:

There is no question that the most serious cases of abuse and neglect warrant immediate removal of the children. Yet in the sweeping majority of cases, either a more thorough investigation is necessary before allegations can be proven or the allegation itself points to the need for preventive intervention, not removal. In such cases, government should avoid burdening the children and their families with the horrendous trauma of separation.

Sadly this is not the way the system currently functions.

*Id.*

228. See Nauer, *supra* note 95, at 21 ("[Child welfare agency] workers routinely use their emergency removal powers to take children from their parents before getting a court order approving the action.").

229. Guggenheim, Proposal, *supra* note 126, at 1.

when they are separated from their parents and placed into foster care.<sup>230</sup> In the majority of child protective cases that deal with parental neglect, the risk of psychological harm may be much greater than the risk of allowing the child to remain a part of her family unit.<sup>231</sup>

Of all the substantiated cases of abuse and neglect addressed by [New York City's child welfare agency], fewer than 10 percent involve any kind of physical or severe emotional abuse. The remaining 90 percent involve charges of neglect against parents who have allegedly failed to care properly for their children. Most child welfare experts understand that it is emotionally far less traumatic for the child—and far more cost effective for the taxpayer—to help most such parents become better caretakers rather than to keep their children for years in foster care.<sup>232</sup>

In spite of the abundant knowledge about children's development and the harm that removals impose on children, states nevertheless continue to respond to charges of neglect in this most intrusive and harsh manner.<sup>233</sup>

The question logically becomes, then: "[W]hat, exactly, is the best way of [ensuring the safety and well-being of children]? By promptly removing children from allegedly neglectful parents and putting them in foster care, or by helping parents learn to stop being neglectful?"<sup>234</sup> This question is particularly compelling in neglect cases where the state breaks up families in which the parent is not guilty of any wrongdoing.<sup>235</sup> Recognizing this important issue, some child welfare experts have concluded that "removal of neglected children from parental custody to foster care can no longer be the state's primary response to poverty-induced child neglect."<sup>236</sup> Thus, child welfare experts are in-

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230. See Guggenheim, *Testimony*, *supra* note 179, at 5 (noting that the state too often removes children from their families without first providing services to the family and, as a result, children are "far more seriously harmed by those removals—whether physically or psychologically—than if state officials never heard of them in the first place").

231. See Braveman & Ramsey, *supra* note 22, at 451 (stating that protecting family relations is essential to a child's physical and emotional development).

232. *Myths and Facts: The Big Picture*, Child Welfare Watch, Winter 1997, at 7.

233. The illegitimacy of some of these removals has been judicially recognized: "Of late, Family Court judges have reported that, in an increasing number of cases brought before them, the child's removal was not justified." *Restoring the Community Connection*, Child Welfare Watch, Winter 1997, at 1, 5.

234. *Does Child Welfare Devalue the Family?*, Child Welfare Watch, Spring 1997, at 2.

235. See generally Braveman & Ramsey, *supra* note 22 (criticizing state intervention when the child welfare agency removes children from their homes only because the family is in poverty). Some critics note the incidents where children are removed from their parents through no measurable fault of the parent: For example, parents have been charged with abuse or neglect for too frequently allowing their children to eat breakfast at McDonald's, for not allowing their children to watch television after 7:30 p.m., and for being late to pick up children after school. Richard Wexler, *Wounded Innocents: The Real Victims of the War Against Child Abuse* 17 (1990).

236. Kindred, *supra* note 24, at 538.

creasingly aware that, in cases of neglect, families can be best helped with proper attention and preventive services.<sup>237</sup>

## 2. Providing Services to Families in Need

Preventive services are an alternate way that states may intervene to remove problems from needy homes without separating children from their families.<sup>238</sup> Service plans often attempt to aid families in many areas, including "child welfare, education, health, housing, mental health, substance abuse, and criminal justice."<sup>239</sup> Because many child welfare experts feel that "state intervention should be based on protecting and strengthening the parent-child relationship, rather than intervening despite the relationship,"<sup>240</sup> states are highly encouraged to provide such services to families before intervening in any other manner.<sup>241</sup> In fact, some argue that states have an affirmative obligation to provide assistance to poor families before intervening to remove children from their parents.<sup>242</sup>

Nevertheless, state agencies are continually criticized for failing to refer at-risk families to preventive services.<sup>243</sup> Critics question whether states are actually committed to making preventive services

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237. *Families Get Lost in ACS Plan*, Child Welfare Watch, Spring 1997, at 6.

238. English & Tritz, *supra* note 98, at 188.

239. Beyer, *supra* note 98, at 311. Many child welfare experts, however, criticize the adequacy of the services that child welfare agencies provide to families. See, e.g., Braveman & Ramsey, *supra* note 22, at 453 ("[T]he inadequacy of supportive services in the community . . . means that many children are removed due to the lack of other more appropriate options." (quoting *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care, 1979: Hearing on H.R. 3434 Before the Subcomm. on Pub. Assistance of the Senate Comm. on Fin., 96th Cong., 1st Sess. 260 (1979)* (testimony submitted by the Association for the Children of New Jersey))).

240. Appell, *supra* note 25, at 610.

241. For example, The Adoption Assistance and Child Welfare Act of 1980 "made federal reimbursement of state expenditures for foster care contingent upon states first attempting to prevent foster care placements when possible." Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. Rev. L. & Soc. Change 441, 449 (1996). Of course, one very important way to prevent foster care placements is to provide the family with preventive services. See *The Assault on Preventive Services*, Child Welfare Watch, Spring 1997, at 4 ("Preventive services have long been a successful, core element of the child welfare system, providing thousands of needy families with access to social services at a time when they would otherwise be threatened with collapse."). With the Adoption and Safe Families Act's new interpretation of the reasonable efforts requirement, however, it is not currently known how much of an emphasis the child welfare system will place on preventive services in the future. Even worse, the harm this may cause to families is compounded by many agency caseworkers' known dislike for parents charged with neglect. See, e.g., Herring, *supra* note 26, at 203-04 (noting caseworkers' biases against biological parents).

242. Kindred, *supra* note 24, at 536.

243. For example, in New York City, there was a dramatic forty percent decline in the number of children referred by the city to preventive services between 1992 and 1997. *The Assault on Preventive Services*, Child Welfare Watch, Spring 1997, at 4.

available to families at all.<sup>244</sup> For example, although problems with neglect are increasing throughout the country,<sup>245</sup> states do not always adequately increase spending on preventive services in order to fill the rising need.<sup>246</sup> In fact, some agencies are cutting funding and referrals for preventive services while the need for such key services escalates.<sup>247</sup> Through such actions, child welfare agencies disserve poor families by choosing intrusive and paternalistic forms of intervention,<sup>248</sup> thereby greatly reducing the likelihood that poor families will be helped in the long-run.

Finally, when child welfare agencies do provide preventive services to needy families, the chosen services too often fail to address the problems that families in poverty actually encounter.<sup>249</sup> Rather than taking the time to tailor a program that is unique and specific to the family's needs,<sup>250</sup> "families often receive 'boilerplate' service plans which can add to, rather than alleviate the families' problems."<sup>251</sup> Unfortunately, the bureaucracy that plagues child welfare agencies can tie caseworkers' hands and prevent well-meaning child welfare officials from adequately serving poor families:<sup>252</sup>

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244. See Appell, *supra* note 25, at 600 ("More than a decade after the federal government enacted funding legislation designed to protect against the over reliance and abuses of foster care, the states are still failing to provide the meaningful supports that would allow families to remain intact.").

245. See National Clearinghouse on Child Abuse and Neglect Information, *In Fact . . . : Answers to Frequently Asked Questions on Child Abuse and Neglect* (visited Mar. 9, 1998) <<http://www.calib.com/nccanch/pubs/infact.htm>> (recording a substantial increase in the number of instances of abuse or neglect in the country: From 1986 to 1993, there was a 67% increase in child abuse and neglect charges; this 1993 figure reflects a 149% increase in abuse and neglect charges from 1980, the time that Congress passed the Adoption Assistance and Child Welfare Act).

246. See *The Geography of Prevention*, Child Welfare Watch, Winter 1997, at 4 ("From fiscal year 1996 to 1997, abuse and neglect reports in New York City shot up seven percent, from 48,702 to 52,106. But for fiscal year 1998, the city has increased preventive spending by only one percent, from \$126 million to \$127.5 million.").

247. See *Families Get Lost in ACS Plan*, Child Welfare Watch, Spring 1997, at 6 (noting that the child welfare agency in New York City has made "painful cuts" in funding and referrals to preventive services).

248. Critics argue that the declining numbers of referrals to preventive services "reflects the defensive mentality of protective caseworkers following a year of bad press—i.e., it's better to remove children first and ask questions later." *The Assault on Preventive Services*, Child Welfare Watch, Spring 1997, at 4.

249. See Appell, *supra* note 25, at 596.

250. See Beyer, *supra* note 98, at 324.

251. Weinstein, *supra* note 75, at 120; see also Appell, *supra* note 25, at 601 ("Instead of offering meaningful assistance, caseworkers too often take a cookie cutter approach to the families and their problems."); Beyer, *supra* note 98, at 314 ("Many states do not consistently adhere to the spirit of the Adoption Assistance and Child Welfare Act. Rather, they define reasonable efforts in terms of those services already available, however inadequate, and plug families into limited, predefined services.").

252. See Garcia & Batey, *supra* note 90, at 1088 (quoting a doctor who noted that child welfare agencies are "asked to do too many things for too many people with too few resources").

[C]aseworkers cannot keep up. . . . The heavy demand [on child welfare agencies] in fact hinders the provision of services to protect and support families. . . . The problems become interchangeable, the serious ones indistinguishable from the minor ones; and needs are generalized and defined according to what services are currently available.<sup>253</sup>

Because underfunded, understaffed, and mismanaged child welfare agencies are responsible for handling and evaluating families' problems,<sup>254</sup> these agencies cannot meet their mandates<sup>255</sup> and families suffer in the process. Although states must make "reasonable efforts" to keep families together, in practice child welfare agencies make "efforts [that] are reasonable in relation to funding available, but not in relation to [caseworkers'] knowledge of effective programming."<sup>256</sup> Thus, the reasonable efforts requirement, originally created to protect families, does not achieve its purpose in practice. Furthermore, the clarification of this requirement provided by the Adoption and Safe Families Act of 1997<sup>257</sup> is not likely to encourage agencies to make greater efforts to help families. Accordingly, indigent parents are in great need of trained, competent, and able advocates to help them obtain the services they require.

#### V. SUGGESTIONS FOR HOW STATES AND THE LAWYERS WHO WORK WITHIN THE STATES CAN ENSURE THAT INDIGENT PARENTS ARE BEST REPRESENTED IN NEGLECT PROCEEDINGS

This final part argues that, for the well-being of the children and the entire family, parents in poverty accused of neglect deserve and require competent and effective counsel throughout their involvement in the child welfare system. Accordingly, this part advocates that all states should provide indigent parents with a statutory right to counsel in neglect cases and describes some important components of this stat-

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253. Appell, *supra* note 25, at 601 (footnotes omitted).

254. Nauer, *supra* note 95, at 22.

255. Appell, *supra* note 25, at 600 ("It is no secret that local child protection agencies are not meeting their mandates. . . . In fact, nearly half of the states are under court supervision for failing to provide basic services to children in need of protection." (footnotes omitted)).

256. Braveman & Ramsey, *supra* note 22, at 454 (quoting Foster Care, Child Welfare, and Adoption Reforms, 1988: Joint Hearings Before the Subcomm. on Pub. Assistance and Unemployment Compensation of the House of Representatives Comm. on Ways and Means and the Select Comm. on Children, Youth, and Families, 100th Cong., 2d Sess. 252 (1988) (testimony of Select Comm. Chr. Hon. George Miller)). In his congressional testimony, the Director of a Minnesota Department of Community Services stated: "[I]n fact, services are not really available. . . . we are just shuffling kids around hoping that they don't die in the process, because that is the worst thing that can happen to you in terms of public relations." *Id.* at 456 (footnote omitted).

257. Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116.

utory right. Furthermore, to ensure that indigent parents receive knowledgeable legal representation, this part proposes that states establish certification programs for their court-appointed attorneys. Finally, this part suggests some ways in which parents' lawyers can act to best help families during their time in the child welfare system.

A. *States Must Recognize A Meaningful Right To Counsel For Indigent Parents In Neglect Proceedings*

By passing the Adoption and Safe Families Act of 1997, the federal government has announced its firm commitment to fighting for the health and happiness of all children. In addition to protecting children from abusive homes,<sup>258</sup> this commitment also requires helping needy families stay together whenever possible and appropriate.<sup>259</sup> This Note argues that, perhaps today more than ever before, the lawyer for the indigent parent has a crucial role to play in helping needy families remain intact and in protecting children from coercive state intervention and damaging removal from their parents. In order for parents' lawyers to make a difference in the lives of the poor families who enter the child welfare system, however, states must do their parts by providing indigent parents with a meaningful statutory right to counsel in neglect proceedings.<sup>260</sup>

Without a skilled attorney advocating to reunite the family, poor parents in the child welfare system are often left powerless and hopeless.<sup>261</sup> When the state coercively intervenes in a poor family's life, separates children from their parents, and demands certain actions from the parents before it will consider returning the children, parents are understandably confused, heartbroken, and terrified. Further, this rush of emotions that comes when the state removes one's children is heightened when the family at issue is poor.<sup>262</sup> Without economic resources, a network of knowledgeable contacts, or much education, parents in poverty who lack legal representation are unfairly and inexcusably at the mercy of the very agency that took their children from them.<sup>263</sup> The harm of not having legal representation is even more

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258. See *supra* notes 62-69 and accompanying text (noting that the main focus of the Adoption and Safe Families Act of 1997 is to protect children from abuse).

259. Senator DeWine of Ohio, one of the members of Congress who proposed the Adoption and Safe Families Act, recognized the importance of preserving families: "We should not be in the position of taking children away just because the parents are too poor—or just because there is a problem in the family. If the problem can be fixed, we must try to keep the family together for the children's benefit." 142 Cong. Rec. S5712 (daily ed. June 4, 1996).

260. Many states already provide indigent parents with a statutory right to counsel. See *supra* note 133 and accompanying text. This section, however, argues that all states should provide these rights and, further, that these rights must be meaningful for parents in poverty.

261. See *supra* notes 92-96 and accompanying text.

262. See *supra* notes 92-96 and accompanying text.

263. See *supra* Part IV.A.

egregious in light of the anti-parent bias that pervades the child welfare system.<sup>264</sup> Thus, if indigent parents do not have legal representation, no one in the system will likely voice concern for the parents' rights.<sup>265</sup>

As a necessary check on the potentially devastating actions of child welfare agencies, out of a basic sense of fairness to the families involved in neglect proceedings, and out of an appreciation for poor families' circumstances that are often the main cause of the neglect charge, all states should recognize a right to counsel for indigent parents in neglect proceedings. In accord with the goals of the Adoption and Safe Families Act of 1997,<sup>266</sup> lawyers for indigent parents can play a crucial role in helping the state child welfare agencies determine those families who should be reunited and, thus, who deserve appropriate and intensive services. Thus, it is in both the family's and the state's best interests to provide indigent parents with adequate and effective court-appointed counsel in neglect proceedings.

Simply recognizing a right to counsel for indigent parents, however, may not be enough to help families in poverty. To ensure that poor families are best protected when they are involved with the child protective system, states' assigned counsel statutes must be sensitive to the important role that parents' lawyers play in the lives of families in poverty. Thus, these statutes must provide parents' lawyers with the opportunities to best serve their clients.

First, states need to provide indigent parents with their assigned counsel in advance of their first court date.<sup>267</sup> Meeting their attorneys ahead of their first appearances in court will allow indigent parents to alleviate some of the problems they would otherwise encounter in the child welfare system by: (1) telling their stories to their attorneys, thereby feeling a sense of control over their situations;<sup>268</sup> (2) helping

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264. See *supra* Part IV.B.

265. Martin Guggenheim further notes that even if the child welfare agencies act with the best intentions of the parents in mind, the outcomes are nevertheless not always positive for the families:

Good intentions on the part of the state authorities and agencies involved in child protection proceedings are no guarantee that they will have prophetic powers or even good judgment. As Justice Brandeis observed in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 479 (1928): "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Martin Guggenheim, *Ethical Considerations in Child Welfare Cases: Duties of the Law Guardian and the Parent's Attorney*, in *Child Abuse, Neglect and the Foster Care System 1998*, at 657, 662 (PLI Litig. & Admin. Practice Course Handbook Series No. C-179, 1998).

266. See *supra* notes 55-74 and accompanying text.

267. See *supra* Part III.C.2.

268. See *infra* Part V.C.2 (discussing the importance of empowering poor parents by demanding that they take active roles in their cases).

to prepare their attorneys to appear in court, thereby reducing the power that the agency has over poor families; and (3) increasing the speed with which they can begin to fight to keep or to be reunited with their children.

Second, states must continue to provide indigent parents with court-appointed counsel after the dispositional hearing.<sup>269</sup> Because neglect proceedings are shaped by parents' future behavior and not by their past conduct, parents' lawyers must be available after the trial has ended to monitor families' progress and to assist families in rebuilding their lives. By failing to provide parents with lawyers who understand the child protective system and who can advocate on parents' behalf after disposition, states will wrongly continue to process disempowered and uninvolved indigent parents through an over-worked system that fails to take their individual circumstances into account.<sup>270</sup> Instead, if states redefine the scope of parents' lawyers' representation to include their active involvement after disposition, then states will help ensure that the agencies make reasonable and appropriate demands on parents, that parents actually obtain necessary services and become involved in their own cases, and that families in poverty are reunited sooner. Thus, by providing indigent parents with court-appointed counsel after disposition, states will best comply with Congress's goal of quicker permanency for children.

Finally, state assigned counsel programs must make a commitment to compensate parents' attorneys appropriately and fairly for the meaningful services they provide.<sup>271</sup> For example, by abolishing the differential between rates paid for in-court and out-of-court time, states will send the important message that child protective cases are best resolved through negotiation, collaboration, and compliance with individually-tailored service plans rather than through the adversarial courtroom process. When attorneys are encouraged to work diligently for their clients out of court, child protective proceedings will be resolved more smoothly and quickly, thereby best serving the family involved. Failing to sufficiently compensate parents' lawyers discourages complete representation, active involvement, and genuine devotion to poor families. Furthermore, on a larger scale, paying parents' lawyers insultingly low wages is an affront to the legal profession's stated commitment to equal justice for all. Thus, in order to help their most needy, most disadvantaged, and most fragile citizens, states must make a firm commitment to provide poor families in the child welfare system with well-trained, well-prepared, and well-compensated court-appointed counsel.

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269. *See supra* Part III.C.3.

270. *See supra* notes 249-57 and accompanying text.

271. *See supra* Part III.C.4.



B. *States Must Certify And Train Lawyers For This Type Of Representation To Ensure That Indigent Parents Are Provided With A Meaningful Right To Counsel*

This part argues for the proper training of parents' lawyers and proposes a model certification program that states should require all attorneys to complete before representing families in poverty in the child welfare system.

1. *The Importance Of Interdisciplinary Training For Attorneys Who Work In The Child Protective System*

Given the numerous problems that plague the child welfare system and, more specifically, the particular difficulties that indigent parents face in this system, lawyers for parents have an admittedly difficult role to play. In order to best and most effectively represent families' interests, it is essential that lawyers approach their cases with an interdisciplinary understanding of the issues involved:

The knowledge required by . . . professionals [in the field of child neglect] covers a broad spectrum. It includes human behavior, intervention methods, family dynamics, child development, substance abuse and mental health issues, an understanding of the legal requirements for intervention and the process by which legal decisions are made, and effective collaboration skills.<sup>272</sup>

Because child welfare law involves many non-traditional legal issues,<sup>273</sup> a proper appreciation of other disciplines is key to ensuring that lawyers for indigent parents fully understand the scope and depth of their clients' problems. In order to gain such an appreciation and understanding, lawyers for indigent parents require specialized training.<sup>274</sup>

The Federal Government has recognized this need for formal, multi-disciplinary training for lawyers who practice in the child protective area. In 1988, the National Center on Child Abuse and Neglect awarded grants for interdisciplinary training in academic institutions to prepare graduate students to work in the child welfare system.<sup>275</sup> Through the generosity of these grants, institutions around the country have created interdisciplinary seminars in the area of child abuse

272. Weinstein, *supra* note 75, at 157-58 (footnotes omitted).

273. Criticizing the use of the traditional legal adversarial model in child protection cases, Janet Weinstein observes: Child welfare law "is not a field which is 'owned' by the law. Social work and mental health professionals play substantial roles in both juvenile and family courts. Nevertheless, the legal process seems to be running the show—a case of the tail wagging the dog." *Id.* at 84 (footnote omitted).

274. Isaacs, *supra* note 147, at 238; *see also* Weinstein, *supra* note 75, at 104 ("All professionals involved [in the child welfare system] suffer from this training deficit. Judges, attorneys, social workers, physicians, mental health experts and other child advocates are inadequately trained about the many issues which affect this type of work.").

275. Weinstein, *supra* note 75, at 157.

and neglect.<sup>276</sup> These seminars typically focus on the connections between law, social work, and psychology in the child protective area.<sup>277</sup> Such academic programs greatly serve the child welfare system as a whole by ensuring that entering professionals have a genuine understanding of the complexities of the field.<sup>278</sup>

Short of this multifaceted training at the graduate school level, lawyers who represent indigent parents in neglect proceedings must be properly trained after entering this area of the law:

Because of the complexity of families' needs and the complexity of the service delivery system itself, quality training and professional education for all professions involved in child welfare must be interdisciplinary. Child-oriented and family-oriented reform necessitates that front-line service providers and legal counsel continuously upgrade their knowledge and skills in such fields as child development, family law, cultural competence, and child welfare history. Quality professional training and education can occur . . . in continuing professional education programs.<sup>279</sup>

With a proper understanding of their clients' circumstances and an appreciation for the job that child welfare agency caseworkers must do, lawyers for indigent parents will likely be more successful at reuniting families. Furthermore, in light of the current changes in national child welfare policy away from family preservation, a lawyer who understands the system thoroughly and can "speak the language" of the other professionals involved in her client's life will be a great asset to a family in poverty which, without the help of an effective advocate, otherwise faces the tragic possibility of being separated permanently.

## 2. The Certification Procedure That States Should Adopt<sup>280</sup>

Given the importance of interdisciplinary training in child protective cases, states that provide indigent parents with court-appointed

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276. See Suellyn Scarnecchia, *An Interdisciplinary Seminar in Child Abuse and Neglect with a Focus on Child Protection Practice*, 31 U. Mich. J.L. Reform 33 (1997) (describing the topics covered in the University of Michigan's interdisciplinary seminar in child abuse and neglect and explaining the importance of such an interdisciplinary approach to working in the child welfare field). The University of Oklahoma also took advantage of this federal grant and created a program at its Health Science Center which trains future lawyers, physicians, psychologists, and social workers to understand each others' disciplines. *Professionals Given Abuse Training*, Daily Oklahoman, Nov. 12, 1990, available in 1990 WL 3040128.

277. Scarnecchia, *supra* note 276, at 35.

278. See *id.* (noting the need for this interdisciplinary training early in a professional's education).

279. Duquette et al., *supra* note 54, at 106.

280. In states that already provide indigent parents with a statutory right to counsel, the administrative offices that oversee the compensation for their assigned counsel programs should also be responsible for supervising and conducting this certification program. By tying an attorney's initial training and her continuing

counsel must devise a system to ensure that the lawyers are properly trained to advocate for these parents. Thus, this section suggests some components of a certification program for parents' lawyers that would help provide indigent parents with a meaningful right to counsel in neglect proceedings.

In order to be certified to represent indigent parents in neglect proceedings, attorneys should complete an intensive, week-long training program. States should divide this training into two components: Classroom training and courtroom training.

a. *Classroom Training*

During the classroom portion of the training program, states must familiarize lawyers with the different professionals who will be involved in their clients' lives. For example, states should have social workers, psychologists, agency caseworkers, and substance abuse specialists come into the classroom to educate lawyers about their roles in the lives of families in the child welfare system. In addition to learning about the unique roles that other professionals play, this portion of the training should highlight the connections between all of the actors involved in poor families' lives and their common interests in helping needy families. The goal of this interdisciplinary training is to foster communication and understanding among the different professions. Thus, once trained attorneys are in practice, it is hoped that these lawyers will de-emphasize the adversarial nature of child protective proceedings, which often works to the detriment of the families entrusted to their care.

Furthermore, the classroom training should include a discussion of the various service programs that the state offers to families in the child welfare system. Although the child welfare agency, and not parents' lawyers, is responsible for providing families with appropriate services, parents' lawyers should nevertheless have an understanding of the state's different offerings. Because parents' lawyers are much better-situated to become familiar with a family's particular needs and circumstances than the overburdened child welfare agency, being informed about the types of programs available to families and the various problems that such programs hope to target will help parents' lawyers best advocate for carefully-tailored service plans for families. Thus, states should invite child welfare caseworkers to educate lawyers about the services that their agencies offer. Further, this portion of the training should also include a discussion with actual parents who have gone through some of the various programs. This firsthand information about the efficacy of the service programs will help par-

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education requirements to her pay check, states will better ensure the success of their programs.

ents' lawyers understand which programs will most suitably assist their clients.

Finally, states' training programs must educate lawyers about the child welfare system in general. Because the system is so complex and different from anything that most lawyers have encountered before and because it will become such an integral part of parents' lawyers practice, states must prepare these attorneys before they enter the system. Thus, this portion of the training should highlight the unique aspects of the child protective system, including the focus toward protection and rehabilitation and away from blame and punishment,<sup>281</sup> the almost exclusively poor population in the child welfare system and the problems that families in poverty typically encounter,<sup>282</sup> the biases and stereotypes that unfortunately pervade the entire child protective system,<sup>283</sup> the very real harm that state intervention and removals can cause to children and their families,<sup>284</sup> and the difficulties of working within a large government bureaucracy.<sup>285</sup> Only once parents' lawyers feel comfortable and familiar with the challenging child welfare system can they effectively work within the system to help needy families rebuild their lives.

#### b. *Courtroom Training*

Before states certify lawyers to represent indigent parents, they also must train these attorneys to litigate in court. Parents' lawyers will need to be extremely well-versed in the procedures and substantive laws of the family courts where they will practice. Thus, this portion of the training should include an in-depth review of the applicable state child protective law. States should invite lawyers and judges from their family courts to educate the lawyers who are being trained.

In addition to a review of the law, states must acquaint lawyers with the courts themselves. Thus, the final portion of the certification process should require lawyers to observe child protection cases.<sup>286</sup> By watching actual trials at the end of their training, lawyers will have the unique opportunity to see what they have learned being implemented in practice. Parents' lawyers will be able to most effectively serve their clients only after gaining an appreciation for the other professions involved in the child welfare system, learning about the complexities of the system, becoming familiar with the procedural and

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281. See *supra* notes 150-55 and accompanying text.

282. See *supra* Part II.

283. See *supra* Part IV.B.

284. See *supra* Part IV.C.

285. See *supra* notes 252-60 and accompanying text.

286. If a state does not allow visitors into its family courtrooms, then this final part of the training should require lawyers to participate in trial simulations. Using the same lawyers and judges who lectured about the procedural and substantive laws in the courts, states should establish a mock trial program to familiarize lawyers with the nature of child protective proceedings.

substantive laws applied in family court, and observing actual court proceedings. Accordingly, states should require all such training before certifying lawyers to represent indigent parents and compensating them for such service.

C. *How Lawyers In The Child Protective System Can Best Implement Indigent Parents' Right To Counsel*

Once lawyers are appropriately trained and certified to represent parents in poverty, they must use their knowledge and skills in a manner that most effectively advocates for indigent families.

1. *Lawyers For Indigent Parents Must Work Collaboratively With The Child Welfare Agency*

One of the most important ways that a lawyer can use her interdisciplinary training is to form a collaborative team of professionals which, together, will assist families in need.<sup>287</sup> Promoting the benefits that a highly skilled team would bring to families, one child welfare expert warns: “[I]n the absence of a team of lawyers working together with a team of other professionals, including social workers, mental health professionals, homemakers, and counselors, among others, the task of successfully representing parents in these cases is exceedingly difficult and frequently is doomed to failure.”<sup>288</sup> Such an approach would particularly assist families in poverty who are not only over-represented in the child welfare system, but who also suffer from problems on multiple levels. Although the law traditionally compartmentalizes people’s lives, focusing narrowly on only one issue at a time, in reality people experience a host of different issues simultaneously. Thus, lawyers who use their training in the child protective area to work together with other professionals in the field will be much more successful at helping the whole family.

This collaboration among professionals could also serve to lessen the power that the child welfare agencies currently exercise over families in poverty.<sup>289</sup> Cooperation between the lawyer for the indigent parent and the child welfare caseworker, for example, could ease some of the negative sentiments against parents that currently pervade the child protective system.<sup>290</sup> This increased appreciation among child welfare workers for the problems that families in poverty

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287. See Weinstein, *supra* note 75, at 141 (advocating for a change in child protective proceedings from the adversarial model to one that focuses on collaborative problem solving).

288. Guggenheim, *Testimony*, *supra* note 179, at 7.

289. See Granik, *supra* note 116, at 3-4 (recognizing the power that the child welfare agency has over the future of families in the system and suggesting that lawyers for parents seek productive, non-confrontational relationships with the agencies).

290. See Hamburg, *supra* note 63 (explaining the prevalent “parent-bashing culture” in the child welfare agencies and noting the harm that such negative attitudes causes children and their families).

face and, more importantly, for the capabilities and promise that families truly have, is especially important now that the national policy on child welfare cases is quickly moving away from one of family preservation.

When working with the agency, lawyers for parents should focus primarily on the family's service plan. Because caseworkers are often too overburdened to carefully tailor services plans to each family's specific needs,<sup>291</sup> parents need someone to make the family's unique circumstances known to the child welfare agency. By maintaining a close and interested relationship with the family throughout the child protective process, the parent's lawyer is well-positioned to work with the agency to create an appropriate service plan.<sup>292</sup>

Finally, while collaborating with the agency, the parent's lawyer must work toward increasing the visitation between children in foster care and their parents.<sup>293</sup> Frequently visiting their children in foster care is one of the most important steps that parents can take toward successful reunification.<sup>294</sup> As such, by advocating vigorously to increase the frequency of parent-child contact, the parent's lawyer can significantly speed up the reunification process.<sup>295</sup> As a result, faster resolutions of neglect cases will not only benefit families, but will also comply with Congress's goal of more quickly achieving permanency for children.

## 2. Lawyers for Indigent Parents Must Actively Involve Families in Their Own Cases

Even the most outstanding preventive services, the best trained and most highly compensated counsel, the most well-managed and cooperative child welfare agency, and the ideal child protective system free of biases and bureaucratic difficulties cannot solve families' problems

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291. See *supra* notes 249-56 and accompanying text (describing the "boilerplate" service plans that the overworked child welfare agencies often dole out to families).

292. Martin Guggenheim writes:

The case plan is supposed to be tailored specifically to the needs of the family. 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.

Guggenheim, Proposal, *supra* note 126, at 4.

293. Granik, *supra* note 116, at 6 (encouraging parents' lawyers to work for visitation between parent and child); see also Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. Rev. L. & Soc. Change 397, 408 (1996) (stressing that visitation between a parent and her child in foster care is essential to the child's psychological well-being).

294. Beyer, *supra* note 98, at 336 (discussing the important role that visitation plays in successful reunifications).

295. Guggenheim, Proposal, *supra* note 126, at 5 ("[V]isitation is recognized to be the key to reunification. Lawyers can play a crucial role in expanding the number of hours of visitation per week—and thereby increasing the likelihood that children will maintain a relationship with their parents and return home more quickly.").

alone: The key to successfully healing families in poverty is to help them to help themselves.<sup>296</sup> Lawyers for indigent parents must educate parents about the child welfare system that has entered their homes and their lives.<sup>297</sup> They must motivate parents to become active participants in planning for their families' futures.<sup>298</sup> Lawyers must strengthen families by teaching them to demand and gain respect in the child welfare system.<sup>299</sup> And, parents' lawyers must empower families by giving them the necessary tools to exercise control over their own circumstances:

By recognizing a family's strengths and listening to the family's own assessment of its needs, [professionals in the child welfare system] empower[ ] the family. . . . Reaching agreement with a family on [its] needs leads to [its] active involvement in crafting services and [helps the family take] responsibility for change. Instead of sending the family to a program to have something done to it, the message is: You have agreed on what you need. The services you have helped to plan will assist you in getting your needs met.<sup>300</sup>

Perhaps such active participation by motivated, loving, and well-intentioned parents will help the child welfare system respect families in poverty<sup>301</sup> and understand that parents charged with neglect do have the capacity and desire to change.<sup>302</sup> Given the obstacles in the current child protective system that prevent parents' voices from being heard—one of the largest of which may be the national move away from family preservation—it seems unlikely that families in poverty will come to actively participate on their own. Thus, without the dedication and service of effective, competent, and enthusiastic lawyers,

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296. Criticizing the current child protective system that deals with families in an improperly detached manner, Janet Weinstein writes: "Parents involved in the child protection system . . . find themselves caught in a process where they are forced to become dependent upon professionals who claim to know more about their child's needs than they do." Weinstein, *supra* note 75, at 154. Alternatively, the author proposes a different type of system that promotes collective responsibility. *Id.* at 139-74.

297. See *Parents on the Periphery*, Child Welfare Watch, Winter 1997, at 6-7 (stating that too often parents do not understand the role that they can and must play in the child welfare system).

298. See Beyer, *supra* note 98, at 324 ("Designing family support to succeed entails collaboration among the family and caregivers in crafting unique services to match the strengths and needs of that child and family.").

299. See Garcia & Batey, *supra* note 90, at 1098 ("[P]arents must receive and should demand a level of respect that allows them to contribute meaningfully to determinations about the future of their children.").

300. Beyer, *supra* note 98, at 316 (footnote omitted).

301. See National Clearinghouse on Child Abuse and Neglect Information, *Community Responsibility for Child Protection* (visited Mar. 9, 1998) <<http://www.calib.com/nccanch/pubs/commresp.htm>> ("Professionals must recognize that most parents do not intend to harm their children. Rather, abuse and neglect may be the result of a combination of psychological, social, situational, and societal factors.").

302. See *id.* ("Service providers should recognize that many maltreating adults have the capacity to change their abusive/neglectful behavior, given sufficient help and resources to do so.").

families in poverty may be tragically lost in this new, changing tide of child welfare law in the nation.

### CONCLUSION

Most likely out of concern for severely abused and maltreated children, our nation's child welfare system often ignores the needs of indigent parents accused of child neglect. The lack of attention paid to parents in poverty, however, also ignores the special bonds that children have to their parents and presumes that all children are better off when separated from allegedly neglectful parents. In reality, though, ripping children away from their homes and their families often harms children more than the underlying cause for the alleged neglect. Furthermore, parents in poverty may be inappropriately charged with neglect when their difficult economic situations, and not their fitness as parents, is really the issue. Unfortunately, our child welfare system continuously responds to poor families' needs in ineffective and improper manners.

The newest piece of federal legislation affecting the child welfare system—The Adoption and Safe Families Act of 1997—may continue to disserve poor and needy families. Intended to make children's health and safety the primary focus of child protective proceedings, the ASF forces child welfare officials to give up on parents sooner than before. Because indigent parents may have difficulty correcting their families' situations with the speed with which the federal government now requires, the ASF may actually work to hurt children by dissolving loving, salvageable families.

Accordingly, to protect against harming children and families who enter the child welfare system on allegations of neglect, states must provide indigent parents with competent and effective court-appointed counsel. Parents' lawyers can provide their clients with a voice in the child welfare system that otherwise harbors negative feelings toward parents. Furthermore, effective counsel for parents can work to alleviate the current imbalance of power against parents in child protective proceedings. Most importantly, though, lawyers for indigent parents can help heal and reunite needy families. By establishing relationships with their clients and knowing how to navigate through the child welfare system, parents' lawyers can advocate for services that are carefully-tailored to their clients' needs. To this end, parents' lawyers can help to realize Congress's goal of expedited child protective cases by ensuring that families in the child welfare system are most efficiently and most appropriately served. Thus, rather than giving up on parents, the best way to protect the health and safety of all children is to take the time to care for and to work with families in need. Providing indigent parents with a meaningful right to counsel in neglect proceedings is crucial to this effort.



*Notes & Observations*