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Justice for Our Children: Justice for a Change

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"In the little world in which children have their existence, . . . there is nothing so finely perceived and so finely felt as injustice."[1]

- Charles Dickens

INTRODUCTION

Children find themselves in the legal system in a variety of ways—as the subjects of abuse or custody proceedings, as victims or witnesses in criminal trials, or as delinquents. Despite the context, their court involvement is often predicated upon the failure of an adult in their lives to protect them or to guide them. Too often it is the inability of the child's parents to provide adequate care and supervision that trigger legal proceedings. Sadly, once a child is caught in the legal system, new opportunities for failure often arise. Having been initially neglected by their families, these children may then be re-traumatized by the institutions that purport to serve their "best interests."

Despite decreases in crime and domestic violence, child abuse and neglect reports have dramatically increased to approximately three million per year.[2] One need look no further than the cover stories of *Time* magazine over the last decade to acquire insight into the shortcomings of "the system's" ability to protect children. The cover of the December 11, 1995 *Time* issue features a black and white photo of six-year-old Elisa Izquierda. The angelic appearance of Elisa is contradicted by the headline describing her horrific fate—"A Shameful Death: Let down by the system, murdered by her mom, a little girl symbolizes America's failure to protect its children."[3] Elisa's mother had forced the child to eat her own feces and violated her with a toothbrush and hairbrush before eventually bludgeoning Elisa to death.[4] As tragic as Elisa's demise was, even more troubling is the knowledge that it could have been prevented. Neighbors had heard Elisa's cries for months and the city authorities had

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1. CHARLES DICKENS, GREAT EXPECTATIONS 30 (Harper & Brothers 1877) (1860).

2. Annie G. Steinberg, Barbra Bennett Woodhouse, & Alyssa Burrell Cowan, *Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research*, 40 FAM. CT. REV. 116, 117 (2002).

3. TIME, Dec. 11, 1995, at cover.

4. David VanBiema, *Abandoned to Her Fate: Neighbors, teachers and the authorities all knew Elisa Izquierdo was being abused. But somehow nobody managed to stop it*, TIME, Dec. 11, 1995, at 32.

been notified at least eight times of the abuse.[5] Despite the evidence of abuse and concerns for Elisa's safety from friends and family, a judge awarded full custody to Elisa's mother.[6] Calls to Elisa's child welfare caseworker were met either by no response or by claims that he was "too busy" to check up on the family.[7] All of the adults in the system responsible for protecting Elisa—police, judges, and caseworkers—either failed to recognize the threats to her safety or simply ignored her perilous situation altogether.

Another six-year-old child, Terrell Peterson, serves as cover model for the November 13, 2000 issue of *Time*. Again, the reality of the headline betrays the innocence of his photo—"The Shame of Foster Care: The coroner gave up counting injuries inflicted on six-year-old Terrell Peterson. A *Time* investigation into a system in shambles."[8] After investigating reports that Terrell's mother had been neglecting him, the Georgia Department of Family and Children Services (DFACS) placed the child with his step-grandmother despite the fears expressed by his mother that the woman would harm Terrell.[9] As it turns out, Terrell's mother's fears were well-grounded—Terrell died after suffering severe abuse including being cut, burned by cigarettes, whipped, and chained to a railing.[10] Terrell's death resulted not only from the injuries inflicted by his step-grandmother, but also by the system's failure to adequately assess his situation. The DFACS not only ignored his mother's pleas to remove him from his step-grandmother's home, but even went so far as to help the step-grandmother obtain legal custody of Terrell.[11] Having taken control over Terrell's placement, the DFACS then failed to take the actions necessary to ensure his safety.

Colorado had its own tragic headline, "Little Girl Lost",[12] detailing the horrors inflicted on five-year-old Stephanie Martinez. There were so many visible warning signs, all of them repeatedly ignored.[13] When Stephanie lay dying alone in a closet, she had reportedly been scalded, beaten, whipped, starved and tortured.[14] The pathologist who performed the autopsy counted 130 bruises and injuries all over Stephanie's body.[15]

More recently, New Jersey's child welfare system has been criticized for doing too little to stop suspected abuse. Police arrested

5. *Id.*
6. *Id.*
7. *Id.*
8. TIME, Nov. 13, 2000, at cover.
9. R. Robin McDonald, News, *Child Advocates Convince Judge Shelters' Lawyers are Stonewalling*, FULTON COUNTY DAILY REPORT, Sept. 25, 2002, at 1.
10. *Id.*
11. *Id.*
12. Lisa Levitt Ryckman, *Little Girl Lost*, ROCKY MOUNTAIN NEWS, July 31, 2002, at A1.
13. *Id.*
14. *Id.*
15. *Id.*

Vanessa and Raymond Jackson after authorities discovered that four of their adopted children—ages nine to nineteen—were being starved by the Jacksons, barely surviving on a diet of peanut butter, pancake batter, and even wallboard.[16] Since the New Jersey Division of Youth and Family Services (DYFS) has no official oversight of adopted kids, even regular visits by a caseworker to check on foster children living in the home did not lead to a reporting of the suspected abuse.[17] In January of 2005, authorities arrested Florida couple John and Linda Dollar who had fled to Utah after accusations that they had abused seven of their adopted children.[18] In addition to beating their children, the Dollars also allegedly shocked them, yanked their nails out, and starved them.[19] So severe was the malnourishment that the Dollar's twin fourteen-year-old boys, adopted at age four from Florida Department of Children and Families, weighed only thirty-six and thirty-eight pounds each. [20]

Unfortunately these stories are not rare occurrences exploited by sensational journalists to sell magazines. Those within the legal system have also been confronted with similar examples of the failure to protect abused and neglected children. In *DeShaney v. Winnebago County Department of Social Services*,[21] the United States Supreme Court held that substantive due process did not require the county's social services department to intervene to protect a child from his father's violence.[22] In his dissent, Justice Blackmun decried the majority's lack of compassion for the abused child, Joshua DeShaney:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that

16. Susannah Meadows & Brian Braiker, *Arrested Development*, NEWSWEEK, Nov. 10, 2003, at 39.

17. *Id.*

18. Justice George, *Abused Kids on Way to Recovery*, ST. PETERSBURG TIMES, Feb. 15, 2005, at 1B.

19. *Id.*

20. *Id.*

21. 489 U.S. 189 (1989).

22. *DeShaney*, 489 U.S. at 194-203. In *DeShaney*, because Joshua's attorneys did not raise the point in the courts below, the Court declined to consider whether "the Wisconsin child protection statutes gave Joshua an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation . . . ." *Id.* at 195 n.2. In a recent opinion, however, the Court closed the procedural due process door to children like Joshua by declaring, "In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations." Castle Rock v. Gonzales, 125 S. Ct. 2796, 2810 (2005).

> this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.[23]

Elisa, Terrell, Stephanie, the Jackson children, and Joshua, along with the infinite number of children throughout the nation whose stories go untold, stand as primary evidence that America is doing something wrong. Every year approximately one million children in the United States are victims of child maltreatment, with over one thousand of these incidents resulting in the child's death.[24] One might expect that with the safeguards and trappings of a complex legal system, American children would not fall through the proverbial cracks. Sadly the system has not only failed to achieve its goals but has in many ways exacerbated those problems it seeks to remedy by intervening. The institutionalized power of the state harms children with impunity in an area of the law that is solely designed to protect them. In other areas of the law in which children are implicated, the same is often true.

This article argues that the current legal system *does not*, and inherently *cannot* adequately protect the rights of children. The system is designed primarily to protect adults; and without effective legal representation, children are denied fundamental due process. Part I illustrates through three recent cases how the legal system fails children. Part II elaborates on the legal system's treatment of children's legal issues. Finally, Part III proposes changes to insure a child-centered system of decision-making.

I. RECENT CASES: HOW THE LEGAL SYSTEM FAILS CHILDREN

The symposium planners have selected three cases through which to explore the treatment of children in the legal system—*Nicholson v. Scoppetta*,[25] *Crawford v. Washington*,[26] and *Simmons v. Roper*.[27] While each of these cases involves children, upon closer examination, their analyses provide compelling evidence of the inherent failure of our legal system to address the needs of children. The fundamental problem is the fact that the United States legal system is designed to protect the rights of adults. Steeped in tradition, the rights of children warrant protection only insofar as they implicate adult interests. Accordingly, none of these cases provide an accurate analysis of the legal rights of children, but rather, an analysis of adult rights as they happen to relate to children.

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23. *Id.* at 213 (Blackmun, J., dissenting) (second alteration in original) (citation omitted).
24. Marvin L. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 264 (1995).
25. 820 N.E.2d 840 (2004).
26. 541 U.S. 36 (2004).
27. 112 S.W.3d 397 (Mo. 2003).

The fact that children remain a tangential issue in each of the cases is indicative of how courts in general view children.

A. Nicholson v. Scoppetta: *A Domestic Violence Issue*

Nicholson v. Scoppetta is a federal class action in which several female victims of domestic violence alleged that the New York City Administration for Children's Services (ACS) violated their constitutional rights when it removed their children from them based on a finding that the children had been exposed to domestic violence, and therefore neglected.[28] The court held that where the sole allegation of neglect is that the mother allowed the child to witness domestic abuse, the mother cannot be held responsible for neglect.[29]

While the outcome of this case will significantly impact the lives of children, it is clear that the court views *Nicholson* strictly from the perspective of domestic violence. Children enter into the discussion only because it is the fundamental right of the mother to raise her children that is threatened by the ACS removal policy. The court in *Nicholson* views the child in the context of the mothers' rights, not as a separate person deserving of protection. The primary focus in the case is the mother's rights. First and foremost, the court wants to ensure that the mother's constitutional rights are not violated by the ACS's removal of her children. Only after proper constitutional safeguards are provided to protect the mother's rights, does the court then consider the implications of ACS's actions on the children.

However, child victims in domestic violence cases are typically not represented. Courts and battered women's advocates have long minimized the impact of domestic violence on children by describing the child as a witness, not a victim. Witnessing domestic violence is experiencing the horror of it in all its brutal detail: six year olds calling 9-1-1 and toddlers hiding under the bed in the midst of yelling and broken dishes. While professional organizations and advocates continue to emphasize the devastation domestic violence has on children, advocacy on their behalf is often not addressed.

B. Crawford v. Washington: *A Hearsay Issue*

In *Crawford v. Washington*, Crawford, an adult, was charged with assault and attempted murder. The trial allowed a recorded statement as evidence and Crawford was convicted. The United States Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits out-of-court statements by witnesses that are testimonial in nature.[30] The holding in *Crawford* tightened the previous standard for the admissibility

28. *Nicholson*, 820 N.E.2d at 842-44.
29. *Id.* at 844-47.
30. *Crawford*, 541 U.S. at 68-69.

of hearsay testimony articulated in *Ohio v. Roberts*.[31] Although the Court did not explicitly describe what types of statements it may consider "testimonial," it hinted that any statements the declarant would reasonably expect to be later used in a court of law, such as statements to police during interrogation or statements made to a physician, would qualify as testimonial.[32]

The primary concern of the Court in *Crawford* is the protection of the accused's constitutional right to confrontation. The case lacks any discussion of how the holding may potentially impair the role of children in the legal system. The Court goes into a lengthy discussion of the historical development of cross-examination dating as far back as Roman and Colonial times.[33] Notably, these are both eras in which children were completely absent from the legal world. Today, however, children routinely find themselves in court, primarily as victims, and sometimes as witnesses, or as the accused.

Although the facts in *Crawford* do not involve children, the case's holding has many implications for children as witnesses. In a situation where the witness against the accused happens to be a child, it is clear that the rights of the accused will trump any consideration of the child witness's interests. Child abuse cases present the most likely setting for *Crawford* to affect children because the victims in these cases do not always appear in court.[34] Prior to *Crawford*, prosecutors often played videotaped interviews of the victim if the child was too young to testify.[35] After *Crawford*, this practice will be impermissible and many convictions based on such recorded testimony may be subject to reversal.[36] The full impact of *Crawford* has yet to be determined as practitioners alter their behavior and test the limits of the ruling.

Crawford also highlights the deeper issue of how courts deal with child witnesses generally, not just in the context of hearsay statements in child abuse trials. Courts strictly adhere to established norms of procedure to ensure the rights of the accused, despite the potential trauma to child witnesses in an adversarial system. The unfamiliar environment of the courtroom, the impersonal approach of the attorneys and recounting the traumatic experience itself may all serve to inflict more harm on the child witness. Direct and cross-examination, which may confuse and intimidate children, are not the best means of eliciting truthful informa-

31. Ohio v. Roberts, 448 U.S. 56, 66 (1980). In *Roberts*, the statement of an unavailable hearsay declarant may be admitted only if it bears adequate "indicia of reliability." *Id.* Statements that fall within a "firmly rooted hearsay exception" or show "particularized guarantees of trustworthiness" may be inferred as reliable. *Id.*

32. *Crawford*, 541 U.S. at 51-52.

33. *Id.* at 43-50.

34. Wendy N. Davis, *Hearsay, Gone Tomorrow*, 90 A.B.A. J. 22, 24 (2004).

35. *Id.*

36. *Id.*

tion from a child.[37] Child witnesses are not independently represented, as other witnesses who may rely on legal counsel to advocate and protect their interests.

In addition to the impact *Crawford* will have on the court's treatment of child witnesses, the holding may also lead to decreased prosecutions and convictions of some alleged child abusers. *Crawford* will exclude many child hearsay statements when in-court, under-oath testimony is not available.[38] Many times, the child victim may be the most knowledgeable about the torture inflicted upon him or her. Where the strength of the case depends on the testimony of a child who is incompetent to take the stand, the inadmissibility of hearsay statements may be fatal to the prosecution's case.[39] Faced with this prospect, many prosecutors have already given up on otherwise promising child abuse cases.[40] This is a striking example where a child's seeming incompetence is used not as a shield to protect the child, but a sword that denies accountability for harm inflicted by adults.

C. Simmons v. Roper: *A Capital Punishment Issue*

In *Simmons v. Roper*, Simmons committed murder when he was seven years old and sentenced to death. The Supreme Court of Missouri held that recent legislative action supports a finding that a national consensus has developed against the execution of defendants under age eighteen at the time of their offense.[41] The United States Supreme Court in *Thompson v. Oklahoma* said that the determination of what constitutes "cruel and unusual" punishment should be evaluated according to "evolving standards of decency that mark the progress of a maturing society."[42] In the fourteen years following the Supreme Court's ruling in *Stanford v. Kentucky*,[43] only eighteen states have barred executions of juveniles. However, no state has lowered its minimum age of execution below eighteen, and the overall imposition of the juvenile death penalty has become increasingly rare.[44] Thus, the court in *Simmons* concluded that based on such evidence of a national trend against the juvenile death

37. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 294 (1999).

38. Davis, *supra* note 34 *passim*.

39. *Id.*

40. According to Victor Vieth, director of the American Persecutors Research Institute's National Child Protection Training Center, "A lot of prosecutors have just thrown in the towel." *Id.* at 24.

41. *Simmons*, 112 S.W.3d at 397.

42. Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).

43. *See Stanford*, 492 U.S. at 361 (holding that execution of individuals who were age sixteen or seventeen at the time of the crimes did not violate constitutional prohibitions of cruel and unusual punishment because no national consensus existed against such executions).

44. *Simmons*, 112 S.W.3d at 399.

penalty, the Supreme Court today would likely hold that these types of executions violate the Eighth and Fourteenth Amendments.[45]

On March 1, 2005 the United States Supreme Court issued its ruling in *Roper v. Simmons*,[46] confirming the predictions expressed by the Missouri Supreme Court and overruling *Sanford*. In the majority opinion, Justice Kennedy held that the Eighth and Fourteenth Amendments prohibit execution of defendants who were under eighteen years of age at the time they committed their crime.[47] The Court first determined that the various state legislative actions banning the juvenile death penalty provided evidence that a national consensus had developed in opposition to the execution of individuals who had committed their crimes as minors.[48] Additionally, the Court used its own independent judgment to come to the conclusion that the death penalty is a disproportionate punishment for juveniles, due in large part to the reduced culpability of young offenders which negates the retribution and deterrence rationales behind such a severe form of punishment.[49]

At every stage of Christopher Simmons's case, from the Missouri courts to the United States Supreme Court, the system viewed the defendant primarily as a death row inmate, not as a child. While age and the special circumstances that accompany it serve as a major factor in the court's ultimate decision, the main focus of the case never shifts far from the overarching theme of whether or not the death penalty *itself* is justifiable in any case. The historical development of death penalty jurisprudence in the United States, cited by both the Missouri Supreme Court and the United States Supreme Court, reflects the nation's changing opinion of capital punishment in general, rather than a changing view of how the legal system should treat child offenders.

While the Supreme Court ultimately came to the correct decision regarding capital punishment of juveniles, this latest opinion, along with earlier cases addressing the issue, almost entirely ignores the causal connection between the legal system's treatment of children in areas such as abuse and neglect and their eventual involvement in the criminal system. Often the children who become alleged delinquents in juvenile court, including death penalty cases, are the same children who were once the victims of severe abuse and neglect. Studies show a startling correlation between risk factors for children in both the child welfare and juvenile justice systems.[50] Regrettably, our political system ignores the long-term costs of child abuse and neglect such as criminal activity, substance

45. *Id.* at 400.
46. Roper v. Simmons, 125 S. Ct. 1183 (2005).
47. *Id.* at 1194.
48. *Id.* at 1192-94.
49. *Id.* at 1195-97.
50. Claudette Brown, *Crossing Over: From Child Welfare to Juvenile Justice*, MARYLAND BAR JOURNAL, May/June 2003, at 22.

abuse, domestic violence, and unemployment, which often plague maltreated children into adulthood.[51] In a cruel irony, the state that failed to protect these children ultimately ends up incarcerating them as a means of protecting society from their delinquent behavior.

Unfortunately, there is far too little collaboration between abuse/neglect and delinquency professionals, especially considering the fact that these two areas each have responsibility for the same children and often do not even realize it.[52] Perhaps now that the Supreme Court has resolved the debate over the juvenile death penalty, the legal system can begin to focus more attention on the root cause of why these young people find themselves defendants in such serious cases in the first place. Cooperation between the abuse/neglect and delinquency systems is essential. A step in the right direction, movements have begun to require dual agency involvement in the hopes of providing increased attention for these so-called "nexus kids".[53]

II. THE DISTORTED VIEW OF CHILDREN IN THE UNITED STATES LEGAL SYSTEM

The three cases discussed above, though involving children in various ways, merely skim the surface of the larger issue of how the legal system treats children. These cases do, however, provide snapshots of the various ways in which the courts have failed to adequately consider, then meet, the special needs of children. This section analyzes in more depth the various deficiencies of the system in regard to its treatment of children. Part IIA outlines the inherent inability of a system designed for adults to protect the rights of children. Part IIB discusses the disadvantages to children of giving undue weight in light of facts to the rights of parents in protection and custody cases. Finally, Part IIC gives a brief overview of federal law involving children.

A. The Legal System is Designed to Protect Adult Rights

When considering what goals society hopes to advance through a complex legal system, one plausible answer is the protection of an individual's rights. But exactly whose rights—and even more specifically, which rights—are important enough to warrant the full protection of our legal system is a question apparently so obvious that we seldom even ask it. In a legal system designed by adults, and arguably for adults, it is clear that only those rights considered fundamental by individuals with the requisite level of maturity will be relevant to the courts. As a result of this inattentiveness to the experiences and feelings of children, the

51. Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3 WHITTIER J. CHILD & FAM. ADVOC. 215, 220 (2004).

52. Brown, *supra* note 50, at 19.

53. *See id.*

legal system shows an exaggerated reverence to adult authority.[54] When children become participants in this system, they find themselves subject to rules which rarely contemplated their special needs. Unfortunately, even in the best circumstances, this places children on an uneven playing field with little chance of a meaningful victory.

One example of this is a custody dispute. States vary in the weight accorded to children's preferences in custody battles.[55] Although most states allow courts to *consider* the child's wishes,[56] the legal system in general typically denies children any meaningful voice in custody disputes that profoundly affect their lives. How the court becomes aware of the child's wishes if it even chooses to hear them may vary from courtroom to courtroom.

In re the Marriage of Hartley provides an illustration of how courts overlook the expressed interests of children in custody cases. In *Hartley*, the court appointed a guardian *ad litem* to represent the interests of twelve-year-old Eric Hartley in a custody dispute following the divorce of his parents.[57] Throughout the proceedings, Eric voiced concerns to both the court and his guardian *ad litem* that his interests were not being adequately represented in court.[58] The Children's Legal Clinic then filed an entry of appearance on Eric's behalf, arguing that due to abuse by Eric's stepfather in his mother's home, custody of Eric should be awarded to his father.[59] The Supreme Court of Colorado ruled that even though the guardian *ad litem* did not voice Eric's custody preferences to the court, the court appointed guardian *ad litem* sufficiently represented Eric's interests.[60] This ruling demonstrates the court's unwillingness to give credence to the child's complaints about the guardian *ad litem*'s lack of time and attention to his case, his failure to get to know his client, or understand his needs, as well as not expressing his preference. Thus, the court failed to realize that what Eric wanted was also factually in his best interests. In fact, the trial court granted Eric's wish to live with his father because it was in his best interests. What the Supreme Court refused to find was that Eric had a right to an attorney to promote his view.

The interests of a child involved in a custody dispute are often completely foreign to adults. In the midst of conflict, an adult man or woman may become, even unconsciously, self involved and cannot appropriately empathize with the child's feeling of being emotionally torn between the

54. Barbara Bennett Woodhouse, *Enhancing Children's Role in Policy Formation*, 45 ARIZ. L. REV. 751, 752 (2003).

55. Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Study and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 630 (2003).

56. *See id.*

57. *In re* Marriage of Hartley, 886 P.2d 665, 667 (Colo. 1994).

58. *Id.* at 668.

59. *Id.*

60. *Id.* at 676.

people they most love in their lives and on whom they are completely dependent. Parents often do not recognize the divided loyalty a child may feel. Yet the courts have less difficulty declaring that a child would desire freedom of speech or freedom of choice, even though such concepts may be outside the scope of a child's understanding. Similarly, adults may promote an eighteen month old's right to confidentiality in the child welfare system, while denying her more compelling right to a permanent home. Such inconsistencies demonstrate the point made by one commentator that,

> We accept that children's claims must fit adult purposes because children are potential adults and childhood is preparation for adulthood. To the extent any child's claim diverges from adult purposes, then, the law refuses to entertain it. Any purpose or interest of value only to children as children can command no legal recognition or representation because, by definition, any such interest or purpose is merely childish and inferior, of course, but so long as they serve no politically powerful adult purpose, those claims remain unvoiced.[61]

Not only does the legal system illogically ascribe certain adult-valued rights to children, it also makes light of those issues that impact only children. Children's relative immaturity is merely a pretext for the legal system to marginalize children and the issues important to them.[62] Children face a disadvantage in the legal system merely because they are children. Our legal system today views children as impaired adults, incapable of understanding or perceiving until they reach adulthood.[63] In this way, the system bars children from adequately redressing injustices against them in much the same way women and racial minorities experienced exclusion in the past.[64]

Some commentators argue that unlike other groups deprived of rights, children have an assured remedy to their inferior legal status in that they will eventually attain adulthood and all of its accompanying rights.[65] This view not only ignores the foundational value of childhood but also the fact that the rights denied to children now—particularly in abuse and neglect cases—may gravely impact their lives after they reach adulthood. By perpetuating a cycle of violence, drug addiction or welfare dependency, children reach adulthood without ever escaping the system. Discriminating against children in the legal system does them an immediate disservice as well as sending them a message about the legal system that will likely stay with them for years to come. This is not to say that courts should treat children as miniature adults, but merely that

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61. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 14 (1994).
62. *Id.*
63. *Id.* at 12.
64. *Id.* at 16.
65. Harry Brighouse, *How Should Children Be Heard?* 45 ARIZ. L. REV. 691, 695 (2003).

courts should recognize the unique needs of children. The law should not dismiss children's perspectives as immature and inferior, but rather should respect and embrace their views as simply different.[66] This view demands not only legal protection, but also effective legal representation to prevent routine harms.

An additional way in which the legal system fails to meet the needs of children is in its inability to provide timely resolutions to issues. This effect is most profound in the area of child placement. Court delay presents one of the biggest obstacles to ensuring that children are placed in a permanent home.[67] While an adult may be annoyed by a case that drags on, for a child left in limbo about their future such a wait can have serious long term effects. Studies show that delays in child placement matters have significant negative impacts on children's development and may lead to aggressive, even criminal behavior in adolescence and adulthood.[68] Children also experience lapses in time differently from adults, and what seems a short period to an adult may be perceived as an eternity to a child.[69] Court delay is just one aspect of an overwhelmed system of too many cases, and too few workers and judges. Children in this system are denied services, separated from siblings, arbitrarily and multiply placed and suffer harm. Judicial accountability compounds this problem because judges are seldom held responsible for harmful decisions or delays in cases involving children.[70] Judicial leadership is critical for creating a culture of accountability to children, from parents, the state, and the court, as well as insuring effective legal representation for children.[71]

Lack of finality in judgments also makes the legal system ill-suited to resolve children's issues. Where children are involved, an erroneous decision on the placement of a child will dramatically impact the child's life. The consequences on the child's growth and development are permanent. It makes little difference to a child who was removed from his or her family, if several months and multiple placements later, the court decides that the child in fact would have been better served by staying with the biological parents. The trauma of repeated separations outside a child's home inflicts lasting scars that all the safeguards of the judicial system cannot undo. It is unlikely that any later remedy, even a sought after permanent home, will restore them to a healthy emotional state or restore their faith in the adults that have failed them.

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66. Fitzgerald, *supra* note 61, at 19.

67. Jessica K. Heldman, *Court Delay and the Waiting Child*, 40 SAN DIEGO L. REV. 1001, 1006 (2003).

68. *Id.* at 1011.

69. *Id.*

70. *Id.* at 1023.

71. One striking example, in this author's experience, of a juvenile court judge who dramatically and positively changed the culture of the court in a mere two years and insured accountability to children and families, is The Honorable Chris Melonakis of Colorado's Seventeenth Judicial District.

B. Parents' Legal Rights are Always a Major Factor

Even when a dutiful court acknowledges that a child has a legal interest in a dispute, that interest almost always takes a backseat to the constitutional rights of the parent. Once the court takes notice of a parent's constitutional claim, the only remedy for the child lies in the assertion of a state interest that derives from an adult perspective.[72] In the words of one commentator, putting the child first is "often difficult and painful. It is difficult because adults do not have the same needs as children and cannot easily perceive what they are. It is painful because what is good for children may be perceived as unfair to adults."[73]

The danger in giving such great weight to parental rights is that in some situations this unequal balancing may lead to outcomes detrimental to the child. As noted by Richard J. Gelles and Ira Schwartz:

> [T]he idea of a level playing field that provides both parties with legal advocacy and allows for an unbiased assessment of the weight of evidence is an illusion. The child welfare "playing field" is in reality decidedly unbalanced, almost always tilted in favor of the parents' rights at the expense of a child's protection.[74]

If the legal system is to give serious consideration to issues affecting children, then courts need to distinguish when a child and parent have the same interests and when the needs and interests of the parent and child diverge.[75] Again, adequate legal representation for the child is critical to this process. Just recently one Federal District Court held that children have a constitutional right to an attorney in abuse and neglect cases.[76]

Giving more legal rights to children and more power to the state to enforce these rights, however, conflicts with some of the fundamental principles underlying the development of our nation's political and legal structure. Parental autonomy is a concept deeply rooted in America's traditional value system.[77] A look at Supreme Court decisions involving family issues indicates a tendency by the Court to defer to the wishes of the parents.[78] The ideal of parental autonomy has its advantages—it prevents a movement toward a totalitarian government, the fear of which initially inspired the parental autonomy tradition in America.[79] The chal-

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72. Fitzgerald, *supra* note 61, at 38.

73. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 196 (2004).

74. Richard J. Gelles & Ira Schwartz, *Children and the Welfare System*, 2 U. PA. J. CONST. L. 95, 95 (1999).

75. Ross, *supra* note 73, at 192.

76. Winn v. Perdue, 356 F. Supp. 2d 1353, 1363 (N.D. Ga. 2005).

77. Bartholet, *supra* note 51, at 217-18.

78. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Parnham v. J.R., 442 U.S. 584 (1979); Santosky v. Kramer, 455 U.S. 745 (1982); Troxel v. Granville, 530 U.S. 57 (2000).

79. Bartholet, *supra* note 51, at 218.

lenge is to find a more appropriate balance between parents' rights to raise their children as they see fit and the state's power to protect children when parents fail in that role.[80]

C. Overview of Federal Law

Changes in federal law over the past few decades reflect changing attitudes regarding the state's role in protecting children. Unfortunately, just as the court system has failed to adequately address children's issues, so too has the legislature. Congress has experimented with various legislative acts as a means of protecting abused and neglected children. At best, these changes in federal law indicate Congress's acknowledgment that the current federal policy is not working. However, even the latest child protection laws have the same inherent problem as the prior laws the were meant to improve upon—they require that the protection of children is to be decided within a system designed to protect adults, with little attention to the need for zealous legal representation on behalf of children.

From 1980 to 1997, a pro-parent emphasis dominated federal law. The 1980 Adoption Assistance and Child Welfare Act mandated that if the government removes children from a home for their protection, it must take steps to eventually reunify the family.[81] The Act came as a response to criticisms that the system had gone too far by removing children from their homes without good reason and leaving them in foster care for too long.[82] Designed to fix problems with the foster care system, the Act conditioned federal funding for foster care on certain reforms.[83]

In 1997, Congress passed new legislation intended to shift the emphasis from the parent to the child. The stated goal of the Adoption and Safe Families Act (ASFA) is to place a "higher value on children's interests in safety and in moving on to permanent adoptive homes if their birth parents cannot demonstrate within a reasonable period of time that they are capable of providing a nurturing home."[84] The legislation attempts to reach this objective in three ways: 1) by identifying situations where family reunification efforts do not have to be made; 2) by mandating that states seek termination of the parents' rights in cases where the child has been out of the home for fifteen of the previous twenty-two months; and 3) requiring states to implement concurrent planning in case reunification attempts fail.[85] Despite the lofty goals of ASFA and similar

80. *Id.* at 217-18.

81. Judge Hector E. Campoy, *Symposium Introductory Speech: Youth, Voice and Power: Multi-Disciplinary Perspectives*, 45 ARIZ. L. REV. 567, 570 (2003).

82. Marvin L. Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, 32 COLO. LAW. 65, 68 (2003).

83. *Id.*

84. Bartholet, *supra* note 51, at 226.

85. Gelles, *supra* note 74, at 109.

legislation, lack of funding and other supportive resources mean that many children are in limbo far too long and are not getting the protection and care they need and deserve. Laws alone are useless until they are enforced. For the spirit of child protection laws to be enforced requires the professional courage to examine what we know and to face the injustice. Doing something about it requires ensuring effective legal representation for children, without which they remain voiceless in a system by and for adults.

According to one commentator, "The child welfare world is littered with the wreckage of well-intentioned programs designed by adults but irrelevant to children."[86] Recent studies of children in the foster care system demonstrate the effects of this wreckage. A report by the Pew Commission on Children in Foster Care examines the demographics of the over one-half million children living in foster care throughout the United States.[87] Of these children, more than one-fourth had been in foster care for between two and five years.[88] Seventeen percent had languished been in foster care for over five years.[89] These alarming statistics support the conclusion drawn by many observers that the current system of protecting children "merely substitutes government neglect and mistreatment for parental neglect and abuse."[90] A more recent study by Casey Family Programs found that adults who had formerly been in foster care had more mental health problems, were less likely to graduate from high school, and had lower incomes then those in the general population.[91] Similar results are documented in the latest Chapin Hall study in Chicago.[92] The disappointment of repeated attempts over two decades to reform the current system demands recognition that children are entitled to no less than effective legal representation as one critically necessary and overdue reform.

III. MAKING THE CASE

Having established that the legal system in its current state does not serve the needs of children, one must next consider what changes should be implemented to remedy these problems. Part IIIA of this section discusses the need for legal representation. Part IIIB urges the exploration of innovative and unlimited options, in ensuring this benefit.

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86. Woodhouse, *supra* note 54, at 754.

87. *See* ALFRED PEREZ ET AL., THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, DEMOGRAPHICS OF CHILDREN IN FOSTER CARE (Sept. 16, 2003), *at* http://pewfostercare.org/research/docs/Demographics0903.pdf.

88. *Id.* at 3.

89. *Id.*

90. Gelles, *supra* note 74, at 111.

91. CASEY FAMILY PROGRAMS, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 32-36 (Apr. 6, 2005), *at* http://www.casey.org/Resources/Publications/NorthwestAlumniStudy.htm.

92. Monica Davey, *Those Who Outgrow Foster Care Still Struggle, Study Finds*, N.Y. TIMES, May 19, 2005, § A, at 16.

A. The Critical Role of the Child's Attorney

Absent the assistance of legal representation, a child has no realistic prospect of successfully navigating the complexities of the court system. Therefore it is necessary that an adult act as the child's voice to insure that the court recognizes the legal interests of the child. Until 1974, the federal government had not even recommended—much less mandated—that states have guardians *ad litem* represent children's legal rights.[93] Only about half of all states require that courts appoint lawyers for abused children.[94] Whether lawyers or guardians *ad litem* are appointed, the exact role of the child's representative remains unsettled.

A quick glance through the literature on the subject of representing children reveals a wide range of views as to the attorney's function when dealing with a child client. The "best interests" model requires that the attorney ascertain and advocate for the child's best interests, taking the child's wishes into account only as one factor in this determination.[95] In contrast, the traditional attorney-client approach takes the view that the attorney should represent the child in the same manner as he or she would represent an adult client. Following this model, the attorney would allow the child client to determine the direction of the case.[96] No state has endorsed a child's attorney model exclusively, though the American Bar Association and the National Association of Counsel recommend versions of this model for children. The guardian *ad litem* is a hybrid of these two models—the attorney serves as a lawyer in the traditional sense, but advocates for the child's best interests when conflicts arise between the child's expressed wishes and his or her best interests.[97] Even more divergent views of the attorney-child relationship argue that financial and time constraints justify the position that a child's attorney has no obligation to see their client before court.[98]

A single definition of the attorney's role, however, is impossible to reach due to the wide range of circumstances such a description would necessarily have to encompass. The age, maturity, and intelligence of the child, as well as the reason for their involvement in the legal system are just a few of the factors which may impact the responsibilities of the attorney. This difficulty in establishing a consensus is demonstrated by the fact that the relationship between children and their legal representa-

93. Gelles & Schwartz, *supra* note 74, at 109.

94. Shalia Dewan, *Abused Children Are Found Entitled to Legal Aid*, N.Y. TIMES, Feb. 9, 2005, § A, at 16.

95. Astra Outley, THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, REPRESENTATION FOR CHILDREN AND PARENTS IN DEPENDENCY PROCEEDINGS 2-4, at http://pewfostercare.org/research/docs/Representation.pdf (last visited June 25, 2005).

96. *Id.*

97. Ventrell, *supra* note 24, at 279.

98. Marvin Ventrell, *Foster Care and Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT. 433, 435 (2000).

tion varies depending on the state, the case, and the proceeding.[99] The underlying reasons for such inconsistencies include: lack of binding uniform standards, scholarly debate over the issue, and insufficient training and compensation for child attorneys, among others.[100]

According to Martin Guggenheim, the main reason why determining the proper role of the attorney in the context of young children is so hard is that this area of law lacks the guidelines that exist in other practice areas.[101] The Model Rules of Professional Conduct and the Model Code of Professional Responsibility, which articulate the role of counsel, assume that the client is an "unimpaired adult."[102] Obviously there are substantial differences between a child and an "unimpaired adult" which would alter the role of counsel in the context of a child client. Like the legal system itself, the rules governing the ethics of the legal profession are dominated by a focus on adult representation, providing virtually no mention of how an attorney should go about representing a child.[103]

Regardless of the form an attorney's representation takes, assurances must be made that the quality of representation rises to the level deserved by children. Whatever the theoretical debate about an attorney's role, practical considerations of compensation and caseload undermine each model. A recent federal district court in Georgia addressed the connection between caseload and the quality of the child's representation. In *Winn v. Perdue*,[104] the court held that Georgia statutes and the Georgia Constitution provide foster children with the right to counsel in deprivation proceedings.[105] The court based its holding on the conclusion that a child in a deprivation proceeding inherently has a conflict of interests with his or her parent, guardian, or custodian, which necessitates a separate legal counsel for the child.[106]

The right to counsel, the court went on to note, means the right to *effective* counsel.[107] While the National Association of Counsel for Children advises that attorneys representing more than 100 child clients at a time cannot possibly achieve effective counsel, the two counties in *Winn* each had caseloads of 439.2 and 182.8 child clients per attorney.[108] The

99. Outley, *supra* note 95, at 2-4.

100. *Id.* at 1.

101. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1399 (1996).

102. *Id.*

103. *Id.* at 1401.

104. 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

105. *Winn*, 356 F. Supp. 2d at 1358-61. The Court described such cases with, "[d]eprivation cases consist of a series of hearings and review proceedings that take place over the course of a child's stay in the Georgia foster care system." *Id.* at 1356.

106. *Id.* at 1359.

107. *Id.* at 1361.

108. *Id.* at 1356. The author believes that a child's relationship with her/his attorney in abuse and neglect cases is critical. That relationship must, by necessity, extend to the foster parents, treatment providers and others. Such relationships are difficult to develop with 100 or more children.

plaintiffs in *Winn* presented evidence that the number of cases significantly compromised the ability of the counties' child advocate attorneys to provide adequate representation.[109] Among this evidence was testimony by attorneys that they often never meet and personally speak with the children they represent.[110]

When the additional factor of poor compensation is added to the equation, defining the proper role of the child's attorney becomes even more complex. Even if an agreement can be reached as to how a lawyer should properly go about representing a child, there still remains the looming issue of who compensates, as well as how and whether the compensation provided for taking on such a role is sufficient incentive for a lawyer to devote the requisite time and care to the child's case. Lack of compensation raises the question of whether children can ever be adequately represented in a system that does not sufficiently reward the efforts of their lawyers.[111] The fact that lawyers representing major corporations make many times the income of attorneys representing the most vulnerable members of society generates accolades for attorneys serving children. But without close scrutiny of the quality of that representation, children continue to be underserved and society's responsibility goes unattended.

Before any meaningful dialogue can take place in regard to the role of the child's attorney, the issue of compensation must be addressed. The inherent value of having lawyers to represent children must be reflected in the compensation available for those willing to take on such an important role. Compensation schemes based on hours spent rather than number of cases will allow lawyers to give more time and attention to each child, as opposed to taking on caseloads so large that the quality of representation is severely diminished. While some jurisdictions implement such methods, no studies have documented the long-term success of these compensation reforms on outcomes for children

B. Best Interests Informed by the Least Detrimental Alternative

The "best interests" standard is a rallying cry for children—compelling, yet elusive. Most courts currently use a "best interests of the child" standard to determine child placement in the area of dependency and neglect as well as in custody disputes. The standard has perpetuated the law's tendency to divert its focus away from the child by concentrating instead on parental rights and the nebulous concept the courts have

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Our respective systems must continue to evaluate the results achieved for children in making these judgments. With that in mind, it would be appropriate to have an attorney who is not as overwhelmed as the caseworker, judge and almost every other player in the system.

109. *Id.* at 1363.

110. *Id.*

111. Low compensation has been cited as one of the main impediments to quality legal representation for children. *See* Outley, *supra* note 95, at 4-5, 8.

paradoxically labeled "best interests of the child."[112] The "best interests" standard articulates the procedure a judge must follow, but does not assure children that their lives will be improved by the court's ruling.[113]

A major shortcoming of the best interest standard is that it poses a danger that children's futures may be adjudicated on the basis of societal norms that are immaterial to their well-being. Many factors—gender issues, constitutional concerns of race and religion, the subjective view of the judge—can cloud the court's ability to fully and fairly examine which course of action truly serves the child's best interests.[114] As the Supreme Court has recognized, courts deciding abuse and neglect cases are particularly susceptible to bias stemming from race, class, and culture.[115] Custody disputes also invite the same prejudices when applying the best interest standard.[116] Stereotypes of men and women may contaminate the best interests determination, creating a situation where the court is in effect choosing between the parental interests of the mother and father rather than the interests of the child.[117] Adding to the ambiguity of the best interest standard is the fact that the United States currently has no national consensus as to what type of family structure and parenting techniques fulfill the child's best interests.[118]

As mentioned in Part IIB, the child's best interests will always succumb to the constitutional claims of the parents.[119] This happens most often in joint custody cases when the court upholds the non-custodial parents' visitation rights.[120] Even a "bad" parent who does not provide adequate care or support to their children—and may even be abusive—retains a constitutional right to visit the children, regardless of the child's preferences or best interests.[121]

In light of the unfavorable outcomes potentially created by use of the best interests standard alone, judges faced with a choice between multiple outcomes should augment their decisions by a weighing of which option would be the "least detrimental alternative" for the child.[122] Under this revised standard, the best interests of the child would remain the focal point of the court's analysis, but the determination of what is

112. Fitzgerald, *supra* note 61, at 63-64.
113. Guggenheim, *supra* note 101, at 1426.
114. Fitzgerald, *supra* note 61, at 59.
115. *See* Santosky v. Kramer, 455 U.S. 745, 745 (1982); Fitzgerald, *supra* note 61, at 61-62.
116. Fitzgerald, *supra* note 61, at 62.
117. *Id.* at 59-69.
118. *Id.* at 62-63.
119. Fitzgerald, *supra* note 61, at 60.
120. *Id.*
121. *Id.* at 60.
122. "[B]ecause the best-interests standard did not in and of itself define what it is that a child needs, we propose that the placement standard should be one that provides the *least detrimental alternative for safeguarding a child's growth and development.*" JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 50 (1996) (citation omitted).

truly in the "best interests of the child" would be made significantly more accurate by the additional consideration of which alternative would be the *least* detrimental. In keeping with the Hippocratic oath of physicians, attorneys serving children should be called to do no harm.

The standard acknowledges the fact that detriment is inherent in every child placement decision and that the deprivation of the child's "best interests" has already taken place. The wording of the "least detrimental alternative" reminds courts that their primary task at this point is to "salvage as much as possible out of a less-than-satisfactory situation."[123] In this way, the least detrimental alternative provides a more realistic guideline for courts than the best interests standard, which often involves irrelevant and time-consuming data gathering.[124] This modified "best interests" standard would be more in harmony with the proposition that a child's attorney should "maximize the possibility that the case will impose the least harm possible on the child."[125]

In the case *In the Interest of A.V.M.*,[126] the Colorado Court of Appeals in an unpublished opinion agreed that the least detrimental alternative best serves the child's interests. In *A.V.M.*, an Anglo couple appealed the trial court's decision to deny their request to adopt their African American foster child.[127] Despite the fact that the five year old child had lived in the foster home since infancy, the trial court had refused to approve his adoption based on a finding that the Anglo foster parents could not be sensitive to the child's racial and cultural needs, thereby making them unsuitable adoptive parents.[128] The Colorado Court of Appeals noted that the Colorado statutory law requires that upon removal, a child's best interests require that he "be placed in a secure and stable environment, . . . not be indiscriminately moved from foster home to foster home, and . . . have the assurance of long-term permanency planning."[129]

The court held that "Choosing the least detrimental alternative available under these circumstances will best serve A.V.M.'s interests."[130] The "least detrimental alternative" standard acknowledges the fact that thus far the system has failed to serve the best interests of the child, that the injury to the child has already been done, and that the best strategy at this point is for the court to make a decision which will not increase or prolong the detrimental effects of the system's past failure. Had the court opted instead for the "best interests" standard, clearly a

123. *Id.*
124. *Id.*
125. Guggenheim, *supra* note 101, at 1428.
126. No. 88CA1074 (Colo. Ct. App. Aug. 3, 1989) (not selected for publication).
127. *A.V.M.*, No. 88CA1074 at 1.
128. *Id.*
129. *Id.*; *See* COLO. REV. STAT. § 19-1-102(1.5)(a) (2005).
130. *A.V.M.*, No. 88CA1074 at 2.

reasonable person could have concluded that being raised by adoptive parents of the same race would be in A.V.M's best interests. Similarly, one could also argue that staying with the same foster parents who had essentially raised him from birth would be in A.V.M.'s best interests. The problem with the "best interests" standard therefore becomes clear in situations such as A.V.M.'s where two different custody outcomes could arguably serve the child's best interests. In this case, it is necessary to apply the least detrimental alternative.

Recognizing that either alternative would serve the best interests of A.V.M., the court must next consider which of the two alternatives would be the least detrimental to the child. Removing A.V.M from the only stable home he has ever known, based solely on the belief that a African American family would be more culturally sensitive to his needs, would clearly be disruptive and moreover devastating to a five year old child. At this stage in his life, A.V.M. would unlikely share the trial court's perception that his adoptive parents were not suitable. The only factor a child of this age would care about is maintaining the parents he has loved his entire life. The least detrimental alternative standard gives more weight to A.V.M.'s viewpoint than does the "best interests" standard by requiring the judge to stand in the shoes of the child. Implementation of this standard in custody placement decisions would be a step toward a greater appreciation for the unique needs of children.

C. Recommendations

This article urges two critical recommendations. First, to ensure that every child has the right to and benefit of an effective attorney; and second, to promote partnerships between specialist children's attorneys and volunteer attorneys to enhance opportunities for every child to benefit from an effective legal relationship.

1. *Right to an Attorney*

The majority of states statutorily require some form of attorney guardian *ad litem* model of legal representation, whereby an attorney is appointed to represent the child's best interests.[131] Traditional attorneys are utilized in fewer states, and some states allow the appointment of both guardian's *ad litem* and attorneys for children.[132] In Georgia, children in the welfare system are assigned lawyers only in cases where the state is seeking to terminate parental rights.[133] This intolerable situation gave rise to the recent federal district court decision by Judge Marvin H. Shoob that "foster children have both a statutory and constitutional right

131. COLO. REV. STAT. § 19-1-111 (2005).

132. DAVID KATNER ET AL., NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN 10-13 (Apr. 2001), *at* http://www.nacchildlaw.org/documents/naccrecommendations.doc.

133. *Winn*, 356 F. Supp. 2d at 1357.

to counsel . . . ."[134] Additionally, an appellate court decision in Illinois held that children have the right to substitute private counsel for their court-appointed Public Guardian.[135]

In celebrating this huge step toward justice for children, attorneys can now mobilize the legal talent to realize this achievement for every child caught in the throes of a system that is failing them.

2. *Promote Partnerships between Specialist Children's attorneys and Volunteer Attorneys*

a. The Need

In July 2004, The Pew Charitable Trust released a national survey of more than 2,200 dependency court judges. The judges identified overcrowded dockets and inadequate resources as the greatest obstacles to finding safe, permanent homes for children.[136]

Abused and neglected children have complex, urgent, and individualized needs. Though there are many able and dedicated children's attorneys, most are faced with overwhelming caseloads, far beyond the ability of an individual to devote the time and effort necessary for each child. In addition to caseloads, the difficulty of repeatedly challenging the inadequacies of the child protection system: depleted resources, multiple routine displacements, bureaucratic indecision, competing values and contradictory visions leaves advocates emotionally and physically exhausted. The time available for one child is severely limited.

Now, more than ever, children need attorneys with sufficient time to go beyond legal advocacy and explore innovative and individualized solutions, identify treatment resources, explore family and alternative placements, and seek professionals willing to donate their time and talent to serve the unmet needs of children. Children need attorneys with whom they can develop a meaningful relationship; a relationship that ensures the counseling role of an attorney's responsibility, as well as the advocacy role. These roles allow an attorney to anticipate needs, prevent problems, and ensure the critical implementation of treatment that is so often delayed or non-existent.

The companion issues of huge caseloads and inadequate compensation have systemically colluded to deny children effective legal advocacy. Burdensome caseloads are typically justified by the compensation available, so compromising the legal needs of children becomes standard

134. *Id.*

135. *In the Interest of* A.W., 618 N.E.2d 729, 732-34 (Ill. App. Ct. 1993).

136. CHILDREN & FAMILY RESEARCH CENTER, VIEW FROM THE BENCH: OBSTACLES TO SAFETY & PERMANENCY FOR CHILDREN IN FOSTER CARE: SUMMARY OF KEY FINDINGS FROM A NATIONAL SURVEY OF DEPENDENCY COURT JUDGES 1-4 (July 2004), *at* http://www.fosteringresults.org/results/reports.htm.

fare. Attorneys have little time to challenge the routine harms inflicted on children by multiple placements, the separation of siblings, and the denial of timely treatment. Thus, individual children are often denied basic safety and permanence.[137] Collectively, children continue to be denied meaningful access to justice.

b. One Option

It need not be this way. We must instill spirit and meaning into the system by viewing legislative mandates within a framework of innovative and unlimited options. Volunteer attorneys engaging in *pro bono* work on behalf of children is one option to complement the work of specialist attorneys. Specialists must work in partnership with volunteer attorneys. The specialists provide the critical training, support, and necessary consultation critical to the effective use of volunteer attorneys. Particularly when a child is the beneficiary, *pro bono* work is not a matter of mere charity, but a matter of social and professional responsibility.[138] Attorneys yearn for the opportunity to seek justice in an area of the law where the level of satisfaction can rarely be replicated elsewhere.

By engaging highly skilled, effective and talented attorneys, we can enhance the quality of representation by ensuring adequate time and attention to each child, reducing the caseloads of specialist attorneys, and involving influential firms in statewide legislative battles for resources. It is the experience of the author that volunteer attorneys are able to spend a hundred hours getting to know a child, understanding his needs, and exploring appropriate resources and placements, in part because they are not constrained by the demands of hundreds of children. They bring outstanding legal skills and support staff to enable them to zealously advocate for clients. Further, because otherwise experienced counsel are often newcomers to such matters, they offer novel ideas and persuasive arguments in a system that is often closed to all but a close knit group of attorneys. The potential impact of private attorney involvement in improving service delivery for children cannot be underestimated. In the area of children's law, everyday tragedies and national statistics demand such innovative solutions.

The concept of *pro bono* attorneys is one crucial step to help mobilize needed resources and create the child-centered system worthy of the collective talent of all of us.[139] The American Bar Association Litigation

137. *Id.*

138. Effective Jan. 1, 2005, Colorado allows lawyers to apply for and receive CLE credit for pro bono legal representation. COLO. R. CIV. P. 260.8. *See also* JoAnn Vogt, *New Rule Authorizes CLE Credit for Pro Bono Representation*, 34 COLO. LAW. 25, 25-26 (2005); *see also* Grob, *infra*, note 139.

139. Seth A. Grob & Shari F. Shink, *Advocating Excellence for Children: A Call to Action*, *in* CHILDREN'S LAW, POLICY, & PRACTICE 111, 134-47 (1995 ed.).

Section's Children's Rights Committee is available to assist local communities eager to recruit volunteer attorneys.[140] Additionally, there are Children's Law Centers in many states with active volunteer *pro bono* partnerships to offer models for replication.[141] By partnering with *pro bono* attorneys, each state's Bar Association has the opportunity to make the same critical difference for children that they have made for every other protected class in history.

CONCLUSION

The needs of children in the court system and the demand for reform are as dire as at any time in our history. Abused children are among the most vulnerable in our society and the most invisible. They are no longer abstract statistics or unnamed faces in far off nations. Juvenile courts offer a window into the shattered lives of our children, yet much of their suffering is preventable. Their suffering is the consequence of deliberate decisions that should be morally and politically repugnant to us.

One author suggests using a "civil rights" analysis for children. He encourages us to fight to end the mistreatment and abuse of our children with the moral outrage and indignation it deserves.[142] This approach is supported by the continuing failure of our system to respond to the 1990 report of the United States Advisory Board on Child Abuse and Neglect that warned of a "national emergency."[143] So, too, by the 1991 Final Report of the National Commission on Children that questioned the moral character of a nation that tolerates the consistent presence of institutional immorality.[144] As a result of our failures, incalculable harm continues to be done to children and families, each state's finances and our future.

We are nearing almost two decades since these reports were issued. Since their release, the more recent Pew Report (2004) issues yet another resounding cry for action, while our moral outrage remains stifled.[145] We tolerate the injustice, settle for promises and boast about incremental improvements.

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140. *See About the Children's Rights Litigation Committee*, American Bar Association, *at* http://www.abanet.org/litigation/committee/childrens_l/home.html (last visited June 25, 2005).

141. Grob, *supra* note 139, at 147.

142. Lewis Pitts, *Beyond Rhetoric to Due Process Protective Rights for Children: A Civil Rights Approach is Imperative*, *in* PERSPECTIVES ON CHILD ADVOCACY LAW IN THE EARLY 21ST CENTURY 31, 48-49 (2000).

143. THE U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 1-9 (U.S. Gov't Printing Office Stock No. 017-092-00104-5, 1990).

144. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 84 (Summary ed. 1991).

145. *See supra* note 136.

Financial measures are needed to address the fundamental inequities faced by the poor, abused and neglected children in our system. Resources are needed for child protection, health care, mental health treatment, social workers, and juvenile court counselors; and adequate compensation for judges, court personnel, as well as attorneys to engage in high quality litigation to ensure the basic necessities of life for all children. Without such representation, children will continue to struggle against the imbalance of power that corrodes their human spirits in unimaginable ways.

Yet, new strategies are also needed. We need a clarion call for children – a visionary movement on behalf of our future. Like the civil rights movement, we must draw upon creative lawyering, simultaneously with public education and media strategies. We cannot stand by until Congress and state legislatures allocate the necessary funds. It is professionally irresponsible to wait. We must take all necessary steps to assume responsibility for the children who need us today.

Children, more than any other population in our community, need a champion to assert their rights. As ministers of our system of justice, lawyers are uniquely qualified to lead the movement in this vast pioneer area called children's law. Judge Charles Gill, a co-convener of the National Task Force for Children's Constitutional Rights, calls on attorneys to provide the impetus for improving the legal system for children. He declares attorneys are a powerful force in our country who "hold the key to unlocking the bold, dramatic solutions needed by children and families."[146]

Only through diligent, persistent, and widespread efforts can we reach a "tipping point" and move toward a more child-centered system.[147] Perhaps the most critical role to be played by each of us, specialists and *pro bono* attorneys alike, is making the injustice visible. Only by accepting our personal responsibility as attorneys, and as human beings, can we begin to achieve for children what every other disadvantaged population has won for itself – meaningful access to the courts and fundamental fairness. Only then will we have achieved recognition of the compelling needs and rights of children.

In looking toward the future the Bar must have the foresight now to identify the legal barriers and problems facing children and be able to offer creative answers. The legal community must have a vision of what tomorrow should resemble in terms of achieving excellence in outcomes

146. Telephone Interview with Charles D. Gill, Senior Judge, Connecticut Superior Court, Litchfield Judicial District (July 6, 2005); *see also* Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543 (1991).

147. *See* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 3-14 (2000).

for our nation's "invisible" population. In charting that path, we must not be constricted by resources, inertia, skepticism, and convention. For as Dr. Martin Luther King, Jr. once said, "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny."[148]

148. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963) *available at* http://www.stanford.edu/group/King/popular_requests/.