

Volume 20 | Issue 1

Winter 2017

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Kara R. Finck
University of Pennsylvania

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Recommended Citation

Kara R. Finck, *A Robust Defense: The Critical Components for a Reimagined Family Defense Practice*, 20 CUNY L. Rev. (2016).

Available at: <https://academicworks.cuny.edu/clr/vol20/iss1/15>

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Acknowledgements

This article is based on a plenary presentation at the CUNY Law Review “Reimagining Family Defense Symposium” held on April 8, 2016. I want to thank my co-presenters at the plenary, Martin Guggenheim, Diane Redleaf, and Lauren Shapiro, for their inspiration and advocacy in family defense. I also want to thank Elizabeth Levitan for her research assistance.

CUNY Law Review Footnote Forum

March 7, 2017

Recommended citation:

Kara R. Finck, *A Robust Defense: The Critical Components for a Reimagined Family Defense Practice*, 20 CUNY L. REV. F. 96 (2017), <http://www.cunylawreview.org/reimagined-family-defense-finck/> [<https://perma.cc/B4EV-UA5G>].

A ROBUST DEFENSE: THE CRITICAL COMPONENTS FOR A REIMAGINED FAMILY DEFENSE PRACTICE

*Kara R. Finck*¹

At its core, family defense protects the legal relationship between a parent and their child, one of the most intimate, complicated, and nuanced relationships in practice and under the law. Family defenders represent parents and caregivers accused of neglect or abuse of their children in family and dependency courts. While the process of individual representation may appear straightforward, the ideals of family defense incorporate an explicit recognition of the social determinants that bring families into the child welfare system in the first place, including poverty, substance abuse, and untreated mental health issues. Although much of the attention paid to the child welfare and family court systems is focused on children and their placement in foster care, family defenders understand that any intervention by the child welfare agency and family court system has a profound impact on children and families. Often referred to as attorneys for parents, in literal contrast to attorneys for children, family defenders advocate beyond the direct representation of an individual client. Even the act of renaming lawyers for parents in abuse and neglect proceedings as “family defenders” as opposed to “parents’ attorneys” highlights the potential impact and scope of this work. Inherently, family defense practice

¹ Practice Associate Professor of Law and Director, Interdisciplinary Child Advocacy Clinic at the University of Pennsylvania Law School. This article is based on a plenary presentation at the CUNY Law Review “Reimagining Family Defense Symposium” held on April 8, 2016. I want to thank my co-presenters at the plenary, Martin Guggenheim, Diane Redleaf, and Lauren Shapiro, for their inspiration and advocacy in family defense. I also want to thank Elizabeth Levitan for her research assistance.

incorporates legal advocacy that supports, strengthens, and stabilizes the client's family, consequently promoting better outcomes for children.

This article posits that there are three critical components which should be included in any family defense practice model designed for advocating for parents and children in the child welfare and family court systems. A robust family defense is defined not only by its commitment to the zealous defense of clients, including all of the legal tools available in litigation, but also by its recognition of the unique context of family defense, which incorporates social services, community engagement, and anti-poverty lawyering into a comprehensive response for parents in family court.

My experience representing parents and managing a family defense practice for almost a decade at The Bronx Defenders, a holistic public defender office, informs the selection of these three critical components for family defense practice. I first recognized the potential impact of a robust family defense practice when I observed a family court proceeding in the mid-1990s as part of a research project designed to improve case processing in family courts across New York State.² During the mid-1990s, New York City agencies and family courts were still reeling from the death of Elisa Izquierdo,³ a young child who died at the hands of her caregivers, even though her family was known to the local child welfare agency. Lacking a law degree or any prior experience in the child welfare system, I was still struck by the tenor of court appearances, the sheer number of families in the waiting area, and the assembly line treatment of families appearing before the Court.

In my initial observation, court appearances were surprisingly short and summary in nature, lasting only minutes but concluding with orders about nuanced and complicated issues such as visitation with parents, services for

² From 1996-1997, I worked as a Program Associate at the Vera Institute of Justice on a number of projects concerning reform in the New York State Family Courts. As part of that work, I was tasked with observing and recording quantitative data on court appearances, including the amount of time spent on the appearance, participation of parents, attorneys, and caseworkers, and presence of children in the court. This project was part of my work at the Vera Institute of Justice and was funded by the Permanent Judicial Commission on Justice for Children. My research culminated in a report covering a range of findings about case processing, disposition, and resolution. See VERA INST. OF JUSTICE, FAMILY COURT IMPROVEMENT STUDY: FINAL REPORT (1997), <http://archive.vera.org/pubs/family-court-improvement-study> [https://perma.cc/BTF4-MKXV].

³ Joe Sexton, *Mother of Elisa Izquierdo Pleads Guilty to Murder in a Pivotal Child-Abuse Case*, N.Y. TIMES (June 25, 1996), <http://www.nytimes.com/1996/06/25/nyregion/mother-of-elisa-izquierdo-pleads-guilty-to-murder-in-a-pivotalchild-abuse-case.html> [https://perma.cc/TA8K-RWBM].

children, and progress in a substance abuse treatment program.⁴ It was unsettling to see how the complex and intricate details of a family's life could be reduced to such a brief summary. While the issue of whether the court is the right place to engage in a discussion of those complex family dynamics as a "problem-solving court" persists,⁵ it was evident that critical decisions about families and children were being made on the basis of limited information from the child welfare agency.

The level of legal representation varied greatly, from children with attorneys and social workers advocating for them to parents with substitute counsel often standing in for the individually assigned parents' attorney and updated on the case only moments prior to starting the appearance. In New York City, an institutional provider represented most of the subject children in New York City Family Court,⁶ but there was no corresponding organization representing the majority of parents in the system.⁷

It was also clear that parents without competent counsel were at a significant disadvantage. As the American Bar Association noted, "[q]uality representation and due process for all parties in the child welfare system are essential but not always achieved. Poor parent representation exacts huge

⁴ See VERA INST. OF JUSTICE, *supra* note 2, at 28-29 (noting that the average length of 74 observed initial abuse and neglect hearings in family courts in New York, Bronx, Erie, and Suffolk Counties in New York State was eight minutes). The short duration of family court cases has been documented elsewhere, including a 2012 report from Casey Family Programs, which found that placement review hearings in Texas lasted, on average, only "8 minutes, well short of best-practice recommendations of 30 minutes." ALICIA SUMMERS ET AL., CASEY FAMILY PROGRAMS, EXAMINATION OF JUDICIAL PRACTICE IN PLACEMENT REVIEW HEARINGS FOR YOUTH IN THE PERMANENT MANAGING CONSERVATORSHIP OF TEXAS 7 (2012), http://www.ncjfcj.org/sites/default/files/Texas%20Judicial%20Reform%20Courtroom%20Observation%20Study_Final%20Report.pdf [<https://perma.cc/53SA-N8GJ>].

⁵ See, e.g., Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 262-69 (2008) (describing the history and limits of the problem-solving court solution to societal problems); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113, 114-17 (2010) (noting that the ability of problem-solving family courts to pursue child safety, family integrity, and permanency has significantly diminished).

⁶ The Legal Aid Society includes the Juvenile Rights Practice which "represents 90 percent of the children who appear before the Family Court in New York City on child protective, termination of parental rights, PINS (person in need of supervision), and juvenile delinquency petitions." *Juvenile Rights Practice*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/juvenilerights/juvenilepractice.aspx> [<https://perma.cc/ZA69-UY23>] (last visited Nov. 29, 2016).

⁷ Based on the author's experience, there were other legal services organizations such as Legal Services New York-Bronx, Neighborhood Defenders Service, and Brooklyn Legal Services that included attorneys for parents in family court, and a private law firm, Lansner & Kubitscheck.

costs for families and the state.”⁸ The consequences of inadequate and poor representation are significant, including prolonged separation of families and siblings in foster care, termination of parental rights, and languishing in foster care only to age out into homelessness, unemployment, or criminal justice involvement.

Today, the landscape of family defense has changed, notably in New York City⁹ and other jurisdictions across the country including Washington State, Detroit, and Philadelphia.¹⁰ The national movement to reform legal services for parents in the child welfare system continues to gain momentum and attention.¹¹ Consequently, there is an opportunity to envision a significant role for family defenders in reforming child welfare and family court.

Yet there is still much work to be done to reform the family court and child welfare system to ensure that justice for parents and their children is the norm rather than the exception. Outside of the robust community of family defenders in New York City, the majority of parents are not

⁸ CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, SUMMARY OF PARENT REPRESENTATION MODELS 1 (2009), <http://www.iowacourts.gov/wfdata/files/ChildrensJustice/ParentAttyRepresen/Summary&LinksofParentRepresentationModels.pdf> [<https://perma.cc/TZ6H-ZTQ7>].

⁹ Daniel Wise, *Agencies Hired to Represent Parents on Abuse and Neglect*, 237 N.Y. L.J. 1 (2007), <http://www.newyorklawjournal.com/id=900005481074/Agencies-Hired-to-Represent-Parents-on-Abuse-and-Neglect> [<https://perma.cc/NBU3-7VVB>].

¹⁰ The current institutional providers of representation for parents and caregivers in New York Family Court are The Bronx Defenders; Center for Family Representation; Neighborhood Defenders Service of Harlem; and Brooklyn Defender Services, Family Defense Practices. Innovative family defense institutions have also developed in other jurisdictions. *See, e.g.*, DETROIT CTR. FOR FAM. ADVOC., <http://www.detroitcfa.org> [<https://perma.cc/VB45-T5C4>] (last visited Nov. 16, 2016); FAM. DEF. CTR., <http://www.familydefensecenter.net> [<https://perma.cc/886Z-E6XR>] (last visited Nov. 16, 2016); *Parents Representation Program*, WASH. ST. OFF. OF PUB. DEF., <http://www.opd.wa.gov/index.php/program/parents-representation> [<https://perma.cc/9SF9-ULVW>] (last visited Nov. 16, 2016).

¹¹ *See, e.g.*, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS (Martin Guggenheim & Vivek S. Sankaran eds., 2015) (providing an overview of best practices in representing parents in abuse and neglect cases); *Parent Representation*, AM. BAR ASS’N, https://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html [<https://perma.cc/93JH-7F6P>] (last visited Nov. 29, 2016) (describing the national advocacy and training assistance work conducted by the project as part of the Center on Children and the Law); CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, INDICATORS OF SUCCESS FOR PARENT REPRESENTATION (2015), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf [<https://perma.cc/A2C4-V2TD>].

represented by institutional providers.¹² With growing evidence of the adverse impact of foster care on children and the poor outcomes for adolescents who age out of the system,¹³ practitioners should consider how a robust family defense program can improve outcomes for families and children and ensure justice for parents in family court. As noted by Vivek Sankaran, “[a] national consensus is emerging that zealous legal representation for parents is crucial to ensure that the child welfare system produces just outcomes for children.”¹⁴

I. BACKGROUND AND THE CURRENT STATE OF LEGAL REPRESENTATION FOR PARENTS

The symposium’s title asked us to reimagine family defense, which presumes that the community of practitioners and scholars invested in this work agree upon a model of family defense, one which has been created, practiced, and evaluated. While the number of family defense programs has grown nationally and the community of family defenders has expanded significantly,¹⁵ there is still debate as to the necessity and efficacy of family defense programs at every stage of a court case and child welfare investigation.¹⁶ Furthermore, structural barriers to providing parents with

¹² See generally CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, COURT IMPROVEMENT PROGRAM PARENT ATTORNEY SURVEY RESULTS (2011), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_la_w/parentrepresentation/cip_survey_results_long.authcheckdam.pdf [<https://perma.cc/93JH-7F6P>] (surveying 47 states and D.C. on their programs for parent representation including the provision of ongoing training, access to social work supports, and pay structures).

¹³ See, e.g., MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGES 23 AND 24 95-96 (2010), https://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf [<https://perma.cc/2AFY-ZRXJ>] (“[F]ar too many foster youth are not acquiring the life skills they will need if they are to become productive young adults.”); Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 761 (2008) (concluding that children who are placed in foster care in Illinois are two to three times more likely to enter the criminal justice system as adults than their counterparts who are not placed in foster care); Theo Liebmann, *What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL’Y 141, 148-49 (2006) (proposing new foster care reforms that account for the impact of removal on children’s well-being and outcomes).

¹⁴ Vivek S. Sankaran, In Practice, *Protecting a Parent’s Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97, 97 (2009).

¹⁵ See generally CTR. ON CHILDREN & THE LAW, *supra* note 8 (providing a summary of parent representation models that have emerged in different jurisdictions nationwide).

¹⁶ See Sankaran, *supra* note 14, at 97.

“effective, adequately compensated attorneys in all cases” still exist across the country.¹⁷

When beginning to consider the possible models for family defense, it is helpful to start with a better understanding of the current state of representation for parents in family court nationally. In the current state of representation for parents, the states vary widely on how and when family defenders are trained, supported, funded, and assigned. In a small number of jurisdictions, such as New York City and Washington State, family defenders are part of larger offices with collateral supports including social workers, parent advocates, and investigators. In other locales, family defenders are solo practitioners without the support of an institutional office, assigned only at the court’s discretion and funded a set amount for the case regardless of the amount of time spent representing the client or the particular complexity of the matter.¹⁸ As such, it is difficult to reimagine family defense as one might reimagine criminal defense and the public defender system since there is no universal model for structuring, funding, or providing representation to parents in the family court system.

States vary as to whether or not an attorney is appointed, and the timing of that appointment, for a parent accused of abuse or neglect who is unable to afford private counsel. Some states encourage counsel for parents in dependency proceedings, but render it subject to the court’s discretion or available only after the first appearance of a case in court.¹⁹ Other states, including New York, provide a clear right to counsel in abuse and neglect cases.²⁰ While there are robust institutional providers in New York City²¹

¹⁷ *Id.*

¹⁸ *See, e.g.*, CTR. ON CHILDREN & THE LAW, AM. BAR ASS’N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN PRACTICE 4-7 (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_la_w/parentrepresentation/michigan_parent_representation_report.authcheckdam.pdf [<https://perma.cc/9VVG-YKfV>].

¹⁹ *See, e.g.*, MINN. STAT. § 260C.163(3)(b) (2013) (noting that that court maintains discretion to appoint counsel “in any case in which it feels that such an appointment is appropriate if the person would be financially unable to obtain counsel”); OR. REV. STAT. § 419B.205(1) (2003) (“Counsel shall be appointed for the parent or legal guardian whenever the nature of the proceedings and due process so require . . .”).

²⁰ N.Y. FAM. CT. ACT § 262(a) (McKinney 2012).

²¹ The current institutional providers of representation for parents and caregivers in New York City Family Court are The Bronx Defenders, Center for Family Representation, Neighborhood Defender Service, and Brooklyn Defenders. *See generally* N.Y. STATE DEFS. ASS’N, FAMILY COURT PUBLIC DEFENSE SERVICES: PARENT REPRESENTATION 4 (2016), https://c.ymcdn.com/sites/nysda.site-ym.com/resource/resmgr/Docs/NYSDA_Family_Court_List.pdf [<https://perma.cc/HF3Q-WL8E>].

and numerous innovative models across the country,²² the majority of parents brought into the family court system nationwide are not represented by a holistic legal team appointed at intake and assigned throughout the pendency of the matter.²³ Across the country, forty-one states have a categorical right to counsel in abuse and neglect proceedings, while nine other states, including California and Texas, qualify that right.²⁴ In Mississippi, there is no right to counsel for parents.²⁵ Additionally, the timing of assignment of counsel in dependency proceedings varies from state to state.²⁶

The models for family defense range from stand-alone institutional providers to departments under a larger legal services or public defender office.²⁷ New York, for example, employs a system where individual attorneys are appointed to a panel or a contract system where they are assigned by the court to represent parents accused of abuse or neglect, in addition to institutional providers.²⁸ Some states reimburse individual attorneys for both in-court and out-of-court work on an hourly basis,

²² See, e.g., DETROIT CTR. FOR FAM. ADVOC., <http://www.detroitcfa.org> [<https://perma.cc/VB45-T5C4>] (last visited Nov. 16, 2016); FAM. DEF. CTR., <http://www.familydefensecenter.net> [<https://perma.cc/886Z-E6XR>] (last visited Nov. 16, 2016); *Parents Representation Program*, WASH. ST. OFF. OF PUB. DEF., <http://www.opd.wa.gov/index.php/program/parents-representation> [<https://perma.cc/9SF9-ULVW>] (last visited Nov. 16, 2016).

²³ See *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/73WL-NGKV>] (last visited Nov. 28, 2016) (click "Right to Counsel Status" bubble; then choose "Abuse/Neglect/Dependency – Accused Parents" from drop-down menu).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., VA. CODE ANN. § 16.1-266 (2005).

²⁷ See CTR. ON CHILDREN & THE LAW, *supra* note 12, at 2, 5-6 (out of the 44 states that responded to an ABA survey, 22 have statewide systems and 17 have county-based systems, while only 13 states universally require training for parents' attorneys prior to appointment).

²⁸ In family court in New York, "counties are left to choose and oversee their own system for providing family law representation for parents and adults as they do in criminal cases[.]" SPAGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 99, 101-02 (2006), <https://www.ils.ny.gov/files/Spangenberg%20Group%20Report%202006.pdf> [<https://perma.cc/PZC8-6BF3>]. Bronx and New York County Courts both use the panel system of appointments and institutional providers described above. See *Assigned Counsel Plan (18B)*, APP. DIVISION, FIRST JUD. DEP'T, <https://www.nycourts.gov/courts/AD1/Committees&Programs/18B/index.shtml#overview> [<https://perma.cc/7MXE-WHB8>] (last visited Nov. 30, 2016).

whereas other states provide a set amount for the case.²⁹ In addition, there are also family defense centers dedicated to preventive legal advocacy,³⁰ and a number of clinical programs focused on parent representation housed at law schools.³¹ The outlines of practice for each of these models differs, as does the funding and access to non-legal supports including social workers, lay advocates, investigators, and experts. The unifying theme for most of the organization-based models is a commitment to a strong legal defense for parents accused of abusing or neglecting their children and the provision of social work support as part of that defense. However, even within those organizations that share this common theme, there is a range of models with respect to the inclusion or incorporation of social worker or other non-legal advocates on staff.³²

²⁹ See CTR. ON CHILDREN & THE LAW, *supra* note 12, at 6 (summarizing the types of compensation parents' attorneys receive in different jurisdictions).

³⁰ For more information about The Family Defense Center, please visit FAM. DEF. CTR., <http://www.familydefensecenter.net> [<http://perma.cc/886Z-E6XR>] (last visited Nov. 16, 2016). For more information about the Detroit Center for Family Advocacy, please visit DETROIT CTR. FOR FAM. ADVOC., <http://www.detroitcfa.org> [<http://perma.cc/VB45-T5C4>] (last visited Nov. 16, 2016).

³¹ Current law school family defense clinics include the New York University School of Law Family Defense Clinic, University of Michigan Law School Child Advocacy Law Clinic, Benjamin N. Cardozo School of Law Gertrud Mainzer Family Defense Field Clinic, CUNY School of Law Family Law Practice Clinic, David A. Clarke School of Law General Practice Clinic, and Hamline University School of Law Child Protection Clinic. See, e.g., *Family Defense Clinic with NY Defenders*, NYU L., <http://www.law.nyu.edu/academics/clinics/familydefense> [<https://perma.cc/2KM2-XZJ9>] (last visited Nov. 30, 2016); *Student Opportunities*, MICH. L., <https://www.law.umich.edu/centersandprograms/pcl/Pages/Student-Opportunities.aspx> [<https://perma.cc/EDY2-GRM8>] (last visited Nov. 30, 2016); *Gertrud Mainzer Family Defense Field Clinic at the Bronx Defenders (BXD)*, CARDOZO L., <http://www.cardozo.yu.edu/familydefensefieldclinic> [<https://perma.cc/TV5T-6MW8>] (last visited Nov. 30, 2016); *Family Law Practice Clinic*, CUNY SCH. L., <http://www.law.cuny.edu/academics/clinics/family.html> [<https://perma.cc/J9KK-WGUQ>] (last visited Nov. 30, 2016); *General Practice Clinic*, DAVID A. CLARKE SCH. L., <http://www.law.udc.edu/?page=GenPracticeClinic> [<https://perma.cc/E9HD-NXLQ>] (last visited Nov. 30, 2016); *Child Protection Clinic*, HAMLINE U. SCH. L., <http://mitchellhamline.edu/child-protection-program/courses-and-curriculum/child-protection-clinic/> [<https://perma.cc/MKY8-WAQ3>].

³² See Kara R. Finck, *Applying the Principles of Rebellious Lawyering to Envision Family Defense*, 23 CLINICAL L. REV. 83, 95-96 (2016) ("While many refer to their practice as interdisciplinary, the scope of collaboration, incorporation and inclusion can vary significantly. . . . For example, an interdisciplinary practice may involve social workers but not other disciplines such as medicine or nursing, both of which are critical to the client's health and well-being. Perhaps the legal practice includes social workers on staff but does not incorporate them into the direct representation of clients at all stages, from the first client meeting to a prep session for an impending trial. The attorneys in the office may construct a model where they determine the flow of clients to a social worker on staff

Much of the social science scholarship in child welfare is focused on the provision of social services before, during, and after a placement in foster care, and the role of the agency in assessing, preventing, and remedying the neglect and abuse of children.³³ Legal representation for parents and its impact on family court processes and child welfare outcomes, including time to permanency and child well-being, have not received the same amount of attention.³⁴ The role that a robust, interdisciplinary family defense team can play in reforming the child welfare system may not be immediately evident to stakeholders in the child welfare and family court systems.

This article posits that increased attention to the role of family defenders in reforming child welfare and improving outcomes for children and families is critical to any deep understanding of the current system and reform efforts. The underlying theory for this vision of family defense is that its programs can impact the rates of initial foster care placement, time to reunification and/or permanency, and efficacy of the family court system.³⁵

through an internal referral system. A progressive legal practice may employ social workers to collaborate on the cases but only if there are issues implicating the delivery of social services such as substance abuse, mental health or special education services.”).

³³ See, e.g., OLIVIA ANN GOLDEN, REFORMING CHILD WELFARE (2009) (examining child welfare reform’s successes and setbacks from the perspective of a services administrator); Patricia Chamberlain et al., *Implementation and Evaluation of Linked Parenting Models in a Large Urban Child Welfare System*, 53 CHILD ABUSE & NEGLECT 27 (2016) (examining the impact of caseworkers using evidence-based principals in everyday interactions with caregivers); Burton J. Cohen, *Reforming the Child Welfare System: Competing Paradigms of Change*, 27 CHILD. & YOUTH SERV. REV. 653 (2004) (examining different paradigms of child welfare reform but focusing on the strengths and weaknesses of different types of services and means to increase social services rather than quality of legal representation); Nicola A. Conners-Burrow et al., *Trauma-Informed Care Training in a Child Welfare System: Moving it to the Front Line*, 35 CHILD. & YOUTH SERV. REV. 1830 (2013) (exploring differences in training of child welfare workers); Ericka Deglau et al., *Practice Change in Child Welfare: The Interface of Training and Social Work Education*, 51 J. SOC. WORK EDUC. 153 (2015) (examining child welfare employees’ insights into the relationship between professional education and workplace training).

³⁴ MARK E. COURTNEY ET AL., EVALUATION OF THE IMPACT OF ENHANCED PARENTAL LEGAL REPRESENTATION ON THE TIMING OF PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE 1 (2011), https://partnersforourchildren.org/sites/default/files/2011_evaluation..._impact_of_enhanced_parental_legal_representation....discussion_paper.pdf [https://perma.cc/9WDD-5J4D] (“[Our] research review identified inadequate methodological rigor, limited research on outcomes of the juvenile dependency court process and child welfare system, and a dearth of research on legal representation as some of the deficiencies of the existing research literature. In particular, research on parental representation is lacking[.]”).

³⁵ *Id.* at 4 (“PRP increases the speed at which children reunify, and for those children

A. Critiques of Family Defense Providers

Critics of parent representation programs—whether from the bench, child advocacy programs, or child welfare practitioners—contend that robust family defense programs delay permanency, defined as the time to resolution for a child in foster care either through reunification with their parents or an alternate formal custody arrangement such as adoption or guardianship, because of undue litigiousness.³⁶ The argument is that parents’ attorneys would employ defense tactics such as requesting unnecessary delays, advising parents not to comply with service plans, and being overly litigious in what should otherwise be a collaborative process.³⁷ Putting aside the merits of family court as a collaborative endeavor, data from a 2003 study of Washington State’s Parent Representation Program demonstrate that a parent representation program accelerated the time to permanency.³⁸ As a similar 2011 study confirmed, the Washington State program of parent representation demonstrated that “the availability of adequate parental legal representation speeds reunification with parents, and for those children who do not reunify, it speeds achieving permanency through adoption and guardianship.”³⁹ These studies also offer a response to the critics of robust parent representation—they note that the time to adoption and legal guardianship decreased, casting doubt on the assertions about undue delay by parents’ attorneys.⁴⁰

While the evaluations of parent representation programs are limited, there is promising data on the link between parent representation programs

who cannot be reunified, PRP speeds their permanency to adoption or guardianship. We estimate that if PRP had existed statewide in 2001, the 2001 cohort of children in care would have achieved reunification about a month sooner, and children who could not be reunified would achieve other permanency outcomes about a year sooner.”)

³⁶ *Id.* at 3.

³⁷ *Id.*

³⁸ NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION 3 (2003), http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf [<https://perma.cc/8SKQ-JJEE>] (“Proper representation by defense attorneys will help to ensure that parents of dependent children retain their right to due process, as well as assist the court in complying with state and federal case processing time frames for achieving permanency for and ensuring the safety of children.”)

³⁹ COURTNEY, *supra* note 34, at 1.

⁴⁰ *Id.*; see also NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 38, at 8 (“Although its scope was limited (i.e. restricted to an archival review of court records), the evaluation found a noticeable difference in case processing timeframes, time spent in out-of-home care, and case outcomes among each of the samples.”).

and improved outcomes for families.⁴¹ Adequate and institutionalized parent representation programs increase the rate of family reunification.⁴² These initial findings suggest what family defense practitioners know, which is that when parents have zealous advocates with supports, the entire system works better to improve the lives of children and families.

II. ENVISIONING A ROBUST MODEL: THREE COMPONENTS

In considering a robust family defense practice, the model must incorporate interdisciplinary expertise and preventive advocacy through an institutional provider. While each of these components individually serves to better support families and children, all three are necessary for a robust family defense model capable of reforming both the child welfare and family court systems. If more organizations were able to implement the model, research could focus on the efficacy of family defenders in preventing and shortening foster care stays, addressing underlying legal and social service issues for families that impact child well-being, and ultimately reducing the number of cases brought into the Family Court system.

A. The First Component: An Institutional Presence in the Court System

The first component for a robust family defense is an institutional presence, defined as an office or collaborative organization that is responsible, at a minimum, for more than half of all the cases in the system at any given time. While solo practitioners working in this system can effect tremendous change for individual clients, it is critical to have a significant volume of cases overall in order to impact the jurisdiction and to institute systemic reform efforts.⁴³ The total number of cases assigned to an office plays a critical role in ensuring a collective voice and presence as part of the

⁴¹ COURTNEY, *supra* note 34, at 4-6.

⁴² *Id.* at 4 (“[T]he exit rate to reunification is 11% higher when a child is living in a county where [a parent representation program (“PRP”)] is in operation than when a child lives in a county where PRP is not in operation . . .”).

⁴³ Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 997-98 (2013) (“At The Bronx Defenders, we use a myriad of tactics—including, but not limited to, community intake, local organizing, policy advocacy, coalition-building and collaboration, and legal action—to forge a connection with the community and advocate for systemic change.”); *see also Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 228 (2008) (“As individual lawyers connected to no community movements, we can hardly address the systemic problems and issues[.]”).

system. As an institutional provider, the family defenders are placed on the same level as the other institutional stakeholders in the system,⁴⁴ including the child welfare agency, counsel for the agency, and attorneys for children.

The coordinated efforts of attorneys working for the same provider can have a profound impact on the child welfare and family court system's policy and practice. One example that highlights the potential impact of institutional family defender offices is the enhanced communication policy of the New York City Administration for Children's Services (ACS). ACS adopted the policy to establish clear guidelines for communication between attorneys for children, attorneys for parents, and ACS casework staff. The original enhanced communication policy permitted caseworkers to speak with attorneys representing children in foster care about the progress in a case, including visitation, service plan meetings, and social services.⁴⁵ Parents' attorneys, however, were routinely informed that the caseworkers were not permitted to share that same information, effectively requiring parents' attorneys to communicate only with the agency's counsel.⁴⁶ The policy also did not provide discretion to caseworkers when communicating with attorneys for parents based on the goal of the case or specific plan in place for a family. For example, even if the parent had unsupervised visitation with her child in foster care and was working towards reunification, the caseworker was still prohibited from sharing case updates with the parent's attorney, although they could freely share the same information with the child's attorney. Besides the perceived unfairness in having a different policy for attorneys representing children as opposed to parents, the practical impact of the policy was to impede the flow of critical information about parents and children between the court stakeholders.⁴⁷

⁴⁴ *But see* Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1618 (2003) ("Defenders, however, may not experience their role in the creation and execution of the courts as equivalent to the other stakeholders, and therefore may be more resistant to reconsidering the ethical framework for zealous advocacy, including their responsibilities to the community.").

⁴⁵ Nanette Schorr, *ACS's Interpretation of the "No Contact Rule" Impedes the Reunification of Families*, 70 FORDHAM L. REV. 441, 441-42, 441 n.4 (2001).

⁴⁶ *See, e.g., id.* at 441-42, 441 n.4 (2001); Ann Moynihan et al., *Foreword*, 70 FORDHAM L. REV. 287, 318, 318 n.182 (2001).

⁴⁷ Schorr, *supra* note 45, at 450 ("ACS's openness to its caseworkers communicating with children's law guardians reflects its opinion that direct contact between its caseworkers and lawyers for opposing parties in the proceedings is not only necessary, but productive. The prohibitive policy of ACS with respect to parent attorneys shuts them out of an important avenue of advocacy for parents and shuts parents out of the opportunities such advocacy could have otherwise provided to them."); *see also* STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES § 1(6) cmt. 1 (AM. BAR ASS'N 2006), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_la

While local advocates and parents' attorneys raised issues with the policy and advocated for reform individually, my experience in practice highlighted the collective power of the institutional provider. Given the number of cases handled by the institutional office, attorneys were able to collect case examples where the enhanced communication policy delayed the goals in the case or frustrated efforts to promote visitation and services. When the three institutional providers in Manhattan, Brooklyn, and the Bronx joined other legal services organizations and parent advocacy groups, ACS relented and allowed the same communication between casework staff and parents' attorneys. The groundwork was laid by the individual advocates, but the reform in the policy was a result of the combined efforts of the institutional providers. The institutional providers convened a series of meetings, provided drafts of a revised communication policy, and explained the impact of the disparate rules for communication and information sharing. Removing that structural barrier to communication between the caseworkers responsible for daily oversight of the parents' cases and the parents' advocates was critical to increasing the flow of information on cases, ensuring that services were being provided to clients, and integrating the in- and out-of-court processes for parents in the family court system.

A more amorphous, but no less important, benefit of the institutional provider model of family defense is the culture of the legal offices. As a former family defender whose practice was housed in a criminal public defender office, the robust nature of a holistic criminal defense practice that valued strong trial skills as much as client-centered counseling was particularly well-suited to the family defense model.⁴⁸ Criminal defense attorneys' focus on trial skills encouraged family defenders to use all litigation tools at their disposal, including requesting hearings on an emergency removal⁴⁹ and litigating contested issues such as visitation and a finding of neglect. The practice of holistic lawyering where the social

w/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf [https://perma.cc/79VP-3T7Q] (“[T]he parent’s attorney should communicate with the caseworker, foster parents and service providers to learn about the client’s progress and their views of the case, as appropriate. . . . The parent’s attorney must have all relevant information to try a case effectively.”).

⁴⁸ See Steinberg, *supra* note 43, at 963-64 (describing the four pillars that comprise a holistic defense practice: (1) an interdisciplinary team of experts who work side-by-side to address all aspects of a client’s case; (2) working in teams with frequent, open communication; (3) training all advocates to have an inter-disciplinary skill set so they recognize the numerous issues clients face, ask the right questions, and make appropriate referrals; and (4) working closely with the community served to create large-scale change).

⁴⁹ See N.Y. FAM. CT. ACT § 1028(a) (McKinney 2010) (requiring a hearing “to return a child temporarily removed”).

service needs of clients were integrated with their legal needs also resonated with family defense work.⁵⁰ The support of investigators and lay advocates enriched the litigation strategy and provided assistance when counseling clients about potential legal remedies and results. The incorporation of social workers, discussed in more depth as part of the second component, created a culture of collaboration on cases that went beyond referrals for consultation. Ultimately, the size of the office and the scope of the cases handled as an institutional provider created an engaged and dedicated culture of advocates, as interested in advocating for their individual clients as they were for systemic change.

B. The Second Component: Interdisciplinary Practice Moving Beyond Social Work

A robust family defense program should also incorporate an interdisciplinary practice in order to meet both the legal and social service needs of families navigating the child welfare and family court systems. Interdisciplinary practice is a general term referring to a range of models for lawyering, legal offices, and practice that incorporate other professionals and disciplines.⁵¹ At a minimum and in the context of legal practice, it presumes including non-legal experts and advocates as part of the direct representation of clients. The most obvious interdisciplinary practice is between law and social work,⁵² given the unique emphasis on social services at all stages of child welfare cases. There is also a significant role for mental health and medical providers to collaborate with parents'

⁵⁰ See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Public Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 630-35 (2006) (describing the core tenets and benefits of holistic client-centered legal advocacy).

⁵¹ See Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 429 (2001) ("In a multi-disciplinary practice, defenders work regularly with trained social workers who assist in problem-solving for the defense at all stages"); see also Finck, *supra* note 32, at 92 ("At The Bronx Defenders, a team of interdisciplinary advocates created a model for representing parents that combined a robust litigation practice with an integrated social work practice and community engagement efforts. The lawyers were part of teams incorporating social workers, community activists, lay advocates, and neighborhood coalitions. The model was directly informed by the principles of holistic defense, which expands the scope of representation to include housing, benefits and immigration attorneys. The goal of the representation is to address the underlying causes and collateral consequences stemming from clients' interactions with the child welfare and criminal justice system.").

⁵² See LYN K. SLATER & KARA R. FINCK, *SOCIAL WORK PRACTICE AND THE LAW* 1-2 (2012) (discussing the overlap of legal and social work practice in contemporary society).

attorneys⁵³ given the law's inherent emphasis on child well-being and development. While it may be unrealistic to sustain a family defenders office with in-house social service, psychological, and medical experts, creative partnerships between offices and community-based clinics could approach this vision and expand the range of interdisciplinary practice.

The interdisciplinary practice that I envision for family defense goes beyond the traditional inter-professional work between lawyers and medical experts, based in the form of expert witnesses, testimony, and reports. The interdisciplinary practice for a robust family defense office requires non-legal staff as part of the legal case from the outset of representation.⁵⁴ A social worker may be involved in the legal strategy, initial meetings with a client, or counseling of the client about legal and non-legal options.⁵⁵ The social worker might also meet with a client to assess their social service needs and provide resource referrals to the client.

Fundamentally, the model recognizes that clients' issues are not limited to those defined by their legal case and that there are just as likely to be non-legal solutions to the client's issues. Therefore, while the legal case may be the reason why the individual becomes a client in the first place, the representation and advocacy incorporate a deeper inquiry and analysis with the client of the legal and non-legal issues at hand and the range of solutions available both in and out of court.

The nature, complexity, and promise of interdisciplinary practice in the provision of legal services is the subject of a lengthier inquiry, but the inclusion of social work, mental health, and medical expertise are especially critical for family defenders.⁵⁶ It is unrealistic to expect systemic change or

⁵³ Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123, 2126 (1999) ("There are many ways in which mental health professionals can assist lawyers and their clients."); Steinberg, *supra* note 50, at 634 ("For starters, organizing affiliations with other lawyers doing criminal and civil representation and ensuring they may easily access a centralized group of mental health professionals, social workers, and investigators is absolutely critical.").

⁵⁴ See Galowitz, *supra* note 53, at 2130-31.

⁵⁵ *Id.* at 2126 (footnotes omitted) ("Social workers can be useful in interviewing, evaluation, crisis intervention, short-term casework, negotiation, and referral. As a result of social workers' training and education, they are better equipped than lawyers to provide services such as crisis intervention, evaluation of clients' needs, referrals to appropriate agencies, and direct casework.").

⁵⁶ Finck, *supra* note 32, at 93 ("[A] robust and creative interdisciplinary practice can fulfill the promise of rebellious lawyering to empower individual clients and their greater communities through access to a broader set of tools including mental health, social services and peer supports. This is particularly powerful in family defense because of how interdisciplinary principles are embedded in the law of child welfare and the work of family defenders.").

meaningful remedies for parents in the family court system through solely legal means.⁵⁷ The issues confronting the vast majority of parents and families brought into family court implicate a wide range of external government and private systems.⁵⁸ The response must be equally expansive and recognize the context for parents and families beyond the courtroom doors and specifics of the case.

C. The Third Component: Including Preventive Legal Advocacy in Family Defense Programs

The final component of a robust family defense program is preventive legal advocacy. Preventive legal advocacy for family defenders ranges from representing parents during a child welfare investigation to providing community education around the child welfare and family court processes. This is the most idealistic component of a robust family defense practice, given the number of practical and structural limitations on the lawyering. Legal services for parents before a case is filed in family court are significantly limited by a lack of funding, in part because there is no legal mandate for counsel during a child welfare investigation.⁵⁹ However, the role of preventive legal services for parents deserves greater exploration and study because so much of the child welfare system's focus is during the

⁵⁷ Poverty, racial injustice, and inequality compound the issues faced by families in the family court system. See Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 218 (2013) ("The nation's poorest children, not surprisingly, make up most of the foster care population."); see also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 14-15, 24-36 (2002) ("What was understood by some advocates as a social problem rooted in poverty and other societal inequities became widely interpreted as a symptom of individual parents' mental depravity.").

⁵⁸ Poor parents—who are overrepresented in family court—frequently must turn to social support systems like welfare, unemployment benefits, Medicaid, and public housing that require involvement with a number of public agencies. 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, 584 (1997) ("In addition to receiving direct public benefits (like AFDC and Medicaid), poor 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."); Steinberg, *supra* note 43, at 987 ("Our clients spend their lives navigating one indifferent administrative bureaucracy after the next: the welfare office, the child welfare system, school bureaucracies, the housing authority, and Medicare systems.").

⁵⁹ For a discussion of state-by-state breakdowns of when the right to counsel is triggered in family court, see *supra* notes 19-20 and 24-26 and accompanying text.

investigative stage—before any action is initiated in court.⁶⁰ Including legal advocacy as a preventive service during the investigation phase has the potential to address the underlying issues in a family’s housing stability, access to medical care, and financial insecurity.

There are currently a handful of programs across the country that engage in preventive legal advocacy through direct representation of parents before a case is filed.⁶¹ Legal advocacy at this stage can take a number of forms including accompanying a parent to a meeting with the child welfare agency, advocating for an out of court solution, gathering and providing evidence to contest allegations of abuse and neglect, and holding the agency accountable for providing services to prevent a child’s entry into foster care. The importance and potential impact of legal advocacy at this stage cannot be understated. Preventive legal advocacy can mean the difference between a child unnecessarily entering foster care for any amount of time and remaining with their family at home and in their community.⁶² The earlier intervention of preventive legal advocacy with its combined focus on legal and social work remedies can identify and address many of the issues surrounding families who ultimately become involved with family court.

Often, families are in crisis when first in contact with the child welfare system. Facing a host of legal issues including inadequate housing, lack of access to mental health services for children, or food instability, parents may be overwhelmed and distrustful.⁶³ The child welfare agency’s ability to engage and create trust with the family is inherently compromised by their

⁶⁰ See, e.g., CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2014 ESTIMATES AS OF JULY 2015 1 (2015), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> [<https://perma.cc/V3GD-J55X>] (reporting that in 2014, 264,746 children entered foster care); CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2014 ii (2016), <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf> [<https://perma.cc/43VL-Y2EP>] (reporting that the number of children who received an investigation or alternative response after a report in 2014 was over 3.2 million).

⁶¹ See, e.g., *The Detroit Center for Family Advocacy*, UNIV. MICH., <http://detroit.umich.edu/centers-initiatives/highlights/promoting-safe-and-stable-families-detroit-center-for-family-advocacy/> [<https://perma.cc/CBS6-N7SL>] (last visited Nov. 29, 2016); FAM. DEF. CTR., <http://www.familydefensecenter.net> [<https://perma.cc/NA4A-8QAN>] (last visited Nov. 29, 2016).

⁶² See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 460 (2003) (“Lawyers have long recognized the powerful influence that an initial removal exerts on subsequent child protective proceedings. Twenty years ago, an American Bar Association study reported that ‘experienced litigators’ in child protection cases found it difficult to get children returned home ‘once removed, whether the original removal was appropriate or not.’”).

⁶³ Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1039-40, 1042 (2014).

authority to remove children from parents' care. Additionally, for many child welfare systems, the resources available through the traditional system may be limited. The family itself or community members may have access to creative or non-traditional solutions. The confidential relationship with a lawyer can be significant in helping family members find solutions to challenges and in guiding them through the child welfare investigation process so that the parents are fully informed, advised, and incorporated into the planning about their family.⁶⁴ Throughout the child welfare investigation and the period before a petition is filed in family court, parents are asked to participate in meetings with the child welfare agency, provide records about their children's care, and participate in services recommended by the agency.⁶⁵ Preventive legal advocacy can help parents in understanding their legal rights and the process for an investigation, in advocating for their family at the meetings, and in gathering a more nuanced and richer picture of the family's strengths and challenges as part of the process.

Many organizations engage in community education efforts aimed at preventing a family's entry into the foster care system and navigating the child welfare system.⁶⁶ Community education efforts include know your rights presentations at local community based offices, the inclusion of parent advocates on the legal advocacy team, and partnerships with community-based parents' organizations that are often comprised of stakeholders with prior experience in the child welfare system. Community education work should be included as part of any preventive legal advocacy program. The impact of educating the community of parents, caregivers, and service providers is not only bringing transparency to the system but ultimately informing reform efforts with the experience and expertise of parents and children who have been in the system.

CONCLUSION

⁶⁴ See generally *id.* at 1042 (“[B]y having complete loyalty to the client, [legal teams] may be better suited to persuade parents to access needed services like public benefits, counseling, or substance abuse treatment that will help prevent children from being removed from their homes.”).

⁶⁵ Chill, *supra* note 62, at 462 (“Many parents understandably become angry at and highly suspicious of caseworkers who remove their children for reasons that are not readily apparent to them—especially when, as is usually the case, the removal occurs without warning after parents have been speaking and/or working voluntarily with CPS for several days, weeks, or months.”).

⁶⁶ See, e.g., Finck, *supra* note 32, at 102-03 (describing family defense-oriented community engagement programs); Steinberg, *supra* note 43, at 999-1000.

Family defenders play a critical and too often overlooked role in the child welfare and family court systems. As lawyers dedicated to upholding parents' rights, engaging in community education, and providing holistic representation to clients, family defender programs have the potential to reform a broken system and ensure that families are provided with the highest quality legal and social services. If we are to reimagine child welfare and family courts, we must first create a robust national community of family defenders defined by their systemic impact in the courts and the community, commitment to interdisciplinary practice, and focus on all aspects of the case including pre-petition.

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