

2000

Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers

Randi Mandelbaum
Rutgers University

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Juvenile Law Commons](#)

Recommended Citation

Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 Loy. U. Chi. L. J. 1 (2000).

Available at: <http://lawcommons.luc.edu/lucj/vol32/iss1/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers

*Randi Mandelbaum**

In the late twentieth century, one would expect our nation to have settled the question of whether legal representation must be provided for children involved in judicial proceedings affecting the rest of their lives—cases in which their parents' interest may clearly be at odds with theirs. This question is far from settled.¹

I. INTRODUCTION

In 1974, by its passage of the Child Abuse Prevention and Treatment Act (“CAPTA”), Congress established a statutory right to representation, although not necessarily by counsel, for all children who are the subjects of child protection proceedings.² Specifically, as a

* Visiting Clinical Professor of Law and Acting Director, Child Advocacy Center, The State University of New Jersey, Rutgers University - Newark, School of Law. LL.M. Georgetown University Law Center 1994; J.D. The American University, Washington College of the Law 1988; B.A. Brandeis University 1985. This paper primarily was written while I was an Associate Clinical Professor at the University of California, Hastings College of the Law. I wish to thank Kathy Hessler, Shauna Marshall, and Laura Rovner for their unending encouragement and support, and Mark Aaronson, Kate Bloch, Joshua Davis, Justine Dunlap, Peter Edelman, Bea Moulton, Ascanio Piomelli, Michael Wald, and Kelly Weisberg for their invaluable suggestions and advice. Patricia Brown, Michelle Dicks, Lisa Kearns, David Kiernan, Kristine Kim, and Michelle Miller provided excellent research assistance. The library support rendered by Linda Weir and Carolyn Kinkaid at Hastings College of the Law was essential. Finally, without the continual nurturance, guidance, assistance, and love bestowed upon me by my life partner, David Giles, this paper would not have been possible.

1. Howard A. Davidson, *Foreword* to ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* at xi (1993); see also Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child Is My Client, But Who Am I?*, 64 *FORDHAM L. REV.* 1917, 1923 (1996) (referencing Davidson's *Foreword* in HARALAMBIE, *supra*, and expressing frustration with their perception that “the nation continues to be ambivalent regarding the provision of quality legal representation to children”).

2. See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§ 5101-5107 (1994 and West Supp. 2000)). Throughout this paper, the term “child protection proceeding” will be used to refer to the entire set of hearings that occur in juvenile court pursuant to the filing of a petition, usually by a child welfare agency, alleging child abuse and/or neglect. Typically, a child protection proceeding will consist of four types of hearings.

condition for receiving federal funds, “in every case involving an abused or neglected child which results in a judicial proceeding,” each state is required to “provide a guardian ad litem . . . to represent the child.”³ Congress amended the statute in 1996 to specify that the guardian ad litem (“GAL”) may “be an attorney or a court appointed special advocate⁴ (or both)” and that the purpose of such appointment shall be “(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”⁵ No further congressional

However, depending on what transpires, all may not occur in any given proceeding. While each jurisdiction may give the hearings different names and may structure the child protection proceeding differently, each proceeding usually is comprised of an emergency removal or shelter care hearing, an adjudicatory or fact-finding hearing, a disposition hearing, and any number of review hearings. An emergency removal or shelter care hearing typically is held to determine whether it is safe for the children to remain in the care of their parent(s) pending a more complete determination of whether the children have been abused and/or neglected and what is in their best interests. It is at the adjudicatory hearing that a full evidentiary proceeding occurs and a decision as to whether the children were abused and/or neglected is made. In other words, findings are made as to whether the facts, as portrayed in the petition alleging child abuse and/or neglect, can be proven and whether the statutory definitions of abuse and/or neglect have been met. If a finding of child abuse and/or neglect is made at the adjudicatory hearing, the case proceeds to a disposition hearing. At times, the adjudicatory and disposition hearings may be held simultaneously, or at least on the same day. A disposition hearing is the part of the proceeding where the court renders decisions as to where the children should be placed and what services are needed by the family. These decisions are made in accordance with the children’s best interests. See KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS 38-39 (1996). Moreover, the court will make determinations as to the legal status of the children and what are the short- and long-term goals for the children and the family. All of these plans and orders are then periodically reviewed by the court. See *id.* Such review hearings are mandated by federal law and must occur no less than once every twelve months. See 45 C.F.R. § 1356.21(b)(2)(i) (2000); 45 C.F.R. § 1355.20 (2000). As the proceeding progresses, the court must address and focus on issues concerning the children’s need for permanency. See HOWZE, *supra*, at 38-39.

3. 42 U.S.C.A. § 5106(a)(2)(A)(ix) (West Supp. 2000). The initial objectives of CAPTA were to provide federal financial assistance for the “identif[ication], prevent[ion], and treat[ment]” of child abuse and neglect, primarily through demonstration projects, and to create a National Center for Child Abuse and Neglect. S. REP. NO. 104-117, at 4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 3490, 3493. Three states, California, Indiana, and Pennsylvania, do not receive CAPTA funds because these states allow the child to be represented by the same attorney who represents the child welfare agency. See Jennifer Walter, *Averting Revictimization of Children*, 1 J. CTR. FOR CHILDREN & COURTS 45, 47, 59 nn.26-27 (1999).

4. A Court Appointed Special Advocate (“CASA”) is a volunteer lay advocate who has received specialized training and made certain time commitments. For a more in-depth analysis of the development of CASA programs throughout the country, and a more complete description on the role of the CASA, see Laurie K. Adams, *CASA: A Child’s Voice in Court*, 29 CREIGHTON L. REV. 1467 (1996), and Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 327 (1993). See also *infra* notes 72-74, 322-38 and accompanying text (discussing the role of CASA volunteers).

5. CAPTA Amendments of 1996, Sec. 107, § 107(b)(2)(A)(ix)(I)-(II), Pub. L. No. 104-235, 110 Stat. 3063, 3073-74 (1996) (codified as amended at 42 U.S.C.A. § 5106a(b)(2)(A)(ix)(I)-(II))

guidance was or has been given as to the role of the GAL or the purpose of the representation.⁶

Over the past two decades, numerous scholars and organizations, including various committees of the American Bar Association (“ABA”), have attempted to provide some guidance for child advocates struggling to provide ethical and quality representation to their child clients. For example, in 1983, as part of its efforts to develop model ethical rules, the ABA created Model Rule 1.14.⁷ Additionally, during this time, a growing number of scholars have examined and debated the question of what is the appropriate role for the child’s representative, particularly the role of an attorney.⁸ Most recently, several

(West Supp. 2000)).

6. The corresponding regulations, both past and current, provide little additional guidance as to the role and purpose of the GAL. The original regulations stated that the GAL’s responsibilities include “representing the rights, interests, welfare, and well-being of the child.” See Heartz, *supra* note 4, at 331. The current regulations simply state that “[in] every case involving an abused or neglected child which results in a judicial proceeding, the State must ensure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child.” 45 C.F.R. § 1340.14(g) (1999); *see also* Heartz, *supra* note 4, at 330-31 (maintaining that CAPTA “did not offer guidance about what the qualifications . . . or . . . duties” of the GAL should be); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 289 (1983) (concluding that CAPTA never made it clear what role the child’s representative was supposed to play). A look at the legislative history of CAPTA does not offer much additional guidance. A brief summary is provided by Rebecca Heartz:

The original version of the law passed by the Senate contained no mention of the need for independent legal representation of the child. It was not until subsequent committee hearings that this issue was addressed in testimony given by Brian Fraser, then staff attorney for the National Center for Prevention of Child Abuse and Neglect. It was Fraser who played the primary role in the inclusion of the guardian ad litem requirement in the final law. Fraser had previously authored an article on the role of guardians ad litem, which broadly defined their duties to include both legal and nonlegal activities. Fraser’s view of the guardian ad litem was as a “special guardian” legally obligated to do everything within his power to insure a judgment that is in the child’s best interests, including acting as investigator, advocate, counsel, and guardian.

Heartz, *supra* note 4, at 331 (citations omitted). From a historical standpoint, Professors Robert Kelly and Sarah Ramsey attribute the enactment of this statutory provision to the following factors: a heightened awareness of the issue of child abuse and neglect, especially the harms that can occur to children, the children’s rights movement, which had developed in the 1960s, and the Supreme Court’s decision in *In re Gault*, 387 U.S. 1 (1967), concluding that children in delinquency matters have a right to counsel. See Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 409-411 (1983).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1992). See *infra* note 97 for the text of the Model Rule.

8. For exhaustive lists of some of the many articles and papers on the representation of children published in the last twenty-five years, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 711

recommendations for more uniform standards have been developed by various organizations and conferences.⁹ Despite these efforts, much confusion remains and many commentators have found that lawyers who represent young children in child protection proceedings exercise too much discretion and therefore may make determinations on behalf of the young children that are based on their own views and backgrounds and not those of their child clients.¹⁰ The situation is worsened by the fact that all of the systems designed to protect these extremely vulnerable children and serve their needs, including the current systems for providing representation, are failing.

Given the lack of clarity over the role of the representative, as well as concerns about the quality of much of the representation being provided to children, it is not surprising that recently there has been renewed scholarly attention and legislative inquiry concerning the question of

app. D.2 (1997); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 941 n.11 (1995); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 FORDHAM L. REV. 1473, 1473 n.1 (1996).

Additionally, Volume 64, Number Four of the Fordham Law Review is devoted entirely to the recommendations, reports, articles, and responses that were generated from the Proceedings of the Conference on Ethical Issues in the Legal Representation of Children. This conference was sponsored not only by the Fordham Law Review but also by the Administration for Children, Youth and Families, U.S. Department of Health and Human Services; the ABA Center on Children and the Law, Young Lawyers Division; the ABA Center for Professional Responsibility; the ABA Section of Criminal Justice, Juvenile Justice Committee; the ABA Section of Family Law; the ABA Section of Individual Rights and Responsibilities; the ABA Section of Litigation, Task Force on Children; the ABA Steering Committee on the Unmet Legal Needs of Children; the Juvenile Law Center; the National Association of Counsel for Children; the National Center for Youth Law; the National Council of Juvenile and Family Court Judges; and the Stein Center for Ethics and Public Interest Law, Fordham University School of Law. See Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996) [hereinafter Special Issue]. The conference was attended by "more than seventy lawyers, judges, legal scholars, and representatives of other professions" over a three-day period in December 1995. Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1283 (1996).

9. See, e.g., Linda Elrod et al., Representing Children Standards of Practice Committee, American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995); Special Issue, *supra* note 8. The latter publication is the written documentation, including recommendations, working group reports, articles, and responses, from the Proceedings of the Conference on Ethical Issues in the Legal Representation of Children at Fordham Law School from December 1-3, 1995. To review the recommendations or find more information about the conference, see Special Issue, *supra* note 8, at 1301-23.

10. See *infra* Part III.A. Unless otherwise noted, when I refer to "young" or "impaired" children, I mean those children unable to direct the objectives of representation. The questions of how one determines who is "young" and what is the appropriate role for attorneys for young children are the subject of much disagreement. The former question is beyond the scope of this paper. The latter will be discussed extensively below.

whether all children, especially young children, should be represented in child protection proceedings. Professor Martin Guggenheim has called for the curtailment, if not the elimination, of legal representation of young children, and Professor Emily Buss has recommended that lawyers refrain from taking positions on behalf of their child clients.¹¹

11. See generally Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) [hereinafter Buss, *Developmental Barriers*]; Martin Guggenheim, *Matter of Ethics: Counseling Counsel for Children*, 97 MICH. L. REV. 1488 (1999) [hereinafter Guggenheim, *Matter of Ethics*] (reviewing PETERS, *supra* note 8); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996) [hereinafter Guggenheim, *Paradigm*]; Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998) [hereinafter Guggenheim, *Reconsidering the Need*]; Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) [hereinafter Guggenheim, *Reflections*]. For further elaboration on the recommendations of Professors Guggenheim and Buss, see *infra* Part III.

It is important to note that Professor Buss never calls for the elimination of the role of the attorney for young children. She is primarily concerned with the questions of when and whether children can be empowered. Yet, in concluding that many children cannot be empowered, Professor Buss also voices her concern with the roles that representatives for young children play and accordingly recommends that these representatives be prohibited from taking positions in court proceedings. This paper will only address the latter concern.

Professor Guggenheim, who has voiced his concerns about the role of the attorney for young children since 1984, has, in recent years, devoted much attention to the topic, having written three times on the subject in the last four years and co-authored the American Academy of Matrimonial Lawyers' *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*. See 13 J. AM. ACAD. MATRIM. L. 1 (1995) [hereinafter *AAML Standards*]. These standards propose that "courts should not routinely assign counsel or guardians ad litem for children in custody or visitation proceedings," and that if a representative is appointed for a child under twelve, that representative should "not advocate a position with regard to the outcome of the proceeding or issues contested during litigation." *Id.* at 2, 19 (referencing Standards 1.1 and 2.7, respectively).

Both Professors Guggenheim and Buss have authored other works as well. Those writings, however, do not directly or indirectly address the question of whether children in child protection proceedings should be represented. See, e.g., Emily Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1986); Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431 (1996) [hereinafter Buss, *Parents' Rights*]; Emily Buss, *Too Young to be Rehabilitated? Comments on Lipsey's "Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders?"* 6 VA. J. SOC. POL'Y & L. 653 (1999); Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999); Emily Buss, *"You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles"*, 64 FORDHAM L. REV. 1699 (1996) [hereinafter Buss, *Children's Misperceptions*]; Martin Guggenheim, *Considerations in Child Welfare Cases: Duties of the Law Guardian and the Parent's Attorney*, 179 PLI/CRIM 657 (1998); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L. Q. 121 (1995); Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?*, 1 CLINICAL L. REV. 677 (1995); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999) [hereinafter *Dilemma*]; Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. L. 35 (1995);

The legislative probe has taken several different forms. In 1988, through its reauthorization of CAPTA, Congress directed that the National Center on Child Abuse and Neglect (“NCCAN”) study “the effectiveness of legal representation of children in cases of abuse or neglect through the use of the guardian ad litem and court appointed special advocates” and report the results to Congress.¹² More recently, in 1995, Congress proposed decreasing funding for CAPTA and abolishing the federal requirement for the appointment of representatives for children who are the subjects of child protection proceedings.¹³ Additionally, the American Academy of Matrimonial Lawyers (“AAML”), a committee of the ABA’s Family Law Section, and the National Conference of Juvenile and Family Court Judges have recently adopted standards and principles that support the notion that

Martin Guggenheim, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998); Martin Guggenheim, *State Intervention in the Family: Making a Federal Case Out of It*, 45 OHIO ST. L.J. 399 (1984); Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children: Wilder v. Bernstein*, 56 BROOK. L. REV. 603 (1990); Martin Guggenheim & Jeffrey Fagan, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415 (1996); Martin Guggenheim & Marc Miller, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990).

12. Child Abuse Prevention, Adoption and Family Services Act of 1988, Pub. L. No. 100-294, § 104, 102 Stat. 102, 118 (1988). The U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES’ NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION (1990) [hereinafter NATIONAL STUDY] and the FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIANS AD LITEM (1993) [hereinafter FINAL REPORT], discussed herein, are the embodiment of this Congressional directive. The National Study is viewed as Phase 1 and Appendix A of the Final Report (although it is bound separately). Both the National Study and the Final Report were conducted by CSR, a Washington, D.C. consulting firm.

13. See Shepherd & England, *supra* note 1, at 1923. These contemplated reductions in spending and eliminations of statutory mandates never came to pass due to disagreements between the House and Senate. See *id.* at 1923-24. However, the issue of whether to provide representation to children in child protection proceedings, especially representation by attorneys, is still an issue in many states. See *infra* notes 67-80 and accompanying text (describing how the states have not adequately met their obligation to provide appropriate representation); see also Cheryl Romo, *In Court Alone*, L.A. DAILY JOURNAL, Feb. 29, 2000, at 1 (quoting Adam B. Schiff, chair of the California State Senate Select Committee on Juvenile Justice as stating that providing legal representation to all children involved in child protection proceedings is a “tough sell” in the legislature and describing the public as not “convinced [that] kids need attorneys.”).

children in custody and visitation matters¹⁴ are not required to have lawyers.¹⁵

It is unclear if the views of two prominent and thoughtful scholars, ongoing legislative concerns, and institutional pronouncements from organizations in different, but related, fields will result in any changes to the current systems that provide representation to young children. The implications are so grave, however, that further examination is warranted as to the appropriate role of an attorney representing young children in the context of child protection proceedings and to our ability to ensure that the needs and legal interests of these children are represented. The thesis of this paper is that representation of young children is needed, that this representation is best when it is conducted by attorneys acting, as much as possible, in the traditional attorney role, and that concerns regarding unguided discretion and bias by lawyers can be substantially reduced with a concerted effort by attorneys to understand the lives of their young child clients, including their families, backgrounds, and cultures.¹⁶ However, recognizing that accomplishing these goals will entail additional resources that jurisdictions may not be willing to allocate, this article also recommends that enhancements in the roles and responsibilities of juvenile court judges and child welfare agency social workers be made. Further, the article advocates that we continue our discussions regarding how court-appointed special advocates (“CASAs”) and attorneys can best work together. While these recommendations would not protect the interests of young children to the same degree as a competent and well-supported attorney would, they are worth considering as part of the dialogue

14. While issues concerning custody and visitation occur in child protection proceedings, the reference here and throughout this article to custody and visitation matters refers to those cases where custody and/or visitation is in dispute, and where allegations of child abuse or neglect are not at issue, or at least are not central to the proceeding. A typical example is a divorce proceeding where there are conflicts over the custody of the children.

15. See *AAML Standards*, *supra* note 11; A.B.A. & NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *PRINCIPLES FOR APPOINTMENT OF REPRESENTATIVES FOR CHILDREN IN CUSTODY AND VISITATION PROCEEDINGS* (1997) (cited in Guggenheim, *Reconsidering the Need*, *supra* note 11, at 302 n.10). For a contrary view of whether children in custody and visitation proceedings should be represented, see Patricia S. Curley & Gregg Herman, *Representing the Best Interests of Children: The Wisconsin Experience*, 13 J. AM. ACAD. MATRIM. L. 123 (1995) (describing the practice in Wisconsin, one of only two states that mandates the legal representation of children in custody disputes, and calling for such mandatory representation in all states). See also Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 J. AM. ACAD. MATRIM. L. 57 (1995)

16. By emphasizing that all children need legal representation, I do not mean to ignore the fact that other parties in child protection proceedings, especially the parents, also need representation. Rather, like children, parents need competent, well-supported, and committed legal representation as well.

which has begun, and needs to continue, on how child protection proceedings can be made more responsive to the needs and interests of the children it serves.

In order to place these questions and issues in context, the second part of this article will discuss the current plight of children in this country who are abused and neglected.¹⁷ This discussion will include brief descriptions of the systems designed to meet the needs of these children, including the provision of legal representation. This part will also address the serious deficiencies in these systems.¹⁸ In addition, Part II of this article will introduce two fictional children whose lives are reflective of the many children who are abused and neglected.¹⁹ Their stories will be used throughout the paper to illustrate common situations confronted by children in the dependency system that must be taken into account when reconsidering the need to provide legal representation to young children.

Part III then elaborates on some additional concerns about the legal representation of young children and summarizes two proposals that call for the curtailment of such representation.²⁰ Acknowledging the merits of the concerns summarized in Parts II and III of the article, Parts IV, V, and VI respond to the recommendations calling for the reduction or elimination of the role of the attorney for young children.²¹ Specifically, Part IV explains how the proposals will not eliminate bias and discretion in the representation of young children,²² while Part V discusses why it is necessary for young children to have representatives.²³ Part VI focuses on the question of how lawyering for young children can be improved and thus become less haphazard and more reflective of the interests and needs of children.²⁴ This discussion will highlight some of the recent writings of Professor Jean Koh Peters and will propose areas of study in order to further develop and support her paradigm.²⁵ Finally, Part VII suggests that alternative approaches to the representation of young children be studied.²⁶ Part VII also calls for alterations to our child welfare policies, particularly regarding the role

17. *See infra* Part II.

18. *See infra* Part II.

19. *See infra* notes 28-37 and accompanying text.

20. *See infra* Part III.

21. *See infra* Parts IV, V & VI.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See infra* Part VI.

25. *See id.*

26. *See infra* Part VII.

of the agency social worker, and in the responsibilities that we place on juvenile court judges.²⁷ As stated above, these latter recommendations are especially important if the support, financial and otherwise, for the improvement and augmentation of legal representation continues to be deficient.

II. THE CONTEXT

A. *The Lives of Two Neglected Children*

In order to better understand the complexities and difficulties of a child protection case, it is helpful to look first at an individual family situation as it might become known to a child's legal representative at the beginning of such a proceeding.²⁸ Throughout and following this narrative will be more general descriptions of the characteristics of children who may be victims of abuse and/or neglect, and the systems and laws that are in place to protect and serve them and their families. Such a contextual portrayal is necessary to thoroughly examine the question of whether legal representatives are needed.

The children whose situation we are going to examine are Andrew and Brenda Smith. They entered the child protection system within the last 48 hours. Andrew is ten years old and Brenda is eight. They are African Americans.²⁹ Prior to being removed from their home, they

27. *See id.*

28. The following fictionalized fact pattern is based upon a compilation of many cases in which I was appointed the child's legal representative. From March 1989 until May 1992, I was a staff attorney at the Child Advocacy Unit of the Legal Aid Bureau, Inc., in Baltimore, Maryland. As such, I represented hundreds of children in child protection proceedings. This hypothetical example is also intended to highlight some of the prevalent characteristics of abused or neglected children. Moreover, the story is told from the perspective of a white, middle-class attorney, as that is the only reliable account I could write. Throughout this narrative, as well as the entire article, I will use the terms "lawyer," "attorney," "counsel," and "legal representative" interchangeably to refer to a child's representative who is a member of a state bar. Where the term "representative" or "advocate" is used, it will refer to a representative for a child who may be an attorney or a lay advocate.

29. Children of color, especially African American and Native American children, are disproportionately represented in the child protection system as compared to their representation in the national child population. In 1997, "two-thirds (66.7 percent) of all victims were white, 29.5 percent were African American, 2.5 percent were American Indian/Alaska Native, and 1.3 percent were Asian Pacific Islander." U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1997: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM 4-5 (1999) [hereinafter CHILD MALTREATMENT 1997]. Moreover, "[i]n 35 states, 13.3 percent of victims were Hispanic, compared to 18.8 percent of the population of these states." *Id.* The Child Maltreatment 1997 Report summarized that the "proportions of victims who were African American or American Indian/Alaska Native were two times greater than the proportions of those children in the general population. The proportions of victims who were white or Asian Pacific Islander were lower than the proportions of those children in the

lived with their mother, Caroline Smith, who is twenty-six years old.³⁰ They have different fathers and neither father has had much contact with his child. Brenda's father has a serious substance addiction. The exact whereabouts of Andrew's father are unknown. The family's only source of income is public assistance.³¹

general population." *Id.* (citations omitted).

Children of color also are disproportionately represented in foster care. See S. REP. NO. 104-117, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492 (finding that "minority children enter the child protection system in disproportionately large numbers and are far more likely to remain in substitute care for long periods of time - even years"); CHILD WELFARE LEAGUE OF AMERICA, CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES (1999 CWLA STAT BOOK) 95 (1999) [hereinafter 1999 CWLA STAT BOOK] (reporting that "African American and American Indian children are highly overrepresented in . . . out-of-home care"); Annie Woodley Brown & Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 74-75 (1997) (reporting that African American children make up 42.4 percent of all children in foster care, a figure that is grossly disproportionate to their 15 percent representation in the general population); Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 100-01 (1996) (analyzing a study of five states and concluding that the proportion of African American children in care ranged from three times as high to over ten times as high as the proportion of Caucasian children in care); Guggenheim, *Dilemma*, *supra* note 11, at 144 (citing New York City Administration for Children's Services, Selected Child Welfare Trends (noting that a report on New York City found that out of 42,000 children in foster care in New York City in December 1997, only 3.1% were white)); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125 (1999) (citing statistics to support the fact that 45% of the foster care population in 1998 was black, while black children only comprised 15% of the general population under the age of eighteen).

These figures are quite shocking when one learns that there is not any correlation between race and rates of child maltreatment. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3) 8-7 (1996) [hereinafter NIS-3]. These "findings suggest that the different races receive differential attention somewhere during the process of referral, investigation, and service allocation and that the differential representation of minorities in the child welfare population does not derive from inherent differences in the rates at which they are abused or neglected." *Id.* The 1999 CWLA Stat Book states that the disproportionate number of substantiated reports of abuse or neglect for children of color may be due to biases related to race and ethnicity as well as to the high correlation between race and poverty. See 1999 CWLA STAT BOOK, *supra*, at 21, 95; see also HOWZE, *supra* note 2, at 13 (reviewing census data and concluding that more than half of all African American children under the age of eighteen live in poverty compared to approximately seven percent of white children).

30. Frequently, the parents in child protection proceedings are single mothers. See HOWZE, *supra* note 2, at 11; see also Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997) (maintaining that the "vast majority" of parents involved in child welfare matters are mothers).

31. The fact that Andrew and Brenda are forced to live in poverty, unfortunately, is also very common among abused and neglected children. "Children from families with annual incomes below \$15,000, as compared to children from families with annual incomes above \$30,000 per year, were over 22 times more likely to experience some form of maltreatment that fit the Harm Standard [actual harm] and over 25 times more likely to suffer some form of maltreatment as defined by the Endangerment Standard [risk of harm]." NIS-3, *supra* note 29, at xviii. The

disparities are even greater when the incidence of neglect (as contrasted with abuse and neglect combined) is studied (44 times more likely by either definition). *Id.* at 5-6 to 5-8, 8-10. For a statistical and more in-depth analysis of the correlation between the incidence of child abuse and/or neglect and family income, see *id.* at 5-2 to 5-10. See also 1999 CWLA STAT BOOK, *supra* note 29, at 223 (reporting that “declining family support and increasing poverty and substance abuse have accompanied the steady growth in the numbers of U.S. children placed in out-of-home care—from 280,000 in 1986 to 530,496 in 1996”) (citations omitted)); HOWZE, *supra* note 2, at 11 (noting that the majority of cases involve people at or below the poverty line); Appell, *supra* note 30, at 584 (finding that the families involved in the child protective system are “overwhelmingly poor and disproportionately of color”); Buss, *Parents’ Rights*, *supra* note 11, at 432 (declaring that “[t]he child welfare system is a system that, in dramatic disproportion to their numbers, affects poor people”); Courtney et al., *supra* note 29, at 129 (reviewing studies and concluding that there is a high correlation between poverty and child maltreatment, particularly neglect); Roberts, *supra* note 29, at 118 (maintaining that “[m]ost children in foster care were removed from their homes because of parental neglect related to poverty”) (footnote omitted). Professor Emily Buss discusses why this is so:

There are some very sensible reasons for this overrepresentation: To the extent poverty can be linked to drug addiction, violence, a hazardous living environment, and, most of all, stress, being poor will increase the likelihood that a child will be abused or neglected. But the poor are not overrepresented in the child welfare system simply because their child-rearing problems are greater or more widespread. Even in factually similar circumstances, a poor family is much more likely than a middle or upper income family to be suspected of, and reported for, abuse or neglect. Poor families live in close quarters with thin walls that expose them to the scrutiny of neighbors. Their welfare checks bring with them the surveillance of income maintenance workers; their visits to public health clinics expose them to the subset of medical professionals most trained and oriented toward looking for abuse and neglect. Moreover, poor families lack the resources to buy private help . . . that can get them through the difficult times by helping them to reduce their abusive conduct or by keeping the abusive conduct out of the public eye.

Buss, *Parents’ Rights*, *supra* note 11, at 432-33.

The likelihood that poverty will lead to state intervention into the lives of poor families may only get greater with the limitations imposed by welfare reform in 1996. See Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care and Adoption*, 60 OHIO ST. L.J. 1189, 1200 (1999); Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225, 1245-48 (1999); Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out of Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249 (1999).

The correlation between poverty and child abuse has been noted for at least the last three decades. See 1999 CWLA STAT BOOK, *supra* note 29, at 223 (noting that “[c]hild maltreatment is often part of the sad cycle of cause and effect that poverty may help set in motion”); ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 440 (3d ed. 1995) (maintaining that “the foster care system has long been criticized as being class biased”); Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888 (1975) (finding that “the most prevalent characteristic of families charged with neglect is poverty”); Shirley Jenkins, *Child Welfare as a Class System*, in *CHILDREN AND DECENT PEOPLE* 3 (Alvin L. Schorr ed., 1974) (maintaining that “poverty is often the antecedent condition” of neglect and that the child welfare system has always predominantly served poor children and their families, and because the system has always served children so poorly, it also can be seen as a perpetrator of poverty); Leroy Phelton, Ph.D., *Child Abuse and Neglect: The Myth of Classlessness*, 48 AMER. J. OF ORTHOPSYCHIATRY 608, 609-11 (1978) (concluding that there is a “strong relationship between poverty and child abuse and neglect,” that “the highest incidence of neglect occurred in families living in the most extreme poverty,” and that “the most severe injuries occurred within

Ms. Smith also suffers from a dependency on drugs.³² She has been a victim to this addiction for the past five years, but it has become more severe during the last two. Over the years, the family has moved from place to place, staying with friends when possible and, at times, living in shelters or on the street. Approximately one year ago, the family was fortunate to move off of the waiting list and into a two-bedroom apartment in a subsidized housing development. However, the family is about to be evicted from this housing unit due to nonpayment of rent and because drug dealers were alleged to be on the premises.

A social worker from the local child protection services agency (“CPS”) removed Andrew and Brenda from their home after the manager of their housing complex called the agency to report that Ms. Smith had left the children unsupervised, alone, and with very little food to eat for two days. The family, however, was already known to CPS. The agency had previously received calls from the children’s school about excessive absenteeism and the fact that the children frequently came to school dirty. In addition, Andrew’s teacher had expressed concerns of educational neglect. It seems that Andrew is not doing well in school. He has been exhibiting some behavioral problems and the teacher believes that he may have a learning disability. The teacher would like to refer Andrew for a special education assessment and has attempted to meet with Ms. Smith to discuss her concerns. However, Ms. Smith has not responded to any of the letters the teacher has sent home.

After being removed from the family home, Brenda was placed in a family-like foster home. Andrew, however, was placed in an emergency shelter. There were no available foster homes for a boy his age, nor were there any foster homes where Andrew and Brenda could be placed together. Significantly, the extent of CPS’s assistance to the

the poorest families”). For a historical analysis of the relationship between socioeconomic status and the child welfare system, see Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1-3), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), 17 STAN. L. REV. 614 (1965).

32. The prevalence of substance abuse problems in child abuse or neglect cases is quite high. “By some estimates, 70 to 90 percent of child abuse and neglect cases known to CPS agencies involve parents with alcohol or drug abuse problems.” Howard Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L.Q. 765, 777 (1999); see also HOWZE, *supra* note 2, at 11 (noting that “drug addiction is a common finding in neglect cases”); Cahn, *supra* note 31, at 1200 (citing to studies that “indicate that between 1/3 and 2/3 of all substantiated reports [of child abuse and neglect] involve some form of parental substance abuse”); John Needham, *One Day in a World of Hard Cases and Harder Decisions Juvenile Court: ‘Dependency’ Hearings Weigh the Fates of Children, Parents and Would-Be Parents. Sometimes There is No Right Answer*, L.A. TIMES, Apr. 5, 1993, § A at 22 (quoting a judge as stating that more than eighty percent of the cases he sees involve parents using illegal substances).

family in the past has been the provision of emergency funds to help pay some overdue rent and to reactivate the electricity and telephone. No other resources or services have been provided.

Just prior to the shelter care hearing,³³ in an interview room at the courthouse, Andrew and Brenda meet individually with their legal representative, a Caucasian woman in her late twenties from a middle-class, suburban background.³⁴ Ms. Smith has not appeared at the courthouse, so the representative expects that the children will continue to be placed outside the home. Neither has expressed a preference nor a reluctance to go home. However, both children report to her that they are very upset about being separated from one another and have expressed a strong desire to be with Brenda's godmother, Ms. Anita Jones, who has come to the courthouse. Both children appear to the attorney to be frightened and very anxious. Andrew complains of a headache, while Brenda reports having had a stomach ache all day. From what the legal representative can observe while at the courthouse, the children seem very bonded with one another and comfortable with Ms. Jones. The lawyer, however, recognizes that these first impressions are merely preliminary.

There do not appear to be any biological relatives available to care for the children. Ms. Jones, who is a friend of the children's maternal grandmother, informs the representative that all of the children's extended family live out of state, but that she has cared for the two children on and off over the years and would be willing to do so now. The child welfare agency social worker is aware of Ms. Jones' offer and has even been to her home and found both Ms. Jones and her home to

33. A shelter care hearing is an emergency hearing that, in most jurisdictions, must occur within 24 to 48 hours after children are involuntarily removed from the care of their parents.

34. Andrew and Brenda's legal representative also represents common characteristics of advocates who represent children in child protection proceedings. Not only are the representatives typically white and from middle-class backgrounds, but the judges and child welfare agency social workers are as well. See Appell, *supra* note 30, at 585 (noting that in contrast to the recipients of child welfare services, "the judges, caseworkers, and attorneys are mostly middle-class and white"); Buss, *Developmental Barriers*, *supra* note 11, at 925 (briefly describing a hypothetical situation between an attorney and a child client where the race and socio-economic status between the two are different); Louise Kiernan, *Children on Trial; Juvenile Court, An Ongoing Struggle to Mend Broken Lives*, CHI. TRIB., Jan. 19, 1997, § C (magazine), at 3 (describing a juvenile court in Chicago as "a place where mostly white, middle-class lawyers and judges make decisions about the lives of families and children who are mostly black, Hispanic and poor"); see also HOWZE, *supra* note 2, at 1-2 (describing an incident where a courtroom clerk was surprised that an African-American woman came to the juvenile court, not as a mother, but as an attorney). However, according to a national study of 432 jurisdictions, the majority of attorneys acting as child representatives are male, not female. See NATIONAL STUDY, *supra* note 12, at 33.

be appropriate. The social worker went to Ms. Jones' home as part of her efforts to locate Ms. Smith. As the social worker would with a blood-relative, she also ran a background clearance check on Ms. Jones in anticipation of the shelter care hearing and the possibility of placing the children with her. However, it is against the policy of the agency to place children in the home of an unrelated person, even someone who is as close with the children as Ms. Jones, unless it is a licensed foster home. The process of licensing can take several months.³⁵ This is the situation as Andrew and Brenda await their shelter care hearing.

Andrew and Brenda are not alone. Rather, they are two of the approximately one million children who are abused or neglected each year.³⁶ The type of maltreatment, however, varies. Of those children found to be abused or neglected, more than one-half suffer from neglect, as is the case with Andrew and Brenda; nearly twenty-five percent are victims of physical abuse; and twelve percent are sexually abused.³⁷

35. See Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need For a New Funding Scheme For Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 922-23 (1995) (describing the problems of licensing kinship caregivers).

36. See CHILD MALTREATMENT 1997, *supra* note 29, at 4-1. Due to collection and analysis lags, at the time of writing, the most recent year for which data is available is 1997.

In actuality, approximately three million children were alleged to be abused or neglected in 1997. See *id.* at 3-2. After investigation, approximately one million were "substantiated" or "indicated" victims of abuse or neglect. See *id.* at 4-1. It is significant to note that the number of reports of abused or neglected children has increased from the previous year. In 1996, a little over two million children were reported as abused or neglected. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM 2-1 (1998). By 1997, this number had risen to three million. See CHILD MALTREATMENT 1997, *supra* note 29, at 3-2.

Reports of child maltreatment come from various persons and sources based on data from 42 states:

[P]rofessional reporters, including educators, law enforcement officials, social services personnel, medical personnel, mental health personnel, child day care providers, and substitute care providers, accounted for 777,637 reports (53.6 percent) of alleged maltreatment that were referred for investigation. Other relatives, friends and neighbors, parents, and alleged victims contributed 382,239 reports (16.4 percent). Another 290,523 reports (20.0 percent) originated from anonymous or unknown sources, other sources, and alleged perpetrators. Educators initiated 236,719 reports (16.3 percent) and were the largest single source. . . . Law enforcement personnel constituted the second largest source, contributing 193,007 reports (13.3 percent). The distribution of sources of reports has remained virtually constant since 1990.

See *id.* at 3-1.

37. See CHILD MALTREATMENT 1997, *supra* note 29, at 4-2. The remainder of the maltreatment consisted of psychological or emotional abuse or neglect, medical neglect, and other types of abuse, such as "'abandonment,' 'congenital drug addiction,' and 'threats to harm the child.'" *Id.* at 4-2, D-13.

Of the children who were the subject of substantiated abuse or neglect findings in 1997, 6.9 percent were less than one year old, 30.9 percent were one to five years old, 39.7 percent were six

Unfortunately, the problems for Andrew and Brenda do not stop at home. Because of the conditions of the systems that are supposed to protect Andrew and Brenda from abuse or neglect, there is no assurance that all will be well for them if they are removed from their home. The two public systems designated to both protect abused and neglected children and assist their families in addressing the causes of maltreatment are our child welfare agencies and our juvenile courts. In addition, to ensure that all children involved in child protection proceedings are represented, most states have established some system or structure to provide for representation. Over the past few decades, however, numerous studies and reports have documented extensive and chronic neglect of children in these systems. In order to understand what Andrew, Brenda and their family are likely to face if they become involved with these systems, it is necessary to briefly describe the functions of each of these systems, as well as some of their many shortcomings.

B. Status of Our Child Welfare Agencies

At present, child welfare agencies in many states are under court supervision as a result of lawsuits that documented extreme violations of federal and state laws in providing services to children and their families.³⁸ One judge described the system in his jurisdiction as one of

to 12 years old, and 19.3 percent were 13 to 17 years old. *See id.* at 4-3, fig. 4-3. Of these same children, 52.3 percent were female. *See id.* The National Incidence Study of Child Abuse and Neglect looked at gender differences and found that girls are three times more likely than boys to be sexually abused. *See NIS-3, supra* note 29, at 8-6. However, boys are more at risk for emotional neglect and serious injury than girls. *See id.*

The perpetrators of the abuse were predominantly the parents of the children. *See CHILD MALTREATMENT 1997, supra* note 29, at 7-1 (reporting that in 1997 approximately seventy-five percent of the perpetrators were biological, adoptive, or step parents).

In the last decade, the annual number of children "seriously injured by abuse . . . has quadrupled, to 572,000 from 143,000." Robert Pear, *Many States Fail to Meet Mandates on Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at A1. Accounting for approximately 2,000 fatalities a year among children of all ages, child abuse is the leading cause of death among children under the age of four. *See id.*; *see also CHILD MALTREATMENT 1997, supra* note 29, at 6-1 (reporting that children three and younger accounted for seventy-seven percent of child maltreatment fatalities).

38. *See Pear, supra* note 37, at A1; *see, e.g., Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993) (summary of case from the perspective of the attorneys representing the class of children is available at <<http://www.youthlaw.org/docket.htm>>); *David C. v. Leavitt*, 13 F. Supp. 2d 1206 (D. Utah 1998) (summary of case from the perspective of the attorneys representing the class of children can be found at <<http://www.youthlaw.org/docket.htm>>); *L.J. v. Massinga*, 778 F. Supp. 253 (D. Md. 1991) (for modification of consent decree); *LaShawn v. Dixon*, 762 F. Supp. 959 (D. D.C. 1991), *aff'd in part LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied* 510 U.S. 1044 (1994); *L.J. v. Massinga*, 699 F. Supp. 508 (D. Md. 1988) (discussing consent decree proposed by parties).

“outrageous deficiencies,” while another jurist declared the current state of affairs to be a “bleak and Dickensian picture.”³⁹ According to a report by the United States Advisory Board on Child Abuse and Neglect, “[i]t is not a question of acute failure of a single element of the system; there is chronic and critical multiple organ failure. In such a context, the safety of children cannot be ensured. Indeed, the system itself can at times be abusive to children.”⁴⁰

The widespread deficiencies within the child welfare system can be seen in almost every state, at every level, and at every step in the process.⁴¹ For example, the first type of service that child welfare agencies provide is the investigation of reports of child abuse and neglect. The need for this service to occur in a prompt and responsible manner cannot be overstated.⁴² Yet, approximately one-third of state agencies charged with this responsibility are “unable to investigate reports within 24 or 48 hours, as required by law.”⁴³ Reviewing the

39. See Pear, *supra* note 37, at A1; see also Appell, *supra* note 30, at 593 & n.86 (lamenting the many problems found in the child welfare system).

40. S. REP. NO. 104-117, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492; see also Buss, *Parents' Rights*, *supra* note 11, at 439 (declaring that the child welfare system “plays out abysmally for children” and that children’s treatment in this system “often constitutes abuse and neglect of its own”); Tracy Weber, *Twice Abused: Inside Orange County's Child Welfare System*, L.A. TIMES, May 5, 1998, at A1 (describing the child welfare system as “antiquated” and “struggling under the weight of too many children and too little oversight”).

It also is significant to note that poor children and families of color are treated worse and receive even fewer services than their white counterparts. See Courtney et al., *supra* note 29, at 108-25 (reviewing various studies of how children of color fare in our child welfare systems). “The overall picture . . . is that families and children of color experience poorer outcomes and are provided fewer services than Caucasian families and children.” *Id.* at 125. However, most studies reviewed did not factor in class; those few that did “showed a reduced or nonexistent effect of race or ethnicity.” *Id.* at 125-26; see also Roberts, *supra* note 29, at 126 (concluding that “once black children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children”) (footnote omitted).

41. See Pear, *supra* note 37, at A1. In 1996, a committee report that accompanied the 1996 legislative amendments to CAPTA declared the following: “No matter which element of the system that it [the Advisory Board] examined - prevention, investigation, treatment, training, or research - it found a system in disarray, a societal response ill-suited in form or scope to respond to the profound problems facing it.” S. REP. NO. 104-117, at 3-4 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492-93.

42. It is important to stress that investigations must be performed responsibly, not only so that children are protected from serious abuse and neglect but also so that children are not unnecessarily removed and traumatized when allegations are unfounded or not sufficiently serious as to warrant the children being removed from their family and home.

43. S. REP. NO. 104-117, at 2 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3491; see also Buss, *Parents' Rights*, *supra* note 11, at 433 (“Investigations of abuse and neglect reports are routinely done by case workers with little or no specialized training in how to approach the families, how to conduct an effective and appropriate investigation, and how to assess the information uncovered.”); Pear, *supra* note 37, at A1 (stating that “[c]hild welfare officials in many states, swamped with work, are slow to investigate reports of child abuse and neglect”). It

situation of Andrew and Brenda, it appears that the agency responded promptly. Had it not, however, the likely result would have been that Andrew and Brenda would have spent another night alone, unsupervised, and without sufficient food.

Children removed from the care of their parents and placed in foster care, even temporarily, are also at great risk of not having their needs met by the child welfare agencies.⁴⁴ Placements in overcrowded and inadequate foster homes that fail to provide for children's basic needs are common.⁴⁵ As Professor Richard Wexler told a Senate committee, "[f]oster care is not a haven. Often it is not even safe. Most people assume that removing children from their parents means removing them from danger and placing them in safety. Often it is the other way around."⁴⁶ In the case of Andrew and Brenda, it is too early to predict how they will fare out of their mother's care. However, we do know that the children have been separated⁴⁷ from each other and that Andrew was not even able to be placed in a family-like foster home.

Once children are placed in foster care, it is the responsibility of the child welfare agency to meet the needs of the children and to provide

is significant to note that the 24-48 hour rule is not required in all circumstances and in all jurisdictions.

44. See Appell, *supra* note 30, at 593 & n.86 (explaining that "one of the weaknesses of the child protection system is its failure to treat the children once it removes them from a dangerous situation").

45. See Pear, *supra* note 37, at A1. As with the fictional Andrew and Brenda, it is significant to note that the medical and psychological needs of children being placed in foster care have been found to be extensive. "91.5% of children were found to have at least one abnormality in at least one body system and more than half of the children's health problems warranted the need for referrals for medical services." ABA, A JUDGE'S GUIDE TO IMPROVING LEGAL REPRESENTATION OF CHILDREN 60 (Kathi L. Grasso ed., 1998) [hereinafter A JUDGE'S GUIDE]. Additionally, "22% of children aged 3 to 6, 63% of children aged 7 to 12, and 77% of teenagers were found to be in need of a mental health referral." *Id.*; see also Appell, *supra* note 30, at 593 n.86 (citing M. Graziano & Joseph R. Mills, *Treatment for Abused Children: When is a Partial Solution Acceptable?*, 16 CHILD ABUSE AND NEGLECT 217 (1992)), and concluding that psychological services are not provided in a timely fashion, if at all); Walter, *supra* note 3, at 52 (noting that "foster children are not routinely assessed for medical, psychological, or developmental conditions") (footnote omitted).

46. S. REP. NO. 104-117, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492 (testimony of Professor Richard Wexler). Many of the children placed in non-kinship foster care are forced to frequently move from one foster home to another. Over a six-year period, 34% of children in non-kinship foster care had five or more placements. See Richard P. Barth, *The Juvenile Court and Dependency Cases*, 6 JUV. CT. 100, 105 (1996). Kinship foster care is a term used when children who are removed by a juvenile court from the care of their parents and placed in the custody of the state are placed by the child welfare agency with relatives.

47. In California, "more than 60 percent of foster children are part of a sibling group and 41 percent of those are not placed with their siblings." Walter, *supra* note 3, at 61 nn.89 & 90 (citing to California Dept. of Soc. Servs., Foster Care Info, Sys, Data).

services and resources to the family in order to address the cause or causes of the maltreatment and to hopefully reunify the family as quickly as possible.⁴⁸ For Andrew, Brenda, and Ms. Smith, this might mean providing medical, psychological, or educational services to Andrew and Brenda, drug rehabilitative treatment to Ms. Smith, and assistance in securing housing. Here too, however, the agencies have been found to be failing abysmally.⁴⁹

48. See 45 C.F.R. § 1356.21(b) (2000).

The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured [and] to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child)

Id. However, with the passage of the Adoptions and Safe Families Act of 1997 ("ASFA"), reasonable efforts are no longer required in all circumstances. See 45 C.F.R. § 1356.21(b)(3) (2000).

Reasonable efforts to prevent a child's removal from home or to reunify the child and family are not required if the State agency obtains a judicial determination that such efforts are not required because

(i) a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State law, which may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) a court of competent jurisdiction has determined that the parent has been convicted of

A) Murder . . . of another child of the parent;

B) Voluntary manslaughter . . . of another child of the parent;

C) Aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; or

D) A felony assault that results in serious bodily injury to the child or another child of the parent; or,

(iii) the parental rights of the parent with respect to a sibling have been terminated involuntarily.

Id. Given the fact that abandonment can be considered an "aggravated circumstance," it is possible that a determination that reasonable efforts were not required might be made with regard to the case of Andrew and Brenda. Moreover, ASFA also codified the concept of "concurrent planning," which gives state child welfare agencies permission to make efforts toward an alternate permanency plan at the same time that it makes efforts to reunify the child and family. See 45 C.F.R. § 1356.21(b)(4) (2000). For two very different analyses of ASFA, compare Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95 (1999), with Roberts, *supra* note 29.

49. See Pear, *supra* note 37, at A1 (maintaining that few child welfare agencies provide the necessary services to keep families together or to reunite them once separated); see also Appell, *supra* note 30, at 595-602 (discussing many of the problems with the child welfare system and documenting a lack of necessary services to help prevent initial placements into foster care and to assist in reunifying families).

The Child Welfare League recommends that caseworkers carry no more than 15 cases each, although caseworkers often are responsible for 50 to 70 cases. See Pear, *supra* note 37, at A1 (citing to statements by David S. Liederman, Executive Director of the Child Welfare League of America); see also Walter, *supra* note 3, at 51 (describing the caseloads of child welfare caseworkers as "heavy" and exceeding established standards).

Very few children and families receive the assistance they need, and reunification services are often lacking. Many parents “end up with nearly identical boilerplate plans of counseling, parenting and anger management or drug classes – if they can get into the heavily overbooked classes at all.”⁵⁰ Consequently, many children have languished in foster care for years on end without a clear permanency plan and without significant efforts having been made by the child welfare agency to either reunify the child’s biological family or take the necessary steps to free the child of his legal ties to his biological family so that he can be adopted.⁵¹ Not only does this lack of meaningful assistance and services create a situation that is painfully unfair to the parents and potentially harmful to the children (who are generally better off with their own families, if the abusive or neglectful conditions are remedied), but when an agency fails to provide such assistance it becomes very difficult, if not impossible, for the agency or the court to determine and/or pursue an appropriate long-term or permanent plan for a particular child. Recent changes in federal law, mandating that decisions with respect to permanency be made within twelve months of a child entering foster care, heighten the significance of this scarcity of resources and create an even more dire situation.⁵²

50. Tracy Weber, *Twice Abused: Inside Orange County’s Child Welfare System*, L.A. TIMES, May 22, 1998, at A1; see also HOWZE, *supra* note 2, at 17 (describing the provision of services by child welfare agencies as “cookie-cutter remedies” that are unhelpful and unreflective of cultural and sub-cultural realities); Appell, *supra* note 30, at 601 (maintaining that “instead of offering meaningful assistance, caseworkers too often take a cookie-cutter approach to the families and their problems”); Buss, *Parents’ Rights*, *supra* note 11, at 438 (claiming that “overwhelmed, underfunded, and highly bureaucratic child welfare agencies provide little if any, useful assistance” and calling for state agencies to provide parents with the means to be good parents).

51. While some child welfare agencies have improved recently, many problems persist, especially in those states where there are large urban centers. Of those children who are removed from their family homes, “the vast majority of them (in excess of two-thirds) will return home, although more than half will remain in care for at least 18 months in California, 35 months in Illinois, 12 months in Michigan, 25 months in New York, and 9 months in Texas.” Barth, *supra* note 46, at 105.

52. Under ASFA, if 12 months of reunification services are unsuccessful, the agency is to move forward in its efforts to develop an alternative permanent plan and find an alternative permanent placement, which can include the termination of parental rights, a step that then permits the child to be adopted. See 45 C.F.R. § 1356.21(b)(2)(i)-(ii) (2000). In fact, also under ASFA, a child welfare agency can pursue both reunification and an alternative permanency plan at the same time. See 45 C.F.R. § 1356.21(b)(4) (2000). This is known as “concurrent planning.” Significantly, it is more difficult to find permanent and/or adoptive homes for older children, children of color, and children with special needs. See Roberts, *supra* note 29, at 119-20 (maintaining that there are insufficient adoptive homes for the number of children who need them, and that black children are less likely than white children to be adopted).

C. Shortcomings of Juvenile Court

Of course, Andrew and Brenda will not face the perils of the welfare system alone. Their interests are supposed to be protected by our juvenile court system, which will oversee the possible removal and placement of Andrew and Brenda, as well as the provision of services to Andrew and Brenda and their family. However, like the child welfare agency, the juvenile court, with which Andrew and Brenda will find themselves involved, is also likely to suffer from serious deficiencies.⁵³ Very little data exists that documents or explains how it is determined which substantiated reports of abuse or neglect are brought to the attention of the juvenile court.⁵⁴ The few studies that have been conducted reveal that only a small proportion of substantiated cases seek the assistance of the court.⁵⁵ Such a small percentage is more easily understood when one considers that the only cases likely requiring the court's attention are those where the child welfare agency finds it necessary to involuntarily remove children from the care of their parents, or where the child welfare agency finds the parents not to be cooperating with treatment plans outlined by the child welfare agencies. Andrew and Brenda fall into this category, as they have essentially been abandoned, and their mother is not available to voluntarily work with the child welfare agency in making arrangements to ensure their safety in the future.

Despite the small percentage of substantiated instances of abuse or neglect requiring judicial attention, the actual number of cases is quite large - many more than most juvenile courts and presiding judges are able to handle in an adequate manner.⁵⁶ Descriptions of the operations of our juvenile courts reveal an overwhelmed and, at times, even unresponsive judicial process. Common characteristics include: judges with no more than a few minutes to spend on each case; orders being issued without any legal or factual basis; extraordinarily long delays,

53. See Walter, *supra* note 3, at 51 (explaining that "courts have not been given the resources they need to adequately perform [their *parens patriae* responsibilities]").

54. See Barth, *supra* note 46, at 102 (explaining that the current national data systems do not include information on the likelihood that a child abuse report will be presented to the juvenile court).

55. See *id.* (describing how, in one study, petitions were filed in twenty-one percent of the substantiated cases, while in other jurisdictions the percentages were as low as three to four percent).

56. See, e.g., M. HARDIN, JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORM: ONE COURT THAT WORKS 12 (1992) ("a study of judicial caseloads in six states that found a 120 percent increase in child victim cases, but only a seven percent increase in family and juvenile court judges from 1984 to 1990"); see also Buss, *Parents' Rights*, *supra* note 11, at 434-35 (maintaining that in many jurisdictions "courts are overwhelmed by the size of their caseloads").

especially if any party wishes to contest an issue; and inadequate appellate processes.⁵⁷

One unfortunate result of such an ill-functioning system is that, in some cases, “children who should be removed from their homes are not, and children who are removed should not have been.”⁵⁸ Frequently, children like Andrew and Brenda do not receive the attention and protection to which they are entitled. Numerous studies of various juvenile court systems validate these appalling characteristics.⁵⁹ A September 1997 report by the Fund for Modern Courts found that New York “Family Court judges were overburdened and were forced to provide ‘assembly-line’ justice because they had only a few minutes to review each case.”⁶⁰ A similar report concerning the Massachusetts family court system found it to be in need of a serious overhaul.⁶¹

In sum, the outlook for Andrew and Brenda is dismal. They and their mother are in need of assistance. Yet, the systems designed and

57. See Buss, *Parents' Rights*, *supra* note 11, at 434-35; see also Appell, *supra* note 30, at 602 (lamenting the high caseloads of judges and concluding that “ineffective gatekeeping creates a vicious circle - by keeping caseloads high, the system forecloses its ability to provide meaningful assessment and review of whether families should be in or out”).

58. Buss, *Parents' Rights*, *supra* note 11, at 439.

59. See generally Walter, *supra* note 3, at 51 (stating, for example, that “[a] recent study concluded that California’s juvenile courts do not comply with the national resource guidelines on judicial caseloads articulated by the National Center for State Courts”) (footnote omitted) (quoting CENTER FOR CHILDREN & THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, COURT PROFILES, prepared for *Beyond the Bench IX* (1998)). Moreover, “California juvenile court case-processing times do not adhere to statutory timelines.” *Id.* (footnote omitted) (quoting NATIONAL CENTER FOR STATE COURTS, CALIFORNIA COURT IMPROVEMENT PROJECT 23-25 (1997)).

60. John Sullivan, *Chief Judge Announces Plans to Streamline Family Court*, N.Y. TIMES, Feb. 25, 1998, at 7 (quoting report by the Fund for Modern Courts). As an example, the report looked to Brooklyn, New York, where it found that a case received four minutes of the judge’s attention on the first appearance and eleven minutes on subsequent occasions. See *id.*; see also Jennifer Warren, *System Overload: Rise in Abuse, Neglect Results in a Sputtering Juvenile Court*, L.A. TIMES, Dec. 27, 1987, at A1 (quoting a deputy district attorney explaining why there is very little time that can be allocated to each case); Weber, *supra* note 40, at A1 (describing one juvenile court in the Los Angeles area as chaotic and disorderly and quoting a judge who acknowledged that he often has just minutes to decide a case). These problems are long-standing. In his 1975 article, Professor Mnookin described a study conducted by himself and Professor Michael Wald whereby they reviewed juvenile court cases in two counties. In approximately two-thirds of the cases, hearings took two minutes or less. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 274 (Summer 1975).

61. Among the problems cited were the poor condition of the courthouse, backlogs in cases, scheduling problems, antiquated rules, too few judges and support staff, insufficient court security, and outmoded phone and communication systems. See MASSACHUSETTS BAR ASS’N, REPORT OF THE FAMILY LAW SECTION COMMITTEE ON THE CRISIS IN THE PROBATE AND FAMILY COURT 2 (1997); *Family Court’s Troubles Shock Authors of Study*, AP, June 5, 1997, available at LEXIS, Nexis Library, AP File (discussing Report of the Family Law Section Council).

established to render this aid are unable to assist all of the children and families who are in need.⁶² In an effort to ensure that the individual needs of each child are addressed, Congress mandated that each child be provided with a representative.⁶³ As will be examined next, however, the provision of representation has not always accomplished this goal.

D. Poor, if Any, Representation

Numerous scholars and studies have documented a multitude of systemic problems affecting the provision of competent representation to children who are involved in child protection proceedings.⁶⁴ Although the concerns have been characterized in various ways by different commentators, the problems can be separated into two categories.⁶⁵ The first set of issues involves the lack of sufficient resources available to support competent representation, while the second involves the lack of guidance available to representatives as to what role they should play.⁶⁶ Both, especially the latter, result in representation that is often haphazard and biased.

1. Inadequate Resources and Support for Representation

With regard to the provision of representation, it is first necessary to determine what is currently occurring at the state level. A relatively recent report on the effectiveness of representation pursuant to CAPTA revealed that while all states currently have statutory provisions that provide for representation, in actuality, the states have not been meeting their obligations to provide representation in an appropriate manner, if

62. See Walter, *supra* note 3, at 51.

63. See *supra* notes 3-5 and accompanying text (explaining the requirement for GAL representation of each child and the role of the GAL by 45 C.F.R. § 5103).

64. See, e.g. ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS: EXECUTIVE SUMMARY (1988) [hereinafter NATIONAL EVALUATION]; FINAL REPORT, *supra* note 12; NATIONAL STUDY, *supra* note 12; Shepherd & England, *supra* note 1, at 1919-32; Special Issue, *supra* note 8.

65. See Shepherd & England, *supra* note 1, at 1925. These commentators explain that "[r]esearchers have identified both systemic and individual attorney problems that have contributed to the poor representation of children." *Id.* While there is little doubt that problems concerning individual attorneys occur, many of these concerns are similar to those regarding poor representation in any context, and are therefore beyond the scope of this article. To the extent that the problems of individual attorneys reflect larger systemic concerns (i.e., lack of time to conduct adequate investigations, including contacting the child client, and lack of specialized training), they will be addressed as part of my discussion of systemic problems.

66. See *infra* Part II.D.1-2; see also Hartz, *supra* note 4, at 328 (finding that "[t]he funding and definitional deficiencies that plagued the early implementation of the CAPTA guardian ad litem requirement still exist, and independent representation for abused and neglected children remains inconsistent and inadequate").

at all.⁶⁷ “In eight states, the appointment of a representative is discretionary or required only in some cases, resulting in a substantial number of abused and neglected children in these states not being represented.”⁶⁸ In many other states, although a representative is required by state statute, children are forced to participate in court proceedings without representation.⁶⁹

In those states where a representative is appointed, the qualifications, training, and support of the representatives vary greatly from state to state, and even among counties within a state. For example, only about half of the states mandate that all children receive representation by attorneys.⁷⁰ Where representation is not required to be by attorneys, it may be provided by paid or volunteer lay advocates, or by a combination of different types of representation, including some representation by attorneys.⁷¹

The most prominent of the lay advocacy programs is the CASA program, which currently operates in some form in every state by volunteer participants.⁷² The provision of representation by CASAs -

67. See FINAL REPORT, *supra* note 12, at xix (calling for additional resources to implement the GAL requirement in CAPTA).

68. NATIONAL STUDY, *supra* note 12, at 9. Specifically, in Texas, Indiana, and Delaware, the appointment of a representative is at the discretion of the court. See *id.* In Colorado, the appointment of a representative is required in abuse, but not neglect, matters. See *id.* Georgia, Louisiana, and Wisconsin require appointment only in termination of parental rights cases. See *id.* Finally, in Arkansas, appointment is mandated only when custody is at issue. See *id.*; see also Shepherd & England, *supra* note 1, at 1921 (discussing the NATIONAL STUDY).

69. See NATIONAL STUDY, *supra* note 12, at 9-16, 41 (1990). “All abused and neglected children are not being represented in 26 states. In nine of these states, more than 90 percent of children are represented and the children who do not receive representation are concentrated in small rural areas that have small caseloads.” *Id.* at 14. However,

[e]ight states have more widespread difficulties in providing representation. . . . Florida where only 49 percent of children receive a GAL, Nevada with 32 percent representation, and Delaware with 22 percent were the lowest in the nation on this measure In the five remaining states where representation is low - California, Idaho, Indiana, Louisiana, and Oregon - lack of representation is widespread throughout the state.

Id.

70. See NATIONAL STUDY, *supra* note 12, at 17 (concluding that 23 states mandate representation by an attorney); PETERS, *supra* note 8, app. B at 253 (finding that 26 states require legal representation). Differences in findings may be attributable to the different time periods in which the studies were conducted or to variations between actual practice and statutory mandates. Findings from the National Study also revealed that in another 23 states, whether the representation was provided by an attorney or a lay advocate was left to the discretion of the presiding judge. See NATIONAL STUDY, *supra* note 12, at 17.

71. See NATIONAL STUDY, *supra* note 12, at 18-23.

72. See Heartz, *supra* note 4, at 328. Most of these programs are members of the National Court Appointed Special Advocates Association, a national organization that provides training and technical assistance. See *id.* The first CASA program began in Seattle, Washington in 1977.

who typically only handle one case at a time, are motivated, and well-trained - has been found by some researchers to be effective, especially in the tasks of investigation and monitoring.⁷³ However, such positive reports should be tempered by significant concerns regarding the ability of CASAs to effectively participate in "courtroom activities."⁷⁴

While it may seem that those states that provide attorneys to all children involved in child protection proceedings are fully complying with their obligations under CAPTA, a closer examination reveals otherwise. Many states that provide attorneys as representatives fail to provide a sufficient amount of resources to the appointment of these legal representatives.⁷⁵ The result of this deficiency in funding is inadequately trained lawyers⁷⁶ who are either poorly paid,⁷⁷ forced to

Following its success, programs were developed in Arizona, California, Florida, New York, and Rhode Island. *See id.* at 337. The National Court Appointed Special Advocates Association was created in 1982 and incorporated in 1984. *See id.* For a full exploration of the history of the CASA program, see Adams, *supra* note 4, at 1467; Heartz, *supra* note 4, at 336-47. For a more detailed discussion of the use of CASAs as representatives, see *infra* Part VII.D.

73. *See* NATIONAL EVALUATION, *supra* note 64, at 13-19; Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 389 (1987). For a fuller discussion of the strengths of CASA programs, see *infra* Part VII.D.

74. *See* FINAL REPORT, *supra* note 12, at xviii, 6-2, 6-11, 6-15. For an analysis of the effectiveness of representation by CASAs, as well as a critique of some of the national studies reviewing the effectiveness of various forms of representation, see *infra* Part VII.D.

75. *See* Heartz, *supra* note 4, at 328; Shepherd & England, *supra* note 1, at 1925. While a severe lack of resources and training are largely responsible for the poor representation of children, other factors also play a role. These variables may include the appointment of different attorneys for the same child at different hearings, delays in the appointment of a representative, unrealistic expectations of what is entailed in the representation of a child in an abuse or neglect matter, and a sense of passivity on the part of the representatives. *See* Shepherd & England, *supra* note 1, at 1925.

76. *See* FINAL REPORT, *supra* note 12, at xviii-xix (calling for the need for more focused training); NATIONAL EVALUATION, *supra* note 64, at 19-20 (remarking that "law school does little to prepare attorneys for the GAL role"); NATIONAL STUDY, *supra* note 12, at xviii (calling for the need for more training); A JUDGE'S GUIDE, *supra* note 45, at 1 (maintaining that many lawyers have not had any formal or adequate training); Duquette & Ramsey, *supra* note 73, at 351 (explaining that "few lawyers have had any special training or expertise in representing children"); William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 IND. L.J. 635, 640 (1998) (remarking that law schools do not "adequately prepare" law students to handle cases involving children); Kelly & Ramsey, *supra* note 6, at 451, 454 (finding that most attorneys do not receive any specialized training and remarking on the need for increased training); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 105-06 (1997) (analogizing juvenile court to a "training ground for public sector attorneys" (footnote omitted)).

77. *See* NATIONAL STUDY, *supra* note 12, at 14 (reviewing the low levels of compensation of representatives for children); A JUDGE'S GUIDE, *supra* note 45, at 1 (documenting the fact that attorneys for children receive low levels of compensation as well as delays in receiving such compensation); PETERS, *supra* note 8, at 32 n.18 (discussing the problem of inadequate compensation); Kelly & Ramsey, *supra* note 6, at 452 (surveying lawyers and finding that 68% of

handle voluminous caseloads,⁷⁸ or both.⁷⁹ Consequently, attorneys appointed to represent children in child protection proceedings are often unable to spend the time necessary to adequately investigate cases, develop relationships with their child clients, monitor court orders, and generally perform their responsibilities in an ethical and competent manner.⁸⁰

those surveyed did not feel that they were adequately paid for the time spent on their cases); William Wesley Patton, *California Dependency Cases or The Answer to the Riddle of the Dependency Sphinx*, 1 J. CTR. FOR CHILDREN & CTS. 21, 31 (1999) (concluding that "in California, most children's attorneys receive neither adequate compensation nor any payment for work accomplished outside the courtroom" (footnote omitted)).

78. See FINAL REPORT, *supra* note 12, at 4-7 (studying and reporting on workloads of representatives for children); A JUDGE'S GUIDE, *supra* note 45, at 1, 67-68 (finding some jurisdictions to have "inordinately high" caseloads); NATIONAL EVALUATION, *supra* note 64, at 7 (surveying judges and state attorneys and reporting that these respondents felt that caseloads of some attorneys were too high and that this situation interfered with attorneys' "ability to spend sufficient time on the case[s]"); NATIONAL STUDY, *supra* note 12, at 35 (reporting on the high caseload levels of different representatives); see also Shepherd & England, *supra* note 1, at 1924-25 (discussing the findings of the National Evaluation, the National Study, the Final Report, and a study conducted by Professors Kelly and Ramsey).

79. Those localities that appoint legal representatives tend to do so in accordance with one of two models. Some adhere to a staff attorney model where a state or county contracts with a local legal aid or public defender's office to provide representation. Others appoint private attorneys and pay them on a per case basis. See A JUDGE'S GUIDE, *supra* note 45, at 66. The former model is often characterized by high caseloads, while attorneys in the latter model complain of low pay, delays in payment, and caps on the amount of compensation that can be received on any given case. Both models, in different ways, create great disincentives, if not outright obstacles, to a lawyer's ability to provide ethical and competent representation.

80. See *supra* notes 67-79 and accompanying text. A recent essay by a member of California Youth Connection ("CYC"), a foster youth advocacy organization comprised of foster youth throughout California, summarized the "top five desires" of a group of CYC members for their court appointed attorneys as:

1. foster youth want to be treated as paying clients rather than as another number
2. foster youth want attorneys to explain what the judges are saying during court
3. foster youth want to be contacted a week before their court appointments
4. foster youth want more face-to-face and telephone communication with their attorneys
5. foster youth want to be involved in training attorneys about the foster care system

Johnny Madrid, *My Court Experience*, 1 J. CTR. FOR CHILDREN & CTS. at 3, 4-5 (1999).

Unfortunately, deficiencies in the legal representation of children have been longstanding. A study conducted in the early 1980s in North Carolina of the legal representation of children "concluded that the attorneys were not only ineffective but even tended to substantially delay a child's return home." Shepherd & England, *supra* note 1, at 1925 (citing to Kelly & Ramsey, *supra* note 6, at 407); see also Robert F. Kelly & Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 RUTGERS L. REV. 1217, 1240-44 (1988) (reviewing a study of the representation of children in New York from the early 1980s and finding the performance of attorneys and the systems that provide the attorneys to be "flawed" and the lawyers who represent children to not be very effective).

2. Lack of Guidance⁸¹

Compounding the lack of adequate support for representation is the fact that representatives face great confusion over the nature of their role in child protection proceedings.⁸² Over the years, various commentators have attempted to define the role of the representative with respect to attorneys representing children.⁸³ No clear consensus, however, has prevailed, and the impact of this confusion on the quality of representation is a source of enormous concern.⁸⁴ In sum, advocates have had very little guidance in determining what their roles and responsibilities should be, creating a situation of haphazard representation.⁸⁵ This section details the sources of some of the confusion.

81. Many scholars have written on the past and current confusion concerning the role of the child's representative. However, I am especially grateful to Professor Jean Koh Peters for her clear and extensive analysis of the current situation, most notably her statutory analysis of all United States jurisdictions. See PETERS, *supra* note 8, at 24-33, app. B. at 253. While my discussion reviews various writings, I have opted to loosely follow Professor Peters' outline found on pages 23-39 of her book, *see id.*, as it is the clearest and most logical way to understand current and past thinking on the role of the child's representative.

82. See Working Group on the Allocation of Decision Making, *Report of the Working Group on the Allocation of Decision Making*, 64 *FORDHAM L. REV.* 1325, 1331 (1996); *see also* Buss, *Developmental Barriers*, *supra* note 11, at 900 (explaining that there is no "clear consensus about the role that lawyers should assume"); Green & Dohm, *supra* note 8, at 1282 (analyzing a hypothetical child protection case and describing seven different ways that a lawyer in the hypothetical scenario might act); Haralambie, *supra* note 8, at 944 (noting that "[t]he duties of attorneys representing children are not adequately addressed by existing ethical rules, standards, statutes, and case law"); Ramsey, *supra* note 6, at 289-90 (finding that there are no clear expectations for a GAL); Shepherd & England, *supra* note 1, at 1925, 1933 (maintaining that there is a "lack of clarity concerning the lawyer's role" and that neither CAPTA nor state statutes have helped to define the role of the GAL).

83. See *supra* notes 6, 8, 9, 11 and accompanying text (listing references to literature concerning the role of the attorney representing children).

84. See Shepherd & England, *supra* note 1, at 1925-26 (maintaining that a "lack of clarity concerning the lawyer's role" was partially responsible for unfavorable evaluations of legal representatives for children) (citing to Kelly & Ramsey, *supra* note 6, at 415-16, 451 for their conclusion that confusion over one's role was a significant contributor to poor representation).

85. See HARALAMBIE, *supra* note 1, at 25-26 (finding that lawyers are left on their own to determine how to represent children); PETERS, *supra* note 8, at 38 (describing the decision of what role to play as "confus[ing]"); Buss, *Children's Misperceptions*, *supra* note 11, at 1719 (explaining that lawyers bring their own "predilections to bear" on the determination of what role to assume); Guggenheim, *Matter of Ethics*, *supra* note 11, at 1488 (reviewing PETERS, *supra* note 8) (lamenting that lawyers have been "remarkably free—or remarkably burdened—to figure . . . out for themselves" how to represent children in child protective proceedings).

a. Confusion in State Statutes

With relatively no direction provided by the language or legislative history of CAPTA,⁸⁶ each state developed its own (and in many regards idiosyncratic) model of practice.⁸⁷ In fact, the current state of affairs can best be described as nothing short of “chaotic.”⁸⁸ This disarray can be attributed to each state’s unique customs and “politics,”⁸⁹ fiscal concerns,⁹⁰ “confusion in terminology,”⁹¹ differences in the state’s definitions of the representatives’ roles and responsibilities,⁹² and great discrepancies between statutory mandates and what occurs in reality.⁹³

86. See *supra* notes 2, 3, 5 and accompanying text (introducing and describing the history of CAPTA).

87. A recent and comprehensive survey of the fifty states and other U.S. jurisdictions by Professor Jean Koh Peters “revealed fifty-six [different] state systems for representing children in child-protective proceedings.” PETERS, *supra* note 8, at 26; see also *id.* at 24-33, app. B at 253 (presenting the comprehensive survey); Guggenheim, *Reconsidering the Need*, *supra* note 11, at 305-07 (expressing concern about the lack of meaningful guidance from legislatures and courts in determining the role of the child’s representative); Heartz, *supra* note 4, at 333 (discussing the “variation among the fifty states in the implementation of the GAL requirement”); Ramsey, *supra* note 6, at 289-90 (maintaining that most state statutes do not assist in defining the role of the child’s representative); Angela D. Lurie, Note, *Representing The Child-Client: Kids Are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y. L. SCH. J. HUM. RTS. 205, 216-20 (1994) (reviewing state statutes in New York and Montana and finding them to be unclear).

88. See PETERS, *supra* note 8, at 26 (describing lawyering for children as being in a state of “chaos,” “def[y]ing] routinization,” and “actively breed[ing] disorder and confusion”); Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757, 759 (1990) (maintaining that questions concerning the role of the lawyer are answered by looking to “the philosophy of the local forum, the appointing judge, the guardian ad litem, the maturity, verbal and social skills and confidence of the child-client and the alleged facts which bring the case to court”); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 278 (1995) (explaining that deciding how to represent a child is a complex process which often depends on “the jurisdiction; the type of proceeding; the particular appointment; and the maturity of the client”).

89. See PETERS, *supra* note 8, at 30 (attributing “individual state’s practice and politics” as a reason why the states’ models differ from one another).

90. See *id.* at 32 (concluding that the high cost of providing lawyers leads some states to favor programs that provide alternative means of representation).

91. See *id.* at 31.

A central cause of the confusion and inability to make meaningful generalizations about the national trends in representation of children is the problem of terminology. Lawyers for children in the various states are called counsel, guardians *ad litem*, attorneys guardian *ad litem*, law guardians, attorneys *ad litem*, and a number of other terms. . . . The central term, guardian *ad litem* appears to have no commonly accepted definition.

Id. at 31 n.17.

92. For example, “[d]espite the pervasive appearance of the words ‘interest’ and ‘best interests’ both the statutes and our interviews showed absolutely no consensus about what it means to represent a child’s best interests or interest.” *Id.* at 32.

93. See *id.* app. B at 253 (individual discussion sections for each state).

The last factor may be due to differing interpretations of state mandates by counties, other localities, courts, or individual representatives, or by a combination of some or all of these factors.⁹⁴

b. Unhelpful Ethical Rules

A likely place for children's representatives to turn for direction, at least for those representatives who are lawyers, is to the legal profession's ethical regulations. However, a strong consensus of academics and practitioners agree that these rules provide little, if any, assistance.⁹⁵ The ABA's Model Rules of Professional Conduct, which have been adopted in whole or in part in most states, are almost entirely

[E]ven though forty-six states use the term guardian *ad litem*, the essence of the role of the guardian *ad litem* is unclear. Nothing guarantees that a guardian *ad litem* in one state would play the same role as a guardian *ad litem* in the next state or even that two guardians *ad litem* in the same state but different counties would play the roles similarly. Frankly, there is not even a guarantee that the same guardian *ad litem* would represent two similarly situated children similarly!

Id. at 32 n.17.

In a similar vein, it is significant to note that even literal readings of some state statutes can cause confusion. See *id.* at 31 n.17 (explaining that some state statutes use contradictory terminology within the same statute when defining the role of the representative (i.e., describing the obligation to "advocate" as well as to "protect the best interest of the child")); Haralambie, *supra* note 8, at 941 (concluding that "courts and legislatures . . . have often required attorneys to assume dual and potentially inconsistent roles").

As a further example, recent amendments to California's Welfare and Institutions Code § 317(e) mandate that:

in any case in which the minor is four years of age or older, counsel shall interview the minor to determine the minor's wishes and to assess the minor's well-being, and shall advise the court of the minor's wishes. Counsel for the minor shall not advocate for the return of the minor if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor.

CAL. WELF. & INST. CODE § 317(e) (West 2000). Not only does this statute confuse the role of advocate and protector but it likely violates an attorney's obligations under Model Rules 1.2 and 1.14. For a critique of section 317(e) and a full exploration of its problems, see Patton, *supra* note 77, at 21, and William Wesley Patton, *Children's Counsel as Advocates and Guardians Ad Litem*, 2 U.C. DAVIS J. OF JUV. L. & POL'Y 16 (1997).

94. See individual discussion sections for each state in Appendix B of PETERS, *supra* note 8, app. B at 253; see also Hartz, *supra* note 4, at 333 (discussing the National Study and noting wide variations in how the role of the GAL is determined "even within a single state, with adjoining counties often having different methods of representation").

95. See Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1959-60 (1996) (maintaining that our ethical regulations fail to provide guidance); Buss, *Children's Misperceptions*, *supra* note 11, at 1718-19 (concluding that Model Rule 1.14 raises more questions than it answers); Green & Dohm, *supra* note 8, at 1288-89 (stating that current ethical guidelines may provide "incomplete or inappropriate answers to important questions about how lawyers properly should serve children"); see also PETERS, *supra* note 8, at 36 n.21 (containing a list of additional articles finding Model Rule 1.14 to be inadequate).

concerned with the representation of adult clients.⁹⁶ The one rule which specifically addresses the concerns of representing children, or others with “impaired decision making capabilities,” Model Rule 1.14,⁹⁷ provides little guidance on the question of when a client should be deemed to be “impaired” (“unimpaired” children are generally subject to the same rules as competent adults) and what role should be taken by the representative once this determination is made.⁹⁸

In treating the client’s status as a minority as a form of disability, Model Rule 1.14 is a continuation of the approach taken by Ethical Consideration 7-12 of the ABA’s Model Code of Professional Responsibility, the predecessor set of ethical rules.⁹⁹ Model Rule 1.14

96. See Green & Dohrn, *supra* note 8, at 1289 (explaining that “[o]ne difficulty in applying the general principles is that representing children differs from representing other clients”); Guggenheim, *Paradigm*, *supra* note 11, at 1400-01 (finding that our ethical rules primarily concern the representation of adult clients); Haralambie, *supra* note 8, at 944 (maintaining that “[t]he existing ethical rules were not drafted with child advocacy in mind”).

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1992). Model Rule 1.14, Client with a Disability, provides:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired whether because of minority, mental disability or for some other reason, the lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer make seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot act in the client’s own interest.

Id.

98. See Buss, *Children’s Misperceptions*, *supra* note 11, at 1718-19 (asserting that Model Rule 1.14 does not answer the question of “[w]hen and how is a child’s decision-making capacity ‘impaired’ by minority?”). Rather than refer to young children as “impaired,” Professor Appell uses the term “precapacitated” to acknowledge the fact that children, unlike many incapacitated adult clients, never had capacity, but hopefully will in the future. See Appell, *supra* note 95, at 1957 & n.6. I agree with Professor Appell’s concerns and prefer the term she uses. However, because the Model Rules and most commentators refer to young children as “impaired,” for ease of reference, I will continue to use this notation.

99. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1980), which provides:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions that are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of his client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make either acting for himself if

emphasizes the need for an attorney to “as far as reasonably possible, maintain a normal client-lawyer relationship.”¹⁰⁰ Only when the client is found to be unable to act in his own interest may the attorney “seek the appointment of a guardian or take other protective action.”¹⁰¹ However, Model Rule 1.14 and its accompanying comments provide very little guidance as to when an attorney should take such “protective action” (i.e., find a client to be “impaired”) and what process an attorney should adopt to make this determination.¹⁰² Additionally, once a client is found to be “impaired,” Model Rule 1.14 fails to explain how an attorney should decide what “protective action” to take.¹⁰³

c. Disagreement Within Scholarly Literature

The scholarly literature also provides little guidance to assist lawyers in clarifying what role they should play when representing a child client.¹⁰⁴ Among scholars, the determination of what role a legal

competent or by a duly constituted representative if legally incompetent.

Id. Because the Model Rule has been adopted in a majority of states, I will limit my analysis to Model Rule 1.14. However, it is significant to note that like Model Rule 1.14, EC 7-12 allows an attorney for a client with a disability to make decisions on behalf of the client. See PETERS, *supra* note 8, at 37; Appell, *supra* note 95, at 1960. In fact, EC 7-12 more directly authorizes such actions. See PETERS, *supra* note 8, at 37 (discussing EC 7-12). However, unlike Model Rule 1.14, EC 7-12 recommends that the attorney “obtain all possible aid from the client.” *Id.* For a more in-depth comparison of Model Rule 1.14 and EC 7-12, see *id.*

100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1992).

101. *Id.* at Rule 1.14(b).

102. See Ramsey, *supra* note 6, at 304-05 (describing the ethical rules as “silent about what standard should be used to judge the client’s decision-making abilities”).

103. See Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 693 (1987) (concluding that the Model Rules fail to “provide any useful guidance for what is to be done when it is not possible to maintain a normal lawyer-client relationship”).

It has even been suggested by one commentator that where a lawyer takes on a full GAL role, the lawyer could be found to have violated Model Rule 1.14. See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1522-23 (1996) (questioning whether Model Rule 1.14(b), which permits a lawyer to “seek appointment of a guardian or take ‘other protective action,’” was meant to be interpreted so broadly that it included determining a client’s best interests and advocating for the same).

104. See PETERS, *supra* note 8, at 41-43. “Although many commentators have attempted to prescribe the role of the child’s representative, little consensus exists regarding the responsibilities and duties of the child’s representative or regarding what constitutes effective representation of children.” Duquette & Ramsey, *supra* note 73, at 347-48.

As a way of explaining the role of the representative, several commentators have focused on the potential duties that a representative may be required to perform. For example, in 1976, Brian G. Fraser, in one of the first, if not the first, explanation of the purposes and goals of the GAL, described four roles: (1) investigator; (2) advocate; (3) counsel; and (4) guardian. See Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 33-34 (1976). In 1980, a conference was sponsored by the National

representative for a child should play has evolved into a vigorous, and often heated, debate over whether the legal representative should represent the child's best interests or advocate for the child's wishes as an attorney would do when representing an adult.¹⁰⁵ Under the best interests approach, the child's wishes are usually one among many factors that the attorney would consider in determining what is best for the child.¹⁰⁶ Whereas, under the traditional attorney model, the legal

Legal Resource Center for Child Advocacy. See Howard A. Davidson, *Foreword* to NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE MANUAL (ABA rev. ed. 1981) (on file with author). A summary of this conference contains a "partial" list of 26 different duties for which the GAL is responsible. See Howard A. Davidson, *Final Report: National Guardian Ad Litem Policy Conference*, in NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE MANUAL (ABA rev. ed. 1981) (on file with author). In 1990, an expert in the field of child advocacy described the following five major roles: (1) fact finder-investigator; (2) legal representative; (3) case monitor; (4) mediator-conciliator; and (5) information and resource broker. See DONALD DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES* 35 (1990). The Final Report adopted these five roles. See FINAL REPORT, *supra* note 12. Also in 1990, Tara Lea Muhlhauser characterized the role of the representative as that of investigator, champion, and monitor and stressed the importance of the representative simultaneously pursuing all three roles. See Tara Lea Muhlhauser, *From "Best" To "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 638 (1990).

However, a mere description of the various responsibilities of a representative does not provide much, if any, guidance as to how one interacts with one's clients and with the other parties in the proceeding, what positions, if any, the representative should take, and how one resolves several difficult ethical dilemmas. In fact, such a listing of duties tends to exacerbate the confusion rather than alleviate it.

105. See PETERS, *supra* note 8, at 41 (declaring that the debate has become polarizing); Buss, *Children's Misperceptions*, *supra* note 11, at 1700-02 (describing the disagreement about the "proper role for a lawyer to assume" as a struggle that classically comes down to a choice between 'best interest' and 'expressed interest' representation); Shepherd & England, *supra* note 1, at 1933 (citing to an "ongoing debate" in the legal profession); Weinstein, *supra* note 76, at 134 (finding that "[l]awyers and academicians have spent a great deal of time debating the role of the child's attorney" at the expense of the needs of the children).

It also is important to acknowledge that some scholars advocate for a hybrid role. See, e.g., Duquette & Ramsey, *supra* note 73, at 352-53; Haralambie, *supra* note 8, at 953-54. But see Buss, *Children's Misperceptions*, *supra* note 11, at 1702 & n.6 (contending that the hybrid model is really the GAL model because it allows for substitution of judgment).

106. Commentators who support the best interests model, which at times is viewed synonymously with the term GAL and called the GAL approach, believe that most children are without the requisite maturity, capacity, or judgment to be able to make important decisions on their own behalf. See DUQUETTE, *supra* note 104, at 150 (proposing that for children under fourteen years of age, the representative should "make a determination as to the best interests of the child regardless of whether that determination reflects the wishes of the child"); Fraser, *supra* note 104, at 30 (describing one of the roles of the GAL as a protector of the child's interests); Muhlhauser, *supra* note 104, at 642 (maintaining that one of the roles of the GAL is to examine the "better interests" of the child, acknowledging that there may be more than one good option); Weinstein, *supra* note 76, at 135 (citing to a moral obligation to protect children); Albert E. Hartmann, Note, *Crafting an Advocate for a Child: In Support of Legislation Redefining the Role of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM

representative attempts to represent the child in a manner similar to that of an adult client, with the same ethical obligations that representatives have when representing adult clients.¹⁰⁷ Accordingly, directions concerning the objectives of the representation and significant decisions are left up to the child client, as they would be with an adult client.¹⁰⁸

237, 239 (1997) (recommending a legislative proposal that calls for representatives to utilize the best interests approach, but to also state the child's wishes if the child has articulated any). While not advocating for such an approach, Professor Buss has clearly explained and summarized this approach:

Those who advocate the GAL approach argue that children lack the maturity of judgment, even the cognitive capacity for decision making, necessary to assess appropriately their own interests, particularly their long-term interests. Even to the extent children's judgment is no worse than that of adults, proponents of the GAL approach would argue that society has a greater obligation to protect children from their own bad judgments. Moreover, children are under tremendous pressure to misidentify and/or misarticulate their own interests - pressure from their families, from the court process, and from the circumstances leading to the court process.

Buss, *Children's Misperceptions*, *supra* note 11, at 1702-03 (footnotes omitted). Most proponents of this model also consider it important - and part of the representative's role - to ensure that the court has all available and relevant information before any decision is rendered. See Fraser, *supra* note 104, at 33 (explaining that along with the responsibility to protect the child's interest, the GAL must "ferret out all of the relevant facts . . . [and] insure that all the relevant facts . . . [and] available options" are before the court); Muhlhauser, *supra* note 104, at 641-42 (describing the GAL's role as someone who "provide[s] information to the court, explore[s] options or alternatives, and . . . negotiate[s] with and among the systems or institutions having an interest in the case").

107. Practitioners and scholars preferring the traditional attorney or expressed wishes model assert that the child either has a right to have her position heard and represented to the judge like any other party, or at the very least, that important issues are better decided if the child's wishes are made known to the court. See Buss, *Children's Misperceptions*, *supra* note 11, at 1703-05 (describing the traditional attorney approach); see also Ventrell, *supra* note 88, at 260 (asserting that "the law supports a modern concept of zealous child advocacy" where attorneys advocate for "the interests of child clients, just as they would the interests of adult clients"); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 354-57 (1993) (arguing for the child's representative to advocate for the child's wishes and point of view if the client is able to articulate a reasoned preference).

Expressed wishes advocates argue that not only is giving the child a voice empowering to the child, but "lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment." Buss, *Children's Misperceptions*, *supra* note 11, at 1704 (articulating one of the justifications for the expressed wishes model); see also Ramsey, *supra* note 6, at 297 (arguing that representing a child's wishes "might result in wiser decisions"); Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1583 (1996) (noting that "[m]ore is at stake than simply communicating the child's preference").

Additionally, these advocates believe that a child will more readily go along with a decision, even if he does not agree with it, if he feels that he had a say in how it was determined. See Ross, *supra* at 1619; see also Wilber, *supra*, at 355 (proclaiming that "[i]f the child perceives that someone is on his side and the court has considered his views, even an unsatisfactory result will be easier to accept").

108. See Green & Dohrn, *supra* note 8, at 1295; Marvin Ventrell, *The Child's Attorney*:

Additionally, as with an adult client, the attorney must preserve confidences, keep the child informed, maintain undivided loyalty to the child, and conduct himself in accordance with the norms of competent representation.¹⁰⁹ As the debate has evolved, a consensus of scholars and practitioners has expressed a preference for the traditional attorney model.¹¹⁰

Nevertheless, neither approach is without problems, and neither works well for children of all ages.¹¹¹ It is difficult, if not impossible, to represent the wishes of a child who is too young to communicate verbally.¹¹² Likewise, it is extremely hard not to advocate for the wishes of a teenager who certainly is mature enough to have a voice and an opinion on important matters in his life.¹¹³ For these reasons, there are few scholars who steadfastly and rigidly adhere to one approach or the other. In sum, the discussion often boils down to the questions of when is a child capable of directing the objectives of the representation,

Understanding the Role of Zealous Advocate, 17 FAM. ADVOC. 73, 74 (1995) (discussing the need for attorneys to represent their child clients just as they would represent an adult client).

109. See Green & Dohrn, *supra* note 8, at 1294-95; Ventrell, *supra* note 108, at 74-75. Although one's ethical obligations may be clearer under the traditional attorney model, they are by no means easily discernible. As a thorough reading of the Fordham recommendations and ensuing articles and responses reveals, many ethical dilemmas remain. For example, questions regarding the attorney's obligations to preserve the child's confidences may be difficult, especially when not revealing the confidences may mean that the child is likely to be in danger.

110. See Green & Dohrn, *supra* note 8, at 1294-95 (1996); Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, *Recommendation of the Conference*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Recommendation*].

111. See PETERS, *supra* note 8, at 40 (explaining that "the line between these two positions is in no way hard and fast"); Buss, *Children's Misperceptions*, *supra* note 11, at 1705; Buss, *Developmental Barriers*, *supra* note 11, at 903 (noting here as in her earlier work that few take an "absolutist" position).

112. See PETERS, *supra* note 8, at 40 (concluding that "[a]most all those who focus on wishes acknowledge that children below a certain age or competence must be represented in a way that differs from the traditional representation of an adult"); Buss, *Children's Misperceptions*, *supra* note 11, at 1705 (explaining "that those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rationale decision-making process about the particular issue in question"); Buss, *Developmental Barriers*, *supra* note 11, at 903 (remarking that the "traditional attorney model assumes . . . that the child is old enough to communicate a position"); Lyon, *supra* note 103, at 692 (arguing that "[t]he possibility that the child may not be able to express a clear, uninfluenced and competent opinion complicates the task of representing the child-client wishes").

113. See PETERS, *supra* note 8, at 40 (stating that "[c]urrently, I would be hard-pressed to identify anyone who still advocates the 'pure best interests point of view' or the 'pure wishes point of view'"); Buss, *Children's Misperceptions*, *supra* note 11, at 1705 (explaining that even "[t]hose advocating the guardian *ad litem* role . . . generally still concede that at some age . . . children should be able to direct their counsel . . ."); Buss, *Developmental Barriers*, *supra* note 11, at 903 (noting that "proponents of the GAL model generally recognize that, at some age, children become developmentally indistinguishable from adults in all relevant respects").

and what role the attorney should play for the child who lacks this capacity.¹¹⁴ The remainder of this paper primarily focuses on this latter issue.

III. CONCERNS REGARDING THE REPRESENTATION OF YOUNG CHILDREN AND PROPOSALS TO ELIMINATE OR LIMIT SUCH REPRESENTATION

A. *Concerns About the "Best Interests" Approach - Unfettered Discretion and the Possibility of Attorney Bias*

The "best interests" model has been the approach predominantly relied upon by attorneys when representing young children.¹¹⁵ Yet, many have expressed concern about legal representatives who represent a child's best interests according to what the attorney deems best (often and inevitably based upon the legal representative's values and life experiences, albeit unwittingly at times) and the haphazard representation that ensues. At the Fordham Conference in 1995, the participants determined that "lawyers for children currently exercise too much discretion in making decisions on behalf of their clients."¹¹⁶ They were concerned that this discretion could lead to situations where two different, equally well-intentioned, legal representatives, in nearly identical situations, might advocate for different, even contradictory, results.¹¹⁷ While the conferees were concerned about the representation

114. Professor Katherine Hunt Federle would not agree with this statement. As one of the most prominent spokespersons for the importance of empowering children, Professor Federle believes one should not analyze the role of the attorney in terms of the capacity of the child. See Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1696 (1996); see also Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 *J. CONTEMP. L.* 23 (1990); Katherine Hunt Federle, *The Child As a Client*, 15 *GP SOLO & SMALL FIRM LAW.* 22 (Oct./Nov. 1998); Katherine Hunt Federle, *Constructing Rights for Children: An Introduction*, 27 *FAM. L.Q.* 301 (1993); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 *TEMPLE L. REV.* 1585 (1995); Katherine Hunt Federle, *Looking For Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523 (1994); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 *DEPAUL L. REV.* 983 (1993); Katherine Hunt Federle, *Overcoming the Adult-Child Dyad: A Methodology for Interviewing and Counseling the Juvenile Client in Delinquency Cases*, 26 *J. FAM. L.* 545 (1987-88); Katherine Hunt Federle, *Rights Flow Downhill*, 2 *INT'L J. CHILDREN'S RIGHTS* 343 (1994).

115. It is significant to note that many state statutes require that representatives follow the best interests approach in their representation of all children. For analyses of the roles of representatives for children in every state, the District of Columbia, and U.S. territories see PETERS, *supra* note 8, app. B at 255-479 (excerpting statutes and providing discussion explaining the practice in each jurisdiction).

116. *Recommendation, supra* note 110, at 1309.

117. Green & Dohrn, *supra* note 8, at 1286-90; see also Guggenheim, *Paradigm, supra* note

of children of all ages, they were most concerned about young children, especially those who are not yet verbal. With regard to these children, the conferees felt that because the children were so young, and therefore had only a limited range and number of life experiences, there was very little about the child's life that could be useful in advising the lawyer as to the child's goals and objectives.¹¹⁸ The situation is only made more difficult by the fact that there are few, if any, helpful professional norms or standards that a legal representative can look to for guidance in determining what would be in the best interests of a particular child.¹¹⁹

One might ask what is so alarming about well-meaning attorneys making decisions on behalf of children who have come before the juvenile court because the family that was supposed to love, protect, and care for them has failed in its responsibility in some way. The answer is complex, but essentially can be reduced to two related worries, both of which emphasize a serious concern that the decisions being made are biased and do not reflect the children's lives. First, there is unease caused by the fact that these determinations are beyond the scope of a legal representative's expertise and therefore may require attorneys to make decisions that they are not well-suited to make.¹²⁰ Second, there is concern that the determinations that legal representatives are making may not be what is best for the children.¹²¹ Very few lawyers have had any significant training in law school, or elsewhere, on how to represent a child client.¹²² Nor have they had training in representing clients from cultural and socioeconomic backgrounds that are different from their own.¹²³ Lessons in child development; child psychology; recognizing,

11, at 1414-15; Guggenheim, *Reconsidering the Need*, *supra* note 11, at 312-19; Peters, *supra* note 103, at 1527.

118. See Green & Dohrn, *supra* note 8, at 1290.

With a young child, no lifetime footprints guide the lawyer about the person's intent or wishes or nature. Consequently, the discretion accorded the lawyer or guardian *ad litem* for a preverbal child is unparalleled in scope. The opportunity, indeed inevitability, of bias and personal value-determined judgments in such a situation, including the class, race, ethnic, and religious assumptions that underlie notions of child rearing and family life is vast and undisclosed.

Id.

119. See *supra* notes 82-114 and accompanying text (discussing the lack of guidance regarding the role of the child's representative).

120. See Peters, *supra* note 103, at 1525-27.

121. See *id.*

122. See *id.* at 1525-26; see also Green & Dohrn, *supra* note 8, at 1286-87; *supra* note 76 and accompanying text (explaining how lawyers for children are often not well-trained); *infra* notes 307-13 and accompanying text (recommending comprehensive and mandatory training programs for all participants in the child protective system).

123. See Peters, *supra* note 103, at 1525; see also Earlene Boggett, *Cross-Cultural Legal*

understanding, and working with clients from different racial, ethnic, and class backgrounds; and interviewing, counseling, and interacting with a child client are seldom, if ever, a central part of law school curricula, nor are they often, if ever, a legislatively mandated prerequisite for being appointed as a legal representative for a child.¹²⁴

The inevitable result is that many lawyers are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own. Not only is there a significant chance that these decisions and ensuing positions may be against the best interests of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative,¹²⁵ but it also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child.¹²⁶

Additional concerns about legal representatives who undertake the best interests approach center around the fact that the role of the child in the process is often minimized.¹²⁷ At worst, it has led to situations where representatives do not even deem it necessary to meet with their child clients.¹²⁸ More frequently, it has led to a greatly reduced role for

Counseling, 18 CREIGHTON L. REV. 1475, 1497 (1985) (arguing that law schools need to enhance their curricular offerings to include courses in cross-cultural legal counseling); Gerald P. Lopez, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generics Legal Education*, 91 W. VA. L. REV. 305, 343, 305-58 (1989) (asserting that legal education teaches law students to "approach practice as if all people and all social life are homogeneous").

124. See Peters, *supra* note 103, at 1525. But see *infra* Part VII.D for a discussion of the mandatory training requirements imposed upon CASA representatives by many CASA programs, including training on cultural awareness.

125. See *supra* note 34 (discussing the common ethnic, class and race distinctions between the child clients and the legal representatives).

126. See *Recommendation*, *supra* note 110, at 1309 ("References to the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyer's and the lawyer's lay understanding of child development and children's needs should be considered highly suspect."); see also Guggenheim, *Paradigm*, *supra* note 11, at 1415 (declaring that "[s]imilar cases will be decided differently merely because assignment of a different lawyer").

127. See INGER J. SAGATUN & LEONARD P. EDWARDS, *CHILD ABUSE AND THE LEGAL SYSTEM* 50-52 (1995); Peters, *supra* note 103, at 1523.

128. See FINAL REPORT, *supra* note 12, at xv (stating that "[a]lmost 30 percent of private attorneys had no type of contact with their [child] clients, followed by 17.4 percent of staff attorneys and 8.9 percent of CASAs. One possible explanation for these high percentages is the perception among GALs that contact with abused/neglected infants and toddlers is not applicable to investigating and preparing for their cases."); Peters, *supra* note 103, at 1523 (describing some "extreme" situations where lawyers have represented children without meeting them) (footnote omitted); Shepherd & England, *supra* note 1, at 1929 (finding that many attorneys have "no contact or limited contact with their child clients"). Many states now specifically require by

the child, such that the child's wishes are not made known to the court and the child has very little, if any, understanding of the court process, his role in it, and what it means to his life.¹²⁹

In sum, there has been widespread dissatisfaction with a best interests approach that, to a large degree, leaves the determination of what is best for their child clients to the discretion of the legal representatives. Inadequate resources, time, training, and awareness of developmental and cultural differences have served only to increase this discontent and to cause growing and serious concerns about both the lack of uniformity in role and potential bias in decision-making. While these concerns have caused many students of child advocacy to favor an approach where legal representatives act as much as possible as traditional counsel in accordance with standard ethical norms, this clearly does not solve the problem for all children, either because of diminished capacity or prevailing state statutes that call for a best interests approach to be taken.

B. Recent Proposals Addressing the Role of the Attorney for Young Children

Considering the serious concerns about the role of legal representatives for young children, the quality of representation in general, and the limited resources available for social and judicial services for children and families, it is not surprising that some child advocacy scholars have taken to rethinking issues regarding the appropriate role of legal representatives for young children and, in fact, whether an attorney is even appropriate and/or necessary. The most prominent and vocal of these scholars is Professor Martin Guggenheim, whose writings over the past fifteen years, most notably over the last four, have focused on the dual questions of whether and when representation is needed for young children in child protection proceedings.¹³⁰ Specifically, Professor Guggenheim has opined that lawyers for young children are not needed or, at the very least, lawyers

statute that representatives meet with the children they are appointed to represent. See PETERS, *supra* note 8, app. B at 253. According to Professor Peters' statutory excerpts and statutory analyses, those states are California (four years of age or older), Colorado, Hawaii, Illinois, Iowa, Kansas, Maine, Minnesota, Montana, Nebraska, Texas (four years of age or older), Utah, and Wisconsin.

129. See Buss, *Children's Misperceptions*, *supra* note 11, at 1712 (discussing the importance of children understanding the legal processes and the attorney's and child's roles in those processes).

130. See generally *supra* note 11 (discussing Professor Guggenheim's work).

should not advocate for any position in these proceedings.¹³¹ Professor Emily Buss also has recommended that legal representatives of young children decline to take positions, although she clearly finds attorneys necessary and enunciates an alternative role for them - that of “educators” and enforcers of “statutory fidelit[ies].”¹³²

1. Professor Guggenheim’s Paradigm

Professor Guggenheim proposes that the proper analysis for ascertaining the role of the attorney for a young child involves an assessment of the intended scope and purpose of the representation.¹³³ He begins his analysis by explaining how the role of counsel for adults is based on the “central principle” of “individual autonomy.”¹³⁴ In other words, “[u]nimpaired adults have the inherent power to make *all* the important decisions concerning their lives.”¹³⁵ Therefore, consistent with a lawyer’s ethical code, “lawyers for adults are obliged to ‘abide by the client’s decisions concerning the objectives of representation’ and to use their skill to achieve the objectives sought by the client.”¹³⁶

Professor Guggenheim then contrasts the inherent power of adults with the limitations on young children’s ability to exercise power and, therefore, to assert their rights to autonomy.¹³⁷ Because of these differences, he concludes that the law “treats children differently than adults in many ways,” and, as a result, the role of counsel may be different.¹³⁸ Because he finds the right of autonomy to be at the heart of an adult’s right to direct the representation, Professor Guggenheim asserts that the same analysis must be applied to the determination of the appropriate role of counsel for children. One must determine “whether law or policy empowers, or refuses to empower children with a prominent role in deciding their own future.”¹³⁹

131. See Guggenheim, *Paradigm*, *supra* note 11, at 1431; Guggenheim, *Reconsidering the Need*, *supra* note 11, at 351; Guggenheim, *Reflections*, *supra* note 11, at 77.

132. Buss, *Developmental Barriers*, *supra* note 11, at 955-60 (discussing “the lawyer as teacher”).

133. Guggenheim, *Paradigm*, *supra* note 11, at 1408-09, 1412-17.

134. See *id.* at 1405-06; Guggenheim, *Reconsidering the Need*, *supra* note 11, at 321 (explaining that “[t]he ethic of self-determination remains the touchstone of most forms of lawyer-client relationships”) (quoting Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures and Professions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975, 1985 (1996)).

135. Guggenheim, *Paradigm*, *supra* note 11, at 1405.

136. *Id.* (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1992)).

137. See *id.* at 1405-21.

138. *Id.* at 1407-08.

139. *Id.* at 1408.

In discussing the autonomy rights of children, Professor Guggenheim distinguishes between inherent autonomy rights and autonomy rights based upon the law of a particular subject area.¹⁴⁰ With respect to the inherent autonomy rights of children, Professor Guggenheim looks to the Model Rules of Professional Conduct and concludes that if a child can be found to be “unimpaired,” as defined by the Model Rules, then, like an adult, he presumably is of a sufficient state of mind to make decisions and determine the objectives of his case.¹⁴¹ Although Professor Guggenheim specifically states that it is beyond the scope of his examination to address the question of how a child is determined to be “impaired,”¹⁴² he defines young children as “children so young that they cannot articulate their preferences to counsel (e.g., newborns to children ages two or three) and children who, though old enough to communicate, would be considered to be ‘impaired,’ within the meaning of Rule 1.14 of the Model Rules of Professional Conduct.”¹⁴³ Significantly, Professor Guggenheim also recommends that attorneys err on the side of finding children impaired.¹⁴⁴ Professor Guggenheim’s views on the issue are perhaps most apparent when one looks to the AAML standards for custody and visitation proceedings, which he co-

140. *See id.* In order to more easily understand Professor Guggenheim’s analysis, he has devised a two-part inquiry. First, one should question if the child is:

of sufficient age, intelligence, and maturity to be ‘unimpaired’ as defined by the Model Rules[.] If the answer is ‘yes,’ the inquiry should cease. In these circumstances, children are empowered by established principles to set the objectives of the litigation. If the answer is ‘no,’ then it is necessary to continue the inquiry by examining whether and to what degree children are supposed to have autonomy rights in the particular subject matter under consideration.

Id. at 1409.

Professor Guggenheim acknowledges that this inquiry is a departure from his earlier analysis. *See id.* at 1421 n.69. In 1984, Professor Guggenheim concluded that, because attorneys for seven-year-old children in delinquency matters must abide by their child clients’ wishes, they must do the same in child protection proceedings. *See Guggenheim, Reflections, supra* note 11, at 90-91. In reaching this conclusion, Professor Guggenheim compared delinquency cases to child protection matters and found many similarities, most notably the fact that both types of proceedings can result in a child being removed from the care of his parents. *See id.* at 92. Interestingly, he also found support for the assertion that the causes of delinquency and child maltreatment, and thus the need for a child to be removed from his home, were often identical. Hence, he argued that it would not be proper to base the determination of whether a child is given the right to direct counsel on the arbitrary decision by the state of whether to proceed with the prosecution of a delinquency or a neglect petition. *See id.*

141. *See Guggenheim, Paradigm, supra* note 11, at 1399. Professor Guggenheim finds that unimpaired “children enjoy the identical right to the kind of counsel as adults.” *Id.* at 1408.

142. *See id.* at 1402 n.14.

143. *Id.* at 1399.

144. *See id.* at 1402 n.14, 1412 n.43.

authored. Under these standards, a child is presumed to be impaired until the age of twelve.¹⁴⁵

If a child is found to be impaired, and therefore not to have any inherent autonomy rights, then a lawyer must “examine the relevant legislation and case law in the particular subject area.”¹⁴⁶ If these legal sources confer autonomy rights on the child, then the lawyer must let the child direct the representation.¹⁴⁷ If not, the lawyer must limit her representation to advancing the child’s rights “as the legislature and case law have articulated them.”¹⁴⁸

As an example of a circumstance where a child would be found to have autonomy rights based upon substantive law, Professor Guggenheim describes the hypothetical situation of an eleven-year-old girl seeking permission from a judge to terminate her pregnancy.¹⁴⁹ The prevailing law in the jurisdiction described by Professor Guggenheim states that a minor must have the written consent of one of her parents or an adult family member, or a judicial waiver, in order to undergo an abortion.¹⁵⁰ A judge must grant such a waiver if the minor is found to be “‘mature and well-informed enough to make the abortion decision on her own’ or if the judge finds that the abortion is in [the minor’s] best interests.”¹⁵¹ In this situation, Professor Guggenheim believes that whether the child is found to be unimpaired or impaired, a lawyer representing the child must zealously advocate for what the child

145. See AAML STANDARDS, *supra* note 11, at 9 (Principle 2.2 states that “[t]here is a rebuttable presumption that children age twelve and above are unimpaired. There is a rebuttable presumption that children below the age of twelve are impaired.”).

146. Guggenheim, *Paradigm*, *supra* note 11, at 1421.

147. See *id.* at 1412 (stating that “[w]here the legislature wants a child’s own views to be an important factor in the decision-making process, the child’s views should become prominent.”).

148. *Id.* at 1416. Professor Guggenheim acknowledges that the Model Rules do not limit an attorney who has been appointed to represent an impaired child in this way. See *id.* at 1414. In fact, he notes that the Model Rules explicitly allow lawyers to assume the role of guardian, and as such, to choose the best position for the child. See *id.* However, Professor Guggenheim calls upon all lawyers for young children to “eschew this alternative.” See *id.* His views are based upon his concerns regarding the lack of uniformity in the role of the lawyer and his fears that the choices lawyers will make will be based on their own values and backgrounds, rather than those of the children. See *id.* at 1414-15 (arguing that our system works best when the instances of a randomly chosen adult making decisions for another person are limited). Professor Guggenheim states that “[s]imilar cases will be decided differently merely because of assignment of a different lawyer. Some lawyers will end up seeking diametrically opposed results in indistinguishable cases. The only differences in these cases frequently will be the personalities, values, and opinions of the randomly chosen lawyers.” *Id.* at 1415.

149. See *id.* at 1417-20.

150. See *id.* at 1417.

151. *Id.*

wants.¹⁵² He arrives at this conclusion because he finds that the child in this situation is “empowered” to set the objectives of her case “because she possesses a substantive constitutional right to do so.”¹⁵³

Professor Guggenheim distinguishes this situation from a child’s rights in the adjudicatory phase of a child protection proceeding, where he finds the proceeding to “have virtually nothing to do with empowering children.”¹⁵⁴ He, therefore, concludes that the appropriate role of a lawyer for an impaired child “throughout the fact-finding stage of a child protective proceeding is to attempt, in the most objective way, to aggressively enforce the law as it was written by the legislature and interpreted by the courts.”¹⁵⁵ According to Professor Guggenheim, if lawyers for young children take any position at adjudicatory hearings, they “should insist that children not be removed from the parents’ custody until a court has determined, based on reliable evidence, that there are statutory grounds for removal.”¹⁵⁶ Given this limited role, he ultimately concludes that, in many cases, lawyers for young children are not needed at all.¹⁵⁷

Whether Professor Guggenheim advocates for the complete removal of the attorney from the court process, or merely a limited role, is

152. *See id.* at 1418.

153. Professor Guggenheim states that, “[t]he substantive law of abortion is that all pregnant minors - both ‘impaired’ and ‘unimpaired’ - have the right to ask a judge to allow them to abort the fetus they are carrying.” *Id.* at 1418-19.

154. *Id.* at 1428. Professor Guggenheim asserts that, “[c]hildren have no more right to insist that the state intervene to protect them from inadequate parents than to insist that the state stay out of their lives.” *Id.*

155. *Id.* at 1431. It is significant to note that Professor Guggenheim’s analysis in 1996 was limited to adjudicatory hearings. However, Professor Guggenheim does suggest, in some of his other writings, that once a child is found to be in need of the court’s assistance (i.e., there has been a positive determination of parental unfitness), there may be some justification for the appointment of counsel. For example, in his article in the Loyola University Chicago Law Journal, he mentions that “some situations may still justify the appointment of an attorney” and elaborates in a footnote that one of these situations would be where a child becomes a ward of the state and enters the foster care system. Guggenheim, *Reconsidering the Need*, *supra* note 11, at 351 & n.200. Similarly, in 1984, he briefly noted that the role of counsel is altered once a finding of neglect against the parents is made. *See* Guggenheim, *Reflections*, *supra* note 11, at 142-43.

156. Guggenheim, *Paradigm*, *supra* note 11, at 1431. Professor Guggenheim finds support for this assertion in the writings of Joseph Goldstein, Anna Freud, and Albert Solnit. *See id.* at 1407. These authors defer to parental autonomy and do not advocate appointing a legal representative for the child until a “ground for intervention” has been established at an adjudicatory hearing. *See* JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 111-12 (1973); *see also* Guggenheim, *Reconsidering the Need*, *supra* note 11, at 344.

157. *See* Guggenheim, *Reconsidering the Need*, *supra* note 11, at 351 (“Once attorneys for impaired children stop advocating an outcome, they become a type of procedural grease, principally concerned with making sure that the child receives all the appropriate procedural protection.”).

ambiguous. Professor Guggenheim was perhaps clearest in his views on the appropriate role for counsel in 1984, when he directed attorneys “not [to] participate in any aspect of a neglect proceeding until the child has been judicially declared to be neglected.”¹⁵⁸ In 1996, Professor Guggenheim did not directly suggest that lawyers should not participate. Instead, he proposed that their role be limited to that of “law enforcers.”¹⁵⁹ However, because he focused only on the adjudicatory phase, he emphasized the need to enforce the law that states that children should not be removed from their parents’ care until the parents have been found to be unfit.¹⁶⁰ In 1998, Professor Guggenheim once again advised attorneys to refuse to take any position, but also stated that at adjudicatory hearings, “[o]nce attorneys [for children] stop advocating an outcome,” the functions they serve “could just as effectively [be] safeguard[ed]” by the judge and the other parties in the matter.¹⁶¹ Whatever his exact recommendation may be, Professor Guggenheim clearly advocates for substantially limiting the role of the attorney. In all phases of a child protection proceeding, he would limit the role of the attorney for young children to, at most, ensuring that statutory mandates are enforced. At adjudicatory hearings, his preference appears to be to eliminate the role of the attorney for young children.¹⁶²

158. Guggenheim, *Reflections*, *supra* note 11, at 138 (italics omitted).

159. *See* Guggenheim, *Paradigm*, *supra* note 11, at 1431.

160. *See id.*

161. Guggenheim, *Reconsidering the Need*, *supra* note 11, at 351. In 1998, Professor Guggenheim also asserted that the lawyer should ensure that the court has all the information it needs to make a well-informed decision. *See id.* at 348. However, he does not explain whether an attorney appointed to represent an impaired child should conduct her own factual investigation, and if so, whether she should include an inquiry as to the child’s wishes as part of this investigation. Moreover, it is not evident from Professor Guggenheim’s writings whether he would include a reporting of the child’s wishes as part of any neutral report that an attorney might make or give to the court in a child protection proceeding. To the extent that Professor Guggenheim finds it appropriate or necessary for a lawyer for an impaired child to conduct a factual investigation, it is difficult to comprehend how a lawyer could not help but get involved in advocacy. Likewise, it is difficult to envision how one enforces statutory mandates in an objective fashion. For further analysis of these problematic aspects of Professor Guggenheim’s analysis, see *infra* Part III.B. (discussing the inevitability that lawyers will exercise some discretion).

162. The fact that Professor Guggenheim argues for such a limited role at the adjudicatory stage takes on an even greater significance when one considers that only a small percentage of cases filed with the juvenile court are actually dismissed at the adjudicatory phase. *See* Buss, *Developmental Barriers*, *supra* note 11, at 902 (concluding that decisions at adjudicatory hearings often “mark the first in a long series” of court decisions). As is stated above, in most substantiated reports of abuse or neglect, it is not necessary to seek the assistance of the court system. *See supra* notes 54-55 and accompanying text. In my experience, in those cases where the agency has found it necessary to seek the aid of the judicial system, there is often little doubt

2. Professor Buss' Recommendations

Professor Emily Buss shares Professor Guggenheim's concerns about the potential influence of attorney bias in determining what is best for their young child clients.¹⁶³ She also has concerns about the ability of children, with the exception of older children, to meaningfully participate in attorney-client relationships in accordance with a more traditional attorney model. She therefore recommends that attorneys for children be prohibited from taking any positions in litigation until the children are developmentally capable of understanding the nature of the proceedings and the significance of their role as decision-maker.¹⁶⁴ Until such time, Professor Buss proposes modifying the traditional attorney model.¹⁶⁵ She advocates for attorneys to adopt a "teaching

that the family is in need of some form of assistance (although I do not mean to imply that in order to provide assistance, the children always need to be removed from the care of their parents and family). Rather, the cases that are brought to the court's attention are usually those where the child is thought to be in danger or where the child welfare agency finds the parents to be uncooperative and acting against the interests of the children. Given the likelihood of cases moving onto the dispositional phase, it is not fair to the child, nor is it efficient, to wait until the disposition hearing to appoint counsel for the child.

Moreover, because the interests and facts of each stage in a child protection proceeding are so closely related, it is often impossible to view the proceeding as comprised of separate and distinct phases. What occurs in one stage can directly affect what occurs in subsequent hearings. For example, a parent might agree to a finding that she has had difficulty caring for her children in the past, if all of the parties also agree that the disposition will be to return the children to her care and for the child welfare agency to provide services to the family. In practice, because the issues at adjudicatory and disposition hearings are so closely connected, many jurisdictions actually allow for the two hearings to be merged. For similar reasons, many courts and judges may be "preoccupied throughout all phases of all proceedings with the 'best interests of the child,' even when, at a given phase of the proceedings, another standard such as parental fault is controlling." Peters, *supra* note 103, at 1515. Finally, Professor Guggenheim's focus on adjudicatory hearings ignores the fact that emergency removal hearings, where issues of temporary placement are decided, occur prior to adjudicatory hearings.

163. See Buss, *Developmental Barriers*, *supra* note 11, at 960-61. Professor Buss refers to a representative of a young child as a Guardian Ad Litem or "GAL." This is her way of distinguishing them from representatives who approach their role as traditional attorneys would.

A GAL generally lacks expertise in assessing how to choose the best among generally unattractive options for children. The socio-economic gulf between lawyer and client further undermines the lawyer's ability to make good, generic judgments on her clients' behalf, and the limited contact she has with any particular client prevents her from developing any child-specific insights into which plan will best serve her client's interests.

Id. at 960 (footnotes omitted).

164. See *id.* at 958-60.

165. See *id.* at 956.

approach” as educators¹⁶⁶ and protectors of “statutory fidelit[ies].”¹⁶⁷

The overall focus of Professor Buss’ analysis is not on whether or how young children should be represented, but on the questions of whether and when children are able to be empowered.¹⁶⁸ In answering these questions, Professor Buss finds it necessary to look to developmental literature that considers children’s socio-cognitive functioning and development.¹⁶⁹ This literature leads Professor Buss to the conclusion that, until children are capable of understanding their sense of themselves and their sense of themselves in relation to others, they will not be able to be empowered.¹⁷⁰

Professor Buss acknowledges that empowerment is not the only goal of attorney-child client relationships, but she explains that her concerns about children’s abilities to be empowered extend to all of the other reasons why legal representatives would seek to engage in traditional attorney-client relationships with their child clients.¹⁷¹ Specifically, she

166. Professor Buss envisions that representatives would “approach their representation as a teaching opportunity—an opportunity to begin to expose a child to what it means to engage in the decision-making process and take some control . . .” *Id.* at 956. Professor Buss acknowledges that her suggestion that legal representatives should educate their clients is not significantly different from any lawyer’s current obligation to keep his clients informed, to take the time to develop relationships with his clients based on trust and rapport, and to explain the law, legal processes, and the purposes and outcomes of all legal proceedings and significant occurrences. *See id.* at 956-57. In fact, she states that the primary difference between her recommendation and existing professional responsibilities of attorneys is that the process of education that she is contemplating “could take years.” *See id.* at 957.

167. *See id.* at 959.

168. *See id.* at 896-99. Professor Buss chooses to focus on children’s ability to be empowered because she finds there to be “a growing call for child ‘empowerment’ among those concerned with the legal representation of children.” *Id.* at 896. In fact, she states that she used to be “a long-time advocate of child empowerment.” *Id.* at 897. However, she now fears that those advocating for child empowerment have failed to consider whether children’s immaturity and lack of familiarity with court processes and lawyers create situations where empowerment is difficult, if not impossible, for all but older children. *See id.* at 896-99.

Professor Buss states that her “definition of empowerment derives from [her] interpretation of both the adult and child empowerment literature . . .” *Id.* at 918. Specifically, Professor Buss defines empowerment with respect to child clients as:

[T]he transformation of the child client’s perception of his influence in the litigation process and the creation of an appetite for the exercise of that influence. The influence in question has two targets: (1) the process and outcomes of litigation and (2) the perceptions of the client held by the client and others.

Id. at 917-18.

169. *Id.* at 921. Professor Buss contrasts this developmental study with previous analyses that have “focuse[d] almost exclusively on the development of logical reasoning skills - often generically described as cognitive development - and more specifically on the capacity to engage in a rational decision-making process.” *Id.* at 904-05.

170. *See id.* at 921-26.

171. *See id.* at 951-52.

states that “[d]isentangling the empowerment goal from other justifications for the traditional attorney model, we discover that the same socio-cognitive sources of confusion can undermine these other justifications as well.”¹⁷²

Professor Buss understandably is reluctant to cite to an exact point in time when children might attain this developmental capacity.¹⁷³ Nonetheless, she ultimately concludes that it likely would not occur before children reach “late childhood,” a period of time that, for her, corresponds to the ages of ten to twelve.¹⁷⁴ Moreover, Professor Buss notes that children who are abused or neglected, or who have been forced to grow up in other stressful environments, may not develop this requisite capacity until even later.¹⁷⁵ In sum, what is pertinent to the inquiry of whether children need representation is that Professor Buss recommends that lawyers refrain from taking any positions in the litigation and limit their role to ensuring statutory fidelities until their child clients are able to understand the nature and impact of their influence, a point in time that likely would not occur until the child reaches the age of ten or twelve, if not later.

IV. RESPONSE TO PROPOSALS CALLING FOR THE REDUCTION IN THE SCOPE OF REPRESENTATION FOR YOUNG CHILDREN

While attempts to reduce discretion and bias in the representation of young children are extremely important and laudable, limiting the role of attorney to ensuring statutory fidelities or enforcing statutory mandates will not substantially accomplish these goals because much discretion remains in the determination of when a child is impaired and the meaning and implementation of statutory fidelities or statutory mandates.

A. *Substantial Discretion Remains in the Determination of Whether a Child is Able to Direct the Objectives of the Representation*

Before a decision can be made as to whether an attorney should assume the role of a traditional attorney or limit her role to enforcer of statutory mandates or statutory fidelities, the attorney must, as discussed above, first decide whether or not a child is capable of directing the objectives of the representation and participating in an attorney-client relationship. Professors Buss and Guggenheim attempt to offer some

172. *Id.* at 951.

173. *See id.* at 920, 955.

174. *See id.* at 951.

175. *See id.* at 918-19, 918 nn.76-77, 929 & nn.109-10.

guidance on this question. Professor Buss provides an analysis of the necessary developmental thresholds. Professor Guggenheim offers that attorneys should err on the side of finding a child to be impaired. In the end, both suggest that many children will reach significant developmental hurdles between the ages of ten to twelve.¹⁷⁶

Yet, what is important to highlight is that in making the determination of when a child is sufficiently mature, an extraordinary amount of discretion still remains with the legal representative. For example, Professor Guggenheim claims to be proposing a methodology for all impaired children. Yet, for all but the youngest of these young children (e.g., newborns to ages two or three), there may be a question of whether they are actually impaired. It is highly possible that in the representation of Andrew and Brenda one conscientious lawyer might find the children to be unimpaired, while an equally well-meaning attorney might reach the opposite conclusion. Professor Buss, in an earlier work, examines the likelihood of this occurring:

[E]ach lawyer will bring her own predilections to bear – predilections about children’s needs and abilities, about the legal process, and about the lawyer’s place in the process. And it is these predilections, rather than the Rule itself, that will determine what model of representation the lawyer will assume. A lawyer predisposed to depart from the normal client-lawyer relationship in the representation of children will conclude that the differences in children’s developmental and life experience make such a relationship impossible. A lawyer predisposed, on the other hand, to maintain the normal client-lawyer relationship in her representation of children will conclude that, despite some differences in children’s development and experience, the relationship can nevertheless reasonably be maintained.¹⁷⁷

The outcome of this exercise of discretion will have a tremendous impact on every aspect of the lawyering that follows. In the case of Andrew and Brenda, it is not likely that either Professor Guggenheim or Professor Buss would find Andrew and Brenda able to maintain a traditional attorney-client relationship. However, considering their ages and their potential maturity levels, it is highly plausible that other scholars and practitioners might disagree.¹⁷⁸ In particular, it may have

176. See *supra* notes 144-45, 173-75 and accompanying text.

177. Buss, *Children’s Misperceptions*, *supra* note 11, at 1719.

178. Several scholars have posited the age of seven as a significant developmental threshold and the point at which a child is capable of making decisions and rational thought. See, e.g., Ramsey, *supra* note 6, at 310-19. “Many-seven year-old children can consider cause and effect, can use information, can reason about alternatives, and can communicate the decision reached.” *Id.* at 314; see also Haralambie & Glaser, *supra* note 15, at 60-61 (citing Lois Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, in CHILDREN’S COMPETENCE TO

significant consequences on the positions advocated by the attorneys for the children, including positions affecting where the children will be placed and what services will be provided to the children and to their mother. For example, if their attorney finds them to be sufficiently mature, she would advocate at the shelter care hearing for the children's desire to be placed with Ms. Jones pending the adjudicatory hearing. In doing so, she would inform the court of Ms. Jones' presence, her bond with the children, her availability and suitability to care for the children, at least temporarily, and the children's wishes to be placed with her.

On the other hand, if the legal representative finds the children to be too young, Professors Guggenheim and Buss would have the attorney limit her representation to enforcing statutory mandates or statutory fidelities. Depending on how one defines statutory mandates or statutory fidelities, and what a lawyer is permitted to do with respect to enforcing such mandates, this difference may prove substantial.¹⁷⁹ If the legal representative does not interpret statutory mandates to allow or require a placement with Ms. Jones, then the lawyer would be silent on this issue, which likely would result in the children remaining separated and in foster care. Statutes, especially at this early stage, seldom direct or provide guidance as to how determinations of where children should be placed are made. At most, they might identify the types of placements that could be considered.¹⁸⁰ Hence, the discretion exercised in making the decision about when children are too young to direct their

CONSENT 246 (1983) (concluding that many seven-year-olds "may have reasonable preferences and ideas about what happens to them"). Some legislatures have even determined that four-year-olds are sufficiently mature as to warrant mandating their lawyers to interview them. *See* Patton, *supra* note 77, at 29 (reporting that in California "4-year-old children are presumptively determined capable of expressing their desires because both attorneys and social workers are mandated to interview them").

179. It is likely that none of the other parties will bring the existence of Ms. Jones to the judge's attention as placement with her is against the rules and policies of the child welfare agency and Ms. Smith is not present.

180. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-815(h)(1)(iii) (1999). "If the child is alleged to be in need of assistance . . . , he may be placed in shelter care facilities maintained or approved by the Social Services Administration, or the Department of Juvenile Justice, or in a private home or shelter care facility approved by the court." *Id.*

Some lawyers might interpret statutory mandates or fidelities more broadly or loosely to encompass either advocating for a particular placement or, at least, bringing information about a particular placement to the court's attention. If this occurs, it is not clear how this would be different than advocating a position or how it would substantially reduce discretion. For further analysis of the difficulty of determining statutory mandates or fidelities and distinguishing between enforcing statutory mandates or fidelities and advocating for a position, see *infra* Part IV.B.

representation can have enormous implications on the lives of the children in child protection proceedings.¹⁸¹

This brief hypothetical circumstance also illustrates how difficult it is to define what constitutes a statutory mandate and what is the appropriate role for the lawyers in enforcing these mandates. It is to this discussion that we now turn our attention.

B. Enforcing "Statutory Mandates" or "Statutory Fidelities" Requires the Exercise of Discretion

Under Professor Guggenheim's analysis, if the lawyer for the young child determines that her child client is impaired, then the attorney must define her role and responsibilities by the legal interests that are mandated by statute or case law, and the only appropriate role for the lawyer of an impaired child is to "aggressively enforce the law as it was written by the legislature and interpreted by the courts."¹⁸² Professor Buss argues that representatives for young children should "limit [their] advocacy to ensuring statutory fidelities."¹⁸³ It is not clear to this writer whether these two recommendations are the same, or what exactly they mean. However, assuming they are similar, two concerns exist, both of which limit the likelihood that discretion and bias will be substantially reduced. First, it will be difficult to identify the relevant legal interests.

181. While there is little, if any, research that analyzes the significance of these early emergency removal hearings, it is unquestionably a critical and traumatic time for the children involved. Given children's different sense of time (e.g., three weeks for a child can seem like an eternity), as well as the fact that, like Andrew and Brenda, many of these children likely just experienced an episode of abuse or neglect, the decision of where they should spend the next few weeks, if not months, is of the utmost importance and has the potential to have long-standing ramifications for them, their families, and even the course of the court proceeding. For an analysis of children's sense of time see GOLDSTEIN, *supra* note 156, at 40-43.

Until such a point that the case is dismissed or the court has found that the children are in need of the court's assistance (a finding that is made at the conclusion of the adjudicatory hearing) and has made a formal disposition, there will continue to be a need to determine the temporary custody and placement of the children. Accordingly, if the adjudicatory hearing is continued, if it is begun, but cannot be completed in one day or in one sitting, or if the disposition hearing takes place at a separate and different time from the adjudicatory hearing, there will be a need for subsequent shelter care hearings. See Kiernan, *supra* note 34, at 10 (observing juvenile court practice and declaring that "[t]he decision made during a temporary custody hearing is crucial because it can mark the beginning of a long, painful odyssey. For the first of what may be many times, the judge must predict whether a child will be safe."). Moreover, judges are more likely to continue early custodial decisions than they are to change them. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 *ROUNDTABLE* 139, 148-55 (1995) (discussing empirical evidence and research that suggests that "status quo bias" leads judges to favor maintaining placements made at emergency removal hearings).

182. Guggenheim, *Paradigm*, *supra* note 11, at 1431.

183. Buss, *Developmental Barriers*, *supra* note 11, at 959.

These interests are not always clear and may even be subject to multiple and conflicting interpretations.¹⁸⁴ Second, even if the interests can be identified, it is not possible to ensure that these interests can be enforced without advocating for a position and therefore exercising a substantial degree of discretion.

Studying Professor Guggenheim's framework illustrates the difficulty, if not impossibility, of determining the legal interests of a child in a child protection proceeding. For example, in his analysis of the adjudicatory phase of a child protection proceeding, Professor Guggenheim posits that there are two possible interpretations of a child's legal interests.¹⁸⁵ First, he states that one could "say that children have a right to live with their parents unless a court finds the parents unfit."¹⁸⁶ Second, he explains that children also could be found to "have the right to be separated from their parents whenever their parents are actually unfit."¹⁸⁷ Although he acknowledges that there is "much force to this alternative definition,"¹⁸⁸ Professor Guggenheim does not find these competing conceptions of a child's legal interests to be equally compelling. In fact, he disposes of the second interpretation by stating that "the law prefers nonintervention and presumes that children are best off remaining in their parents' custody without coercive assistance."¹⁸⁹ Yet, some might arrive at the opposite conclusion, while others would find a conflict between two "clearly defined legal rights" of a child.¹⁹⁰ Clearly, there is confusion over what

184. Many have agreed that a lawyer for a young child should attempt to limit the scope of her representation to the legal interests at hand. See *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375, 381 (1995) (examining Standard B-4(2) which declares that "[t]o the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests"); *Recommendation*, *supra* note 110, at 1310 (stating that a lawyer must "narrow the area of inquiry by determining the *legal* interests of the child"). However, it is not at all clear that everyone would agree on what constitutes a legal interest. See Appell, *supra* note 95, at 1963 (concluding that children's legal rights may conflict); Roberts, *supra* note 29, at 117 (concluding that "there is no fixed meaning of children's rights in any particular context involving children's welfare"); Walter, *supra* note 3, at 47 (describing the "child's interests that are affected by governmental intrusion in an abuse and neglect case" as the following: "being free from abuse," "growing up with their families," obtaining a "swift and legally permanent plan," and "being informed and having a voice").

185. See Guggenheim, *Paradigm*, *supra* note 11, at 1429.

186. *Id.* at 1429-30.

187. *Id.* at 1430.

188. *Id.*

189. *Id.*

190. See Appell, *supra* note 95, at 1963. Professor Appell discusses the legal interests of a child to remain with his parents and of a child to be protected from harmful parents. See *id.* In some situations, especially those where it seems clear that the child has suffered harm in the care

constitutes a child's legal interests and rights at an adjudicatory hearing, or, if multiple rights are identified, how the differing interests should be "prioritized" or resolved if in conflict.¹⁹¹

Assume for the moment that Andrew and Brenda have been determined to be too young to direct the representation and that their legal representative is concerned for their safety if they are returned to the care of their mother. How should the attorney proceed at the adjudicatory hearing?¹⁹² In other words, which legal interests should prevail? Should the lawyer assert the children's right to remain with their mother unless the state can prove unfitness, or should the attorney assert the children's right to be free from harm? The approach of Andrew and Brenda's legal representative will be different depending on how she interprets their legal interests. If the attorney focuses on the children's right to be with their mother, she will seek to ensure that the state is forced to prove its case, that all of their mother's defenses are appropriately and aggressively raised, and that the strong bond between Andrew and Brenda and their mother is highlighted. On the other hand, if the legal representative's emphasis is on protecting Andrew and Brenda from harm, she will be concerned with whether the facts supporting her concerns regarding past, current, and future harm are made known to the court by the state child welfare agency. Clearly, there is tremendous discretion in determining what constitutes the children's legal interests at the adjudicatory stage.

When one moves to phases other than the adjudicatory stage, the number of potential legal interests at stake only increases. Thus, a situation is created where it is either more difficult to determine what interests should prevail,¹⁹³ or where the predominant interest is the best interests of the children and it is difficult to determine what is best.¹⁹⁴

of his parents, she believes these interests may be in conflict. *See id.* Thus, in her view, a paradigm that directs a lawyer to exclusively represent a child's legal interests may be ambiguous, if not subject to differing, and at times conflicting, interpretations. *See id.* at 1963-65. Specifically, she concludes that "a child has the right to remain a part of his or her family of origin, yet a child also has an interest in being protected from abusive or neglectful parents." *Id.* at 1963 (footnotes omitted). Professor Appell also cites to possible confusion when a lawyer determines that the "child's substantive legal rights may violate the child's less defined constitutional rights." *Id.* In this instance, she maintains that Professor Guggenheim's paradigm could lessen the likelihood that a lawyer will pursue constitutional challenges of state or federal law. *See id.*

191. *See id.* at 1963-65.

192. *See id.* at 1955 (offering a similar illustration concerning two children, both under the age of two years).

193. *See id.* at 1958.

194. *See infra* notes 245-52 and accompanying text.

For example, at a disposition hearing, where the focus is on “planning for the child[ren] and the future of the family,”¹⁹⁵ the court must make determinations as to what services are required by the family, where the children should be placed, what the legal status of the children should be, and what should be the plan for the future.¹⁹⁶ The prevailing standard that the court must use in making all of these decisions is the best interests of the children.¹⁹⁷ Moreover, the goal, unless formally changed by the court,¹⁹⁸ is to reunify the family if the children are placed out of the care of the parents, or to maintain the family structure if they have not been removed.¹⁹⁹ However, under the Adoptions and Safe Families Act of 1997 (“ASFA”), if children are placed out of the care of their parents, child welfare agencies are permitted, and even encouraged, to pursue “concurrent planning,” a policy whereby the agency simultaneously makes efforts to reunify the family and to develop an alternative permanency plan if reunification is unsuccessful.²⁰⁰ Once again, multiple legal interests are at stake, especially for the children who now not only continue to have the right to be free of harm, but also to have their needs met by the state if they are placed out of the care of their parents. This includes the need for a permanent placement if attempts at reunification fail and, regardless of where they are placed, to have the state provide services to them and their families to address the cause of maltreatment.

195. HOWZE, *supra* note 2, at 38.

196. *See id.*

197. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-27 (West 1998 and Supp. 1998). For an example of how extensive and difficult a best interests determination can be, see 705 ILL. COMP. STAT. 405/1-3(4.05) (West 1998), which lists an exhaustive set of factors to be considered when making a best interests determination. *See also* TEX. FAM. CODE ANN. § 263.307 (West 1996) (outlining a similar type of assessment); *infra* notes 245-52 and accompanying text (explaining the difficulty, if not impossibility, of determining what is best for a child).

198. *See* 45 C.F.R. § 1356.21(b)(3) (2000) (outlining circumstances where reasonable efforts to prevent a child’s removal or to reunify a child with his family are not required); *see also supra* note 48.

199. *See id.* § 1356.21(b).

200. *See id.* § 1356.21(d)(4). Professor William Patton explains how the requirements of concurrent planning may cause the potential of conflict for a child’s representative:

Under concurrent planning, the child’s attorney will now be forced at the disposition hearing and at all future review hearings not only to argue what reunification services should be provided, but also to advocate his or her client’s desire for alternative permanent placement should parental severance take place. Concurrent planning changes the context and the tactics of the child’s advocate because it functionally presents a balance of competing parental universes.

Patton, *supra* note 77, at 34. *See also* Roberts, *supra* note 29, at 114 (concluding that the requirement of concurrent planning creates “conflicting incentives”).

Again, an examination of Andrew and Brenda's situation illustrates these varying and numerous interests. At a disposition hearing, a legal representative of Andrew and Brenda who concludes that the children have a legal interest in being returned to the custody of their mother, likely would focus on the responsibility of the child welfare agency to make "reasonable efforts" to reunify the family and the probability that such efforts, if made in a prompt and appropriate manner, would be successful.²⁰¹ However, an attorney who has found that reunification would not be in the children's best interests likely would not emphasize the "reasonable efforts" requirement and might even assert that it should not be required in this instance. Even if "reasonable efforts" were found to be required, a representative who has come to the conclusion that the best long-term placement for the children is with Ms. Jones, or at the very least not with their mother, would stress that under the ASFA, a parent only has twelve months to make efforts at reunification.²⁰² Likewise, she would carefully monitor the situation so that, at the first possible moment, she could alert the court that it is time for the permanency plan to be reviewed. Moreover, she would continuously stress to the court the importance of the agency licensing Ms. Jones and/or investigating the out-of-state relatives as to their interest in caring for Andrew and Brenda.

Even if the determination of what legal interests are at stake is clear, it is difficult to envision how one ensures that all of these relevant interests are addressed by the court without the attorney taking or advocating for a position in some way.²⁰³ In other words, how does an attorney play a "watchdog" role without entering into some advocacy-type role where one position is favored over another? By the very nature of what the attorney chooses to call to the judge's attention, the attorney likely is emphasizing a particular point of view. Moreover, it is unclear whether this new role requires the lawyer to conduct a factual investigation. If not, it will be difficult for the attorney to know on what interest and issue the court should be focusing. To the extent that it is appropriate or necessary for a lawyer to conduct a factual investigation, however, it is difficult to comprehend how a lawyer could not help but get involved in advocating for a position.

201. See 45 C.F.R. § 1356.21(b).

202. See *id.* § 1356.21(b)(2)(i)-(ii); § 1355.20.

203. Professor Buss recognizes that a distinction between asserting that a statutory obligation has not been fulfilled and taking a position may be very difficult to make and "will prove elusive" at times. Yet, her only advice on how to distinguish the two is that attorneys should "make clear to the court when they are acting without the client's direction." Buss, *Developmental Barriers*, *supra* note 11, at 959 n.202.

In sum, not only is it difficult to determine when a child should be deemed too young to direct the representation, but what legal interests or statutory mandates are involved and how they should be enforced also are seldom clear. Hence, any attorney of a young child who seeks to enforce such mandates will be forced to use substantial discretion in interpreting whether a child is impaired, which legal interests are present, and what will be required to satisfy those interests in a given proceeding.

V. WHY CHILDREN NEED REPRESENTATION

Even if the proposals made by Professors Guggenheim and Buss are found to reduce discretion and bias on the part of legal representatives of young children in child protection proceedings, which I do not believe they do to a significant degree, they should not be followed because, in my view, there are compelling reasons why the representation of young children should not be curtailed or eliminated. Examining why such representation is needed, as this Part does, is not only an important inquiry in its own right, but also aids in our understanding of why their recommendations may be potentially harmful to the young children who are the subjects of child protection proceedings.

A. *The Presiding Judge Cannot Adequately Protect the Children's Interests*

Professor Guggenheim asserts that young children's interests in child protection proceedings can be adequately represented by either of the other two parties (i.e., the parent(s) and the child welfare agency) in the proceeding or, alternatively, by the presiding judge.²⁰⁴ In theory, this is conceivable, as the stated charge of the child welfare agency is to ensure that children are protected. In addition, the overriding role of the state, primarily through the court system, is to act in accordance with its obligations as *parens patriae*.²⁰⁵ In practice, however, this is not

204. See Guggenheim, *Reconsidering the Need*, *supra* note 11, at 351; see also Duquette & Ramsey, *supra* note 73, at 347 (noting that in the 1980s "some debate still exist[ed] regarding whether a child need[ed] independent representation" and that "[s]ome writers view[ed] the child's representative as an extraneous figure" because the other parties or the judge could adequately protect the child's interests) (footnote omitted).

205. The literal translation of the term *parens patriae* is "parent of the country." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). The term traditionally refers to the role of the state as sovereign and guardian of persons under legal disabilities. See *id.* While the role of the state as *parens patriae* is an important and controversial function, a full exploration of this duty is beyond the scope of this article. For a historical analysis of the state's *parens patriae* function, see Areen, *supra* note 31, at 896-917 and Susan B. Hershkowitz, *Due Process and the Termination of*

possible.²⁰⁶ As one commentator has noted, “[a] judge cannot simultaneously act as an advocate for the child and as an impartial arbiter in the case. Nor can a judge independently investigate the circumstances of a case in order to assist in identifying the child’s interests.”²⁰⁷

Although the prevailing standard, in most phases of child protection proceedings, is the “best interests” of the child,²⁰⁸ without a representative for the child, a judge will be forced to make this incredibly difficult and important determination with little, if any, knowledge of the child’s perspective²⁰⁹ and without all of the necessary information.²¹⁰ For example, a judge cannot visit with the child out of court in a setting that may be more comfortable and natural for the child. Likewise, a judge is unable to conduct any out of court interviews with persons who may be able to provide important information about the child’s life experiences and the circumstances that brought the case to the court’s attention. In fact, the only way that a judge can hear from such persons as family members, teachers, or therapists is to subpoena them to court and force them to testify in front of many persons, including attorneys, parents, social workers, and, potentially, the children. Unfortunately, information obtained in this manner likely will be different than if the inquiries were made in a more private setting.²¹¹

Moreover, because a judge would not have had the opportunity to develop the case factually, she might not even know which persons are necessary to subpoena. For example, in the case of Andrew and

Parental Rights, 19 FAM. L.Q. 245, 249-52 (1985). For an understanding of the doctrine’s origin, see Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

206. See Wilber, *supra* note 107, at 350 (stating that “the traditional role of the court as *parens patriae* . . . has been widely discredited”); see also Walter, *supra* note 3, at 49 (maintaining that juvenile courts have not been able to protect the interests of children).

207. Wilber, *supra* note 107, at 350; see also Haralambie & Glaser, *supra* note 15, at 92 (explaining that the judge in matrimonial matters is not an investigator and cannot protect the child); Walter, *supra* note 3, at 49 (stating that “[a] court’s decisions can only be as good as the information it has before it” and asserting that the information that juvenile court judges typically receive is incomplete because the flow of information is controlled by the attorneys).

208. See *supra* notes 2, 197 and accompanying text; *infra* notes 245-52 and accompanying text.

209. See PETERS, *supra* note 8, at 3-9 (setting forth the proposition that one can always learn information from a child, even from an infant); Peters, *supra* note 103, at 1515.

210. “One can question how often, if ever, any judge will have the necessary information.” Mnookin, *supra* note 60, at 257.

211. It also can put a treating therapist or other professional in awkward positions - positions that ultimately could damage the treatment process itself. See Peters, *supra* note 103, at 1529-32.

Brenda, without a representative for the children, a judge might not have become aware of the existence of Ms. Jones, especially early in the proceeding. Nor would the judge necessarily have learned of the extent of the children's medical and educational needs.²¹² As stated above, the child welfare agency social worker would have been precluded from discussing Ms. Jones with the judge. It also is questionable whether either the child welfare agency or the children's mother would have been inclined to highlight the needs of the children. While most parents wish for all of their children's medical and educational needs to be met, many parents in child protection proceedings may be hesitant or afraid to openly discuss the needs of their children, as doing so might cause them to publicly air their own perceived failures as parents.²¹³ Also, disclosure may be against the parents' own interests. Moreover, if the agency, through its representatives, displays openly that it is aware of the children's needs, then it becomes incumbent upon the agency to use its limited resources to provide services to meet those needs.

In sum, a judge is dependent on information being brought to her. Although she certainly has some mechanisms at her disposal to augment the amount of information she receives, and thus to better her understanding of a case, such efforts are inevitably limited.²¹⁴ In actuality, the customary, if not only, persons that a judge will hear from are the child welfare agency social worker and one or both of the parents.²¹⁵ As will be seen below, however, the interests of both of these parties often do not coincide with those of the child. Consequently, without the input and participation of the child, through a representative, the court will miss critical information.²¹⁶ Thus, even the most conscientious and well-trained judge²¹⁷ would be unable to make fully informed determinations that are in the best interests of the children.²¹⁸

212. See Walter, *supra* note 3, at 49.

213. In addition, if a child is placed outside of his home, the parent may not know of the status of the child's well-being. See *id.*

214. One of the more comprehensive approaches that a judge can take is to order that the children and/or the parents receive psychological evaluations. However, at least one scholar has noted some serious concerns regarding these assessments. See Peters, *supra* note 103, at 1535.

215. Interviews with judges reveal that they "rel[y] heavily on social workers' reports." Terry Pristin, *Child Courts Struggle in Harsh Environment*, L.A. TIMES, Feb. 2, 1998, at 1. Yet, the quality of these reports "range from the barely adequate to the comprehensive." *Id.*

216. See Walter, *supra* note 3, at 49.

217. See *infra* note 307-13 and accompanying text.

218. See Haralambie, *supra* note 8, at 985 ("It is only when *all* parties are represented by independent and competent counsel that the court can have access to all of the relevant information and alternatives.").

B. Interests of Children May Differ From All Other Parties

Numerous scholars and commentators have concluded that the interests of the parents and the state do not necessarily coincide with those of the child.²¹⁹ In fact, there are many times where neither the interests of the parents nor the state are synonymous with those of the child.

1. Conflict Between Interests of Children and Parents

“One does not have to work in family court very long to learn that in countless circumstances a juvenile’s rights and interests . . . are at sharp variance with those of his parents.”²²⁰ The very fact that allegations of child abuse or neglect are being brought against a parent places the parent and child in a situation where their interests are potentially, if not actually, in conflict.²²¹ Even if a parent did not intentionally mistreat her child, once she is alleged to have harmed her child, it cannot be assumed that the parent will act (at least at the court hearing) in a way that is consistent with the well-being of her child. At that point, the parents’ interests almost certainly will conflict, to some extent, with those of the child.

2. Conflict Between Interests of Child and Child Welfare Agency

Perhaps less obvious than the interests of the parents and children being in conflict²²² is the situation where the interests of the children

219. See SAGATUN & EDWARDS, *supra* note 127, at 68-70 (maintaining that the other parties in the matter cannot be relied upon to assert the perspective of the child); Duquette & Ramsey, *supra* note 73, at 346 (recognizing that children need independent legal representation because neither the state’s nor the parents’ interest can “be assumed to coincide entirely with the child’s”); Ramsey, *supra* note 6, at 292 (concluding that a “lawyer’s advocacy for the child’s interests is needed because the traditional representatives and protectors of the child are unable or unwilling to put the child’s interests first”); Ross, *supra* note 107, at 1585 (finding that “parents and state guardians do not and cannot always speak for their children”); Wilber, *supra* note 107, at 350 (discussing how the state, the courts, and the parents do not satisfactorily represent the children’s interests).

220. Lyon, *supra* note 103, at 686 (quoting *In re Clark*, 185 N.E.2d 128, 130 (Ohio Misc. 1962)); see also Ross, *supra* note 107, at 1582-84 (maintaining that the interests of parents and children are not always the same); Walter, *supra* note 3, at 49 (declaring that “in terms of protecting the child’s best interests, it would be folly to rely on the attorney for the parent”).

221. See Wilber, *supra* note 107, at 351 (“Parents engaged in a . . . protracted child abuse proceeding . . . are often blind to the child’s need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order providing counseling or other supportive services for the child.”).

222. As explained above, many abused or neglected children and their families are living in impoverished and hostile environments. Stress as a result of these unfortunate living situations, and not ill-will or malice on the part of the parents, often leads to or causes the maltreatment of the children. It is therefore worth noting that the interests of the parents and the children may not

and the child welfare agency are in conflict. As was discussed above, state child welfare agencies are plagued with “budgetary constraints, large caseloads, public pressures, political loyalties, and bureaucratic inertia.”²²³ Moreover, the ability to obtain federal funding for certain activities and services, but not others, creates “perverse incentive[s] to state child services agencies.”²²⁴ For example, the provision of a steady stream of income and stable housing may be required to reunify a family and truly advance a child’s best interests.²²⁵ Yet, federal funding “for state administered foster care programs [is] readily available, [but not] funding for job training and housing programs and the jobs and homes themselves”²²⁶ All of these factors not only diminish the ability of these agencies to adequately represent the children’s interests, but they create a situation where the agencies may be taking positions primarily based on institutional considerations and not on the needs of individual children.²²⁷

conflict to as great an extent as may initially be assumed.

223. Wilber, *supra* note 107, at 350; *see also* Buss, *Parents’ Rights*, *supra* note 11, at 438 (describing child welfare agencies as “[o]verwhelmed, underfunded, [and] highly bureaucratic”); Haralambie, *supra* note 8, at 951 (finding that the positions of the child and the state are not “necessarily identical”); Walter, *supra* note 3, at 50 (explaining that there are “many conflicting interests” preventing the agency from safeguarding each child’s interest); Lyon, *supra* note 103, at 686-87 (maintaining that the state is “unlikely to present an uncompromised view of the child’s interest that is free of institutional or professional biases and interests”); Stacy Robinson, Comment, *Remedying our Foster Care System: Recognizing Children’s Voices*, 27 FAM. L.Q. 395, 398 (1993) (discussing how budgetary constraints have caused state child welfare agencies to be understaffed and unqualified).

For a description of the consequences of this lack of resources and staffing, *see supra* notes 38-52 and accompanying text.

224. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 48 (1994) [hereinafter Fitzgerald, *Maturity, Difference, and Mystery*]. An example of these conflicting interests can be seen in the ASFA, which provides financial incentives to states that increase the number of children that are adopted, but not for states that improve their ability to reunify families. *See* Walter, *supra* note 3, at 50; *see also* Romo, *supra* note 13, at 8 (quoting Terry Friedman, presiding judge of Los Angeles juvenile court, as saying that “[i]t’s not likely that an attorney is going to advocate zealously for a child when that counsel is advocating for an agency that could lose federal money”).

225. *See* Fitzgerald, *Maturity, Difference, and Mystery*, *supra* note 224, at 47-48.

226. *Id.* (citing to CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN 1992, 28, 61-67 (1993)).

227. *See* Duquette & Ramsey, *supra* note 73, at 355 (concluding that because of high caseloads, the state agency “may be unwilling or unable to meet each child’s individual needs”); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, B. B. J., Feb. 1991, at 6, 9 (1991) (stating that “placement decisions are often based on institutional constraints and personal biases rather than on a true perception of the needs of the child”). One national study found that caseworkers had less contact with children than with the children’s representatives. *See* FINAL REPORT, *supra* note 12, at 5-7. For example, representatives reported “talking with the child to assess placement needs in 59.8 percent of the cases, while caseworkers reported such contacts in only 45.5 percent of cases.” *Id.* Moreover,

For example, in the case of Andrew and Brenda, such institutional factors may prevent the agency from adequately representing the children and ensuring that the needs of the children are met. Regardless of where Andrew and Brenda are temporarily placed, there almost surely will be a need for them and their mother to receive multiple services from the state child welfare agency.²²⁸ In addition to medical and mental health services for the children, their mother likely needs substance abuse treatment, as well as some support and guidance in advocating for Andrew's educational needs. There may be a need for the family to be assisted by the child welfare agency in securing their current housing arrangement or, if this is not possible, in obtaining alternative housing. For the reasons discussed above, it is not likely that the child welfare agency on its own would bring the need for all of these services to the attention of the court.²²⁹

Even if the child welfare agencies were adequately and appropriately staffed and funded, they likely still would not be able to fully represent the interests of the children. State child welfare agencies would continue to be bound by internal policies that, inevitably, could not meet the unique and individual needs of each child who is forced to interact with them. Studies conducted to determine the appropriate and optimal child welfare policies have proven that it is extremely difficult to establish policies that will meet the needs of all children.²³⁰ Yet, in order to have a well functioning agency, such policies are essential.²³¹

"[t]he percentages for contacts to assess service needs were 53.5 and 41.2 percent, respectively."
Id.

228. My assertion that the state child welfare agency is required to provide services to Andrew and Brenda's mother presumes that at least one of the permanency plans for the children is for them to be reunified with their mother.

229. See Walter, *supra* note 3, at 50 (noting services are more likely to be provided if the child's attorney is advocating).

230. For example, see study conducted by MICHAEL WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 181-200 (1988) (examining the effects of foster care versus home placement and finding that abused and neglected children are at serious risk in both settings). See also Areen, *supra* note 31, at 889 (remarking that there is "little agreement on when intervention in a particular family is justified [and] . . . about what forms of intervention are constructive"), 893 n.26 (citing B. Russell for the proposition that administrative agencies like uniformity, but it can create problems of pigeonholing and persecution of those who can't conform); Courtney et al., *supra* note 29, at 130-31 (reviewing various studies and exhorting policy makers to question the efficacy of 'one size fits all' services, and especially to consider the role of race and ethnicity in the provision of services); Kiernan, *supra* note 34, at 10 (quoting a judge as saying that "[w]hat we need to do is create many different approaches. We need to understand that kids rely upon their family structure and create a more comprehensive approach to dealing with the families.").

231. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 334-35 (discussing the use of rules as a means of reducing agency discretion and "making the actions of government fair and predictable" (citing MAX WEBER, 3 ECONOMY &

Hence, it is necessary to have a representative appointed for the child whose sole responsibility is to learn the unique needs and goals of each child and to ensure that these needs and goals are advocated for and addressed as part of the proceedings.

The placement issues concerning Andrew and Brenda are a good example of this dilemma. One could argue that, rather than require representation for all children, it would be more cost effective and efficient to change the administrative policy concerning non-relative placements. However, this policy is just one of many that might not coincide with Andrew and Brenda's individual needs. It is impossible to anticipate the needs of all of the children forced to interact with our child welfare system and, in turn, to formulate policies that will appropriately address all of those needs. Consequently, representatives are necessary to identify all such needs, to advocate for appropriate and adequate remedies, and to challenge existing policies if necessary.

Finally, at a systemic level, representatives also are needed to keep pressure on the child welfare bureaucracies, which, like most bureaucracies, are not always able to respond to their clients because they are perpetually in need of additional funds and, as a result, are continuously being forced to streamline and curtail services.²³² Even if the child welfare agencies were to receive renewed and augmented funding today, without ongoing pressure from advocates for the children, one cannot assume that the funding would go directly toward addressing the needs of the children and their families, nor that the funding would remain at this increased level over the long-term.

Some might ask why the judge, the ultimate arbiter of the child's best interests, could not monitor the actions of the other parties and ensure that the children's legal interests are protected and their needs addressed. As explained above, however, the judge is not in a position to independently and adequately investigate the matter and, thus, cannot assess whether the children's interests are being met or appropriately represented by the other parties in the proceeding.²³³

Given the differing, and often conflicting, interests of the parties involved in a child protection proceeding, it is critical for each young child to have an independent representative, someone whose sole charge

SOCIETY, 958, 973-75, 979 (1968))).

232. See MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 39 (1980) (describing the financial situation of "street-level bureaucracies" as "chronically inadequate").

233. See *supra* notes 204-18 and accompanying text (discussing the inability of judges to adequately protect the children's interests).

is to learn and then advocate for the child's needs and goals. Without such an advocate, the child risks being harmed by the very process and parties that are supposed to protect him and ensure that his best interests are being promoted.²³⁴ Professor Ramsey powerfully articulates the multiple ways that a child who is the subject of a child protection proceeding can be harmed.

First, there is the possibility that the gravity of the child's situation may not be realized, adequate protection will not be provided, and the child's parents will seriously injure or even kill him. Second, the child runs the risk of being harmed by too much intervention. The child's family life can be disrupted or even destroyed by coercive state action. Finally, the child runs the risk of being neglected by the state once the state has taken jurisdiction over him.²³⁵

Clearly, in any given child protection proceeding, numerous possible solutions can be generated, and the need for a careful and comprehensive analysis underlies most decisions that must be made. In such a setting, the child's interests and position will "easily differ" from those of the other parties, and the child's interests will seldom be protected by one of the other parties.²³⁶

VI. A BETTER MODEL FOR REDUCING BIAS AND DISCRETION

Recognizing that the interests of young children cannot be sufficiently protected by the presiding judge, nor adequately advanced by one of the other parties in the proceeding, the need for someone to be appointed to identify, understand, and advocate for the interests of young children becomes apparent. Considering the current state of legal representation, whether there should be a requirement that representation be provided by lawyers is somewhat less clear. The serious nature of child protection proceedings, the substantial interests at stake for the children, the difficult decisions that must be made, and the forum in which these decisions are determined point to the conclusion that the interests of young children would be most adequately advanced and protected if a lawyer is appointed. Yet, at the same time, the legitimate concerns articulated by Professor Guggenheim, Professor Buss, and others about haphazard, underfunded,

234. See SAGATUN & EDWARDS, *supra* note 127, at 67-68, 72, 84-85 (concluding that the other participants in the proceeding cannot be counted on to listen to and represent the needs of the child) (footnotes omitted); Margulies, *supra* note 8, at 1499 n.94 (maintaining that "reducing the power of an advocate for children just gives the other advocates more authority"); Walter, *supra* note 3, at 51-53.

235. Ramsey, *supra* note 6, at 292 (footnote omitted).

236. See Wilber, *supra* note 107, at 351.

and biased representation offer grounds to question a requirement that all young children be provided with legal representation.

The final two parts of this paper will set forth several suggestions addressing these concerns. This part discusses why representation by lawyers is preferable and necessary. Further, this part examines an approach requiring legal representation of all children, which aims to address the concerns regarding haphazard and biased representation by developing a deep understanding of the children's lives and experiences. Part VII, acknowledging the history of insufficient support for providing adequate representation to children and the likelihood that the resources necessary to support the recommendations in Part VI are not going to be available in most jurisdictions in the foreseeable future, proposes several modest recommendations. Two pertain to enhancements in the policies of our child welfare agencies and in the responsibilities of our juvenile court judges. Both of these alterations could help the juvenile courts and child welfare agencies focus more on the needs of the children. A third tentatively suggests that alternative models of representation for young children be studied that might be able to provide more cost effective and principled representation of young children than currently is taking place. While the recommendations in Part VII would not ensure the caliber of representation that is discussed in Part VI, and that I think is necessary to adequately protect and advance the needs and interests of young children, they would enhance our child protection system and, in turn, help protect the interests of young children in these proceedings.

A. Competent Attorneys as the Preferred Type of Representation

A consensus of the participants of the Fordham Conference, as well as numerous scholars, practitioners, and organizations, have expressed the need for children to be represented by attorneys.²³⁷ The reasons emphasized in support of this need are significant. Among some of the considerations highlighted by the Working Group at the Fordham Conference were the inability "to ensure that the best result" will be reached for each and every particular child if a lawyer is not appointed, the importance of "redress[ing] the imbalance of power," and the need to "minimize the risk of harm to the child that flows from contact with the legal system."²³⁸ Others concerned with children receiving legal

237. See FINAL REPORT, *supra* note 12, at xv; A JUDGE'S GUIDE, *supra* note 45, at 4-5; Green & Dohrn, *supra* note 8, at 1294-95; Recommendation, *supra* note 110, 1301-02, 1328; Ross, *supra* note 107, at 1572-73; Walter, *supra* note 3, at 51; Wilber, *supra* note 107, at 350-52.

238. The Working Group on the Allocation of Decision Making, *Report of the Working Group*

representation have stressed notions of fairness and efficacy²³⁹ and the unwillingness of some judges to listen to and take seriously the arguments expressed by lay advocates.²⁴⁰ One commentator in particular has noted that “[t]he essence of the adversarial system is the idea that an equitable result is best reached through zealous and effective representation of all sides of an issue.”²⁴¹ Finally, one child advocate emphasized the mediating effect that a legal representative for the child can have on the proceeding.²⁴² “Good lawyers for children can expedite the resolution of disputes, help minimize unnecessary contentiousness between the adult parties, [and] facilitate the settlement of contested issues”²⁴³

Clearly, there are important reasons why all children need to be represented and why this representation should be conducted by attorneys. However, the considerations leading to the conclusion that lawyers would provide the best type of representation presume that the lawyers being appointed are able to provide competent representation. As discussed earlier, many commentators question this assumption in the case of the legal representation of young children, largely due to the potential for unfettered discretion and bias. I already examined why the proposals limiting or eliminating representation for young children either would not substantially reduce discretion and bias or would leave children without a representative to protect and advance their needs and interests. However, if these proposals are not acceptable, what is?

on the Allocation of Decision Making, 64 FORDHAM L. REV. 1325, 1327 (1996).

239. See FINAL REPORT, *supra* note 12, at xv (stating that “TEG [Technical Expert Group] members maintained that, in their opinion, it was unacceptable for any child to appear before the court without being represented by either an attorney or another person equally qualified to fulfill the role, and the study recommends that an attorney be present at all hearings.”); Romo, *supra* note 13, at 8 (quoting Terry Friedman, presiding judge of Los Angeles juvenile court as saying “Children must have counsel. They must be independent and must be viewed as equal with all other counsel.”); Walter, *supra* note 3, at 58 (exhorting that “[d]ue process and fundamental fairness cry out for a child’s right to independent representation in dependency proceedings.”).

Some of the unique and important skills of an attorney include: the ability to recognize and research legal issues, analytically apply facts to law, take testimony of witnesses, cross-examine witnesses, prepare and submit written pleadings, bring matters to the court’s attention through motions, creatively challenge and advance substantive law, and argue appeals.

240. See Margulies, *supra* note 8, at 1499 n.94 (discussing court appointed advocates, and stating that “reducing the power of an advocate for children just gives the other advocate more authority”); Ross, *supra* note 107, at 1572-73 (quoting Justice Powell’s concurrence in *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) (“[T]he adversary system functions best and most fairly only when all parties are represented by competent counsel.’ Indeed the absence of counsel in an adversary system severely diminishes the odds of justice being served.”).

241. Wilber, *supra* note 107, at 354.

242. See A JUDGE’S GUIDE, *supra* note 45, at 1.

243. *Id.*

B. The Search for a Less Discretionary Model

The solution lies in our ongoing attempts to answer the question of how lawyers for young children can provide principled and unbiased representation to young children. Any model that is developed must give sufficient guidance and direction so that the representation is less arbitrary, less biased, and hopefully true to the children's lived experiences. Yet, it also must be flexible enough to encompass and reflect the unique needs and circumstances of each child client, leading to representation that is based on each child's perspective as it can be learned from the child and a contextualized, 'deep understanding' of his world.²⁴⁴

Any attempt to guide lawyers looking for a more principled and contextual model of representation must first recognize that efforts to develop a paradigm that will always lead to a conclusive determination of what is best for a young child will never succeed completely. It is virtually impossible to definitively determine what is best for a child, for doing so would require predictive capabilities that none of us possess.²⁴⁵ As Professor Catherine Brooks has stated:

244. See PETERS, *supra* note 8, at 1 (proposing contextual approach); Peters, *supra* note 103, at 1512, n.12. See *infra* Part V.B.2 (discussing the need for an advocate to assure that a child's unique needs are met).

My support for a contextual approach to representation runs contrary to an earlier assertion of mine that there is a need for a "bright line" test, at least with regard to the ethical rules of confidentiality and potentially for other aspects of representation as well. See Randi Mandelbaum, *Rules of Confidentiality When Representing Children: The Need for a "Bright Line" Test*, 64 FORDHAM L. REV. 2053 (1996). My earlier suggestions were based on my desire to both give guidance to practitioners and to acknowledge the realities of practice. Yet, after further thought, I have come to the conclusion that we cannot accept the current state of practice. There are no "easy answers" to these very tough questions about proper models of practice and what constitutes the ethical representation of children. As explained above, the lack of answers is in part responsible for the poor state of representation for children. However, if we are ever to improve practice, we must struggle with the hard questions and develop models of representation, like that of Professor Peters, that attempt to understand each child's individual world with all its unique and idiosyncratic features. See PETERS, *supra* note 8, at 1-2.

245. See Brooks, *supra* note 88, at 770-71 (declaring it impossible to ever know what is in the child's best interests); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984) (concluding that in custody cases the best interests standard "is both too broad and too narrow to be acceptable"); Lurie, *supra* note 87, at 235 (questioning whether it is possible to predict what a particular child would want); Guggenheim, *Reconsidering the Need*, *supra* note 11, at 307 (quoting Hillary Clinton, "[the] best interests standard . . . is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."); Mnookin, *supra* note 60, at 255-62 (maintaining that what is "best" for a particular child is "usually indeterminate and speculative"); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 58 & n.23 (1990) (explaining that "[t]here . . . is no general agreement as to what a child's best interests are" and that "[t]he standard has long been criticized as being overly vague and

Knowing, advocating, and adopting the position which addresses the best interests of the child requires a prediction of the future of the child, the child's relationships within the family, and the parents' ability to meet the apparent and hidden needs of the child. All of those pieces which make up a "best interests" analysis cannot be known in any real way.²⁴⁶

Moreover, when considering what is best from the child's perspective, it is not clear from what standpoint of time this determination should be made.²⁴⁷ In other words, should one look to what the child would want at the current time or at the time the child becomes an adult?²⁴⁸

It is equally difficult to eliminate all discretion on the part of attorneys.²⁴⁹ Given the nature of the decisions that often must be made in the course of a child protection proceeding, it is inevitable that lawyers (and judges) will need to exercise some discretion.²⁵⁰ As has been previously noted, "[d]eciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself."²⁵¹ Such determinations could be "elaborated endlessly" and always will involve some discretion, subjectivity, and value judgments.²⁵²

1. Past Attempts to Offer Guidance

It is possible, however, to limit the amount of discretion and bias involved in the representation of young children²⁵³ and to give guidance as to how to represent young children in a way that is as true as possible to their lives and backgrounds. Some commentators might argue that

subjective"); Weinstein, *supra* note 76, at 81, 108-12 (discussing how vague the best interests standard is and how there often is no one correct answer).

246. Brooks, *supra* note 88, at 771.

247. See Mnookin, *supra* note 60, at 260.

248. See *id.*; see also Chambers, *supra* note 245, at 488-89.

249. See Peters, *supra* note 103, at 1512 n.12 (remarking that discretion in the determination of a child's best interests cannot be eliminated).

250. See Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2218-19, 2247-49, 2261-64 (1991) (arguing "that no easy choices are available in thinking about custody disputes, that wholeheartedly rejecting discretion is certainly not such a choice, and that a motley mix of discretion, guidelines, and rules may be the best we can do").

251. Mnookin, *supra* note 60, at 260; see also Fitzgerald, *Maturity, Difference, and Mystery*, *supra* note 224, at 53-64 (analyzing the difficulties and the numerous problematic aspects of best interests determinations in custody disputes); Herma Hill Kay & Irving Phillips, *Poverty and the Law of Child Custody*, 54 CAL. L. REV. 717, 720 (1966) (discussing the difficulty of determining what is in a child's best interest).

252. See Mnookin, *supra* note 60, at 260.

253. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170-71 (1986) (finding that in divorce matters "discretion need not be uncontrolled and that significant predictability can be introduced").

these efforts already have been made and were ultimately unsuccessful.²⁵⁴ Yet, a closer look reveals that those efforts were limited and insufficient. As explained above, most scholars have focused on the debate between the traditional attorney model, the best interests approach, and why one should be favored over the other.²⁵⁵ Moreover, while many writers focused on how to represent young children, or children of any age, in accordance with a best interests approach, these writers tended to merely define the tasks for which a lawyer would be responsible.²⁵⁶ Although this provided some guidance, it did not assist lawyers in understanding the lives and needs of their young child clients and ultimately what would be best for these young children.

Nonetheless, a few scholars in the past have proposed models that stressed the importance of determining the child's perspective in order to understand the needs and interests of the child, and they have attempted to give some guidance as to how one should proceed in identifying this perspective. These commentators looked to the doctrine of substituted judgment, an approach most often seen in the medical context, and attempted to apply it to the child protection setting.²⁵⁷ The

254. See *supra* notes 116-29 and accompanying text (discussing problems with the "best interests" approach).

255. See *supra* notes 104-14 and accompanying text (discussing debate over "best interests" or "traditional" approaches).

256. See *supra* note 104 (listing the duties that a representative may be required to perform).

257. See Elder, *supra* note 227, at 6; Wilber, *supra* note 107, at 349; Lyon, *supra* note 103, at 681.

It is significant to note that several other well-respected scholars have also written on the importance of recognizing children's perspectives as different and distinct from all other individuals. See Fitzgerald, *Maturity, Difference, and Mystery*, *supra* note 224, at 11; Wendy Anton Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power in Juvenile Justice*, 1996 WIS. L. REV. 495 (1996) [hereinafter Fitzgerald, *Stories of Child Outlaws*]; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) [hereinafter Woodhouse, *Hatching the Egg*]; Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994). Although these scholars do not necessarily focus on child protection proceedings or attorney-child client relationships, they do stress the importance of understanding children's unique perspectives in all spheres. Moreover, they emphasize how policies and laws would be different if they were enacted in accordance with children's viewpoints. For example, Professor Woodhouse examines the unique right of children to receive basic nutrition, support and protection not only from their parents, but from society at large. See Woodhouse, *Hatching the Egg*, *supra*, at 1755-56. Accordingly, she argues that "parental rights should be reconceptualized as flowing from parents' responsibilities" and that parenthood should not be considered a form of ownership, but rather a "stewardship." *Id.* Similarly, Professor Fitzgerald calls for including the perspectives of children in our efforts to reform our juvenile justice systems and to amend our laws and policies governing family disputes. See Fitzgerald, *Maturity, Difference, and Mystery*, *supra* note 224, at 11; Fitzgerald, *Stories of Child Outlaws*, *supra*, at 495. Although at times it may be difficult to determine the

doctrine of substituted judgment has been utilized for nearly two centuries as an approach by which a court determines decisions for a person who is incapacitated and not able to make decisions for himself.²⁵⁸

To determine the intent of a young child, these scholars developed a tiered analysis. They first considered the best source of information to be the child himself and they recommended learning as much as one could from the child.²⁵⁹ If this was not possible or only led to a limited understanding, then they next suggested that the attorney attempt to learn as much as possible from people involved in the child's life who know the child well.²⁶⁰ Finally, they recommended that the attorney either look to what others who were in a similar situation as the child wish had been advocated or to what a reasonable child in the client's position would want.²⁶¹ In order to determine the latter, these commentators suggested looking to the types of things that a child would value.²⁶²

actual perspectives of very young children, the recommendations and theoretical interpretations of these noteworthy scholars serve to illustrate that children's interests are unique and in need of expression and protection.

258. See Wilber, *supra* note 107, at 359-60 (citing Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990)). Currently, the doctrine of substituted judgment is most common in the area of medical treatment consent (i.e., informed consent). The doctrine has been the subject of much controversy based on its uneven application by various courts and the difficulty of inferring intent where there is little, if any, evidence on which to base such a conclusion (i.e., for a person who has always been incapacitated). See *id.* at 361. Yet, despite these limitations, scholars still found it useful to explore its relevance to the legal representation of young children. Acknowledging that it was difficult to discern the needs and desires of a young child, they found significant differences between the way in which the doctrine was applied in the medical treatment context and the way in which it could be employed when representing a young child. See *id.* at 362; see also Lyon, *supra* note 103, at 702.

259. See Elder, *supra* note 227, at 8-9; Lyon, *supra* note 103, at 702-03.

260. See Elder, *supra* note 227, at 9; Wilber, *supra* note 107, at 362; Lyon, *supra* note 103, at 703-04.

261. See Elder, *supra* note 227, at 9; Wilber, *supra* note 107, at 362; Lyon, *supra* note 103, at 704-05.

262. For example, one commentator defined such values as "the protection of the child's physical and emotional safety, preservation of the child's family of origin whenever possible, placement in the least restrictive alternative – preferring family, relatives, or a family-like setting over institutionalization – and minimizing disruption and exposure to prolonged or intense conflict." Wilber, *supra* note 107, at 363. While another writer defined these necessities as: (1) the provision of basic needs; (2) provision and maintenance of nurturance, stability, and continuity; (3) freedom from abuse and neglect; and (4) maintenance of the family. See Elder, *supra* note 227, at 8-9.

A variation of this approach has been proposed by Professor Margulies, who advocates that, in making decisions on behalf of the child client, the representative look to three important factors as guidelines: (1) continuity of caregiving; (2) parents' commitment of time to their child's

Although the substituted judgment approach focused the representative's thinking on the importance of the child's perspective, this model is lacking in the amount of guidance it provides on how to determine the child's perspective. Because of the difficulty in identifying the interests of young children, these scholars tended to ultimately rely on a type of "reasonable child" test, an approach that does not adequately consider the unique and individual realities of each child client's world.²⁶³ Hence, while the substituted judgment model provides some help in guiding the lawyer to more principled or child-centered representation, it still leaves room for too much discretion and the need for a better way to focus the representation on the unique and individual interests of each child.

2. Paradigm Proposed by Professor Jean Koh Peters

Professor Jean Koh Peters has developed a model of representation that I believe helps us to do this. Her model calls for attorneys to represent the "child-in-context."²⁶⁴ Professor Peters' approach to lawyering is the most thoughtful and comprehensive model to date on how to provide principled representation to all children, and especially young children.²⁶⁵ Specifically, she proposes a new model that

attempts to reframe the duality between wishes and best interests representation into a paradigm that unites representation of all children along the age spectrum around the idea of the child-in-context

In essence, the concept of the child-in-context is the child understood on her own terms in ways that she would be able to understand and endorse.²⁶⁶

As part of her new paradigm, Professor Peters advocates for maximizing the participation of the client wherever and however possible.²⁶⁷ Also, she provides detailed guidance on how to proceed if

education; and (3) the presence of exploitation or violence against the child or other family members. See Margulies, *supra* note 8, at 1502; see also Chambers, *supra* note 245, at 493-95 (acknowledging the difficulty of defining "elemental qualities of life or personal characteristics that most children would want," but attempting to do so nonetheless).

263. See Lurie, *supra* note 87, at 235 (noting that the substituted judgment approach has been criticized because, in actuality, it simply gives an attorney the ability to rationalize doing whatever she wants to do (citing Kevin W. Bates, *Live or Let Die; Who Decides an Incompetent's Fate?* In re Storar and In re Eichner, 1982 BYU L. REV. 387, 392 (1982))).

264. Professor Peters adheres to the views of the participants of the Fordham Conference, the ABA, and other scholars in her insistence that children of all ages be represented by attorneys. See PETERS, *supra* note 8, at 1.

265. See Peters, *supra* note 103, at 1505.

266. PETERS, *supra* note 8, at 2.

267. In order to emphasize and illustrate the importance of the child's participation, but also the difficulty when a child is very young, Professor Peters posits that "[a] useful image for

the child's ability to participate is limited or if a representative is mandated by state statute to represent the child's best interests.²⁶⁸

In representing children too young to fully participate, Professor Peters is very concerned with making certain that all aspects of the representation, including actions that attorneys might take as well as the decisions or positions for which attorneys might advocate, remain true to the children's realities and perspectives.²⁶⁹ Professor Peters

thinking about the child's competence to contribute to his representation is the concept of 'dimmer switch,' where the "child's potential contribution . . . should be seen as covering a point across a broad spectrum." *Id.* at 53. She adds that even a newborn child can contribute some amount to his lawyer's representation and "the lawyer must strive to incorporate every percentage of the client's contribution into the representation." *Id.* at 53-54. Furthermore, Professor Peters recommends that lawyers for children should conduct their representation according to the following three default practices: (1) Relationship default: "A lawyer should begin her representation as she would any other lawyer-client relationship, by meeting the client and trying to ascertain the client's goals." (2) Competency default: Presume the child "can understand the legal issues" in the case and express subjective perspective or offer critical information about them. (3) Advocacy default: "All lawyers whose child clients can express a view relevant to the legal representation should proceed in the first instance as if the stated view *is* the goal of the representation." *Id.* at 49-54. Professor Peters believes that these defaults outline a model of practice that is consistent with Model Rule 1.14. *Id.* at 49. "Rule 1.14's admonition that the lawyer maintain a traditional lawyer-client relationship dictates that lawyers for children must observe three default practices with respect to their clients from day one of the representation." *Id.*

268. For example, in a supplement to the text, Professor Peters describes a creative mapping process - stellar cartography - to assist the lawyer in making sense of both the child's daily life and the child's history. *See id.* at 6.

In addition, in her earlier work, she presents a framework for assessing and determining the best interests of a young child. *See Peters, supra* note 103, at 1554-55. First, if the child is able to converse, she insists that the representative attempt to communicate with the child and engage in counseling sessions with the child. *See id.* Second, she advises the representative to conduct an investigation to uncover as much as possible about the child's world. *See id.* at 1555. Next, she recommends "evaluat[ing] the actual alternative options in terms" of two existing developmental theories that she discusses - "the psychological parent and family network paradigms." *Id.* Finally, she suggests "consult[ing] experts for guidance." *Id.* at 1557.

Interestingly, when representing young children, Professor Peters, like the drafters of the Fordham Conference Report, recommends informing the court of all potential solutions if no one option is clearly the best option. *See id.* at 1558; *Recommendation, supra* note 110, at 1311. To a certain extent, this can be viewed as analogous to Professors Guggenheim and Buss' proposal of declining to take a position and enforcing statutory mandates. However, on closer analysis, such a comparison is inaccurate for Professor Peters anticipates that a representative would be involved in advocacy. Specifically, Professor Peters recommends that an attorney conduct a full investigation and perform all tasks necessary to advocate for a position. *See Peters, supra* note 103, at 1554-63. Only if there is no definitively preferable option does she propose presenting more than one position to the court. *See id.* at 1558. Moreover, she recommends that the representative argue against all options that the representative finds to be inappropriate. *See id.* Such actions seem to reflect a different role for the representative than that proposed by Professors Guggenheim and Buss.

269. For example, Professor Peters discusses ten "principles of good communication with clients." PETERS, *supra* note 8, at 84-89. She gives pointers for how to do a thorough, but quick,

explicitly states that she is “rejecting and replacing”²⁷⁰ the GAL model and, accordingly, the best interests approach that permits lawyers to determine what is best primarily based on the discretion of the attorney.²⁷¹ Rather, she outlines how attorneys can advocate on behalf of a child based “on a full, efficient, and speedy factual investigation that leads the lawyer to a deep understanding of the child’s family system, her history, and her daily life.”²⁷²

In sum, Professor Peters’ approach substantially reduces the presence of the attorney’s own biases and predilections and provides guidance for how a lawyer can more faithfully identify the interests of the child from the context of the child’s life. In doing so, she preserves the critical role of the attorney as advocate, while reducing bias. However, our search for a less discretionary approach to the representation of young children must not end here.

investigation. *See id.* at 92-110. In addition, Professor Peters emphasizes the importance of interdisciplinary meetings. *See id.* at 153-91. She also lists and describes seven questions to keep the lawyer honest with herself and suggests that the lawyer write a letter to the child explaining why she is making a particularly significant decision. *See id.* at 65-69.

270. *See Peters, supra* note 103, at 1507.

271. *See id.* at 1523. It is “useful and necessary to abandon the guardian *ad litem* role for the following reason: Lawyers playing the role of guardian *ad litem* often have felt unconstrained by traditional lawyering duties.” *Id.*

272. *Id.* at 1554-55. Not surprisingly, Professor Guggenheim is critical of Professor Peters’ paradigm. *See Guggenheim, Matter of Ethics, supra* note 11, at 1489 (reviewing PETERS, *supra* note 8). In a recent book review of her text, Professor Guggenheim praises her attempts to reduce attorney discretion and bias, but is critical of how she advises attorneys to do so. *See id.* Specifically, he dislikes “the *method* by which she recommends that lawyers determine what they should advocate when representing very young children in child protection proceedings” and again asserts that lawyers should define their role based on substantive law. *Id.* at 1505. However, in his criticism, Professor Guggenheim fails to acknowledge the depth of Professor Peters’ analysis as well as the totality of what her model presents. His critique condenses her proposals into a simple recommendation that lawyers adhere to Professor Peters’ blending of child development theories. *See id.* at 1509-11. Accordingly, he is fearful that representatives will just disagree with her developmental theory and choose alternative ones, thus perpetuating a discretionary approach. *See id.* at 1511. What is problematic with Professor Guggenheim’s critique is not his disagreement with Professor Peters’ approach, but his failure to appreciate that the central focus of Professor Peters’ paradigm is not child developmental theory, but the child and the development of a thorough and contextual understanding of the child’s world. *See Peters, supra* note 103, at 1554-63. In helping the lawyer to understand the child’s perspective, she encourages representatives to look to various developmental theories (and does discuss two popular developmental theories) and to consult with experts. *See id.* at 1556-59. However, a reliance on any one theory of child development, or even a blending of theories, is not an accurate portrayal of Professor Peters’ model. In fact, Professor Peters encourages lawyers to “continue to deepen their understanding of the rich and complex debates about child development that continue in other disciplines.” *Id.* at 1556. Moreover, she cautions lawyers to “be aware that the understandings of child development and placement issues in other disciplines are dynamic and constantly changing” and that the two theories that she discusses “will certainly shift, evolve, and probably be replaced in the coming years.” *Id.* at 1556 n.148.

C. Concerns with Professor Peters' Approach - The Need To Go Further

1. The Need to Recognize Differences

There exists a great need to study how Professor Peters' model can be built upon to more explicitly acknowledge and account for the fact that the lives of these child clients are likely to be vastly different from those of their representatives, especially in terms of race, ethnicity, and socioeconomic status.²⁷³ Although Professor Peters' paradigm emphasizes the importance of understanding the child's life, which would include a recognition that the child's experiences, background, and culture may be different from that of the lawyer, she does not explicitly discuss the difficulty on the part of an attorney to fully understand the child's world, particularly how differences in race, ethnicity, and class might impact the child's experiences, including how the child experiences the attorney-child client relationship.²⁷⁴ Such a recognition of differences has enormous ramifications for all aspects of the lawyering process, including, but not limited to, the attorney-child client relationships that develop, the activities that the lawyer undertakes, and the best interests determinations that the lawyer

273. Other significant differences (i.e., age and possibly gender or sexual orientation) will exist as well. However, at this time, my analysis is limited to differences in race, ethnicity, and socioeconomic status. Professor Peters and others have done an excellent job of illustrating how differences in age may affect many aspects of lawyering. It is difficult to determine how often differences in gender and sexual orientation are likely to occur and the extent of the impact of these potential differences on the lawyering process and developing attorney-client relationships. Further study and examination is necessary, but is beyond the scope of this paper.

It also is critical to explore how the implications of race and class are intertwined. However, once again, the complexities of this interrelationship justify a much more thorough analysis than is possible in this writing.

274. While I was in the final stages of the preparation of this piece, I learned that the 2000 Supplement of Professor Peters' book, currently unpublished, will provide a prescription as to how a lawyer should take into account the many differences that likely will exist between herself and her client. It is my hope that my writing supports the great need for such guidance and that Professor Peters' supplement will move lawyers to re-examine the way in which they are lawyering and encourage persons from all disciplines to continue to study why and how it is so important to recognize differences.

makes.²⁷⁵ These implications rarely have been studied in the context of the attorney-child client relationship.²⁷⁶

As was documented above, a disproportionate number of children who enter the child protection system are poor and of color.²⁷⁷ Moreover, a large majority of the attorneys appointed to represent these children are white and from middle to upper-middle class backgrounds.²⁷⁸ Scholars in a variety of disciplines, as well as policy-makers, already have begun exploring how race and class impact our child welfare policies and programs.²⁷⁹ Yet, we have spent little time

275. See Boggett, *supra* note 123, at 1477-79 (discussing from a multi-disciplinary perspective the many barriers to cross-cultural counseling that exist); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809 (1993) (explaining that differences in class, race, and gender between an attorney and a client greatly impact an attorney's ability to build rapport).

276. *But see* HOWZE, *supra* note 2, at 74; Janet Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763 (1996); *Recommendation*, *supra* note 110, at 1301. Ms. Howze thoughtfully enunciates why it is so important to consider the impact of differences in cultures and backgrounds:

Central to the ability of lawyers and judges to answer these questions is a willingness to look beyond what we know, what our life experiences have been. We must develop a method of interacting with families that assumes there is validity in examining the total family environment - including cultural and sub-cultural context.

HOWZE, *supra* note 2, at 13.

In her short article, part of the Fordham Symposium, Ms. Chaplan briefly discusses the need to "learn from clients' narratives of their experiences" and its derivation in postmodern theory. She then interviews seven youths - six young men, ages seventeen to twenty, and one young woman, age eighteen - who all had been involved in child protection proceedings and the foster care system. In her interviews, she questions the youths as to their perceptions about their attorneys and the attorney-client relationships. "All of these youths valued the opportunity to have their attorneys get to know them" and listen to them. Chaplan, *supra*, at 1775. However, they differed somewhat on their perceptions of the lawyer's role and ethical obligations. *See id.* at 1768-84.

Listed in the recommendations of the Fordham conference are references to the importance of recognizing differences in race, class, and culture. For example, when discussing recommendations for improving the interviewing and counseling skills of representatives, the participants recommended that the lawyer's techniques should be "culturally competent." *See Recommendation*, *supra* note 110, at 1303. Likewise, when determining whether a verbal child is capable of directing the representation, the conferees cautioned that "[a] lawyer should be aware of the risks that biases based on cultural, race, ethnicity, or class differences between the lawyer and child client may inappropriately influence the lawyer's perception of the child's capacity to direct the representation." *Id.* at 1313. The participants recommended that lawyers for children should receive specialized training on how "competing paradigms address the needs of children of diverse ethnic, racial, and class backgrounds." *Id.* at 1312. Finally, they proposed that "[f]urther study should be made of how differences in race, ethnicity, culture, or class may affect children's decision making with respect to legal representation, and of how lawyers may properly take that into account in determining a child's capacity to direct the representation." *Id.* at 1314.

277. *See supra* notes 29 & 31.

278. *See supra* note 34.

279. *See, e.g.*, Brown & Bailey-Etta, *supra* note 29; Gilbert A. Holmes, *The Extended Family*

studying how these cultural and socioeconomic differences affect the development of our attorney-child client relationships and the lawyering that ensues, especially how we determine what to advocate for on behalf of our young child clients.²⁸⁰ Only with a sound understanding of how lawyers should attempt to recognize these differences will we be able to limit attorney discretion to the greatest extent possible, better understand the lives of our child clients, and therefore be in the best position to determine what is in a child's best interests free of our own biases and more consistent with the lived experiences and realities of the young children who we are representing.²⁸¹

Racism pervades every segment of our society and every aspect of a person of color's life experiences, from small to large.²⁸² For example, Professor Peggy Davis discusses the infinite number of "microaggressions" that a person of color must sustain on a daily basis.²⁸³ Moreover, white persons also are influenced by their own

System in the Black Community: A Child-Centered Model for Adoption Policy, 68 TEMP. L. REV. 1649, 1658-69 (1995) (documenting and discussing the prevalence of extended family systems in African American communities); Perry, *supra* note 245, at 57 (arguing "for more specific rules for the treatment of race" in child placement decisions); Symposium, *Helping Families in Crisis: The Intersection of Law and Psychology*, 22 N.Y.U. REV. L. & SOC. CHANGE 295 (1996-97); Symposium, *The Impact of Psychological Parenting on Child Welfare Decision Making*, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1983-84).

280. *But see* HOWZE, *supra* note 2, at 7-14, 72-76 (explaining that assumptions and perceptions about race and ethnicity influence all aspects of child protection proceedings and emphasizing the importance of understanding the numerous ways that culture and subculture can affect decisions central to a determination of what is in a child's best interests).

281. *See id.* at 7 (calling for a new methodology that emphasizes cultural differences and context, encourages continuous questioning, and "requires that the scope of relevant facts be expanded to include the total life experiences of adults and children before the court").

282. *See* Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 933 n.168 (maintaining that "'being Black or White affects every element of individual existence including access to jobs, education, housing, food, and even life or death'" (citing ROBERT STAPLES, INTRODUCTION TO BLACK SOCIOLOGY 250 (1976))). *See generally* Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Ian F. Haney Lopez, *Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Chester M. Pierce, *Psychiatric Problems of the Black Minority*, in AMERICAN HANDBOOK OF PSYCHIATRY 512 (S. Arieti ed., 1974). Obviously, a full exploration of the rich body of literature that constitutes critical race theory is well beyond the scope of this article. However for a good introduction to the literature see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

283. *See generally* Davis, *supra* note 282, at 1565-76. Professor Davis defines microaggressions as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." *Id.* at 1565 (footnotes omitted). These microaggressions "simultaneously sustain defensive-deferential thinking and erode self-confidence in Blacks." *Id.* at 1565-66 (citing to Chester M. Pierce, *Unity in Diversity: Thirty Years of Stress* 17 (1986) (unpublished manuscript) (on file with author)). Moreover, "[b]y monopolizing perception and

attitudes and society's attitudes, both conscious and unconscious, toward race.²⁸⁴ Professor Charles Lawrence explains:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites.²⁸⁵

In other words, it is impossible for people to not have strong perceptions and attitudes about race based upon their own race and background.²⁸⁶

The ramifications of living in poverty have been found to be equally devastating and subordinating. Not only are the economic conditions extremely difficult, but persons forced to live in poverty are far more likely to suffer from the ill-effects of poor educational systems, deficient or non-existent health care, inadequate housing or homelessness, hunger, social isolation, police brutality, environmental health hazards, racial discrimination, high crime rates, and substance abuse addiction.²⁸⁷ How these stressors impact a person's perspective obviously will vary with each person and each situation. Yet, it is apparent that any one of these circumstances, and especially a combination of them, has the capacity to alter one's life in a myriad of ways.

One of the few studies to even look at these issues in the context of child protection proceedings and the attorney-child client relationship found that, when black children were represented by black attorneys, or when white children were represented by white attorneys, the odds that the children would be removed from their home were reduced substantially.²⁸⁸ The researchers believe that one explanation for this occurrence may "lie in the fact that race remains a substantial social and

action through regularly irregular disruptions, they contribute to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks." *Id.*; see also Pierce, *supra* note 282, at 515 (defining microaggressions as "white putdowns, done in automatic or unconscious fashion").

284. See Lawrence, *supra* note 282, at 321-30 (describing racism as both a crime and disease and examining unconscious racial motivations).

285. *Id.* at 322 (footnote omitted); see also Pierce, *supra* note 282, at 513.

286. See Pierce, *supra* note 282, at 513 (concluding that "[i]n almost any instance of black-white negotiation, the black sees things one way, while the white see them differently").

287. See generally HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* 5 (1995); JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 32-39 (1995); Federle, *supra* note 31, at 1237-43; Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States 1970-1980*, in *THE URBAN UNDERCLASS* 235, 249-50 (Christopher Jencks & Paul E. Peterson eds., 1991); Charles N. Oberg et al., *A Portrait of America's Children: The Impact of Poverty and A Call to Action*, 4 *J. OF SOC. DISTRESS & HOMELESS* 43, 45-53 (1995).

288. See Kelly & Ramsey, *supra* note 6, at 438.

communicative barrier and consequently, where no barrier exists among attorney, client, and parents, greater degrees of empathy and cooperation may help to avoid a drastic custodial disposition such as removal.”²⁸⁹

2. The Applicability of the Theoretics of Practice Movement

Further support for the need to specifically acknowledge and recognize the impact of differences in race, ethnicity, and class on one’s lawyering and relationships with clients can be found in a relatively new and developing scholarly literature known as the “theoretics of practice” movement.²⁹⁰ This new body of literature has begun to apply critical race theory and multi-disciplinary knowledge concerning power, subordination, and marginalization to the study of lawyering.²⁹¹ The significance of this literature is its concern regarding prevailing practices of lawyering for “lower income persons”²⁹² and persons from disadvantaged backgrounds, and its focus on the need to “situate their work in the lives and in the communities of the [clients].”²⁹³ One of the primary goals of this approach to lawyering is the empowerment of the client through the relationship that the attorney and client develop together and the collaborative lawyering efforts in which they work together.²⁹⁴ “Rebellious lawyers” emphasize the need to work with, not

289. *Id.*

290. See, e.g., Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992). Depending on one’s focus this new literature also has been called “rebellious lawyering,” see GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE (1992) [hereinafter REBELLIOUS LAWYERING], “collaborative lawyering,” see Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000), or “community lawyering,” see, e.g., Shauna Marshall, *Mission Impossible: Ethical Community Lawyering*, CLINICAL L. REV. (forthcoming Jan. 2001).

291. Some of the leading proponents of this movement are Professors Anthony V. Alfieri, Gerald P. Lopez, and Lucie E. White. For complete lists of their works, see Piomelli, *supra* note 290, at 432 nn.27, 25, and 26 respectively. Clearly, a full analysis of this new theoretical approach to lawyering far exceeds the thesis of this paper. For an excellent and recent synopsis of the literature, as well as a discussion of those who critique it, see *id.* at 427.

292. Professor Piomelli explains why it is preferable to use the term “lower-income” rather than “poor.” He finds that the latter term connotes “pitifulness.” Moreover, he maintains that “some of the authors of this new scholarship do not limit their focus to representing those with the very lowest incomes.” *Id.* at 423 n.23.

293. Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989) [hereinafter Lopez, *Reconceiving Civil Rights Practice*].

294. “At the level of practice, the most significant common theme of this literature is its commitment to more active client participation in the framing and resolution of disputes What is different about the new scholarship is its call to involve clients in the actual implementation of remedial strategies.” Piomelli, *supra* note 290, at 440; see also REBELLIOUS

for, their clients and to constantly be aware of how the dynamics of power shape every aspect of the clients' lives and experiences.²⁹⁵

In sum, the theoretics of practice movement aims to critique and improve the attorney-client relationship and the performance of attorneys who work with lower income adult clients by studying how preconceived and unconscious beliefs based on differences in culture and background impact the ability to competently lawyer.²⁹⁶ For example, one legal scholar looked to social science research and concluded the following:

Cultural differences may have several effects. They can lead to misunderstandings between counselor and client. They can interfere with the establishment of rapport and trust between counselor and client. Cultural differences may also alienate the client from the source of help. Additionally, if the counselor is unaware of cultural differences, the counselor may incorrectly analyze an interaction with the client. Moreover, the counselor may fail to fully appreciate that his/her role is dynamic and impacts on any given interaction with the client.²⁹⁷

Another declared that it is necessary to take gender, race, and class into consideration in order to answer the following questions:

[H]ow are lawyers to understand the 'individual makeup of each client?' How are we to learn 'who she 'really' is?' How are we to establish a 'counseling dialogue?' How are we to 'help clients resolve

LAWYERING, *supra* note 290, at 38-82; Lopez, *Reconceiving Civil Rights Practice*, *supra* note 293, at 1608-57; Lucie E. White, *Collaborative Lawyering in the Field? On Mapping Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 157-61 (1994).

295. See Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 629 (1991) (imploring advocates to "listen [] to and giv[e] voice to client stories" as a way of beginning to overcome some of the power imbalances between clients and attorneys); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 REV. L. & SOC. CHANGE 369, 375, 375-79 (1982-83) (describing a "power-oriented" approach to law practice); Piomelli, *supra* note 290, at 439-40 (summarizing how collaborative lawyering scholars conceptualize power); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21-58 (1990) (examining how a client's subordination affects her ability and willingness to participate in attorney-client relationships and formal legal proceedings).

296. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 377 (1997) (studying "(1) how the lawyer's unconscious racism and cultural bias may impact the attorney-client relationship; and (2) how the client's cultural experiences and internalization of microaggressions impact the client's view of the relationship with not only the lawyer, but, also, the law"); see also Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 791-92 (1992) (discussing how lawyers' depiction of clients as "dependent," "incompetent," or "deviant" serve to maintain clients in these roles).

297. Jacobs, *supra* note 296, at 377; see also *id.* app. at 413 tbl. 1 (containing examples of some possible verbal and non-verbal sources of miscommunication between cultural groups).

problems?' How are we to assign 'maximum value' to client decision making? Finally, how is a client to 'hear' what we have to say and 'see' what we have to show?²⁹⁸

While the significant issues presented by the age and maturity levels of child clients, as well as the context of child protection proceedings, may have enormous implications for the relevance of this literature to attorney-child client relationships, it does not follow that this literature is irrelevant and unimportant to child advocates. For example, it is an inescapable fact that race is a factor in Andrew and Brenda's lives and in the life of their attorney.²⁹⁹ It will affect Andrew and Brenda's understanding of and relationship with their attorney, as well as with court officials, child welfare agency personnel, and everyone else who takes part in child protection proceedings.³⁰⁰ Similarly, race will impact the lawyer's understanding of Andrew and Brenda, her interactions with them, and her ability to communicate with Andrew, Brenda, Ms. Jones, and any other family or community member. Ultimately, what happens between Andrew and Brenda and their lawyer may have both subtle and profound effects on the lives of Andrew and Brenda. Not only will it likely impact the decision made by the lawyer on behalf of Andrew and Brenda, but it will tremendously affect Andrew and Brenda's willingness and ability, both now and in the future, to participate in the proceedings, work with their lawyer, and understand what is occurring.³⁰¹

298. Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y. L. SCH. L. REV. 7, 18-19 (1990); see also Hing, *supra* note 275, at 1810 (acknowledging that "by knowing more about [the client's] race and culture and by being cognizant of our differences, I may avoid making inappropriate assumptions and establishing false expectations and thereby improve my ability to communicate with her"); Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 134 (1999) (noting how "attorney perceptions of clients are influenced by stereotypes"); White, *supra* note 295, at 21-58 (illustrating through a case example how and why the recognition of race and class differences is so important).

299. "Cognitive development around three years of age permits a child to become aware of racial difference and it is here that he or she can first directly experience the effects of racism. . . . The effects of racism begin to impact children more directly after eight or nine years of age." James P. Comer, *Racism and the Education of Young Children*, 90 TCHRS. COLLEGE REC. 352, 354-55 (1989).

300. "Somewhere between eight and twelve children begin to 'place' themselves and their families in the social status structure that they have begun to observe. They begin to internalize the attitudes about themselves held by powerful individuals in their environment — parents, teachers, others — and they often act on or react to these expectations in a self-fulfilling manner." *Id.* at 355.

301. See Jeanne B. Robinson, *Clinical Treatment of Black Families: Issues and Strategies*, SOC. WORK 323, 325 (1989) (finding that differences in race significantly impact on the relationship that is developed between a clinical social worker and her client and on the effectiveness of counseling); Chalmer E. Thompson et al., *Counselor Content Orientation, Counselor Race, and Black Women's Cultural Mistrust and Self-Disclosures*, 41 J. OF COUNS.

Professor William Kell has begun to focus on the very important question of how the theoretics of practice movement can inform and aid child advocates.³⁰² His application, however, is limited to exploring how this literature can guide child advocates in overcoming differences in age.³⁰³ Absent from his analysis is an examination of how differences in race, class, and ethnicity may impact lawyering for children. Yet, knowledge of lawyering for adults of different backgrounds stresses that such an understanding is essential, particularly considering that such differences factor into lawyering activities and the attorney-child client relationships that develop. Consequently, there is a great need for scholars and practitioners, in a variety of disciplines, to begin to broach these questions.

Our ability to understand our child clients' lives and communities, as Professor Peters calls upon us to do, depends on our ability to open ourselves up, to listen, to question when we do not understand, and to recognize that there is not one ideal norm, but rather that differences exist.³⁰⁴ An analysis of exactly how these principles and approaches are incorporated into our lawyering is beyond the scope of this article. Clearly, there is a great need for more in-depth exploration of why and how differences in race, ethnicity, and class impact our lawyering for children and how we might improve our representation based on our awareness of these differences. Unless we take the time to develop this deeper understanding, our lawyering will be lacking and our assessments of what is best for our young child clients might still be based on our own value systems rather than on a contextual understanding of their lives.

PSYCHOL. 155, 155 (1994) (maintaining that "[s]tudies have shown that Black clients report lower levels of rapport with White counselors than with Black counselors, prefer Black counselors to White counselors, and report greater counseling satisfaction with racially similar counselors than with racially dissimilar counselors").

302. See Kell, *supra* note 76, at 636, 642-45. Specifically, he finds that this literature "demonstrate[s] the need for child advocates to re-examine how they approach client relationships." *Id.* at 636.

It is important to recognize that to a certain extent Professor Buss, through her analysis of whether children can be empowered, also has begun to apply this literature to lawyering for children. However, my emphasis is somewhat different and broader. I believe we need to consider and build upon this literature because it contributes greatly to our general understanding of how our clients' diverse backgrounds will impact our attorney-child client relationships, the child clients' experiences in the legal proceeding, and the outcomes of the proceedings. It is the latter focus that I believe likely will be important to our efforts at improving the representation of children.

303. Differences in race and class are only mentioned as one of many factors to consider in trying to understand a child's view of the world. See *id.* at 644.

304. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 31-33, 70-81 (1987).

VII. SOME ALTERNATIVE AND MORE FEASIBLE RECOMMENDATIONS

Given that the requisite support for the improvement of lawyering for children has not been forthcoming and is not likely to increase in the foreseeable future,³⁰⁵ it is important to consider less costly alternatives that can immediately aid in ensuring that children receive adequate representation and that the unique needs and interests of each child is and remains the focus of the proceeding. With the exception of my last recommendation in Section D, which is limited to the representation of young children, the following suggestions concern children of all ages who are involved in child protection proceedings. As I stated above, however, none of these suggestions, either individually or taken together, would protect the interests of young children to the same degree as would a legal representative following the model proposed in Part VI.³⁰⁶

A. Training

This article has focused on concerns related to discretion and bias in the representation of children and has discussed ways to reduce such bias and discretion in that representation. The concerns regarding discretion and bias, however, are not limited to lawyers for young children. Judges, representatives of the child welfare agencies, and parents' attorneys also are not immune from bias and operate with discretion.³⁰⁷ Thus, there is a serious need for mandatory, higher quality, and more comprehensive education of all professionals involved in the child protection system (i.e., representatives for the children, attorneys for the other parties, judges, and caseworkers).³⁰⁸ Training is a relatively inexpensive undertaking, a proposal that is supported by numerous persons and entities,³⁰⁹ and, perhaps most

305. Numerous commentators have called for an increased level of support for attorneys representing children in child protection proceedings. However, these pleas have not been heeded. See, e.g., Walter, *supra* note 3, at 58.

306. It is important to note that the recommendations outlined in Sections A, B, and C could be implemented in conjunction with the approach to lawyering outlined in Part VI. The needs of children forced to participate in our child protection system would be best met if this were to occur.

307. See Elaine Pinderhughes, *Developing Diversity Competence in Child Welfare and Permanency Planning*, in *THE CHALLENGE OF PERMANENCY PLANNING IN A MULTICULTURAL SOCIETY* (Gary R. Anderson et al. eds., 1997) (highlighting the need to train child welfare caseworkers on how to work with diverse populations).

308. See Appell, *supra* note 30, at 602 (concluding that the "[i]mproved training of caseworkers, lawyers, and judges could help ameliorate many . . . problems").

309. See *supra* notes 76, 122 and accompanying text; *infra* note 311 and accompanying text.

importantly, an activity that has demonstrated significant results.³¹⁰ Consequently, the inclusion of more exhaustive and ongoing educational programs should be an important part of any reform package.

Such an educational program would need to not only focus on issues concerning child abuse and neglect, confidentiality, child protection systems, child development, and family systems, but also emphasize the significance of differences in race, class, and culture, and discuss how lawyers and other representatives can work with children and families from different backgrounds.³¹¹ Disciplines other than law have created comprehensive training regimens based on the need for cultural competency.³¹² Some concentrations have even gone so far as to integrate cross-cultural training into their general curriculum.³¹³ While

310. See Duquette & Ramsey, *supra* note 73, at 342-91 (demonstrating through a study the benefits of training in improving the quality of representation).

311. See Espinoza, *supra* note 282, at 910 (calling for race-conscious education); Hing, *supra* note 275, at 1810-11 (explaining that “common sense, without training, is dangerously fashioned by our own class, race, ethnicity/culture, gender and sexual background”); Jacobs, *supra* note 296, at 348 (maintaining that race neutral training of interviewing and counseling skills may actually lead to continued marginalization of clients of color); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1041 (1997) (exhorting legal academics to develop teaching mechanisms that train law students to be attentive to the context of their clients’ lives); Hartmann, *supra* note 106, at 247 (concluding that “training will help make the ‘best interests’ decision less subjective”).

312. See Sharon-Ann Gopaul-McNicol, *A Theoretical Framework for Training Monolingual School Psychologists to Work with Multilingual/Multicultural Children: An Exploration of the Major Competencies*, 34 PSYCH. IN SCHS. 17, 17 (1997) (focusing on the necessity of cross-cultural training for school psychologists so that they can address the psycho-educational needs of a culturally and linguistically diverse student body and proposing “major competency skills . . . needed by all school psychologists”); Derald Wing Sue et al., *Multicultural Counseling Competencies and Standards: A Call to the Profession*, 20 J. MULTICULTURAL COUNS. & DEV. 64, 74-80 (1992) (describing 31 multicultural counseling competencies and explaining the need for such competencies); see also APA *Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations* (last modified Jan. 29, 2000) <<http://www.apa.org/pi/guide.html>>; *Psychological Testing of Language Minority and Culturally Different Children* (last modified Jan. 29, 2000) <<http://www.apa.org/pi/psych.html>>.

313. See SHIRLEY JENKINS, *ETHNICITY AND RACE: CRITICAL CONCEPTS IN SOCIAL WORK* (Jacobs & Bowles eds., 1988) (stressing the need to integrate ethnic studies into the social work curriculum); Celia Jaes Falicov, *Training to Think Culturally: A Multidimensional Comparative Framework*, 34 FAM. PROCESS 373, 377 (1995) (presenting a multi-dimensional framework that “takes culture into the mainstream of all thinking, teaching, and learning in family therapy”); Gopaul-McNicol, *supra* note 312, at 26 (emphasizing that in the training of school psychologists the “[i]nclusion of cultural and ethnic content should be infused in each course, not taught as a single course only” and that there should be “aggressive recruitment of faculty members and students of various cultural backgrounds”); Robert-Jay Green, *Training Programs: Guidelines for Multicultural Transformation, in RE-VISIONING FAMILY THERAPY: RACE CULTURE AND GENDER IN CLINICAL PRACTICE* (McGoldrick ed., 1998) (advocating for changes in the educational institutions and programs that train family therapists).

we must be mindful of differences in approach and purpose, this likely is a good starting place. In sum, I wish to strenuously emphasize the need for thoughtful, comprehensive, and mandatory training programs for all participants in the child protective system.

B. Proposed Changes in State Laws and/or Child Welfare Agency Policies

In addition to the need for increased training, state regulations or child welfare policies should be amended to reflect supplemental requirements on the part of child welfare agency representatives.³¹⁴ These proposed mandates would require all non-attorney representatives of child welfare agencies, otherwise known as caseworkers, to express to the court all services and placements which the caseworker believes are necessary and in the best interests of the children and families who are the subject of these proceedings even when agency policy conflicts with the provision of such services or placements.³¹⁵ Moreover, when a shortage of resources prevents the child welfare agency from providing what would be in the children's best interests, the caseworker must make this information known to the court as well.³¹⁶

314. The representative of a child welfare agency may be an attorney or a caseworker (who may or may not be a licensed social worker) or both. However, with respect to my proposal, I am only referring to non-attorney representatives. Mandating attorneys to follow these proposals might interfere with their ethical obligations as legal representatives for the agency.

315. This recommendation could be implemented in a variety of ways. First, state regulations governing the responsibilities and conduct of employees of child welfare agencies could be amended. Second, formal guidance could be provided by the federal child welfare agency (the Federal Department of Health and Human Services). It is common for this federal agency to issue policy memoranda to the state child welfare agencies. Third, internal policies of state or county child welfare agencies could be supplemented with new provisions. Given the likelihood that caseworkers will have a difficult time complying with this new requirement, the first option, which is the only one that is legally binding, might be preferable.

This policy change would be buttressed if recommendations made by Howard Davidson, Executive Director of the ABA Center on Children and the Law, also were followed. Mr. Davidson cites the need for all caseworkers to have at least college degrees in social work, counseling, or a directly related field and for them to "be legally required to attend a pre-service academy similar to the intensive professional skills education that police, firefighter, and emergency medical technician trainees typically receive, with rigorous tests of competencies mandated at the completion of the training." Davidson, *supra* note 32, at 773. Moreover, Mr. Davidson recommends that "children ombudsmen" agencies be established, "well-publicized places where parents, other concerned adults, or children can register complaints about infringement of rights, lack of services, improper care, etc." *Id.* Finally, he proposes that child welfare agencies and juvenile courts be required "to make specific findings on the relationship of family poverty to children's entry or continuation in the child welfare system." *Id.* at 775.

316. Such a change in law and agency policy also might need to include protections for the caseworkers who will be forced to make such disclosures.

Reviewing the circumstances of Andrew and Brenda helps to illustrate the importance of this new requirement. For example, under my proposed plan, a caseworker assigned to assist Andrew, Brenda, and their mother would be required to alert the court of the existence of Ms. Jones and the suitability of Ms. Jones as a temporary caregiver, despite the agency policy prohibiting placement of children with unlicensed caregivers who are not blood-relatives. Likewise, the caseworker would have to make known to the court the fact that Andrew and Brenda's mother needed drug rehabilitation services even if the child welfare agency was not able to provide the services because of a shortage of appropriate resources.

Whether the above-described alteration in policy will be able to overcome the strong force of internal pressure that caseworkers experience to streamline services and follow agency procedures and policies is unclear; however, it may set a different tone and, hopefully, will result in some caseworkers informing the court when the agency is not able to make decisions or provide services that are consistent with the best interests of the children and their families. In addition, it may inspire some caseworkers, especially those who are relatively new to their positions, to avoid accepting as inevitable certain resource constraints and policies that may negatively impact some children and families. My hope is that this change in policy will encourage caseworkers to be responsible to both the agency and the children and families that have been assigned to them for assistance.³¹⁷

Of course, this new reporting requirement will not guarantee an increase in services and resources for children and families. Judges who become aware of problems or deficiencies will not necessarily order the needed changes, and, even if they do, there is no certainty that the orders will be followed.³¹⁸ While my ultimate objective is to be more responsive to the needs of children and families, I understand that, given the serious and long-standing deficiencies that exist in all of the structures that make up our child protection system, additional reporting will not change the system immediately. It is, however, my hope that by mandating caseworkers to report the needs of children and families

317. By emphasizing the need for this dual allegiance, I do not mean to imply that caseworkers currently do not feel a sense of responsibility to the children and families assigned to their caseloads. Rather, I aim to stress the impossible situation that many caseworkers find themselves in of having to balance the desire to meet the needs of children and their families with the incredible pressures that come from bureaucratic constraints which unfortunately limit the services and resources available to these same children and families.

318. See Buss, *Parents' Rights*, *supra* note 11, at 435 (noting that juvenile court orders are often not followed).

notwithstanding shortcomings in policies or resources, all parties, especially our child welfare agencies and juvenile court judges, will become more aware of the limits of our child protection system, be required to confront these issues, and hopefully respond appropriately.³¹⁹

C. Additional Responsibilities of Juvenile Court Judges

My proposal with respect to child welfare agencies likely will have a greater impact when combined with additional responsibilities I propose being placed on juvenile court judges. In addition to increased training, I recommend the development of questionnaires that juvenile court judges would be required to complete at each hearing that occurs in the course of a child protection proceeding. The enactment of such a requirement could be in the form of an advisory or directive from a state's judicial association. Alternatively, and more formally, the requirement could take the form of a legislative amendment to the statute, regulations, or court rules that govern a state's or county's child protection proceedings.

Different questionnaires would need to be developed for each stage of a child protection proceeding. At a minimum, however, questioning at each hearing would cover the issues of where the children are placed, the needs of the children and families, and the services that are being provided to address these needs. The questions also would be tailored to the different phases of a child protection proceeding. For example, at a disposition hearing, in addition to the above issues, a judge would be required to inquire about the need for assessments, such as specific medical and/or psychological evaluations. In addition, if the children have been removed from the care of their parents, and the plan has not been changed from one of reunification, a judge would have to obtain a description of the efforts being made to achieve reunification, including the frequency of visitation between parents and their children and between siblings (if not placed together), and the provision of necessary

319. The suggestion that our judicial system has a role to play in the development or reform of public policy may be viewed as controversial. However, upon closer examination, significant precedent exists. Partnerships between juvenile court judges and child welfare officials, attorneys, and other interested persons aimed at improving the child protection system have occurred and are still taking place in most, if not all, jurisdictions. Many of these are being supported by federal funds. On a related note, juvenile court judges in California voted to oppose Proposition 21, a state initiative on the March 7, 2000 ballot that called for the enactment of harsher penalties for various juvenile crimes and changes in state laws concerning juvenile delinquency. See Catherine Bridge, *Lining Up Against Prop 21*, THE RECORDER, Feb. 17, 2000, at 1; Bob Egelko, *Judges Oppose Initiatives on Teens*, SAN DIEGO UNION-TRIBUNE, Jan. 29, 2000, at A-3.

ameliorative services to address the cause and effects of the maltreatment.

These questionnaires may be a more formal version of the process some judges already follow in practice. It certainly is what most, if not all, juvenile court judges would want to do if they had the time. However, my own experience, as well as a more general assessment of the current functioning of the juvenile courts, unfortunately indicates that our juvenile court systems are generally forced to rush through child protection proceedings, allotting only a few minutes for each hearing.³²⁰ By requiring judges to seek out this more detailed information at every hearing, I hope to put them in a much better position to more systematically and thoroughly monitor and review the welfare of the children that appear before them and, where appropriate, intervene to protect the children.

A concern about this recommendation is that judges currently do not have the time to devote to in-depth questioning and investigation and, therefore, implementation of this requirement would require greatly increased resources. While this is a valid point in the short term, it is likely that the need for additional judicial resources will lessen over time. Once all of the parties become accustomed to the fact that such questions will be asked by the judge at each hearing, they will begin to gather such information as part of their hearing preparation and practices. Thus, the time it takes for the court to collect and record the information will diminish.

Hopefully, the court's insistence on receiving this information will encourage all of the parties to think comprehensively about the needs of the children and their families and, in turn, the necessity of developing programs and practices to better address the identified needs. When weighed against the fact that this additional requirement likely will increase the probability that the child welfare agencies and the courts will be more responsive to the needs of the children and their families, any minimal increase in resources needed to enable the juvenile court judges to implement this recommendation is not significant.

D. An Alternative Model to Consider for Representing Young Children

My final thoughts have the potential to improve the quality of representation that some young children currently receive, but is not one that I make without a great deal of trepidation. Yet, if a commitment to

320. See *supra* notes 53-63 and accompanying text (explaining some of the shortcomings of many juvenile courts).

dedicate the resources necessary to improve and augment legal representation provided to children is not supported, then inadequate, haphazard, and biased representation likely will persist. In this instance, it would be worth studying whether some form of a CASA program might provide an alternative model for the representation of young children that can ensure that these children are represented adequately and in a less biased manner. In particular, we need to focus on the degree of involvement needed by lawyers, the effectiveness of CASAs, especially in the courtroom, and the ability to recruit a sufficient number of CASAs.³²¹ Whether any CASA model would ever be capable of providing adequate representation to all young children is unclear. However, in some circumstances, it would appear that such a system might be preferred over the status quo. Yet, without additional information and study, it is impossible to know. Therefore, this final recommendation only calls for additional study.

As was briefly mentioned above, a CASA is a trained, volunteer, lay advocate.³²² Programs that recruit, train, and coordinate the provision of representation by CASAs exist in every state.³²³ Some CASA programs are configured so that a CASA is paired with an attorney representative, while in other programs, the CASA volunteer may be on his own or loosely supervised by an attorney.³²⁴ Under any type of

321. As is stated above, this recommendation is the only one that is limited to young children. Given that there is little, if any, controversy over the provision of legal representation to older children who are competent, I limit this discussion of proposed changes to the type of representation that is provided to young children only. It is my hope that, at least for older children, those able to voice their interests and direct the scope of representation, my preference, as well as the preference of many others, for the provision of legal representation will be followed.

As for guidance on how to determine a young child, I, like others, am reluctant to pinpoint an exact age. See Buss, *Developmental Barriers*, *supra* note 11, at 920, 955. However, given the significance of this distinction, as well as literature that points to the age of seven as a critical turning point, I would err on the side of designating a child as an older child so that more children will receive representation by lawyers.

322. Some jurisdictions use trained volunteers, but do not describe them as CASAs. See NATIONAL STUDY, *supra* note 12, at 6. For purposes of this discussion, I will refer to all trained volunteers, including those organized outside of the formal CASA program, as CASAs.

323. See *supra* notes 4, 72-74 and accompanying text. For more details about the recruiting and screening process for CASAs, see Adams, *supra* note 4, at 1468-69.

324. National Standards of the National CASA Associations require that each program recognized by the Association operate with access to legal counsel. See Howard Davidson, *Collaborative Advocacy on Behalf of Children: Effective Partnerships Between CASA and the Child's Attorney*, in *LAWYERS FOR CHILDREN* 17, 25 (ABA Center for Children and the Law ed., 1990). However, not every lay advocacy program is recognized by the National CASA Association. Moreover, having access to an attorney does not guarantee that the attorney has the necessary expertise, nor does it ensure that CASAs have adequate support. See Duquette & Ramsey, *supra* note 73, at 349 (explaining that in some communities, "the volunteer may be

CASA model, the typical caseload of a CASA consists of children from no more than three families, and often a CASA is only responsible for one child or one sibling group at a time.³²⁵ The training of CASAs, their responsibilities, and the point at which they are appointed in a child protection proceeding vary from jurisdiction to jurisdiction.³²⁶ However, all CASA programs provide training.³²⁷ In most programs, this training consists of instruction on the roles and responsibilities of the CASA, confidentiality, child abuse/neglect, permanency planning, the hearing process, the investigation of cases, the interrelationships between various agencies, child development, and cultural awareness.³²⁸ Moreover, most programs mandate that a CASA spend a certain amount of time per week with the children for whom they have been appointed as advocate and that they make a commitment to remain involved with the children and/or with the case for a significant period of time.³²⁹

The strengths of the CASA programs can be found in the commitment and dedication of the volunteers, the extensive training that CASA programs provide, and the fact that each volunteer pledges to devote a significant amount of time to his work with the children.³³⁰ It is these factors, among others, that put CASAs in the unique position of being able to get to know the children that are assigned to them and of learning about and understanding their lives and needs. Some relatively recent studies on the effectiveness of representation for children in child

paired with an attorney and become the 'eyes and ears' of the child's lawyer," while in other areas, the volunteer may be on his own); Hertz, *supra* note 4, at 332-33 (remarking that models of representation that include volunteers vary). A survey conducted by the National Court Appointed Special Advocate Association in 1992 found that in approximately 60 percent of CASA programs, volunteers served as the child's sole representative. *See id.* at 337.

325. *See Adams, supra* note 4, at 1470.

326. However, the National Court Appointed Special Advocates Association has developed national standards. *See id.* at 1468.

327. *See NATIONAL STUDY, supra* note 12, at 42 (concluding that "all CASA and volunteer programs require training"); Adams, *supra* note 4, at 1468-69 (discussing mandatory training program).

328. *See Adams, supra* note 4, at 1468-69. Most training programs for CASAs include an initial training program lasting from nineteen to forty hours combined with ongoing training. For example, in San Francisco, CASAs are required to make an eighteen-month commitment. However, it is significant to note that despite these requirements the average tenure of a CASA is only 1.5 years, compared to 2 years for staff attorneys and 5 years for private attorneys. *See NATIONAL EVALUATION, supra* note 64, at 20.

329. *See FINAL REPORT, supra* note 12, at xiv (finding that CASAs have been very effective in the tasks of investigation and monitoring); *see also Hertz, supra* note 4, at 340-41.

330. *See NATIONAL EVALUATION, supra* note 64, at 18 (concluding that the two reasons for the effectiveness of CASAs is their "personal motivation" and their "low caseloads"); *see also Hertz, supra* note 4, at 340-41 (recounting the results from evaluations of the effectiveness of the lay volunteers).

protection proceedings suggest that CASAs are able to provide adequate representation.³³¹ In fact, one study found that “compared to attorneys, the CASA models were clearly superior.”³³²

Despite this support, several significant concerns exist. First, it is unclear from the studies that have been conducted to date whether CASAs alone are providing the representation, or if they are working with another representative who may be an attorney. Where the CASAs clearly are functioning as the sole representative, it is unclear if the CASAs are supervised by attorneys or other experienced advocates, and, if so, the degree of the supervisors’ involvement.³³³ For example, one report declared that trained lay advocates, law students, and trained attorneys performed substantially similar as child advocates, and that all of these types of representatives performed better than untrained attorneys.³³⁴ In actuality, the CASAs that were studied worked under the supervision of an experienced, trained attorney and the supervising attorney “appeared in approximately sixty-five percent of the hearings . . . [and handled all] cases that went to contested adjudication.”³³⁵

Secondly, and related to the previous concern, representation of young children by CASAs alone still leaves us with the question of whether lay advocates will be able to master the legal knowledge, advocacy skills, and expertise necessary to adequately protect the interests of young children, and whether children represented by CASAs will be able to be respected and treated as an equal party by the

331. See NATIONAL EVALUATION, *supra* note 64, at 20; Duquette & Ramsey, *supra* note 73, at 389. But see FINAL REPORT, *supra* note 12, at xix (suggesting that no single GAL model is superior to others and that an “optimal approach” would involve the combined resources of “attorneys, lay volunteers, and caseworkers to perform the broad range of functions and services”).

332. NATIONAL EVALUATION, *supra* note 64, at 20. “The CASA’s success appeared to be due to their intimate knowledge of the case. They conducted extensive investigations, monitored the case closely for its duration and developed good relationships with their child clients. CASAs were most effective in ensuring the family was receiving services that would lead to family reunification.” *Id.* at 18. This study also found that representation by private attorneys was ineffective and the weakest form of representation, and that, while the staff attorney model showed evidence of effectiveness, it was affected by caseloads that were too high. See *id.* at 15-21.

333. For example, the characterization of the lay volunteer model in the National Evaluation is vague as to the degree to which the CASAs are supervised by attorneys. When defining representation by CASAs, it merely states that “[l]ay volunteers serve as the GALs under the supervision of a staff attorney, panel attorneys, or the public defender. Volunteers receive training, conduct all investigations and follow-up and appear in court.” NATIONAL EVALUATION, *supra* note 64, at 2. The extent and manner of supervision is never explained.

334. See Duquette & Ramsey, *supra* note 73, at 389-90.

335. *Id.* at 360.

judge and other parties in the proceeding.³³⁶ These concerns are supported by at least one study that looked at the different tasks that representatives are called upon to do and concluded that CASAs did not perform very effectively in those tasks involving negotiation and “courtroom activities.”³³⁷

Finally, a question remains as to whether there would ever be an adequate number of dedicated volunteers if a jurisdiction were to expand its use of CASAs, or substitute CASAs for some attorneys. This concern becomes even greater when one considers the time and emotional commitment required of CASAs. It also may be a more serious concern in large, urban settings with high child protection dockets. Most studies of the effectiveness of representation for children involved in child protection proceedings fail to address this concern, and those few that do note that it is “sometimes difficult to recruit volunteers.”³³⁸

Having reviewed the reported strengths and weaknesses of CASA programs, it appears that CASAs are strongest when they receive the training and have the time necessary to appreciate the importance of gaining a deep understanding of the lives and backgrounds of the children they are representing. However, CASAs are lacking in their ability to communicate the interests and needs of the children in the courtroom and other adversarial settings (i.e., pre-trial negotiations) that are part of child protection proceedings. Therefore, it may be worth studying whether we can recruit and appropriately train a sufficient number of CASAs and how CASAs and lawyers can work together so that we maximize the reported strengths of CASAs and use lawyers to help support them where they are weak.

A few commentators before me have suggested models that combine representation by lay advocates and attorneys. Recently, Professor Appell argued that the best model of representation for young children is one where the attorney would represent a specially trained and well-supported lay advocate instead of the child.³³⁹ Moreover, in 1990, Mr. Davidson maintained that the best model of representation is “both a

336. See Buss, *Developmental Barriers*, *supra* note 11, at 954-55; see also *supra* Part V and notes 237-43 and accompanying text.

337. See FINAL REPORT, *supra* note 12, at 6-15 (concluding that CASAs should be accompanied by and represented by an attorney in all courtroom proceedings and negotiations and that attorneys were more effective than CASAs in having their recommendations adopted as part of the court proceedings).

338. NATIONAL EVALUATION, *supra* note 64, at 20.

339. See Appell, *supra* note 95, at 1971-73.

lawyer and a CASA.”³⁴⁰ While there is some merit to the suggestion that all children in child protection proceedings should be appointed both lay advocates and attorneys, it is unlikely that legislatures across the country will do so. Convincing states to not only secure counsel for all children, but also well-trained lay advocates, who may even be compensated for their time, like the model proposed in Part VI, presents serious resource issues. Moreover, if such resources are available, a model such as the one described in Part VI likely would be preferable.

Perhaps another combined model worthy of consideration is one where CASAs provide the majority of the representation of young children, but are supported by child advocacy law offices, which are staffed by one or more trained and experienced attorneys.³⁴¹ It would not be the duty of the staff of these law offices to serve the representational needs of all children. Rather, these offices would: 1) represent a few children in individual child protection matters, most likely those which are contested, legally complicated, or concern a novel or significant legal issue; 2) assist CASAs, generally, by providing legal information and support; 3) monitor the overall operation of the child protection system; and 4) advocate for positive systemic change. Not only would this structure provide legal assistance to CASAs and legal representation for those children embroiled in difficult child protection proceedings, but the structure also would enable experienced child advocates to obtain a first-hand and ongoing understanding of the problems in the system while still allowing them to have the time to press for systemic change.

Whether this model of dual representation or any other approach other than the one outlined above in Part VI will be able to provide adequate representation to young children remains unclear. Where a jurisdiction currently does not provide any legal representation to children and also does not provide any attorney supervision to its CASA program, the system clearly would be an improvement and should be

340. Davidson, *supra* note 324, at 21-41; *see also* DUQUETTE, *supra* note 104.

341. For example, in New York City and Baltimore, the cities' legal aid offices maintain specialty units, comprised of attorneys, social workers, and support staff, devoted entirely to the representation of children in child protection proceedings. A major difference, however, between these offices and my proposal is that these offices represent many, if not most, of the children that are brought before juvenile courts due to allegations of child abuse and/or neglect. For an analysis of the effectiveness of having legal services represent children in child protection proceedings, see William Grimm, *Child Advocacy in a Legal Services Program*, in ABA CENTER ON CHILDREN AND THE LAW, *LAWYERS FOR CHILDREN* 98 (1990). A different type of children's law office can be found in San Francisco, where some children are served by a non-profit law office known as Legal Services for Children. This office handles a variety of legal matters affecting children, including a small caseload of child protection matters.

considered. Moreover, in those jurisdictions where attorneys are unable to provide competent representation due to a lack of support, it also may be worthwhile to explore alternative models. Those models that combine the strengths of CASAs and the strengths of attorneys may come closest to a more affordable model that provides representation that is both adequate and less biased. Yet, given all of the concerns articulated above about any wide-scale reliance on CASAs and the significance of the changes proposed, a careful and thorough period of study is all that should be taken at this time.³⁴²

VIII. CONCLUSION

Professor Guggenheim may be correct in asserting that we have entered “Phase Three” of the overall study of the role of counsel for children in child protection proceedings.³⁴³ However, his characterization of the focus of this new phase is mistaken. Rather than exhausting any further energy on the questions of whether and when children should be appointed representatives, we need to keep our focus on how to best provide such representation.

I hope that the preceding analysis demonstrates why young children involved in child protection proceedings need representation and why any movement to eliminate or lessen such representation will only subject already vulnerable children to great risk of harm. Yet, what unfortunately also is evident is that the representation with which all children have been provided to date has been woefully inadequate. Not only because it has been insufficiently supported, but because representatives have lacked guidance as to their roles and responsibilities. Consequently, representatives, especially representatives of young children, have advocated positions that were not reflective of the lives and experiences of the children, but rather, were reflective of the values and views of the representatives.

The question then becomes how can we provide better representation. Professor Jean Koh Peters’ model, which calls for a contextual approach to representation, has taken us several steps forward. Further recognition of differences between the representatives and children in

342. Even the director of the National Court Appointed Advocates Association contends that more study is needed. See Hartz, *supra* note 4, at 340 (asserting that “additional large scale and longitudinal evaluations of volunteer models are needed to determine if volunteer effectiveness is universal”).

343. See Guggenheim, *Reconsidering the Need*, *supra* note 11, at 304. Professor Guggenheim refers to Phase 3 as a re-evaluation of whether and when lawyers should be appointed to represent children.

terms of race, ethnicity, and class, and how these differences impact our representation and the relationships we develop with our child clients will move us even closer to a less biased and more principled form of representation that leads to a solid and deep understanding of the lives of our child clients.

Unfortunately, although I believe it is critical for these children to receive this kind of representation, I also understand that it is not likely to occur given the unwillingness to dedicate resources necessary to provide such representation. I hope that the necessary support will one day soon be provided. Yet, until this occurs, it is worth studying whether less costly alternatives exist which might be able to provide more effective representation that is true to the individual needs of the children and their families. My suggestions in Part VII are aimed at furthering this discussion. However, I must conclude by reemphasizing my main point. The legal interests of all abused and neglected children will best be protected and advanced by well-supported and well-trained lawyers for all children - lawyers who have the time, understanding, and commitment to provide representation that is faithful to the lives of their child clients.