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From Paternalism to Process: Reflections from the Bench on 40 Years of American Child Advocacy

By Erik S. Pitchal¹

As the child advocacy field takes stock of its development over the past forty years – its progress and its setbacks – and considers where it may be going next, I am also marking my fifth anniversary on the Family Court bench in New York City. Having essentially grown up, professionally speaking, in parallel with my field, this seems as good a time as any to trace the points of overlap and observe the ways in which developments in child advocacy have impacted my own approach to work in our field. Having made the transition from advocate to neutral, I have the benefit of still being immersed in child welfare and juvenile justice issues, but enough distance from practice to be able to offer, I hope, a couple of useful notes.²

I am often asked by students and young attorneys if I always wanted to be a judge and how I got to this point in my career. While the idea of eventually becoming a judge crossed my mind during the wonderful year I spent as a law clerk, it was never really a career goal. I was inspired by the example of “my judge,” Robert Patterson, Jr.,³ to be a strong advocate for causes I believed in and to treat people with dignity and respect. He encouraged me to take a job offer from the Legal Aid Society, where he had been president of the board, and with the juvenile division in particular, which had been started by an old friend of his decades earlier.⁴ He knew of my interest in working for and with children, and knew of the many opportunities I would have to make a difference as a front-line lawyer in Family Court.

I was interested in how the law treated children, in part because I had studied education policy as an undergraduate and in part because of a positive experience during my 2L summer working on juvenile delinquency cases in a public defender’s office. In truth, though, I was drawn to this field for altogether more personal reasons. My parents divorced when I was very young and, when I was about eleven, they had what I experienced to be a pitched battle over visitation

¹ Judge, Family Court of the State of New York for the City of New York. Judge Pitchal has been a member of the National Association of Counsel for Children his entire career and has been a board member of the organization for more than 10 years. His full biography is available at https://iapps.courts.state.ny.us/judicialdirectory/Bio?JUDGE_ID=JiMLFtzQDCQLMVrdDJuNow%3D%3D.

² There is a vast literature on American child advocacy, and it goes far beyond the modest scope of this essay to survey and analyze it. Don Duquette and his team at the University of Michigan undertook the task of compiling and summarizing all secondary sources on the legal representation of children from 1974 to 2010; their incredibly valuable contribution is available at http://www.improvechildrep.org/NeedsAssessment/LiteratureReview.aspx#_ftn131. Duquette’s intellectual heft is matched only by the warmth and generosity of his heart. He has been a mentor to countless child advocates over the many decades of his career. My measured sense of where the child advocacy field is headed pales in comparison to his expansive vision. See Donald N. Duquette, *Looking Ahead: A Personal Vision of the Future of Child Welfare Law*, 41 U. MICH. J. L. REFORM 317 (2007).

³ Judge Patterson had a storied career as an attorney before becoming a federal district court judge. See Sam Roberts, *Robert P. Patterson, Jr., Lawyer and Judge Who Fought for the Accused, Dies at 91*, N.Y. TIMES, (Apr. 24, 2015), <https://www.nytimes.com/2015/04/25/nyregion/robert-patterson-jr-lawyer-and-judge-who-fought-for-the-accused-dies-at-91.html>.

⁴ For an excellent history of the Legal Aid Society’s Juvenile Rights Division, see Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497 (2000).

issues in Family Court. I was assigned a guardian ad litem (GAL), who was a lawyer,⁵ and I told her my strong feelings about the substance of my parents' dispute. After the first few appearances, the GAL did not achieve the results I was looking for. I then started asking for something else: I wanted to see the judge and tell her myself what was important to me. It would be about two years before I was permitted to do so, in chambers with a court reporter, the GAL, and no one else.⁶ It would be another year or so before I was permitted to come into the courtroom, after the judge had already made her final decisions (with which, on the merits, I agreed).⁷

By the time I started at Legal Aid Society, I had it pretty firmly in my head that children were entitled to zealous, independent representation and that this advocacy could, and in many instances should, be in direct opposition to their parents. I had no real conception or understanding of the foster care system, but I did enter the field prepared to fight to keep children away from their parents if that was what my clients wanted. At that time, my approach was in one sense consistent with where child advocacy was, and in another, somewhat of an outlier. I was consistent in thinking that children's interests were, to a significant degree, divested from their parents'. In the late 1990's, New York City had close to 40,000 children in foster care,⁸ and almost every child had gotten there with the acquiescence, if not explicit support, of their assigned attorney, known then as "law guardians."⁹ It was unusual for lawyers in my office to oppose the placement of children into foster care, and even more rare to oppose the city's legal intervention into families lives and the court's exercise of child welfare jurisdiction.¹⁰

Where I did not fit in with many of my colleagues was in my firm belief that the role of the child's attorney – especially for older youth who could express themselves cogently – was to advocate for the client's goals, not for what the law guardian thought was best for them. When I started advocating in accordance with my clients' direction, I discovered that I was regularly fighting to get kids who were already in foster care out, and to prevent those who were not yet there from going in. It turned out that children wanted their parents to get help and support, and to do a better job raising them, but they did not want to be separated from their families. They certainly did not want to spend more time than they had to on the inside of what I rapidly learned was a troubled, and at times even harmful, child welfare system.¹¹ I spent the first year at Legal Aid almost exclusively handling cases that were post-disposition, representing children in

⁵ As I learned later, her technical job title was "law guardian." *See infra* notes 9 and 15.

⁶ Conversations in chambers between the child and judge are common in contested custody and visitation matters in New York State, as provided for in *Lincoln v. Lincoln*, 24 N.Y.2d 270 (1969).

⁷ The judge was Hon. Sondra Miller, a well-respected jurist who was later elected to New York State Supreme Court and then appointed to its Appellate Division, where she served with distinction for many years. During the time I was at Legal Aid and she was on the appeals court, I appeared before Judge Miller on an emergency motion I had filed contemporaneously with an appeal regarding an 18-year-old client who was being ejected from foster care over his objection. After I was appointed to the bench myself, I saw Judge Miller (who was by then retired) at a judicial training course. I approached her and told her my story. She asked me if she had "gotten it right" on my case.

⁸ Press Release, Mayor's Press Office, Mayor Giuliani Hails Child Welfare Panel Final Report That Finds ACS Has Made "Remarkable Progress" (Dec. 7, 2000), <http://www.nyc.gov/html/om/html/2000b/pr458-00.html>.

⁹ *See, e.g.*, Diane Somburg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529 (2003).

¹⁰ In this regard, I have to agree with the observations set forth in Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

¹¹ At the time, New York City's child welfare system had been the subject of ongoing litigation for many years. *See, e.g.*, NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE CHILD WELFARE* (2001); *Marisol A. v. Giuliani*, 929 F.Supp. 662 (S.D.N.Y. 1996).

permanency hearings.¹² There were some children who were happy with and well-served by their foster care placement and limited family visitation when I picked up their cases, but many others were desperate to go home. Listening to my clients changed my perspective on the system and my role in it as a child advocate.

I did not know it at the time, but the child advocacy field was in the midst of a sea of change. From the advent of the federal role in child welfare in the 1970s and the mandate of the Child Abuse Prevention and Treatment Act (“CAPTA”)¹³ that states ensured that all children before the juvenile court had a *guardian ad litem* (GAL), the field had been influenced by the *parens patriae* principle.¹⁴ It was thought that judges needed “eyes and ears” on the ground to advise them on what a child’s best interests were. Even though New York, unlike most states, guaranteed a lawyer for each child in dependency cases, our role as defined in statute was to protect children’s interests as well as to assist them in expressing their wishes to the court.¹⁵ In difficult cases, judges did not like when I advocated more for the latter than for my own personal views on the former. At the time, I was a twenty-something white man and did not think I was in much of a position to say what was “best” for most of my clients, who were so different from me in so many ways.¹⁶ To be effective, however, I had to couch my client-directed advocacy in language that made it sound like I was offering a best interests analysis. This was more successful when I did not oppose the court’s making a finding of parental maltreatment and exercising jurisdiction. It was much more difficult to claim that dismissal of the entire case served a child’s best interests, but I did try sometimes. Paternalism¹⁷ was the dominant norm in the entire field for a very long time, written into statutes and practice guidelines, and baked into the basic operating assumptions fueling judges and lawyers alike.

Many trace the birth of the “best interests of the child” norm to Professor Joseph Goldstein and his co-authors of a trilogy of books by that name.¹⁸ The books were revolutionary in that they impelled a reckoning with norms, many of which came to be seen as regressive and distasteful, that had dominated the areas where the law impacted children for a very long time. Goldstein

¹² Spinak, *supra* note 4, at 523–24 (describing the creation of the Permanency Unit at Legal Aid). As part of the federal-state partnership for child welfare, federal law requires any state receiving federal child welfare financing to ensure that every child in its foster care system receive an annual permanency hearing in the relevant state court. At such hearings, the court must determine what the child’s permanency plan is, such as family reunification, adoption, or another planned permanent living arrangement. *See* 42 U.S.C. § 675(5)(C). In New York State, we conduct permanency hearings twice a year, and we inquire into and make orders concerning a variety of issues designed to further children’s permanency, such as the services the parents and children are receiving and the parent-child visitation plan. N.Y. Fam. Ct. Act § 1089 (2007).

¹³ Child Abuse Prevention and Treatment Act, 42 U.S.C §§ 5101-5107 (2010).

¹⁴ 42 U.S.C. § 5106(a)(b)(2)(B)(xiii) (2018).

¹⁵ N.Y. Fam. Ct. Act § 241 (2010).

¹⁶ Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. LAW. REV. 76 (1984).

¹⁷ The definition of paternalism is somewhat contested in the academic literature on law, philosophy, and behavioral economics, but a decent starting point might be “the restriction of a subject’s self-regarding conduct primarily for the good of that same subject.” Thaddeus Mason Pope, *Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 660 (2004).

¹⁸ JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, & ANNA FREUD, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

forced legislators, courts and lawyers to place the child at the center of their thinking, not as chattel, but as human beings whose lives were affected every day by judges' decisions.¹⁹

Goldstein's work did not pre-ordain a scenario in which hundreds of thousands of children would be placed in foster care. In fact, he was not an advocate for separating children from their families based on their "best interests."²⁰ His point was that child custody cases – whether private matters between parents or those involving the state – should be handled quickly and with finality, with due regard for the child's sense of time.²¹ To the extent that he was outcome driven, as opposed to process driven, he favored children being placed with their "psychological parent" who most often, but not always, was one of their birth parents.²² In the new child protection landscape that took off in the 1980s, the best interests concept became the legal standard used at critical points in child welfare cases, but it was somehow transformed from its original meaning. I was aware of this because I had the great fortune of taking a juvenile law seminar with Goldstein while I was in law school. The year I took the class was the year he and his wife published a new edition of their Best Interests trilogy.²³ He made a very strong point in class about the new subtitle: The Least Detrimental Alternative. It was a point about humility – that judges, GALs, and anyone else associated with "the system" could not deign to know what was best for a child.²⁴ The best we could do was to come up with the choice that would hurt the child the least.²⁵ To the extent this required foster care, it was most often the case that zealous advocacy for appropriate reunification services and ample, safe family visitation best-suited my child clients.²⁶

While at Legal Aid, I was influenced deeply by two other thought leaders in child advocacy who, unbeknownst to me, helped to move the entire field away from paternalism toward a more authentic, child-centered approach to the work: Jean Koh Peters and Marty Guggenheim. I had studied with Peters just as she was finishing her highly acclaimed book on representing children.²⁷ Peters taught that to be a true advocate for children, a lawyer must enter the client's world, deeply and repeatedly, understanding that young person in the context of her family, community, and entire life experience.²⁸ With that richly textured knowledge, the lawyer could then either advocate for the child's wishes, or – if required by statute, rule, or unspoken norm – advocate for his or her

¹⁹ For an overview of Goldstein et al.'s influence on family law, see John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621 (1992).

²⁰ Goldstein is quite explicit in favoring minimum state intervention. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996) [hereinafter *THE LEAST DETRIMENTAL ALTERNATIVE*].

²¹ *THE LEAST DETRIMENTAL ALTERNATIVE*, *supra* note 20, at 107.

²² *Id.* at 11.

²³ *Id.*

²⁴ *Id.* at xix-xx.

²⁵ *Id.* at 50.

²⁶ Chris Gottlieb & Erik S. Pital, *Family Values: How Children's Lawyers Can Help Their Clients by Advocating for Parents*, 58 JUV. & FAM. CT. J. 17 (2007). At the same time, the substantive law was also changing, in recognition of the trauma that placement into foster care itself could cause a child. See *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 378-79 (2004), in which the New York State Court of Appeals held that in ruling on emergency custody motions in child protection cases, family court judges must balance the imminent risk to a child of remaining at home against the harm of removal.

²⁷ JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (3rd ed. 2007) [hereinafter *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS*].

²⁸ *Id.*

“best interests.”²⁹ If the latter, at least when following the Peters playbook, the lawyer would have a shot at formulating a position that was more than just the lawyer’s personal preference or belief about what was best for the child.³⁰

I got to know Guggenheim through a friend who had been his student. Guggenheim offered encouragement and wisdom in equal, welcome measure. He taught that a child’s lawyer need not always have a position on the outcome, particularly if the child was young and if the lawyer did not have access to any information beyond what was developed on the record before the judge.³¹ It was not only permissible, but honorable, to focus instead on the process, advocating for speedy hearings and respectful treatment of the client’s parents.³² I still remember the first time I refused to take a position. It was an abuse case, and my two-year-old client had been severely burned; the parents asked for the child to be returned from care, and the court conducted the statutorily-required emergency custody hearing. I had no idea what had happened to my client, even after reviewing all the evidence and asking open-ended questions of the witnesses at trial. When it came time for my summation, I highlighted for the judge what seemed to be the most important pieces of evidence on both sides, and then confessed that I did not have a position. My supervisor, who happened to be in the courtroom at that very moment, was displeased and told me afterwards that it was my obligation to have a position on every case. The judge, however, thanked me for my integrity (we are now colleagues).

The theme that children are not atomized beings, but part of families who can only be understood in the context of those families and advocated for with that understanding firmly in mind, was driven home for me by the Fordham II conference in 2006. Fordham I had been a gathering ten years prior at Fordham University, where child advocacy was the center of a national intellectual discussion.³³ Fordham I made a resounding call for every child in a dependency case to have a lawyer, which was still a novel argument at that time.³⁴ But when many of the same leading thinkers and lawyers came together in 2006 at UNLV, it was in the wake of significant growth in the foster care population. The consensus was that the field needed a more nuanced way of thinking about how to properly represent a child which took into account the child’s place within a family structure. The conference’s conveners, along with Guggenheim, Peters, and many others who contributed to the conference book,³⁵ are responsible for what we might call the 21st century approach to child advocacy, which is more of the kind of advocacy we see today.

First and foremost, Fordham II reiterated the strong consensus that children in dependency cases need to have a lawyer-advocate, not a lay GAL.³⁶ For a long time, this idea was contested, but no longer. Lawyers are seen as the only player in a complex system capable of truly vindicating the child’s rights – whatever those might be. Ironically, when I left Legal Aid, it was because I felt

²⁹ Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996).

³⁰ REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS, *supra* note 27, at 17.

³¹ Guggenheim, *supra* note 16, at 138.

³² See, e.g., MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005).

³³ Bruce A. Green & Bernadine Dohrn, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1281 (1996). The purpose of the Fordham I conference was first to make explicit for practitioners around the country the areas of professional consensus regarding the role and scope of the child’s attorney, and second to further a dialogue around those areas of child advocacy where a consensus was lacking.

³⁴ *Id.* at 1294–95.

³⁵ Bruce A. Green and Annette Appell, *Representing Children in Families – Forward*, 6 *NEV. L.J.* 571 (2006).

³⁶ *Id.* at 572, 584; see also Erik S. Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 663, 665 (2006).

I could not move the system and make the kind of difference I wanted to on behalf of my clients. It turned out the real problem was my caseload of many, many hundreds of children at one time. I noticed it when, uncharacteristically for me, my voicemail box got full and remained so for over a week, as I was unable to return all the calls.³⁷

From Legal Aid, I went to Children's Rights, litigating class action reform cases on behalf of foster children in many jurisdictions around the nation.³⁸ While I was there, we placed a major focus on reforming not only the child welfare system writ large, but also the juvenile court system. *Kenny A. v. Perdue*³⁹ is notable not just for the principle that all children in dependency cases have the right to a lawyer, but for the idea that, by having properly trained and resourced lawyers with reasonable caseloads, foster children are more likely to have better outcomes.⁴⁰ The lawyer is the bulwark against bureaucracy and the vindicator of the child's substantive rights as against the state, but only if the lawyer is able to devote enough attention to each client. You cannot be client-directed if you do not have time to talk to your client.

Fordham II also highlighted the extensive scope of the child advocacy role, making it a lawyering job unlike any other. The conference attendees adopted a far-reaching set of recommendations for what children's attorneys should do, including meet their clients in their communities; engage in broad-based coalition building; utilize financial and demographic data and analysis in their advocacy; undertake legislative advocacy and community education, outreach, and organizing; hold service providers accountable by challenging ineffective or harmful programs; provide legal services in matters ancillary to the matter on which they are initially appointed (holistic lawyering); remain constantly aware of their clients' level of functioning and maturity of thinking (which presumably change rapidly as children grow); re-orient their entire mode of advocacy to incorporate a truly collaborative multi-disciplinary approach, as well as to more fully and authentically incorporate their clients' voices into their advocacy; model the decision-making process for their clients and otherwise assist their clients in developing the capacity to make their own decisions; and use the media as a key component in their advocacy, among dozens of other recommendations.⁴¹

Setting aside the aspirational reach of the Fordham II recommendations, the actual work of the average child's attorney is unceasing and has become far more professional since the National Association of Counsel for Children was born some 40 years ago. The NACC annual conference

³⁷ In a national survey of children's attorneys conducted in the mid-2000's, we found that nearly 18 percent of respondents had caseloads of 200 or more, and almost 25 percent had caseloads between 100 and 199 cases. Howard Davidson & Erik S. Pitchal, *Caseloads Must be Controlled So All Child Clients Can Receive Competent Lawyering*, THE SPECIALIZED PRACTICE OF JUV. LAW 1, 6 (2006). The problem of too many cases for too few lawyers has long been a contributing factor to endemic delays in New York City Family Court. See Martin Guggenheim & Chris Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y. & L. 546, 566 (2005). In 2008, pursuant to a legislative mandate, New York State's chief administrative judge issued workload standards for attorneys for children, generally capping their open caseload at any given time to 150 child clients. N.Y. R. Chief Admin. Judge § 127.5.

³⁸ Children's Rights had brought the litigation against New York City's child welfare agency that formed the backdrop to my work at Legal Aid, see *Marisol A. v. Giuliani*, *supra* note 11.

³⁹ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1358 (N.D. Ga. 2005); *Id.* at 1362; see also Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from Kenny A.*, 36 NOVA L. REV. 407, 429 (2012).

⁴⁰ Lustbader & Pitchal, *supra* note 39.

⁴¹ See generally *Recommendations of the Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592 (2006).

has grown in size, scope, and ambition into a major event on the child advocacy calendar each summer. The NACC now certifies attorneys, pursuant to a designation by the ABA, as specialists in the field of child welfare, which they can lawfully tout in most states.⁴² Most importantly, the NACC is the go-to source for up-to-date training programs, bringing new knowledge to solo practitioners and agency attorneys alike all around the country. The text is the “Red Book,”⁴³ a compendium of all the things a competent child welfare lawyer needs to know, from litigation skills to the basics of abusive head trauma. Authored by over three dozen of the leading thinkers and practitioners, the Red Book is the child advocate’s encyclopedia, providing critical information on the context for child welfare law, an overview of the legal framework of the field, and detailed guidance on how to advocate inside and outside the courtroom. The Red Book and related training materials, along with the treasure trove of intellectual work being produced by law faculty and students in specialized journals like this one, the *Juvenile and Family Court Journal*, and the *U.C. Davis Journal of Juvenile Law*, exemplify the maturation of our field in the past few decades.

In the spirit of Peters, lawyers for children today do far more than just talk to their clients. They immerse themselves in their clients’ worlds.⁴⁴ Pioneered at Legal Aid and at clinics like those at the University of Michigan, many child welfare law offices across the country now use an interdisciplinary model in their representation, generally teaming a licensed social worker with the attorney.⁴⁵ For solo practitioners who represent children, many states have a mechanism for the attorney to seek, *ex parte*, a court order permitting them access to state or local funds to retain a social worker for a specific case.⁴⁶ Most of the social worker’s time is spent out of the courtroom, advocating with school systems and other agencies for specialized services for the client, but from the bench we see and appreciate the impact this work has on the trajectory of the case. Many social workers are also excellent at helping attorneys understand their clients and build relationships with them. Additionally they are well-positioned to use their forensic expertise to aid in the litigation itself by, for example, writing affidavits in support of the attorneys’ motion to quash subpoenas for the child’s testimony in open court. In such motions, the standard for the court involves determining the harm to the child of testifying in the courtroom, and the attorney must make an offer of admissible evidence concerning such harm to prevail on the motion.⁴⁷

As leaders in the field were expanding the role of counsel for children, they also noticed the limits of the argument in favor of the right to counsel generally. Legislators and courts, whether sympathetic to the notion of children having a lawyer or not, demanded to know whether having attorneys really made a difference. The right to counsel movement was coming up against the national push in philanthropy and government social welfare services to support only those

⁴² Amanda George Donnelly, *Child Welfare Law: Legal Specialty with Attorney Certification*, 36 COLO. LAW 83, 86 (2007).

⁴³ DONALD N. DUQUETTE, ANN M. HARALAMBIE & VIVEK S. SANKARAN, *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES* (3d ed. 2016).

⁴⁴ In fact, there remains a danger that children’s lawyers, in the spirit of immersion into their clients’ worlds and attending to the multiplicity of duties called for by leading voices, will seek to do too much. See Erik S. Pitchal, *Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing Too Much, on Behalf of Children*, 6 NEV. L. J. 1350, 1355 (2006).

⁴⁵ Spinak, *supra* note 4; Duquette, *supra* note 2.

⁴⁶ See, e.g., N.Y. County Law § 722-C; Mass. Indigent Court Costs Law, codified at Mass. Gen. Laws 261, §§ 27A-27G.

⁴⁷ *Matter of Giannis F.*, 95 A.D.3d 618, 618 (1st Dep’t. 2012).

practices that were documented to be efficacious – known in the vernacular as “evidence-based.” Our field has risen to the challenge of proving the merit of providing a lawyer to every child in a dependency case, with a growing body of research to support the theoretical and normative claims that had been made for years. For example, the federally funded National Quality Improvement Center on the Legal Representation of Children in the Child Welfare System (“QIC-ChildRep”), was a seven-year, multi-project that gathered and developed knowledge in the field, including empirical research.⁴⁸ Among other things, QIC-ChildRep developed a practice model involving six core skills, gleaned from demonstration projects in two jurisdictions.⁴⁹ The evidence showed that children who were represented by lawyers who were trained and appropriately supervised in the six core skills tended to exit foster care sooner than children in a control group.⁵⁰ Similar work has demonstrated the expedited permanency experienced by children assigned counsel in one county in Florida.⁵¹ More research can and will be done, not only to justify the work, but to improve it.⁵² Of course, the field is still roiled by the age-old debate about whether lawyers should advocate in accordance with their client’s direction or based on the lawyer’s notions of what is best for the child. With the ABA Model Act,⁵³ the examples of rules in New York⁵⁴ and Massachusetts,⁵⁵ and other influences, there is movement towards the client-directed model. Where advocating for a particular substantive outcome would be too controversial or problematic (especially but not exclusively in the example of young children unable to express their wishes), there is some support for the concept of advocacy for a child’s “legal interests.”⁵⁶ A child’s legal interests are generally thought to be some uncontested bundle of rights to which every child is entitled but which may be given short shrift by the other parties to litigation. I am less sanguine about the existence of such non-outcome determinative “legal interests;” this concept may sound neutral but is not always so in practice.⁵⁷ I certainly concur with the Model Act’s call to focus on

⁴⁸ DONALD N. DUQUETTE, *CHILDREN’S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM* (2016).

⁴⁹ *Id.* at 67-68.

⁵⁰ BRITANY ORLEBEKE, XIOMENG ZHOU, ADA SKYLES & ANDREW ZINN, FINDINGS OF THE EVALUATION OF THE QIC-CHILDREP BEST PRACTICES MODEL TRAINING FOR ATTORNEYS, *CHILDREN’S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM*, at 84 (2016).

⁵¹ Andrew E. Zinn & Jack Slowriver, *Expediting Permanency Legal Representation for Foster Children in Palm Beach County, Florida*, CHAPIN HALL CTR. FOR CHILD. (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/428.pdf.

⁵² Just as child welfare policy and the services provided to support it touch far more lives and cost far more money than the dependency court system, so too the policy and social work research base is more extensive than in law. *See, e.g.*, Richard Barth, *A Look Back at the Impact of Research on Child Welfare Policy*, THE CHRONICLE OF SOC. CHANGE (Nov. 7, 2017), <https://chronicleofsocialchange.org/analysis/look-back-impact-research-child-welfare-policy>.

⁵³ *See generally* Model Act Governing the Representation of Child. in Abuse, Neglect, & Dependency Proc. (Am. Bar Ass’n. 2011). *See also* Andrea Khoury, *ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases*, 30 ABA CHILD L. PRACTICE 106 (2011).

⁵⁴ N.Y. Comp. Codes R. & Regs. tit. 22 § 7.2 (2007), available at <http://ww2.nycourts.gov/rules/chiefjudge/07.shtml>. *See also* Gary Solomon, *Giving the Children a Meaningful Voice: The Role of the Child’s Lawyer in Child Protective, Permanency, and Termination of Parental Rights Proceedings*, <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf>.

⁵⁵ MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES, PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES, § 1.6(b) at 9, <https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/2015/01/CAFL-Trial-Performance-Standards1.pdf>.

⁵⁶ *See, e.g.*, Standards of Prac. for Law. Who Represent Child. In Abuse & Neglect Cases, §B-3 cmt. at 5 (Am. Bar Ass’n 1999).

⁵⁷ Guggenheim, *supra* note 16, at 99.

those few legal rights that are truly objective, such as placement in the least restrictive setting possible and, critically, its emphasis on the lawyer's role in expediting the court process.⁵⁸

Where the field has done a better job coming to a consensus of what a lawyer should do is in relation to the child-client's role in the litigation more generally. That is, we have a far more robust appreciation as a field now for the multiple ways that a child can meaningfully participate in a case than we did even ten years ago. First and foremost, we now understand that for children and for their cases, it is important for them to come to court and at least see the judge, especially on matters of permanency planning.⁵⁹

Throughout American history, children have been at the forefront of movements for social change. Barbara Bennett Woodhouse makes this point forcefully, highlighting the examples of young Ben Franklin and others.⁶⁰ It is important to note that children have been the fulcrum for many landscape-altering constitutional cases. The *Brown* in *Brown v. Board of Education*⁶¹ was nine-year-old Linda. John and Mary Beth Tinker (aged fifteen and thirteen, respectively) wanted to protest the Vietnam War at school and ended up as named parties to a major First Amendment case in the Supreme Court.⁶² Samantha Redding, age thirteen, suffered the indignity and humiliation of a strip search in the principal's office when she was found with one illicit tablet of ibuprofen in her schoolwork; she did not just get mad, she sued and vindicated the Fourth Amendment rights of school children nationwide.⁶³ Around the world, children are active participants in youth assemblies, school advisory councils, and other quasi-legislative arenas, helping adults decide matters of direct importance to young people.⁶⁴ Going beyond mere tokenism,⁶⁵ this participation is often authentic and impactful. Two recent, inspiring examples – the environmental movement known as Zero Hour⁶⁶ and the gun control activism of March for

⁵⁸ Model Act Governing the Representation of Child. in Abuse, Neglect, & Dependency Proc. § 7(b)(3) at 5 (Am. Bar Ass'n. 2011).

⁵⁹ Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Cases*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233 (2008); Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 ABA CHILD L. PRAC. 129 (2007).

⁶⁰ Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, U. ILL. L. REV. 1567, 1570–72 (2009).

⁶¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

⁶² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁶³ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

⁶⁴ Two noteworthy examples come from South Africa and Wales, respectively. The post-apartheid constitution in South Africa guarantees children the right to be cared for by a parent or other adult, social services, and protection from abuse and maltreatment, but for many years Parliament did not enact implementing legislation. Starting in 2003, a group of children aged 11 to 17, assisted by child-serving NGO's, engaged in various advocacy activities aimed at drafting and passing a child-centered piece of legislation. Lucy Jamieson & Wanjiru Mukoma Dikwankwetla, *Children in Action: Children's Participation in the Law Reform Process in South Africa*, in A HANDBOOK OF CHILDREN AND YOUNG PEOPLE'S PARTICIPATION: PERSPECTIVES FROM THEORY AND PRACTICE 73 (2010). In Wales, there are national standards for youth participation in various aspects of civic and public life; the standards themselves were developed by young people. Anne Crowley & Anna Skeels, *Getting the Measure of Children and Young People's Participation*, in A HANDBOOK OF CHILDREN AND YOUNG PEOPLE'S PARTICIPATION: PERSPECTIVES FROM THEORY AND PRACTICE 184 (2010).

⁶⁵ Caitlin Cahill & Roger A. Hart, *Re-Thinking the Boundaries of Civic Participation by Children and Youth in North America*, 17 CHILD, YOUTH & ENV'T 213, 218 (2007).

⁶⁶ See, e.g., Alexandra Yoon-Hendricks, *Meet the Teenagers Leading a Climate Change Movement*, N.Y. TIMES (July 22, 2018); see also <http://www.thisiszerohour.org>.

Our Lives⁶⁷ – stand out in part because the United States is significantly behind the rest of the world in how it socializes – or fails to socialize– youth into our democratic, self-governance norms.

Our foster care system, though greatly reduced over the past ten years, still has over 400,000 children in it⁶⁸ which, perhaps unintentionally, provides a vast pool of potential participants in real-life decision-making. Considering that no child enters foster care (nor stays there beyond a year's time) without the explicit order of a judge, there is a tremendous opportunity for these same children to be actively engaged in the judicial process that leads to these and related decisions. While no child should be forced to come to court if they do not want to⁶⁹ – and testifying in open court during an abuse trial may be harmful to and undesired by the child⁷⁰ – if we create the right court environment, with attorneys and courtroom staff who recognize the importance of the child's presence, there is no reason why more children should not come.

From my perspective on the bench, I always appreciate the strong client-directed advocacy from “attorneys for the child,” the term that replaced “law guardian” when New York adopted a client-directed model of representation.⁷¹ I respect and admire their decision to abstain from taking a position on the substantive outcomes in a case when their clients are quite young, or it appears the client is not able to make a reasoned decision to guide the advocacy. If they elect to “substitute judgment” in those cases, I expect that they have undertaken a Peters-like immersion into their client's world, and that the position they express is the product of rich, deep learning and not merely an articulation of their personal values.

Regardless of how they have reached their position on substantive issues, however, from the perspective of the bench, the most important thing attorneys for children can do is to protect their clients' procedural and participatory rights. That means pushing for timely hearings and dispositions, even if the other parties seek adjournments. More broadly, child advocates should be aligned with the family court's mission to treat all litigants fairly and with respect, and to ensure that the people whose lives we affect so deeply are meaningfully involved in the judicial process.

Family and juvenile courts have long been positioned to be a forum for problem solving. Even in a busy urban environment where resources may be lacking, judges can infuse daily practice with therapeutic practices, such as greeting parents directly, by name; making eye contact; listening actively; and treating parents as experts on their families.⁷² These and other techniques bend some of the legal, social, and institutional rules that bind more traditional courts, and create more respectful and inclusive environments.⁷³ While the therapeutic jurisprudence approach has its critics,⁷⁴ the separate but related concept of procedural justice is, I believe, central to family court work and absolutely essential if we are to be at all successful.⁷⁵ Four principles define the

⁶⁷ See <https://marchforourlives.com>.

⁶⁸ Children's Bureau, U.S. Department of Health & Human Services, *The AFCARS Report 24* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>. After dropping below 400,000 in federal fiscal year 2012, the total number of children in foster care has been gradually increasing each year since, with new entries outpacing exits.

⁶⁹ *Matter of Shawn S.*, 163 A.D.3d 31 (N.Y. App. Div. 2018).

⁷⁰ See *Matter of Giannis F.*, *supra* note 47.

⁷¹ 2010 N.Y. Sess. Laws Ch. 41 (A. 7805-B) (McKinney).

⁷² Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 L. & SOC. INQUIRY 701 (2015).

⁷³ *Id.*

⁷⁴ Jane Spinak, *Unified Family Court: Romancing the Court*, 46 FAM. CT. REV. 258 (2008).

⁷⁵ Tom Tyler, *Group Conflict Resolution: Sources of Resistance to Reconciliation: Governing Pluralistic Societies*, 76 LAW & CONTEMP. PROBS. 187 (2009).

consensus understanding of when a decision-making process is deemed just: voice, neutrality, respectful treatment, and trustworthiness.⁷⁶ Voice refers to the ability to, literally, be heard – to be able to make one’s case directly to the decision-maker. Neutrality requires the participant to believe that the decision-maker enters the forum without bias or pre-conceived notions. Respectful treatment necessitates the tribunal to see each litigant as an individual human being worthy of dignity. Trustworthiness is linked to participation; people only value being able to provide their direct input if they believe that they will be genuinely listened to.⁷⁷

Research suggests that adults are more likely to view legal rulings as legitimate if they experience these four principles during the process that led to the those rulings.⁷⁸ In theory, we would expect similar results from adolescents and children, especially considering that they have more limited knowledge and understanding of the legal system than adults.⁷⁹ In recent years, perhaps based on this theory, advocates have started to push for ways for youth to be active participants in their own cases.⁸⁰ New York’s recently adopted statute requiring courts to permit youth of varying age ranges to attend their own permanency hearings exemplifies this trend.⁸¹

Courts and judges must take the lead to give life to the procedural justice norms. After all, we are the decision-makers and courts are the forum that we control. We cannot create an environment dedicated to procedural justice alone, however. Of the four pillars of procedural justice, voice is perhaps the one most dependent on players beyond the bench. Judges can seek to incorporate the voices of litigants once they are present, but attorneys for children must play a leading role in maintaining contact with their clients and counseling them about the importance of their participation. They also should find ways for their child-clients to be engaged in extra-judicial processes such as service plan reviews, family team conferences, and education meetings. I firmly believe that the more youth participate in court – provided that we do our part to give life to all the procedural justice principles – the more likely they are to not only believe that our decisions are legitimate and worthy of respect, but also the more likely they are to be civically engaged in a meaningful way as they become adults. They may not come to family court by choice; once there, however, they can either see us as an example of a functioning democratic process, or not. As a result of what a youth experiences in court, he or she will either gain some confidence in our democratic systems and a self-concept as a democratic actor – or not.

As a judge, I make decisions that can change the entire life course of a child. She needs to walk away from that proceeding feeling like her voice was heard, whether I did what she asked me to or not. I want to hear her voice; I suspect she wants me to hear it, just as my eleven-year-old-self wanted to be heard. It is the attorney’s job to make sure I have the opportunity to hear the child’s voice and do so in an authentic, non-traumatizing manner. Helping juvenile and family courts (and other forums where their clients’ lives are being affected) become infused with procedural justice is the project for the child advocacy field in the coming years.

⁷⁶ Tom R. Tyler, *Social Justice: Outcome and Procedures*, 35 INT’L J. PSYCHOL. 117, 121 (2000).

⁷⁷ *Id.*

⁷⁸ TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

⁷⁹ Tamar Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009).

⁸⁰ *See, e.g.*, Khoury, *supra* note 59.

⁸¹ N.Y. Fam Ct. Act §1090-a (McKinney 2016).