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## The History and Influence of the National Association of Counsel for Children – An Alternate Perspective

*Martin Guggenheim*<sup>1</sup>

### I. INTRODUCTION

Founded in 1977, the National Association of Counsel for Children (NACC) has grown from a tiny organization of slightly more than one hundred to a robust organization of several thousand professionals. Forty years of an organization's life is as good a time as any to reflect on the organization and review its work. As it happens, I began my legal career as a children's lawyer in juvenile delinquency-related and child welfare-related proceedings six years before NACC was founded. In this sense, I grew up professionally with NACC, although I have never joined the organization.

NACC formally focuses on several discrete areas of the law, with a predominant focus on child welfare and juvenile justice. For several reasons, this article will focus only on NACC's child welfare work. The founding history of NACC was principally about child welfare. In its early years, it focused almost exclusively on securing quality representation for children in child welfare proceedings. Over the years, NACC has also become involved in juvenile justice. However, NACC is still best known for its focus on child welfare.<sup>2</sup>

Indeed, NACC is the nation's leading advocacy group in child welfare that claims to speak for the child. As long-time NACC board member Donald Duquette expressed it, NACC is "the premier membership organization for lawyers who represent children, parents, and state agencies in child welfare law cases."<sup>3</sup> Every important children's advocacy organization in child welfare in the United States belongs to NACC. With this in mind, this article is a limited review of NACC, focused on its work in connection with child welfare.

Part II will describe the conditions in which NACC was founded. Part III will describe what happened in the field of child welfare between NACC's founding in 1977 through the end of the century. Part IV will review the public statements NACC made over the first thirty years of the organization's history. Parts V and VI focus mostly on NACC's public pronouncements over the past ten years, beginning around 2008. Part V looks at the amici curiae briefs NACC filed in

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<sup>1</sup> Fiorello LaGuardia Professor of Clinical Law, New York University School of Law. I would like to thank Betsy Aronson, a member of NYU Class of 2018 for outstanding research assistance in the writing of the article and Kim Kvorchak for her gracious exchanges with me over the course of my writing this and for inviting me to participate in this symposium. I also gratefully acknowledge support from the Filomen D'Agostino Research Fund.

<sup>2</sup> There have been several prominent national organizations principally or exclusively devoted to juvenile justice concerns, including the Juvenile Law Center, founded in 1975 in Philadelphia and the Juvenile Defender the National Juvenile Defender Center, founded in 1999 in Washington, D.C. Over the past decade and a half, NACC has filed amici briefs in the Supreme Court of the United States in all of the landmark juvenile justice cases including *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 136 S. Ct 718 (2016), as well as several lower courts throughout the country. But nothing NACC said in those briefs was distinct from what juvenile defenders were also arguing. I do not think it unfair to suggest that NACC is not the leading juvenile justice advocacy group; nor are its positions on juvenile justice in any way distinctive from the leading juvenile justice advocacy groups in the United States.

<sup>3</sup> Donald N. Duquette, *Looking Ahead to the Next 30 Years of Child Advocacy Symposium*, 41 U. MICH. J.L. REFORM 317, 320 (2007).

various courts throughout the United States. Part VI describes relatively recent pronouncements by NACC officials and others writing in NACC publications. Overall, the picture I mean to present is that, for too many years, NACC's child welfare focus was unfortunately narrow, but it has greatly expanded its scope today in ways that deserve celebration.

## II. THE CONDITIONS UNDER WHICH NACC WAS FOUNDED

Before describing when and how NACC was founded, it is useful to provide some historical background. As is well known, Juvenile Court is a distinct concept – a legal forum in which matters related to juvenile delinquency or child welfare are heard. Juvenile Court was a signal invention of progressives broadly seen as an important opportunity to serve the needs and interests of children through a unique system that was short on due process but concentrated on improving the lives of the children who came before the court.<sup>4</sup> Children in delinquency proceedings, indistinguishable from children in child welfare proceedings, were conceived as victims who deserved the kind hand of judges to help them negotiate their complicated lives.<sup>5</sup> Their alleged wrongful conduct (acts of delinquency) was explained as a symptom of something wrong in the child or the child's environment and, consequently, the purpose of court intervention was not punitive; it was to be helpful and rehabilitative.<sup>6</sup>

This approach had profound implications for the process used in the court system. This close attention, commonly analogized to a “medical model” (as distinct from a “legal model”), was meant to allow judges a full opportunity to find out what was going on in a child's life and fashion a plan to address whatever deficiencies might have been identified.<sup>7</sup> “Punishment” was to have no part of the process. In its place, courts were expected to fashion dispositions designed to further the child's well-being. Children who appeared before judges in juvenile court did not need lawyers *defending* them any more than a patient needs a lawyer defending him or her when visiting a physician's office. The interactions between patient and doctor (or child and judge) are neither adversarial nor punitive. Despite prominent criticism of juvenile court during some portion of those 67 years,<sup>8</sup> this unique, progressive institution was permitted to flourish until the Supreme Court of the United States reviewed the practices of juvenile court in 1967 in *In re Gault*.<sup>9</sup>

*Gault* changed everything. Famously insisting that juvenile court be “candidly appraised,”<sup>10</sup> the Court rejected the founders' idea that there was no need for procedural fairness because the purpose of intervention was to improve children's lives.<sup>11</sup> *Gault* heralded in a new era

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<sup>4</sup> See generally HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* (David J. Rothman & Sheila M. Rothman eds., 1927).

<sup>5</sup> *Id.*

<sup>6</sup> Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

<sup>7</sup> See Mae C. Quinn, *Access to Justice: Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond*, 38 WASH. U. J.L. & POL'Y 1, 3 (2012).

<sup>8</sup> Dean Roscoe Pound famously declared, “The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts.” (*In re Gault*, 387 U.S. 1, 18 (1967) (citing ROSCOE POUND, *Foreword* to PAULINE D. YOUNG, *SOCIAL TREATMENT IN PROBATION AND DELINQUENCY*, at vii, xxvii (1937) (cited in *In re Gault*, 387 U.S. 1, 18 (1967))).

<sup>9</sup> *In re Gault*, 387 U.S. 1428, 1439 (1967).

<sup>10</sup> *Id.* at 1440.

<sup>11</sup> *Id.* at 1437.

of children's rights. Perhaps *Gault's* greatest impact was its conclusion that children in delinquency proceedings have a constitutional right to be represented by counsel.<sup>12</sup>

Unquestionably, *Gault* played an important role in the decision ten years later to create NACC. Other equally important developments are also part of the story. Altogether, four catalytic events led to NACC's founding in 1977, including *Gault*. A critical event occurred five years before *Gault*, when Dr. C. Henry Kempe made the medical "discovery" of the battered-child syndrome – a finding by medical health professionals that explained injuries sustained by children (usually multiple fractures of bones) as the consequence of child abuse.<sup>13</sup> As the long-time executive director of NACC, Marvin Ventrell, explains it:

[A] medical discovery would transform the child protection component of [juvenile] court. Denver physician C. Henry Kempe and several of his colleagues wrote a landmark article, 'The Battered Child Syndrome,' which was published in the *Journal of the American Medical Association* in 1962. In this article, the authors exposed the reality that significant numbers of parents and caretakers batter their children—even to death.

'The Battered Child Syndrome' described a pattern of child abuse resulting in certain clinical conditions. It further established a medical and psychiatric model of the cause of child abuse. The article, marking the development of child abuse as a distinct academic subject, is generally regarded as one of the most significant events leading to professional and public awareness of the existence and magnitude of child abuse and neglect in the United States and throughout the world.<sup>14</sup>

Kempe and his colleagues' work at the University of Colorado greatly influenced national laws involving child abuse through the rest of the decade, inspiring the modern child welfare practice of creating hotlines to field reports of suspicious child abuse activity and the creation of mandatory child abuse reporting laws.<sup>15</sup> The third event, undoubtedly inspired by *Gault*, occurred in 1974 when Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which required states to ensure that children were represented in child welfare proceedings by a guardian *ad litem* or an attorney in order to qualify for federal child welfare money.<sup>16</sup> The final event happened in 1976 when Kempe helped bring Donald Bross to the faculty at the University of

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<sup>12</sup> *Id.* at 1448. The related idea that children (regardless of the kind of proceeding) deserve to be represented by somebody who is not already a party to the proceeding, has captured the minds and hearts of most professionals in law ever since.

<sup>13</sup> See C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

<sup>14</sup> Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practices*, 32 COLO. L. REV. 65, 68 (2003).

<sup>15</sup> *Id.* As Marvin Ventrell reports, "In response to 'The Battered Child Syndrome,' the U.S. Children's Bureau held a symposium on child abuse, which produced a recommendation for a model child abuse reporting law. With Colorado leading the way, forty-four states had adopted mandatory reporting laws by 1967." See also ALAN SUSSMAN & STEPHAN COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION (1975).

<sup>16</sup> 42 U.S.C. §5106 a(b)(2)(B)(xiii) (2017) (CAPTA provided states with funding for the investigation and prevention of child maltreatment, conditioned on states' adoption of a mandatory reporting law. It also conditioned funding on the appointment of a representative for the child in each child welfare proceeding.).

Colorado School of Medicine as a professor of pediatrics.<sup>17</sup> Bross also became the first Director of Education and legal counsel for the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect. The following year, he was among those who founded NACC.<sup>18</sup>

When it was founded, NACC's preeminent purpose was to ensure that every child in a child welfare proceeding was represented, ideally by a lawyer.<sup>19</sup> Bross invented the term "pediatric law"<sup>20</sup> and worked hard to advance the idea that children need and deserve to be represented in child welfare proceedings. An important and long-standing issue NACC had to deal with, which has never quite been resolved, was *why* a child needs a lawyer and *what role* a child's lawyer should play in a child welfare proceeding. Even though *Gault* spelled out the role of counsel in delinquency proceedings, it is anything but clear whether the role a child's lawyer should play in a delinquency proceeding is the same as what is required of a child's lawyer in child welfare proceedings. *Gault* explained that children's lawyers in delinquency proceedings have three principal responsibilities: "to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."<sup>21</sup> This is, of course, indistinguishable from the role expected for lawyers representing adults in criminal proceedings.<sup>22</sup>

The question remains, what has *Gault* to do with child welfare proceedings? There are important overlapping characteristics in juvenile delinquency and child welfare proceedings. In both proceedings, the state's stated purpose is to intervene to help the child. In both proceedings, state officials may seek a court order to remove the child from his or her family and place the child in state custody. In delinquency proceedings, to be sure, the children are at risk of being placed in institutions, whether they be called training schools or prisons, but many are also at risk of being placed in foster care.<sup>23</sup> In child welfare proceedings, children are at risk of being placed in

<sup>17</sup> *Biography of Donald C. Bross, JD, PhD: Professor of Pediatrics and Family Law*, UNIV. OF COLO. DENVER, [http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/faculty/staffpages/Pages/Don\\_Bross.aspx](http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/faculty/staffpages/Pages/Don_Bross.aspx) (last visited Nov. 5, 2018).

<sup>18</sup> *Id.*

<sup>19</sup> Donald C. Bross, *The Evolution of Independent Legal Representation for Children*, 1 J. CTR. FOR CHILD. & THE CTS. 7 (1999).

<sup>20</sup> *Id.* at 14.

<sup>21</sup> *Id.* at 36.

<sup>22</sup> The *manner* in which a child's lawyer in a delinquency proceeding might differ from how a lawyer would go about serving his adult client in a criminal proceeding. For example, the skilled juvenile lawyer might need to communicate with his or her client in a specialized way, ensuring that the client fully grasps the choices faces him or her, but the ends and goals of the representation were indistinguishable. Despite this clarity, the legal literature in the immediate wake of *Gault* rather remarkably disputed and debated the appropriate role of counsel for accused delinquents. *See, e.g.*, Jacob L. Isaacs, *The Lawyer in the Juvenile Court*, 10 CRIM. L.Q. 222, 233-34 (1908); Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401 (1973). There is no need here either to revisit the counter arguments of the role of counsel in delinquency proceedings or when and how the role ultimately came to be agreed upon. Suffice it to say, there no longer is a doubt about counsel's role in delinquency proceedings.

<sup>23</sup> *See, e.g.*, N.Y. FAM. CT. ACT § 353.3 (1) (2018) ("the court may place the respondent in his or her own home or in the custody of a suitable relative or other suitable private person or the commissioner of the local social services district or the office of children and family services pursuant to article nineteen-G of the executive law, subject to the orders of the court"). As explained by Merrill Sobie in the Practice Commentaries, New York law "confers the general placement authority, i.e. the placement of respondents in their own homes, with suitable relatives, with appropriate local commissioners of social services, or with OCFS [the New York State Office of Children and Family Services]. The list includes every possibility ranging from 'home' placement or foster care placement, to placement with an authorized private residential care agency (via a commissioner of social services or OCFS), or a secure placement."

institutions, group homes, or foster care.<sup>24</sup> Importantly, the *Gault* Court was disinterested in what the facilities were called.<sup>25</sup> *Gault* also eschewed any interest in the state's professed purpose in seeking the court order. It single-mindedly focused on the liberty rights of children and declared that they had the right to prevent disruption of their lives over their objection by being provided with a lawyer whose purpose is to fight against the state's goal when the child is opposed to it.<sup>26</sup>

As Marvin Ventrell explains, "scholars have argued for the extension of *Gault* to child welfare law on the theory that maltreated children face a similar deprivation of liberty to juvenile confinement in that they are forcibly placed by the state in various settings (albeit 'for their own good')." <sup>27</sup> There is, however, one overwhelming distinction between these very different kinds of proceedings. In delinquency proceedings, the child is accused of behavior that warrants intervention. In child welfare proceedings, the child is not accused of anything; he or she stands before the court as a putative victim of his or her caregiver's wrongdoing. Unlike in child welfare proceedings, the structure of delinquency cases pits the state against the child.

How much of a difference this distinction makes in determining the role and purpose of the child's lawyer in a child welfare proceeding has never been satisfactorily resolved.<sup>28</sup> On the one hand, it is entirely fair to point out that children in child welfare proceedings who become state wards as a result of court intervention are deprived of their liberty (when it is against their will) in ways indistinguishable from delinquents who become state wards. In both proceedings, children run the risk of remaining state wards for many years. Indeed, the risk of a child remaining a state ward longer through the child welfare system is often greater than through the juvenile delinquency process. Sadly, many children remain state wards for their entire childhood when placed into foster care as young children, resulting in a placement that can last 15 or 17 years.<sup>29</sup> Delinquency sentences are rarely that long.

Much hinges, however, on whether one is perceiving the child in court as the accused or the victim. I believe it is fair to say that the NACC founders called for children to be represented in child welfare cases before serious thought was given to the purpose. As a result, a long debate ensued over the role of counsel for children that lasted for at least thirty years, and perhaps still lasts to this day. As Marvin Ventrell wrote in 2000, "[u]nlike any other area of practice, children's lawyers do not have a clear articulation or model of their role. They do not even agree oftentimes on the fundamental duties for which they are appointed to represent the child, and that's a system

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Merril Sobie, *Practice Commentaries*, MCKINNEY'S CONS. LAWS OF N.Y., BOOK 29A, FAMILY CT. ACT § 353.3, at 353 (2018).

<sup>24</sup> See, e.g., N.Y. FAM. CT. ACT § 1052 (2018).

<sup>25</sup> *In re Gault*, *supra* note 9, at 1443. ("The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours...")

<sup>26</sup> Elegantly stated, *Gault* demanded only that lawyers "ascertain whether [there is] a defense and to prepare and submit it."

<sup>27</sup> Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 94–95 (2006).

<sup>28</sup> Compare Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996), with Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006).

<sup>29</sup> "[C]hildren may spend their entire childhood cycling through various temporary foster care placements before aging out, without ever being reunified with their families of origin or finding an adoptive home." Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.C.L. L. REV. 183, 186 (2008). "Each year approximately 20,000 youths age out of the foster care system in the United States, typically when they reach the age of eighteen." *Id.* at 187.

doomed to failure.”<sup>30</sup> It is not my purpose to revisit the debate over the role or purpose of a child’s lawyer in child welfare proceedings. I mention this history because the child-as-victim framing by NACC’s founders has had deep implications for the organization entirely apart from the debate over the role of counsel for individual children in child welfare proceedings.<sup>31</sup>

The modern juvenile justice system’s lawyers for children saw the state, and the progressives behind it, as dangerous foes of children. But NACC’s founders were themselves modern progressives, calling for a legal system committed to saving children. Bross and the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, of which he was the legal director, saw children in child welfare proceedings primarily as victims who needed protection by state officials that had long been unavailable to them. For the founders of NACC, the distinctions between delinquency and child protective proceedings were considerably more straightforward than I have suggested. The child welfare case was brought not because the child did anything wrong, but because the child’s caretaker did. This made all the difference to them. NACC’s founders helped advance the reach of child welfare interventions to ensure that children would be protected from harm inflicted by their family members.<sup>32</sup>

The Kempe Center, which, as we have seen, brought NACC into existence, was founded on the principle that American society needed to change its attitude toward children who were abused and to stop ignoring the abuse. NACC was an active voice seeking new, robust child protection laws calculated to find more abused children and ensure that states bring abused children into the judicial system so that they could be protected from harm.<sup>33</sup> Like the progressives, NACC’s founders’ instincts were entirely government friendly. They encouraged state officials, including judges, caseworkers, mandated reporters, children’s lawyers, and advocates such as Court Appointed Special Advocates (CASA), to pay greater attention to children who are victims of abuse and to protect them more aggressively than they had been before NACC started.

### III. CHILD WELFARE SINCE NACC WAS FOUNDED

I write as a fierce advocate for children and their rights. It is from that vantage that I am displeased with most of what goes on in the field of child welfare in the United States. I begin with this important disclosure because my purpose in this article is to evaluate NACC’s contributions

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<sup>30</sup> Marvin Ventrell, *Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN’S J. LEGAL COMMENT. 433, 435 (2000).

<sup>31</sup> At the same time, the perception of the child in these different proceedings surely has some impact on the performance of lawyers representing children. I know few children’s lawyer who accept with equanimity a dismissal of a child welfare proceeding when a parent committed an act of maltreatment on the child and a dismissal of a juvenile delinquency proceeding when the child committed a serious crime. At the same time, most juvenile defenders I know lack even the slightest interest in ensuring that children who commit crimes be brought into juvenile court so that the state will be able to help them.

<sup>32</sup> To be clear, Bross was also a progressive in his desire for government to be a proactive force ensuring that children will thrive without the need for protecting them from their parents’ misdeeds. In his words, government financial support for poor families “has been among the most important contributors to a financial safety net for children. Governmental funding of Women, Infants, and Children (WIC) helps ensure nutrition for thousands, and Early Periodic Screening and Diagnostic Testing (EPSDT) continues to identify medical and developmental problems early enough to mean better outcomes for many thousands more.” Bross, *supra* note 19, at 13.

<sup>33</sup> As the website for the Kempe Center expressed it, when the Center was founded in the 1970s, it had “one vision: to recognize that children were being abused, the threat was real, and we must do something about it.” See THE KEMPE CTR. FOR THE PREVENTION & TREATMENT OF CHILD ABUSE & NEGLECT, <http://www.kempe.org/about/history/> (last visited Sept. 21, 2018).

over its first forty years. NACC has, by any measure, contributed to the growth, size, and shape of modern child welfare practice in the United States. If I am unhappy with modern child welfare practice in this country, one should expect some of my criticism to be focused on NACC's participation in shaping that system.

I also want to be clear, however, that in my disappointment with the modern child welfare system, I fully share a bedrock concept which undergirds everything NACC stands for: *children deserve to be protected from harm inflicted on them by adults or others, even when the persons inflicting the harm are parents or other family members*. I share the notion that the state owes a duty to protect vulnerable people, including children, from known danger such as child abuse and neglect. I do not want the reader to understand that my disappointment with NACC is because it played the important role of calling for a robust child welfare system in the United States. I, too, want that.

That said, my disclosure needs to go further. For much of NACC's history, I regarded it, at best, as an organization which occasionally supported things I wanted. Far more often, I regarded NACC as an organization which ignored significant, endemic problems in child welfare. I have long thought that deliberate avoidance of fundamental problems in the system contributed to making the system worse, doing damage to poor children and their families. At its worst, NACC promoted and supported policies that I believe are deeply harmful to children. At its best, I was disappointed with NACC's behavior over most of these past forty years because of its silence in the face of manifest injustices perpetrated by the child welfare system.<sup>34</sup> Even more, as an organization devoted to children's rights in child welfare proceedings, NACC should be held accountable for its failure to criticize the manifest features of American society that disadvantage the children and families that end up in the child welfare system.

Ultimately, I am making two claims. First, in too many ways, children being raised in poor families in the United States are treated worse by state officials than they were before NACC was founded. Although I do not believe NACC is responsible for this, it is important to acknowledge the limited gains children have had over the past forty years. Second, NACC deserves an important measure of criticism for ignoring and remaining silent about several aspects of child welfare practice in the United States which have been deeply destructive of poor children and their families.

***A. Children Entangled in the Child Welfare System in the United States are Worse Off Than Before NACC was Founded***

NACC began at an inauspicious time in American history as it relates to child welfare. The previous generation's commitment to serving children raised in vulnerable homes culminated in the passage of the Social Security Act of 1935 which, among other things, for the first time in American history, provided a direct subsidy program for poor families in order to help these families keep and raise their children themselves.<sup>35</sup> The federal government's vision, at a time when poverty was prevalent across the American landscape, included providing "cash grants adjusted to the needs of the family [in order] to keep the young children with their mother in their

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<sup>34</sup> See *infra* notes 86–144, and accompanying text.

<sup>35</sup> Social Security Act of 1935, Pub. L. No. 74-271, §§ 401-06, 49 Stat. 620, 627-29 (repealed by Personal Responsibility and Work Opportunities Act of 1996 § 103(a)(1)).



own home, thus preventing the necessity of placing the children in institutions.”<sup>36</sup> Back then, federal policy was based on the “recogni[tion] by everyone” that giving money to poor families to help them raise their children at home is “the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised.”<sup>37</sup>

This federal policy began to unravel with the coming of the Nixon Administration in 1968. That administration was the first to undermine the safety net structures of the New Deal, placing new restrictions on public assistance and public health programs, and ending President Johnson’s War on Poverty practically as soon as it began.<sup>38</sup> By the early 1970s, progressives in Congress needed a new way to continue supporting vulnerable families. Walter Mondale helped shepherd the enactment of CAPTA in 1974 as a way to maintain federal support for vulnerable families.<sup>39</sup> Undeniably, Kempe’s work was a pivotal catalyst for this legislation.<sup>40</sup>

The key strategy Mondale employed was to avoid any suggestion that broader social causes needed to be considered when addressing child well-being.<sup>41</sup> In contrast, taking advantage of the then recent concern that children were too often seriously abused by their parents, Mondale confidently assured lawmakers on both sides of the aisle that child abuse knew no class boundaries and that CAPTA was designed to protect all children, including those raised in wealthy homes.<sup>42</sup>

Thus, when NACC began, the child welfare system was based on a flawed premise – a baseless denial that the leading danger children in the United States risked (and the most straightforward for government to address) was poverty.<sup>43</sup> The myth of classlessness that undergirded CAPTA led to a new ideology: removing children from homes in which they were maltreated was an important solution to the newly discovered Battered Child Syndrome. Never

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<sup>36</sup> Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 261 (2006) (quoting S. Rep. No. 74-628, at 17 (1935)).

<sup>37</sup> *Id.*

<sup>38</sup> See generally, NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001). In 1978, researchers David Fanshel and Eugene Shinn observed that “[c]utting public assistance budgets, ending support for public housing, terminating mental health after-care clinics--all grim phenomena of this recent period--are sure ways to increase the number of families where parental breakdown will occur and children will require foster care.” DAVID FANSHIEL & EUGENE B. SHINN, *CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION* 507 (1978).

<sup>39</sup> See BARBARA J. NELSON, *MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS* 15, 97–103 (1984).

<sup>40</sup> See Kurt Mundorff, *Advocating for Change: The Status & Future of America’s Child Welfare System 30 Years After CAPTA*, CARDOZO PUB. L. POL’Y & ETHICS J. 353, 354 (2005) (“The groundswell of public attention to child abuse that finally resulted in CAPTA can be traced to a 1962 article by Dr. Henry Kempe on the battered child syndrome.”).

<sup>41</sup> Mondale emphasized that child abuse was a “national” problem, not a “poverty problem.” NELSON, *supra* note 39, at 107 (quoting Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93rd Cong. 17-18 (1973) (internal quotation marks omitted) (statement of Sen. Mondale)).

<sup>42</sup> *Id.*

<sup>43</sup> See PETER J. PECORA, JAMES K. WHITTAKER & ANTHONY N. MALUCCIO WITH RICHARD P. BARTH & ROBERT D. PLOTNICK, *THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH* 66, 67 (1992) (tracing the correlation between poverty and child maltreatment); Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 609 (1978) (“Every national survey of officially reported child abuse and neglect incidents has indicated that the preponderance of the reports involves families from the lowest social economic levels.”); Leroy H. Pelton, *Resolving the Crisis in Child Welfare: Simply Expanding the Present System Is Not Enough*, 48 PUB. WELFARE 1, 23 (1990) (noting the “abundant evidence that child abuse and neglect are strongly related to poverty”).

mind that the smallest percentage of children brought to court as alleged victims of maltreatment are ever abused.<sup>44</sup>

With these headwinds as NACC came into existence, surely no one could blame NACC for what followed: a frightening rise in the size of America's foster care population. For example, between 1985 and 1997, the foster care population nearly doubled from 276,000 to about 500,000 children.<sup>45</sup>

It is relatively easy to explain how this happened. Troubled by the rise in the foster care population through the 1970s, Congress enacted the Adoption Assistance and Child Welfare Act of 1980,<sup>46</sup> expressly intending to allocate money for services aimed at preventing the separation of children from their parents and at speeding the return of children to their parents. The Act further required agencies to make reasonable efforts towards these goals.<sup>47</sup> Unfortunately, the Reagan Administration never provided funds for preventive foster care placements.<sup>48</sup> As a result, as I explained in an earlier article,

[o]ut-of-home placement continued to be the principal child welfare policy in the United States through the 1980s. Between 1981 and 1983, federal foster care spending grew by more than 400% in real terms, while preventive and reunification spending grew by only 14%, and all other funds available for social services to the poor declined.<sup>49</sup>

### ***B. The Failure to Provide Parents with Adequate Legal Representation***

The rise in the foster care population was hardly the only thing that was troubling since 1977, the year NACC was founded. What happened in court every day was also extremely unsettling. I have had extensive experience appearing in Family Court in New York City over the

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<sup>44</sup> See H. Elenore Wade, *Preserving the Families of Homeless and Housing-Insecure Parents*, 86 GEO. WASH. L. REV. 869, 874 (2018) ("In some states, neglect is identified as a reason for removal in over ninety percent of removals. For example, in New York from 2010 to 2014, removals to foster care for general neglect constituted ninety-three to ninety-five percent of all removals, with the remainder of removals occurring due to findings of emotional abuse, medical neglect, physical abuse, sexual abuse, or some other unclassified form of maltreatment.") *citing* Annie E. Casey Foundation, *Children Who Are Confirmed by Child Protective Services as Victims of Maltreatment by Maltreatment Type*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/6222-children-who-are-confirmed-by-child-protective-services-as-victims-of-maltreatment-by-maltreatment-type>.

<sup>45</sup> Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 420 (1999); *see also* Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129, 134 (2001) (*citing* LEROY PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC WELFARE SYSTEM IN THE U.S.* 6 (1989)).

<sup>46</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. §602 (1982)).

<sup>47</sup> In the late 1970s, for the first time in American history, federal legislators became deeply concerned that too many children ended up in foster care and that many children remained in foster care for too long.

<sup>48</sup> DUNCAN LINDSEY, *THE CHILD WELFARE SYSTEM* 83-89 (1994); *see also* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-34, *CHILD WELFARE: STATES' PROGRESS IN IMPLEMENTING FAMILY PRESERVATION AND SUPPORT SERVICES* 3 (1997) ("By the early 1990's, over half the [child services] programs we surveyed reported that they were not able to serve all families who needed services primarily due to the lack of funds and staff.")

<sup>49</sup> Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1728 (2000).

entire period of NACC's existence, beginning even six years before the organization was founded. I believe my experience in that court is representative of what occurred in many similar courts across the country. Certainly, many colleagues who represent parents in these proceedings have attested to me throughout this time that my complaints about what went on in court very closely resemble theirs.

The courts in which I practiced regularly were characterized by qualities that should cause concern to anyone committed to fundamental fairness, to providing the accused a timely and meaningful opportunity to be heard, and to expecting courts to perform their vital role of being a check on the awesome power of the executive branch. Among the most salient deficiencies was the systemic failure to assure that parents were provided with excellent legal representation.

As much as people debate the importance of counsel for children,<sup>50</sup> one thing, for me, is plain: even for those who believe it is essential that children be represented by lawyers in child welfare proceedings, *between* children and parents, the parent is in greater need of a lawyer at least through the stage of the case until the parent has been adjudicated as neglectful. Thankfully, it is becoming commonplace today to accept the principal, as NACC does, that every child deserves to have his or her parent represented by a well-paid lawyer with a caseload small enough to permit him or her to provide excellent representation.<sup>51</sup>

Children need parents to be well represented, both when the children do not want to be separated from their families and when there is no proper legal basis to remove them from their families. The greatest children's lawyer in the land will be unable to defeat a petition alleging child neglect when the unrepresented parent makes an admission to the petition. The same is true when the represented parent makes the admission but does so because an underpaid lawyer lacked the time to investigate the matter and persuaded the parent that it was in her interest to "cooperate" with the agency and concede maltreatment.

And yet, it is common in too many jurisdictions in the United States for children to be routinely assigned legal representation, even when the parents are obliged to appear unrepresented.<sup>52</sup> Throughout NACC's existence, even though most states in the United States maintained a system by which indigent parents were entitled to court-assigned counsel, many jurisdictions' actual practices are appalling. In some states, parents are assigned counsel very late in the proceeding, long after a child was placed in foster care, and too late to be in a position to defend the case meaningfully.<sup>53</sup> As Vivek Sankaran recently explained, "[i]n many jurisdictions,

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<sup>50</sup> I accept that my position on the subject – that it is not very important for children to be represented in child welfare proceedings – particularly before the adjudication of parental unfitness has been made, has lost in the national debate over children's lawyers. See Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 128–29 (1984).

<sup>51</sup> See, e.g., NACC's 2018 Policy Agenda which calls for children and parents to be appointed well-trained, well-resourced, independent and competent counsel at the onset of all court proceedings, including appeals. See NACC Policy Agenda, NACC, <https://www.naccchildlaw.org/page/PolicyAgenda> (last visited Nov. 5, 2018).

<sup>52</sup> The Supreme Court held in *Lassister v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 2155 (1981) that indigent parents do not have a constitutional right to court-assigned counsel even when they risk the permanent destruction of their parental rights. Throughout NACC's existence, Mississippi refused to recognize a parent's right to counsel in child welfare proceedings.

<sup>53</sup> Martin Guggenheim, "General Overview of Child Protection Laws in the United States," in *REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS* 1, 3 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

parents' lawyers [ ] get paid very little, receive inadequate training, and carry high caseloads."<sup>54</sup> In his words, it is "well known to anyone in the [child welfare] field [ ] that the lack of quality parent representation remains a blight on our child protection system."<sup>55</sup> This means that countless cases handled by members of NACC involve matters in which a child's parent is unrepresented entirely or is represented by a lawyer whom the child's lawyer knows is unable to devote sufficient attention to the case.

***C. The Failure of Child Welfare Courts to Treat Parties with Dignity and Respect and to Perform their Crucial Role of Providing a Meaningful Check on Agencies***

Even if the systemic failure to provide parents with excellent legal representation is the most visible aspect of unfairness in the operation of child welfare courts in the United States, many other qualities of practice are equally disturbing. The child welfare courts with which I am most familiar have, for too long, been conducted in unacceptable ways, apart from the failure to provide excellent legal representation. Judges, court officers, case workers, and attorneys for agencies speak and interact disrespectfully toward parents, revealing racial and class biases that pervade the experience. A generation of law students who first observed practice under my supervision invariably were horrified to see court in action. They are disappointed to see parents being shamed, silenced, and disrespected from so many quarters.

They also are stunned to observe a dysfunctional court where meaningful decision-making rarely occurs. It was more than reassuring when, in the late 1990s, a neutral team of evaluators studied the New York City Family Court system for the first time and was equally as disturbed as my students. This came about when New York City's child welfare system became subject to public scrutiny in the late 1990s because of a settlement in *Marisol A. v. Giuliani*.<sup>56</sup> That settlement established a Special Child Welfare Advisory Panel, whose responsibility was to study Family Court practice. The Panel issued the most critical and steel-eyed assessment of Family Court practice ever published.

Though the pace seems fast and the atmosphere hurried, actual resolution of cases in the family courts proceeds very slowly. The courts are characterized by crowded dockets, long adjournments, and not enough attorneys to represent parents and children. With rare exceptions, hearings lack sufficient docket time for a true examination of the issues. A family that becomes the subject of an abuse or neglect proceeding in these courts can expect to return to court repeatedly and to remain involved in litigation for many months, and sometimes for years. A single fact-finding or dispositional hearing may require four to six separate dates and extend over six months or more. It is not uncommon for children to be in care for a full year, at which point an ASFA permanency hearing is required, without having had a disposition of the original protective proceeding.<sup>57</sup>

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<sup>54</sup> Vivek Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 8 (2017).

<sup>55</sup> *Id.* at 10.

<sup>56</sup> *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 669 (S.D.N.Y. 1996), *aff'd sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

<sup>57</sup> N.Y. SPECIAL CHILD WELFARE ADVISORY PANEL, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 44-45 (Mar. 9, 2000) (on file with author) [hereinafter ADVISORY PANEL].

The Panel captured what constituted acceptable practice in New York: “Some caseworkers appear in court late; some are unprepared to testify; and some do not appear at all, without providing prior notice.”<sup>58</sup> When workers do appear, they too frequently “are unable to provide essential information because they have just been assigned the case and have not yet familiarized themselves with it.”<sup>59</sup> Even when workers have been on the case for several months, there is a significant communication problem within the system. In the report’s words, “[b]asic information is not transmitted from one contract agency to another when a child is transferred; as a result, a worker may appear in front of a judge not even knowing why the child was originally placed in care.”<sup>60</sup> The Panel observed caseworkers routinely ignore court orders.<sup>61</sup> Even worse, the Panel concluded that “neither the courts nor [the agency] appears to have a system for tracking this or for holding anyone responsible.”<sup>62</sup>

It also noticed something even more disturbing about how the court functions: the judges revealed themselves to be complicit in maintaining a court system that fails to do its job properly. The judges acknowledged to the Panel that the prosecuting agency commonly “lack[ed] adequate preparation or fail[ed] to present a solid evidentiary case of abuse or neglect.”<sup>63</sup> Even so, the judges explained that they were unwilling to “hold ACS accountable by refusing to grant their petitions in these cases” because of their fear of “making a mistake and having a child die.”<sup>64</sup> The Panel condemned New York City’s Family Court at the end of the 1990s as a court system which “comes frighteningly close to abdicating the Court’s basic responsibility to protect the rights of children and families.”<sup>65</sup>

This manifest failure of legal process also means, of course, that the substance of child welfare is adversely affected. Many observers have noted how common it is for judges to “rubber stamp” agency requests to remove children from their parents.<sup>66</sup> Robert Gordon’s criticism of child welfare court practice at the end of the 1990s described the common knowledge that judges were going through the motion of doing their job of ensuring that agencies were providing families with reasonable efforts to keep their children at home.<sup>67</sup> Gordon reported, “in order to assure continued federal funding, courts regularly rubber stamp agency efforts as ‘reasonable,’ sometimes on preprinted court order forms.”<sup>68</sup>

What was true in the 1990s has sadly been true throughout the entirety of the modern child welfare system. Despite the substantive rule that children should never be removed from their families when they could safely be maintained at home with services paid for by the agency, in

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<sup>58</sup> *Id.* at 45.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> ADVISORY PANEL, *supra* note 57.

<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.*

<sup>66</sup> See NAT’L COUNCIL OF JUV. & FAMILY CT. JUDGES, CHILD WELFARE LEAGUE OF AM., YOUTH LAW CTR. & NAT’L CTR. FOR YOUTH LAW, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 8 (1987).

<sup>67</sup> See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 638–639 (1999).

<sup>68</sup> *Id.* at 677.

too many instances the only “service” offered was foster care.<sup>69</sup> Even when services are offered, the community too often lacks the needed services.<sup>70</sup> Or, parents are ordered to complete a particular program (such as a “parenting class”) despite any evidence that the program would be of any help.<sup>71</sup> Further, when parents fail to complete the program, the failure is used as a basis to terminate their parental rights because compliance with court orders serves as some kind of proxy for the degree to which the parent really loves her child.<sup>72</sup>

#### **IV. NACC IGNORED AND REMAINED SILENT ABOUT SEVERAL ASPECTS OF CHILD WELFARE PRACTICE IN THE UNITED STATES THAT HAVE BEEN DEEPLY DESTRUCTIVE OF POOR CHILDREN AND THEIR FAMILIES**

This snapshot of various deficiencies in practice in child welfare courts is not meant to be exhaustive. This is not an article about all that is wrong with child welfare practice and policy. It is a review of NACC’s public statements over its first thirty years of existence, given some of the shortcomings and failures we have just reviewed. What this article has already discussed should make it clear both that what was going on in those courts was unacceptable and that anyone practicing in them had to know this. These practices not only involved serious breaches of basic fairness and due process, they also involved no less serious violations of crucial substantive rules – rules designed to ensure that children would not needlessly be removed from their homes except when no less drastic remedy existed.

NACC’s first major publication, the Advocacy Guide, designed to encourage NACC’s membership to fight for improvements in child welfare practice, was published in 2000.<sup>73</sup> The explicit purpose of the Advocacy Guide was to encourage members throughout the country to become more directly involved in advocating for children’s rights beyond the courtroom, and to address NACC’s list of what they regarded to be the most important issues affecting children in the United States.<sup>74</sup>

Here is its list, in its entirety, as it relates to child welfare:

1. NACC believes that, in order for justice to be done in child abuse and neglect related court proceedings, all parties should be represented by counsel. The children who are the subjects of these proceedings are usually the most profoundly affected

<sup>69</sup> The Child Welfare League of America found in 1987 that in more than half of the foster children’s cases they reviewed, the most pressing need for the family was for daycare or babysitting. *See* MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 29, 63–64 (1987).

<sup>70</sup> Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 314 (1996) (“Many states . . . define reasonable efforts in terms of those services already available, however inadequate, and plug families into limited, predefined services”).

<sup>71</sup> *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 601 (1997) (“Instead of offering meaningful assistance, caseworkers too often take a cookie cutter approach to the families and their problems”).

<sup>72</sup> *See* Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Courts*, 40 COLUM. J.L. & SOC. PROBS. 507, 508 (2007) (“Child welfare practice is, instead, received commonly as a police power function, controlling poor parents’ lives, setting needless obstacles in their path, and unnecessarily delaying or thwarting progress. Parents experience agencies and caseworkers as playing a game of ‘gotcha,’ pouncing when parents fail in some responsibility”).

<sup>73</sup> MIRIAM A. ROLLIN, NAT’L ASS’N OF COUNSEL FOR CHILDREN, BETTER PUBLIC POLICY FOR CHILDREN, YOUTH AND FAMILIES: AN ADVOCACY GUIDE (2000).

<sup>74</sup> *Id.* at 10.

by the decisions made in these proceedings, and these children are also usually the least able to voice their views effectively on their own. However, in many jurisdictions, the courts do not appoint independent attorneys for all children in abuse and neglect related proceedings. NACC insists that federal, state, and local law should mandate that independent attorneys be appointed to represent the interest of children in all such proceedings. In addition, the NACC believes that CASA volunteers can serve an important role in ensuring that children and their families receive appropriate services and assistance by investigating and reporting to the court and by exchanging views and coordinating efforts with the children's attorneys. Children's attorneys, however, remain uniquely qualified to provide a voice for children in these legal proceedings through presentation of oral and written submissions to the court. CASA volunteers can therefore supplement but not supplant the efforts of children's attorneys.

2. The NACC believes that child welfare systems must be funded adequately and must offer a combination of preventive and reunification services to children and families, as well as the placements and services needed by children in custody of the state. In addition, child welfare systems must provide adequate case management and permanency planning services to link children and families with appropriate services, and to provide appropriate placements for children.
3. The NACC believes that the court system should be the vehicle for prompt and just determinations in child abuse and neglect related proceedings – proceedings which should minimize the further trauma to child victims. The NACC favors federal, state and local programs to help bring court systems closer to these ideals.<sup>75</sup>

I hope the reader finds this as unsatisfying as I mean to portray it. There are several glaring problems with this list, the least of which is what was not included on it. Before focusing on what NACC did not bother to discuss, it is worth carefully assessing what it chose to say. Let us begin with its focus on lawyers. One might be inclined to give NACC credit for clarifying that it believed *all* parties should be represented by counsel, an improvement over its published views when NACC was founded in the 1970s, when its only focus was on a child's right to representation.<sup>76</sup> However, it is difficult to conclude that NACC believed all parties *equally* deserve quality representation. Undeniably, the thrust of the first issue on NACC's list was on the need for children to be well represented.

The Guide explained that children need lawyers because lawyers “play a critical role in empowering children and ensuring that children's views are heard in legal proceedings” and “the presence of children's attorneys is critical to ensuring the timeliness of proceedings.”<sup>77</sup> It even went so far as to imply that, of all parties in child welfare cases, children are the most in need of counsel. Its reasoning was that “[t]he children who are the subjects of these proceedings are usually

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<sup>75</sup> *Id.* at 7.

<sup>76</sup> *Id.* at 5. (“The NACC was founded in 1977 to promote quality representation of children in the legal system”).

<sup>77</sup> *Id.* at 7.

the most profoundly affected by the decisions made in these proceedings.”<sup>78</sup> That is a fair statement, as far as it goes, but it could be mistaken for the idea that, if states are going to be selective in deciding whether parents or children are more deserving of lawyers, NACC hopes they choose the children.

Given NACC’s certain awareness of the dismal record in so many states to provide parents with lawyers capable of representing their clients at the highest level, its emphasis on the importance of counsel for children, combined with its silence on the failure to provide parents with quality representation was, in a word, unacceptable. Anyone with the slightest knowledge of how courts work must concede that a child’s lawyer is unable to defend charges against an uncounseled parent. Instead, whenever a parent is inadequately represented, there will be no meaningful contest of the charges in the petition and the court will secure jurisdiction over the family along with the power to decide where the child will live for the next several months, years, or even for his or her entire childhood. Yet NACC’s Advocacy Guide said nothing to suggest that it considered the failure to provide parents with excellent representation as a serious issue which demands immediate attention.

Lest there remains any doubt about NACC’s principal interest in ensuring that children were represented, whether or not their parents were, everything else said in the first issue focused exclusively on children’s representation. Most of this remaining focus shifted to the intramural fight NACC had long engaged in with guardians *ad litem* and with CASA.<sup>79</sup> The Advocacy Guide stressed NACC’s belief in the superiority of lawyers for children over any other kind of representative, conceding “that CASA volunteers can serve an important role in ensuring that children and their families receive appropriate services,” but insisting that “[c]hildren’s attorneys [...] remain uniquely qualified to provide a legal voice for children in these legal proceedings through presentation of oral and written submissions to the court.”<sup>80</sup> It ended the statement by

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<sup>78</sup> *Id.* It complained that “children are also usually the least able to voice their views effectively on their own.” Does this mean that rarely is it known what happened to the child? There are several possible reasons children are the least able to communicate. One is that they are infants and toddlers (which, in fact, constitute a high percentage of all new cases). For these children, neither they nor their counsel is capable of “voicing their views effectively.” Another possible reason, and the one NACC undoubtedly cares most about, is that children’s views are rarely heard in the courtroom. But there is still a third concern, and to my knowledge it is something about which NACC has never seemed to mind. Children are rarely able to voice their views effectively in child welfare proceedings, not because their views are unknown, but because they are substantively irrelevant. State laws throughout the United States call for children who have been abused, and who cannot safely be kept in their homes, to be placed into state custody. It is substantively irrelevant whether the child agrees that s/he should be separated from her family or whether she wants to continue to live with her family. Similarly, states routinely terminate a child’s parental rights even when children would strongly prefer to remain legally related to their family, because the substantive standard for termination is the best interests of the child. One would think that an organization committed to children’s voices being heard in the courtroom would demand that the law give greater substantive importance to the child’s views. NACC’s failure to complain about the lack of substantive rights children have when courts decide their fate in child welfare cases has long struck me as bordering on the incoherent. It is, to say the least, confusing for an organization to be committed to the proposition that each child has the right “to voice their views effectively” would remain entirely content to tolerate laws that fail to care what the child’s views are. See case cited *infra* note 136 for a rare example of NACC taking the substantive position that courts should be prohibited from terminating a child’s parental rights over the objection of the child in the absence of finding there are compelling reasons to do so.

<sup>79</sup> ROLLIN, *supra* note 73.

<sup>80</sup> *Id.*



clarifying its belief that CASAs are fine as court aides, but they should never “supplant the efforts of children’s attorneys.”<sup>81</sup>

Both the second policy issue (calling for more funding) and the third issue (calling upon the federal government to help the court system “minimize the further trauma to child victims”)<sup>82</sup> were written at a level of abstraction that renders them practically meaningless. What is startling is that I have just set forth everything NACC had to say about the things it wanted changed or improved in child welfare as of 2000. NACC was saying the most important change needed in child welfare practice at the end of the 20<sup>th</sup> century was to provide all parties with a lawyer and presented a strong reminder that the children are really the most important party in the case, and they deserve actual lawyers, not merely a CASA.

If NACC’s Advocacy Guide in 2000 gave no hint of any deep unhappiness with the trajectory of child welfare practice and policy in the United States, perhaps concerns could be found elsewhere. Unfortunately, my review of NACC’s public statements throughout the first thirty years failed to detect any such thing. In 2004, NACC announced its Five-Year Plan, meant to cover NACC’s focus for the years 2005 through 2010.<sup>83</sup> The plan revealed what NACC actually cared about and what it did not. It also revealed just how much NACC was unwilling to ruffle anyone’s feathers, something most lawyer-activist organizations in any other field commonly feel the need to do. NACC’s Five-Year Plan was both extremely modest and filled with platitudes.

The Five-Year Plan set forth four principal missions. The first was to “strengthen the delivery of legal services for children,”<sup>84</sup> to be accomplished by ensuring “that children are provided with well resourced, high quality legal counsel when their welfare is at stake.”<sup>85</sup> The second was to “enhance the quality of legal services affecting children,” to be furthered by “establish[ing] standards of practice and provid[ing] training, education, and technical assistance to promote specialized high quality legal services.”<sup>86</sup> The third was to “improve Courts and Agencies Serving Children,”<sup>87</sup> by “promo[ting] systemic improvement in our child serving agencies and court systems.”<sup>88</sup> The final mission was to “advance the Rights and Interests of children,”<sup>89</sup> which NACC sought to accomplish by “promot[ing] law and policy that advance the welfare of children.”<sup>90</sup>

The Five-Year Plan also established “eight strategic goals” for the organization. These were to:

1. Enhance NACC effectiveness through a large, stable, and diverse membership.
2. Establish and maintain the practice of law for children as a full-time legal specialty.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 8.

<sup>83</sup> Nat’l Ass’n of Counsel for Children, *THE GUARDIAN* 1, 1 (Fall 2004).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Nat’l Ass’n of Counsel for Children, *supra* note 83.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

3. Improve and support the practice of law affecting children through education, training, technical assistance and the creation of comprehensive law offices.
4. Achieve the NACC's mission through federal, state, local, and court policy advocacy.
5. Promote the welfare of children through youth empowerment.
6. Promote an effective, high quality juvenile court judiciary.
7. Enhance association effectiveness through collaboration with related child advocacy programs.
8. Enhance the welfare of children through litigation programs.<sup>91</sup>

Where to begin a critique of this Mission Statement? What should we have expected of the organization calling itself the leading children's advocacy organization in the United States focused on child welfare practice and policy? Surely NACC would have said something about how poorly many courts were acting at a time when a glaring problem in child welfare cases was the virtual absence of a due process practice, of a meaningful system of checks and balances, and of courtrooms ensuring that the law was faithfully followed. At a time when objective outsiders found courts performing as rubber stamps and agencies getting whatever they asked for in court, where was NACC to speak up? How can it be that the leading organization committed to children's rights in child welfare proceedings would fail even to acknowledge, let alone condemn, the problem? Any defense of this manifesto suggesting that NACC was subtly acknowledging the failures of the court process by its call to "improve courts" and "promote [their] systemic improvement" should be rejected.

It also should not be overlooked how quickly NACC retreated from its 2000 Advocacy Guide's expressed commitment to quality representation for all parties.<sup>92</sup> By 2004, NACC was again focused exclusively on ensuring that children are provided with well resourced, high quality legal counsel when their welfare is at stake and enhancing the quality of legal services affecting children.

During a period when too many courts commonly allowed parents to appear unrepresented or appointed a lawyer paid so little or so overworked that the parent was little better off than getting no lawyer at all, NACC did worse than ignore the problem; it even dropped its titular commitment to parents' entitlement to excellent legal representation, reverting to its origins that the most important party in child welfare proceedings are the children and the most important principle to NACC was that each child be represented by a lawyer – and a *real* lawyer at that. By now we can see that NACC did not believe that it is more important that parents are well represented than children. Perhaps for this reason, NACC did not consider part of its mission to complain when parents were denied their right to excellent legal representation.

There are other equally unacceptable qualities about this Five-Year Plan. Everything NACC talked about focused on *process*. I have already explained why I consider what they chose to discuss and ignore is unacceptable. However, the reader should also appreciate that the Five-

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<sup>91</sup> *Id.*

<sup>92</sup> See ROLLIN, *supra* note 73, and accompanying text.

Year Plan ignored entirely any discussion of *substance*. Not even a nod is given in the direction of complaining about the failure of government to provide funds to ensure that children are never needlessly removed from their families. There is no mention of the ease with which parents' rights were being terminated, or the growing number of legal orphans.<sup>93</sup> Surely the leading organization of lawyers who appear regularly in those courts would have something to say about the deficiencies of practice that outsiders found so disturbing.

Marvin Ventrell, NACC's executive director from 1994 through 2009, was comfortable defending child welfare practice in the United States through the end of the 20<sup>th</sup> century. It is interesting to observe the trajectory of his views, both on how well child welfare was working and his perception of the motives and personalities of child welfare critics. Writing in 1998 after celebrating the achievements of child welfare practice in the United States, Ventrell acknowledged that the system had its critics. As he explained it,

Criticism of the juvenile dependency court tends to take two forms. The first is a 'parental rights' criticism *which seems to come from a vocal minority* and suggests that the child protective system overreaches into the autonomy of the family and that families should be allowed, without governmental interference, to raise, educate and discipline children as they see fit.<sup>94</sup>

He rejected the criticism outright, explaining its two flaws. First, he wrote that these objectors either believe "that children are not seriously maltreated by their caretakers, or that society should allow over [one] million children a year to be maltreated by their caretakers as a price of parental autonomy."<sup>95</sup> Doubling down, Ventrell countered that the "child maltreatment data" suggesting that one million children are maltreated each year "is probably understated."<sup>96</sup>

Then, he went considerably further in his defense of the status quo. He fiercely disputed the contention that there is any overreaching by the child protective system, asserting "there is a lack of evidence that the child protective system unfairly intrudes into the American family."<sup>97</sup> Amazingly, he followed that by explaining that "[t]he vast majority of families will simply never experience any form of intervention from the state."<sup>98</sup> I am entirely in agreement with his second point, but do not agree that it proves there is no overreaching going on. Instead, there are two very different experiences in child welfare in the United States. There are communities in which child welfare removals are virtually unknown, and there are communities ripped apart by child welfare

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<sup>93</sup> No student of child welfare can responsibly disagree that we have needlessly destroyed American families by terminating parental rights when children are unlikely to be adopted and there was no concern that an on-going parental-child relationship would be harmful to the child. In those cases, at least, a rote application of a poorly written and conceived federal law (ASFA) has inflicted irreversible harm on many thousands of American children, with estimates ranging from 60,000 to more than 100,000. See LaShanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U. REV. L. & SOC. CHANGE 507, 516 (2017) (the federal government counted more than 63,000 foster children as having no legal ties and no prospects of securing one...); ADMIN. FOR CHILD. & FAMILIES, ADMIN. ON CHILD., YOUTH & FAMILIES, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., The AFCARS Report No.23, 1 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

<sup>94</sup> Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 31-32 (1998) (emphasis added).

<sup>95</sup> *Id.* at 32.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

interventions such that every family knows someone whose children are in foster care.<sup>99</sup> The fact that we almost never remove children from privileged homes says nothing about whether we needlessly remove children from poor families. Ventrell went further and added that “[i]t is a myth that the state possesses unfettered authority to substitute its parenting judgment for that of parents.”<sup>100</sup> As support for his claim that courts never overreach, he simply explains that “parents have a constitutionally protected right to raise their biological children.”<sup>101</sup>

Responding to the criticism that child welfare interventions fail to “produce adequate outcomes for many children,”<sup>102</sup> Ventrell conceded that “on some level, this criticism is valid,” explaining that sometimes agencies or courts fail to *remove* children in danger, among other problems.<sup>103</sup> In his words, it “must be acknowledged” that there may be “inappropriate removal, inadequate services to children at home and in placement, lack of competent legal representation for children, untimeliness of proceedings and failures to develop permanent solutions.” However, for Ventrell, there was little need to worry because “[e]fforts such as the State Court Improvement Program are addressing these issues.”<sup>104</sup>

The reader should have no doubt: the leadership of NACC in the 20<sup>th</sup> century not only had great faith in the child welfare system, it was exceedingly complacent. It expressed its confidence that, for the most part, things were going quite well and, where they were not, state officials were working hard to make them better.<sup>105</sup>

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<sup>99</sup> Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 UNIV. ILL. L. REV. 171, 179 (2003) (“The impact of family disruption and supervision is intensified when the child welfare system’s destruction is concentrated in inner-city neighborhoods. In Chicago, for example, almost all child protection cases are clustered in two zip code areas, which are almost exclusively African American.... One in ten children in Central Harlem have been taken from their parents and placed in foster care. In 1997, 3,000 children in this single neighborhood were in the State’s custody. The spatial concentration of child welfare supervision creates an environment in which state custody of children is a realistic expectation, if not the norm. Everyone in the neighborhood has either experienced state intrusion in their family or knows someone who has”).

<sup>100</sup> Ventrell, *supra* note 94, at 32.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* Ventrell’s 1998 article was reproduced in modified form in all three editions of NACC famed Red Book (formally known as CHILD WELFARE LAW AND PRACTICE, REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (1st ed. 2005; 2d ed. 2010; 3d ed. 2017)). It is interesting to observe the subtle modification of his language over the years. In the 2017 edition, he no longer relegates the “parental rights” criticism to a “vocal minority.” But he continues to defend the status quo arguing that the number of maltreated children in the United States is very likely understated. (*citing* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *Child Maltreatment 2002*.) He also asserts that there is “an absence of data showing overreaching” and “a lack of evidence that the child protective system unfairly intrudes into the American family,” again, because “[t]he vast majority of families will simply never experience any form of intervention from the state.” Marvin Ventrell, *The History of Child Welfare Law*, CHILD WELFARE LAW AND PRACTICE, REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (3d ed. 2017). Ventrell also acknowledges a number of serious concerns about child welfare practice in the 2017 version of his chapter. For example, he reports that “the Third National Incidence Study of Child Abuse and Neglect (NIS-3) reports the highest correlation of family income to maltreatment exists in families with an annual income of \$15,000 or less, and the lowest correlation in families with annual income of \$30,000 or more. This and the disproportionate representation of minority children in dependency cases should be taken seriously, particularly in light of the medical view that child abuse knows no class or race boundaries. Whether reporting accurately captures maltreatment in higher income households, and whether intervention is racially and culturally competent, are issues which warrant investigation.”

Beyond this, NACC's focus over the first 30 years of its existence was remarkably hermetic. It focused in a narrow, sealed way on two things above all else. First, it focused on itself as an organization devoted to the principle that children deserved to be represented in all child welfare proceedings. This became its mission and involved an intramural fight with CASA, its leading competitor. But NACC refused to offer critical commentary on what should have been a preeminent concern: the degree to which child welfare practice had been turned into something bad for poor children, including the break-up of poor families at an unprecedented rate. When children were needlessly removed from their mothers merely because the mothers faultlessly were themselves threatened or assaulted by an intimate adult partner, NACC was silent.<sup>106</sup> Over the period of NACC's existence, both the child poverty rate and income inequality grew.<sup>107</sup> One would never know this by reading NACC's publications during its formative years.<sup>108</sup>

Nor is this a matter of important leaders of NACC being unaware of the need to pay attention to things outside of the four corners of the child welfare system. Consider the sage views of Don Duquette, who played an exceptionally large role in NACC for most of its history. In 2007, as part of a celebration of thirty years of child advocacy work he had done at the University of Michigan Law School, Duquette explained that child advocates need to "address child poverty and strengthen its policies supporting children's families and the institutions that help children grow and develop into healthy and productive citizens."<sup>109</sup> His goal was to help create a society that is "better at preventing child abuse and neglect."<sup>110</sup> He worried about, and condemned, "overzealous state intervention."<sup>111</sup> Duquette wanted court orders designed to "minimize the disruptions to a child's life [and] generally provide for more contact between parent and child."<sup>112</sup> He also wanted to see fewer terminations of parental rights and bring in "more persons [to] participate in the permanency decisions."<sup>113</sup> It is precisely this kind of critique and advocacy that was missing from NACC during too much of its formative years.

Even when NACC acknowledged some of the most pressing real-world problems in child welfare, its proposed solutions have been stunningly meager. In 2005, for example, NACC published in *The Guardian* the first article that I could find that paid serious attention to the "heavy toll" foster care exacts on children, including "the severing of ties with all that is familiar to the child, often including siblings and extended family."<sup>114</sup> The article, written by Miriam Krinsky, highlighted how miserable foster care has proven to be for too many children forced to endure it.

<sup>106</sup> See *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003).

<sup>107</sup> Writing about child poverty in the United States during NACC's formative years, Peter Cicchino reported that "[t]he child poverty rate has gone from about 15% in 1974; to about 22% in 1993; to between 24% and 29% [in 1995]. Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5, 20 (1996).

<sup>108</sup> NACC's behavior over much of its history is akin to a group of professionals deeply committed to children's health and well-being who see children being placed in a hospital when they don't need to be there, and the hospital is astonishingly ill-equipped to serve the children well. The hospital lacks adequate food, clothing, shelter, education, for the children residing within it. These professionals work on those problems, trying to get better food, better beds, better education. But they entirely overlook that the children should not have been there in the first place.

<sup>109</sup> Duquette, *supra* note 2, at 317.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 322.

<sup>112</sup> *Id.* at 323.

<sup>113</sup> *Id.*

<sup>114</sup> Miriam Aroni Krinsky, *NACC and ABA Join Call for Reform of Foster Care System*, THE GUARDIAN 1, 1 (Summer 2005).

In Krinsky's words, "[w]ithin two years of aging out of a child welfare system that committed collectively to parent them, more than half of former foster youth are unemployed, a third become homeless, and one in three will be incarcerated."<sup>115</sup> One reform NACC embraced was a call to shift federal money that favors foster care to permit spending on services that could keep families intact.<sup>116</sup> The article also was critical of the courts, reporting that barely half of child welfare judges surveyed "received any child-welfare training before hearing dependency cases,"<sup>117</sup> and that the courts suffer from "overloaded court dockets, a chronic shortage of available services for families, and poorly prepared caseworkers" which create "major barriers to finding stable and secure homes for children in foster care."<sup>118</sup>

Ultimately, NACC's response seemed to me, again, remarkably tepid and too attentive to the needs of NACC's membership. According to Krinsky, in light of these recognized problems, NACC proposed that "[c]hildren in foster care should have the right to effective legal representation in the court process," "to stand on equal legal footing in the court process," and to "be notified of their own court proceedings and given a meaningful opportunity to participate in proceedings that will craft their future."<sup>119</sup> To ensure better, more qualified lawyers for children, NACC proposed increasing the pay for children's lawyers and "the establishment of loan forgiveness programs for lawyers who specialize in this area."<sup>120</sup> NACC also called for training and collaboration, including better sharing of information.<sup>121</sup> It further recommended better judicial leadership and flexible funding for cases.<sup>122</sup>

For too many years, NACC focused in extraordinarily narrow ways on things to improve in child welfare proceedings. No other children's rights organization behaved like this. Take, as an example, the juvenile defender community, which has long understood that policies happening outside of juvenile court greatly determine what happens inside the court. Organizations such as the National Juvenile Defender Center have long derided the school-to-prison pipeline as poor public policy and deeply harmful to children.<sup>123</sup> One might think it is unfair to criticize an organization that chooses to limit its focus to the four corners of child welfare.<sup>124</sup> But it is essential that any organization devoted to advancing children's rights in child welfare proceedings cast a critical eye on all matters that, even tangentially, impact child welfare policy and practice.

What goes on outside of the formal parameters of the child welfare system dramatically impacts what happens inside it. Treating child welfare as an entity unto itself while ignoring what is happening in the United States to poor families disadvantages the children who are the subject of child welfare proceedings. When there are only a few tools in the toolkit, government officials can be expected to use the ones at hand, which too often means removing children from their families. Child welfare practitioners who restrict their focus to the narrow formalities of child welfare are unintentionally disadvantaging children.

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<sup>115</sup> Krinsky, *supra* note 114.

<sup>116</sup> *Id.* at 1-2.

<sup>117</sup> *Id.* at 1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Krinsky, *supra* note 114, at 1-2.

<sup>122</sup> *Id.* at 2.

<sup>123</sup> See NAT'L JUV. DEFENDER CTR., *Juvenile Defender Resource Guide*, 27-33 (HyeJi Kim ed., 2016), available at <http://njdc.info/wp-content/uploads/2016/10/Resource-Guide-CompleteRevised-Final-2016.pdf>.

<sup>124</sup> In all events, it should be clear that I do not rest my criticism of NACC for failing to go outside of the formal boundaries of child welfare. Independently, NACC should be faulted for ignoring for too long the prominent failings of child welfare within the four corners of the system.

The claim that all children who end up in foster care are there because of pathology in their homes is something we have grown used to hearing from too many child advocates. A change is long overdue. Labeling all foster children as abused, or even neglected, slanders their parents and contributes to the false master narrative that only children raised in dangerous homes by unfit parents end up in foster care. Children's advocates harm children and insult their families by failing to carefully characterize the families into which foster children were born and raised.

#### IV. NACC'S AMICUS WORK

NACC has expressed itself as an organization in two principal ways. By far, the most prominent was through its own publications, which the previous section considered. NACC also submitted a significant number of amicus briefs, providing the organization an opportunity to persuade courts to decide issues of importance in accordance with NACC's policies and values. This section will describe NACC's submissions as a friend of the court. As will be clear, the briefs, especially those written within the past ten years or so, are significantly more progressive than NACC's reports, five-year plans, and other statements in its official publications.

Consistent with its roots as an organization committed to protecting children from harm, NACC has long shown an interest in supporting state efforts to introduce into evidence, in criminal or civil proceedings, statements made out of court whose admissibility would arguably violate an accused's right to confront witnesses against them<sup>125</sup> and to extend statutes of limitations involving crimes committed against minors.<sup>126</sup> It has also involved itself in child support<sup>127</sup> and immigration

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<sup>125</sup> See, e.g., *Giles v. California*, 554 U.S. 253 (2008) (making space for child victim's testimony when unavailable for trial); *Davis v. Washington*, 547 U.S. 813 (2006) (Confrontation Clause victim's statement in response to 911 operator's interrogation was not testimonial; batterer's written statements in affidavit given to police were testimonial and were subject to Confrontation Clause). In *Commonwealth v. Ritchie*, NACC filed a brief supporting the granting of certiorari that argued that the Pennsylvania Supreme Court went too far in protecting the rights of an accused defendant in a criminal sex abuse case when it ordered that the defendant had the Sixth Amendment right to "rummage" through otherwise privileged files maintained by the civil child abuse child protective system. Brief for the National Association of Counsel for Children, et al. as Amici Curiae Supporting Petitioner, at 11, *Commonwealth v. Ritchie*, 480 US 39 (1987) (No. 85-1347), 1986 WL 728026. The state court ruled that the defendant had the right to see child protection files even when "(a) the prosecution had made no use whatever of the files in question; and, (b) defense counsel's request to review these files was in no way particularized but, rather, was based on conclusory representations that there 'could be' material helpful to the defendant in such files." NACC argued that "[t]he importance of confidentiality in child abuse reporting laws cannot be exaggerated." *Id.* at 5, 9. NACC argued that without "the assurances of confidentiality" in the Pennsylvania law "it is probable, indeed, highly likely, that many fewer child sexual abuse cases would be reported." *Id.* at 9-10. It particularly stressed the cases of sexual abuse involving a child and someone in a caretaking relationship. In those cases, NACC explained, the abuse is all "doubly harmful, since assaults or molestations by strangers do not present conflict for the child, enabling the child to identify the abuser and to describe the abuser, more readily." *Id.* at 11.

<sup>126</sup> See *Stogner v. California*, 539 U.S. 607 (2003) (supporting California's extended statute of limitations for child sex abuse prosecutions as appropriate because victims often need additional time before alerting officials of the crime).

<sup>127</sup> See, e.g., *Blessing v. Freestone*, 520 U.S. 329 (1997) (unsuccessfully arguing that children and families may privately enforce federal child support statutes 42 U.S.C. § 651.); *C.K. v. Shalala*, 883 F. Supp. 991 (D. N.J. 1995) (seeking higher AFDC benefits); *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005) (lesbian parent counts as parent obliged to pay child support). It asked the Court to review the state court ruling and limit the reach of the rights of defendants to gain access to child abuse files. See also *Idaho v. Wright*, 497 U.S. 805 (1990) (supporting special rules for interviewing child victims and permitting their out of court testimony as reliable); *Maryland v. Craig*, 497 U.S. 836 (1990) (motion supporting granting of cert and arguing that the protection of child witnesses from further trauma justifies, in some circumstances, protecting children from face-to-face confrontation with the defendant); see *Davis*,

matters,<sup>128</sup> as well as juvenile justice matters in both the Supreme Court<sup>129</sup> and various lower courts.<sup>130</sup>

Through its submissions to courts in various briefs filed over the years, NACC revealed itself as appropriately sensitive to overreaching by government officials in the name of advancing the interests of children. Thus, NACC has been comfortable arguing to courts that, “in recognition of the fundamental role played by families in children’s lives, [NACC] supports their preservation and opposes laws that would undermine their stability.”<sup>131</sup> Similarly, in its amicus brief filed in *Troxel v. Granville*,<sup>132</sup> NACC argued that the Washington statute authorizing “any local judge” to “requir[e] a mother to ‘confer’ with her children’s paternal grandparents . . . about how and when to tell the children about their biological father’s suicide. . . without a preliminary inquiry into the nature of the person’s relationship to the child or any finding that the child will be otherwise seriously disadvantaged” should be held unconstitutional as an infringement of “fundamental rights of children and their parents to family privacy and autonomy under the due process clause of the 14th Amendment.”<sup>133</sup>

NACC argued in its *Troxel* brief that the statute “strikes at the heart of longstanding common law and constitutional principles that protect parental autonomy and ensure that a child will not become ‘the mere creature of the State.’”<sup>134</sup> NACC explained that statutes that “allow courts to arrogate to themselves the right to override routine parental decisions,” wrongfully intrude on the privacy of the family.<sup>135</sup> Citing *Stanley v. Illinois*,<sup>136</sup> the NACC brief explained that “court action on behalf of a non-parent based on an ill-defined ‘best interests of children’ test is an impermissible burden on parents and on the liberty interests of children to a parent and a measure

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547 U.S. 813 (siding with Indiana –supporting laws making it easier to introduce out of court statements of children); see *Giles*, 554 U.S. 353 (Confrontation clause requirements should not apply strictly to children’s testimony).

<sup>128</sup> See generally *Demiraj v. Holder*, 631 F.3d 194, 197 (5th Cir. 2011), opinion vacated, appeal dismissed, No. 08-60991, 2012 WL 2051799 (5th Cir. May 31, 2012) (persecution on account of family membership counts for asylum seekers); *D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016) (unaccompanied minor child immigration case). See also *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013), cert. denied, 135 S.Ct 58 (2014).

<sup>129</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (executing juveniles violates the Constitution); *Graham v. Florida*, 560 U.S. 48 (2010) (life without possibility of parole for juvenile convicted of non-homicide is unconstitutional); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (considerations of a child’s age must be taken into account when applying *Miranda v. Arizona*); *Miller v. Alabama*, 567 U.S. 460 (2012) (automatic sentence of juvenile to life without possibility of parole was unconstitutional); *Montgomery v. Louisiana*, (136 S.Ct. 718 (2016) (holding that *Miller v. Alabama* is retroactive).

<sup>130</sup> See, e.g., *Kelsey v. Florida*, 206 So.3d 5 (2016) (meaningful opportunity for juvenile to seek review of lengthy adult criminal sentence); *In re C.S.*, 115 874 N.E.2d 1177 (Ohio 2007) (juvenile had right to counsel in delinquency proceeding); *In re V.A.*, 50 A.3d 610 (N.J. 2012) arguing for judicial review of waiver decision from juvenile to adult criminal court). See also *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *aff’d sub nom.* *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *rev’d sub nom.* *Reno v. Flores*, 507 U.S. 292 (1993) (challenge to practice of strip-searching juveniles held by immigration officials).

<sup>131</sup> NACC Amicus Brief filed In Support of Petitioner in *Pierre v. Holder*, cert. denied, 135 S.C. 38 (2014) at 4.

<sup>132</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>133</sup> Brief filed for Robert C. Fellmeth et al. as Amici Curiae Supporting Respondents at 2, *Troxel v. Granville* at 2, Summary of Argument, 530 U.S. 57 (2000) (No. 99-138) [hereinafter *Troxel* Brief].

<sup>134</sup> *Id.* at 2-3 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).



of family autonomy.”<sup>137</sup> NACC objected that this level of intrusion “includes financial, time, and privacy sacrifices by the affected family.”<sup>138</sup>

The largest focus of NACC’s amici work on matters directly related to child welfare has been on the right of children to be represented in child welfare termination of parental rights proceedings<sup>139</sup> and related inquiries involving the representation of children, such as whether statements children make to guardians *ad litem* are confidential.<sup>140</sup> In addition, NACC has weighed in on various problems foster parents and foster children experienced, including foster children’s right to sex reassignment surgery,<sup>141</sup> foster parents’ entitlement to insurance for their wards,<sup>142</sup> and other foster parents’ interests.<sup>143</sup>

As the leadership of NACC began to change in the early 2000s, NACC’s amicus work began to take a decidedly pro-parent turn, especially when compared to NACC’s focus before that time. Since then, NACC has filed a series of briefs supporting parental rights in ways it never did in earlier years. Beginning around 2008, NACC has weighed in on a variety of matters involving children that stray from its earlier roots as a pro-prosecution supporter. In *Camreta v. Greene*,<sup>144</sup> NACC took a strong position that a two-hour interrogation of a nine-year-old girl at her school in the presence of an armed, uniformed police officer, constituted an impermissible seizure in violation of the child’s rights under the Fourth Amendment. NACC explained that children deserve protection both from abuse inflicted on them by adults and also from

<sup>137</sup> Troxel Brief, *supra* note 133, at 3.

<sup>138</sup> *Id.*

<sup>139</sup> See e.g., *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017) (arguing that the appointment of guardian ad litem for a child in termination case does not satisfy legislature’s requirement for the appointment of counsel). *In re Dependency of K.P.T.* (Wash. App. 2015) (arguing that due process requires the appointment of counsel for children in dependency proceedings in the state of Washington.); *In re Felicity S.*, 171 Cal.Rptr.3d 487 (Cal. Ct. App. 2014), *as modified* (May 23, 2014), *ordered not to be officially published* (Aug. 20, 2014) (seeking admonition of counsel for child for failing to provide adequate representation); *In re Christina M.*, 908 A.2d 1073 (Conn. 2006) (arguing that children have right to counsel in termination cases); *E.T. v. Cantil-Sakauye*, 682 F.3d 1121 (9th Cir. 2012) (excessive caseloads for children’s lawyers); *Dependency of MSR and TSR*, 271 P.3d 234 (Wash. 2012) (child’s right to independent counsel in termination proceeding); *In re Josiah Z.*, 115 P.3d 1133 (Cal. 2005) (elaborate interpretation of role of appellate counsel for children in dependency proceedings and the related role of CAPTA guardian). NACC also weighed in on the rights of children to representation in a divorce proceeding. See *Grissom v. Grissom*, 886 S.W.2d 47 (Mo. Ct. App. 1994) (representing children in divorce cases).

<sup>140</sup> See, e.g., *People v. Gabriesheski*, 205 P.3d 441, 443 (Colo. App. 2008), *aff’d in part, rev’d in part*, 262 P.3d 653 (Colo. 2011) (arguing that conversations between a child and her guardian ad litem in a dependency and neglect case are confidential communications protected by attorney-client privilege); *R.L.R. v. State*, 116 So.3d 570 (Fla. Dist. Ct. App. 2013) (attorney-client privilege applies to child in child protective proceeding to the extent that the child’s lawyer may not disclose the child’s confidential information informing the lawyer of the child’s whereabouts).

<sup>141</sup> See *In re Brian L.*, 859 N.Y.S.2d 8 (N.Y. App. Div. 2008). See also *In re Churchill/Belinski*, Mich. App. N.W. 2d (2018); *In re Mays*, 807 N.W.2d 307 (Mich. 2012) (child’s opinion in termination of parental rights decision).

<sup>142</sup> See, e.g., *In re Corrine W.*, 198 P.3d 1102 (Cal. 2009) (supporting foster parents’ claim of entitlement to insurance coverage for foster child); *County of Los Angeles v. Smith*, 89 Cal. Rptr. 2d 159 (Cal. App. 1999) (child support for foster children). NACC also wrote an amicus brief in a case involving mandated reporters. See *B.H. v. County of San Bernardino*, 361 P.3d 319 (Cal. 2015) (duty of mandated reporter to report).

<sup>143</sup> See *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (supporting granting standing to seek visitation to persons who served as a de facto parent); *Baby Girl v. Adoptive Couple*, 570 U.S. 637 (2013) (supporting adoptive couple’s right to keep child placed with them at birth over the objection of the birth father); *In re D.I.S.*, 249 P.3d 775 (Colo. 2011) (arguing for limiting parents’ power to terminate a guardianship arrangement to which they once consented).

<sup>144</sup> *Camreta v. Greene*, 563 U.S. 692 (2011).

the harms to children that follow from deeply flawed state-based interventions conducted with the professed goal of protecting children from abuse. These harms include both the immediate trauma of being subjected to ill-conceived and poorly-executed interrogations, and the serious collateral harms to children that arise when unreliable information procured through bad forensic practices prompts unwarranted or unsustainable interventions, including the highly disruptive placement of a child into foster care.<sup>145</sup>

NACC stressed that ineffective forensic practices used in the investigation of sex abuse are harmful to children directly and “because they impede the successful prosecution of perpetrators of abuse.”<sup>146</sup> In addition to condemning the methods used to interview the nine-year-old child, NACC took a strong position supporting parental rights, suggesting that the nine-year-old child at the center of the case possesses not only the “right to be free from unreasonable seizures but also [the] right under the Fourteenth Amendment - reciprocal to that of her parents - to be free from state actions that interfere with the integrity of her family relationships without adequate cause.”<sup>147</sup>

In addition, NACC has helpfully advanced the claim that the Interstate Compact for the Placement of Children<sup>148</sup> should not be applied to parents living out-of-state who are not accused of neglect.<sup>149</sup> It has also supported the claim that parents in child welfare proceedings have the constitutional right to counsel.<sup>150</sup> NACC supported the Department of the Interior against a challenge that guidelines promulgated in 2015 by the Department too broadly interpreted the Indian Child Welfare Act; the challengers claimed that the guidelines violated the rights of off-reservation children with Indian ancestry to be more easily adoptable by non-Indian foster or adoptive parents.<sup>151</sup> It also argued that the one-parent rule in Michigan, which allowed the state to keep a child from both parents even when only one parent was found to be unfit,<sup>152</sup> was unconstitutional<sup>153</sup> and, relatedly, that a parent’s right to custody may not be infringed without a judicial finding of unfitness.<sup>154</sup>

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<sup>145</sup> *Id.* at 707.

<sup>146</sup> *Id.* at 699.

<sup>147</sup> *Id.* at 711.

<sup>148</sup> The ICPC is an agreement incorporated into state statutes governing the transfer of children across state lines for placement in foster or pre-adoptive homes. The ICPC’s full text is also available at <http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html>.

<sup>149</sup> *In re Emoni W.*, 305 Conn. 723 (2012); *Adgeron v. District of Columbia*, No. 1:11-cv-01772 (D.C. 2011).

<sup>150</sup> *See In re C.M.*, 48 A.3d 942 (N.H. 2012) (arguing that providing parents with the right to counsel is necessary to prevent an erroneous deprivation of a liberty interest. Additionally, errors made in the initial custody deprivation can affect subsequent decisions throughout the case including the final termination of parental rights decision. Finally, parents’ counsel plays a crucial role in reducing errors in child welfare cases.) *See also People v. McBride*, 516 N.W.2d 148 (Mich. Ct. App. 1994) (arguing in favor of a parent’s right to counsel in termination of parental rights proceedings).

<sup>151</sup> *See A.D. by Carter v. Washburn*, 2017 WL 1019685 (D. Ariz. 2017) (supporting Guidelines for State Courts and Agencies in Indian Child Custody Proceedings against a challenge to their legality).

<sup>152</sup> The one-parent rule was announced in *In re CR* (Mich. App. 2002) and was eventually overruled in *In re Sanders*, 852 N.W.2d 524, 527 (Mich. 2014).

<sup>153</sup> *In re Mays*, 807 N.W. 2d 307 (Mich. 2012).

<sup>154</sup> *In re Ethan, Emily, Tarah, and Titus Bratcher* (Mich. 2010). *See Matter of Custody of C.C.R.S. v. T.A.M.*, 892 P.2d 246 (Colo. 1995) (En banc) (arguing that trial court properly ordered custody of child to non-parent without a showing of parental unfitness).

In recognition of the many harms associated with foster children whose parents' rights are terminated but who never become adopted,<sup>155</sup> NACC filed a brief in the Michigan Supreme Court in 2015 arguing that courts should be prohibited from terminating parental rights over the child's objection in the absence of finding that there are compelling reasons to do so.<sup>156</sup>

## V. NACC'S PRESENT AND FUTURE

This was neither an easy nor happy article to write. I do not enjoy being highly critical of an organization, particularly one with so many members who are my friends. Why, then, did I bother to write this? The answer is because I believe that today's NACC is genuinely committed to addressing critical issues in child welfare in ways that further the protection of children and families from government overreaching. For too long, NACC ignored what I regard as the single most pressing problem in child welfare in the United States: the ease with which children become state wards and the frequency with which the child welfare system permanently destroys American families.

Over the past 15 years, a number of leading children's advocates have become prominent leaders within NACC, including LaShanda Taylor Adams, Rich Cozzola, Erik Pitchal, Josh Gupta-Kagan, Leslie Heimov, Josh Kay, Vivek Sankaran, and David Thronson, to name only a few. As a result, NACC has a different personality. Both Kendall Marlowe, the immediate past executive director, and Kim Dvorchak, the current executive director, are deeply aware of the importance of applying NACC's influence beyond the four corners of child welfare and of being critical of practices that harm children and families. NACC today is closer than it has ever been to being a strong ally of family defenders, the field of child welfare practice most dear to my heart. Indeed, the fact that Kim Dvorchak moved to NACC from her previous position as executive director of the National Juvenile Defender Center is highly auspicious. The National Juvenile Defender Center is an exemplar of a children's rights organization devoted to high quality representation of children in juvenile delinquency-related proceedings which is willing to comment on all matters that negatively impact children in the juvenile justice system.

This change in NACC's focus became noticeable in 2009 when NACC President Maureen Farrell-Stevenson made a compelling call for NACC to pay attention and do something about the serious crisis impacting poor families and children.<sup>157</sup> After describing the growing number of children living in poverty in the United States and explaining how easy it can be for child welfare investigators to confuse poverty for neglect, she wrote:

What does this mean for those of us involved in representing or working with families in the child welfare system? Since poverty is on the rise, particularly child poverty, it is important to remind ourselves that the lives of those individuals involved in the child welfare system are significantly and particularly impacted.

<sup>155</sup> See Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.C.L. L. REV. 183, 183 (2008) "For former foster care youths, exiting the foster care system is often a distressing time when they find themselves unprepared for the hard realities of adulthood. Youths who 'age out' are more likely than their peers to suffer from homelessness, be involved in criminal activity, be uneducated, be unemployed, experience poverty, and lack proper healthcare."

<sup>156</sup> *In re McCarthy*, 860 N.W.2d 626 (Mich. 2015).

<sup>157</sup> Maureen Farrell-Stevenson, *Poverty and Child Welfare*, 31 THE GUARDIAN, 1, 1 (2009), available at [https://c.ymcdn.com/sites/naccchildlaw.site-ym.com/resource/resmgr/guardian/guardian\\_4winter2009\\_r2.pdf](https://c.ymcdn.com/sites/naccchildlaw.site-ym.com/resource/resmgr/guardian/guardian_4winter2009_r2.pdf)

Further, we must remind ourselves that we must address the impact of poverty to the best of our abilities.<sup>158</sup>

She ended her message by quoting Marian Wright Edelman: “Child poverty and neglect, racial disparities in systems that serve children, and the Cradle to Prison Pipeline are not acts of God. They are America’s immoral political and economic choices that can and must be changed with strong political, corporate, and community leadership.”<sup>159</sup> No longer is NACC focused on children’s lawyers and their role as a thing unto itself. Today’s NACC has joined the community of children’s advocates’ organizations willing to criticize the courts in which their lawyers practice and also the laws and policies outside of their system that directly impact their clients.

In 2013, NACC’s then-brand-new executive director Kendall Marlowe’s message in *The Guardian* took NACC into new territory, clarifying that NACC “deserves the blame for what hasn’t been done.”<sup>160</sup> He lamented that

[o]ver 400,000 children live in the child welfare system’s “substitute care,” a euphemism for government removal of children from their families, often without any real plan to provide those children with a better life. Tens of thousands of youth are detained in prison-like institutions, even though many have committed no violent crime and pose little danger to their community. In countless custody cases, life-changing decisions are made for children with little to no consideration of the children themselves. We remove, separate, institutionalize and incarcerate children at rates not seen anywhere else in the world. Where were we, as the community of advocates for children, when these systems were built, and where are we now, when reform is so often halting and fragile?<sup>161</sup>

Josh Gupta-Kagan, a member of NACC’s board, writing in *The Guardian* in 2014, boldly called for

legislatures [to] reform mandatory reporting and mandatory investigation laws because they impose a coercive legal regime on an overly broad category of cases. Mandatory reporting statutes have become canonical in the United States, but . . . state legislatures have expanded them far beyond their original goal of requiring physicians to report serious physical abuse. Child welfare experts from competing perspectives have offered robust criticisms of these laws for overwhelming CPS agencies with large numbers of relatively minor allegations. . . . These investigations are hallmarks of a parental fault paradigm—coercive actions which seek to determine if a parent has committed a bad act—and impose harms in their own right.<sup>162</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2.

<sup>160</sup> Kendall Marlowe, *A message from NACC Executive Director, Kendall Marlowe*, THE GUARDIAN (Feb. 1, 2013), available at [https://c.ymcdn.com/sites/naccchildlaw.site-ym.com/resource/resmgr/guardian/e-guardian\\_2013\\_v35n02\\_r2.pdf](https://c.ymcdn.com/sites/naccchildlaw.site-ym.com/resource/resmgr/guardian/e-guardian_2013_v35n02_r2.pdf).

<sup>161</sup> *Id.*

<sup>162</sup> Kendall Marlowe, *The Death of the Kids v. Parents Debate*, THE GUARDIAN (June 1, 2016), available at [https://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Guardian/2016\\_06\\_June/Guardian\\_2016.06.pdf](https://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Guardian/2016_06_June/Guardian_2016.06.pdf).

As NACC's stance has evolved throughout the years, the language spoken by NACC leaders through the organization's public organ, *The Guardian*, is becoming ever more in sync with advocates for poor families, including parent defenders. Thus, in a 2016 issue of *The Guardian*, Kendall Marlowe, the Executive Director of NACC at the time, took NACC's focus to a new place with his article entitled "The Death of Kids v. Parents Debate," asserting,

We're the National Association of Counsel for Children, but who do we stand for? Kids? Parents? Families"... [T]he idea persists that advocacy for children and advocacy for parents are always and forever in opposition.... I write today to declare the end of this divisive, counterproductive and naïve debate. The divide in our dependency field is based on a false construct, and at this point serves only to promote our own feelings of self-righteous self-regard....

We should support each other's efforts in establishing a broad and inclusive right to counsel that raises all boats even as it heightens our respect for the law in an often lawless dependency court.... The more common reality is that well-informed court interventions understand that ultimately, children are not raised by agencies or programs; they are raised by families.... Yes, parents deserve the liberty to raise their own children, in the absence of serious, demonstrable safety threats. But it's also true that kids need their parents (and their siblings, aunts, uncles and grandparents.) Children are best protected and served through families....

Our goal in child welfare proceedings is ultimately not procedural but substantive: we want kids to be safely and securely loved and supported by permanent families. We have (or should have) no desire to separate children and their parents. We protect when we must, but do so to the greatest extent possible by promoting and aiding the strength and resilience of the child's family. We know that no child should be cast adrift, without a family to call their own. Family, in all its forms and with all its challenges, may be the source of risk, but it is ultimately also the source of our solutions.... We want that child to rest their head tonight in a safe and warm home, where their parent loves and cares for them. The law must respect daughter, son, mother and father, with full and equal regard, and so should we.<sup>163</sup>

Later in 2016, reflecting on her long, distinguished career in child welfare, Ann Haralambie acknowledged the problems associated with children's lawyers who recommended a child's removal from his or her family because

[w]e thought we were heroes.... We saw kids cut off from everything and everyone that mattered. We saw parents frustrated, removed from ongoing involvement in their children's lives, and for some, resolved to just giving up and moving on to have other children, who may then be removed and placed in the system. We saw older kids placed in group homes, where their acts of frustration and rage, such as breaking things, were reported to the police, and they entered the juvenile justice system. We saw kids aging out of foster care with few, if any, resources of any kind. Most returned to the families from whom they had been removed, many

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<sup>163</sup> *Id.*

became homeless, and many went to jail. Our smug satisfaction at being do-gooders wasn't so satisfying anymore... We know more about the damage done to children from improvident removals.<sup>164</sup>

In this respect, I found it particularly affirming to read Marvin Ventrell's contribution in 2016 to the Redbook. Ventrell has contributed a chapter to NACC's premier publication in every edition, but the 2016 edition contained language that I have been waiting most of my career to read. Reflecting on what has occurred in child welfare since the beginning of NACC, he wrote,

The huge increase in maltreatment cases and removals of the 1970s and 1980s produced a population of 500,000 children living and frequently drifting in foster care, without permanent plans. Our zeal to protect children, to be "child savers" once again, and perhaps our failure to value "adequate parenting" over removal, taught us one of our biggest lessons. Our efforts can and sometimes do harm children.<sup>165</sup>

I am genuinely thrilled that NACC is now comfortable acknowledging its role in harming children in this country when, for too long, it defended, or explained away as necessary or unavoidable the tragic consequences a generation of children born into our most vulnerable homes have experienced. I am not suggesting, of course, that had NACC spoken this way sooner the world would actually look very different. In this sense, I do not blame NACC for the problems of this country's child welfare system. But I have always wanted NACC to be an ally in the fight for social justice for poor children, and this concession that NACC's "efforts can and sometimes do harm children" is most welcomed.

So, what might become NACC's major message going forward? Perhaps it could take a page from the Young Center for Immigrant Children's Rights public advocacy efforts.<sup>166</sup> The Young Center, like NACC, is one of the nation's leading organizations committed to ensuring high quality legal representation for children in the substantive field of its focus. The Young Center, though, has never limited its focus to what happens in Immigration Court. To the contrary, one of its recent public relations campaigns went right to the heart of its objection to America's immigration practices. It produced a banner headline brilliant in its simplicity: *Stop separating immigrant families*.<sup>167</sup>

There is, of course, a difference in what the federal government is doing in 2018 to immigrant families and what states have been doing to poor families that have become enmeshed in the child welfare system over the past generation. But there are many people working in child welfare, myself included, who have wanted NACC to shout over these past 40 years the same message: *stop (needlessly) separating families*.<sup>168</sup>

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<sup>164</sup> Ann Haralambie, *As the Pendulum Swings: Child Welfare Roles and Specialization Over the Years*, THE GUARDIAN 1, 38 (Sept. 2016).

<sup>165</sup> Marvin Ventrell, *The History of Child Welfare Law*, in NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, CHILD WELFARE LAW AND PRACTICE 229 (Donald N. Duquette et al. eds., 3<sup>rd</sup> ed. 2016).

<sup>166</sup> THE YOUNG CENTER, <https://www.theyoungcenter.org/>.

<sup>167</sup> Jennifer Nagda, *National Day of Action for Children*, THE YOUNG CTR. (June 1, 2018), available at <https://mailchi.mp/theyoungcenter/national-call-in-day-against-family-separation-6-1-18?e=d3e0836810>.

<sup>168</sup> Maybe this is closer to realization than some think. In an article written in 2018 in Youth Today, lamenting the number of children in foster care in Los Angeles, Wende Nichols-Julien, the head of CASA of Los Angeles, objected to someone's belief that the problem was there were not enough adequate foster homes for these children. "That isn't

Increasingly, children's lawyers who care about child welfare practice and policy, are broadening their sights beyond the courtroom. Consider as an example, a recent article by two such lawyers, Jenny Pokempner and Jennifer Rodriguez:

Across the United States, child welfare systems are charged with responding to help young people who experience abuse or neglect. Until recently, these systems have frequently structured their practice around keeping children safe from physical harm and avoiding risk. They have not taken up a charge to support nurturing families or healthy childhoods. Providing children and youth safety and protection is fundamental, but most parents and societies aspire to provide their children with much more. As lawyers for children, we think a lot about what justice means for children and families who come into contact with the child welfare system. Justice does mean protecting the rights of children and families and making sure children are protected when they are in state care. For children in foster care, this type of justice has been elusive when only safety and protection dominate child welfare policy and practice and when we fail to ignore how systems of protection sometimes do children significant harm.<sup>169</sup>

This is precisely the kind of thing we need more children's lawyers to say.

## VI. CONCLUSION

A great children's advocacy organization must be as vigilant in protecting children from their caregivers as it is in recognizing that children are placed at extreme risk of harm when state officials attempt to enter their lives through the child welfare system. NACC has not yet produced a publication with the headline "*Stop Needlessly Destroying American Families*," but that day has never seemed closer.

I look forward to NACC becoming as ardent a critic of removing children from their families and putting them into state custody as organizations devoted to representing children in juvenile justice and immigration proceedings. In no other area of the law could we even conceive of a children's rights group that does not constantly stress that what is good for one's parent is good for a child. As NACC continues to do this, it will begin to align fully the child welfare lawyers with the juvenile delinquency and immigration lawyers and will also make NACC a natural ally of parent defenders. From my perspective, it cannot be too soon for children's lawyers genuinely committed to child welfare and children's rights to regard the parent defender movement in the United States as their most important ally.

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the problem," she objected. "The problem is that too many kids in Los Angeles County are removed from their homes." Lauren Lee White, *Los Angeles' Vast Child Welfare System Has a Lot to Teach the Nation*, YOUTH TODAY (Apr. 23, 2018), <https://youthtoday.org/2018/04/what-las-child-welfare-system-can-teach-us-about-other-systems/>.

<sup>169</sup> Jenny Pokempner and Jennifer Rodriguez, *Foster Care In the United States: A Timeline; It's a long, complicated history*, TEEN VOGUE (May 31, 2018, 9:00 AM), <https://www.teenvogue.com/story/foster-care-in-the-united-states-a-timeline>.