

Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System

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INTRODUCTION

The conference title, *Transgressing Borders*,¹ poses interesting interpretations when applied to the field of foster care. I frame my comments in the debate over what have been identified as the competing rights of protection and empowerment. I would like to present empowerment of caretakers and protection and empowerment of children as complimentary goals in the foster care system. This means family preservation services sensitive to the complicated dynamics in homes with domestic violence. For older teens, empowerment by protection requires permanent placement options that allow children and their birth families more latitude to plan in cooperation with child welfare agencies. Both require new and real investment in families and caretakers. While this may not be fiscally realistic, it is legally possible and morally necessary.

From colonial times through twentieth-century Supreme Court action and more recent federal legislation, the tension between parental empowerment/autonomy and child protection has been in a shifting balance. In earlier times, parental authority could not be questioned for the purpose of protecting children from abuse. However, by the late nineteenth century, children could be protected by removal via criminal proceedings or philanthropic agency actions. More recently, in the 1980's, family empowerment and protection of children were seen as complimentary, not competing--the best way to protect children was not by removal but through

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services which empowered parents to safely care for their children. In the last few years, federal law has again shifted the balance toward protection via removal from the home and swifter termination of parental rights. Amidst this shifting debate, new factors constantly change understandings of the complexities of family privacy and parental empowerment and the role of the state in protecting children.

Foster care is defined for this article as out-of-home care agreed to by parents or ordered by a court following a report of abuse or neglect filed with a state child welfare agency.² It is provided by state or local public agencies directly or by contract with private providers.³ Federal funds reimburse the public agencies creating a federal-state matching system, which carries federal mandates in exchange for the matching funds.⁴ Foster care is therefore a locally provided placement service with some federal regulation as a result of federal mandates. Foster care can be used in other public systems such as the mental health system or the juvenile justice system to house children who cannot be cared for in their own homes.

Foster care is sometimes understood as placement in home-like settings as opposed to group homes or institutions. I am using the term more broadly to refer to out-of-home placement of any type for abused and neglected children. This could include institutional settings, group homes, foster family care or supervised independent living arrangements.

Borders separate many classifications with legal significance in the area of foster care. Most obviously, biological parents as a category have different rights and responsibilities expected of them and owed to them than foster parents or adoptive parents; children in care similarly have specified rights which are not provided to children cared for in their own homes. Because of the distinguished mix of presenters on the conference foster care panel who debate the categories of biological parent, foster parent and

2. For a more complete discussion of the foster care system and the child protection system which triggers out-of-home care based on abuse or neglect, see Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1438-42 (1999).

3. These are usually non-profit private providers, but foster care by for-profit providers is eligible for federal matching funds. See 42 U.S.C. § 672(c) (Supp. V 1999). States may contract with over 200 private provider agencies to provide foster care to abused and neglected children. See Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1313 n.81 (1999).

4. See, e.g., Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106a (Supp. V 1999); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (1994 & Supp. 1999).

adoptive parent, I focus on the eligibility borders into and out of the foster care system and the implications for protection and empowerment of transgressing those borders. Foster care remains the only open-ended entitlement program,⁵ and as such, it is crucial to carefully consider how the law defines who may come in, who may go out, who must come in and who must go out.

In Part I, I draw upon some of my previous writings to summarize the history, legislation, current operation and representational standards of the legal system that responds to child abuse and neglect.⁶ I include this background to depict the tensions between protection and empowerment in history, policy and practice. These tensions are balanced within a context of gender subordination, racism and classism. While the specifics of the context have changed over time, these three types of discrimination are still omnipresent and operative in the foster care system.

I discuss the right to protection as developed by constitutional case law and federal legislation. I use the historical background to highlight the conflict which developed between protection of children and empowerment of parents and also to distinguish the origins of the child protection system from those of the domestic violence system which has its own historical development. I draw upon the scholarly and practical debate regarding the proper model of representation of children to illustrate the tension between empowerment and protection, especially for older children.

In Part II, I turn to the extension of the definitions of child abuse or neglect to include domestic violence. "Child abuse and neglect" is a phrase which encompasses a spectrum of child maltreatment from actual serious injury to possible risk of harm perpetrated by caretakers upon their children. As discussed *infra* Part I-C and I-D, each state has its own laws defining child abuse and neglect within the parameters of federal mandates.⁷ Domestic violence similarly encompasses a spectrum of abuse. It is abuse between adult intimate partners perpetrated to maintain power and control.⁸

As the comorbidity of domestic violence and child abuse and neglect is

5. For a discussion of the connection between public assistance and foster care entitlements, see Mangold, *supra* note 3, at 1310.

6. See Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835 (2000); Mangold, *supra* note 3, at 1295; Mangold, *supra* note 2, at 1397.

7. See, e.g., 42 U.S.C. § 5106a(b)(2)(A) (1994 & Supp. 1998).

8. The Power and Control Wheel, which depicts the cycle of power and control in abusive adult relationships, was developed by the Domestic Abuse Intervention Project, 206 W. Fourth St., Duluth, MN, 55806. See Domestic Abuse Intervention Project's Power and Control Wheel, *reprinted in* NANCY K. D. LEMON, DOMESTIC VIOLENCE L. 43 (2001).

documented and its effects understood, more attention is being placed on coordinating the provision of services dealing with domestic violence and child protection. This coordination has resulted in identification of new forms of child abuse and neglect based upon the existence of domestic violence in the home. Domestic violence is a newly recognized form of child abuse and neglect that creates eligibility for foster care. The issues posed in recognizing domestic violence as a form of abuse are captured in part, in the case study of “Rosa” by Zanita Fenton, Chair of the conference’s foster care panel.⁹ That case study will be referred to in this article when illustrative and reads as follows:

Rosa

Rosa’s mother was the victim of domestic abuse. [Her husband left all the child care and housework to her, they argued a lot, he belittled her mother, he insisted on sex with her even when she had health problems, he isolated her from friends, he controlled the finances and would not let her get a job. When she feared that the verbal abuse was escalating into physical abuse, she decided to leave, going to a shelter.]

Ten months after Rosa’s mother left her father, Administrative Services (ADS) charged her with neglect for allowing Rosa to witness domestic abuse: “Respondents constantly argue in the presence of the child, with the child intervening and the child . . . states that she wished her parents would not argue as much.” ADS placed Rosa in foster care while the neglect proceedings were pending.

Charges were added that the mother “admits to being present when the father would beat the child” and that she “failed to protect the child from being beaten.” Her mother says that she only told the social worker that she argued with her husband about spanking Rosa and that she refused to do so.

In the Rosa case study, ADS charges Rosa’s mother with neglect for allowing Rosa to witness verbal domestic violence of her mother by her father. “Witnessing domestic violence” is a newly recognized form of child abuse. The charges against Rosa’s mother later include “failure to protect” for abuse allegedly perpetrated by the father against the child and known to

9. See Zanita E. Fenton, *Foster Care: The Border of Family Identity-Maintaining, (Re)creating, Destroying*, 36 NEW ENG. L. REV. 59 (2001).

the mother. "Failure to protect" is likewise a new form of child abuse or neglect based upon the presence of domestic violence in the home.

The presence of domestic violence in the home can now create eligibility for foster care. Violence between adults in the home is now a type of child abuse or neglect, which can trigger the legal responses leading to placement outside the home. The fact that the presence of domestic violence may allow children to come into temporary foster care for protection has advantages and disadvantages which are discussed; the fact that exposure to domestic violence may force some children into foster care against their wishes and those of their mothers, who may be the ones revealing the violence, has created a more complicated discussion implicating the advantages and disadvantages of the core idea of coordination of the systems. To what extent should protection of children trump empowerment of mothers? Can we shift the debate to consider empowerment of mothers and children as the best permanent and temporary way to protect children?

The history of the legal responses to domestic violence is explained as necessary background to the convergence and divergence of the domestic violence and child protective systems in theory and practice. The goal of the domestic violence system is to empower women; the child protective system too often pits mother caretakers against the agency in a purported effort to protect children. Current statistics and socio-legal responses to domestic violence are described to lay the groundwork to consider the efforts at coordination of the two systems and the consequences of that coordination.

I conclude this section with suggested reforms to avoid the unintended results of collaboration and to begin to imagine a system that truly invests in the empowerment of caretakers in an effort to protect children.

Part III focuses on age as a criteria of eligibility in the foster care system. While domestic violence can bring a child in, age can force a child out, objectively ending a child's right to protection. I discuss age as an absolute limit to the continuation of foster care services, creating ineligibility when a birthday is crossed. In 1999, Congress estimated that approximately 20,000 teens exited foster care because they had aged-out of the system, reaching the birthday when they were no longer eligible for foster care benefits.¹⁰ Significantly, none of the nine children in the eight case studies used by the panel at the conference were about teens in foster care. Older foster children are never the paradigm and are often forgotten in the system. The eldest

10. See H.R. 3443, 106th Cong. (1999). As a result of the Foster Care Independence Act, discussed *infra* Part III, states may now continue some benefits to age twenty-one and receive federal matching funds for them. In some cases, the age of ineligibility is still eighteen, in others it is twenty-one. See Mangold, *supra* note 6, at 835.

child discussed in the case studies was eleven-year-old Cara, and her case raised issues of disabilities more than age. We are not told the age of Rosa. Yet, for children approaching ineligibility for foster care, age can be the most relevant factor. Statistics on older children in foster care are presented in conjunction with recent federal legislation raising the age for discretionary eligibility. As in Part II, I conclude this section with suggestions for reform to mitigate the harshness of age ineligibility and to imagine a more flexible spectrum from protection to empowerment.

PART I. THE RIGHT TO EMPOWERMENT AND THE RIGHT TO PROTECTION IN THE FOSTER CARE SYSTEM

A. Theoretical Framework of the Foster Care System

While parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect. This tension between parental rights and child protection is the key conflict in the child protection system, but I am interested here in exploring the unique tensions raised by domestic violence and age ineligibility for older children in foster care. If the allegations of abuse and neglect are severe enough, federal and state laws aimed at protecting children require that they be removed from their parents and placed in foster care.¹¹ Foster care is an entitlement, and every state is required by state and federal law to provide foster care for eligible children.¹² Foster care provides out-of-home care for over 500,000 children in the U.S. every day.¹³ Most of these children are in foster care as a result of allegations of abuse and neglect against their parents.¹⁴ A sense of the range of allegations is presented by Professor Fenton's case studies.

In her now famous and often misunderstood article on children's rights, Hillary Rodham Clinton wrote in 1973 that "children's rights" was a

11. *See, e.g.*, Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106 (Supp. 2000); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C. (Supp. 1997)); Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (1994 & Supp. 1998).

12. *See* 42 U.S.C. § 622 (1994 & Supp. V 2000).

13. *See* CHILD. DEF. FUND, STATE OF AMERICA'S CHILDREN: 2000 YEARBOOK 84, 86 (2000). *See also* STAFF OF H.R. COMMITTEE ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 783-90 (Comm. Print 1998) (noting statistics for 1995 and earlier) [hereinafter 1998 GREEN BOOK].

14. *See* 1998 GREEN BOOK, *supra* note 13, at 790 (noting statistics for 1995 and earlier).

“slogan in need of a definition.”¹⁵ Twenty-seven years later, the notion of children’s rights is still not well defined. Perhaps it is more accurate to say that there is no singularly accepted definition or theory of the rights held by children. The rights claimed tend to be of two general types: those advocating for children as autonomous persons under the law¹⁶ and those placing a claim on society for protection from harms perpetrated on children because of their dependency.¹⁷ I label the first type as the right of empowerment and the second as the right to protection.

The rights of empowerment for children were advocated in the manner in which many rights connected with oppressed minorities were pressed in the 1960’s. Some children’s advocates explicitly cited children as the next group after blacks and women who were entitled to a revolutionary expansion of rights.¹⁸ Empowerment rights were necessary to recognize children’s equality with adults. They would give children such privileges of citizenry as the right to vote, work and contract.¹⁹ While children may always hold empowerment rights, those rights cannot be exercised until the child reaches a certain level of maturity.²⁰ While the age at which such an exercise occurs may vary, the key is that the right of empowerment evolves for each child from inability to exercise to ability to exercise.

Independent living initiatives²¹ for teens in foster care seek to enhance the empowerment rights of children. Unfortunately, the goal of empowerment is unconnected to any objective assessment, which could continue protective

15. Hillary Rodham Clinton, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 487 (1973).

16. See, e.g., JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974), HENRY H. FOSTER, JR., A “BILL OF RIGHTS” FOR CHILDREN (1977).

17. See, e.g., Bruce Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their ‘Rights’*, 1976 BYU L. REV. 605 (1976).

18. See Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 270 (1995). Minow discusses works such as John Holt’s *ESCAPE FROM CHILDHOOD* (1974) and Richard Farson’s *BIRTHRIGHTS* (1974) to explain this movement in the 1960’s and 70’s, but whose origins were derived much earlier in the writings of Jean-Jacques Rousseau and John Dewey.

19. See, e.g., Minow, *supra* note 18, at 271; see also, e.g., RICHARD FARSON, *BIRTHRIGHTS* (1974).

20. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) (arguing that developmental issues are important in considering empowerment rights of children). But see Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996) (arguing that empowerment is an important consideration for all children in determining the model of attorney representation of children).

21. See Independent Living Initiative, Pub. L. No. 99-272, 100 Stat. 294 (codified as amended at 42 U.S.C. § 677).

services. Regardless of a child's maturity and resources, and regardless of their success in independent living programs, all children are liberated from foster care when they reach the age of majority.

Unlike the rights connected with empowerment, protection based rights evolve in the opposite pattern. The right is strongest at the front end of the foster care system after cases are investigated and initial placements are developed. The very young or incompetent have the strongest claim on these rights, but the ability to exercise them diminishes with maturity. Our foster care system has been developed to give children a right to protection until the age of eighteen or, in some cases, twenty-one. At the age of eighteen or twenty-one, the right to protection is superceded by a right of empowerment as children mature out of the system whether they are ready for independence or not.²² Foster care ends when children reach the age of majority, eighteen or twenty-one, depending on state law and regulations.²³ In 1999, Congress estimated that 20,000 teens exited foster care because they "aged-out" of the system, reaching the age at which eligibility for foster care benefits is terminated.²⁴

There is tension between the right to protection of abused and neglected children and the empowerment rights of older foster children. How much authority should be ceded to older children to determine their services and placement arrangements? How do we justify terminating needy children from foster care solely because of their age? Similarly, there is tension within the domestic violence system and between the domestic violence and child protection systems over the indeterminant border between protection and empowerment. Is the goal of the domestic violence system to protect or empower in the short and long term? How does and should the children's protective services system interpret its role to protect children while empowering caretakers? These core questions regarding protection and empowerment frame my discussion of age and domestic violence as determinants of eligibility for foster care. Transgressing the border between empowerment and protection to understand empowerment of older children and of caretakers as the heart of protection frame my proposed reforms.

22. See Gerald P. Mallon, *After Care, Then Where? Outcomes of an Independent Living Program*, 77 CHILD WELFARE 61, 62 (1998) (stating at the outset that "[P]reparing young people in out-of-home care for independent living and for successful adulthood has not been one of the child welfare system's primary goals.").

23. See WASH. REV. CODE § 13.34.030 (1) (2000) (stating that a child is "any individual under the age of eighteen years"); HAW. REV. STAT. § 346-17.4 (a) (1) (1999) (stating that a child is eligible for foster care if "[t]he person is twenty-one years old or younger").

24. See H.R. 3443, 106th Cong., (1999). As a result of the Foster Care Independence Act, discussed *infra*, states may now continue some benefits to age twenty-one and receive federal reimbursement for those foster care benefits.

B. Supreme Court Cases Developing the Boundaries of the Right to Protection²⁵

The right to protection frames the entire child welfare system and much of the state law governing the state systems, but is not clearly recognized under constitutional law.²⁶ In 1944, the Supreme Court in *Prince v. Massachusetts*²⁷ recognized the authority of the state to protect children even when this infringed upon the legal caretaker's authority. This case was preceded by *Meyer v. Nebraska* and *Pierce v. Society of Sisters*²⁸ which voided state laws limiting parental authority in the choice of schools.

In *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, state laws infringing upon the authority of parents were deemed unconstitutional. The *Pierce* court recognized the rights of parents, their duty to their children and the right to exercise these rights and duties free of state intervention.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 [mandating that children attend public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²⁹

This oft-quoted phrase recognizes the rights and duties of parents and the possible role of the state on behalf of children. The parent-child-state triangular balance is introduced constitutionally.³⁰ The court in *Prince v. Massachusetts* built upon the foundation laid by *Meyer* and *Pierce* but decided that the circumstances of the case warranted state intervention to protect the child. In *Prince*, *parens patriae* power of the state to protect children was upheld. The *Prince* court held valid a state child labor law

25. Discussion of these cases summarizes previous writings. See Mangold, *supra* note 9, at 844-49; Mangold, *supra* note 2, at 1402-10.

26. See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (deciding that the state does not owe a duty to protect a child from violence at least until the child is in state custody); *infra* text accompanying notes 35, 39-42.

27. 321 U.S. 158 (1944).

28. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

29. *Pierce*, 268 U.S. at 534-35.

30. For a discussion of the balance between parental rights and the state's authority to intervene into the parent-child relationship, see Mangold, *supra* note 2, at 1438-42.

against both the legal guardian's assertion that the law violated her right to raise the child as she saw fit and the child's right to practice Jehovah Witness beliefs by selling religious magazines. In discussing the applicable precedents, the court limited the holdings of *Meyer* and *Pierce* and recognized the state's ability to exercise its authority to protect a child's welfare:

Previously in *Pierce v. Society of Sisters*, 268 U.S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer v. Nebraska*, 262 U.S. 390, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters*, *supra*. And it is in recognition of this that these decisions have respected the private realm of family life that the state cannot enter It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare³¹

This framework was not constitutionally developed by the Supreme Court until the 1972 case of *Wisconsin v. Yoder*³² reinforced the authority of parents. That case resulted in a successful challenge to compulsory education laws imposed on the Amish. In *Yoder*, parents were convicted under a Wisconsin law requiring a child's attendance at school until the age of sixteen. The parents argued that sending their teens to school past the eighth grade violated their Amish beliefs and lifestyle. The court agreed with the parents against the state's authority to protect the children in this case.³³

Meyer, *Pierce*, *Prince* and *Yoder* all dealt with state intervention to protect children but were not public family law³⁴ cases dealing with children

31. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1943).

32. 406 U.S. 205 (1972).

33. The rights of children were not explicitly considered by the majority, but they were raised by Justice Douglas in his dissent. Douglas argued for a remand to consider the wishes of the children whose parents were convicted under the compulsory education law. The weight to be given to their wishes was not stated. Seeking such input from children could be viewed as granting them empowerment rights over their parents' control, but Douglas did not detail the authority to be given to their wishes, nor did he speak in terms of children's rights in his dissent. See *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting).

34. See Mangold, *supra* note 2, at 1397. "I coin the phrase *public family law* to depict cases where the state has intervened into the 'private' family to assume some custodial interest from the parents." *Id.*

in state custody as a result of allegations of child abuse or neglect. In *Santosky v. Kramer*,³⁵ and then in *DeShaney v. Winnebago County Department of Social Services*,³⁶ parental rights and duties and state rights and duties toward abused and neglected children were addressed by the Supreme Court. In *Santosky*, the court held that the standard necessary to involuntarily terminate parental rights was “clear and convincing evidence.”³⁷ Even when children were in the dependency system and their care was subject to procedural safeguards at each juncture, the court found that the importance of the parental right to the care and control of their child could not be severed absent a showing by the state of clear and convincing evidence of unfitness.³⁸ The *Santosky* court relied on a line of cases, beginning with *Meyer*, *Pierce*, and *Prince*, to demonstrate historical recognition of parental rights.

[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relations are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.³⁹

In *DeShaney*,⁴⁰ the rights of parents to raise their children free of state intervention was upheld over a child’s right to protection in a case in which the facts were deeply challenging to the weight given to parental rights. The court declined to find a state duty to protect a child who was in the custody of his father, not in state custody, when the child suffered permanent serious injury at the hands of his father.⁴¹ Winnebago County Department of Social Services was repeatedly informed of incidents of abuse and the risk of further abuse, but the agency did not remove the young child from his father’s care.⁴² The court reasoned that the state right to intervene, investigate, and monitor the situation did not implicate a duty to protect the child who remained in his father’s care.⁴³ In accordance with the parent-

35. 455 U.S. 745 (1982).

36. 489 U.S. 189 (1989).

37. *Santosky*, 455 U.S. at 769.

38. *See id.*

39. *Id.* at 753.

40. 489 U.S. 189 (1989).

41. For a provocative discussion of the Thirteenth Amendment as the more appropriate cause of action in this case, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

42. *See DeShaney*, 489 U.S. at 191.

43. *See id.* at 197.

child-state framework developed in the *Meyer-Pierce-Prince* line, the state had not taken on the custodial right and therefore did not hold the accompanying duty to protect the child. The right of control had been left exclusively to the father, and the child could not make out a liberty claim for denial of a duty to protect based on the father's acts of "private violence."

These court cases discuss the *parens patriae* power of the state to protect children but leave blurred where the border of the right to protection exists amidst the parents' fundamental right to raise their children. None of these cases discuss children's empowerment rights or the importance of the age and maturity of the children. Legal doctrine mediating the tension between protection and empowerment is undeveloped. The boundary for eligibility for protection is therefore left to myriad state laws within the framework of federal mandates.

C. History of the Balance Between Protection and Empowerment in the Foster Care System⁴⁴

1. Early Protection of Children

Since the earliest colonial days, some children have needed protection beyond that which families could provide. Orphans are the obvious children in need of protection.⁴⁵ In the seventeenth and eighteenth centuries, children whose parents did not provide adequate religious or other instruction could also be removed to insure that the children would grow to be productive adults.⁴⁶ Children had no recognized "right" to protection, and physical punishment was permitted and even required,⁴⁷ but religion and orderly

44. For a fuller history of child protection before federal legislation to address child abuse and neglect, see Mangold, *supra* note 2, at 1397 (summarized in part in this section).

45. Mary Ann Mason examined the record of two Virginia parishes to provide demographic information on involuntary apprentices. "Orphans constituted 38.1% of all child apprentices; 39.3% were classified poor children; 11% were described as illegitimate; and 12.6% were termed mulatto." Mary Ann Mason, *Masters and Servants: The American Colonial Model of Child Custody and Control*, 2 INT'L J. CHILDREN'S RTS. 317, 326 (1994).

46. See CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, Vol. I, 1600-1865, 27-29 (Robert H. Bremner ed., 1970) [hereinafter CHILDREN AND YOUTH, Vol. I].

47. The earliest colonial laws included provisions prohibiting excessive corporal punishment of children. See *The Body of Liberties of 1641: The Liberties of the Massachusetts Collonie in New England, 1641*, reprinted in EDWIN POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS: 1620-1692, 543 app. (1966). *The Body*

societal norms prompted early settlers to protect the well-being of children even against the prerogatives of their fathers.

Colonial fathers were charged with the proper upbringing of their children, responsible for educating and training them to be productive citizens of the community. Fathers who failed to properly instruct their children could lose custody of the children.⁴⁸ As early as the 1640's, the colonial laws authorized public authorities to remove children from their families and place them with other families who could raise them in a manner deemed appropriate.⁴⁹ Colonial laws allowed private intervention into the parent-child relationship to assure that child rearing was appropriate for raising employable and moral children. Tightly woven religious communities provided moral guidance and often acted with public authorities to provide supervision of family life.⁵⁰

Forasmuch as the good education of children is of singular behoof and benefit to any Common-wealth; and whereas many parents & masters are too indulgent and negligent of their duty in that kinde. It is therefore ordered that the Select men of everie town, in the severall precincts and quarters where they dwell, shall have a vigilant eye over their brethren & neighbours, to see, first that none of them shall suffer so much barbarism in any of their families as not to indeavour to teach by themselves or others, their children & apprentices, so much learning as may inable them perfectly to read the english tongue, & knowledge of the Capital lawes Also that all masters

of Liberties addressed the issue of the physical punishment of children by their parents in Chapter 83 stating: "If any parents shall wilfullie and unreasonably deny any childe timely or convenient marriage, or shall exercise any unnaturall severitie towards them, such childeren shall have free libertie to complaine to Authoritie for redresse." WILLIAM H. WHITMORE, *THE COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1672 (1890) (from The Body of Liberties of 1641) (Boston, Rockwell and Churchill 1890)*. For a discussion of the English stockholder interests prompting codification of colonial law see ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 21-22 (1987). There is, however, no evidence of colonial fathers being punished for excessive corporal punishment alone. See Mason, *supra* note 45; PLECK, *supra*. In fact, corporal punishment of children was accepted and encouraged in colonial times. The 1674 Records of the Suffolk County Court record two instances, one involving Governor Leveret's grandson, where parents were ordered to whip their children at home in the presence of the constable as punishment for misbehavior by the children. See POWERS, *supra* at 178. Even capital punishment for incorrigibility was codified. The General Laws of Massachusetts Colony, 1658, state that a son who is "stubborn and rebellious and will not obey [his parents'] voice and chastisement, but lives in sundry and notorious crimes, such a son shall be put to death." *THE GENERAL LAWS OF THE MASSACHUSETTS COLONY 15 (1658) (Capital Laws, ch.13)*.

48. See PLECK, *supra* note 47, at 27-29.

49. See *id.*

50. See generally PLECK, *supra* note 47.

of families doe once a week (at the least) catechize their children and servants in the grounds & principles of Religion And further that all parents and masters do breed & bring up their children & apprentices in some honest lawful calling, labour or employment, either in husbandry, or some other trade profitable for themselves, and the Common-wealth if they will not or cannot train them up in learning to fit them for higher employments.⁵¹

In 1642, Massachusetts Bay enacted a law, to be enforced through the courts, that children could be removed from their parents' home involuntarily, based upon the manner in which parents were raising them. The goal was not to protect children from abuse but rather to protect society from poorly raised youth.

And if any of the Select men after admonition by them given to such masters of families shal finde them still negligent of their dutie in the particulars aforementioned, whereby children and servants become rude, stubborn & unruly; the said Select men with the help of two Magistrates, or the next County court for that Shire, shall take such children or apprentices from them & place them with some masters for years (boyes till they come to twenty one, and girls eighteen years of age compleat) which will more strictly look unto, and force them to submit unto government according to the rules of this order, if by fair means and former instructions they will not be drawn unto it.⁵²

Such children were removed by the town authorities and placed in an apprenticeship or indenture, called "binding out."⁵³ These indentures, or contracts to bind out children, could be arranged voluntarily by parents seeking training for their children or involuntarily by authorities who removed children from parents whose child rearing was seen as inadequate.⁵⁴ Involuntary indentures required local authorities to contract with families to care for the removed children.⁵⁵ These contracts were the first contracting to care for children whose families were considered unable to properly raise them to protect the community from the negative impact of these improperly raised children. Throughout the eighteenth century, public authorities acted to protect vulnerable children, such as orphans, emancipated slaves, unaccompanied laborers and contract laborers by binding them out to masters who would provide acceptable supervision and training.

51. THE BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (1648) *reprinted in*, THE LAWS AND LIBERTIES OF MASSACHUSETTS 11 (1929).

52. *Id.*

53. *See id.*

54. *See CHILDREN AND YOUTH*, Vol. I, *supra* note 46, at 64.

55. *See id.*

Because the family unit was considered a form of governance and social control at the time, such involuntary indentures were not really public-private contracting as we understand it today. These arrangements predated a uniform child protection system, but they introduced interventions by the state as *parens patriae* that would later be assumed by nineteenth century criminal law prosecutions and anti-cruelty agency interventions. Historical beliefs of appropriate child rearing triggered these early interventions. Such early colonial arrangements are evidence of substitute care facilitated by local authorities; the same is true with modern foster care.

From the earliest colonial days through the antebellum years, binding out remained the preferred way to deal with children of the poor. Although the first orphanage was established in 1728 in New Orleans, specialized institutional care for children was scarce until the nineteenth century.⁵⁶ Until that time, children of the poor who could not be bound out to private families were placed in almshouses, publicly operated warehouses for the poor not segregated by age.⁵⁷

2. Protection of Children from Abuse and Neglect

The middle of the nineteenth century brought cases of criminal

56. *See id.* at 60-63.

57. In February 1775, of the 622 paupers on the books of the New York City Almshouse, 259 were children, mostly under nine years of age. The authorities made every effort to bind out even these young children. In 1788, laws were passed allowing children in New York City, Albany and Hudson to be bound out without parental consent. The mayor, recorder, or aldermen could approve such an arrangement for any child found begging in the streets. By 1795, forty percent of the "inmates" at the almshouse in New York City were children under nine years of age. In 1797, following a yellow fever epidemic that filled the New York City almshouse with widows and their children, a group of women founded the Ladies Society for the Relief of Poor Widows with Small Children. The group was incorporated by law in 1802. In-kind help was given to assist widows in making a livelihood, but no relief was granted to women who refused to place out their children who were able to work. By 1800, the Society helped 152 widows with 420 children and in 1803 received state funding, raised by lottery, to continue its work. In 1806, an orphanage was founded by the Society. At the time, it was only the second such institution in the young country, the other being in Charleston, South Carolina. *See* DAVID M. SCHNEIDER, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866*, at 179-89 (1938). Amidst the development of institutional care for children in the mid-19th century, the population of children in almshouses continued to grow. "The census of 1880 showed that 7,770 children between the ages of two and sixteen were in almshouses in the United States . . ." *See* Mason P. Thomas Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 302 n.37 (1972) (*citing* HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED AND DEPENDENT CHILDREN* 80 (1902)).

prosecutions against parents for beating their children. These prosecutions introduced an era when the legal system began to intervene in family life and compromise parental autonomy to protect children from physical assaults at the hands of their parents. At this nascent stage of development of a legal response to child abuse, many children considered “poor” or “neglected” were already under public supervision. Now, the states began to prosecute cases of physical assaults by parents on their children and to refer some of those children to the community resources available for neglected children.

The early cases prosecuting parents for physical assaults illustrate the historical hesitancy of the court to infringe on parental authority to protect children on the basis of allegations of physical beatings by fathers. Such intrusions would challenge the accepted paternal role and parenting prerogatives. The texts reveal a range of legal questions posed by the courts in attempting to redefine the limits of state intervention. Courts debated whether it was the state of mind of the parent when perpetrating the beating,⁵⁸ the instrument used in the beating,⁵⁹ or the injury caused by the

58. In *Stanfield v. State*, the court rejected the lower court charge, which focused on the instrument used in the beating, instead focusing on the manner of the Defendant.

The charge asked and given does not mend the matter, which was that the jury could not convict the defendant unless the chastisement was done in a cruel or vindictive manner. . . . Was the correction moderate? . . . If it was, defendant was not guilty of an assault and battery at all. . . . If it was not moderate, but excessive, he was guilty as charged of an aggravated assault and battery by having exceeded the boundary of his legal right as guardian under the law, and placed himself in the attitude of a stranger and not a parent to the child Whether it is moderate or excessive must necessarily depend upon the age, sex, condition and disposition of the child, with all the attending and surrounding circumstances, to be judged of by the jury

43 Tex. 167, 168 (1875) (citations omitted). In *Johnson v. State*, similar reasoning was used.

The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, to the good of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise, upon light or frivolous pretenses. But, at the same time, that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried. In chastising a child, the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess, which constitutes the offence, and what this excess shall be is not a conclusion of law, but a question of fact for the determination of the jury.

21 Tenn. 283, 283 (1840).

59. In *Neal v. Georgia*, 54 Ga. 281, 282 (1875), the court affirmed that one

beating which should constitute evidence of abuse sufficient to sustain a prosecution.⁶⁰ Courts searched for objective measures of actionable abuse to avoid over-intrusion into family government. In one of a few early reported cases, a permanent serious injury was necessary to prosecute to protect children.

It will be observed that the test of the defendant's criminal liability is the infliction of a punishment "cruel and excessive," and thus it is left to the jury without the aid of any rule of law for their guidance to determine. It is quite obvious that this would subject every exercise of parental authority in the correction and discipline of children--in other words, domestic government--to the supervision and control of jurors, who might, in a given case, deem the punishment disproportionate to the offense, and unreasonable and excessive. It seems to us, that such a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children The test, then, of criminal responsibility is the infliction of permanent injury by means of the administered punishment, or that it proceeded from malice, and was not in the exercise of a corrective authority We do not propose to palliate or excuse the conduct of the defendant in the present case. The punishment seems to have been needlessly severe, but we refuse to take cognizance of it as a criminal act, because it belongs to the domestic rather than legal power, to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity.⁶¹

These criminal prosecutions were contemporaneous with the more famous 1874 case of Mary Ellen.⁶² That case was championed in the front pages of the New York Times. It was brought by leaders of the New York Society for the Protection of Cruelty to Animals, heralding an era of child rescue and protection by private philanthropic agencies.⁶³ The growing work by such agencies developed the social and legal response to protect children from the abusive actions of their parents by "rescuing" children from them.

"lick" with an old saw was "cruel and outrageous abuse of the parental authority, and made the perpetrator of it guilty," while also noting that a "very large margin must be left to the judgment of the parent." *Id.* at 283.

60. *See* State v. Jones, 95 N.C. 588, 589 (1886).

61. *Id.* at 590-93.

62. *See* Lela B. Costin, *Unraveling the Mary Ellen Legend: Origins of the "Cruelty" Movement*, 1992 SOC. SERVICES REV. 203 (1991).

63. For a summary discussion of earlier foundations of child protection in response to child labor and orphans in colonial times and through the civil war, see NEIL A. COHEN, *Child Welfare History in the United States*, in CHILD WELFARE: A MULTICULTURAL FOCUS 13-21 (Neil A. Cohen ed., 1992). For a discussion of the emergence of protection of children within the societies for the protection of cruelty to animals before the Mary Ellen case, see Costin, *supra* note 62.

The Society leaders argued to the court on behalf of Mary Ellen, a young girl whose care was at issue, that children, as members of the animal kingdom, were entitled to protections at least equal to those provided animals.⁶⁴ The arguments were fashioned by Henry Bergh, founder and president of the Society, and Elbridge T. Gerry, counsel for the Society. The New York Times article of April 10, 1874 opened:

It appears from proceedings had in Supreme Court yesterday, in the case of a child named Mary Ellen, that Mr. Bergh does not confine the humane impulses of his heart to smoothing the pathway of the brute creation toward the grave or elsewhere, but that he embraces within the sphere of his kindly efforts the human species also.⁶⁵

The news articles explained that the child had been discovered when a woman, Etta Angell Wheeler, was on an “errand of mercy” to a dying woman. She was told by the woman of the desperate cries of a child in the next tenement building. Wheeler had tried repeatedly to gain entrance to the apartment to see the child. She was eventually let into the flat when Mr. Connolly, the man of the house, was not present, and she was able to observe and have a short visit with Mary Connolly, his wife, and Mary Ellen. While the news accounts of the time do not include commentary on domestic violence, the circumstances of Wheeler’s failed attempts and subsequent entry, only when Mr. Connolly was absent, portray a scenario recognizable today as comorbid domestic violence and child abuse. Perhaps Mr. Connolly perpetrated some form of domestic violence against Mary Connolly and was also abusive toward Mary Ellen; Mary Connolly was therefore fearful of allowing Wheeler’s entry in his presence. In another possible scenario, perhaps Mr. Connolly was abusive toward his wife but Mary Connolly was perpetrating the abuse against Mary Ellen either individually or along with Mr. Connolly.

Reports indicate that Wheeler went to several institutions to seek help for the child, before she found Bergh and pleaded for his assistance.⁶⁶ It was known at the first hearing that Mary Ellen was living with Mary and Francis

64. See Costin, *supra* note 62, at 204.

65. *Mr. Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif—Her Treatment—A Mystery to Be Cleared Up*, N.Y. TIMES, Apr. 10, 1874, at 8.

66. Perhaps because Mrs. Wheeler’s husband was a newspaper man, the case is graphically and fully reported in the paper. See Costin, *supra* note 62, at 210; N.Y. TIMES, Apr. 10, 1874, at 8; N.Y. TIMES, Apr. 11, 1874, at 2; N.Y. TIMES, Apr. 14, 1874, at 2; N.Y. TIMES, Apr. 28, 1874, at 8; N.Y. TIMES, Dec. 27, 1874, at 12. For a compilation of related articles and papers of the New York Society for the Prevention of Cruelty to Children, see CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, Vol. II, 1866-1932 Parts 1-6, 185-97 (Robert H. Bremner ed., 1971) [hereinafter CHILDREN AND YOUTH, Vol. II, Parts 1-6].

Connolly and they were charged with cruel abuse against her, but that they were not her natural parents.⁶⁷ It is not clear how this casual custodianship affected the willingness of the agency, court and public to champion prosecution of the Connollys.

The case was originally prosecuted against both Mr. and Mrs. Connolly. Mary Ellen's ill health, lack of proper clothing and frequent abuse with whips, scissors, and slaps must have been known, if not perpetrated, by both adults in the home. Even if this could not be proven, it was only Mrs. Connolly, on a day when Mr. Connolly was not present, who allowed Mrs. Wheeler into the apartment to discuss Mary Ellen. Only Mrs. Connolly ever appeared in court. Only she was ultimately tried and sentenced for the abuse.⁶⁸ This celebrated abuse case targeted the "mother" caretaker. No male was held accountable. The case signals the entry of private philanthropic agencies into the legal system on behalf of abused and neglected children. It also foreshadows the treatment of mothers and lack of attention paid to holding abusive fathers and husbands accountable before dependency courts.⁶⁹

This may be an infamous case of "failure to protect." Because he was deceased, this case did not impinge on the rights of Mary Ellen's father. Mary Ellen's mother's rights were not at issue in the prosecution because her mother had abandoned her or had been separated from her much earlier. Mary Connolly, taking on the custodianship of Mary Ellen as her stepmother, may have been prosecuted because of this legal relationship. It is also possible that she was prosecuted, despite her ultimate willingness to allow Mrs. Wheeler into the flat against the wishes of her husband, because she was the "mother" of the child and was therefore responsible for her care under nineteenth century notions of parenting. Mr. Connolly's drunkenness, violence against Mary Ellen and possible violence against Mrs. Connolly were ignored, perhaps because he had no legal relationship to the child, or

67. See *The Mission of Humanity*, N.Y. TIMES, Apr. 11, 1874, at 2; Costin, *supra* note 62, at 207; CHILDREN AND YOUTH, Vol. II, Parts 1-6, *supra* note 66, at 187.

68. See *Mrs. Connolly, the Guardian, Found Guilty, and Sentenced to One Year's Imprisonment at Hard Labor*, N.Y. TIMES, Apr. 28, 1874, at 8.

69. See generally Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers,"* in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 142-66 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); NAT'L CENTER ON WOMEN AND FAMILY LAW, FAILURE TO PROTECT: A REFERENCE MANUAL FOR NEW YORK ATTORNEYS REPRESENTING BATTERED WOMEN AT RISK OF LOSING THEIR PARENTAL RIGHTS FOR FAILURE TO PROTECT THEIR CHILDREN FROM THE ABUSER (1993) [unpublished monograph].

perhaps because his behavior, as an unrelated “man in the house” was not as shocking to the norms of child care at the time.

The publicity surrounding this case led to important results for the future of child protection. The activities of private provider agencies acting on behalf of abused and neglected children increased significantly. In the same year, a private provider agency, the New York Society for the Prevention of Cruelty to Children, was formed with Elbridge Gerry as its counsel.⁷⁰ By 1880, thirty-three such societies existed in the United States,⁷¹ most of them in the business of rescuing both animals and children. As Bergh explained:

The protection of children and the protection of animals are combined because the principle involved, i.e., their helplessness, is the same; because all life is the same, differing only in degree of development and expression; and because each profits by association with the other.⁷²

These early efforts were aimed at rescuing children and, sometimes, prosecuting the adults who brutalized them. The societies did not see as their mission any education or support of parents or treatment of families. As Gerry explained:

The SPCC was simply created as a hand affixed to the arm of the law, by which the body politic reaches out and enforces the law. The arm of the law seizes the child when it is in an atmosphere of impurity, or in the care of those who are not fit to be entrusted with it, wrenches the child out of these surroundings, brings it to the court, and submits it to the decision of the court--unless, on the other hand, it reaches out that arm of the law to the cruelist, seizes him within its grasp, brings him also to the criminal court and insures his prosecution and punishment. These are the functions of our societies.⁷³

70. See CHILDREN AND YOUTH, Vol. II Parts 1-6, *supra* note 66, at 189-97.

71. See Linda Gordon, *Child Abuse, Gender and the Myth of Family Independence: Thoughts on the History of Family Violence and Its Social Control 1880-1920*, 12 REV. L. & SOC. CHANGE 523 (1983-84).

72. See Costin, *supra* note 62, at 213.

73. ELBRIDGE GERRY, THIRTY FIRST ANNUAL MEETING OF THE AMERICAN HUMANE ASSOCIATION (Albany, N.Y. 1907), *cited in* Costin, *supra* note 62, at 219. At this 1907 speech at the Annual Meeting of the Society, Gerry was also clear that the society's purpose was to rescue children and refer their parents for prosecution, not to provide treatment. The New York Society for the Prevention of Cruelty to Children (hereinafter “N.Y.S.P.C.C.”) was “not created for the purpose of educating or reforming children, or seeing that they were transported into other homes.” *Id.* This description was meant in part to differentiate the purposes of the Society from the work of the New York Children's Aid Society which gathered up children from the industrializing Northeast cities and sent them on “orphan trains” to the rural Midwest where they were given “proper homes” through an informal indenture. These *rescue* efforts are also distinguishable from broader turn-of-the-century *preventative* efforts. Carl Carstens led the first of these agencies, the Massachusetts Society for the

Until the mid-twentieth century, private philanthropic agencies intervened on behalf of abused and neglected children. States made fledgling criminal prosecution efforts on behalf of individual children but neither the civil nor the criminal response was uniform or broadly applied. State criminal prosecutions for abuse continued without any federal legislative guidance into the 1970's.⁷⁴ No federal law codified the duties of the state to protect children from abuse and neglect.

A seminal event in the history of state intervention to protect children from child abuse and neglect was the 1962 publication of Battered-Child Syndrome by Dr. Henry Kempe.⁷⁵ Kempe was a pediatrician who worked with pediatricians and radiologists to identify causes of suspicious injuries to children.⁷⁶ With new knowledge about injuries that could only be caused by abusive behavior, states moved to codify responses to protect children. Between 1963 and 1967, every state passed a statute requiring some form of reporting of incidents of child abuse. Reporting triggers the state response based on a child's right to protection from abuse and neglect.

In 1973, the Senate Subcommittee on Children and Youth of the Committee on Labor and Public Welfare held hearings in Washington and at children's hospitals around the country on the needs of abused and neglected children.⁷⁷ Bills were introduced in both the House and Senate, but the Senate subcommittee chaired by Walter Mondale held the main hearings. In a letter of transmittal to the Senate Committee Chairman, Mondale explained the need for legislation:

The Subcommittee held hearings in Washington, New York, Denver and Los Angeles. Members of the Subcommittee personally visited victims of child abuse in hospitals and observed firsthand the operations of multi disciplinary child abuse teams in several cities. We were appalled to learn how many abused and neglected children there are and how little is being done to help

Prevention of Cruelty to Children. In 1907, at that Society's Annual Meeting, Carstens stated the broader mission of child protection: "Children will still need to be rescued from degrading surroundings for many years to come . . . but the society recognizes more definitely that it is a preventive agency." MASSACHUSETTS SOC. FOR PREVENTION OF CRUELTY TO CHILDREN, 1907 ANN. REP. 27, in Paul Gerard Anderson, *The Origin, Emergence, and Professional Recognition of Child Protection*, 63 SOC. SERVICES REV. 222, 224 (1989).

74. For a summary of the history of child protection and of the present operation of the system, see Mangold, *supra* note 6.

75. See C. Henry Kempe et. al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N. 105 (July 7, 1962).

76. See C. Henry Kempe, *Paediatric Implications of the Battered Baby Syndrome*, 46 ARCHIVES OF DISEASE IN CHILDHOOD 28, 28 (1971).

77. See *Child Abuse Prevention Act, 1973: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare*, 93d Cong. 2 (1973) [hereinafter *Mondale Hearings*].

them and their troubled families. Statistics vary widely, but there is little question that thousands and thousands of youngsters suffer severe physical and emotional abuse every year. This is a problem that cuts across social and economic barriers. It occurs in all kinds of neighborhoods. Yet there was no focused Federal effort to deal with the problem. Nowhere in the Federal government could we find one official assigned full time to the prevention, identification and treatment of child abuse and neglect.⁷⁸

One year later in 1974, The Child Abuse Prevention and Treatment Act (CAPTA) was passed.⁷⁹ CAPTA initiated a federal response to child abuse based on a child's right to protection by the state where there is evidence of parental harm. It formulated the mandates for the development of a bureaucracy within the Department of Health, Education, and Welfare (HEW) (now called the Department of Health and Human Services) to gather information and expertise on the problem of child abuse, a largely undocumented subject at the time.⁸⁰

Most important for the subsequent history of the federal/state relationship addressing child abuse, CAPTA contained provisions for a grant program.⁸¹ Eligibility for grants required states to follow a series of mandates in order to receive the funds.⁸² Those provisions concerned reporting, investigating, confidentiality of record keeping, and law enforcement cooperation.⁸³ They were the earliest versions of the more complete and complicated federal-to-state reimbursement system which funds state child protection systems today.

CAPTA established a minimum law enforcement-like state response to determine which children had a plausible right to protection.⁸⁴ By focusing on reporting and investigating without attention to supporting families or preventing abuse, parents as "alleged perpetrators" were pitted against the agencies. Parental empowerment was in conflict with child protection. The key state response to protect children from abuse became the mandatory reporting, investigating, and record keeping system that is commonly known as the child protective services system. While all states had some form of reporting law in place before CAPTA, few met the more rigorous CAPTA requirements before 1974. CAPTA, in effect, maintained continuing attention on reporting laws, confidentiality, and investigation.

CAPTA addressed the "front end" of the system, bringing attention to

78. *Id.* at 2 (letter Walter Mondale sent to Hon. Harrison A. Williams).

79. One year later, Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (Supp. 1995).

80. *See Mondale Hearings, supra* note 77 (Letter of Transmittal).

81. *See id.*

82. *See id.*

83. *See* CAPTA, § 4(b)(3).

84. *See id.*

troubled families and children and investigating them. It soon became clear that permanency planning was crucial as children were being placed in foster care in increasing numbers. Following the passage of CAPTA, the numbers of children reported as abused and neglected exploded, and state-based foster care systems were flooded with children placed as a result of reporting and investigation through child protective services. Senator Cranston summarized the situation before the Senate in 1979:

The number of children in foster care in 1977 was approximately 500,000, nearly three times the number of children in foster care as compared to 1961. In only one of every five cases does the services plan for these foster children recommend a specific length of placement. In other words, the so-called temporary provision of foster care has no definite target date for ending the placement and for placing the child in a permanent family setting. Over half the children in foster care have been away from their families for more than 2 years- about 100,000 children have spent more than 6 years of their lives in foster care. Nearly one-fourth of the children have been in three or more foster family homes. Even in cases where the agency had developed a plan for returning the child to his or her home, in one-third of the cases, there was no plan for visits between the child and the parent or another person who would care for the child if returned home. There are more than 100,000 children in foster care awaiting adoption.⁸⁵

As reports mounted as a result of CAPTA requirements, foster care became the expedient and perhaps sole resource to address the children's safety.⁸⁶ Separation became the means of protection and protection was divorced from caretaker empowerment.

3. Protection of Children by Empowerment of Parents

Concerns that children were being unnecessarily placed outside their homes and were languishing without permanency in foster care led to passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).⁸⁷ Many of the children were neglected, not abused. For such children, it was hoped that temporary supportive services would empower parents to resume their authority and safely care for their children. For the first time, empowerment became a preferred means of protection. The AACWA imposed the mandate that states provide a plan to the federal government requiring the state-based public agency to make "reasonable efforts" to prevent placement in foster care or achieve reunification for

85. 125 CONG. REC. 110, 59 (1979) (statement of Sen. Cranston).

86. *See id.*

87. *See* Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in 42 U.S.C. §§ 602, 608, 620-28, & 670-76 (1997)).

children temporarily placed.⁸⁸ The law also provided for adoption subsidies to encourage the adoption of children out of foster care who could not be reunified.⁸⁹ States codified the reasonable efforts and adoption language in their laws.⁹⁰ If states failed to meet the mandates of the law they would risk losing eligibility for matching federal reimbursement for their foster care expenses.⁹¹ As a consequence of the fiscal incentives offered in AACWA, family preservation efforts to reunify families flourished and the number of children in foster care began to decrease.⁹² Unnecessary foster care placement and foster care drift were diminished by requiring case planning, case reviews, reunification efforts and subsidies for adoptions of children leaving foster care.⁹³ The law required that whenever the determination to place a child in foster care was pending, the court had to make a finding as to whether “reasonable efforts” had been made to prevent the placement. It was hoped that this procedural requirement could reduce the unnecessary placement of children in foster care when services to their families could maintain them safely at home.⁹⁴ The goal was never to eliminate foster care. There was and is a point on the spectrum of cases where separation is the only means of protecting children. Instead, the law was targeted at the large number of unnecessary placements of children who could remain safely at home with supportive services.⁹⁵ The provisions of the Social Security Act codifying the AACWA have been revised over the past two decades to require a myriad of planning processes in exchange for federal reimbursement for foster care.⁹⁶ The state is required to have a written document for each child in care which includes, in part,

[A] plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to

88. *See id.* at § 671(a)(15)(A) (1994 & Supp. 1997).

89. *See* 42 U.S.C. § 671(a)(15)(B) (1994 & Supp. 1997).

90. *See, e.g.*, CAL. WELF. & INST. CODE § 366 (West 1999), MISS. CODE ANN. § 43-15-13 (1999).

91. *See* 42 U.S.C. § 671(a) (1994 & Supp. 1997).

92. *See* CHILD. DEF. FUND, STATE OF AMERICA’S CHILDREN: 1994 YEARBOOK 22 (1994).

93. *See* Pub. L. No. 96-272, § 471(a)(15)(B), § 471(a)(16), § 473(a)(1), 94 Stat. 500, 503, 504 (1980) (codified as amended in 42 U.S.C. §§ 602, 608, 620-28 and 670-76 (1997)).

94. *See* 42 U.S.C. § 671(a)(15) (1994 & Supp. 1998).

95. Richard Wexler makes a strong argument for family preservation, especially intensive family preservation services along the Homebuilders Model. Such services are designed to prevent unnecessary placements. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129 (2001).

96. *See* 42 U.S.C. §§ 601-79b (1994 & Supp. IV 1998).

his own safe home or the permanent placement of the child⁹⁷

The protection of the child includes not only state-provided services to alleviate the risks of child abuse and neglect but also to reduce the risks of unnecessary placement. In seeking to protect children from unnecessary placement, the law made the right to protection and the empowerment of families complimentary, not conflicting policies. The policy of protection by empowerment of families was short lived and perhaps never fully exercised. Preventive and supportive services were always “capped” services and funding for them was never sufficient to meet the local need. In contrast, placement services were and are uncapped and available in unlimited supply. These fiscal incentives and disincentives may have undermined the spirit of AACWA.

Following passage of the AACWA, criticism began to mount over the perceived emphasis on empowering families. While the law had also provided for adoption subsidies to encourage and support the adoption of children out of foster care, the emphasis on preservation and reunification was criticized for fostering a climate where children were left in unsafe homes and sometimes returned to unsafe homes.⁹⁸ The concern was that empowering families was being mandated at the expense of the protection of children. While the policy of the AACWA sought to empower families as the best means of protecting children, criticism of the empowerment efforts pitted family empowerment against the protection of children.

In the 1990's, the number of children in foster care began to increase once again. While the reasons for this are complex, the increase is usually attributed to the crack epidemic in the inner cities and the increasing percentage of children living in desperately poor conditions with young, unmarried mothers.⁹⁹ A series of highly publicized brutal deaths of children who were “known to the public agency” and provided with failed preventive services in their own homes instead of being placed in foster care led to a growing outcry for reform of the system.¹⁰⁰

4. Retreating from Protection by Empowerment of Parents with a New Emphasis on Termination of Parental Rights

97. 42 U.S.C. § 675(1)(B) (1994 & Supp. IV 1998).

98. *See, e.g.*, NEW YORK STATE COMMISSION ON CHILD ABUSE, FINAL REPORT (1996).

99. *See id.* at 22-25.

100. *See id.* at 3-4, 28-29. For a discussion of the perceived problems with the reasonable efforts requirement leading to the adoption of the Adoption and Safe Families Act, see Christine H. Kim, *Putting Reasonable Back into the Reasonable Efforts Requirement*, 1999 U. ILL. L. REV. 287 (1999).

The Adoption and Safe Families Act of 1997 (ASFA)¹⁰¹ was a partial response to renewed calls for protection – both for swifter removal from abusive homes and for expedited adoptions. Protection was again viewed as it had been before the AACWA – as requiring swifter removal from investigated homes instead of supportive services into the homes. ASFA provides exceptions to the reasonable efforts requirement introduced in the AACWA when “aggravated circumstances” are present.¹⁰² The section providing for the exceptions appears uncontroversial at first glance, citing torture, death of another child, or sexual abuse as examples; but a more broad exception comes from the “aggravated circumstances” catch-all provision which is left to the states to define.¹⁰³ It moves the balance from empowering parents toward a stronger child’s right to protection. It does not abandon protection by empowerment, but has shifted the policy focus toward protection by removal.

ASFA was passed to clarify that the health and safety of the child should always be paramount and to detail circumstances under which reasonable efforts did not have to be pursued. ASFA retreats from the goal of reunification in certain cases where “aggravated circumstances” or felony convictions exist. In a shift away from reunification and toward adoption the law also required that child welfare agencies file a petition to terminate parental rights for children in care for fifteen of the last twenty-two months.¹⁰⁴ This sets an end limit on protection by empowerment. In the earlier House version, the law expedited termination proceedings only for children under the age of ten.¹⁰⁵ While the law ultimately passed did not include this maximum age requirement, the sentiment of the Congress throughout the debate was that the bill would mainly impact adoptions for this preteen population. The final law includes additional important provisions for older children, namely allowing states to designate them as “special needs” children due to age and making them eligible for adoption

101. See Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 671-679b (1994 & Supp. 1998)).

102. See 42 U.S.C. § 671(a)(15)(D)(i) (1994 & Supp. 1998).

103. See *id.* In his article in this volume, Richard Wexler describes the impact of ASFA in very stark terms. See Wexler, *supra* note 95. While I see ASFA as a partial retreat from the philosophy of family preservation, I would not go so far as him in characterizing this as the age of “take the child and run.” See *id.* If no ASFA exception applies, child welfare agencies are still required to make *reasonable efforts* to prevent placements and reunify children. See *id.*

104. For an article critical of this shift in emphasis, see Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999).

105. See Adoption Promotion Act of 1997, § 3(a)(3)(E) (reported favorably out by the Committee of Ways and Means).

assistance by providing them with continuing health insurance.¹⁰⁶

In 1997, with the passage of ASFA, Congress altered the federal mandates on states providing foster care services to abused and neglected children.¹⁰⁷ The new mandates shifted the focus from preservation and reunification toward a new emphasis on swifter termination. Whether this was a balanced adjustment of protection and empowerment from the empowerment-driven AACWA or a hard swing toward protection that will later be re-balanced is yet unclear.

In 1999, Congress again amended the law governing these placements by focusing on the needs of older children in out-of-home care and passing the Foster Care Independence Act (FCIA).¹⁰⁸ FCIA and ASFA represent a change in philosophy from the previous law, moving from protection by supported family preservation or reunification toward protection by alternative placements – adoption or independent living arrangements. FCIA was passed to enhance services for children aging out of foster care with the goal of “independent living.” In a sense, this law was necessary because of the failure of all previous efforts to find and support families for children in foster care. It made possible a continuing claim to the entitlement of foster care based upon a right to protection until age twenty-one even for older teens who had reached the age of eighteen. This law is an important step in recognizing the role of child empowerment in protecting children, but as is discussed *infra* Part III, it does not go far enough to continue protecting while empowering older foster children.

D. Protection and Empowerment in the Operation of the Current Foster Care System

The fundamental rights of parents can be disturbed and the child’s right to protection triggered by allegations of abuse or neglect. As discussed *supra* Part I.C.3, all states have in place a child protection system which responds to such allegations by investigating families and temporarily removing children when it is deemed necessary for their safety.¹⁰⁹

106. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 306 (1997) (amending 42 U.S.C. § 671(a) (1994 & Supp. 1997)). See 143 CONG. REC. S12, 513-26 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee emphasizing importance of the medical care adoption subsidy for teens adopted out of care).

107. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 671-679b (1994 & Supp. 1997)).

108. Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (1999).

109. The state child protection systems operate under federal mandates codified in the Social Security Act since the Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in 42 U.S.C. §§ 5101-119c

Sometimes parents voluntarily place their children outside the home during the course of the investigation and sometimes a court mandates the placement.¹¹⁰ When placed, these children enter a system of out-of-home care which can include non-relative foster family homes, foster homes provided by relatives called kinship homes, group homes or larger residential settings. Once placed in out-of-home care by the child protection system through the voluntary or involuntary temporary surrender of parents, these children become foster children.¹¹¹ Foster care is always meant to be temporary. A permanency plan is written for every child in care with a recognized goal (reunification, adoption, independent living) and a set of action steps to achieve that goal.

The child protective services system is triggered by a report of abuse or neglect as defined in state law under the requirements of CAPTA. Reports are made by voluntary or mandated reporters to hotlines that federal law requires every state to operate.¹¹² Voluntary reports can be made by neighbors, friends, family members – anyone who suspects child abuse or neglect on the part of a caretaker.¹¹³ If the reporter provides adequate information to the hotline operator, the report triggers investigation by the local child protection agency.¹¹⁴ Private individuals are vitally involved in activating the child protective services system through reporting, but hotlines are maintained and initial investigations are done by the public agency.

Mandated reporters are crucial to the child protective services system. Through mandated reporting, the *parens patriae* power of the state is exercised to conscript professionals who work with children to become partial state agents in protecting children from harm. These reporters generally are persons who work in professions or roles that bring them into

(1995 & Supp. 2000)).

110. A voluntary placement agreement with the parent or legal guardian or a court adjudication is necessary for federal reimbursement for the placement under 42 U.S.C. § 672(a)(1) (Supp. 1998).

111. This article focuses on out-of-home care provided through the child protection system and not as a result of delinquency, mental illness or status offenses which result in placement outside the child welfare system. For a discussion of foster care in the delinquency system, see also Burt Galaway et al., *Specialist Foster Family Care for Delinquent Youth*, 59 FED. PROBATION 19 (1995). For a discussion of privatization of care in these systems, see Mangold, *supra* note 3 at 1300, n.14.

112. See 42 U.S.C. § 5106a(b)(1)(A) (1995 & Supp. 2000).

113. Abuse by a non-caretaker can only be pursued criminally. The civil system is reserved for intra-familial violence.

114. See 42 U.S.C. § 5106a(b)(10) (1995 & Supp. 2000). For examples of state operational directives, see N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992); Boland v. State, 638 N.Y.S.2d 500 (1996).

contact with children.¹¹⁵ If these professionals suspect or believe that children with whom they come into contact in the course of their employment are suffering from abuse or neglect, confidentiality and privilege are forfeited and the professionals are mandated to report the abuse or neglect to the state operated child protection system. Some states require that professionals who work with parents and have reason to suspect abuse are also mandated to report.¹¹⁶ These professionals are not merely invited to participate on behalf of children; they are required to do so regardless of their professional opinion as to the wisdom, value, or safety of reporting.¹¹⁷

In effect, the state forces professionals to participate and invites the non-professional community member, the modern day Etta Angel Wheeler, to make reports voluntarily. This reporting system is not a novel creation of the 1960's; rather, it was an evolving codification of the child protection system developed since colonial times and expanded by private philanthropic agencies and criminal prosecutions at the turn of the century. In 1997, approximately three million children were reported abused or neglected.¹¹⁸ Depending on the severity of the allegations, child protective services workers must respond within the period of time required by state law to determine whether there is sufficient evidence to support the allegations.¹¹⁹ If the workers find that there is not sufficient evidence, the reports are considered "unfounded" and the cases are closed.¹²⁰ Of the three million reports in 1997, investigation by agencies confirmed that abuse or neglect had occurred in just under one million cases.¹²¹ In other words, each year, over two million cases are investigated but no further action is deemed necessary.¹²² Among substantiated reports, data shows that African American children are over-represented; African American children comprise fifteen percent of the population, but make up twenty-eight percent of the children with substantiated reports.¹²³ Neglect is the allegation substantiated for most children in the dependency system.

115. See 42 U.S.C. § 5106a(b) (1995 & Supp. 2000).

116. N.Y. SOC. SERV. LAW § 413 (McKinney 1992).

117. See generally MURRAY LEVINE & HOWARD J. DOUECK, *THE IMPACT OF MANDATED REPORTING ON THE THERAPEUTIC PROCESS PICKING UP THE PIECES* (1995).

118. See CHILD. DEF. FUND, *supra* note 13.

119. See N.Y. SOC. SERV. LAW § 424(6) (McKinney 1992).

120. See *id.* § 424(7).

121. See CHILD. DEF. FUND, *supra* note 13, at 85; MICHAEL R. PETIT ET AL., *CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES*, 3 (1997).

122. In New York, as a result of the death of Eliza Izquierdo, the law was amended to keep records of unsubstantiated reports for use in future investigations. The law is known as "Eliza's Law." N.Y. SOC. SERV. LAW § 422(5) (McKinney 1992).

123. See PETIT *supra* note 121, at 19.

In 1995, forty-two percent of the substantiated cases were classified as neglect while only twenty-two percent were classified as abuse. Sexual abuse was the confirmed allegation in eleven percent of the cases.¹²⁴ If a public agency worker confirms a report, often referred to as “indicating” or “substantiating” the report, the agency decides what further action is necessary. In many cases, the perpetrator is removed from the home by the time the investigation is completed, so no further services or supervision is required. In other instances, the family may be given the option of “voluntarily accepting services” from the agency, services that are often delivered by a private provider agency as a subcontractor to the public agency. These services may range from parenting classes and periodic visits to the home to out-of-home placement of the child. By federal law, the agency must make reasonable efforts to keep the family together unless an exception under ASFA applies. If services are not available to keep the child safely at home despite reasonable efforts to provide such services, the child may be removed.¹²⁵ Data compiled from thirty-five states shows that 130,685 children were removed due to abuse and neglect in 1995.¹²⁶ As of March 1999, there were a record 547,000 children in out-of-home placements as a result of removal due to allegations of abuse and neglect.¹²⁷

Once a child is removed to out-of-home placement, the case must be reviewed periodically by the court or by administrative review.¹²⁸ If the family refuses voluntary services in the home or refuses to voluntarily place the child, the public agency may petition the court to find that the child is abused or neglected and to mandate a disposition.¹²⁹ The disposition can include services in the child’s home and/or out-of-home placement for the child.¹³⁰ A system of procedural requirements comes into play to provide periodic dependency hearings on the parents’ rehabilitation, the agency’s efforts, and the child’s safety.¹³¹ The judge in such proceedings rarely considers the arguably important issues of child support, joint custody, or domestic violence¹³² in formulating mandatory

124. *See id.* at 30.

125. *See* 42 U.S.C. § 671(a)(15)(C) and (D) (1994 & Supp. IV 1998).

126. *See* PETIT, *supra* note 121, at 38.

127. *See* CHILD. DEF. FUND, *supra* note 13, at 84, 86.

128. *See* 42 U.S.C. § 675(5)(B) (Supp. 1998).

129. *See* 42 U.S.C. § 671(a)(15)(C) (Supp. 1998).

130. *See* 42 U.S.C. § 671(a)(15)(A)-(C) (Supp. 1998).

131. *See* 42 U.S.C. § 675(5)(B) (1994).

132. While inquiries into violence against the mother in the home may be part of a risk assessment at the outset of a case, the focus is on the children. If the violence threatens the children, the children can be removed. A referral may be given to the mother to tell her how to remove the perpetrator through the domestic violence system

orders, but advocates against domestic violence are increasingly encouraging such considerations.¹³³ The ultimate protective tool of the system is removal of the children from the home. Increasingly under the provisions of ASFA, this can lead to termination of parental rights and an order that frees a child for adoption.

E. Empowerment vs. Protection in the Debate Over the Proper Role of the Attorney for the Child

The shifting balance between protection and empowerment is evident in the history, laws and current operation of the child protection system and the foster care system as discussed *supra* Part I.B-D. As a theoretical debate, it is still being waged among scholars studying the child protection system when considering the proper role of the attorney for the child. The Child Abuse Prevention and Treatment Act ties delivery of federal matching funds to the requirement that a guardian ad litem be appointed for children in all dependency court proceedings.¹³⁴ Regulations promulgated to interpret this provision of CAPTA state that the guardian ad litem must “represent and protect the rights and best interests of the child.”¹³⁵ The ambiguity in this terminology has left open to interpretation whether attorneys must be appointed to represent children or if others, professionals or volunteers, can take on this role.¹³⁶ Even when an attorney is appointed, as is required in many states, the role of that attorney in the proceedings is unclear. Must the lawyer operate in a traditional lawyer-client relationship to fully protect and exercise their child client’s rights (empowerment model) or can the lawyer generally, or at least in some instances, represent some notion of the child’s best interest (protection model)?¹³⁷

and her swiftness and success in doing so may determine how she is judged as a parent. She will also be given a variety of tasks to work toward reunification with her child. Often, she is required to maintain a stable home and income. This may make it difficult for her to remove a batterer who is the family’s source of income. *See generally* NAT’L CENTER ON WOMEN AND FAMILY LAW, *supra* note 69.

133. Without such comprehensive orders, conflicting orders regarding custody and visitation arrangements can jeopardize the safety of mothers and children. *See* NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994).

134. *See* 42 U.S.C.A. § 5106a(b)(2)(A)(ix) (1995 & Supp. 2000).

135. 45 C.F.R. § 1340.14(g) (1998).

136. For a discussion of the advantages of employing social workers and others who are specifically trained to work with children, especially young children, see Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955 (1996).

137. This ambiguity exists in law and in practice. For a more detailed discussion of the openness to interpretation of the advocates’ role, see Emily Buss, “*You’re My*

Scholarship and commentary on the appropriate model of representation of children in dependency proceedings collectively assumes one of these two positions.¹³⁸ The empowerment model posits that children should be treated as autonomous clients and their positions should be zealously represented before the court. This is sometimes called the “autonomy” or “expressed interest” view. The protection model advocates that children, as not fully competent clients, need to be protected and a position of their “best interest,” whether or not it coincides with their expressed interest, should be advanced.¹³⁹ Proponents of the autonomy or empowerment model advocate that children should be carefully interviewed, and their attorneys should put the child’s expressed interests before the court. This view, prevalent in legal literature,¹⁴⁰ states that a lawyer’s professional role dictates such advocacy on behalf of the client and that any other model which allows for the opinion of the lawyer to be presented to the court is not legitimate.¹⁴¹

There are many commentators who state their preference for an empowering model of representation but import a variety of caveats. Some argue that a lawyer should be excused from following her client’s wishes when the client is too young, the matter is too important, or the proceeding

What?” The Problem of Children’s Misperceptions of Their Lawyers’ Roles, 64 FORDHAM L. REV. 1699, 1700 (1996); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341 (1987); Sarah Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983).

138. There is general agreement that children in delinquency proceedings should be represented as autonomous clients. This consensus flows from a reading of *In re Gault*, 387 U.S. 1 (1967), which focuses on protection of a child’s procedural due process rights when a child’s liberty is at stake. In dependency cases, where a child’s placement is at issue, the right to an attorney should be interpreted as in *In re Gault*. In custody cases, the role of counsel is often debated as it is in dependency proceedings. See Buss, *supra* note 137, at 1700-01 n.3.

139. See generally, *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) (hereinafter “*Conference Proceedings*”). Articles in this special issue deal specifically with the different models. See, e.g., Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996).

140. See generally, *Conference Proceedings*, *supra* note 140; American Bar Association *Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 CHILD. RTS. CHRON. 25, 25-26 (1995-96).

141. See Federle, *supra* note 139, at 1655.

is too chaotic to assure that all proper information will be before the court.¹⁴² Usually these concerns are most keen when the issue before the court is whether a child should be returned to her parents. The concern is that young, impressionable children will wish to return to their parents against their own best interest. Some commentators suggest that when these concerns are present in a case, the child's attorney should assert her own opinion about what is in the child's "best interest."¹⁴³ Others argue that the lawyer should act as an investigator and objectively ensure that all information is in evidence before the court so that a judge can properly decide what is in the child's best interest.¹⁴⁴ At least one commentator urges that lawyers for young children follow the dictates of the underlying substantive law.¹⁴⁵

The first caveat, that capacity must be considered before a child can be represented as an autonomous client, is the most prevalent in scholarly legal literature. It has led to a debate over the proper age at which capacity can be presumed,¹⁴⁶ who should determine capacity,¹⁴⁷ and the attempts a lawyer can make to discern a sense of the child's wishes even when the child is considered impaired.¹⁴⁸

The second caveat, that a child's lawyer can be excused from the traditional lawyer role when the stakes are too high for the child's safety, usually imagines a situation where placement or reunification is before the court and the child is urging a position which would place her with her parents.¹⁴⁹ This occurs at the dispositional or dispositional review stage of proceedings. In the chaotic, crisis driven dependency system, the concern is also raised that the adversarial system cannot be presumed to act properly.

142. See Ramsey, *supra* note 137 at 287.

143. See Peters, *supra* note 139; Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1473-78 (1996).

144. See Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76 (1984) (discussing the various attorney roles, including the role of investigator).

145. See *id.* Guggenheim advocates a traditional lawyer-client relationship for unimpaired children in any legal context. For impaired children, the underlying substantive law should inform the lawyer's representation.

146. See Ramsey, *supra* note 137, at 312 (suggesting a presumptive age of seven).

147. See *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 *FORDHAM L. REV.* 1339 (1996).

148. See Margulies, *supra* note 143, at 1473.

149. See Ramsey, *supra* note 137, at 309-20 (suggesting that a determination of capacity can be tied to the risk presented by the position: if the risk is high, a higher degree of capacity can be required before the lawyer must be bound by the client's position. Ramsey acknowledges the subjectivity inherent in this position).

Critics suggest that not all of the information will be brought out by the overburdened child welfare agency, and the child's position, if prepared in a thorough and aggressive manner, will be given undue weight. Even if both the parental representatives and the public agency prepare fully, the child's attorney can be seen as a third party whose decision lends determinative weight to the position of one or the other party. This can be problematic when the child's attorney follows her client's wishes instead of her own opinion about what is in the child's best interest, and the other parties do not fully develop the facts and present dangers which lead the attorney to reach that opinion.

Other commentators see the role of a child advocate, even an appointed attorney, allowing representation of a child's best interest regardless of the child's expressed interest.¹⁵⁰ Under the best interest approach, possible incompetence, underlying substantive law, and the nature of the proceedings are persuasive in releasing the lawyer from her traditional role and taking a subjective "best interest" approach.

The law governing child protection in abuse and neglect proceedings is unclear in establishing a preference for empowerment or protection even in the exercise of the basic right to counsel. This tension is even present for older children who have the strongest claim on empowerment rights and clearest capacity to inform their attorney of their wishes. For such children, empowering them is the key to protecting them as foster children and when they leave foster care. They should be the source of information and guidance both to their attorneys and to the agency workers planning their protective care.

PART II. DOMESTIC VIOLENCE, CHILD PROTECTION AND THE TENSION BETWEEN EMPOWERMENT AND PROTECTION

A. Balancing Empowerment and Protection of Women - History of the Legal Response to Domestic Violence

The legal response to domestic violence in the United States must begin with an understanding that beating one's wife, like beating one's child, was not only ignored but was condoned by law. The famous "rule of thumb" was part of an accepted Law of Chastisement in English Common Law which allowed wife beating by a husband to keep his wife from acting in unacceptable or illegal ways at a time when the husband and wife were considered one person (the man) and he would be liable for her offenses. In early Colonial times, the Bodie of Liberties prohibited wife assault of any form in Massachusetts in an effort to create civility and order in the New

150. See Peters, *supra* note 139 (discussing the best interest model).

World; but, there is no evidence that this, or its accompanying proscription against unnaturally severe corporal punishment of children, were ever strictly enforced.¹⁵¹ Until the mid-1800's criminal prosecutions, discussed *supra* Part I.C.2, of child abuse by fathers did not trigger state intervention. Similarly, an acceptance of at least moderate chastisement of wives was prevalent, either under the guise that beatings were within the husband's prerogative or that, even if beyond his reasonable prerogative, legal intervention would improperly intervene into the private domestic sphere.

In 1824, in the oft-quoted case of *Bradley v. State*, the Supreme Court of Mississippi ruled that:

Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.¹⁵²

It was not until the late 1960's, as part of the feminist movement sweeping the country, that efforts to change attitudes about domestic violence and to protect women from its harms began and grew.¹⁵³ Until this time, there was no legal response to the systemic problem of domestic violence in the United States.¹⁵⁴ Unlike the concurrent response to child abuse which was developed in each state by law in the 1960's and then by federal legislation in 1974, the initial activity to reform the response to domestic violence was a grass-roots, private effort. Perhaps due to distrust of government prevalent at the time, and to the broader understanding of

151. The Bodie of Liberties of 1641 states, "Number 80. Everie married woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault." and "Number 83. If any parents shall wilfullie and unreasonably deny any childe timely or convenient mariage, or shall exercise any unnaturall severitie towards them, such children shall have free libertie to complaine to Authoritie for redresse." Bodie of Liberties of 1641 as contained in *The Colonial Laws of Massachusetts* (reprinted from the Edition of 1672 with the Supplements through 1686) at 51. For a discussion of this early effort, see PLECK, *supra* note 47 at 4. A second attempt to address domestic violence was made in the progressive era, but was not sustained. *See id.*; *see also* LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988).

152. *Bradley v. State*, 1 Miss. 156 (1 Walker) (Miss. 1824).

153. There were earlier efforts to address family violence but these were not sustained and did not result in legal responses. *See* PLECK, *supra* note 47, at 4.

154. *See* CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 1 (2001).

domestic violence as a form of gender subordination among feminist leaders,¹⁵⁵ the movement was carried on outside of government with the establishment of shelters, public education and support groups for women.¹⁵⁶ These grass-roots interventions were premised on the idea that women could be protected by empowering them – the theories of protection and empowerment were not at odds but were instead complimentary.

One of the first battered women's shelter, Chiswick Women's Aid, was started in England in 1971. United States activists visited the shelter, and subsequently, in the 1970's, shelters began opening in the United States. State legislation providing for civil and criminal remedies followed. During the 1970's and 80's, legal advances were hindered by lingering prejudices amongst judges, prosecutors and police which often frustrated the efforts of women to free themselves from abusive relationships.

While the federal government enacted CAPTA in 1974, it took another twenty years before major federal law addressing domestic violence was passed in 1994. The Violence Against Women Act of 1994 (VAWA), part of the Violent Crime Control and Law Enforcement Act of 1994,¹⁵⁷ created federal enforcement mechanisms to augment state laws. Interstate domestic violence¹⁵⁸ and interstate stalking¹⁵⁹ became federal offenses along with interstate violation of state protection orders.¹⁶⁰ A host of firearm offenses were also made subject to federal jurisdiction.¹⁶¹ States are now required to give full faith and credit to protective orders from other states.¹⁶²

VAWA also included a civil rights provision, declaring by federal law that crimes of violence motivated by gender violated a victim's civil rights. The provision provided relief in the form of compensatory damages, punitive damages, and injunctive relief.¹⁶³ The civil rights provision was declared unconstitutional in *United States v. Morrison*.¹⁶⁴ The other

155. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982).

156. See Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 *GEO. J. GENDER & L.* 127, 128 (1999).

157. See Pub. L. No. 103-322, 108 Stat., 1796 (codified as amended in 1996, 18 U.S.C. § 2261).

158. See 18 U.S.C. § 2261 (1994 & Supp. V 2000).

159. See 18 U.S.C. § 2261A (Supp. V 2000).

160. See 18 U.S.C. § 2262 (1994 & Supp. V 2000).

161. See 18 U.S.C. § 922 (1994 & Supp. V 2000).

162. See 18 U.S.C. § 2265 (1994 & Supp. V 2000).

163. See 42 U.S.C. § 13981 (1994).

164. 529 U.S. 598 (2000).

provisions of VAWA are still in effect and give relief for interstate as well as gun-related violence.

B. Current Domestic Violence System and Coordination with the Child Protection System

1. Statistics

Currently, the institutional responses to family violence are bifurcated between two systems: the child protective services system and the domestic violence system. Each of these systems is premised on a clearly identified victim: the innocent child in need of protection in the child protective services system and the battered wife in the domestic violence system. For those families who do not neatly fit into the paradigm of single victim image of one system, access to legal or social service assistance to escape the violence is complicated, sometimes complimentary but often contradictory.

Increasingly, there is recognition that family violence does not fit neatly into these two categories and that different forms of family violence occur concurrently and need to be addressed simultaneously. Because of the high comorbidity between domestic violence and child abuse, there is a fledgling effort to coordinate institutional responses to violence against women and children.¹⁶⁵ Tragically, this coordination has resulted in new system-imposed harms to the women and children it seeks to protect.¹⁶⁶ In the case study of Rosa, her mother sought non-legal assistance in the form of shelter to escape her abusive husband. Ten months later, the child welfare agency removed Rosa from her mother's care and placed her in foster care. The allegations prompting the removal were based on Rosa witnessing verbal abuse in her home. By her mother reaching out for support to protect herself and Rosa, she was pitted against the child protection agency. We are not told Rosa's age or wishes in this case. Assuming she is either too young to articulate a preference or wants to be with her mother, there is no evidence that empowerment of her mother and protection of Rosa could not be complimentary instead of contradictory goals.

Studies to date have begun to illuminate the interrelationships between

165. See, e.g., NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994); AMERICAN BAR ASSOCIATION, THE LEGAL IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994).

166. For a discussion of early recognition of this problem, see NAT'L CENTER ON WOMEN AND FAMILY LAW, *supra* note 69 (including position paper, Grossier-Keller, Battered Women and Their Battered Children: Criminal and Civil Allegations of the Women's Failure to Protect).

different forms of family violence.¹⁶⁷ Feminists must play an integral part in gathering the statistics of family violence to ensure an accurate representation of the experiences of women and children¹⁶⁸ in households where violence is present.¹⁶⁹

167. See Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 158 (Kersti Yllö & Michele Bograd ed. 1988). As late as 1988, Bowker, Arbitell and McFerron wrote that empirical data illuminating possible links between forms of family violence was sparse, but we held assumptions that the links exist. The authors review the scant literature on the correlation between child abuse and wife abuse. In their own study, the authors find that child abuse accompanied wife abuse in seventy percent of the studied cases where children were in the home. See *id.* at 162.

In *A Guide to Research on Family Violence*, the Urban Institute and National Council on Juvenile and Family Court Judges reports that, “[t]he risk of child abuse is significantly higher when partner assault is also reported.” THE URBAN INSTITUTE AND THE NATIONAL CENTER ON JUVENILE AND FAMILY COURT JUDGES, *A GUIDE TO RESEARCH ON FAMILY VIOLENCE* 27 (1993) (citing Gerald T. Hotaling et al., *Intrafamily Violence and Crime and Violence Outside the Family*, in *FAMILY VIOLENCE* 315 (Lloyd Ohlin & Michael Tonry ed. 1989)). After this generally accepted statement, the studies vary greatly in their numbers, but all show a high correlation between partner assault and child abuse. See, e.g., LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (Harper & Row 1989) (nearly half of men who abuse their female partners also abuse their children); MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (Anchor Books 1980) (nationally, seventy-five percent of battered women say that their children are also battered); Jean Giles-Sims, *A Longitudinal Study of Battered Wives*, 34 *FAM. REL.* 205 (1985) (one-third of families reporting a violent incident between the parents also reported the presence of child abuse).

168. In 1991, the National Commission on Children wrote,

[A] recent analysis of the factors that place children at risk of maltreatment suggest that only family income is consistently related to all categories of abuse and neglect. When other factors, such as single parenthood and race, are controlled for income, there is no positive correlation with heightened risk of abuse and neglect. In fact, this analysis suggests that when the same resources are available to families headed by single mothers as to two-parent households, children are actually at lower risk of maltreatment.

NAT’L COMMISSION ON CHILDREN, *BEYOND RHETORIC, A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES, FINAL REPORT OF THE NATIONAL COMMISSION ON CHILDREN* 284 (1991) (citing Andrea Sedlak, *National Prevalence of Child Abuse and Neglect*, paper presented for the Conference on Child Welfare Reform Experiments, American Expertise Institute, Washington, D.C. (1991)).

169. Katharine Bartlett describes the importance of “asking the woman question,” in describing feminist legal methods. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990). Given the overwhelming overrepresentation of women as victims of domestic violence, gathering statistics with a woman’s perspective is crucial. For instance, evaluation of success in the domestic violence system often focuses on whether or not a woman complainant appears for all

Existing statistics detailing the violence within families are overwhelming. Between two million and four million women are victims of family violence annually.¹⁷⁰ Violence among adult intimate partners, often called, "domestic violence," is almost exclusively perpetrated by men against women. In the National Crime Survey, ninety-one percent of spousal assaults were by men against their wives or ex-wives.¹⁷¹

It is commonly estimated that the co-morbidity of domestic abuse and child abuse is 30% to 60%.¹⁷² In one survey of battered women, 87% of the women who lived with children reported that the children knew about the battering.¹⁷³ Living within a dynamic of violence makes the children indirect victims. Often, the children are the direct targets of the violence. Researchers estimate that there are 810,000 families in the U.S. where there is concurrent spouse abuse and child abuse.¹⁷⁴ It is also estimated that 3.3 million to 10 million children witness domestic violence annually.¹⁷⁵

proceedings. Prosecution achieving a guilty finding or plea is the ultimate goal. In changing the terms of the debate, feminists need to collect data on whether women who access the system believe the system has been successful for them even if they chose not to participate in the full formal legal process. *See generally*, STATE UNIVERSITY OF NEW YORK AT BUFFALO SCHOOL OF LAW FAMILY VIOLENCE CLINIC, MONROE COUNTY FAMILY COURT DOMESTIC VIOLENCE INTENSIVE INTERVENTION COURT EVALUATION (2000) (evaluation included in person interviews with 143 women seeking protective orders and follow up contacts three months later). As aptly put by Colleen McGrath of the New York State Office for the Prevention of Domestic Violence, "A DA's witness who failed to show up may in fact be a savvy consumer of the system." Interview with Colleen McGrath, New York State Office for the Prevention of Domestic Violence, in Albany, N.Y. (Nov. 21, 1994).

170. *See* Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service*, 23 JAMA 267 (June 17, 1992).

171. *See* Patsy Klaus & Michael Rand, U.S. DEPARTMENT OF JUSTICE STATISTICS, FAMILY VIOLENCE: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (April 1984).

172. *See* CHILD. DEF. FUND, *supra* note 13 at 86 (citing Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134-54 (Feb. 1999)).

173. Lenore Walker reported results from a sample of battered women asked about concurrent child abuse. Fifty-three percent (53%) of the women reported that the batterer abused the children. Twenty-eight percent (28%) reported that they themselves abused the children. *See* LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 188 (1984).

174. *See* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE iii (1990) (citing MARIA ROY, *CHILDREN IN THE CROSSFIRE: VIOLENCE IN THE HOME—HOW DOES IT AFFECT OUR CHILDREN?* (1988)).

175. *See* CHILD. DEF. FUND, *supra* note 13, at 86.

2. Practice

Once a child is removed, or if the family refuses voluntary services, a system of procedural requirements comes into play to provide periodic hearings on the parent's rehabilitation, the agency's efforts and the child's safety. The judge in a child protective services case rarely considers issues of child support, joint custody or adult violence in formulating orders. The ultimate "protective" tool of the child protective service system is removal of the children from the home. In extreme cases, this can lead to termination of parental rights, an act which frees a child for adoption.

While inquiries into violence against the mother in the home may be part of a risk assessment at the outset of a case, it is not the job of the child protective services system to protect the adults in the home. If violence threatens children, the child protective services system has within its power to remove the children, and will not usually take steps to remove the perpetrator. At best, a referral may be given to the mother to tell her how to remove the perpetrator through the domestic violence system.¹⁷⁶ Her swiftness and success in doing so may determine how she is judged as a parent. She will probably also be given a variety of tasks to work toward family reunification. Often, she is required to maintain a stable home and income. This may make it difficult for her to remove a batterer who is the family's source of income from the home.¹⁷⁷ The domestic violence system is usually triggered by an adult victim who seeks the assistance of the police or the courts to stop an act or acts of violence against her. If she alleges

176. Removal via divorce or separation carries pitfalls. The Model Code on Family Violence recommends a rebuttable presumption that it is not in the best interest of a child to award sole, joint legal or joint physical custody to a perpetrator of domestic violence. The Model Code also recommends that visitation by a parent who committed domestic violence only be permitted if the safety of the child and parent victim can be protected with a list of suggested safeguards. See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: MODEL STATE CODE 33, 34 (1994). The "friendly parent" doctrine in child custody cases also has the unintended consequence of rewarding the abuser and frustrating the mother's efforts to separate herself from a batterer. Under that doctrine, the parent most likely to facilitate the relationship between the child and the other parent is given custody. In a domestic violence situation, the woman's arguments to decrease a batterer's access to herself and their child may work against her and give him custody. See e.g., Karen Czapanzky, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247, 256 (1993).

177. Many of the interviewed women at the State University of New York at Buffalo School of Law's Family Violence Clinic discussed the financial difficulties which caused them to stay with the batterer, or suffer financial hardship after ending the relationship. See STATE UNIVERSITY OF NEW YORK AT BUFFALO SCHOOL OF LAW FAMILY VIOLENCE CLINIC, *supra* note 169, at 35.

sufficient facts, she can receive a civil or criminal protective order from the court to order him to cease the abuse and perhaps to keep him away from her for the period of time detailed in the order. A criminal order requires the arrest of the alleged perpetrator. Most states also have procedures in place to allow her to petition for attorney's fees, temporary support, and child custody on a short term emergency basis, but such orders are not always easy to receive, especially when there are existing orders from the domestic relations branch of the court.

Even in localities where police are mandated to make an arrest when there exists probable cause that an act of violence has occurred, release is almost immediate. Maintenance of a violence-free home depends on the woman's ability to enforce the protective order and on the ability and willingness of law enforcement to respond to violations and hold the perpetrator accountable to the terms of the order.

Because of statistics drawing parallels between violence against women and children, efforts to coordinate the responses between the two systems which respond to each form of violence have begun. Tragically, the results of this attempted coordination have frequently been to blame the woman victim of domestic violence for failing to protect her children from the violence. Instead of illuminating the dynamic of violence, stopping the perpetrator from committing violent acts, and supporting the child's non-offending caregiver, the coordination efforts have only made law enforcement and child protective services workers more conscious of the risk of concurrent incidents of violence. Instead of stopping the violent perpetrator, the institutional response has often been to separate the mother caretakers from their children. While violence by the same perpetrator cannot occur simultaneously if the mother and children are in different places, the harm of separation and the failure to address the dynamic which causes the violence may result in more tragedy.

Without a unifying theory to conceptualize the complexity and comorbidity of the violence, the coordination efforts have employed easy solutions with tragic consequences. I highlight two such "solutions" here. The first is prosecutions¹⁷⁸ of mothers for failing to protect their children from family violence when the mother has never herself abused the children and is a victim at the hands of the same abuser. The second is the loss of custody by the parents to the child protective services agency ensuing, in part, from the portrayal of the mother as a helpless victim.

178. The term "prosecution" is used to describe criminal cases brought against women for failure to protect. There is an even larger body of case law in the civil child protective services system using "failure to protect" as grounds for an adjudication and possible removal of the children. *See, e.g.*, NAT'L CENTER ON WOMEN AND FAMILY LAW, *supra* note 69.

Cases have begun to appear in many jurisdictions prosecuting women who are in a relationship with a violent man with civil or criminal failure to protect her children.¹⁷⁹ In some cases, this response has brought victims of violence before the criminal courts due to the actions of their abusers and deprived children of the vital caretaker in their lives. In others, the mother's perceived "inaction" is viewed as failure to protect a child from witnessing abuse or being concurrently abused. Her "action" in calling authorities and seeking shelter or protective orders can alert child welfare authorities to the presence of domestic violence in the home and lead to a civil child protection proceeding. Fear of losing children can prevent caretakers from seeking the help they need to protect children.

Protection via removal should only be an extreme remedy necessary when efforts at supporting the non-offending parent have failed or when the domestic violence victim is herself abusive and needs services to rid violence from the home. Even in such extreme cases, removal should be thought of as temporary, and aggressive reunification efforts need to be provided and repeated as women seek to break out of the cycle of violence and control. Children and mothers must be empowered in developing safety plans that draw on their resources with the support of domestic violence and child welfare systems.

Feminist theories provide a solid framework to examine all forms of family violence. While not all family violence follows strict gender-based identification of male perpetrator and female victim, that gendered paradigm does in fact continue to describe a disproportionate amount of family violence. Gender is a central factor in understanding family violence.

The feminist theory of power and control leading to escalating violence, without its gendered underpinning, broadens the theory to encompass all victims and perpetrators. The richness of the differences among women in violent homes is also a vital component in conceptualizing and addressing family violence. Together, gender, power and control dynamics and an appreciation of non-essentialism within feminist legal theory provide a framework for understanding all forms of family violence.

From this framework, a new institutional response can be imagined. Two scenarios are illustrative:

Police respond to a call for assistance by Rosa's mother for a "domestic dispute." When they arrive, all is calm but the mother seems very nervous and the father stands between her and the police. Rosa is in the other room but appears to be in no harm. The police ask the mother, "Why did you call?" When she tells them there is no problem and asks them to please leave, they warn her

179. *See id.*

that she cannot abuse the 911 service. They further explain that if they come back again, they will think about reporting the family to child protective services to let them investigate the mess.

Imagine instead an approach to family violence which recognizes the centrality of gender in our society and assumes a dynamic of power and control which can be asserted silently, without violence, whenever the perpetrator makes his authority clear. The system would be able to deliver services responsive to the needs of family members who sought assistance. Empowerment would be a means to protection.

Well-trained police could view the role of their response as breaking the cycle of power and control, thus limiting the abuser's authority. Their job performance would not be judged based on the number of arrests they made or successful prosecutions from their arrests but rather on their ability to protect known victims and stop known abusers from becoming violent again with the same or a new victim. If a family member failed to participate in the subsequent stages of the intervention, that would reflect poorly on the system not on the family member. Why did they decide their life was better without the intervention, and how can the system be tailored to be more responsive?

Another example similarly illustrates the danger of a poorly coordinated response:

The child protective services system is investigating a call from a school reporting bruises on Rosa which she says were caused by her mother hitting her with a wooden spoon. When the child protective services investigator speaks to the mother, she is wearing sunglasses in an attempt to hide a black eye. She appears to be on drugs. The child protective services investigator warns her that Rosa can be removed if she does not stop the violence in her home and get her act together. She denies any violence in the home and says Rosa was in a fight after school with another child. The case is unfounded by the child protective services system. Fearful that her life is out of control, the woman calls the domestic violence hotline and asks for a referral for counseling. She is told that mental health professionals are mandated reporters and she is at risk of losing her children to child protective services. She decides not to seek help.

If the child protective services investigator worked within an integrated family violence services system which responded to all forms of family violence, the investigator may have been able to offer services to the mother, not as a victim or perpetrator, but as someone in need of help. Removal of children should not be a threat or punishment but only a drastic

step, sometimes necessary, to secure the child's safety while the caretakers get effective help. With an immediate goal of keeping the child with a family caretaker, assessments must be made to define the "family" to be preserved. Again with a reference to the dynamic of power and control, can removal of a violent adult allow a child to remain safely with a parent? If that is not possible in the short term, what services can make it possible?

In Rosa's case, her mother's efforts to separate from the violence and seek shelter should be supported. Working with her and Rosa, if Rosa is old enough to communicate her wishes, what services and supports do they need to remain safely together? The child protection system and domestic violence system must dovetail efforts to protect children by empowering them and their caretakers.

PART III. EMPOWERING AND PROTECTING OLDER CHILDREN

A. Necessary But Meager Protection: Background to the Foster Care Independence Act (FCIA)¹⁸⁰

At age eighteen or twenty-one, children have spent their right to protection and are considered autonomous adults, although few are prepared for such empowerment. For many older children, relationships with birth families are long-lasting if not strong. Adoptive families are hard to locate. Therefore, permanency, through termination of parental rights and then adoption, is not a viable alternative.¹⁸¹ For those who remain in foster care because their families cannot safely care for them, the failure to successfully reunify or to identify an adoptive family may mean that the children leave foster care with no caretakers. For them, the goal of "independent living" becomes the fall-back permanency option. Faced with this, the public agency with custody of the child in foster care attempts to prepare the aging-out foster child with the skills and resources necessary to succeed on their own. Instead of retaining protection of the child while increasing empowerment, efforts collapse into preparing youth for independent living with no parental guidance and only limited state assistance available.

Revisions in planning requirements specifically addressed the needs of older children in foster care in the mid-1980's and the need to wean them

180. For a discussion of the FCIA and the needs of older foster children, see Mangold, *supra* note 6 at 835 (summarized in part in this section).

181. States have standards for termination of parental rights, which usually include abandonment, permanent incapacity to parent and failure to remedy the circumstances which placed a child into foster care. Federal law now requires that petitions be filed if a child has been in placement for fifteen of the past twenty-two months, but if contested, states will still need to meet their statutory grounds for termination. The federal law includes exclusions from the termination requirement which are enumerated in 42 U.S.C. § 675(5)(E) (1994 & Supp. IV 1998).

from the protection of the state toward independence through empowerment. In 1986, the Independent Living Initiative (ILI) was passed.¹⁸² For children sixteen years and over, the ILI requires specific planning to help these older children before they age out of the foster care system. The provisions of the ILI provide funding for states to assist children who were currently, or had in the past, received foster care maintenance payments or had been in foster care. The goal of the ILI is “to help the individuals participating . . . to prepare to live independently upon leaving foster care.”¹⁸³ The programs suggested by the federal legislation for states to provide to older foster children included programs to “enable participants to seek a high school diploma[,] . . . vocational training[,] . . . provide training in daily living skills[and] . . . provide each participant a written transitional independent living plan which shall be based on an assessment of his needs.”¹⁸⁴

The Foster Care Independence Act of 1999¹⁸⁵ attempts to improve independent living services. The plight of older foster children, and of those newly empowered into independence, was detailed in the legislative hearings for the Foster Care Independence Act. Unfortunately, many young adults who age out of foster care do not successfully make the transition to independent living by the time they age out of care. Too many reappear in shelters, jails or on the streets. The needs of aging-out foster children were at least partially recognized by Congress in passing the Foster Care Independence Act of 1999. This law provides funding for services to assist youths up to age twenty-one who are aging-out of the foster care system into independent living. This law provides reimbursement to the state for services for a few more years, but does not provide a creative solution to address the need for ongoing protection. It does not transgress an arbitrary birthday deadline to allow ongoing support for youths who still need state protection.

In passing the law, Congress explicitly recognized that the overhauls of the 1997 Adoption and Safe Families Act were not sufficient in ensuring permanent homes for all foster children. In debate, Rep. Pryce remarked:

In 1997, Congress tried to help these children by passing legislation to facilitate the adoption of children in foster care. As a result, the dream of a permanent family and a loving home is becoming a reality for more and more children. Yet despite our best efforts to streamline the system and find

182. Pub. L. No. 99-272, Title XII, § 12307(a), 100 Stat. 294 (codified at 42 U.S.C. § 677).

183. 42 U.S.C. § 677(d) (1991 & 1997 Supp.).

184. *Id.*

185. The Foster Care Independence Act of 1999, Pub. L. No.106-169, 113 Stat. 1822 (codified as amended in scattered sections of 42 U.S.C.).

willing families to adopt these kids, the reality is that there are thousands of children who will never leave the foster care system during their childhood.¹⁸⁶

Rep. Camp expressed similar understandings when he stated:

I was very proud to be a part of our efforts to revamp the Foster Care system when this House passed the Adoption and Safe Families Act two years ago. And our efforts are paying off — preliminary numbers show that adoption of foster children have [sic] increased 40 percent since 1995.

But this bill takes the next step—it recognizes that no matter how hard we work, some kids will turn 18 in foster care. They'll "age out" of the foster care system without a network of family and loved ones to turn to.¹⁸⁷

Despite widespread recognition of the need for "family and loved ones to turn to,"¹⁸⁸ the Foster Care Independence Act only provides for increased

186. 145 CONG. REC. 92, H4958 (daily ed. June 25, 1999) (statement of Rep. Pryce).

187. *Id.* at H4971 (statement of Rep. Camp).

188. Many members of Congress echoed this plea to address the need for caring parent-like adults for older foster children. "Those of us who have teenagers know that when the child becomes 18, they still need the guidance, the support, the direction of parents." *Id.* at H4968 (statement of Rep. Lofgren) (debating Foster Care Independence Act of 1999 (H.R. 1802) (106th Congress, 1st Session)). Rep. Pryce stated, "[a]s parents, we do not cut off our children once they turn 18, although I think it is safe to say that even if we did, our children would have a better chance at survival than the products of the foster care system." *Id.* at H4958; Rep. Rangel remarked, "[m]ost all of us know as parents that a child becoming 18 does not necessarily mean that they are ready to assume the responsibility of adulthood." *Id.* at H4960; Rep. Greenwood added, "[w]hen we think of ourselves as parents, how many of us with our children, who have the fortune to have had good, stable upbringings where they are loved, how many of us say, here is your 18th birthday card, hit the street? We do not do that." *Id.* at H4961; Rep. Cardin stated, "[h]ow many of us as parents tell our children at 18 that they are on their own? We have a responsibility." *Id.* at H4961; Rep. Foley remarked, "[w]e can all remember how hard growing up can be. Fortunately for most of us we had loving and supportive. . . family and parents to nurture, encourage, and teach us how to gradually enter adulthood. I could never imagine the feelings of fear or uncertainty that a foster care child approaching his or her 18th birthday must have." *Id.* at H4961; Rep. Eshoo said, "[f]or those of us with teenage children, we know that 18-year-olds aren't often prepared to live on their own, paying their own bills." *Id.* at H4964. In hearings before the House Committee on Ways and Means, Subcommittees on Human Resources, similar sentiments were expressed by William Pinto, Adolescent Services Coordinator, Department of Children and Families, Hartford, CT (March 9, 1999): "For most young people in America, leaving one's home to be on your own means voluntarily giving up the security of the family. You leave when emotionally and economically ready for independence. The move out coincides with a positive event, such as getting married or landing that first big job. When setting up the first apartment, Mom has saved silverware and dishes, Aunt Millie has that pull-out couch in the basement, and Dad may put a fresh coat of

funds for enhanced programming by the states and not for family supports for children who need them.

Many children still exit foster care with no home, adult assistance or real promise of a future. There are approximately 500,000 children in out-of-home care on any given day.¹⁸⁹ Nearly one-third of the children entering care in any year or in care during that year are teens.¹⁹⁰ Of the children leaving care, almost 40% are teenagers.¹⁹¹ Only eleven percent of these are in care due to status offenses such as truancy or ungovernability or delinquency.¹⁹² The remainder are in care mainly due to protective services, parental condition or absence, or relinquishment of parental rights.¹⁹³ Data is available from the federal government from twenty-four states on the outcomes for children of all ages exiting out-of-home care. In the six months from April 1, 1996 through September 30, 1996, sixty-three percent who left care were reunited with their families and eleven percent were adopted.¹⁹⁴

In the Findings accompanying the Foster Care Independence Act, Congress estimated that 20,000 teens leave foster care each year "because they have reached the age of eighteen and are expected to support themselves."¹⁹⁵ The option of independent living is the fall-back option. For these children, an expectation of successful independence is uniquely problematic.

Studies show that nearly 30 percent of these youths average nine years in foster care without a permanent living arrangement. As a result, within two years of leaving foster care, only half have completed high school, fewer still are employed, and nearly 60 percent of the young women have given birth, almost always outside of marriage.¹⁹⁶

Studies of children who have aged out of foster care are scarce¹⁹⁷ but

paint on the wall. Most importantly, underneath it all is the security of knowing that if it doesn't work out, you can always go back home. (And don't all the parents of young adults in this room know that they often end up back at our front door?)" *Id.* at H4965 (statement by William Pinto).

189. *See* 1998 GREEN BOOK, *supra* note 13, at 783 (noting that the most recent statistics in the 1998 Green Book are for 1995 and previous years).

190. *See id.* at 786.

191. *See id.*

192. *See id.* at 790.

193. *See id.*

194. *See id.* at 796.

195. Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified at 42 U.S.C. § 677).

196. Nancy Johnson, *Foster Care Youth to Discuss Transition to Adulthood at Hearing Tomorrow*, GOVERNMENT PRESS RELEASES BY FEDERAL GOVERNMENT DOCUMENT CLEARING HOUSE, May 12, 1999, available in 1999 WL 2224152.

197. *See Post-Foster Care Independent Living Programs: Hearing Before the*

findings are consistently disturbing.¹⁹⁸ One study of all forty-six young men discharged from an independent living group home in New York City found that the overall mean length of time these young adults had spent in care before discharge was eight years.¹⁹⁹ Three studies²⁰⁰ relied upon by government sources report the tragic next chapter for children exiting foster care.²⁰¹

As success in the current job market becomes even more tightly connected to educational attainment, children aging out of the foster care system are ill-equipped to compete. The Westat study found that forty-six percent of the 810 young adults studied who had left foster care had not completed high school.²⁰² That number was thirty-seven percent for Courtney and Piliavin who studied 113 former foster children and thirty-

Subcomm. On Human Resources of the House Comm. On Ways and Means, 106th Cong. (1999) available in 1999 WL 16947799 (statement of Cynthia Fagnoni, Director, Education, Workforce, and Income Security Issues, Health, Education and Human Services Division, U.S. General Accounting Office) [hereinafter Fagnoni Statement].

Many foster youths have a difficult time making the transition from the foster care system to self-sufficiency. While there are few available studies tracking youths who have exited foster care, our review of these studies reveals some consistent findings. Research has shown that many former foster care youths have serious education deficiencies and rely on public assistance In addition, former foster care youths often find themselves lacking adequate housing.

Id.

198. For a literature summary on the topic, see Richard P. Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in 1 CHILD WELFARE RESEARCH REV. 323, 345-48 (Richard Barth et al. eds., 1994).

199. See Mallon, *supra* note 22 at 65.

200. See Fagnoni Statement, *supra* note 197; see also Westat, Inc., *A National Evaluation of Title IV-E Foster Care Independent Living Programs for Youth* (Washington, D.C.: HHS, 1991), Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK 419 (Oct. 1990), Mark E. Courtney and Irving Piliavin, *Foster Youth Transitions to Adulthood: Outcomes 12 to 18 Months After Leaving Out-of-Home Care* (Madison, Wisc.: University of Wisconsin, 1998). For an explanation of the findings of the Courtney study, see *Post-Foster Care Independent Living Programs: Hearing Before the Subcomm. On Human Resources of the House Comm. On Ways and Means*, 106th Cong. (1999) available in 1999 WL 16947799 (statement of Mark E. Courtney, Assistant Professor, School of Social Work and Institute for Research on Poverty, University of Wisconsin-Madison).

201. See Fagnoni Statement, *supra* note 197 (the government cites studies that show that foster children exiting care who have received independent living programming during their stay in foster care have better success than those who do not (citing Maria Scannapieco et al., *Independent Living Programs: Do They Make a Difference?* 12 CHILD & ADOLESCENT SOC. WORK J. 5 (Oct. 1995)).

202. See Fagnoni Statement, *supra* note 197.

eight percent for Barth who studied fifty-five former foster care youths.²⁰³ Employment success was equally dire. Westat, the largest study, found fifty-one percent unemployed two and a half to four years after leaving care.²⁰⁴ Sixty-two percent had not maintained a job for at least one year.²⁰⁵ Courtney and Piliavin found thirty-nine percent unemployed twelve to eighteen months after aging-out of the system.²⁰⁶ Barth found twenty-five percent unemployed one to ten years after leaving foster care.²⁰⁷

Perhaps the two most disturbing correlations are between aging out of foster care and homelessness²⁰⁸ and incarceration. Westat found that twenty-five percent of the former foster children had been homeless at least one night.²⁰⁹ Courtney and Piliavin found that twelve percent were homeless at least once and that twenty percent of males and ten percent of females had been incarcerated at least once in the twelve to eighteen months since exiting care.²¹⁰ Barth recorded that thirty-five percent had been homeless or moved frequently and that thirty-five percent had spent time in jail or prison.²¹¹

Invisible to these counts are the children who have no stable home but live night-to-night on the generosity of friends or acquaintances. Called “couch surfers” in child welfare lingo, these teens are at risk for every frightening possibility of the street.²¹² “The couch surfing phase is

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. The correlation between discharge from foster care and homelessness has long been recognized. *See The Adoption Assistance and Child Welfare Act and Related Proposals: Hearings on H.R. 2810 Before the Subcomm. on Public Assistance and Income Maintenance of the Comm. on Ways and Means, 99th Cong., 1st Sess. 1-2 (1985)* (statement of Leonard Bradley, Deputy Commissioner of Tennessee Dept. of Human Services on Child Welfare League of America) (state-by-state survey of state agencies asked what they believed happened to children who age out of foster care) (citing Mari Brita Maloney, *Out of the Home Onto the Street: Foster Children Discarded Into Independent Living*, 14 *FORDHAM URB. L. J.* 971, 988-89 (1985)).

209. *See* Fagnoni Statement, *supra* note 197.

210. *See id.*

211. *See id.*

212. *See* Susan K. Livio, *Freedom Daunting for Ex-foster Child*, *HOME NEWS TRIB.*, Jan. 3, 1999, at A1 (many former wards of foster care would be homeless “were it not for the generosity of friends and adults who have looked after [them] over the years. Social workers call such young people ‘couch surfers,’ for their habit of sleeping on a friend’s couch until they wear out their welcome”); Susan K. Livio, *Death, Disappointment Stalk “Couch Surfers,” THE COURIER-NEWS*, Nov. 14, 1998, at A1.

preliminary to being out in the street.”²¹³ The numbers for teen pregnancy,²¹⁴ inadequate health care and other indicators of maladjustment are similarly disturbing.

In introducing H.R. 3443 which later became the Foster Care Independence Act of 1999, Congress emphasized its concern for this vulnerable group of former foster children and made the following findings:

(1) States are required to make reasonable efforts to find adoptive families for all children, including older children, for whom reunification with their biological family is not in the best interests of the child. However, some older children will continue to live in foster care. These children should be enrolled in an Independent Living program designed and conducted by State and local government to help prepare them for employment, postsecondary education, and successful management of adult responsibilities.

(2) Older children who continue to be in foster care as adolescents may become eligible for Independent Living programs. These Independent Living programs are not an alternative to adoption for these children. Enrollment in Independent Living programs can occur concurrent with continued efforts to locate and achieve placement in adoptive families for older children in foster care.

(3) About 20,000 adolescents leave the Nation’s foster care system each year because they have reached 18 years of age and are expected to support themselves.

(4) Congress has received extensive information that adolescents leaving foster care have significant difficulty making a successful transition to adulthood; this information shows that children aging out of foster care show high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior; they are also frequently the target of crime and physical assaults.

(5) The Nation’s State and local governments, with financial support from the Federal Government, should offer an extensive program of education, training, employment, and financial support for young adults leaving foster care, with participation in such program beginning several years before high school graduation and continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of

213. Susan K. Livio, *Abusive Foster Care Left Teen Ill-Equipped for Freedom*, THE COURIER-NEWS, Dec. 13, 1998 available in <http://www.injersey.com/news/story/0,1210,143770,00.html> (last visited Dec. 14, 1998) (statement of Stephanie Schwartz of Crossroads, an outreach program for troubled youth in Burlington, County).

214. See Sharon G. Elstein, *Teenagers Are Adoptable: Strategies for Success*, 18 CHILD L. PRAC. 49 (June 1999). A 1991 study found that two to four years after leaving foster care, nearly 66% of teens were mothers compared to 25% in the general population. See *id.*

age.²¹⁵

The purpose of the law was to enable states and localities to operate a spectrum of training programs to better prepare children aging out of foster care. The bill never included new or creative alternatives to create families or supportive homes for these children and thereby provide for ongoing protection. The purpose was described as follows:

(a) PURPOSE.—The purpose of this section is to provide States with flexible funding that will enable programs to be designed and conducted -

(1) to identify children who are likely to remain in foster care until 18 years of age and to help these children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities (including smoking avoidance, nutrition education, and pregnancy prevention);

(2) to help children who are likely to remain in foster care until 18 years of age receive the education, training and services necessary to obtain employment;

(3) to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;

(4) to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults; and

(5) to provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.²¹⁶

215. Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified as amended in scattered sections of 42 U.S.C.). This Act was introduced January 6, 1999. S. 1327 has some additional information in the findings section (section 3) which goes on after the first sentence in H.R. 3443 to state, "In addition, approximately 5,000 adolescents (foster children over the age of 12) are adopted out of the foster care system each year, of whom approximately 620 are over the age of 16 at the time of their adoption. A large percentage of these children have not yet completed their high school education." S. 1327, 106th Cong. § 3 (1999).

216. Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822. This Act was passed by the House of Representatives on November 18, 1999 and by the Senate on November 19, 1999. It was signed into law by President Clinton on December 14, 1999. The earlier version debated on the floors of the House and Senate (H.R. 1802) contained substantially similar "finding" and "purpose" sections. H.R. 1802 was passed by the House in June. Both H.R. 3443 and H.R. 1802 were

Representative Johnson, co-author and lead co-sponsor of the legislation with Representative Cardin, summarized the goal of the legislation as “to prepare these young people to be able to move into the work force or to continue with their education on the very day they leave foster care. These children face very difficult problems and we must create programs to help them learn to be self-reliant.”²¹⁷

The intent of the Foster Care Independence Act was to empower teens and assist them into self-reliance. This is laudable and necessary but the evidence shows these youths need much more. They are uniquely and tragically ill-equipped for empowerment with no ongoing protection. Only up to thirty percent of any state’s funding under this legislation can be used for room and board for children ages eighteen to twenty-one. These funds are valuable in helping to subsidize the former foster child’s existence under a notion of protection, but the focus is on empowerment, despite the teens’ documented need for protection.

Coupled with the Adoption and Safe Families Act, the Foster Care Independence Act seems to provide an increased, but still inadequate, spectrum of permanency options for older foster children. Children who are neither reunited nor adopted (but instead age out of the system with no identified caretaker) are left to independent living. If they live with, or receive support of some kind from relatives or other informal custodians, there is no public assistance for such accommodation.²¹⁸

B. Creative Remedies to Protect Older Children by Empowering Them and Their Parents

1. Open Adoption

titled “The Foster Care Independence Act.” Finding (a)(2) was added in H.R. 3443 and the final bill.

217. 145 CONG. REC. H4957-60 (daily ed. June 25, 1999) (statement of Rep. Johnson). Like many of the speakers, a litany of bad outcomes for the foster children was detailed by the speaker: “Today, two-thirds do not complete high school, 61 percent have no job experience, and 38 percent are diagnosed emotionally disturbed. Most end up jobless, addicted, pregnant, or in jail.” *Id.*

218. Some localities use local money without state or federal reimbursement, and some states use exclusively state money without federal reimbursement to fund guardianships or other novel permanency plans. *See, e.g.,* Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 456-74 (1996) (discussing state subsidies for guardianship); Kathleen O. Byrne and Matilda T. Bellucci, *Subsidized Adoption: One County’s Program*, 61 CHILD WELFARE 173, 173-74 (1982) (describing county subsidization for adoptions out of foster care before adoption subsidies were available under the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500).

I use the term open adoption under the broadest definition, requiring neither a formal contract nor court order, but allowing for some ongoing contact to facilitate the surrender of rights and the finalization of the adoption.²¹⁹ Open adoption requires the termination of parental rights but allows for some continued contact between the birth family and the child. It could be as minimal as letters and pictures or could involve ongoing visitation. The term open adoption is used more generically to refer to any adoption in which confidentiality is compromised by opening records, exchanging information, visiting, etc. Here, the purpose in suggesting open adoption is to allow ongoing contact in whatever form will facilitate the finalization of the adoption and, thus, some familial supports for older children in foster care. Open adoption can empower birth parents and older children by creating an acceptable adoptive arrangement. The adoption may be open by informal agreement, contract or court order.²²⁰ Like traditional closed adoptions, open adoptions should be eligible for all forms of adoption assistance and subsidies, thus increasing the options available to provide familial protection for older children.

States only began to enact adoption statutes in the middle of the nineteenth century. In the twentieth century, legislatures amended the laws by providing confidentiality for the process, thereby creating the notion of closed adoptions.²²¹ While closed adoptions were the norm in the 1970's, some open adoptions were informally arranged and legally sanctioned at that time.²²² Only a few states legislatively endorse open adoptions.²²³

219. See Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996). Sanger uses such an inclusive working definition to describe both direct and indirect contact between the child, birth parents and adoptive parents. She makes the point that open adoption may "increase the number of children available." See *id.* at 492. Others have echoed the prospect, emphasized here for older children, that open adoption may provide stable familial relationships for some children who would not otherwise have parents who could care for them. Lawrence W. Cook, Note, *Open Adoption: Can Visitation with Natural Family Members Be in the Child's Best Interest?* 30 J. FAM. L. 471, 478 (1992). But see Carol Amadio and Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59, 60 (1983) (defining open adoption as an agreement in writing approved by the court). Some distinguish open adoption from cooperative adoption. See, e.g., Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1001-02 (1995). In cooperative adoption the ongoing contacts are arranged by mutual collaboration or agreement, a contract which is made between the birth parent(s) and the adoptive parents. See *id.*

220. See Appell, *supra* note 219, at 1011.

221. See *id.* at 1006.

222. Annette Baran et al., *Open Adoption*, 21 SOC. WORK 97, 98-99 (1976) (advocating that open adoption should be accepted as an alternative and discussing an "experiment" in which an author arranged an open adoption).

For all children in foster care with positive memories and bonds to their birth families, open adoption may provide a mechanism for permanency which does not require a total severance of ties with that family. This is especially relevant in cases of adoption by relatives where confidentiality is impossible.²²⁴ For older children aging out of foster care, open adoption may provide a mechanism to allow the contacts that both the child and birth parent want or to allow for ongoing sibling contact.²²⁵ Allowing these relationships to continue in some form may make the termination of parental rights more tenable for both parties. This could facilitate an adoption, which could not otherwise occur by assuring the parents that in surrendering their rights and freeing their child for adoption, they will not lose all contact with the child. This minimal empowerment may be what it takes to provide an adoptive family for a child in foster care.

2. Guardianship

Guardianship is a judicially sanctioned arrangement; an adult can act as a guardian for a child for the duration of the court order. Guardianship was originally used to oversee a minor's property or estate when his/her parents were deceased or could not otherwise perform this function. Probate guardianships, as they are sometimes called, do not involve physical custody of the child, but are the antecedent to the current use of guardianships by the family or juvenile courts.²²⁶ Probate guardianships, like the guardianships now ordered in the child welfare system, could be for a defined period of time or ongoing. Guardianship traditionally terminates no later than a child's eighteenth birthday. Just as foster care can continue to

223. See, e.g., ALASKA STAT. § 25.23.130(c) (Michie 2000); N.M. STAT. ANN. § 32A-5-35(A) (Michie 1999); N.Y. SOC. SERV. LAW § 383(c)(3)(b) (McKinney 1993); TENN. CODE ANN. § 36-1-121(f) (Supp. 2000); WASH. REV. CODE ANN. § 26.33.295(1) (West 1997). Other states have sanctioned open adoption through case law. See, e.g., Adoption of Gwendolyn, 558 N.E. 2d 10 (Mass. App. Ct. 1990) (holding that post-adoption visitation permitted but at the discretion of adoptive parents); Michaud v. Wawruck, 551 A.2d 738 (Conn. 1988) (ruling that contract between birth and adoptive parents was not contrary to public policy).

224. See Appell, *supra* note 219, at 1011.

225. The importance of sibling bonds is one that is rarely paramount in the child welfare system. For a discussion of the importance of the bonds and their implications for advocacy, see Sharon G. Elstein, *Making Decisions About Siblings in the Child Welfare System*, 18 A.B.A. CHILD L. PRAC. 97 (Sept. 1999).

226. See, e.g., ROBERT D. GOLDSTEIN, CHILD ABUSE AND NEGLECT 767-77 (1999); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 691 (1999); Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option for Dependent Children*, 23 J. FAM. L. 391 (1984).

age twenty-one by continuation of the placement order, the court arranging the guardianship could have jurisdiction to continue the guardianship to age twenty-one or even beyond.

Today, guardianships are often provided by relative caretakers who have been kinship foster care resources. Guardianship provides for a more permanent status to the arrangement.²²⁷ Guardianship also allows for the discharge of the child from the child welfare system in many instances, ending supervision by the agency and the court except for the negligible supervision that may be provided by the court overseeing the guardianship.²²⁸ It is usually a single guardian or mother and father unit which are identified to provide guardianship. This does not require termination of parental rights and, in that sense, is less disempowering of parents. Like open adoption, it provides another option which older children and parents could choose and plan for with the child welfare agency. Often relatives prefer guardianship to adoption because they do not have to endure a legal battle to terminate the parental rights of their sibling or other relative. Biological parents may be willing to consent to a guardianship by a sibling or other relative but not to adoption which severs their parental rights. Biological parents may participate in the selection of a guardian²²⁹ and may enjoy ongoing visitation with the child. In families where property is available, guardianship also allows the child to inherit from the parent and does not release the parent from financial support.

Guardianships are frequently used by the child welfare system, but are

227. The Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. § 671 (1994 & Supp. 1998)). Section 101(b) of the Act added a definition of legal guardianship to the law. It is now codified at 42 U.S.C. § 675 (7) (1994 & Supp. 1998). While useful for clarification and uniformity of rights to be conferred onto guardians, no subsidization of guardianship is provided in federal law.

228. Professor Martha Fineman challenges us to separate state support from state supervision of families. For creative permanency planning for children who are over the age of eighteen, support and supervision must exist along a continuum to meet the individual needs of children and the adults sharing the parental responsibilities for them. See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207 (1999).

229. For terminally ill parents, stand-by guardianships or joint guardianships are used to plan for the child's care when the parent is no longer able to do so. See, e.g., Sunny Rosenfeld, *Developments in Custody Options for HIV-Positive Parents*, 11 BERKELEY WOMEN'S L.J. 194 (1996). It is common practice for parents drafting a will to name guardians for their children. See, e.g., Esther Appelberg, *The Significance of Personal Guardianship for Children in Casework*, 49 CHILD WELFARE 6 (1970) (advocating that social workers and caseworkers should encourage parents to draw up wills and name guardians for their children even when there is little or no property to pass on to the children).

not generally supported by federal subsidy as are adoptions.²³⁰ Guardianships are not currently subsidized by the federal government except by waiver.²³¹ An end to state intervention and supervision of a well-functioning guardianship may be a permanency triumph; a custodial relationship moves from foster care to guardianship. Unfortunately, with the discharge from foster care comes an end to the subsidy which had been available for kinship foster care but is not available for guardianship. This loss of funding may prohibit some relatives from making the move to guardianship and eliminate this option for older children and their parents to exit the child welfare system.

A demonstration project in Illinois providing for subsidized guardianship estimates that 4,000 children will move out of kinship foster care and into more permanent and stable subsidized guardianships under the program.²³² Other states allow for subsidization of guardians although their state funds are not reimbursed by the federal government.²³³

3. Mentorship

The word "mentor" has a Greek origin meaning steadfast and enduring.²³⁴ In Homer's *Odyssey*, Odysseus leaves behind his friend, Mentor, to be the guide and educator of his son, Telemachus. Today, the term is used to describe a variety of adult-child supportive relationships²³⁵ in which the adults offer themselves as short or long-term role models for children and

230. The idea of subsidized guardianship has been circulated for years but never adopted by the federal government. See, e.g., Marla Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 *FORDHAM URB. L.J.* 343 (1993); Leashore, *supra* note 224. For a discussion of subsidized guardianship as an exclusion from a declining subsidized reimbursement scale, see Gordon, *supra* note 227.

231. See Schwartz, *supra* note 218, at 456-74; Byrne & Bellucci, *supra* note 218.

232. *Adoption Promotion Act of 1997: Hearings on H.R. 867 Before the Subcomm. On Human Resources*, 105th Cong. 38 (1998) (statement of Jess McDonald, Director, Illinois Dep't. of Children and Family Services).

233. See, e.g., ALASKA STAT. § 13.26.062 (Michie 2000); ARIZ. REV. STAT. ANN. § 8-814 (West Supp. 2000); CAL. WELF. & INST. CODE § 11405 (West 2001); MONT. CODE ANN. § 41-3-421 (1999); N.M. STAT. ANN. § 32A-5-45 (Michie 1978 & Supp. 1999); W. VA. CODE ANN. § 49-2-17 (Michie 1999 & Supp. 2000). See also Timmons v. McMahon, 235 Cal. App. 3d 512, 286 Cal. Rptr. 620 (1991) (allowing payments to temporary, nonrelated guardians).

234. BREWER'S DICTIONARY OF PHRASE AND FABLE 721 (14th ed. 1989).

235. Mentoring in the one-on-one model may not be possible for all children. Alternatives are being explored with less intensive interaction. For a study of one such program in New York City, see Antronette K. Yancey, *Building Positive Self-Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach*, 33 *ADOLESCENCE* 253 (1998).

offer some guidance to the child.²³⁶ Such mentoring programs have existed in the U.S. at least since the turn of the century with the development of the Big Brother Program in 1902.²³⁷ They are increasingly proposed and utilized²³⁸ as a preventive measure against juvenile crime,²³⁹ unemployment,²⁴⁰ school dropout²⁴¹ and teen pregnancy.²⁴²

The term is used here to describe a supportive adult and to distinguish the mentors from those with guardianship or some other form of parental rights over the child. For children who do not want such adults in their lives or who do not have adults in their lives able or willing to enter into more formal parenting relationships of guardianship or adoption, mentors provide some adult supervision and support which could be extremely necessary at

236. Evaluations of such programs are scarce. For a review of a variety of programs, see Dionne J. Jones et al., *Reaffirming Young African American Males: Mentoring and Community Involvement by Fraternities and Other Groups*, 16 URB. LEAGUE REV. 9, 12 (1993).

237. See David Royle, *Mentoring High-Risk Minority Youth: Evaluation of the Brothers Project (Big Brother Agency)*, 33 ADOLESCENCE 145 (1998).

238. One positive example of a mentoring program is the NYC Independent Living Partnership where youths and their adult mentors meet semiannually for a weekend retreat, and monthly for an informal support group or network of support. See Mallon *supra* note 22, at 75. This model provides a network not only of adult mentors but also of former foster children who can support one another in the community. The PRIDE program (Personal and Racial/Ethnic Identity Development and Enhancement) uses successful mentors from the foster child's same cultural background to provide positive role models. This is not a one-on-one program, nor is it a one-day seminar. Instead, the program uses a series of group sessions to provide interaction between the foster child and mentor. It is not an intensive form of mentoring, but its effects have been positive. *But see* David L. DuBois & Helen A. Neville, *Youth Mentoring: Investigation of Relationship Characteristics and Perceived Benefits*, 25 J. OF COMMUNITY PSYCHOL. 227, 227-28 (defining mentoring as a "one-to-one relationship between a [youth] and a caring adult who assists the [youth] in meeting academic, social, career, or personal goals") (citing S.M. Nettles, *Community Contributions to School Outcomes of African-American Students*, 24 EDUC. & URB. SOC 'Y 139 (1991)). See also Yancey, *supra* note 235, at 253.

239. See Michelle Lea Cherne Anderson, *The High Juvenile Crime Rate: A Look at Mentoring as a Preventive Strategy*, 30 CRIM. L. BULL. 54 (1994).

240. See Patricia Rowe, *Volunteer Mentors Empower Inner-City Youths*, 19 CHILD. TODAY 20 (1990) (describing an externship/mentoring program for Washington, D.C. youth to receive job training and experience along with career mentoring).

241. See Elaine A. Blechman, *Mentors for High-Risk Minority Youth: From Effective Communication to Bicultural Competence*, 21 J. CLINICAL CHILD PSYCHIATRY 160, 160 (1992).

242. See Jean E. Rhodes et al., *Natural Mentors: An Overlooked Resource in the Social Networks of Young, African American Mothers*, 20 AM. J. COMMUNITY PSYCHOL. 445 (1992).

difficult times such as the transition out of foster care. The term usually refers to volunteer adults.²⁴³ Youths receiving independent living services are often served in an aggregate setting with little one-to-one adult mentoring or care.²⁴⁴ Resources for mentor programs are often scarce or non-existent despite the fact that “officials in all locations saw some type of mentoring program as one method to provide youths with a vocational role model and opportunities to practice other independent living skills they have learned.”²⁴⁵

Volunteer opportunities should be encouraged; but, a more structured, federally subsidized form of mentoring where one or a variety of adults is paid to provide work, school or emotional support to a teen aging out of the foster care system is necessary. Subsidized mentors could insure that no child exits foster care without some committed adult support.

Such mentors could be identified by the public child welfare agency in the same way that foster parents are identified, either by direct contract with the public agency or through subcontracts with not-for-profit and new profit-making entities which provide a variety of services to the child welfare system.²⁴⁶ Adults interested in assisting children but unable or unwilling to make the commitment as foster or adoptive parents could still play a crucial role in the life of a teen. Whenever possible, the teens could identify mentors who might be willing to assist them in their transition to adulthood. Foster parents of siblings or foster parents of other teenagers are examples.

The realization that some children leave foster care without caring adults available to assist them challenges the very notion of permanency planning which, in some circles, means that all children who cannot be returned to their biological families are adoptable.²⁴⁷ At least since 1986 with passage of the Independent Living Initiative, reality has overtaken theory to provide that “independent living” is a suitable goal for permanency planning. In other words, the goal for many children aging out of foster care is “independent living” because the child welfare system concludes that there

243. See MARC FREEDMAN, *THE KINDNESS OF STRANGERS* xii (1993).

244. See Fagnoni statement, *supra* note 197.

245. See *id.*

246. The Guide Program for foster adolescents is operated by People Places of Charlottesville, Virginia. Teens in the Guide Program live with a responsible, trained adult for eighteen months before they age out of foster care. The adult serves as a “mentor, a sounding board, and a safety net for the teen.” *Post-Foster Care Independent Living Programs: Hearing Before the Subcomm. On Human Resources of the House Comm. On Ways and Means*, 106th Cong. (1999) available at 1999 WL 16947802 (statement of Kelli Sutton Block, People Places of Charlottesville, Va.).

247. See Katharine Miller et al., *Overcoming Barriers to Permanency Planning*, 63 *CHILD WELFARE* 45 (1984).

is no family or permanent home for these teens. The system formulates a permanency plan with that realization in place, based on a right to empowerment triggered solely by age. Permanency planning needs to accommodate options that recognize that empowerment and protection are ongoing, complimentary goals.

By arguing that children need responsible adults supported by the state even after age eighteen, this article posits that the right to protection, so integral to the child welfare system, does not cease on a child's eighteenth birthday. Empowerment is important and teenage children should certainly be participants in their own permanency planning, but that does not require cessation of the exercise of a right to protection. As child welfare support via the Foster Care Independence Act can continue to age twenty-one, so may the suggested recommendations continue past age eighteen to at least twenty-one when the child is in agreement and the adult support is approved by the child welfare agency or court.

If properly funded, then open adoptions, guardianships and mentorships that accommodate empowerment and protection are potential and plausible arrangements for many children for whom reunification or traditional, closed adoptions are undesirable or unattainable. If the law could recognize parents as important but not exclusively so, the outcomes for older children could be healthier and more permanent. Instead of focusing on termination/adoption or independent living, older children would benefit from a system that does not disqualify any adult who wishes to be a positive presence, no matter how limitedly, in a child's life. Children aging out of foster care are a group that could significantly benefit from a cooperatively planned, shared custody relationship, developed with their input and facilitated and funded by the state.

PART IV. CONCLUSION

The Conference, *Transgressing Borders: Women's Bodies, Identities and Families*, gave us all a rare opportunity to come together in memory of Mary Jo Frug and her work and speak openly about the foster care system and many other issues impacting the lives of women and families. I am hopeful that our presentations and conversations that day can continue and will influence the current debates on the foster care system. Throughout history, the foster care system in a variety of forms has been used to exercise the *parens patriae* power of the state to intervene into families and protect children. The protection of children has always been balanced against parental rights and empowerment. In this article, I try and shift the debate to consider protection and empowerment of both caretakers and older children as complimentary goals.

Dealing with domestic violence and its impact on children and the needs of older foster children are some of the many challenges facing the foster

care system. Our current approaches are not working. We need renewed investment and creative permanency planning to address these complicated issues. Foster care is a vital resource but a temporary and radical one. The only way to possibly ensure lasting, safe and healthy plans to protect children is to empower caretakers and older youth.