

DISCOVERING FAMILY DEFENSE: A HISTORY OF THE FAMILY DEFENSE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW

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ABSTRACT

On its 25th anniversary, teachers of the NYU School of Law Family Defense Clinic look back at the development of an innovative practice model that helped shape the burgeoning family defense movement. As the first law school clinic of its kind, in a field that had yet to establish a professional identity or standard litigation practices, the Clinic has had unique opportunities to advance model approaches and influence Family Court practice. The authors discuss the Clinic's role in developing the family defense bar in New York City and the exceptional pedagogical benefits of having law students do clinical work in this field.

Part I describes the genesis and teaching methods of the Clinic and its shift from a courtroom-based approach to defense advocacy (an approach that relies too heavily on a criminal defense model) to add focus on clients' ongoing interactions with administrative and government-contract agencies. This part explains the origins of the Family Defense Clinic's interdisciplinary model of family defense, which integrated social workers into teams with lawyers.

Part II explores the unexpected benefits of the interdisciplinary approach and increasing attention to out-of-court work, which pushed students and teachers to think more deeply about the roles of lawyers and social workers. This part also explains some of the challenges and lessons of moving from representing children to representing parents.

Part III describes the evolution of the Clinic's teaching model to one which combines the pedagogical benefits of in-house clinics with the substantial

[∞] To maintain the first-person approach used in our panel discussion at the symposium, each of the three sections of this article were drafted by one of the three co-writers. Martin Guggenheim is Fiorello LaGuardia Professor of Clinical Law at New York University School of Law and co-director of the Family Defense Clinic. Madeleine Kurtz is Director of Public Interest Professional Development at Columbia Law School. From 1991 to 2003, she was Adjunct Professor of Clinical Law and co-director of the Family Defense Clinic. Chris Gottlieb is Adjunct Professor of Clinical Law and co-director of the Family Defense Clinic. We would like to thank all the students who have been part of the Family Defense Clinic and taught and inspired us so much over the years. Extra thanks to Dani Goodman-Levy, Samantha Lee and Julia Popkin, who made the symposium happen. We also want to thank our wonderful teaching colleagues over the years, including Jill Cohen, Annette Curtis-Williams, Paula Fendall, Jill Gandel, Kathryn Krase, Joy Rosenthal, Carrie Stewart and Lynn Vogelstein. Finally, our thanks to the amazing advocates of Brooklyn Defender Services, The Bronx Defenders, Center for Family Representation, and Neighborhood Defender Service of Harlem. We feel privileged to be part of your community.

benefits—both administrative and substantive—of collaborating with a high-volume partner office. The interaction of idealism and real world constraints in this hybrid clinic model has proved beneficial to both students and practitioners. In addition, this part discusses the enormous impact of having public interest law offices represent parents in New York City Family Courts and at the tables where child welfare policy is made.

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I.

THE BEGINNING (MARTY)

A.

One of the most fateful career decisions I made occurred in 1990, when I decided to create the Family Defense Clinic at New York University (NYU) School of Law. As with many such decisions, it could easily never have happened. By the end of the 1989–90 academic year, I had already been teaching at NYU for sixteen years. I taught several different courses during that time, but the only clinic I ever taught was the Juvenile Rights Clinic (a juvenile delinquency clinic), which I started in 1973, my first year of teaching. I was reasonably well-suited to teach that clinic since I had worked as a juvenile defender before becoming a member of the law school faculty. Randy Hertz joined the NYU clinical faculty in 1985, and he and I co-taught the Juvenile Rights Clinic for the next four years. In those days, we also had an even larger Criminal Defense Clinic. The combination of these two programs resulted in a disproportionate number of criminal law clinical offerings compared to civil clinics.

It seemed the right time for me to teach something new that would not be another criminal law-related clinic. But what else did I know? Before joining the law school faculty, in addition to being a juvenile defender, I was a children’s lawyer in child welfare cases. As a result, I was reasonably familiar with the substantive law of child welfare. However, I immediately rejected the idea of starting a child welfare clinic in which students represented children as their clients. Truth be told, I had never been a fan of children’s lawyers in child

welfare proceedings. I believed—and still do—that it was a violation of a parent’s rights for the state to assign her child a lawyer in proceedings alleging parental unfitness before the unfitness was proven. I had written a law review article arguing that a children’s lawyer should not be employed in a child welfare proceeding, at least not before the court entered a finding of unfitness against the parent.¹

Even larger than the concern over whether children ought to be represented by lawyers loomed the question of the *role* of the child’s lawyer. The majority of children in child welfare proceedings are under the age of seven when the proceedings begin.² Therefore, most children’s lawyers are representing very young children—too young to give their lawyers binding instructions on which positions to advocate in court. As interested as I was (and remain) as a scholar exploring the proper role of lawyers for children in such proceedings, I was loath to teach a clinic in which the students’ fieldwork responsibilities involved work I did not believe they should be doing.

Moreover, as a teacher of lawyering skills, I always believed that among the most important lessons to teach new lawyers (and law students performing the role of lawyer for the first time) is learning both the art of client counseling, which includes trying to dissuade a client from choosing a course of action the lawyer believes is unwise for the client’s interest, *and* learning to enthusiastically embrace the lawyer’s almost sacred duty to strive to achieve a result the client wants, even if the lawyer does not agree with it. Children’s lawyers, at least when their clients are very young, are entirely denied both of those opportunities. Even worse, lawyers for young children are relieved of the duty to seek and secure an outcome they do not believe is appropriate for their client by the remarkable device of getting to *choose* their preferred outcome. Giving lawyers this responsibility may be necessary when representing clients with certain disabilities, but it is a great exception to the ordinary role of lawyers. As a teacher, I have never seen the wisdom of teaching new lawyers how to perform the role of lawyer for the first time by teaching them the exception before giving them a sustained opportunity to practice the standard rule first. With this in mind, I have never been a believer in teaching a child welfare clinic in which the students’ clients are young children.

Since the only civil law subject I knew was child welfare, it quickly became apparent that if I were to teach such a clinic, our clients would have to be the parents. Clinical education has always had twin concerns: pedagogy and service to the community. Although I was long proud of our work in the Juvenile Rights Clinic in terms of what we were teaching and what our students were learning—

1. See generally Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children in Judicial Proceedings*, 59 N.Y.U. L. REV. 76 (1984).

2. In 2015, the median age of children entering the foster care system in the United States was 6.3 years. See CHILD WELFARE INFO. GATEWAY, FOSTER CARE STATISTICS 2015 (2017), <https://www.childwelfare.gov/pubPDFs/foster.pdf> [<https://perma.cc/W7XW-5A26>].

easily satisfying the teaching and learning components of clinical education—I never believed we were making a significant contribution to the community.

Let me clarify. I did believe we were providing indigent accused juvenile offenders excellent legal representation. But we were taking cases that initially had been assigned to The Legal Aid Society and, had we not taken those cases, the clients would have been well-represented anyway. To be precise, I believed our clinic clients were better represented than they would have been by Legal Aid (because the clinic's caseload was very small and students tended to work considerably harder and longer on their cases than would have been possible for Legal Aid attorneys if they handled the cases on their own), but the *value added* to the client and, even more, to the community experiencing these hardships was small.

In 1990, by contrast, parents who were accused in Family Court of maltreating their children were very unlikely to be represented by a very good lawyer. At that time, New York City court officials created a system in which children were represented by a well-funded multidisciplinary law office³ and the prosecutors came from the highly regarded Corporation Counsel's office. But the attorney assignment system for parents was terrible. This was true for several reasons, perhaps the most prominent being that they were grossly underpaid. In 1990 (and until as late as 2004), attorneys earned the pathetic rate of \$40 per hour for in-court work and \$25 per hour for the rare out-of-court work anyone ever bothered to perform.⁴ This group of lawyers (known in New York as "18-b lawyers") enjoyed a very poor reputation. Many of them struggled with effective oral advocacy. Even more, they almost never did any kind of investigation or out-of-court work of any kind. The combination of the low pay and the low esteem in which these lawyers were held in the legal community meant that, with a few notable exceptions, the quality of representation was very low. Indigent parents very rarely were able to find a good lawyer.

Aware as I was of the service purpose of clinical education, it seemed highly appropriate to start a clinic that had the potential to make an important contribution to the community. All of these factors led to this decision, which I characterized in the first sentence of this article as among the most fateful of my career. But starting this clinic also meant committing to teaching students to perform a job I myself had never performed. That is a slight exaggeration. I had represented parents in child welfare cases on appeal and in post-appellate collateral reviews,⁵ but I never handled a case at the trial level in which my client was a parent accused of maltreating her child.

There was still another huge factor looming as a constraint. If I invited

3. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 807 (2006).

4. See N.Y. Cty. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 400 (Sup. Ct. 2003).

5. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Lehman v. Lyncoming Cty. Children's Servs. Agency, 458 U.S. 502 (1982).

students to the party, would they come? There was no clinic of this kind in the country. The closest version was the Child Advocacy Law Clinic at the University of Michigan, which Don Duquette founded in 1976. In that clinic, students were expected to be prosecutors in child welfare cases one third of the time, parents' lawyers one third of the time, and children's lawyers one third of the time. This was the only clinic in the country that even offered students the chance to be defense counsel in child welfare cases. But, as the title of that clinic made manifest, the real focus of learning was on training future child advocates, to which Professor Duquette devoted his academic career.

The clinic I was contemplating starting would have an entirely different feel. Whereas the Michigan clinic exposed students to child welfare practice from multiple dimensions, NYU's version would only be a defense clinic. Although criminal defense clinics were the bread and butter of many law schools' clinical programs in the early years of clinical education, when schools branched out into civil work, none chose the defense side. Consider a close analogue to the Family Defense Clinic: domestic violence clinics, which sprouted throughout the country a bit later in the decade after Congress provided funding for victims of domestic violence.⁶ In all of them, the students represented victims. None chose to represent the alleged batterer, someone broadly demonized as male, mean, and dangerous. In child welfare cases, the "victims" are the children; the "batterers," the parents. So, it was hardly surprising that no school in the country chose to represent parents in child welfare cases. Even I wasn't so crazy to consider calling the clinic the "Children's Batterers' Clinic." But even by calling it the "Family Defense Clinic," it wasn't possible to ignore the truth that our only job was to represent alleged batterers of children (persons accused of maltreating children). Would students want to enroll in such a course?⁷ With all of this in mind, I was, to say the least, nervous when I began teaching the clinic in its inaugural year.

B.

The first issue I had to confront was determining where we would get our cases. In addition to the 18-b panel of lawyers, very few law offices in New York City practiced in the field representing poor parents in child welfare proceedings. These were tiny legal services offices that litigated a handful of cases each year. All but one were part of the Legal Services Corporation, offering legal services in very limited geographic areas in Brooklyn, the Bronx,

6. See, e.g., Leigh Goodmark, *The Role of Clinical Legal Education in the Future of the Battered Women's Movement*, 22 *BUFF. J. GENDER L. & SOC. POL'Y* 27, 30 (2013–14) ("The number of law school clinics focusing on domestic violence increased with the passage of the Violence Against Women Act (VAWA) in 1994.")

7. Fortunately, for whatever reason, demand for the clinic in the first year was strong. Many excellent students were in that first year program, including Charlotte Hitchcock, who went on to have a stellar legal career and is now General Counsel and Chief of Staff at Newark Public Schools, and Stacey Platt, a clinical professor of law at Loyola University Chicago School of Law.

and Manhattan. In addition, one public interest private law office, the law offices of Lansner & Kubitschek, represented parents who were respondents in child welfare cases. In that first year of operating the clinic, I taught alone. I had neither a law colleague nor, as we have had for the past twenty-three years, a social work colleague. Rejecting the option of my joining the 18-b panel and accepting direct court assignments, I chose the alternative of placing students in these several offices and having them work with the lawyers from those offices on their cases.

I don't remember many details of the first year of teaching the clinic, other than concluding that placing students in different law offices was not an ideal clinical experience. In all of my previous clinical teaching experience, my students were given cases they were responsible for handling. They were expected to undertake all of the crucial lawyering tasks including investigating, preparing a defense, negotiating with other parties, appearing in court, and conducting all other critical tasks in the case. I wasn't very happy having students work on other people's cases. In my experience as a clinical law teacher, the transformative opportunity for students in a clinic is to feel the difference between advising someone else what to do (when they know that person is free to disregard the advice) and making a choice that they themselves must carry out. I had always considered the premier clinical placement opportunity for students was for them to perform as close to the attorney-of-record role as feasible. Because I was teaching the clinic alone in Year 1 and had other teaching and administrative responsibilities at the law school, the best I could offer was to place students with other lawyers to help them in their representation.

But during that year, I had the great fortune of meeting Madeleine Kurtz, who was at the time teaching in the Lawyering Program at NYU. Before joining the Lawyering faculty, Maddie was a children's lawyer at Legal Aid. After hearing that I had started this new clinic at the law school, Maddie began attending classes and meeting with me about the work we were doing. She was intrigued and joined me as a co-teacher. We soon began planning to change the clinic's format for the following year. I was thrilled for many reasons when Maddie joined me as a co-teacher in Year 2 of the clinic (1991-92). Most importantly, we could now obtain our own caseload which, in turn, meant that we could allow our students to become responsible for making and executing all decisions in each case.

There was another monumental difference in the way we taught the clinic during the first year and what happened after Maddie joined. Beyond having students directly advocate for their clients and take responsibility for their cases, there was a transformational shift for the faculty as well. In the first year, I thought it was sufficient to have students work on cases, allowing the lawyers to advise the students of the required steps to perform. Not only did this arrangement offer less for the students, it offered less for me as the faculty, as well. What was missing in that first year was engaging in the kind of clinical

teaching that is close to the ideal: working in a student-faculty relationship in which the teacher does not know the answers and needs to engage in a genuine search for them with the students as partners. Rather than performing a role students have come to expect from law professors (possessing the answer and hiding the ball in pursuit of teaching students how to find it for themselves), there is a genuineness in the ideal student-teacher relationship: when the teacher says, “I don’t know what we should do next,” it’s much better when it’s true. When we started becoming counsel of record in our own cases in Year 2, we quickly found ourselves in this ideal place: we genuinely didn’t know what we were doing. We weren’t performing a feigned role of ignorance or uncertainty. It was as genuine as it got.

Even more important, handling our own cases allowed us to do something that proved to be of great value to the field. When the faculty and students became responsible for the outcome of the clinic’s cases, we began a course of practice that cut new paths. Instead of working within the traditional framework of client representation, we were in a position to wholly reimagine the practice of defending parents in child welfare cases. Over the course of the next decade, this led to our discovering what needed to be done to be an effective parent defender in child welfare proceedings.

Child welfare cases are prosecuted along two tracks: the judicial and the administrative. On the judicial side, petitions are filed in family court, and the allegations in the petitions are (sometimes) resolved through contested evidentiary hearings. Courts then typically order that parents perform various services⁸ and ultimately order that children be allowed to remain with their families or be placed in another arrangement. In addition, there is an administrative process that, in many cases, begins before the court proceedings and, in all cases, continues on a separate path during the court process. No good lawyer can afford to ignore the administrative process, which commonly begins when a family comes to the attention of an investigating caseworker following a report of suspected maltreatment made to the child protection agency.

The degree to which out-of-court lawyering mattered became apparent quite early in our work. We learned that successful reunification of foster children with their parents is rarely accomplished by effective examination of witnesses in the courtroom. Rather, these results are more commonly achieved by creating and developing plans designed to keep children safely at home—or to return them home as soon as can safely be accomplished—and by pushing hard for the plan’s prompt implementation. These plans must be developed out of court in conjunction with the agency overseeing the case.

We learned we needed to participate actively in case conferences that are held at the agency because that’s where the substantive work of child welfare is

8. Such services might include attending parenting skills or anger management classes or participating in therapy, counseling or drug treatment programs.

developed.⁹ At these conferences, the case plan for each case is established.¹⁰ These plans set the stage for all that follows and are often the single most important factor in a case's outcome. They specify the steps an agency must undertake to reunify a family and the tasks the parent must perform as the condition for keeping or regaining custody of his or her child. Too commonly, these plans are boilerplate, often requiring parents to do things of no value and failing to identify services the agency should be providing for the particular needs and circumstances of the family. We also learned that courts rarely overrule (or reconsider) the agency's assessment of what services are appropriate and, therefore, waiting until we reached the courtroom to advocate for our clients meant waiting too long.

Wholly apart from holding conferences throughout the proceeding, an even more critical component of the administrative process is ongoing. Caseworkers visit parents in their homes and talk to them and their service providers on a regular basis. Caseworkers are a critical player in each case. Ignoring them as part of the defensive strategy is only a tiny step away from ignoring the case conferences. With this in mind, we also came to realize that we needed to communicate with caseworkers to re-arrange meetings and services, to plan for the next steps, and for many other reasons.

Perhaps most importantly, we also learned how vital it was for us to pay careful attention to our clients and to maintain regular contact with them. Our clients needed to understand what was likely to happen in their cases in the foreseeable future and how what others would say about them could make all the difference in the outcome of their case. We learned that agencies too often offered parents little help or guidance in obtaining services, commonly doing little more than providing a parent an address and expecting the parent to find the service, make the appointment, and wind his or her way through a maze of confusing requirements. We learned that we needed to help parents negotiate all aspects of the process throughout the life of the case. We learned that we could help our clients survive what is otherwise a long, lonely, and frightening journey by staying in close, regular contact with them. This shift of focus from in-court to out-of-court work was, by far, the most important feature of our work.

What did all of this add up to? For one thing, we could no longer merely be

9. *See, e.g.*, N.Y. SOC. SERV. LAW § 409-e(2) (McKinney 2016) (mandating preparation of case plans by the social services district in active consultation with the child's parent or guardian).

10. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6; *see also* § 428.3(f)(4) (requiring a service plan to be completed at the initial case assessment, which is to occur within thirty days of the case initiation date); § 428.3(f)(5) (requiring a service plan to be completed at the time of the comprehensive assessment, which is to occur within ninety days from the case initiation date); § 428.3(f)(6) (requiring a service plan to be completed at each case reassessment, which must occur every six months). Federal law requires states to have written case plans for every child in care in order to ensure that an appropriate long-term plan is identified for each foster child. 42 U.S.C. § 675(1) (2002). These reviews are essential to the success of reunification efforts. *See generally* Subha Lembach, *The Right to Legal Representation at Service Plan Reviews in New York State*, 6 U.C. DAVIS. J. JUV. L. & POL'Y 141 (2002).

a legal team composed of lawyers and law students. We had to become multidisciplinary. As we discussed next steps in our clinic case meetings with students, we concluded that we should call caseworkers on a regular basis and became actively involved in these out-of-court agency-related matters. But when our students called the caseworkers or attempted to attend conferences, they were told they could not talk to the caseworkers or enter the meetings. The students were confused, as were the faculty. Our clients had the right to effective assistance of counsel. We reached the conclusion that it would be ineffective lawyering not to speak with caseworkers or attend conferences. How could it be that we weren't allowed to do these basic things? Even more, the regulations themselves are explicit in clarifying that parents may bring anyone they wish with them when attending agency conferences.¹¹

When we pressed further, the agencies changed their reaction. They no longer prohibited our students from attending conferences, but they explained that if the parent's lawyer was going to be there, the agency lawyer would also have to attend. But the agency lawyers never were available for this purpose. Although delaying things in criminal cases often works to the defendant's advantage (at least when they are released pending trial), delays in child welfare cases can be very harmful to parents and families, particularly when children have been temporarily removed from the parents' custody. This meant that insisting that the prosecutor attend the conference was not a good thing for our clients. But there was a compromise that the agencies readily accepted. They would allow social workers from our office to attend all conferences and they would willingly speak to our social workers for the purpose of consulting on an on-going basis during the pendency of each case. This was more than acceptable to us, in terms of finding an elegant way to get the substance of what we wanted: to engage a trained professional committed to the parent's defense to work closely with parents while they negotiate the administrative process.

There was only one remaining problem: we didn't have a social worker on our team. We weren't an interdisciplinary defense office. We were committed to change that as quickly as possible. Thus, we became interdisciplinary not because we realized in advance the many benefits of such a collaboration but because our adversaries made us do so. That's how great changes sometime happen. In retrospect, there is no more important change that we made to the conception of family defense than that parent defender teams must be interdisciplinary.

We began working on cases thinking defense work would resemble the work of criminal defenders. But after doing the work ourselves, we began to understand we had to do considerably more than what is common to criminal defense work. Like criminal defense, family defense requires a careful investigation into the facts and circumstances of the events that led to the prosecution. But, unlike in some criminal cases, in family defense parents can

11. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(11) (2016).

achieve their objective (gaining the return of their children) whether or not they were “guilty” of something in the past. What matters most in the majority of cases is whether parents are moving toward something the judge or caseworker is demanding. Parents who comply with their case plan or who otherwise make real progress in their lives are most likely to achieve their long-term objective of regaining their children’s custody.

By Year 3, we secured a federal grant from the Department of Education, which was created to support clinical legal education.¹² Ever since, the clinic has had both law and social work students. The social work students are placed in the clinic for their practicum for the entire academic year in fulfillment of requirements for the Master’s in Social Work degree. Since that year, we put three students on each case, two law students and one social work student. Instructors from both disciplines supervise each team.

Through this process, and in large part because the faculty did not have experience in the field, we had to figure out how to practice effectively in this field and with this model. Along the way, we became active advocates for implementing the form of practice in which the clinic was engaged. But this form of practice was rarely in use in New York City. Virtually all parents entitled to court-assigned counsel in Family Court were assigned one of the solo practitioners from the 18-b panel. None of these lawyers worked in an interdisciplinary way. Very occasionally, these lawyers would engage the services of a social worker and have their fees paid by the court.¹³

For the first sixteen years of the clinic’s existence, little of the progress we were making in reshaping the tasks of family defenders had an impact on how lawyers practiced in New York City. The only kind of lawyer assigned to represent indigent parents in New York City until 2007 were solo practitioners who were on the “panel” of court-eligible assigned counsel. These “lawyers” spent virtually their entire professional time in the courtroom, either hanging around the halls for a new assignment or waiting for their cases to be called. As a result, they were completely unavailable to their clients out of court. Too many didn’t even bother to pay for a secretary. All they used was a telephone answering machine which they might or might not have consulted very often. Their clients felt relatively abandoned between court appearances.

Throughout this time, the most consistent complaint parents made about their lawyers was that they were unable to speak with them from one court appearance to the next. It wouldn’t be too much of a stretch to argue that these panel lawyers regularly engaged in malpractice. (This couldn’t technically be true because, as the only lawyers doing this work in volume, they defined the

12. From 1978 through 1997, the United States Department of Education provided more than eight-seven million dollars to law schools for in-house clinical legal education. See Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & Soc. JUST. 309, 324 (2012).

13. N.Y. CTY. LAW §722-c (McKinney 2004) (allowing judges to authorize counsel assigned through the 18-b panel to engage social workers to assist in the representation of indigent clients).

standard of practice and, accordingly, were not deviating from it. But given that their clients were regularly attending conferences at the agency and routinely answering questions posed to them by caseworkers during the pendency of their cases, the lawyers' almost complete lack of concern for this part of the work is impossible to justify.) It is as if during the prosecution of a federal criminal case for tax evasion, the defendant was summoned to the Internal Revenue Service office for a meeting with an employee of the agency. Everything said in these meetings is recorded. And the agency maintains full discretion to use what parents say in whatever way they see fit.

If this arrangement were employed in a tax prosecution case, of course, there is no lawyer in the country who would permit his or her client to go to the IRS meeting without counsel also attending. But child welfare lawyering was in such a backward place that the polar opposite was commonplace; there were practically no lawyers who bothered attending these conferences with their clients. Few parent defenders even knew when or whether these conferences were scheduled. Fewer still counseled their clients on what they should say and how they should address various questions and topics. The majority of court-assigned lawyers billed for less than five hours of out-of-court work in an entire case, even if it lasted years.¹⁴ In our clinic, we would spend 20 hours each week in out-of-court work on each case.

We spent years advocating for change in the delivery of legal services for parents, meeting with local officials to talk about the adequacy of the legal services delivery arrangement. We didn't emphasize (though we had to bite our tongue) that these lawyers were poorly trained, relatively weak, and that parents deserved better. Instead, we focused on the mistake of engaging solo practitioners who were not part of an interdisciplinary office. We told the stories of our many successes in the clinic and how those successes could be attributed to our out-of-court work. We laid out a vision for a new kind of family defender and explained how the extant system was borrowed from the criminal defense model and did not fit the needs of the families before the Family Court. For a long time, it was not clear that anyone was listening. But for many reasons, the tide finally shifted and New York City officials were persuaded to fund interdisciplinary parent defense offices.

As Chris will talk more about in Part III, it would be difficult to overstate the dramatic impact this development has had on child protective cases in New York Family Courts. Most importantly, it means that parents now receive high quality representation throughout their cases. There's another remarkable aspect of the change, though, that I believe deserves particular celebration. As more cities follow New York's lead and invest in this new form of family defense, there are now jobs for graduating law students right out of law school that make family defense as much a career opportunity as criminal defense has been since

14. *See* N.Y. Cty. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 401–02 (Sup. Ct. 2003).

the days of *Gideon v. Wainwright*.¹⁵ And, as family defense continues to grow, more law students than ever are expressing an interest in learning about it in law schools. Perhaps the next place to focus attention in growing this field is in the clinical legal community which remains behind the times in embracing family defense as an important trial-level fieldwork clinic that furthers social and racial justice.

II.

THE DIFFERENCE (MADDIE)

From 1991–2003, I taught in the Family Defense Clinic at NYU School of Law. During that time, I had the opportunity to work alongside Marty to develop and shape a new clinical program and, together with social work colleagues and clinic fellows, discover and refine a new form of practice. This entailed thinking deeply every year about what it means to be a family defense lawyer, how to do that well, and how to teach the essential components of that practice to students. During my years with the Family Defense Clinic, I worked with students as their clinic supervisor and also assumed a caseload of my own when matters continued over time and were no longer appropriate to reassign. All along the way, I was privileged to work with dedicated colleagues and many wonderful students and to be a part of a small but impassioned community of committed and generous legal services lawyers.¹⁶

When people would ask me how I came to do this work (or how I got the job), I would often say that I happened to be at the right place at the right time. And indeed I was: I was in my second year of teaching in NYU's Lawyering Program when Marty started the Clinic. I wanted to be a clinical teacher, and Marty decided by the end of that first year that the Clinic needed a second professor in order to take on full representation of clients. It was, as one might say, a match made in heaven. However, there was something more.

Like both Marty and Chris, I began my career representing children at The Legal Aid Society Juvenile Rights Practice (JRP). I had gone there because of a strong and longstanding interest in juvenile delinquency work; and, at the time, JRP had a fairly substantial delinquency practice. While I was there, however, the child welfare practice spiked¹⁷ and became the bulk of every attorney's

15. 372 U.S. 335 (1963) (establishing a right to counsel in criminal cases, effectively creating the public defense bar).

16. Florence Roberts, Martha Raimon, Nanette Schorr, Marlene Halpern, and Beth Harrow—all lawyers with Legal Services of New York—took me in from the beginning. As an honorary member of the Legal Services of New York Family Law Task Force, I benefitted from their knowledge and experiences and was very fortunate to have their friendships.

17. By 1991, New York City's foster care population was close to 50,000, almost three times what it had been when I started at Legal Aid. Response to the so-called "crack epidemic" sent an enormous number of children to foster care, many directly from the hospital. As a result, the number of neglect petitions filed in family court skyrocketed. See Nina Bernstein, *Giuliani's Foster Care Plan Faces a Political Minefield*, N.Y. TIMES (June 7, 1988), <http://www.nytimes.com/1998/06/07/nyregion/giuliani-s-foster-care-plan-faces-a-political->

caseload. I often found this work particularly troubling. In these proceedings, questions before the courts centered on whether our clients would live with their parents or not and when—if ever—they would return to their parents' care and under what conditions. In the face of these enormous questions, we barely knew most of our clients. Many of them were infants. If they were old enough to talk with, we routinely met with them during our lunch hour, when a caseworker would bring them to our offices. We read reports, spoke with caseworkers, and sometimes enlisted a social worker from our office, but we largely, secretly, floundered. Some of us confessed these feelings to each other: we knew that there was more to know than what the parties reported to the court. We imagined possible outcomes that weren't presented, and we felt heartsick at how often parents in court were summarily judged by others, and left confused. Often, we did not know what we wanted the court to decide. And that is when some of us would fantasize about someday being "Lawyers for Mothers"—because that looked like the place where one could make a difference. So when the opportunity came to join Marty in the new Family Defense Clinic, I jumped at it.

Over the course of the twelve years I taught in the clinic, I learned an immeasurable amount about being a lawyer and a clinical teacher, about interdisciplinary work, and about poverty, families, foster care, and child welfare policy. I saw how societal and personal values and racial bias pervade this field. Every year the clinic evolved, and each class of students contributed new and valuable insights. Our clients invariably presented us with interesting legal questions, showed us where systems had failed, increased our capacities for greater and more empathic understanding, and caused us to look deeply at our role and improve ourselves. In time, our ideas about lawyering and teaching in this field crystallized; our clinic program developed and so did our voice.

Even with our combined experiences, this was new territory and we were figuring it out along the way. But there were benefits to this. Without clear guidelines about how things should be done, and without practice models to look to, we had to develop our own ideas. We were free to imagine, and to think "outside of the box." Once we had social workers on our teams, we were able to serve our clients more fully as individuals. As lawyers and social workers working together, we were able to better understand each family's unique set of strengths and needs as well as consider both legal and non-legal strategies for advancing our clients' goals. Moving beyond the traditional legal lens and outside of the courtroom was essential in these matters and drawing on approaches of these two disciplines became an important element to our teaching.

Here, I will set out some of the most significant things we (teachers and students) discovered over the years. What we learned helped us develop the Family Defense Clinic, and has been relevant for this work and this field going

forward. On a personal note, our experience with the clinic forever impacted both how I think about this field and the role of a lawyer.

One of the first things we learned was that our legal services were needed. We received plenty of referrals over the years—more than we could handle—from a myriad of sources and had no trouble filling our docket with enough varied matters for our clinic students to have rich experiences every year. In the beginning, it was our friends at legal services offices who called us to refer a client when they did not have the resources to take on a new matter or when funding restrictions prohibited them from representing the person.¹⁸ As time went on, we also received referrals from the Law Guardians' offices, the Administration for Children's Services, caseworkers from foster care agencies, and community based agencies providing services to the clients themselves.

I thought about a lot of things in evaluating and selecting cases for the clinic, including whether the matter was likely to provide meaningful work for students and whether we had sufficient resources when the referral was made. I also wanted the clinic to have a variety of matters at any given time. I always harbored some concern about students' emotional wellbeing and about developing our program's reputation. Essentially, however, the process came down to one question: Did I think we could make a difference? With this as the only real "requirement," the clinic caseload invariably presented wide-ranging and illuminating topics: novel legal issues, complex strategy questions, and families needing carefully tailored and meaningful supports and service plans. A few things strike me about the kinds of matters referred to us. We became acutely aware of parents with children in foster care who were not U.S. citizens, and those who were incarcerated. Both groups were, and still are, ineligible for federally funded legal services assistance.¹⁹ Moreover, ineligible for Medicaid coverage, parents without citizenship are unable to access most medical and mental health services, which drastically impedes their ability to comply with court orders and agency requirements that they complete certain programs.²⁰ Parents who are incarcerated also face enormous challenges when their children are in foster care, such as maintaining contact with their children and with agency personnel. The location of prisons, and the rules around visiting make it considerably more time-consuming—and sometimes impossible—for agency personnel to ensure regular visitation, even where mandated by the court to do so. Foster care agencies, courts, and lawyers often fail to appreciate these difficulties, as well as the few resources and services that are in fact available to

18. Legal Services funding restricts representation of individuals who are not U.S. citizens and individuals who are incarcerated. 45 C.F.R. §§ 1626.3, 1637.3 (2017).

19. *See* 45 C.F.R. § 1637.3 (2017) (Federal funding restriction on representing individuals who are incarcerated); 45 C.F.R. § 1626.3 (2017) (Federal funding restriction on representing individuals who are "ineligible aliens").

20. *But see* Matter of Kittridge, 714 N.Y.S.2d 653 (Fam. Ct. 2000) (holding that the respondent mother's immigration status could not relieve the Department of Social Services of its obligation to provide services to her).

parents in prison. In short, incarceration too often renders parents invisible to foster care and court systems not set up to engage them.²¹

A large number of our clients came to us at a time when the matter involving their children was not on a court's calendar, but their children nonetheless were in foster care.²² This period is a most crucial time for families. Foster care agencies are required to work diligently to assist families, provide appropriate services, arrange for meaningful visitation, and move towards reunification.²³ At the same time, parents are expected to maintain relationships with their children and take steps to resolve the issues necessitating placement. Despite the obvious importance of this time period, these critical steps towards reunification often *did not happen*, with lasting consequences.

We also received requests to represent individuals who were not parties to proceedings that were ongoing in family court but who could be resources. Thus, we represented clients who were not parents but who were the most "parent-like" person to the children involved: relatives and long-term foster parents in situations where the parent was not seeking custody. Additionally, we came to represent a number of biological parents who were seeking to care for their children after foster care placement or adoption had failed and the children wanted to return to their birth family (or had returned already on their own).²⁴

Once we became a fully interdisciplinary program, we were referred clients because of the complex and intertwined legal and social work issues they faced. These matters required our expert involvement and entailed significant advocacy outside of the legal arena. With social work expertise, we were able to meaningfully evaluate agency service plans and to develop and recommend our own plans. Clinic social workers participated in various critical settings, including foster care case meetings, schools, benefits offices, community based agencies, and treatment facilities. They worked productively with the many non-lawyers involved in our clients' lives and became a crucial component of our legal work.

We learned a lot from the reaction of others to our work. Most astonishing to me was the hostility we faced in the courthouse. For a former law guardian,

21. See Philip Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1675 (2003).

22. Until 2005, when a court entered an order of placement pursuant to section 1055 of the New York Family Court Act, the matter was deemed "closed" by the court. No subsequent court date was set until the foster care agency filed a petition to extend placement, and a parent had no access to court-appointed counsel until appearing before a judge. A parent could file a petition to enforce or modify the terms of the placement order, but this occurred rarely. The statutory changes make for more frequent court oversight. See L. 2005, Ch. 3, Pt. A, § 27 (codified as amended at N.Y. FAM. CT. ACT § 1088 (McKinney 2016)).

23. See N.Y. FAM. CT. ACT § 1055(b)(i)(A-B) (McKinney 2016), N.Y. SOC. SERV. LAW §§ 409-e, 384-b(1)(a)(iii) (McKinney 2010). There are some exceptions. See N.Y. FAM. CT. ACT. §§ 1039-b, 1052(b)(i)(A) (McKinney 2016).

24. This was before the legislature authorized restoration of parental rights. See N.Y. FAM. CT. ACT §§ 635–637 (McKinney 2010).

this was a sea change. When I was a Legal Aid attorney representing children in these matters, every party and the court listened to and valued my position, the orders I asked for, and the recommendations I offered. Though no judge did everything I wanted, courts invited my participation and asked for my views on issues before making decisions. Moreover, ACS and parents' attorneys all wanted to know beforehand what my position would be and often jockeyed, negotiated, and compromised in order to get me to support their side. While time constraints, enormous court calendars, and disagreements among parties pervaded daily practice at Legal Aid (and Friday nights were sacred times to vent frustrations, let off steam, and share stories of things not going our way) nothing came anywhere close to the experience of representing parents. No one needed—or wanted—our support, and few had interest in our ideas. Not only was it apparent that our clients were despised, but we were too. Walking into court, I could feel it. Whether other parties saw our clients as evil, careless, or selfish, their feelings were clear: parents in these proceedings were bad and undeserving. And me? I could feel the disdain and incredulity directed at me as well. This raised two challenges. First, I had to figure out how to lawyer effectively—and help students to lawyer effectively—in a hostile environment. Second, I needed to establish a positive reputation for the Clinic and make headway in changing the prevailing assumptions about our clients.

It was perhaps the many opportunities to experience family court with our clients, to endure with them the long waits hoping for good news and fearing the worst, and to feel the negative judgments coming from others that brought us closer to appreciating the challenges parents face in merely surviving this process. In turn, we came to realize something else of value we offered: unmitigated support. We stood by our clients in court, we listened to their anguish and frustration, we explained legal proceedings, and we cheered them on. We came to know our clients and something of their lives outside of court. Of course, we provided honest advice, offered suggestions informed by our legal and social work expertise, and often shared news that was deeply disappointing. But we didn't turn against or abandon our clients when there were setbacks, when things didn't go well, or when—as others would say—they “failed.” We were still their advocates, and we were always committed to those core qualities of honesty and loyalty. I'm convinced this makes an enormous difference.

And what about our students? In the midst of my own concerns about navigating hostility, what did the students experience? Everything that law school teaches and, in fact, what observers see in most legal settings suggest that lawyers are respected in a courtroom, that lawyers treat other lawyers professionally, and that a certain civility is the norm. People expect lawyers to take the position that their clients ultimately direct, without attributing to the lawyers the crimes or bad acts their client are accused of. The students would realize immediately that we were in a different world.

Anyone who has done this work also confronts the enormous gap between the laws as written and the laws in action. One of the biggest “aha” moments for

a clinic student is reading the applicable statutes, which sound entirely reasonable and logical, and then visiting family court, which they did early on each year. Seeing only poor families of color involved in foster care proceedings is, by itself, enough to make one wonder. But our students were shocked as well by the absence of effective and engaged representation and the enormity of the decisions being made. As we became involved in court proceedings and got to know our clients, the “aha” moments only continued. We saw our clients’ talents, resiliency, and strengths, and we became privy to their fears and needs. Then we watched as others judged, disrespected, and discouraged them. When students experienced this, they were changed forever.

In the clinic, our students also learn about poverty and the mammoth challenges faced by families living in poverty just to provide for their children. Our students are exposed to the psychic toll that poverty takes, the relentless hardships of not having enough, and the havoc that one crisis can cause. They see the impact of poverty not just on their clients’ lives but also on a parent’s ability to demonstrate her fitness and have her children returned.

In perhaps a singular way, this work also teaches each of us about ourselves. To work intimately with a Family Defense Clinic client—to interview and counsel on the most personal details of home life, relationships, parenting, needs, and poverty—is to come face to face with our own personal values, assumptions, judgments and biases. And then we must deal with them. More difficult than recognizing the unfounded judgments that others make, and invariably more life changing, is to see them in ourselves. And this is deeply a part of the clinic experience. Our students sometimes meet their clients in their homes and often accompany them on appointments. We go to prisons to visit our clients who are incarcerated. We ask about everything: personal issues and struggles, strengths and needs within their families, parenting success and failure, income and resources. We advise about options and outcomes.

While the common question from students considering this work is “what do I do if I don’t think my client should have her child,” the more complex, significant and difficult question is “why do I come to that conclusion and what is it based on?” The work of figuring out what each of us brings to the table, what assumptions we make without even realizing it, and how our own experiences impact the way we interpret information is unavoidable and necessary in everything we do in this clinic. The clinic experience has an enduring impact on those involved, for one can never see the world in quite the same way after recognizing that judgment, bias, and individual perspective are a part of everything we hear, read, and are often persuaded by. In addition to learning to recognize assumptions, we came to learn how much we did not know. For me, coming from a high-volume court-based practice, this was an enormous amount. So little of who the parties are in these proceedings—and what strengths, weaknesses, supports and options families have—comes into the courtroom. I was right to be concerned as the child’s lawyer.

Our ability to spend so much time out of the courtroom—meeting with our

clients and their families, visiting their homes and communities, accompanying them to service providers, watching child visits, attending agency meetings—was key to our effectiveness.²⁵ By working this way, we develop strong and trusting relationships with our clients, and together we create true individualized plans that address their actual needs and draw on their strengths. I watched our clients feel supported and strengthened by our students and saw the value of genuine encouragement and partnership at times of deep sadness and despair. This way of representing parents makes a difference. As we developed new insights about what it could mean to be a lawyer, we pushed our students to think deeply about their role. It is now obvious to many that a good family defense office is made up of interdisciplinary teams involving, at least, lawyers and social workers. But the true nature of this idea took a bit of time to discover and fully appreciate. Though the Clinic certainly was not the first setting to support lawyers and social workers working together (I had worked with social workers at the Legal Aid Society), I learned a great deal more about this partnership—and its necessity for family defenders—over the course of teaching the Clinic and from the two social workers with whom I had the privilege of working. Two early moments stand out for me, and reflect how much we needed to learn. The first involved the protocol for involving a social worker on a case, and the second involved the difference in how lawyers and social workers view “the issue.” As Marty explained earlier in Part I, we didn’t have a full time social worker in the clinic at first; so in the beginning years we had to hire a social worker on the occasions we felt we needed one. When we later did have a social worker on staff, and then social work students in the clinic, we continued to involve them in the same traditional way: the law student team would decide if and when to involve a social worker on a particular matter. This marriage of lawyer and social worker is an exceptionally good one but is not without its challenges. We are educated to see things differently, and I came to understand that we often have different conceptions of what is relevant. I remember in several instances being struck (and admittedly impatient) by the issues our social workers were raising. They were sharing concerns and strategies they had for a family that had nothing to do with the pending charges or issues before the court and that didn’t rise to neglect. It seemed to me irrelevant and even judgmental. But, I came to appreciate that what I had considered irrelevant was actually critical to long-term family stability; it was, therefore, very much relevant to our client’s goals. My thinking, as a lawyer, had been too narrow. Our partner-social workers are able to see things that may be invisible to us lawyers (or out of our view) and assess the impact on family functioning. My sights shifted from what needs to be accomplished to get our client’s children home to include, for example, what is needed for the family to have the best chance of remaining together and thriving.

25. See generally Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL’Y 97 (2012).

And this led to a realization that the decision of whether and how to involve social workers should not be in the hands of lawyers alone, because lawyers are likely to miss something. Thus, our protocol changed, and every case began with an interdisciplinary team. The extent and details of social work involvement became a joint law and social work decision.

With social workers as part of our team, we were able to participate in the administrative arena as well as the courts. We evaluated and responded to plans and recommendations put forth by agency officials. Significantly, we had the capacity to make our own expert assessment of a family's strengths and needs and to work closely with our client to develop our own proposals for steps to maintain or reunite their family safely and successfully. And for the lawyers in the group, working closely with social workers enhanced what we could see and know; their insights expanded our options. It was also good for the students to be aware of professional blinders and to not be limited by them. As my experience in the Clinic changed forever my thoughts about effective lawyering in this field, my ideas of what we could teach students transformed over the years as well. Yes, we spent time teaching the doctrine, law, and theory of the case. We developed simulations to focus on client interviewing, counseling, and witness examination. But, at the core, we came to have other goals. Ultimately, we tried to teach these things: (1) the importance of developing a relationship with one's client and how one might do that; (2) the capacity to be self-aware, to understand what each of us brings to a given situation, and to keep our personal judgments from creeping unintentionally into our work; (3) to be mindful of what we know and what we don't know; (4) how to think and work across discipline; (5) what a lawyer's role can be if we don't limit ourselves; and (6) the enormous impact of race, poverty and class on so many critical encounters, recommendations, and decisions. This wasn't the list at the forefront of our thinking when we began, but these goals came to be those we valued most—both because they are absolutely critical to excellent lawyering in a family defense practice and because they are important for us all in any situation anywhere.

III.

FINDING THE FUTURE (CHRIS)

A.

Continuing Marty and Maddie's theme that the most important developments in professional trajectories often stem not from well thought out ten-year plans supported by endless networking (law students are you listening?), but from necessity-fueled invention, I came to the clinic in 2002, intending to do a one-year fellowship, and find myself still here and not wanting to leave fourteen years later. I didn't resign my prior position representing children, instead taking a leave of absence, so I could easily return. I needed a break from the high caseload I carried as a lawyer for children. I needed a change of pace. I didn't realize it was a particularly auspicious time to begin

representing parents. I didn't realize the practice was about to change dramatically. I didn't realize that my lawyering skills needed a jump-start. It was; they did. And when Marty and Maddie took me into the clinic, I was given the amazing gift of seeing through new eyes a world I thought I knew quite well.

By the time I joined the clinic, I had represented hundreds of children in Family Court and—with the arrogance of a young lawyer who has learned the rules of an insular game—I thought I knew a lot about New York City Family Court and the child welfare system it oversees. I also thought I was very pro-parent. That is, I thought I was trying as hard as anyone to keep families together and that I was giving parents the “benefit of the doubt” more than others in the proceedings.²⁶ In reality, I was pro-parent only relative to the harshly anti-parent mindset that permeates Family Court.

Maddie in Part II talked about how much more difficult it is to advocate for a parent than for a child (even when the parent's and child's interests are aligned), how much more eloquence and creativity the advocacy requires, and how much more vitriol is directed back in response. It is not only the lawyering that is tougher. It may seem counterintuitive, but it is emotionally tougher to represent adults than children in child welfare cases. To meet a child is not to see the world through that child's eyes. It couldn't and shouldn't be to see the world in the limited way children understand it. We inevitably overlay our own adult understanding when hearing a child's perspective. But to hear an adult, to stand next to an adult, can sometimes mean seeing what she sees. Standing next to parents in Family Court, this is often pain and disrespect being inflicted on their families. Put another way, the move from representing children to representing parents opens the possibility of experiencing empathy rather than sympathy. This was not only a significant shift for Marty, Maddie and me personally, but I believe has been for the public interest lawyering community as well—in New York City and, to a growing extent, around the country. If the greatest understanding of oppression comes from aligning with the most despised, there are few places a lawyer can stand today and learn more than next to poor parents of color who are charged with child abuse and neglect.

Though I didn't understand it at the time, 2002 was a critical year for the field of family defense because it was the year the Center for Family Representation started. The first organization in New York established specifically to represent parents, CFR was started and funded by those who saw that New York's child welfare system could not be fixed without a robust defense bar. Even as I introduced clinic students that year to CFR and its founders, Sue Jacobs and Michele Cortese, and told the students what a crucial

26. I use the phrase “benefit of the doubt” to capture how I would have thought of what I was doing at the time. The phrase now makes me cringe for more than one reason. Who was I to give—meaning have the option to withhold—the benefit of the doubt to someone I hardly knew? Who was I to make a decision about where the doubt should fall on anything relating to the sacred relationship between children and their parents? And, in any event, doesn't New York State by law give the benefit of the doubt to parents?

step Sue and Michele were taking, I had no idea how true that was. CFR became the catalyst it was intended to be, and five years later, its initial goal came to fruition when New York City, for the first time, contracted with non-profit law offices to provide institutional representation for parents.

“Institutional representation”—an off-putting phrase for an unusually approachable type of legal practice. The discovery of the new, interdisciplinary practice model Marty and Maddie discussed could by definition only be implemented by multi-person offices. It required more professionals and more room than solo law practices. But of course, creating new offices is more than bringing bodies together and renting space. Any new organization, or new division of an existing organization, develops its own culture and personality. The three groups that received the first contracts from New York City for parent defense—CFR, Legal Services NYC and The Bronx Defenders (later joined by Neighborhood Defender Service of Harlem)—each had its own public interest culture, which nurtured their quickly growing family defense practices.

While solo practitioners can certainly embody lawyerly ideals, there are not too many Atticus Finches these days, at least not paying rent in New York City. It is very different to provide legal services through an organization dedicated to doing so without charging clients. The benefits to both the clients and the professionals can be enormous: social workers and parent advocates can be on hand to do the out-of-court work Marty and Maddie discussed in Parts I and II; social workers and parent advocates can remind lawyers that clients don’t view things wholly through a legal lens; administrative staff can allow lawyers to file discovery requests and motions far more efficiently, and can develop relationships with court personnel that sometimes mean more to success than the best statutory arguments.

For lawyers, the existence of these organizations means not only jobs, but jobs one can get straight out of law school that come with the kind of training and supervision only larger offices can provide. For social workers, it means being able to do client-directed work right out of school and having critical freedom from the mandated reporting that some social workers believe undermines their profession’s goals.

Perhaps most important for staff, these organizations offer the emotional support and grounding needed to do extremely hard work in the trenches: a professional home to go back to after a difficult day in court; knowing your colleagues will listen and understand; being part of a team. They provide the opportunity to enter a field with an ambitious social justice vision.

For clients, being represented by organizations rather than solo practitioners means having a team on your side: an advocate you can reach on the phone when your lawyer is in court; another lawyer from the office available to step in when yours is on leave or stuck in a different courtroom; the benefit of a brief bank so your lawyer doesn’t have to draft every motion from scratch; and office space where your kids can play while you meet with your lawyer.

But the significance of institutional representation goes beyond these

important differences from the experience of individual representation. Legal organizations, unlike solo practitioners, are institutional players. They can sit down at the table with government officials when decisions are made about policy and practice. They can use the accumulated wisdom of thousands of cases to advocate for systemic reform. They can lobby for a constituency who otherwise would have no voice in the halls of government.

B.

But I'm getting ahead of myself. Another change for the clinic the year I arrived was that we began in earnest to partner with the Family Law Unit of South Brooklyn Legal Services. SBLS was the pre-cursor to the Brooklyn Family Defense Project ("BFDP"),²⁷ one of the parent representation providers. In 2002, this unit had just three lawyers and a part-time social worker—enough to do amazing work for a small caseload of clients but it was not yet an institutional player.

As Marty discussed in Part I, the clinic had for most of its first twelve years represented clients on its own. The clinic was the attorney of record for the cases, allowing the students to work under the supervision of Marty and Maddie without other lawyers in the mix. As Marty and Maddie explained, this structure was crucial to the learning process for both students and faculty. The clinical literature touts the virtues of what it calls "in-house clinics," which take their own cases rather than working with other law offices, because they allow students to be supervised by faculty who are experienced in and committed to the clinical method of allowing students to fully take on the role of lawyer in their cases. The clinical goal is that the students will be the ones to identify problems, figure out options, and carry the weight of decision-making.²⁸ This pedagogical approach is at odds with most internship structures. Indeed, it is counterintuitive to the best lawyers, whose every fiber presses them to make the strategic decisions they think best for a client and jump into courtroom colloquy to advocate for their clients rather than leaving these critical tasks to those who are less experienced. But this lawyerly impulse impedes the best type of clinical experience for students. While internships and externships offer much of value to law students, they generally do not provide the opportunity for the kind of experiences for which Tony Amsterdam taught clinicians to aim: those in which students learn to become lawyers who learn well from their own experience by

27. I will refer to them as "BFDP," though the discussion covers the time periods in which they were SBLS and BFDP, which is now part of Brooklyn Defender Services (BDS).

28. See Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984) ("[The students] bore the responsibility for decision and action to solve the problem. They had to: (a) identify the problem; (b) analyze it; (c) consider, formulate, and evaluate possible responses to it; (d) plan a course of action; and (e) execute that course of action. In all of these activities, the students were required to interact with other people. They were thus required to work through the relationships between legal analysis, communication, and interpersonal dynamics.").

practicing in role as lawyers, not as trainees who have someone else making the tough calls for them.²⁹

Marty and Maddie had offered exactly that opportunity. Yet when I came in, it became apparent the clinic had to make some changes because it was becoming unwieldy to carry the clinic's growing caseload. At that time, Family Court cases went on for an average of four years. When I began in 2002, I inherited one case the clinic had been on since 2000 and wouldn't finish until 2006; I was on another for eight years. Sometimes such cases could be assigned to a new set of students after the first set graduated, but turnover every year for six or eight years would be far from ideal, and sometimes the cases no longer had enough meaty legal work to make them rich learning experiences. If we didn't reassign the cases year after year, and took on new ones faster than we closed old ones, our caseload would grow indefinitely. So it was a practical concern about the growing workload that led us to change our structure. Again, we reaped unintended benefits.

It was a risk to give up being attorney of record. It was a risk to give up the straightforward structure of clinic faculty supervising students in the way the clinical law review articles recommend.³⁰ Now we had a complicated mix on each legal team of not only the students and faculty, but also a BFDP lawyer, a supervisor, administrative staff, and sometimes (as SBLs turned into BFDP and gained staff) a social worker or parent advocate. A lot of cooks, many with no training in clinical education. Adding further complication, the teams now had to deal with the constraints faced by all repeat courthouse players. The clinic had previously had a small enough caseload not to have to worry that if we ticked off a particular lawyer or judge on one case, we'd have to appear in front of her on another case a few minutes later. Now if a student (or faculty member) offended someone, the entire BFDP office was associated with that offense and their other clients might pay the price. And the biggest challenge: how to have such large teams operate effectively while maintaining the pedagogical benefits of allowing students to make and implement the key case decisions when there were multiple professionals on each case with their own deeply-felt obligation to zealously represent the clients.

The risk paid off. We have been able to work through the many complications because the BFDP lawyers have committed to our pedagogical approach and have been willing to help us do the hard work of figuring out when it makes sense for us to push them and when for them to push us. There have been some bumps along the way, to be sure. But we think the collaboration has benefitted both organizations far more than anticipated.

29. *Id.*

30. We are certainly not the only ones to have discovered the challenges and rewards of developing a hybrid clinic model. See, e.g., Claudia Angelos, *The Hybrid Clinic: Bringing the In-House Clinic to the Field*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 283 (Susan Bryant, Elliot S. Milstein, & Ann C. Shalleck eds., 2014).

We are able to provide not only resources (covering the cost of an expert or a transcript and providing students who can spend far more time researching legal questions and on the phone easing the anxiety of clients than lawyers with full caseloads can), but also the benefit of the luxuries of clinical practice. The clinic team members can spend hours discussing a case—pulling it apart from new angles, questioning typical practices, developing novel litigation strategies—as lawyers with full caseloads cannot. The BFDP lawyers couldn't and shouldn't revisit typical practices on most cases. But they have told me they greatly appreciate the chance to step back and do that kind of thinking with students when they work a case with the clinic. The BFDP lawyers may not be able to join us for the two-hour discussion on strategy for a case conference and wouldn't be able to spend time drafting a motion to sever that has no hope of being granted but provides an opportunity to put our theory of the case in front of the judge pre-trial, but the lawyers are very happy to reap the benefits of such discussions and motions. And they are good enough lawyers to appreciate having their own assumptions challenged.

Our deal is that we will let the students own the cases throughout the process leading up to litigation decisions. When first assigned, the students are given the case information the BFDP lawyer has, but they are not given the strategies the lawyer inevitably began developing the moment she took the case. The lawyer resists sharing the analysis she does automatically (almost unconsciously) in order to allow the students to exercise their (not-yet-automatic) analytic muscles. The lawyer does not assign tasks and does not even tell the students what she would do next. After the hand-off of information, contact with the client and opposing counsel is handled by the students. And the students head off to do exactly the kind of case development they did when it was an in-house clinic. They identify the issues, develop options, work the problems—on their own and facilitated by faculty. The students make decisions about whatever strategic questions arise in the case, everything from what motions to file and what arguments to include and omit in those motions to what tone to take in communications with opposing counsel. Then the students bring the upshot of that process, of the luxurious amount of analysis and discussion they were able to undertake, back to the BFDP lawyers. The students review the process they went through, explain the options considered, the decisions made, and the reasoning behind them. The lawyers, of course, have the chance to offer additional options and weigh in with their strategic concerns, but the deal is that they will let the students' decisions stand unless the lawyers believe they cannot do so without violating their duty to the client.

Our starting point is that reasonable lawyers can disagree on many strategic questions and we will all try to defer to the students' considered decisions as long as they are within the realm of good lawyering. We all try to remember that using this process, which means allowing someone else to make different decisions than we would make, often results in better lawyering, though that is sometimes easier said than done (for faculty as well as for the BFDP lawyers!).

This process has meant that sometimes motions are filed that the lawyer would not have filed and, likewise, legal arguments made or relinquished that wouldn't have been.³¹ As a result, at times, the lawyers have taken tongue lashings from displeased judges. But at other times, we have achieved delicious victories. Very often the impact of particular arguments is unclear and time is needed before we learn the long-term effects of novel arguments. Win or lose, though, the lawyers seem to have come to feel that the process broadens their arsenal with helpful new tools. Perhaps as important, our joint process seems to invigorate these front-line lawyers who fight every day against the odds and sometimes need reminding of how much fun lawyering can be.

For the clinic, the benefits have gone far beyond the ability to find cases for students each autumn without committing indefinitely to those cases (and an ever-growing caseload). By having BFDP identify cases that are particularly ripe for student assistance, we can target our resources to cases at the times clients need them most and when the learning experiences are richest, knowing BFDP will take back full responsibility when summer comes. And we gain the many advantages of working side by side with great lawyers who understand intimately the day-to-day practice of Family Court. These advantages include not only the logistical and relationship benefits of working with institutional offices, which I discussed earlier (being able to file motion papers on a moment's notice, knowing who to see to obtain a court file most quickly, etc.), but also the hard-earned knowledge base BFDP has developed through being in the courthouse every day. Marty or Maddie or I might be able to direct the students to an obscure appellate decision, but BFDP lawyers can tell them how a particular judge ruled on a particular evidentiary point last week.

Clinic faculty and students get to escape the ivory tower, not only when we go to court but—as important—when case planning. Any decisions we make to buck the system by trying something that “isn't done” are fully informed by knowledge of what is done. Our students get the chance to decide whether to take risks within the constraints of real world practice. It turns out that assessing

31. Interestingly, we have found it is more difficult for lawyers to forgo arguments than to accept adding ones they would not have included. One might expect experienced lawyers would feel more comfortable assessing the odds of success of various arguments and discard more, with students being the ones more inclined to make alternative arguments, but it is the other way around. Perhaps this is because of the time students have to extensively run down the case law on the alternatives or their fresh commitment to the importance of strong narrative to an effective theory of the case. Or one might say it's a misplaced idealism on the part of students that “the right answer” is likely to prevail. But more often it seems to me that the lawyers' hesitations reflect a disturbing reaction akin to those of soldiers in the trenches who have experienced so much traumatic randomness in battle that they take every possible defensive measure, including some that, upon reflection, can be recognized as talismanic. In my experience, lawyers appreciate being pushed to undertake that reflection and to separate a healthy recognition that many things in Family Court are out of their control from fatalism about their armaments. They agree it ends up serving the client, the lawyer, and the broader courtroom practice to forgo alternative or cumulative arguments that one cannot reasonably imagine will convince a listener if the primary offerings do not.

those risks within the context of repeat play (i.e., in the context of caring about the reputation and relationships of BFDP) can be a more valuable experience for students than decision-making in the exceptional context of an in-house clinic.

There's more. We also get the opportunity to escape the tower to work on systemic reform efforts with the offices that have the "street cred" and the statistics to represent our clients at the tables where policy is made. For instance, we have collaborated with the parent representation offices to press children's services and the courts to address mental health issues using up-to-date guidelines from mental health professionals rather than dealing in speculation and prejudice.³² Concrete outputs of that effort included templates for court orders directing mental health evaluations that reflect up-to-date professional practices, and trainings to encourage advocates and courts to demand high quality mental health assessments.

Another example is an interagency committee formed after the clinic joined with the parent representation offices and children's lawyers to ask the City to consider how its own lawyers could better protect the rights of children and families and ensure that the City's family preservation policies are implemented. The committee meets regularly, allowing lawyers for parents, children, and the government to discuss shared goals and improving courthouse practice outside the tensions of individual cases. The parent representation offices are able to identify when a courthouse issue is systemic because they are involved with such a significant number of cases. The clinic would never have a large enough caseload on its own to be able to speak on trends other than anecdotally. By partnering with the larger offices, we bring together their breadth of practical experience and the clinic's ability to survey the relevant academic literature and draw insights from jurisdictions around the country.

These policy reform efforts benefit from student resources as well. For instance, as part of an effort to improve the quality of family visiting, clinic students developed and conducted a survey of parents' experiences visiting their children in foster care to show the ways in which children's services was not following its own visitation policy. The clinic and parent representation offices used this study to successfully lobby for improved visitation practices.

Our close collaboration with the parent representation offices also allows the clinic to play a role in the family defense bar's burgeoning strategic appeals practice. While, of course, the parent representation offices ensure that their clients' appeal rights are pursued whenever in the particular client's interest, the clinic has partnered with the offices to proactively identify and pursue issues on which systemic progress can be achieved through appeals. By offering trainings for the attorneys who create the trial records that go up on appeal, assisting on briefs, and organizing moots for appellate arguments, the clinic has helped the

32. See Nat'l Council on Disability, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* (2012), http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [<https://perma.cc/T4C7-KPAG>].

offices pursue their broader strategic goals and raise the overall level of appellate practice.

These policy and appellate reform efforts are, to be sure, primarily attributable to the newly robust family defense bar created by the institutional providers. But we like to think the clinic offers a kind of support that has helped that community of advocates come together—sometimes through the literal provision of space at NYU for the four organizations to meet and strategize together, and sometimes through the provision of mental space when we are able to encourage and serve as a sounding board for ambitious discussions of long-term goals that might otherwise be overshadowed by the pressures of front-line practice.

We want, though, to be very clear that whatever inspiration the clinic provides to the front-line lawyers of BFDP and the other parent representation organizations pales in comparison to that which we and our students get from them. When students reeling from the challenge of one or two cases ask how an advocate can handle the pressure and frustration of a full caseload, I have no answer except to advise them to absorb as much as they can from our front-line colleagues. At the beginning of the year, when we first bring the students to BFDP, we ask the lawyers there to introduce themselves by saying something about why they do the work they do. Going around that conference room never fails to make tears well. For faculty as much or more than students, the connection to a field (the ongoing realization we are a field!), to an energized defense bar—to a community—is invaluable. I cannot imagine having been able to do this work as long without this fuel for the soul.

So, while Marty, Maddie and I might at some point have urged any law school to invest in in-house clinics as often as possible, we now instead encourage other clinicians to take up the invigorating push-pull of working with practitioners who live in the trenches; not to give up the clinical method of an in-house clinic, but to find a partner office that will commit to that method. Clinics should push public interest practices in new directions. We should let them push us.

C.

Where are we now? Today, more than seventy-five percent of all parents prosecuted civilly in New York City are assigned lawyers who work at the parent representation organizations.³³ Thanks to these organizations and the interdisciplinary model they have adopted, New York City Family Courts are strikingly different from when I walked through their doors in the late 1990's.

33. E-mail from Emma Ketteringham, Managing Attorney, The Bronx Defenders Family Defense Practice, to Chris Gottlieb (Mar. 14, 2017) (on file with author); E-mail from Lauren Shapiro, Director, Family Defense Practice, Brooklyn Defender Services, to Chris Gottlieb (Mar. 14, 2017) (on file with author); E-mail from Susan Jacobs, Special Counsel, Center for Family Representation, to Chris Gottlieb (Mar. 15, 2017) (on file with author).

Without repeating what Marty and Maddie have already said about the differences, I'd like to give some numbers for perspective.

Zero is the number I'll cite most. In the four years I represented children in New York City Family Courts, just before the advent of institutional representation, I saw zero written motions for the emergency hearings to which families are statutorily entitled when a child enters foster care and zero motions to dismiss. I never saw a motion for summary judgment on behalf of accused parents and no formal motions to expand family visitation in any way. I never saw any written motions seeking services for parents or children. I saw only one written motion by a parent's attorney to terminate the client's child's foster care placement. Motion practice was so limited that the best staff attorney training program in the City had not mentioned to me the difference between an order to show cause and a motion on notice, let alone instructed me on how to file either one.

Today, there are thousands of motions filed in New York City Family Courts each year seeking services, visitation, and family reunification. These are not only filed by the parent representation offices. These organizations have dramatically raised the level of practice around them. Solo practitioners representing parents and lawyers for children now regularly file motions that had been unheard of. Family Court judges write far more opinions than they used to, and the field's appellate case law is maturing.

Of the hundreds of permanency hearings I attended as a children's advocate, at which courts assessed whether parents had complied with their family service plan, I never had a case in which the parent had an advocate at the agency conference when the service plan was developed. Today, the parent representation offices ensure that their clients need not go alone to negotiate their families' futures with government officials. They accompany parents to over 2,600 such conferences each year.³⁴

Another set of numbers that would look very different if we did not have institutional providers: when I came to the clinic, there were over 28,000 children in foster care in New York City; today there are fewer than 10,000.³⁵ It

34. E-mail from Emma Ketteringham, Managing Attorney, The Bronx Defenders Family Defense Practice, to Chris Gottlieb (Mar. 16, 2017) (on file with author); E-mail from Rebecca Horwitz, Manager of Government Affairs & Institutional Giving, Center for Family Representation, to Chris Gottlieb (Mar. 15, 2017) (on file with author); E-mail from Gittel Kagan, Director of Social Work, Brooklyn Defender Services, to Chris Gottlieb (May 16, 2017) (on file with author).

35. Compare CHILD WELFARE WATCH, TOUGH DECISIONS: DEALING WITH DOMESTIC VIOLENCE 15 (2003), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138debe4b037d2d5803f6b/1410567659179/CWW-vol9.pdf> [<https://perma.cc/P79M-8T6A>], with N.Y. CITY ADMIN. FOR CHILDREN'S SERVS., FLASH INDICATORS 16 (2016), <http://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/FlashIndicators.pdf> [<https://perma.cc/67US-6YUS>]. It is impossible to wholly disentangle the many interrelated factors that affect how many children are in foster care at any given time, but data demonstrates that the representation of parents by institutional providers has substantially reduced the foster care population. See Data comparing outcomes from when parents were represented by institutional providers to when they were

is often difficult to look at our foster care system and see anything except the need for change (I know that's what the providers see every day). But it seems worth focusing for a moment on the fact that 18,000 more kids might be unnecessarily separated from their families today, and they are not. They are home.

In 2005, the clinic began collaborating with Mimi Laver of the ABA's Center on Children and the Law and advocates around the country to establish the National Alliance for Parent Representation, which works to raise the quality of parent defense nationwide. Much has been accomplished at the national level, including the development of widely accepted standards of practice for parents' attorneys, an active listserv, which allows parent advocates to share legal information, practice tips and support, and a biennial national conference that provides legal education to hundreds of attorneys.³⁶

Much, of course, remains to be done. The National Alliance has identified spreading interdisciplinary representation as a priority and the development of additional parent representation law school clinics as a key step in that direction.³⁷ Staff from the New York City parent representation offices regularly take time from their overbooked schedules to help train lawyers elsewhere and share what they have learned developing their interdisciplinary practices.

For better and sometimes for worse, New York has often led the nation in new directions in child welfare. From the infamous orphan trains through the family preservation legislation of the 1970's, which served as a model for federal law,³⁸ New York has been at the forefront of child welfare practice. One can only hope that is true with respect to the model of parent representation we're growing here. Far from perfect, certainly, but there's no New York trend I'd be prouder to export.

When I started in Family Court as a children's lawyer, I had the mixed blessing of playing a role for which authority figures gave me a great deal of positive feedback. Judges were appreciative of whatever information I gave them and whatever concerns I voiced. I was, after all, speaking for *the children*. Even my parents' friends were impressed with what I was doing with my law degree. It was extremely nice (though not necessarily skill building) as a new lawyer to

represented by solo practitioners (2008–2011) from N.Y. City Admin. for Children's Servs. (on file with author).

36. See ABA NATIONAL PROJECT TO IMPROVE REPRESENTATION FOR PARENTS, AM. BAR ASS'N, <http://www.americanbar.org/content/dam/aba/administrative/childlaw/ParentRep/At-a-glance%20final.authcheckdam.pdf> [<https://perma.cc/T5KU-VGV7>].

37. *Id.*

38. See NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER 197–99* (2001) (describing how New Yorkers led the practice of sending poor children away from their families to work on farms, with the trains the children were sent on called "orphan trains," though these children's parents were not dead, simply poor.); *Id.* at 247 (describing New York's Child Welfare Reform Act of 1979 and the subsequent, national Adoption Assistance and Child Welfare Reform Act of 1980.)

not be criticized in the courtroom; to be appreciated, even liked. As Maddie discussed in Part II, it could not be more different to stand in Family Court as a parent's attorney. As happy as we are to see our clinic students take jobs at the family defense offices, sometimes it has seemed to me unfair to send them off to a first job where instead of that foundation of positive feedback I received, we know they will be treated hostilely and criticized constantly (implicitly and explicitly) as they absorb some of the visceral disdain directed at their clients. I've told Marty that I sometimes worry it isn't healthy, that budding professionals need the approval of authority figures—parent figures—to allow them to build the healthy confidence necessary to survive and thrive in a tough professional world. Family defenders don't get that type of support; they are beaten up daily by the authority figures with whom they have no choice but to interact. But then Marty explained (as he so often has done for me over the years) what is actually needed. Young professionals don't need "parents" at work. They need what adults need: supportive equals, siblings, if you will. They need partners they can count on to inspire them and be deep in it with them. They need what BFDP, The Bronx Defenders, CFR, and NDS give to their staff— and to lucky clinical faculty.