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ADDING VALUE TO FAMILIES: THE POTENTIAL OF MODEL FAMILY COURTS

JANE M. SPINAK*

INTRODUCTION

The Harlem Community Justice Center (Justice Center) officially opened in July 2000 with all the fanfare of a major civic event. The Chief Judge of the State of New York, Judith Kaye, and the Mayor of the City of New York, Rudolph Guiliani, were keynote speakers, lauding the combined efforts of private administrators and public officials in reopening a deteriorating but magnificent 1892 court building in the center of Harlem. The ceremony began and ended with gospel sung by the Addicts Rehabilitation Center Choir, a musical reflection of one component of the Justice Center's jurisdiction. The new Juvenile Intervention Court will focus on young people arrested for non-violent drug-related offenses or who are at risk of substance abuse. The Justice Center also contains a fledgling Youth Court, where teenagers trained as "judge, jury, and attorneys" judge their peers who have been charged with low-level offenses.¹ Before joining the Chief Judge and the Mayor in a ribbon-cutting ceremony, a Youth Court member addressed the assembled notables and community members, remarking on the positive impact the Youth Court had already had on her life. While the Justice Center will handle a significant proportion of local landlord-tenant court matters, its role as a component of the New York City Family Court raises some of the most confounding judicial reform issues.

The Justice Center describes its "Youth Justice" role as addressing "youth crime in East and Central Harlem."² To achieve this:

the Justice Center works intensively with young people who have engaged in delinquent behavior, providing them with the tools they need to get on the right track and avoid further offending. The Justice Center also engages in comprehensive

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1. Youth Justice Fact Sheet, Harlem Community Justice Center (May 17, 2001) (on file with author).

2. *Id.*

prevention activities, reaching out to at-risk-youths before they get into trouble with the law and providing them with the skills to make better life choices.³

The Justice Center thus incorporates assessment services and the partial provision of treatment and preventive services as part of the court's responsibilities. The presiding judge assumes an active monitoring function, closely watching the youth's progress and relying on graduated sanctions to promote individual accountability.⁴

Watching the Justice Center's opening ceremony in the brightly painted, light-filled, and airy central courtroom reminded me of another ceremony I witnessed two years earlier—the first “graduation” of mothers who had completed their participation in New York City's first Family Court Treatment Part (FCTP). The FCTP was the first “model part” introduced into Family Court in New York City.⁵ As with the Justice Center, the FCTP shares some common features with other model Family Court parts being developed nationwide: an activist judge who helps to fashion, and then closely monitor, dispositions; a “team” of lawyers, social workers, and court personnel who try to identify and then work toward common goals with the family; and frequent and meaningful court appearances by relevant parties.⁶ In the FCTP, parents accused of neglecting their children because of their substance abuse participate in an extensive court conferencing and monitoring system.⁷ Parents eligible for the FCTP are assessed by the FCTP clinical staff, are required to waive their right to a litigated hearing, and must admit that the neglect was caused by their addiction.⁸ The parent then enters into a negotiated treatment plan that has been created by the FCTP clinical staff, the parent and her counsel, the lawyer for the children, and the child protective agency's attorney and caseworker; the plan has also been approved by the presiding judge.⁹ The parent is then referred immediately to treatment providers who have contracted with the court to have available treatment spaces.¹⁰ What ensues is an

3. *Id.*

4. *Id.*

5. See Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, J. CENTER FOR FAMS., CHILD. & CTS., 2000, at 5.

6. See *infra* notes 153-55 and accompanying text.

7. Wolf, *supra* note 5, at 13-14.

8. *Id.* at 11-12.

9. *Id.*

10. Hon. Gloria Sosa-Lintner, *Child Abuse, Neglect and the Foster Care System: Effective Social Work and the Legal System; The Attorney's Role and Responsibilities 2000: Family Treatment Court*, in CRIMINAL LAW AND URBAN PROBLEMS 609, 616 (PLI Litig. & Admin. Practice Course, Order No. 00-000W, 2000).

intensive period of court supervision, with frequent in-court drug testing and appearances by the parent and other FCTP “team” members, including the lawyers and agency caseworkers.¹¹ Sanctions for positive drug tests or other lapses in compliance with the treatment plan can range from more frequent drug testing and court attendance to ultimate dismissal from the FCTP, which returns the case to the general pool.¹² Rewards can include longer periods of visitation and less supervision of the parent with her children.¹³

During the first two years of the FCTP, thirty parents and guardians were reunited with seventy-two children whose average length of stay in foster care was eleven months.¹⁴ Approximately sixty-eight percent of the parent participants were in compliance with court mandates at the start of the FCTP’s third year.¹⁵ In New York City, where children spend an average of four years in foster care,¹⁶ these numbers are stunning. For the 243 families (including 453 children) referred to the FCTP during the first two years of its existence,¹⁷ the results are life-changing. Not only are large numbers of families reunited at a record pace, but parents complete treatment and are provided with individualized services that are likely to help them remain sober and stable.¹⁸ For everyone—from the judge who has closely monitored the parent’s progress, to the child protective agency attorney who no longer has to consider terminating parental rights, to the children’s attorney who is happy to see her clients return home—there is a palpable sense of accomplishment.¹⁹ At the “graduation,” ceremonies that occur with increasing regularity, there are cheers, applause, flowers and exhilaration rarely experienced by the parents, the children, or the Family Court professionals.

The Justice Center’s opening produced that same headiness: a sense of possibility—of young lives saved, of older ones being given new

11. *Id.*

12. *Id.* at 628-29.

13. Wolf, *supra* note 5, at 15-16.

14. *Id.* at 19.

15. *Id.*

16. *Unfinished Business: Analyzing NYC's Foster Care Reforms*, CHILD WELFARE WATCH, Winter 2000, at 10.

17. Wolf, *supra* note 5, at 19.

18. *Id.*

19. *Id.* at 19-20. As with many other experiments, the choice of participants affects success. The selection process for the initial participants in the FCTP screened out many of the most serious allegations, such as abuse, and many of the more complicating factors, such as domestic violence and mental illness. *Id.* at 10-11. The planners hoped to gain experience with “easier” cases before expanding the participation criteria. *Id.* While this decision is understandable, it also ensures a greater likelihood of success and affects the validity of the results and the capacity to generalize about them.

opportunities, and a sense of community endeavor (as opposed to solely individual triumph, though there is plenty of that). However, my own delight at both ceremonies was tempered by a darker vision of day-to-day reality in most Family Courts and by a substantial concern about whether "reform" or "model" courts created to address child welfare issues can produce systemic, lasting reform. This Article will explore that concern by reviewing current Family Court model court reform efforts in New York and nation-wide through a number of lenses.

Part I begins with a short description of Family Court, identifying some of the unique features of the court and considering some of the past and current efforts to reform the court by taking those features into account. This is followed by a proposal to analyze Family Court reform through a substantive rather than procedural lens, focusing on the value that families may derive from coming under the court's jurisdiction. Part II contains a description of current New York Family Court reform efforts in the context of the present conditions existing in these courts. Part III considers some preliminary information about the progress of model courts in New York and around the country. Finally, Part IV draws on the earlier discussion to recommend aspects of the model court reform movement that may have lasting, transformative potential for Family Court.

I. THE VALUE OF FAMILY COURT

Throughout its one hundred-year national history, the court variously called Juvenile Court, Domestic Court, Children's Court, or Family Court has struggled with defining its role and responsibilities.²⁰ This struggle is reflected in an assortment of overlapping ways. Although most states have created some type of Family Court as either a separate court or a division of a trial court,²¹ the jurisdictional authority granted to these courts over family law issues varies considerably. New York's Family Court, for example, has original jurisdiction over some

20. Juvenile Court began as an alternative to adult criminal court for children in trouble with the law. Courts variously called Family or Children's Courts expanded their purview to other types of family problems. For a full discussion of the definitional difference, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998). For purposes of this Article, I am using the broadest description of Family Court to include multiple areas of jurisdiction, such as that of New York, which includes delinquency, child welfare, child support, status offenses, family offenses, custody and visitation, guardianship, and adoption within its purview. My focus, however, is on child welfare proceedings.

21. *Id.* at 505-06. Barbara Babb has completed the most comprehensive review of the current state of Family Courts throughout the country.

family issues, such as child protective and delinquency proceedings,²² concurrent jurisdiction over others, such as custody and family offenses,²³ and no jurisdiction over divorce.²⁴ Such variations in jurisdictional authority continue to fuel the most persistent calls for Family Court reform, particularly the need for a unified Family Court system to integrate the court's response to all aspects of a family's needs when its members appear in court.²⁵ The arguments in support of this integration are fairly straightforward and reasonable: diminished jurisdictional and decisional conflicts, greater time and resource efficiencies for courts and litigants, and dedicated court personnel and judicial officers.²⁶ A unified Family Court system would expand the jurisdictional structure of the court that has existed, with only some variation, since its creation. Family Court in New York, for example, traditionally has had tripartite roles: the court dispenses "individualized" justice for the parties by using the substantial discretion given to the court by law and practice; the court draws on the "non-legal" resources in the medical and social service fields to inform and enhance its decision-making capacity; and the court's ultimate decision has at its core a remedial—or perhaps even preventive—purpose.²⁷

A. Defining the Role of Family Court

1. THE TRADITIONAL QUERY

While there is near unanimity among Family Court observers that the advantages of some form of unified court are substantial, the breadth

22. N.Y. JUD. CT. ACTS LAW § 115 (a)(i), (vi) (McKinney 1998).

23. *Id.* § 115 (b), (e).

24. *Id.* § 115.

25. Babb, *supra* note 20, at 527; see also Edward P. Mulvey, *Family Courts: The Issue of Reasonable Goals*, 6 LAW & HUM. BEHAV. 49, 51 (1982) (discussing family court unification efforts twenty years ago). Ironically, New York is one of eleven unified Family Courts in the country, but still does not have jurisdiction over divorce. For efforts to fully unify the New York Family Court system, see *infra* notes 81-82 and accompanying text.

26. WILLIAM C. GORDON, *THE FAMILY COURT SYSTEM* 1 (1977); Babb, *supra* note 20, at 491 n.104; Mulvey, *supra* note 25, at 51-52. All of these factors were considered in the creation of the Family Court in Hawaii in the mid-1960s. Gerald R. Corbett & Samuel P. King, *The Family Court of Hawaii*, 2 FAM. L.Q. 32 (1968).

27. Mary Jean McDonald, *The Role and Responsibility of New York's Children's Court* 2 (Jan. 1997) (unpublished manuscript, on file with author). In dispensing "individualized justice," the court is also protecting the due process rights of the litigants before it. *Id.* Explains Gordon, "[a]dherence to objective standards at all stages does not show a lack of concern for persons coming before the court. Rather, it means that the court system assures all the individuals who appear before it that they will be judged by the same standards." GORDON, *supra* note 26, at 3.

of potential authority by a judge fully exercising her discretion within such a structure inevitably raises a question of the scope of the court's power. This question, which has been at the heart of every effort to create or reform Family Court, has been posed in a variety of ways. One variation asks whether the role of the Family Court judge is primarily adjudicative or administrative: is her primary purpose to decide specific disputes or to manage the larger, more complex issues that the family brings with it to the courthouse?²⁸ A second variation queries: if the court is assuming the larger, managerial role, is that role primarily preventive or primarily remedial? That issue leads to two collateral questions. First, should the court subsume some or all of the services provided to families directly under its control, or should it maintain the traditional division between the executive and judicial functions?²⁹ Second, if the judge does assume a broader role, does this necessarily include a leadership role for the court in the larger community it serves?³⁰ While these questions must be incorporated into any discussion of Family Court reform, they confine the analysis to

28. Corbett & King, *supra* note 26, at 39. After describing the extensive social services available in the Family Court in domestic violence cases, the judges nevertheless conclude: "Our Family Court is being developed as a court utilizing the techniques of the social services, and not as a social service agency utilizing the authority of the law." *Id.*

Placement of related types of cases under one judicial roof, for greater effectiveness, does not mean that the court should wipe out the legal distinctiveness of each of these matters. . . . Some family court proponents . . . believe that the lines etched in substantive and procedural law interfere with the court's ability to resolve problems and would like the court to have broad freedom, at all stages in its proceedings, to decide what is best for the individual (perceived, necessarily from the viewpoint of the person making that decision).

GORDON, *supra* note 26, at 2.

29. McDonald, *supra* note 27, at 7. Family Court has often been characterized as an exception to the bright line demarcation between judicial and administrative roles, and this straddling of roles has been identified, as mentioned above, as one of the inherent tensions of this special court. However the administrative role is defined for the Family Court, it is not without parallels in many state courts which participate in the administration of justice through such actions as regulating the legal profession, establishing regulatory policy or procedural rules, and working on law reform efforts. See Helen Herschkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1869-75 nn.189-222 (2001).

30. The most vocal current advocate for the activist community judge is Leonard P. Edwards, who writes and lectures frequently on this issue. See, e.g., Judge Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, JUV. & FAM. CT. J., 1992, at 1 (Vol. 43, No. 2). In New York, the most famous activist Family Court judge was Justine Wise Polier. See NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* 3-4 (2001).

well-trod paths that are inevitably circular.³¹ Each generation of Family Court reformers has had to find the point along the administrative/judicial continuum that best reflected contemporary beliefs concerning judicial roles, as well as political and fiscal realities, while still pushing towards the reformers' own ideal point.³² This determination will also have to be reached in both the conception of model courts and the inevitable reactions to them.

2. TRYING A DIFFERENT ANALYSIS OF FAMILY COURT REFORM

Although the questions posed in the previous Section are valid, I would prefer to posit a different question regarding Family Court reform, one that takes account of this traditional tension but is not bound by it: can we define the value that Family Court adds to the lives of the families it serves?³³ By defining and determining that value, we may be able to discover whether current Family Court reform efforts—particularly the model court movement—can create lasting, systemic reform.

In 1953, Alfred Kahn published his extensive study of the New York City Children's Court.³⁴ In a chapter entitled "A Dream Still Unrealized," Kahn summarized his own frustration with the Children's Court:

This study has found that the New York City Children's Court, considered by some as an illustration of what a successful court should be, has only begun to move in the expected direction. A minority of children are served with both kindness and skill by those judges, probation officers, and other staff members who have understood the purpose of a children's court, are equipped to perform their tasks

31. "What all this means is that a family court must function as a court, both as a matter of law and as a matter of sound policy. This does not detract from the court's concern for an individual or from its efforts on his/her behalf." GORDON, *supra* note 26, at 3.

32. See, e.g., Judge Gordon's statement in 1977: "Such a family court will see itself not just as a means of carrying out traditional legal concepts; or as a means of using resources efficiently; or as a means of resolving important individual and societal problems—but as all of these." GORDON, *supra* note 26, at 5.

33. This question was first posed by Barbara Blum, a member of the New York State Permanent Judicial Commission on Justice for Children during a meeting to determine the direction of the Commission's court improvement agenda in the late 1990s. The question has been kept at the forefront of the Commission's work by Nancy Dubler, another member of the Commission, ever since.

34. ALFRED J. KAHN, *A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN'S COURT* (1953).

competently, and have at the same time had available to them needed community resources. The majority of children before the Court, however, receive service which does not reflect the juvenile court movement's aspirations or the kinds of help that fully qualified personnel with adequate community resources at their disposal would be able to provide. For some of the children, the Court represents a well-intentioned but inadequately prepared, pressured group of individuals who cannot achieve what they strive to do. For many, it is the insensitive instrument of an indifferent or hostile social world. Thus, in most instances, the Children's Court in New York City fails to act as a "good parent" or as a skilled counselor; far too often it does not even appear as a kind friend. *Indeed, it is as though an ambivalent society created a new institution and then, not being sure about what it had wrought, permitted old practices and failings to continue and provided so few new resources that the institution could not flourish.*³⁵

Kahn's findings confirmed earlier analyses of the juvenile court movement and were repeated by subsequent investigators through the end of the twentieth century.³⁶ Nevertheless, over its one hundred year history, most critics sought a way to hold on to the idea that a court created to address children's and families' issues had intrinsic value—if they could successfully define that value.³⁷ Twenty years ago, Edward Mulvey posed a variation of Kahn's lament when he asked whether it was possible to formulate any reasonable goals for a Family Court system that would withstand "later claims of misdirected idealism" and would "provide a more realistic appraisal of the judiciary's role in the regulation of family problems."³⁸ Mulvey noted that "considerations regarding the expected effectiveness of the court in regulating family dysfunction have never been adequately resolved,"³⁹ and that "the question of whether the court's attempt [to resolve family problems] will

35. *Id.* at 264-65 (emphasis added).

36. Babb, *supra* note 20, at 491-93; McDonald, *supra* note 27, at 5-6; Mulvey, *supra* note 25, at 59-60. The failures of Family Court have also been the subject of non-fiction book length reports, such as JOHN HUBNER & JILL WOLFSON, *SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES* vii (1996).

37. McDonald, *supra* note 27, at 1.

38. Mulvey, *supra* note 25, at 49-50.

39. *Id.* at 52 ("The notable point regarding the recent developments in family courts is that most reforms have focused on improving the efficiency of the court process, while leaving the ideals of preventing family disruption and providing social services basically unquestioned.").

produce gain far outweighing harm is unanswered although often assumed."⁴⁰ This question is often assumed, in part because so much of the discussion around Family Court reform has focused on procedural change. Court efficiency has been particularly central to procedural reform efforts.⁴¹ Those procedural recommendations are usually responses to the sense that the court is being overwhelmed by volume, delay, and congestion. Family Court is not unusual in facing these challenges. Court reform efforts frequently grow out of a sense of crisis in the court system. Yet that crisis may be part of the culture of court systems, worse at some points than at others.⁴² Responding to the crisis only by rearranging the structure of the court has often proven to be insufficient to accomplish fundamental reform.⁴³

Creating fundamental and lasting reform requires a more substantive response to Kahn's and Mulvey's recognitions that Family Court has yet to define itself well enough to create value for families. For that reason, I would like to utilize a "value-added" analysis of the Family Court that is applicable regardless of the structural and procedural reforms undertaken or the place along the judicial/administrative continuum onto which a particular reform falls. At the same time, I recognize that certain procedural reforms may actually enhance the application of a value-added role of the court. In looking at model court reform, for example, the interaction between this

40. *Id.* at 53 (citations omitted).

41. See *infra* Part II for a discussion of reform in the New York Family Court; see also JUDITH S. KAYE & JOHATHAN LIPPMAN, N.Y. UNIFIED COURT SYSTEM, FAMILY JUSTICE PROGRAM INITIATIVE II 2 (1998) [hereinafter FJP II] (on file with author); Mulvey, *supra* note 25, at 52.

42. Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and The California Courts, 1960-1990*, 66 S. CAL. L. REV. 2049, 2052 (1993). Reviewing reform efforts for the California court system, Scheiber effectively argued that high volume, congestion, and delay are recurring problems of a court system that will forever be under-resourced. See *id.* Moreover, procedural reforms, such as judicial reassignments or new forms of case settlement processes, have had limited (and mostly short-term) effects. *Id.* at 2069-70.

43. There may be myriad reasons why structural change is insufficient. Scheiber highlighted how the local legal "culture" affects the ways in which problems are addressed. *Id.* at 2053. He also pointed out that the notion that any particular change is a "reform" is misleading: "One person's 'reform' is another's 'reactionary effort at turning back the clock,' and a measure is not an unalloyed good simply because it represents a new approach. Many changes that are routinely called reforms are not truly reformative in any way but rather are better termed 'adjustments.'" *Id.* at 2055-56. For a parallel discussion of social services reform efforts, see Jane Waldfoegel, *The New Wave of Service Integration*, 71 SOC. SERVICE REV. 463, 465, 479 (1997) (noting that the first administrative reforms incorporating service integration ultimately failed because there was no focus on the substantive core: reforming street-level casework practice).

value-added role and the structure of the model court may create a more lasting synergy for successful reform.

B. The Value-Added Analytical Framework

The analysis I propose for the value-added role of the court begins with a recognition that protecting the procedural due process rights of the litigants in child welfare proceedings while determining the sufficiency of the allegations—and, if the allegations are sufficient, determining custody—no longer adequately defines the role of the Family Court. While the court will always shoulder these responsibilities, federal and state mandates have incrementally expanded the court's role to the point where the court is now required to determine the sufficiency of the child welfare agency's response to the family's needs prior to, and during, the course of the child welfare proceedings. The court actively oversees the case until a permanent solution has been devised for the child and family—a process that can last many years.⁴⁴ This judicial oversight function is different from the role of the child welfare agency, whose primary mission is “to ensure the safety and well-being” of children through the direct provision of assistance.⁴⁵ If this assistance is effective, the court may never be asked to intervene. If it is not successful and the child welfare agency determines that there is sufficient basis for asking the court to sanction greater intervention and oversight in the parent-child relationship, this secondary intercession by the court (beyond the due process mandates) must have a purpose that transcends the child welfare agency's role. Otherwise, there seems little justification in expanding the court's oversight of the child welfare agency's actions.

The purpose that will justify the court's expanded authority—thus adding value to the family's life—is the rigorous enforcement of the constitutional principles that recognize the importance of children being raised by their families and not by the state.⁴⁶ These principles have

44. MARK HARDIN, JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORMS: ONE COURT THAT WORKS 9 (1992) (describing the judicial mandates of the Adoption Assistance and Child Welfare Act and the Adoption and Safe Families Act). The extent and quality of implementing those mandates, however, continues to be problematic. See *infra* notes 55-58.

45. New York City Administration for Children's Services, *Policies: Permanency & Planning Principles*, http://www.nyc.gov/html/acs/html/main/whatwedo/pp_intro.html (last visited Apr. 23, 2002).

46. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972). These cases built upon earlier decisions epitomized in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

most recently been reinforced by the Supreme Court in *Troxel v. Granville*,⁴⁷ where after reviewing the cases that established “perhaps the oldest of the fundamental liberty interests recognized by this Court,”⁴⁸ the Court concluded: “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁴⁹

1. A COMMITMENT TO ENSURING FAMILY INTEGRITY

This commitment to ensuring family integrity must permeate the court’s oversight role for the court to be distinguished from the child welfare agency’s role. For example, prior to the court interfering with family integrity, or allowing another state agent to involuntarily interfere, the court has an affirmative mandate to ensure that reasonable efforts were made to assist the family in remaining a unit *and* in remaining free of unnecessary state intervention in the form of either the child welfare system or the jurisdiction of the Family Court.⁵⁰ This requirement has been incorporated into federal law through both the Adoption Assistance and Child Welfare Act of 1980 (AACWA)⁵¹ and

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children The child is not the mere creature of the State; those who nurture [the child] and direct [its] destiny have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.

Id.; see also Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases* n.12 (discussing the range of explanations for the primacy of parental control in child rearing) (forthcoming in *Hofstra Law Review*; on file with author). These legal and philosophical bases for parental authority are reinforced by the psychological analysis of the family as a functioning system. See Mulvey, *supra* note 25, at 54.

47. 530 U.S. 57 (2000).

48. *Id.* at 65. While *Troxel* addressed the scope of judicial authority in a private visitation dispute between a fit parent and a third party, in highlighting the constitutional protections afforded parents, the Court expressed clear support for limiting the discretion of courts to substitute their judgment for a parent’s. *Id.* at 57. Acknowledging that the judge would have had greater authority to intervene if there were a question of unfitness, the Court never implied that this intervention would not require the judge to adhere to the family integrity principles. *Id.*

49. *Id.* at 66.

50. An example may be illustrative. The court must determine that the child welfare agency used “reasonable efforts” where appropriate to keep a child who is at risk of foster care with her family. 42 U.S.C. § 672(a)(1) (1994). Rigorous enforcement of family integrity principles is likely to result in the court scrutinizing the agency’s efforts to maintain the child at home more scrupulously than if the court did not apply these principles.

51. “[R]easonable efforts shall be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing

the Adoption and Safe Families Act of 1997 (ASFA).⁵² It has also been applied to the states through statute and case law.⁵³

For the court to fully secure its value-added role by applying the reasonable efforts mandate, it must be willing to use its authority not only to accept jurisdiction over a family, but also to reject that jurisdiction and insist that the child welfare agency either continue its own intervention for the safety of the child and the integrity of the family unit or leave the family alone.⁵⁴ If the court determines that its jurisdiction is necessary to ensure the child's protection, the court's next obligation is to enforce rigorously its own state's standards for ultimate removal of a child from a parent's care. This includes determining whether that state's requirements for reunification services and planning are being upheld, and maintaining the integrity of the family unit—even when a child is temporarily living outside that family unit—until sufficient facts enable the court to determine that the integrity is no longer viable. Too often, maintaining family integrity consistent with a child's health and safety is not treated as a primary role for the court once a child has been placed outside the family, despite the temporary nature of the placement and the clear requirements of the law.⁵⁵ In practice, there is often little more than a cursory review of what has occurred in the interim period between removal and the next court proceeding.⁵⁶ In fact, in routinely perfunctory hearings, the court

the child's home; and (ii) to make it possible for a child to safely return to the child's home." 42 U.S.C. § 671(a)(15)(B) (Supp. V 2000) (as amended by the ASFA).

52. *Id.* § 671(a)(15)(B)(i)-(ii); Sarah H. Ramsey, *The United States Child Protective System—A Triangle of Tensions*, 13 CHILD & FAM. L.Q. 25, 30 (2001).

53. Ramsey, *supra* note 52, at 26, 29. Ramsey suggested that there may be a constitutional basis for the provision of services before a family is disrupted, because it would be the least intrusive intervention on the state's part; however she acknowledged that the Court has never reconciled least restrictive family intervention with its decisions that the government does not have an affirmative obligation to provide services as articulated in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989). Ramsey, *supra* note 52, at 26. In any case, on state law grounds, child protective laws routinely require the provision of services.

54. Such a tiered response parallels Jane Waldfogel's proposal of a "differential response" by child protective authorities in initial child protection investigations. Jane Waldfogel, *Protecting Children in the 21st Century*, 34 FAM. L.Q. 311, 318 (2000). Waldfogel recommended differentiating between the most serious cases that require a full-blown investigation and those less serious cases where a more limited service assessment is conducted. *Id.*

55. In New York, for example, legislative findings and intent state: "To the extent it is consistent with the health and safety of the child . . . the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home" N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney Supp. 2001-02).

56. MOLLY ARMSTRONG ET AL., VERA INST. OF JUSTICE, NEW YORK STATE FAMILY COURT IMPROVEMENT STUDY 23 (1997) [hereinafter 1997 VERA STUDY]

expresses dissatisfaction or disappointment with the child welfare agency's efforts to assist the family, but offers little more than admonitions to do better.⁵⁷ Neither the primacy of family integrity nor the urgency of achieving stability for a child is accomplished through these inadequate court rituals. On the contrary, by failing to follow through on these mandates during the life of a child welfare proceeding, the court affirmatively harms both the child and the parents.⁵⁸ The court fails to provide the impetus for the family and the child welfare system to achieve reunification or, if reunification is unavailable, to obtain alternative stability for the child.⁵⁹ That is why the court must

(demonstrating that services were discussed in fewer than one-quarter of the cases observed in New York and Bronx Counties).

57. Court orders requiring services to be provided to parents or children in the course of a child welfare proceeding were recorded in thirty-eight percent of the New York County proceedings and thirty-four percent of the Bronx County proceedings. *Id.* at 24. Moreover, an extension of placement hearing to determine whether a child should remain in foster care, return to her parents, or be freed for adoption, and what actions need to be taken to accomplish the appropriate goal, took on average five minutes in New York County and ten minutes in Bronx County. *Id.* at 32. New York is not alone in the swift superficiality of its child protective proceedings. As David Herring has demonstrated, judges routinely failed to implement both the letter and the spirit of the AACWA:

Judges would often spend ten minutes assessing a family's progress under the case plan, perhaps adjusting the case plan and determining the placement for the affected child, usually for the next six months. These time constrained hearings did not allow judges to engage in the thorough, comprehensive review contemplated by AACWA. In fact, these hearings did not even allow for an adequate presentation of the evidence and of the parties' positions. What they provided was a chaotic, informal flow of information to the judge The result was usually a judicial decision that simply maintained the status quo. In fact, many orders simply read, "child to remain in foster care, review in six months."

David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 CHILD & FAM. L.Q. 329, 335-36 (2000) (footnotes omitted).

58. Despite the aspirations of AACWA, with lax federal compliance mechanisms, children were either left at home in unsafe conditions or languished in foster care; by 1999, 547,000 children were in foster care, more than double the number during the early years of the AACWA. Ramsey, *supra* note 52, at 30.

59. Herring, *supra* note 57, at 342. Herring posited that ASFA is not likely to improve the court's compliance with reasonable efforts and other permanency requirements. *Id.* Without significant increases in resources, a redirection of the resources toward prevention, and audit requirements that analyze the substance rather than the form of compliance:

[t]he agency and the court will continue to have great difficulty in providing services to troubled families in a timely and effective manner. Under such resource-poor conditions, judges and agency personnel will perceive aggressive permanency planning as something to avoid because public systems deny parents a fair chance to reunify with their children.

Id. at 342.

affirmatively recognize the assistance that it can provide to the family by consistently enforcing the legal requirements incorporated into this value-added mandate.

2. FAMILY SYSTEM THEORY AND ITS ROLE IN PRESERVING FAMILY INTEGRITY

"Family system" theory, which recognizes the family as a complex system whose malfunctioning may have multiple causes requiring creative legal dispositions,⁶⁰ reinforces and helps to explain the value-added role of the Family Court. This psychological theory rejects the medical pathology model of court intervention (i.e., finding the "fault" or "cause" of the family's problem and "fixing it" by court order) as ineffective to accomplish both the social goals of the family and the dual legal goals of the child welfare system to maintain families and keep children safe.⁶¹ The family system approach provides a powerful psychological analogy to constitutionally-based family integrity. As Susan Brooks has written:

The current legal system is well equipped to identify an individual child as the subject of child welfare proceedings and to attach blame to an individual parent. Yet, there are obvious flaws with this approach. By focusing on the identified patient [i.e., the child], the system fails to address the needs and interests of other children who remain in the home. Furthermore, by "treating" the parents and patient separately, the legal system fails effectively to facilitate reunification between those parties. Moreover, by singling out the patient,

60. Mulvey characterized this approach as addressing the "family's best interests," though he warned that characterization may be as troublesome as a child's "best interests." Mulvey, *supra* note 25, at 57. Mulvey noted that a paradigmatic shift must occur from a primarily individualistic focus in order for the legal system to "address the definition and proper place of [the family] interest if it is to adopt a true family focus." *Id.* at 50. For a more recent and detailed discussion of family system theory in child welfare proceedings, see Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL., PUB. POL'Y & L. 951, 958 (1999).

61. Mulvey, *supra* note 25, at 53.

By assuming a distinguishable family disorder with an identifiable cause, the court could be justified in ordering family treatment of that disorder without confronting the issue of family autonomy. In short, a "medical model" has been assumed by many advocates of family courts and the basic logic of this approach supports the judiciary's attempt to isolate the cause of family dysfunction and prescribe an appropriate remedy.

Id. (citations omitted).

that child may be empowered inappropriately in terms of the proper balance of power in the family, which requires parents to have the authority to make important decisions for their children. Most importantly from a family systems approach, the legal system fails to recognize the mutual responsibility of family members in whatever occurs in families. This mutuality is not about blame, but rather how families function, their strengths as well as their areas of weakness. By failing to recognize the importance of the family unit, child welfare law, in both its conception and its operation, undermines families' efforts toward restoration and reunification. Finally, it neglects a critical component of permanency for children, which is the continuity of relationships with people who are part of their family system, be they biological parents, aunts, grandparents, cousins, neighbors, or close family friends.⁶²

Applying a family system approach in child welfare proceedings would reinforce the legal application of family integrity unless the judge has sufficient evidence that family unity is no longer consistent with the child's health and safety. Moreover, the family system theory and the legal mandate of family integrity both explicitly reject recent calls for determining the "best interest of the child" prior to a formal court determination of parental unfitness.⁶³ Rather, the best interests of the child analysis is affirmatively incorporated into family integrity until the court has sufficient factual and legal basis to sever family integrity from the child's best interests.⁶⁴ This also helps to diminish the false

62. Brooks, *supra* note 60, at 958.

In large part, the belief of legal advocates that utilization of psychological theory will help isolate the underlying cause of family disruption fails to acknowledge a paradigm shift toward interactionism presently occurring in family theory (and in psychology in general). Instead, the predominant legal belief in the value of psychological theory regarding families appears to be rooted in the assumptions of a previous model.

Mulvey, *supra* note 25, at 54-55 (citations omitted).

63. Bruce A. Boyer & Steven Lubet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in The Child Welfare Wars*, 45 VILL. L. REV. 245, 256 (2000) (discussing attempts to establish the best interest of the child standard for court intervention prior to determinations of unfitness).

64. *Traxel*, 530 U.S. at 88 (Stevens, J., dissenting).

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S. at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

dichotomy between "parental rights" and "children's rights" by seeing both parents and children as part of the legal family unit, even if the child is temporarily out of the parent's custody, until the court affirmatively determines that the parent no longer can legally serve as parent.⁶⁵

3. THE BENEFITS OF USING THE VALUE-ADDED ANALYSIS

Consistent application of this value-added role of the court will result in multiple benefits for families. First, it will reduce inappropriate, seemingly benevolent discretion in a system that relies far more heavily than other courts on predominantly individualized, fact-based decision-making that lacks a coherent underlying theory of families.⁶⁶ Analysts of child protective proceedings have consistently

Id. If the child's immediate interests require separation from the parent, through careful planning and casework, the state can protect the child and family integrity. *See, e.g., In re Michael B.*, 604 N.E.2d 122, 131 (N.Y. 1992). The *Michael B.* Court stated:

[W]here a child has not been freed for adoption, the court must determine whether it is nonetheless appropriate to continue foster care temporarily The court is also statutorily mandated to consider the agency's plan for the child, what services have been offered to strengthen and reunite the family, what reasonable efforts have been made to make it possible for the child to return to the natural home, and if return home is not likely, what efforts have been or should be made to evaluate other options Finally, the court should consider the more intangible elements relating to the emotional well-being of the child, among them the impact on the child of immediate discharge versus an additional period of foster care.

Id. (citations omitted).

65. *Santosky*, 455 U.S. at 759 (holding that the state may not presume, at fact-finding stage of a parental rights termination proceeding, that the interests of the parent and the child diverge). But "family integrity" is not "family best interests." The former still relies on the predominant liberty interests of the parent (with, in some circumstances, the liberty interest of the child) while the latter introduces a third interest of the "family." As Mulvey warned, "whether the state would have constitutional grounds to infer and then to enforce the interests of an abstract, probably nonegalitarian, compact over the individual liberties of the involved parties presents a thorny issue." Mulvey, *supra* note 25, at 56-57.

66. Brooks, *supra* note 60, at 959 ("[Most judges] have no coherent mental health theory guiding their practice A great number of lawyers and judges simply rely on their own sensibilities or 'gut feelings' in child welfare cases."). *Troxel* presents a good example of this reliance on personal feelings; in explaining his reasoning for granting grandparent visitation, the Washington Superior Court judge below stated, "I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent'" *Troxel*, 530 U.S. at 69 (citation omitted). Later the judge added:

"I look back at some personal experiences We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it

recognized that the overwhelming majority of child protective proceedings involve the poor, and that minority families are disproportionately over-represented in those proceedings.⁶⁷ With the value-added role, courts will more likely minimize the state's arbitrary interference with these families' self-governance, avoiding interferences "that have more to do with the racial, religious or cultural preferences of the decision-maker than with legitimate concerns for the protection of the child."⁶⁸ Second, such a role will minimize what has been identified by Peggy Cooper Davis and Gautam Barua as the "sequentiality effect" of custodial decisions in child welfare cases.⁶⁹ As a result of sequentiality, custodial decisions made at one stage of a proceeding reinforce later custodial decisions, regardless of their innate correctness. An initial custodial error to leave a child within a family or to remove the child "is more likely to be maintained or exaggerated than reversed."⁷⁰ While sequentiality can be applicable in many kinds of litigation, it is magnified in custodial decisions by the child development principle that "custodial change becomes inherently and increasingly detrimental as the existing custodial arrangement becomes more longstanding,"⁷¹ and by some of the inherent extra-legal influences or

happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out."

Id. at 72 (citation omitted); see also Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 226-27 (1975).

67. Ramsey, *supra* note 52, at 27; see also RANDY HERTZ ET AL., 2 TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 41.02(b) (1991); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144-45 (1999); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2078 (1995). This is consistent with earlier findings. See Mulvey, *supra* note 25, at 58.

68. Boyer & Lubet, *supra* note 63, at 255. This article provides a fascinating and chilling analysis of late twentieth century American family integrity law in light of the nineteenth century *Mortara* case, noting in particular how due process alone cannot withstand contemporary definitions of best interests of the child without first honoring family integrity. See *id.*; see also Monrad G. Paulson, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 692, 696 (1966) ("Just who becomes beneficiaries of the court's good offices seems very largely dependent upon fortuitous factors or upon the exercise of discretion in the law enforcement processes.").

69. Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 145-46 (1995). See also Janet Weinstein's use of the Davis and Barua analysis in *Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAAMI L. REV. 79, 112-16 (1997).

70. Davis & Barua, *supra* note 69, at 146.

71. *Id.*

biases in child welfare proceedings.⁷² Cooper and Barua identified “status quo bias” and “skew in the assessment of risk” as major forces in applying sequentiality in child welfare cases.⁷³ They deduce that:

The status quo bias has potentially significant consequences in child welfare decisionmaking. The existence of status quo bias implies a tendency to maintain the current state against changes in either direction, even in a category of cases in which change would be optimal. To the extent that judges in child abuse cases are vulnerable to this bias, they will be inclined to continue an existing custodial arrangement, and they will be inclined to do so in at least some cases in which a custodial change is warranted.⁷⁴

Addressing “skew in the assessment of risk,” they identified two principal sources of skew: (1) problems of focus and emphasis, and (2) feedback vulnerabilities. The first includes a bundle of factors in child welfare cases that favor intervention: the very nature of the cases that charge parental maltreatment, the imbalance in resources between the state and the parent affecting the quality of evidence presented to the court, and the judges’ greater fear of harm if the child remains at home than if the child enters care.⁷⁵ The second, feedback vulnerabilities, magnifies the judge’s fear of failure to intervene:

Just as judges are more likely to learn of a regrettable failure to intervene than of a regrettable intervention, they are more likely to receive negative informal and media feedback as a result of a decision to leave a child in an allegedly neglectful or abusive home. In some communities there may be feedback in reaction to family interventions, but the specter of a headline announcing that a child has suffered injury or death as

72. *Id.* at 147 (observing that influences or biases are identified without “implying improper behavior on the part of the judge [but rather] acknowledge that rule systems are not sufficiently rigid to predetermine all cases and that factors not referenced in the rules will affect decisionmaking in those cases which are not predetermined by the terms of the governing rule system”).

73. *Id.* at 148-50. Status quo bias has been empirically identified in various contexts. Relevant for these purposes is the finding that choice is “motivated less by aversion to loss than by aversion to feeling, being, or seeming to be *responsible* for a negative outcome [P]eople feel more responsible for their actions than for their omissions.” *Id.* at 149.

74. *Id.*

75. Waldfogel also identified risk aversion as a barrier to reforming social service systems, particularly child welfare systems, “where the political costs of making a wrong move are very high.” Waldfogel, *supra* note 43, at 470.

a result of being returned to its parents looms more realistically for most judges and may cause some to deviate from the norm of unskewed decisionmaking.⁷⁶

Applying their theory of sequentiality, Davis and Barua found that “interim decisions are more likely to err on the side of intervention” and removal.⁷⁷ If the unintended effect of sequentiality results in the wrong children being temporarily removed in child welfares cases, the court then has a greater responsibility to assume the value-added role in order to rectify the imbalance created by sequentiality.⁷⁸

Finally, in addition to minimizing state intervention based on factors such as race and poverty and curbing the effects of sequentiality, consistent application of the value-added theory diminishes reliance on a flood of resources into the Family Court system as a prerequisite to fundamental change.⁷⁹ Fewer cases will be brought to court, and the

76. Davis & Barua, *supra* note 69, at 152 (citations omitted). In November 1995, Elisa Izquierdo was killed in New York by her mother. The case received national attention. David Van Biema, *Abandoned to Her Fate*, TIME, Dec. 11, 1995, at 32. Following this tragedy, many New York Family Court judges were reluctant to return children to their parents unless they were 100% convinced of the child’s safety, fearing the attention they would receive from the media if their decision was not correct. At the time of Elisa’s death, I was the Attorney-in-Charge of the Juvenile Rights Division of the Legal Aid Society which represented the vast majority of children in Family Court in New York City (including Elisa). In that capacity, I had numerous discussions with attorneys and judges about this fear. See also SPECIAL CHILD WELFARE ADVISORY PANEL, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 48 (2000) [hereinafter ADVISORY REPORT], available at <http://www.aecf.org/child/frontline.pdf> (last visited Mar. 14, 2002).

77. Davis & Barua, *supra* note 69, at 157.

78. Recognizing the sequentiality effect in some of the most highly contested and publicized child welfare cases reinforces this value-added theory for family court decision-making. This is evident in Boyer and Lubet’s discussion of the cases of Baby Richard and Elian Gonzalez, which are both examples of the sequential impact of the court’s failure to apply family integrity at initial stages of the proceedings; these cases resulted in protracted custody battles and the children’s stability being disrupted. Boyer & Lubet, *supra* note 63, at 258, 285.

79. Mulvey, *supra* note 25, at 59 (“One of the striking aspects of family court proposals is the reliance on adequately trained and qualified personnel and resources in order to handle family-based problems in a professional manner.”). Given the realities of how courts operate, this is an example of what Sarason terms “the myth of unlimited resources”:

Essentially, the general belief—general because of the number of people who hold it and because of the number of social problems which give rise to it—is that by an act of national will or resolve, accompanied of course by appropriately sized expenditures, we can train as many people as are necessary to meet a particular problem The belief is that by virtue of money one will be able to hire enough people to provide services to eligible people in the best way those services should be rendered I have never

cases that are brought will be handled more expeditiously and thoroughly. The potential of this assertion remains difficult for many Family Court practitioners and judges to believe. Without looking at current efforts in New York and elsewhere to reform Family Court, we are unable to assess the potential of a value-added analysis in achieving reform, nor can we determine whether the nature of current reform efforts reinforces or rejects application of the value-added role.

II. NEW YORK FAMILY COURT REFORM

A. *Building a Family Justice Program*

Since 1997, the New York State Unified Court System has embarked on an ambitious Family Justice Program (FJP) to develop court initiatives and legislative proposals “to address the justice needs of children and families in the New York State Family Court and Supreme Court.”⁸⁰ The first and overarching goal of the FJP was to take the final step toward establishing a fully unified Family Court system by creating a Family Division of the New York Supreme Court, the trial court of general jurisdiction in New York. As with other unified court proposals around the country, the FJP heralded this proposal as the key solution to simplifying the court structure and injecting “common sense” into court practice.⁸¹ That “common sense” was a recognition of the overlapping nature of legal problems affecting families and the inefficiencies of having multiple courts address those issues. Establishing a unified court system, unlike the other goals within the FJP, requires a state constitutional amendment that has failed to gain the necessary political support.⁸² The greatest portion of the FJP, therefore, is designed to be accomplished through administrative, rather than political, action. The

known a setting, old or relatively new, which did not complain that it had inadequate numbers to do the job in the way it was conceived best to do

....

Avoiding the problem of limited resources and holding to the belief in a predictable future are among the most potent factors influencing the creation and development of a setting, and their potency is increased in proportion to the extent that they are implicit or un verbalized.

SEYMOUR B. SARASON, *THE CREATION OF SETTINGS AND THE FUTURE SOCIETIES* 97, 99, 112 (1972).

80. JUDITH S. KAYE & JONATHAN LIPPMAN, *N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM INITIATIVE I*, at i (1997) [hereinafter FJP I].

81. *Id.* at 5.

82. John Caher, *Court Makeover High on Lawmakers' Agendas*, in *ALBANY TIMES-UNION*, 1999 LEGISLATIVE SURVIVAL GUIDE, <http://www.timesunion.com/capitol/survivalguide99/appeals.stm> (last visited Apr. 10, 2002).

FJP begins with an explicit recognition of the uniqueness of Family Court:

The reality is that Family Court—the court that decides society’s most difficult issues and has the most profound effect on its litigants’ lives—is not like any other court, and the challenge to improve the manner and speed with which it dispenses justice is similarly unique. By their very nature, Family Court cases are not necessarily defined by a single incident or transaction. Its judges are typically faced with an ever-changing scenario of family circumstances—even family members—and a family’s legal difficulties are rarely confined to a single docket in a single courthouse. Typical methods of case management ill suit the tangled nature of Family Court affairs, and overwhelming caseloads, inadequate resources and the large numbers of litigants without lawyers only add to the challenge.⁸³

The FJP that has been developed to escape this quagmire grows out of three interrelated strands of judicial reform efforts. The first is the sweeping national “drug court” movement, which generally offers non-violent, drug-addicted offenders the alternative of court-ordered drug treatment in order to become clean and sober, and to earn dismissal of the criminal charges.⁸⁴ These courts are considerably less adversarial, focusing more on dispositional results than adjudicating offenses, with the district attorney, defense counsel, judge, and treatment providers working as a team toward the goal of the defendant’s sobriety and lawful behavior.⁸⁵ The financial and human savings have been substantial, with participants having lower drug usage rates and decreased criminal recidivism and a concomitant savings on incarceration and treatment.⁸⁶ The “experimentalist” aspects of the criminal drug court model (e.g., legislative identification of a problem followed by local experimentation with collaboratively-developed and pooled information fueling that experimentation) have been identified as key elements to this methodology for systemic reform.⁸⁷ New York has been actively

83. N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM INITIATIVE III, at 1 (2001) [hereinafter FJP III].

84. Wolf, *supra* note 5, 8-10.

85. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 852 (2000).

86. Susan K. Knipps & Greg Berman, *New York’s Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, N.Y. ST. B.J., June 2000, at 8, 9.

87. Dorf & Sabel, *supra* note 85, at 834.

pursuing this model, developing more than thirty treatment courts throughout the state.⁸⁸ The FJP explicitly acknowledges its intent “to apply the insights gained from these criminal court innovations to the Family Court.”⁸⁹

The second strand supporting the creation of the FJP is the role of the National Council of Juvenile and Family Court Judges (National Council), which has spearheaded an intensive agenda to reform Family Court practice, especially in the area of child welfare.⁹⁰ The National Council’s reform efforts have built on changes in federal law that began in earnest with the implementation of the Adoption Assistance and Child Welfare Act (AACWA) in 1980.⁹¹ The AACWA required state child welfare systems to make “reasonable efforts” to prevent children from coming into foster care and to provide services and assistance to children and parents in order to end foster care drift and ensure permanency for children through reunification with their parents or, when appropriate, adoption by another family.⁹² With this mandate came increasing responsibility by the presiding judge in Family Court to ensure that the “reasonable efforts” at prevention and reunification were actually being made by the child welfare system.⁹³ Court responsibility shifted from solely finding parents guilty of neglect or abuse and deciding whether to place the children in care, to supervising the provision of services and assistance to the families who appeared in court.⁹⁴ The National Council spearheaded the effort to encourage judges to embrace this expanded judicial review authority.⁹⁵ In addition, the National Council began to advocate for the development of Family Court judges as judicial leaders. Underlying this perspective of

88. Knipps & Berman, *supra* note 86, at 8-9.

89. FJP I, *supra* note 80, at 10.

90. *See infra* note 95.

91. *See supra* note 51 and accompanying text.

92. *See supra* note 50 and accompanying text.

93. Letter from Judge Leonard P. Edwards, Presiding Judge, Juvenile Court, to Richard O’Neil, Director, Department of Family and Children’s Services, San Jose, California (Dec. 6, 1989), in NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES app. C at 167 (1995) [hereinafter RESOURCE GUIDELINES] (describing the role of the Family Court judge to determine whether the Department has made reasonable efforts to enable children to remain home safely with their families and the consequences of the Department’s failure to do so).

94. Howard A. Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L.Q. 765, 769 (1999).

95. RESOURCE GUIDELINES, *supra* note 93, at 18. The *Resource Guidelines* are considered the “bible” of judicial decision-making for child welfare cases. Of course, the National Council has long struggled with Family Court reform. *See, e.g.*, GORDON, *supra* note 26 (a monograph developed to train Family Court judges under the auspices of the National Council, formerly the National Council of Juvenile Court Judges).

judicial leadership is the belief that Family Court is going to function effectively and with successful outcomes only if Family Court judges embrace the leadership skills necessary to be vocal and creative systemic managers and productive adjudicators.⁹⁶ Leadership training is increasingly incorporated into the Council's publications and recommendations.⁹⁷ Judges who personify this new leader frequently lecture and publish about the effectiveness of this role.⁹⁸ They also travel the country, encourage other judges to assume highly visible community roles, speak out on the needs of Family Court to lawmakers, the media, and the public, and assume ever greater administrative oversight of service providers connected to the court.⁹⁹ This role harkens back to the earliest days of Family Court when many of the Progressive era reformers believed that a key role for the judge was to be a leader in developing and supervising the provision of community resources to children.¹⁰⁰ Not surprisingly, this expansive role has not been uniformly embraced. For many judges whose formative legal training avowed a narrow adjudicatory role, the incremental judicial review requirements of the AACWA, and more recently, the Adoption and Safe Families Act (ASFA), are already viewed distrustfully. A greater administrative and managerial role is even more unsettling.¹⁰¹

The final strand is the local convergence of the first two strands in New York's Chief Judge, Judith Kaye. Judge Kaye has embraced and championed the role of judge as hands-on leader.¹⁰² Working in

96. See, e.g., HARDIN, *supra* note 44, at 90.

97. See, e.g., PERMANENCY PLANNING FOR CHILDREN DEP'T, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, TECHNICAL ASSISTANCE BULLETIN: JUDICIAL LEADERSHIP & JUDICIAL PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1998), http://www.pppncjfcj.org/TA_Bulletins/Number_6/TA-5_Body.pdf.

98. Edwards, *supra* note 30, at 1.

99. In addition to Judge Leonard Edwards, *supra* note 93, Judge Richard Fitzgerald of Louisville, Kentucky, Judge David Grossmann of Cincinnati, Ohio, and Judge Nancy Salyers of Chicago, Illinois, are examples of judges who exemplify this judicial role. Systemic reform, however, may not rely solely on such leadership. See Mulvey, *supra* note 25, at 50.

100. McDonald, *supra* note 27, at 7. This community role was never entirely abandoned. See GORDON, *supra* note 26, at 5, 10; KAHN, *supra* note 34, at 122-23.

101. In April 1998, the New York State Permanent Judicial Commission on Justice for Children sponsored a two-day forum for Family Court Judges entitled "Judicial Leadership in Child Welfare." As a member of the Commission and of the forum planning committee, I knew that the forum was intended to reinforce the idea that judges needed to become judicial leaders if significant improvements for children in child welfare proceedings were going to be achieved. During the course of the forum, however, some judges either openly or privately disagreed with the premise that this was an appropriate role for a Family Court judge.

102. E.g., Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13.

conjunction with the state courts' research and development arm, the Center for Court Innovation, she has created a wide range of court alternatives—community courts, drug treatment courts, domestic violence courts—to address, through judicial structures, deep seated societal issues which frequently result in court intervention. In relation to Family Court reform, for the last dozen years, Judge Kaye has chaired the New York State Permanent Judicial Commission on Justice for Children (Commission), a quasi-think tank, quasi-action network of statewide leaders grappling with children's issues.¹⁰³ The Commission has spearheaded specific efforts, such as the creation of children's centers in courts and the widespread dissemination of information on children's health issues to Family Court personnel, but it has also considered the steps necessary to create lasting reform in Family Court.¹⁰⁴ The Commission embarked on a series of research activities that inspired some of the components of the FJP.¹⁰⁵ Moreover, it has been designated to administer the federally-funded State Court Improvement Project for the court system.¹⁰⁶ Judge Kaye's commitment to Family Court reform also resulted in a resolution adopted by the Conference of Chief Justices that established a Statement of Principles Regarding Children and Families (Statement).¹⁰⁷ The Statement encompassed provisions urging that children and family issues be given high priority within state court systems.¹⁰⁸ Most compelling, though, was the recognition by the chief justices that "our personal commitment and leadership" is needed to ensure that children and families are best served by the court system.¹⁰⁹

These three strands of judicial reform—prototypical drug treatment courts, national Family Court judicial leadership, and a Chief Judge determined to reform Family Court—set the stage for the FJP proposals. Before turning to the specifics of the FJP proposals, it is necessary to review the context in which those proposals were made. Reformers, while always imagining successful systemic change, cannot be

103. *The Permanent Judicial Commission on Justice for Children*, <http://www.courts.state.ny.us/pjcc/index.htm> (last visited Apr. 23, 2002).

104. *Id.*

105. *See, e.g.*, 1997 VERA STUDY, *supra* note 56; PERMANENT JUDICIAL COMM'N ON JUSTICE FOR CHILDREN, FIVE YEAR REPORT, 9-12 (1996), <http://www.courts.state.ny.us/pjcc/bklt2.pdf>.

106. *Id.* at 9.

107. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CONFERENCE OF CHIEF JUSTICES, RESOLUTION 21: STATEMENT OF PRINCIPLES REGARDING CHILDREN AND FAMILIES (2001), http://www.pppncjfcj.org/html/chiefjustices_ccj_resolutions.html (last visited Mar. 14, 2002). Judge Kaye served as the Chair of the Courts, Children and Family Committee that proposed the resolution.

108. *Id.*

109. *Id.*

successful unless they reflect the complexity of the entity being changed and the barriers to achieving reform. This is true with the Family Court and its component parts as it is with any other complex organization.¹¹⁰ What follows is a brief description of child welfare practice in New York City Family Court at the turn of the twentieth century.

B. Current Family Court Practice

In 1999, two years after the initial phase of the FJP was introduced and during the FCTP's second year in existence, 31,973 original child protective petitions and extension of placement child protective petitions were filed in New York City.¹¹¹ While the total number of children in foster care continued its steady decline since the creation in 1996 of the Administration for Children's Services (ACS),¹¹² dipping below 40,000 for the first time in decades, approximately 12,700 children were subject to new child protective or voluntary placement proceedings, which could result in foster care, in 1999.¹¹³ Children still remained in foster care for an average of four years, significantly above the national average.¹¹⁴ In thousands of child protective cases heard in Family Court in 1999, no attorney was assigned to represent the parent or other adult respondents in the cases, despite constitutional and statutory mandates requiring indigent parents to be assigned counsel.¹¹⁵ Child protective cases where counsel was assigned took on average 220 days to reach disposition.¹¹⁶ Most of the attorneys who represented these parents carried extremely heavy caseloads, frequently juggling over one hundred cases at a time.¹¹⁷ Over forty percent of the attorneys spent, on average, fewer than five hours on out-of-court work—such as interviewing and counseling clients, pursuing discovery, preparing for hearings, proposing dispositional alternatives, or negotiating settlements—on cases that

110. Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497, 507 (2000).

111. Aff. of Jane M. Spinak in Support of Plaintiff's Motion for Preliminary Injunction ¶ 284, N.Y. County Lawyers' Ass'n v. State of New York (N.Y. Sup. Ct. 2001) (No. 102987/00) [hereinafter Spinak Affidavit].

112. ACS is an independent child welfare agency within New York City government.

113. Administration for Children's Services, *ACS Update Annual Report 2001: Five Year Trends*, at http://www.ci.nyc.ny.us/html/acs/pdf/update_5year.pdf (last visited March 18, 2002).

114. *Unfinished Business*, *supra* note 16, at 10.

115. N.Y. FAM. CT. ACT § 262(a)(iv) (McKinney 1999); Spinak Affidavit, *supra* note 111, ¶¶ 284-86.

116. *Id.* ¶ 256.

117. *Id.* ¶¶ 250-52.

averaged over seven months to reach a final disposition.¹¹⁸ Judges assigned to determine these cases in recent years may hear between thirty and seventy cases each day.¹¹⁹

Observing Family Court cases during this same year, the Special Child Welfare Panel (Marisol Panel) of national child welfare experts, created as part of the settlement in *Marisol v. Giuliani*¹²⁰ to monitor the reform plans and practices of ACS, reported that a significant impediment to reforming child welfare practices in New York was the role of the Family Court.¹²¹ The Marisol Panel highlighted nine major observations about Family Court practice in New York City that have a “profound impact on the prospect of children and families in New York’s child welfare system, and the likelihood for success of ACS’s reform efforts”.¹²²

- 1) Pervasive delay fueled by repeated adjournments without substantive determinations being made;
- 2) Insufficient compliance with basic norms of professional behavior (e.g., caseworkers being ill prepared or failing to attend court proceedings);
- 3) Vast amounts of time spent waiting because most cases are scheduled for 9:30 a.m.;
- 4) Insensitivity to families who have no privacy to consult with caseworkers or attorneys or, even more disturbing, the routine practice of court insiders streaming through the courtroom during proceedings;
- 5) A woefully inadequate system of representation for parents;
- 6) An unusually excessive focus on parental behavior and guilt rather than the child’s needs and best interests and the family’s capacity for reunification;
- 7) Insufficient attention to risk assessment as a guide to determining the current capacity of parents to care for their children;
- 8) Insufficient attention to critical legal dictates including the detailed and mandatory AACWA and ASFA reasonable efforts and permanency requirements; and,
- 9) Judges seeing themselves as powerless victims of the overall system, unable to hold the child welfare system accountable or

118. *Id.* ¶ 255.

119. JULIA VITULLO-MARTIN & BRIAN MAXEY, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES 1 (Jan. 2000) [hereinafter 2000 VERA STUDY]

120. 185 F.R.D. 152, 154-55 (S.D.N.Y. 1999).

121. ADVISORY REPORT, *supra* note 76, at 44-48.

122. *Id.* at 44.

to ensure justice to children and families, rather than as powerful change agents.¹²³

While some of these issues are tied to procedural inefficiencies and insufficient resources, the Marisol Panel was far more concerned with the underlying cultural meaning of these observations. A clear message is sent to families when they are kept waiting all day in overcrowded and inhospitable courthouses only to have their cases adjourned repeatedly because the professionals responsible for these cases are not prepared or present, or because they have ignored the earlier orders of the court. Such circumstances suggest that neither the court nor the other component parts of the child welfare system is committed to achieving stability or permanency for them.

These alarming observations were, unfortunately, consistent with multiple recent studies addressing, in part, the role of Family Court in the resolution of child welfare issues.¹²⁴ The Heidt study, for instance, noted the lack of continuity among caseworkers and attorneys in child welfare cases, limited preparation for hearings or exploration of out-of-court resources and services, little formal lawyering during hearings, failure to file petitions in a timely manner, frequent and lengthy adjournments, and failure to comply with court orders.¹²⁵ Delving more deeply into what actually occurs in court, the 1997 *Vera Study* concluded that in the key area of determining whether agencies are making "reasonable efforts" to prevent or terminate foster care placement and aid in family reunification, scant inquiry into these efforts was made in over half the cases.¹²⁶ This study identified reasonable efforts in four categories: family visitation, placement alternatives,

123. *Id.* at 44-45. For a discussion about the Marisol Panel's recognition of the potential of model courts assisting in court reform, see *infra* note 184.

124. I have chosen to focus on studies done during the second half of the 1990s during the same period that Family Court reform was being proposed in New York State. Some of these studies were commissioned by the Permanent Judicial Commission on Justice for Children in order to assist in the statewide reform effort. See, e.g., 2000 VERA STUDY, *supra* note 119; 1997 VERA STUDY, *supra* note 56; Jane Heidt, Survey of Key Child Welfare Actors in the Court (Mar. 1, 1996) (unpublished study, on file with author); see also FUND FOR MODERN COURTS, THE GOOD, THE BAD AND THE UGLY OF THE NEW YORK CITY FAMILY COURT (1997); MARK GREEN & CHILD PLANNING & ADVOCACY NOW (C-PLAN), JUSTICE DENIED: THE CRISIS IN LEGAL REPRESENTATION OF BIRTH PARENTS IN CHILD WELFARE PROCEEDINGS (2000) [hereinafter JUSTICE DENIED].

125. Heidt, *supra* note 124, at 1-2. Heidt's study was based on a state-wide survey of key actors in child welfare cases except for judges; every county but one responded with a seventy-five percent response rate. *Id.*

126. 1997 VERA STUDY, *supra* note 56, at 21; see also *supra* notes 56-57 and accompanying text.

services, and permanency planning.¹²⁷ In general, there was inquiry *into at least one* of these factors in fewer than half the cases, and only thirty-eight percent of the judges asked about compliance with their orders and their outcomes.¹²⁸ In investigating the lack of counsel for parents in Family Court proceedings, the *Justice Denied* study situated this lack of counsel in the larger realm of Family Court dysfunction.¹²⁹ As one Family Court judge noted, "if representation is inadequate, then the entire court is inadequate. The court culture accepts delays, adjournments, and being unprepared With so few resources, sloppiness is accepted."¹³⁰

C. *The Challenge of FJP Reform Efforts*

The problems facing Family Court appear to fall into two categories. The first—and most easily identifiable—encompasses the congestion, delay, and lack of resources that typically compel reform efforts. The second is even more elusive and formidable. What the Marisol Panel and other observers identified was a cultural crisis in the court, exacerbated by the overwhelming numbers, but not necessarily a product of them: the court and its participants seem to have lost their way. Neither legal nor social service mandates are being routinely accomplished in a setting that fails to display sufficient understanding of or sensitivity to the needs and interests of the families being served.¹³¹ The FJP must be able to address both categories if it is truly a blueprint for systemic reform.

The FJP has seen three phases since 1997 that have included recommendations related to child welfare proceedings. In addition to the general call for a unified court with a family division, Phase I declared that to respond to the "epidemic" in child welfare cases, "the court system is taking the lead through a targeted approach to neglect and abuse," by introducing the idea of "specialized treatment of

127. 1997 VERA STUDY, *supra* note 56, at 21.

128. *Id.* at 21-22.

129. JUSTICE DENIED, *supra* note 124, at 34.

130. *Id.*

131. Gordon wrote:

A court can project concern about the individuals coming before it in countless other ways, without sacrificing objective standards in its decision-making role. At each point of contact, from the notice that a witness or accused receives, to his/her reception upon entrance to the courthouse, to the waiting rooms, to the timeliness of proceedings, to the procedure followed in the fact finding and any dispositional hearing, to the concern mixed with firmness of any probationary period, and so on, the court can demonstrate respect and concern for each individual involved.

GORDON, *supra* note 26, at 3.

cases.”¹³² Overall, this specialized treatment was intended to result in more efficient, expeditious and comprehensive adjudication of cases.¹³³ These goals are reinforced in Phase II, where the change “reaches into the heart of Family Court operations”¹³⁴ and “fundamentally changes the way the court conducts its business in order to ensure that the justice needs of children and families are met on a daily basis.”¹³⁵ For child welfare proceedings, this fundamental change encompassed two strategies. The first—the predominant strategy in Phases I and II—continued the traditional court reform paradigm of trying “to reduce backloads and expedite handling of all proceedings” by creating more efficient judicial mechanisms for case resolutions.¹³⁶ The second was the introduction of Family Treatment Courts intended “in appropriate cases [to allow] parents [to] receive the treatment necessary for family preservation and unification.”¹³⁷ The introduction of Family Treatment Courts heralded a melding of traditional reform mechanisms and something more: an affirmative commitment “to provide coherent, integrated responses to the needs of drug-addicted parents and their children.”¹³⁸ This substantive commitment to family unification was reinforced by the methodology chosen to accomplish the goal.

As described earlier, the Family Treatment Court—New York’s first model court effort—reflects the basic model court standards created by the National Council of Juvenile and Family Court Judges.¹³⁹ The court started with the premise that the judge assumes an active leadership role to coordinate the creation of the procedures the court will use, to identify and secure the services that will be available to the participants, and to monitor the cases from beginning to end through case conferences and, oftentimes, frequent court appearances.¹⁴⁰ The judge, nevertheless, is part of a case team that includes all of the participants in the system who are working together to determine the goals of the court and the management processes to accomplish those goals.¹⁴¹ Such team case management recognizes the socio-legal

132. FJP I, *supra* note 80, at 9.

133. FJP III, *supra* note 83, at Introduction.

134. FJP II, *supra* note 41, at 5.

135. *Id.* at i.

136. FJP III, *supra* note 83, at 4.

137. FJP I, *supra* note 80, at 11.

138. *Id.* at 10.

139. *See infra* notes 151-53 and accompanying text.

140. MARY MENTABERRY, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, OJJDP FACT SHEET NO. 90: MODEL COURTS SERVE ABUSED AND NEGLECTED CHILDREN 1 (Jan. 1999).

141. Wolf, *supra* note 5, at 7. In the case of the treatment court, this included creating the criteria for screening cases for eligibility, determining whether admission to the treatment court would require waiving certain due process rights, and having court

complexity of family crises, the inability of traditional adversarial processes alone to address continuing family dynamics, and the need for multi-disciplinary problem solving approaches.¹⁴² At the same time, all of the participants have to assess their professional ethical obligations to determine how their clients might be affected by participation in a model court that has different requirements than the rest of the court system.¹⁴³ These requirements include early and active intervention by the court, access to and acceptance of appropriate services, and continuous monitoring by the case management team led by the presiding judge.¹⁴⁴

The inclusion of the Family Treatment Courts and the other model courts in the FJP introduced a potentially more radical approach to reform through their substantive commitment to the family and their procedural mechanisms to achieve the goals of the value-added role I earlier defined for the court. FJP Phase III expanded the use of these model courts and others, such as dedicated domestic violence parts throughout the state.¹⁴⁵ Preliminary data suggests that some of the New York model courts contain the kernels for systemic reform.¹⁴⁶ What

personnel take on some of the case management duties usually performed by child welfare agency personnel. *Id.*

142. Weinstein, *supra* note 69.

143. Wolf, *supra* note 5, at 11. The treatment court was created while I was Attorney-in-Charge of the Juvenile Rights Division of the Legal Aid Society (JRD), which represents children in most of the child welfare cases in New York City. Extensive discussions were held at JRD about the role of the child's lawyer in a treatment part that minimizes the adversarial process and requires parents and children to waive certain procedural rights. Participants also worried about developing the skills for new methods of problem-solving, such as case conferencing or mediation, that model courts embrace.

144. Intensive and early intervention is intended to capitalize on the family crisis that precipitated agency and then court action by, in essence, acting before it is too late. This is in marked contrast to the lack of supervision by the court in the studies discussed *supra* notes 119-30 and accompanying text.

145. FJP III, *supra* note 83, at i-iv.

146. In the New York County Model Court in 1999, four times as many child protective cases reached disposition within ninety days as compared to the regular child protective court parts. Sara P. Schechter, *Family Court Case Conferencing and Post-Dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System*, 70 *FORDHAM L. REV.* 427, 428 n.4 (2001). By the end of six months, the Model Part had reached disposition in almost 93% of its cases while only 38.4% of the rest of the county's child protective cases had reached disposition. *Id.* at 428. There were some other significant outcomes differences as well during that year: 46% of children were placed compared to 58% in the rest of the child protective parts, *id.* at 430 n.8; 24% of the cases were either dismissed, withdrawn, or adjourned in contemplation of dismissal compared to 13%, *id.* at 430 n.10; and the median stay in foster care was only 4.6 months in 1999 compared to the twenty-seven month length of stay calculated in 1998 for the rest of New York City. *Id.* at 430. Nevertheless, the number of children released to their parents or other relatives was almost identical in the Model Court and the rest of the child protective court parts. *Id.* at 430 n.9. For data from the

transforms those kernels into fields (rather than hothouse strains that fail outside their rarified atmosphere) will have to be their substantive goals, not their procedural mechanisms. A review of the current nationwide model court efforts, however, provides only tentative optimism that these substantive value-added goals are being pursued.

III. MODEL COURTS NATIONWIDE

A. Learning by Experience

To consider whether model courts have the potential to assume a "value-added" role for children and families, I have reviewed what the courts say to the public about their efforts. These descriptions provide a starting point for analyzing what the courts themselves state they are trying to accomplish and whether that includes the value-added role that I have identified.¹⁴⁷ The National Council of Juvenile and Family Court Judges' Permanency Planning for Children Department (NCJFCJ/PPCD) has created a web site that highlights the Child Victims Act Model Courts Project, which has been funded by the U.S. Department of Justice's Office of Juvenile Justice & Delinquency Prevention (OJJDP).¹⁴⁸ Each of the model courts has a profile on the web site that highlights, in varying degrees, its background, initial goals (with successes and failures), current goals, lessons learned, and advice to other courts.¹⁴⁹

FCTP, see *supra* notes 5-19 and accompanying text, and *infra* notes 186-93 and accompanying text.

147. In a forthcoming article, I will examine whether some of the model courts have accomplished the goals they are espousing and whether those goals reflect fundamental change.

148. Permanency Planning Dep't, Nat'l Council for Juvenile & Family Court Judges, *Victims Act Model Court Sites* [hereinafter 2000 STATUS REPORT], http://www.pppncjfcj.org/html/model_courts.html (last visited Apr. 12, 2002). Ironically, the title of the Act is in sharp contrast to the spirit of the endeavor, which does not view children as "victims" but rather as in need of assistance so that they can safely remain part of their families or, if that is not possible, in another safe and permanent place. Note that the model court web site has changed since the writing of this Article; while the web site currently posts data for 2000, this Article primarily cites data from the 1999 web site, which is now compiled into an Adobe Acrobat document and available on-line. See *supra* note 155.

149. There are currently twenty-two model courts with accessible information posted on the Victims Act Model Court web site: Alexandria, Virginia; Buffalo, New York; Charlotte, North Carolina; Chicago, Illinois; Cincinnati, Ohio; Des Moines, Iowa; El Paso, Texas; Honolulu, Hawaii; Indianapolis, Indiana; Louisville, Kentucky; Los Angeles County, California; Miami, Florida; Nashville, Tennessee; Newark, New Jersey; New Orleans, Louisiana; New York, New York; Portland, Oregon; Reno, Nevada; Salt Lake City, Utah; San Jose, California; Tucson, Arizona; and Washington,

In compiling this information, the model courts have provided Family Court judges and practitioners nationwide with valuable information about their intentions, their efforts to realize those intentions, and their reflections on those efforts.¹⁵⁰ Given the range of jurisdictions serving as model courts, no jurisdiction can simply dismiss the lessons of the model courts as irrelevant because of demographics. On the contrary, the similarities that many of the model courts experience, provide useful information, regardless of their demographics. By willingly discussing what have been labeled “stumbling blocks” to accomplishments on the court web sites, the model courts have acknowledged the complexity and difficulty inherent in any reform effort. Equally important for an analysis of whether the model courts have value-added potential is what the model courts choose to identify as their substantive goals and the impact of those choices.

The model courts initiative is described by its funder, OJJDP, as “a nationwide effort to improve how courts handle child abuse and neglect cases, [that] is helping children spend less time in foster care and resulting in earlier resolution of cases in dependency courts.”¹⁵¹ The model courts are part of the larger effort by the NCJFCJ/PPCD “to educate judges and other practitioners on the need to expedite secure safe permanent placements for all maltreated children, either by making it possible for them to safely stay with or return to their own families or by finding them safe adoptive homes.”¹⁵² The model court description also includes other key elements seen as essential for success: interdisciplinary training and technical assistance for all youth-serving professionals using the NCJFCJ’s *Resource Guidelines* as a blueprint for improving court practice; identifying “lead” judges to mobilize all the relevant players within their jurisdictions; developing programs that can be seen as easily replicable in other jurisdictions; piloting innovative alternative dispute resolution methods; and sharing information locally and nationwide through enhanced data systems.¹⁵³

A number of issues are immediately apparent when the profiles of the model courts are reviewed. First is the recognition by every model court of the difficulty of achieving systemic change. Second is the

D.C. *Id.* Zuni, New Mexico is also a model court site but does not have posted information as of January 2002. *Id.*

150. Whether the court has actually done what it says it meant to do and/or achieved its intentions cannot be analyzed through its words alone, but requires qualitative analysis.

151. MENTABERRY, *supra* note 140, at 1.

152. *Id.* This description of the model courts is fully consistent with the value-added role for Family Court as it clearly incorporates the basic belief in family integrity into its core.

153. *Id.*

emphasis on procedural goals that address administrative and judicial efficiency. Third is the paucity of discussion by many of the model courts around substantive goals in general and, in particular, goals that reinforce the value-added role of Family Court that is so clearly present in the blueprint *Resource Guidelines* that every model court is using.¹⁵⁴

Each model web site contains sections on lessons learned and advice to other courts. Many of the findings in these sections are so consistent from court to court that they provide the best overall framework for analyzing each court's difficult experience in managing change. Most of the courts recognized that full cooperation, collaboration, and communication among all the stakeholders in the family court and child welfare systems are essential change elements. This requires every part of the system to work together to identify issues, share information, and try solutions. For systems that have rarely made these efforts, patience for outlasting resistance to change then becomes a crucial component. All of the courts became aware of how long change processes and reform efforts can take.¹⁵⁵ The courts consistently identify how additional information can assist the court in the change process. Information may be data collection,¹⁵⁶ sharing ideas locally or with other model courts,¹⁵⁷ keeping better records,¹⁵⁸ developing consistent practice guidelines,¹⁵⁹ or meeting regularly.¹⁶⁰

154. See *infra* note 183 and accompanying text.

155. The model court web site for Cincinnati, Ohio declares: "Additionally it is a challenge to foster an environment of change when you are faced with resistance due to well-entrenched perceptions and practices." PERMANENCY PLANNING DEP'T, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, TECHNICAL ASSISTANCE BULLETIN: CHILD VICTIMS ACT MODEL COURTS PROJECT STATUS REPORT 1999 (Christine L. Bailey et al. eds., 2000) [hereinafter 1999 STATUS REPORT], http://www.pppncjfcj.org/pdf/model_court_status_report.pdf (last visited Apr. 11, 2002).

156. Salt Lake City, Utah: "Of primary importance is the need to define the data so that the Model Court can compare the information compiled and accurately report its status." *Id.* at 161.

157. San Jose, California: "We have learned that most Model Courts have excellent programs going and that each does them in its own way. We have learned that we can 'steal' ideas from other court systems, but that we have to adapt them to our own environment." *Id.* at 174.

158. Chicago, Illinois: "Keep records! You can learn a lot about your court, what works and what needs to be fixed, by keeping track of cases in a systemic way." *Id.* at 57.

159. Louisville, Kentucky: "Courts should develop guidelines and expectations for guardian *ad litem* practice with required continuing legal education." *Id.* at 100.

160. Buffalo, New York: "Make sure that you include a wide group of stakeholders and involve them as early as possible in the process. Hold regular stakeholders meetings." *Id.* at 35.

B. The Focus on Procedural Reform

Overwhelmingly, these model courts show a desire to achieve administrative and procedural reform. Jurisdictions developing initial goals between 1995 and 1999 and additional goals in 2000 all highlighted their administrative and procedural goals. These included developing information systems,¹⁶¹ improving hearings or other court administrative processes,¹⁶² creating a unified Family Court,¹⁶³ and incorporating alternative dispute resolution processes into child welfare proceedings.¹⁶⁴ A vast majority of the model courts identified training and collaboration as essential for achieving all of the other goals.¹⁶⁵ Even the goals that could be seen as more substantive in nature—facilitating adoption—utilized the language of efficiency and effectiveness to describe the efforts.¹⁶⁶ This parallels many earlier court reform efforts.¹⁶⁷

The predominantly procedural focus of the model court reforms, combined with the complexities the courts identified in working with stakeholders to accomplish any meaningful change, present a significant challenge to achieving substantive goals. When the model courts address substantive goals, some inferences can be drawn by what goals they identify or achievements they highlight. The substantive goal that clearly engages most of the courts is adoption. All but one of the model courts has posted the number of adoptions completed within a set time frame.¹⁶⁸ In contrast, only eight of the courts count the number of family

161. Buffalo, New York, *id.* at 25; Charlotte, North Carolina, *id.* at 46; Cincinnati, Ohio, *id.* at 69; El Paso, Texas, *id.* at 74, 80; Miami, Florida, *id.* at 108; New Orleans, Louisiana, *id.* at 200; Portland, Oregon, *id.* at 144; Reno, Nevada, *id.* at 156; San Jose, California, *id.* at 175; and Tucson, Arizona, *id.* at 179.

162. Charlotte, North Carolina, *id.* at 41; New Orleans, Louisiana, *id.* at 200-01; Newark, New Jersey, *id.* at 129, 138; Portland, Oregon, *id.* at 144; and San Jose, California, *id.* at 170.

163. El Paso, Texas, *id.* at 80; New Orleans, Louisiana, *id.* at 198; Portland, Oregon, *id.* at 149; and San Jose, California, *id.* at 175.

164. Buffalo, New York, *id.* at 25; Charlotte, North Carolina, *id.* at 39; Chicago, Illinois, *id.* at 48; Cincinnati, Ohio, *id.* at 63; El Paso, Texas, *id.* at 80; Indianapolis, Indiana, *id.* at 189; Louisville, Kentucky, *id.* at 100; Miami, Florida, *id.* at 104, 108; Nashville, Tennessee, *id.* at 113; Newark, New Jersey, *id.* at 129; New Orleans, Louisiana, *id.* at 200; Portland, Oregon, *id.* at 143; Reno, Nevada, *id.* at 151; Salt Lake City, Utah, *id.* at 161; San Jose, California, *id.* at 169; and Tucson, Arizona, *id.* at 179.

165. All of the sites except Los Angeles, California explicitly identified training and collaboration.

166. Buffalo, New York includes an extensive description of the procedural changes necessary to facilitate adoptions. *Id.* at 29-32.

167. See Scheiber, *supra* note 42, at 2060 n.30.

168. Los Angeles, California did not include this statistic. 1999 STATUS REPORT, *supra* note 155, at 190.

reunifications during the same time frame.¹⁶⁹ Expediting adoptions is the explicit goal of eight courts, while finding reunification goals is more elusive.¹⁷⁰ San Jose, California and Chicago, Illinois developed mission statements that recognize both child protection and family preservation values.¹⁷¹ They equally share a more nuanced recognition of the primacy of family integrity by focusing efforts on prevention and reunification.¹⁷² El Paso, Texas, explicitly set as a goal reunification efforts called "Familias Primero" to use family group conferencing concepts to strengthen families.¹⁷³ Miami, Florida, began with the understanding that family reunification was a primary goal and actually had to accept that not meeting other permanency goals would not be considered failures.¹⁷⁴ In establishing a drug court, Reno, Nevada, sought "to assist in rehabilitation and reunification efforts directed at families affected by drug abuse."¹⁷⁵ Other courts are less explicit or address family integrity issues much later in their processes. For example, in developing a drug treatment court as a 2000 goal, Charlotte, North Carolina, identified lack of treatment as diminishing the chances

169. Charlotte, North Carolina, *id.* at 38; Cincinnati, Ohio, *id.* at 59; El Paso, Texas, *id.* at 70; Honolulu, Hawaii, *id.* at 81; New Orleans, Louisiana, *id.* at 195; Newark, New Jersey, *id.* at 126; Reno, Nevada, *id.* at 150; and Tucson, Arizona, *id.* at 177.

170. Expediting adoptions is an explicit goal of Buffalo, New York, *id.* at 31; Cincinnati, Ohio, *id.* at 63; Louisville, Kentucky, *id.* at 100; Newark, New Jersey, *id.* at 129, 138; Portland, Oregon, *id.* at 144; Reno, Nevada, *id.* at 151; and Salt Lake City, Utah, *id.* at 163.

171. Chicago, Illinois: "To protect every child's right to a safe, permanent, nurturing home and to strengthen families in crisis, treating all with dignity, respecting diversity, and valuing each child as our own." *Id.* at 51. San Jose, California: "To protect children, preserve families and provide permanency for children while treating all with dignity, respecting diversity, and valuing each child as our own." *Id.* at 169.

172. For example, Chicago, Illinois, explicitly identifies on-site availability of services as providing "the family with the optimum chance for reunification where appropriate." *Id.* at 54. San Jose's creation of a drug court developed, in part, out of the recognition that substance abuse services were not available for mothers with their children. *Id.* at 171. Given that the efforts of Cincinnati, Ohio's Hamilton County Juvenile Court occurred much earlier, I am not including that model court in a comparative discussion. See Hardin, *supra* note 44.

173. El Paso, Texas: "Although family group conferencing was originally developed as a diversion strategy, the El Paso Model Court intends to expand the concept to reunify families as part of a plan to strengthen family structures after legal case closures." 1999 STATUS REPORT, *supra* note 155, at 76.

174. Miami, Florida: "The Model Court team reaffirmed success as providing permanency on a timely basis, and acknowledged that permanency is not always reunification and that sometimes—despite skilled social work intervention and legal representation—parents are unable to resume their parental role." *Id.* at 106.

175. Reno, Nevada: "The Family Drug Court Program utilizes a strength-based approach in helping families develop and strengthen the skills necessary to develop responsible, drug-free and alcohol-free homes for their children." *Id.* at 151.

for reunification.¹⁷⁶ Tucson, Arizona, came to a similar conclusion about family visitation practices and developed significantly improved and expanded visitation policies for families.¹⁷⁷ Nevertheless, identifying family integrity as a core substantive goal remains an emergent process for these courts.

Within New York, the Buffalo Model Court Project focused significantly on expediting adoption during its first eighteen months through its "Spring Into Permanency" project.¹⁷⁸ The project fully engaged the joint efforts of the Erie County Family Court Administrative Judge and the Erie County Commissioner of Social Services. Through their leadership, a multi-disciplinary team approach was brought to solving the problem of backlogged adoptions.¹⁷⁹ By creating this team model, which has expanded to include a full array of stakeholders in the child welfare and Family Court systems, this model court is poised to apply the lessons of team building to the full range of child protective cases.¹⁸⁰ As with many other model courts around the country, however, the court's public language continues to lack attention to the role of the court in preventing family break-up or expediting reunification, even as it brings some of the family systems procedural methods, such as mediation and case conferencing, to managing the child protective cases.¹⁸¹

176. Charlotte, North Carolina: "ASFA's time lines make it imperative that substance abusing parents begin treatment almost immediately after their children come into custody if they have any hope of re-unification." *Id.* at 44.

177. Tucson, Arizona: "Standard visitation procedures have offered families one visit per week for a maximum of two hours in length. The entire Model Court working group realized that this was not appropriate for the reunification of families." *Id.* at 162.

178. The court achieved significant improvements in expediting adoptions over this time period. *Id.* at 29-32.

179. *Id.* I have been present at numerous meetings of the Permanent Judicial Commission on Justice for Children where Judge Sharon Townsend and Commissioner Deborah Merrifield have discussed their creative and successful collaboration.

180. *Id.* at 25. Moreover, this court has adopted many of the key elements of the model court movement: interdisciplinary training and technical assistance, using "lead" judges to mobilize support, piloting alternative dispute resolution mechanisms, and sharing information locally and nationally. *Id.* at 24; *see also supra* notes 152-53 and accompanying text.

181. The updated version of the Buffalo web site contains the newest version of the Buffalo posting on the National Council Model Court site and differs considerably from the 1999 Report. *See* 2000 STATUS REPORT, *supra* note 148, at 22-41. At a recent presentation to the NYS Permanent Judicial Commission on Justice for Children on Feb. 20, 2002 at which I was present, Buffalo Family Court Judge Janice Rosa discussed how the use of mediation, case conferencing, and frequent court reviews was changing the culture of communication between the parents and other family members and the court and child welfare system personnel by increasing the respect everyone had for each

C. Aiming for Lasting Reform: The Necessity of Getting to Substance

While there is no question that all of the model courts have struggled valiantly to improve the court system for the families they serve and that for some of the courts the highlighted, detailed procedural reforms have had and will continue to have important substantive results, it is disturbing that so few of the courts discuss their substantive goals, other than adoption, more explicitly or at all. The paucity of discussion about family integrity—in the form of preventing children entering care or seeking their swift reunification with their families if possible—is especially disturbing. Not only does it conflict with the constitutional and statutory mandates described in Part I above, but it is also in direct contradiction to the key principles underlying the *Resource Guidelines* that form the blueprint for the model courts. While always assuring a child's safety first, these principles list "avoiding unnecessary separation of children and families," and "reunification" as the *first two principles*.¹⁸² Only when these unification principles cannot be achieved do the guidelines address the principle of developing alternative permanency plans.¹⁸³

Because many of the model courts have not focused on substantive goals that are consistent with the mandates of family integrity highlighted in the *Resource Guidelines*, the probability that model courts will create sustainable reform is severely jeopardized. First, as discussed in Part I, reforms constructed only around administrative or procedural goals have had a history of limited success. The remarkable potential of the model court movement should not be limited by the primacy of efficiency or administrative restructuring, nor considered possible only with additional resources or reduced caseloads.¹⁸⁴ Second, if Family Court is going to create more significant, sustainable reform, it must rigorously apply the substantive goals that form the basic construction of the model court movement. Those goals capture the value-added potential for Family Court that reformers have previously

other. The court was becoming the place where important decisions were being made by everyone involved in the case.

182. RESOURCE GUIDELINES, *supra* note 93, at 12-13.

183. *Id.* For discussion on the purpose of the entire model court project, see *supra* note 151-53 and accompanying text.

184. The Marisol Panel specifically highlighted the difference between the cultural climate of the New York County Model Court and the FCTP and the cultural climate of the rest of the New York City Family Court. While the Panel acknowledged that the reduced caseloads and additional staffing were responsible for some of the difference, they credited the altered tone of the proceedings—supportive, concerned, and inquisitive—as being far more important to the overall success of the model courts. ADVISORY REPORT, *supra* note 76, at 48-49.

found so elusive. The model court structure and process form a prototype to achieve success through the dynamic interaction of adherence to the substantive goals in a setting conducive to their achievement. That dynamic interaction is apparent in some of the initial accomplishments of the New York County Model Court.¹⁸⁵

New York County piloted a Special Expedited Permanency Part (Special Part) in 1999 and 2000.¹⁸⁶ In a recent article, Judge Sara P. Schechter recounts both her experience as the presiding judge of the Special Part and as a participant in a two-day conference on "Achieving Justice: Parents and the Child Welfare System," to highlight what she believes have been some of the most effective outcomes of the Special Part.¹⁸⁷ She begins with a litany of the complaints by parents about their experiences in Family Court expressed during the conference:

As panelists and members of working groups, parents who had been respondents in Family Court reported a number of problems in the course of having their cases reviewed: they did not understand what was going on during the court proceedings; their lawyers never talked to them or explained the nature of the proceedings; they were never given an opportunity to talk in court or tell their side of the "story"; they were never consulted with respect to the formulation of the service plans for their families; and they had to spend inordinate amounts of time waiting for their cases to be called into court and had to return to court many times after repeated adjournments. Few parents perceived the court process as having contributed to the reunification of their families. At best, the court was seen as a rubber stamp for the child welfare agencies and, at worst, as an independent obstacle and source of delay.¹⁸⁸

Schechter then outlines how creating a model court that begins permanency planning at the beginning of the court process—on the day the case is filed in court—and focuses on conferencing and monitoring throughout the life of the case resulted in increased respect and

185. See *supra* notes 5-19 and accompanying text (discussing the accomplishments of the FCTP).

186. See 2000 STATUS REPORT, *supra* note 148, at 165-66, 168-69 (discussing the results of the Special Expedited Permanency Part both in terms of expediting court processes and decreasing child placements). The New York Model Court did not include data in the 1999 *Status Report* so comparisons between this and other model courts were impossible at the time this Article was researched.

187. Schechter, *supra* note 146, at 427.

188. *Id.*

communication among all the participants; this approach also significantly diminished delays and resulted in greater numbers of children staying out of placement.¹⁸⁹ Moreover, because intake (case assignment) for the Special Part was random, the part dealt with the same range of child protective cases that the rest of the child protective parts handled.¹⁹⁰ Judge Schechter also credits what she calls “back-end tracking” to monitor the service plan following the dispositional conference or hearing as crucial to keeping the case moving toward its stated goal.¹⁹¹ While not all aspects of the process worked smoothly, particularly settlement conferences to resolve the fact-finding stage of the proceeding, Schechter concludes that:

Conferences and post-dispositional reviews help parents receive justice in Family Court. They increase parents’ understanding of the court process and enhance parents’ ability to state their case. They tie the service planning process to court proceedings so that the court proceedings become more relevant and the service planning process more equitable. Because conferencing and post-dispositional reviews unprove communication and clarify expectations among the participants in the legal process, they are tools that help keep families together.¹⁹²

Judge Schechter’s article moves the New York County Model Court discussion beyond a heavy emphasis on administrative and procedural change.¹⁹³ Moreover, this model court, like the Family Court Treatment Parts, does not begin at the end of the life of a case—at termination of parental rights or adoption—but from the moment a family enters the court’s jurisdiction in a child protective proceeding. By explicitly identifying the ways in which components of the model court movement can result in keeping families together, Judge Schechter implicitly answers the broader question of whether the movement has the capacity to create sustainable reform.

189. *Id.* at 430, 433-34.

190. *Id.* at 430. This is in contrast to the screening that the FCTP does. See *supra* note 19.

191. *Id.* at 437-38.

192. *Id.* at 439.

193. This is still emphasized in New York City’s own posting on the National Council’s Model Court site. 2000 STATUS REPORT, *supra* note 148.

IV. MODEL COURTS AND SUSTAINABLE REFORM

From an historical perspective, if we consider model courts as predominantly focused on achieving procedural reform and greater efficiency, there is great likelihood that they will fail. Since there will never be sufficient resources allocated for court reform, the court cannot possibly succeed by restructuring efforts alone. Similar efforts have failed too many times during the past century.¹⁹⁴ Yet the administrative and procedural aspects of the model court movement may play a crucial role in sustainable court reform if they are combined with the substantive, value-added commitment to family integrity.

The structure of model courts builds on a process of cooperation and collaboration. The courts themselves are supposed to be designed and implemented by a wide range of professional participants who create the courts within the legal and judicial framework of the state. The collaborative process can break down traditional, professional, or disciplinary barriers by expanding the information and knowledge of the various participants. Creating the mechanisms that the court will use to function will highlight both disagreement and consensus, permitting the participants to hash through the former and recognize the latter. The participants may also begin to better understand the particular responsibilities that they each shoulder if they have to discuss them prior to assuming the role. The process necessary to reach a working methodology for implementation is not simple. Every model court has highlighted the time and effort that this type of process takes and the resistance to embarking on a reform plan.¹⁹⁵ If resistance to change were to discourage courts from launching model court reform plans, no reform effort would ever succeed. As all of the model courts found, they were each able to begin their efforts and, as time passed, build on the initial changes by remaining committed to a collaborative structural process. A commitment to persevere despite resistance is clearly necessary.¹⁹⁶

The court processes that were ultimately developed reflected a commitment to collaborative effort within individual cases as well. While finding the right balance between due process rights and effective court processes and outcomes remains a concern in any court, the balance seems particularly difficult to achieve in model courts with their multi-party "team" efforts. The multi-party, multi-service provider

194. See *supra* text accompanying notes 36-43.

195. See discussion *supra* Part III, especially text at notes 150-55.

196. This is not to say that disagreement should not be tolerated. Without rigorous discussion, the best plans cannot be developed. The commitment must be making the court work better for the families it serves rather than just accepting the status quo.

model can overwhelm attention to substantive and procedural due process.¹⁹⁷ A model court structure divorced from a clear commitment to legal mandates can look too much like a court proceeding without due process.¹⁹⁸ For that reason, commitment to the value-added role of applying family integrity mandates to complement the new procedural structure will keep the court focused on its ultimate responsibilities. In this way, model courts have the potential for playing two additional roles: a secondary preventive role for families at risk of having their children enter foster care, and a remedial role in reunifying families when children have been removed from their care.

By providing meaningful opportunities for parents and other family members to participate in formal and informal court processes, model court structures reinforce and reflect both psychological family systems theory and a commitment to family integrity. This occurs in a number of ways. While child safety and health is usually the triggering mechanism for bringing families into court for child protective proceedings, model courts—constructed to use family conferencing, mediation, and other alternative dispute resolution processes that emphasize discussion and information-sharing by family members and professionals—recognize the centrality of a family-oriented structure for creating solutions for families. These processes maximize the opportunities for those most directly affected by the power of the child

197. Certainly one of the ongoing concerns with the FCTP for many attorneys and judges is the requirement that there be an admission of neglect before a parent can be accepted into the part. Wolf, *supra* note 5, at 11-12.

198. As Gordon put it:

[T]o use [theories of providing help or treatment to people coming into the Family Court] as a starting premise not only may distort the facts, but it also would alter a court's basic approach from one in which it first must find whether a particular act has occurred—evaluating that past conduct within standards of substantive law—to an approach that bypasses the fact and legal questions from the outset to probe into the individual's personality, past problems, and future treatment needs.

GORDON, *supra* note 26, at 2-3. Weinstein has a different assessment:

The focus should be on the psychosocial nature of the problems, with the legal issues in proper perspective and appropriately handled, but not driving the entire system and not eating up its resources. It should be a hybrid system which combines the protections of the legal system and advocacy with the healing goals of the therapeutic and other helping disciplines. The change should be from an adversarial process to a process which focuses on collaborative problem solving, including the valuing of complete information. An important part of this change would be a shift in the expectations of the professional and client participants with regard to both substance and procedure. The changed expectations must include societal expectations for the system, professional practices and ethical standards, and personal expectations among the participants.

Weinstein, *supra* note 69, at 141.

welfare agency and the court to participate actively in seeking solutions and minimize the tendency to have only the professionals providing information or negotiating solutions.¹⁹⁹

The results look nothing like the current Family Court paradigm. First, distance between the participants and the professionals is diminished. Closer personal contact decreases the tendency to stereotype cases and families. Rather, the complexity of the individuals and families involved is more obvious. The opportunity to see a family as more than the subject of a child protective proceeding can result in more nuanced decision-making, building on family strengths as well as addressing the factors that resulted in harm to the child. Over time, understanding and respect can be developed.²⁰⁰ Second, the model court becomes the site where families and service providers have a consistent place to meet and share information.²⁰¹ The court personnel, including the judge, can be appreciated as relevant participants in the life of the case rather than solely as taskmasters or interlopers, mucking up decisions or arrangements made during extensive periods of time when the court had nothing to do with the case. The judge, in turn, can make determinations based on more information and less speculation. Third, the process of extensive and consistent monitoring—which utilizes current information to modify services and assistance—diminishes the effects of sequentiality.²⁰² The judge is able to measure the consequences of her decisions within a short period of time and thus alter them if they prove inadequate or wrong. Structuring outcomes that can build on small steps, taken in short periods of time, enables the judge to measure capacity for increased responsibility on the part of parents and other family or community supports. The biases that traditionally result in a greater likelihood of removal of children from parental care will be countered by more information about the family, more opportunity to modify or undo custodial decisions, and heightened awareness of the consequences of the decisions.

If the mandates of family integrity are applied by judges in the context of model court processes that utilize these informational and monitoring mechanisms, three levels of court intervention will emerge that can ultimately be used in all child welfare proceedings. The first and most radical under current practice, is the court's determination that its authority is unnecessary to protect the child or assist the family. While the court has always had the authority to dismiss a case, the

199. For an example of the negative impact of excluding parents from negotiations on both the parents and their lawyers, see Spinak, *supra* note 67, at 2026.

200. See *supra* note 181.

201. Schechter, *supra* note 146, at 434.

202. See *supra* text accompanying notes 69-78.

authority is rarely used.²⁰³ Judges traditionally lack sufficient information about either the family or the service providers to determine that the family does not need court intervention to protect the child or to access supportive services. Using the model court structure and methodology can lead judges to determine at very early stages that the court cannot provide additional assistance beyond what the family or service providers identify during the initial phases of the model court process. As a result, the court can limit its intervention to encouraging or assisting families to use those resources before dismissing the case outright or adjourning it in contemplation of dismissal.²⁰⁴ In some of the cases, the court may affirmatively use its own withdrawal of intervention as an incentive for participation in services. In this way, the court acts as a secondary prevention mechanism to maintain families when the primary mechanism within the social services system was unable to do so. For many judges, the most difficult lesson will be learning that not using the full strength of their authority may be better for families.

The next level of intervention uses all of the model court mechanisms described previously, but with the court determining that its jurisdiction is necessary to protect child safety and health and to ensure family integrity. Whether the court removes a child from parental care or supervises the child at home, the model court structure becomes the central device for ensuring the provision of remedial services, parental and agency observance of negotiated agreements and/or court orders, and compliance with the expedited legal timeframes currently required by federal and state law.²⁰⁵ In many model courts, the assumption is that the parent has submitted to the jurisdiction of the court after consultation with counsel and has not demanded an adversarial hearing before entering into a negotiated settlement.²⁰⁶ This assumption, based on the belief that the court cannot demand compliance with various services or assistance unless the parent has admitted to needing them, is ultimately invalid. A parent may agree to the need for certain assistance without admitting that she caused harm to her child, or there may be legitimate factual disagreements that prevent a parent from admitting to maltreatment. The family may nevertheless profit greatly from utilizing the configuration and assistance of the model court. If the model court

203. "None of the 215 cases we observed was dismissed." 1997 VERA STUDY, *supra* note 56, at 21.

204. "[T]wenty-four percent of the child protective cases brought in the Model Court, compared to thirteen percent in the Manhattan Family Court, were either dismissed, withdrawn, or adjourned." Schechter, *supra* note 146, at 430 n.10.

205. 42 U.S.C. § 675; N.Y. SOC. SERV. LAW § 384-b (McKinney 1992 & Supp. 2001-02); N.Y. FAM. CT. ACT § 1055 (McKinney 1999 & Supp. 2001-02).

206. *See supra* note 201.

structure is ultimately going to provide a framework for all child protective proceedings, courts will have to develop adversarial components that honor parents' due process rights but recognize that these families also can benefit from the model court modalities.²⁰⁷ Holding adversarial hearings on legal and factual issues should not be seen as a failure in the model court process as long as the process itself has been used to narrow and define what is truly unresolvable.²⁰⁸ Settlement remains just one of many procedural tools that can assist in the resolution of a case; it is not the ultimate goal.

The highest level of intervention recognizes that despite great effort on the part of all the parties (the service providers, the family and community supports, and the court), family integrity can no longer be the goal for the family. The role of the model court then is to use all of its resources and mechanisms to help the legal family be dismantled in the least harmful and most respectful way. Working closely with the family over time has enabled all of the participants to understand why the family cannot continue to function as a legal unit. This knowledge can be used to encourage the child to gain stability in an alternative family setting while also considering how members of the original family can play a role in the child's life.²⁰⁹ Thus, at each level of intervention, the model court can employ its value-added role.

V. CONCLUSION

The Family Court model court movement is barely five years old, and these courts are just beginning to realize the complexity of their endeavor. Reading what the courts engaged in this experiment say about themselves reveals a mixture of shock and optimism: shock at how hard change is to accomplish, and optimism after seeing real differences in outcomes for families and children. It is also apparent that some of their earliest efforts were procedurally-oriented just to get them started.

207. Schechter wrote:

[At the preliminary conference] [p]arents are encouraged to agree to begin services, although the court cannot order services without a respondent's consent until after a fact-finding inquiry . . . has been conducted. The vast majority of respondent-parents agree to start services at this stage upon hearing that their compliance will help them get their children home sooner.

Schechter, *supra* note 146, at 432.

208. *Id.* at 434-36.

209. In her presentation to the Permanent Judicial Commission, Judge Rosa noted how mediation has been successfully used to resolve termination of parental rights proceedings by building on the respectful relationships that had been developed earlier between the parents and the professionals. *See supra* note 181. The results included maintaining relationships between the children and their biological relatives. *Id.*

Those steps have resulted in administrative restructuring and procedural mechanisms for problem-solving that can now be applied to the substantive mandates of the model court movement, an even harder task to accomplish. Each model court must now commit to the family integrity mandate if this reform movement is going to be less about efficiency and more about the court adding value to a family's life. A key component to determining whether the model court structure heralds sustainable reform is to develop a comprehensive evaluative process to measure the effectiveness of the courts' efforts through outcome analysis.

Ultimately, the model courts must offer a different culture for the larger court system to embrace. These reforms cannot be separated from how society views and treats the families streaming through the courthouse door. I once listened to an upstate judge describe with pride the adoption ceremonies that are held in her courtroom. The success of completing the adoptions at record paces and sending the new family out of the child welfare system filled this judge with immense joy. I asked her whether she holds similar ceremonies when children are returned to their biological parents after stays in foster care. She said she had never considered holding those ceremonies. A few years later, when I attended the FCTP's first graduation ceremony, I thought about that judge and whether this ceremony would also fill her with immense joy. If it would, then model courts may actually be the prototype for systemic change.