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Foreword: Framing Family Court through the Lens of Accountability

JANE M. SPINAK*

Abolish Family Court. Merge it. Restructure it. Give it more power; give it less. Whatever recommendations were made during the two-day conference, not a single participant said that the current Court functioned well. That's hardly surprising. Barely twenty-five years after the first juvenile court was created, some of its chief protagonists expressed alarm about the Court's functioning.¹ Those concerns are eerily similar to some of the current critiques that surfaced at the conference: insufficient resources, inadequate preventive services to keep children out of court, an overwhelmed probation service, judges without ample understanding of the complexities of families' lives, intervening in family life because society has failed those families, and the overuse of detention.²

Our ability to re-imagine how to address these persistent concerns is defined and limited by our positions within a complex system of relationships. Professor Charles Tilly, the conference luncheon speaker, pointed out that we give reasons and determine accountability using well-worn paths of interacting that thwart approaching problems from an entirely new point of view. He cautioned us that "the very structures of organizations estab-

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1. *THE CHILD, THE CLINIC, AND THE COURT* (Jane Addams ed., New Republic) (1925).

2. *Id.* at 251 (overuse of detention), 260 (need for more prevention to keep children out of court jurisdiction), 303-06 (lack of resources), 313 (incapable judges), 315 (overwhelmed probation service), 318 (intervening in family life).

lish frames that focus attention on some kinds of information while screening out a great deal of other information that could, in principle, significantly affect their operation."³ Because almost all of the participants in the conference are part of a system that constantly negotiates responsibility for how the Court and its allied agencies do their work, their ability to imagine alternative solutions to the Family Court as a place to resolve the issues presented to the working groups was limited by these informational frameworks.

Let's consider, for example, the recommendations of the working group "Children Who Break the Rules," whose mandate included addressing the much-maligned status offender jurisdiction. The working group did not recommend abolishing status offender jurisdiction as a few other states have done.⁴ Instead, the working group recommended additional preventive programs and problem-solving diversion approaches that would reduce but not eliminate court intervention in these families' lives.⁵ Professor Tilly would observe that those recommendations make us feel comfortable "because they fit appropriately into local conditions, not because they offer adequate explanations of what actually happens locally."⁶ From earlier reform efforts, we know "what happens locally" is that access to the Court by law enforcement and school officials and parents actually undermines voluntary participation in the preventive and diversion programs that are being recommended.⁷ Nevertheless, preventive and diversion

3. Charles Tilly, Joseph L. Bittenwieser Professor of Social Science, Columbia Univ., Address at the New York City Family Court Conference: Reasons for (and in) Organization Performance (Oct. 26, 2007) (on file with the *Journal*).

4. Although some states, like Illinois, eliminated status offenses almost entirely, previous New York State reforms similarly resisted eliminating PINS jurisdiction. JESSE SOUWEINE & AJAY KHASHU, VERA INST. OF JUSTICE, CHANGING THE PINS SYSTEM IN NEW YORK: A STUDY OF THE IMPLICATIONS OF RAISING THE AGE LIMIT FOR PERSONS IN NEED OF SUPERVISION (PINS) 8 (2001) (hereinafter VERA 2001).

5. See e.g., TINA CHIU & SARA MOGULESCU, VERA INST. OF JUSTICE, CHANGING THE STATUS QUO FOR STATUS OFFENDERS: NEW YORK STATE'S EFFORTS TO SUPPORT TROUBLED TEENS (2004) (hereinafter VERA 2004).

6. See Tilly, *supra* note 3, at 7. While I am pointing out an example of a recommendation that fits well within our experiences, this working group also recommended some of the most creative and "out of the box" solutions, including judging by zip code. See *infra* at 10.

7. SHARON LERNER & BARBARA SOLOW, CTR. FOR N.Y.CITY AFFAIRS, "THERE'S NO SUCH PLACE": THE FAMILY ASSESSMENT PROGRAM, PINS, AND THE LIMITS OF SUPPORT SERVICES FOR FAMILIES WITH TEENS IN NEW YORK CITY 9 (2007).

programs “fit” into our reason-giving framework more comfortably than eliminating continued court jurisdiction. The knowledge that taking these youth to court has seldom resulted in improved outcomes for them⁸ — what actually happens locally — doesn’t fit as suitably into our reason-giving framework, thus limiting our imagination.

Professor Tilly reminded us, nevertheless, that we can break through that limitation by moving beyond conventional explanations. We can turn to multiple disciplines “to construct the best technical cause-effect accounts possible.”⁹ He had a receptive audience. One of the central themes of the conference was improving accountability and information-sharing by building better measurement systems. While the conference recommendations fall into three broad yet overlapping categories — accountability and information systems; Court policy clarifications and reforms; and organizational clarification, and systemic reforms and restructuring — notions of accountability pervade each of those categories. All of the working groups clamored for “better, more efficient and robust record keeping and data collection systems” for three intersecting reasons: to understand better how the Court works, to make the court system less opaque and more accessible to the litigants and the public, and to improve outcomes for individuals and families.¹⁰

Professor J. Lawrence Aber, the morning plenary speaker, encouraged the participants to construct such a system of accountability, while cautioning them about how difficult the construction project can be. He warned that the interrelatedness of Family Court and the multiple social service systems that feed into the Court require an accountability system that distinguishes between the Court’s mission and the missions of these other systems. Without those distinctions, the Court will be unable to measure those things for which it is unmistakably responsible. Professor Aber proposed using a “logic model” system, a rigorous experimental approach that assesses how the existing system

8. VERA 2001, *supra* note 4, at 7–8, 18–20, 33–34.

9. Tilly, *supra* note 3, at 7.

10. Todd Arena, *Report and Recommendations of the Final Plenary Session*, 40 COLUM. J.L. & SOC. PROBS. 443 (2007).

works and identifies specific changes to improve outcomes.¹¹ This model will not be effective, however, unless the system participants make “implicit knowledge explicit” and are willing to uncover answers even worse than those they now imagine exist.¹² Or, in Professor Tilly’s words, the system participants must be willing to reject conventional reasons for how things happen and instead use complex technical accounts to uncover multifaceted explanations. Equally important, an accountability system should begin with the features of the Court’s mission that are currently quantifiable. In heralding a rigorous accountability system, we must nevertheless acknowledge what information may be beyond our present capacity to measure. One of the final recommendations, for example, called for determining “well being” outcomes for children in Family Court proceedings. While we would all like to know whether these proceedings improve the well being of children, the Court does not have the capacity at present to measure this outcome. A brief look at two recent studies confirms why.

In *Beyond Common Sense*, prominent child welfare researchers examine whether — and in what ways — child welfare systems can fulfill the expectations of the Adoption and Safe Families Act of 1997 (ASFA)¹³ to ensure the well-being of children in the child welfare system.¹⁴ Relying on complex data sets that have only recently become available, they explore the substantial challenges to measuring well-being as well as the traditional goals of safety and permanency for children.¹⁵ The authors warn of the complexity of defining, analyzing and applying concepts of well-being beyond those with “common sense appeal.”¹⁶ They

11. For an easily understandable explanation of logic models, see the W.K. Kellogg Foundation Logic Model Development Guide, updated January 2004 available at <http://www.wkkf.org/default.aspx?tabid=101&CID=281&CatID=281&ItemID=2813669&NID=20&LanguageID=0> (last visited March 12, 2007).

12. Dr. J. Lawrence Aber, Professor of Applied Psychology, New York Univ., Address at the New York City Family Court Conference (Oct. 26, 2007) (from author’s notes).

13. Pub. L. 105–89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

14. FRED WULCZYN, RICHARD BARTH, YING-YING T. YUAN, BRENDA JONES HARDEN & JOHN LANDSVERK, *BEYOND COMMON SENSE: CHILD WELFARE, CHILD WELL-BEING, AND THE EVIDENCE FOR POLICY REFORM* (2005).

15. *Id.* at 167–170.

16. *Id.* at 169–70.

point out, for example, that from a developmental perspective, well-being cannot be separated from safety and permanency:

Policymakers, especially those who are elected, want to know that their child welfare system cares about the well-being of children. Separating well-being from safety and permanency in the way the current language does creates the impression that securing safe, permanent homes for children leaves a large domain of concerns untended, when in fact well-being is largely contingent on whether the home is safe and stable.¹⁷

Well-being, nevertheless, has come to be shorthand for myriad components in a child's life beyond the capacity of a child welfare system to provide: most prominently health, mental health, and education. The authors conclude that if the ASFA "mandate for the child welfare system were expressed as *achieving* safety and permanency outcomes and *ensuring* the child welfare system engages the education, health and mental health systems," the mission of the child welfare system could then be accurately measured.¹⁸ As ASFA currently defines well being, child welfare systems are tasked beyond their capacity.

What does that mean for measuring well being outcomes for Family Court proceedings? We are unlikely to be able to parse out whether court intervention improves the well being of children in the near future. A new outcome study of family treatment drug courts (FTDCs) confirms the difficulty in quantifying the role of the court process in achieving successful outcomes. As the authors of the study note, despite the "rapid proliferation [of FTDCs] there is currently very little empirical research that examines the effectiveness of the FTDC model."¹⁹ Their preliminary findings across four national FTDC sites support the effectiveness of FTDC in terms of participants entering treatment more quickly, staying in treatment longer, and being more likely to complete treatment, as well as being more likely to be reunified with their children or their children securing permanent liv-

17. *Id.* at 180.

18. *Id.* (emphasis in original).

19. Beth Green et al., *How Effective are Family Treatment Drug Courts? Outcomes from a Four-Site National Study*, 12 CHILD MALTREATMENT 43, 44 (2007).

ing situations.²⁰ Yet the authors were unable to determine which features of the FTDC model were responsible for these effects.²¹ They cautioned that “research employing more rigorous randomized study designs, using larger sample sizes, and that can directly assess other key outcomes such as parents’ subsequent substance use and child well-being” are needed to identify what makes the FTDC effective.²² In building an initial accountability system, we need to understand our inability to measure concepts as complex as well being or court effectiveness.

Being practical about what we are capable of assessing is only the first step. Coming together to decide how and what to measure is the second. The recommendations tasked the administrative arm of the court system with the responsibility for data collection and analysis. While the court system is the only logical site for this charge, it is currently unable to generate significant data about Family Court from its data management system.²³ New York City has been a model court site since 1999.²⁴ Each model court provides a yearly status report that reviews its goals from the previous year, establishes goals for the following year, and supplies current demographic information about forty-five data points in six categories: judicial caseload; number of children in care; ASFA outcomes in the current year; annual termination of parental rights and adoption cases completed; the number of children entering court jurisdiction in the previous year and achieving permanency in the current year; and the length of time from event to event and recidivism.²⁵ The demographic informa-

20. *Id.* at 52.

21. *Id.* at 56.

22. *Id.*

23. The New York State Permanent Judicial Commission on Justice for Children recently produced *The Child in Child Welfare and the Courts: New York State Court and Child Welfare 2006 Data Book*, a compendium of information about children in the New York State child welfare and Family Court systems. While this book is a significant step forward in state agency collaboration in tracking information about these children, the data for New York City Family Court processes is largely unavailable. N.Y. STATE PERMANENT JUD. COMM’N ON JUSTICE FOR CHILDREN, *THE CHILD IN CHILD WELFARE AND THE COURTS: NEW YORK STATE COURT AND CHILD WELFARE 2006 DATA BOOK* 136–45 (on file with the *Journal*).

24. Model courts address improving court proceedings for families in the child welfare system. National Council of Juvenile and Family Court Judges, *Frequently Asked Questions*, <http://www.ncjfcj.org/content/blogcategory/117/156/> (last visited Mar. 28, 2007).

25. Some of the data points changed over the years but for the most part they fell within these categories. National Council of Juvenile and Family Court Judges, *Victims*

tion from New York City was negligible most years.²⁶ For the 2005 report, the Court was unable to generate specific data for most outcomes, except for the number of original and supplemental child welfare cases filed; the number of adoptions filed, pending, and completed; and the number of guardianships petitions pending.²⁷ If an effective accountability system is going to be created, the court system will have to be willing to take a number of steps. First, it will have to explain its current inability to generate significant data and be willing to consider external proposals for improvement. Second, it must engage the rest of the court system participants in an open discussion about what data is worth collecting and analyzing. As Professor Aber warned, without these two steps — transparency and collaboration — the court system will never generate the data necessary to create constructive reform.

An accountability system could begin with one collaborative venture. For example, to address the persistent outcry about case delays from frequent adjournments, we could begin to capture information about adjournments. We know very little about adjournments beyond Professor Tilly's "conventional accounts" of blaming one part of the system or another for their occurrences. Instead of endless finger pointing, we could develop a system for recording adjournments in each courtroom for a limited time period, look for patterns or idiosyncrasies, and consider other relevant information like case types or numbers of parties. Having gathered the basic information, we would then be prepared to discuss how certain conditions or habits impact adjournment practices to see if collectively we can do something about them. If we are willing to shun conventional answers, make implicit knowledge explicit, accept answers that are even worse than we

Act Model Courts: 2005 National Council Model Court Profiles, <http://www.ncjfcj.org/content/blogcategory/112/151> (last visited Mar. 28, 2007).

26. Model Court Status Reports are available on the National Council of Juvenile and Family Court Judges website. National Council of Juvenile and Family Court Judges, <http://www.ncjfcj.org/content/blogcategory/365/434> (last visited Mar. 28, 2007).

27. National Council of Juvenile and Family Court Judges, *Status Report 2005: A Snapshot of the Child Victims Act Model Courts Project*, 10 TECHNICAL ASSISTANCE BULL. 175–76(2006)

<http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/2005StatusReport/statusreport2005-part2.pdf>.

imagine, and change our behavior based on what we learn, we can begin to create an effective accountability system together.

The question of how people are treated by those who work in the court system was the second way in which accountability framed the conference. The articles written in preparation for the conference helped to frame this theme by highlighting the demographic diversity and poverty of the litigant population — and the resulting disproportionality of people of color in the Family Court — while also stressing the lack of direct participation by litigants either as a result of inadequate access to effective counsel or as a result of actual exclusion.²⁸ Most of the conference participants work in or with the Court, but every working group and the final plenary session included individuals whose lives had been directly affected by court proceedings. The cultural distance between the professionals — particularly, but not exclusively, the judges — and the litigants was reflected in those discussions and in each working group report and the final recommendations.

The participants were clear that some of that distance could be shortened easily if the professionals would manifest more respect and understanding toward the litigants. Some of the distance could also be reduced by ensuring that both adults and children received effective assistance of counsel and access to crucial supports, like trained interpreters. But connecting the Court — especially the judges — to the community resonated most profoundly in the participants' search for how to hold the Court accountable during its powerful intervention in peoples' lives. To continue that search, I want to frame the analysis by considering whether making the Court more representative of that community might improve the relationship. As Professor Tilly advised, unless we are willing to reframe issues in this way, we will lose important information for creating reform.

28. Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Court*, 40 COLUM. J.L. & SOC. PROBS. 507 (2007); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates New York City Family Court*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007); Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551 (2007); Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583 (2007).

Fulton County is a small, mostly rural county in the foothills of the Adirondacks. For the last few years, the Family Court judge there, David Jung, has been scrutinized by the local media for his decision to deny a litigant an attorney in a child support case prior to jailing her. The litigant sought and was granted a writ of habeas corpus from the state supreme court and that determination was upheld on appeal.²⁹ In two years, Judge Jung is up for reelection; his decisions in this and other cases will impact whether he wins, as will the local media coverage, his attendance at Rotary events or the county fair, and whether the people of the county think he fairly represents them. Judge Jung is a middle-aged white man who grew up in the county and has lived and practiced law there his entire professional life.³⁰ The 55,000 residents of Fulton County are 96% white, with slightly more women than men and a median age of thirty-nine. The county is poor, with a median household income of \$34,851 and close to 13% of the county's population living below the poverty line.³¹ The voters of Fulton County know Judge Jung and they will decide whether he serves another ten year term.

If Judge Jung presided in New York City, the voters would not decide. Every county in the state — except the five counties that comprise New York City — elect their Family Court judges.³² New York City Family Court judges are appointed by the Mayor for up to ten year terms. With the exception of the requirement that at least one judge reside in each county, the rest of the forty-seven sitting Family Court judges in New York are assigned to a county by the court administration.³³ Conference participants worried that both the appointment process and the Court's administrative control over where judges sit can result in judges being disconnected from the community. They developed two types of proposals to mitigate this concern. The first set of pro-

29. *People ex re. Foote v. Lorey*, 813 N.Y.S.2d 798 (N.Y. App.Div. 2006), *leave to appeal summarily denied*, 8 N.Y.3d 803, --- N.E.2d ---, 2007 WL 92794 (N.Y. Jan 16, 2007), list of orders available at <http://www.courts.state.ny.us/ctapps/decisions/jan07/011607dc.pdf>, last accessed Mar. 23, 2007.

30. New York State Unified Court System, *Judicial Directory*, http://207.29.128.48/Judge/JudgeDetail?judge_cars_id=7022403 (last visited Mar. 23, 2007).

31. U.S. Census Bureau, *Fulton County QuickFacts*, <http://quickfacts.census.gov/qfd/states/36/36035.html>, last updated Jan. 12, 2007 (last accessed Mar. 23, 2007).

32. N.Y. FAM. CT. ACT § 135 (McKinney 2007).

33. N.Y. FAM. CT. ACT § 121 (McKinney 2007).

posals loosely can be considered educational for the judges, providing answers about topics such as: where do different types of litigants live; what can we learn about law enforcement, social services, and facilities in those communities; what areas of the communities are most heavily involved in the Family Court; and what can those communities teach the Court that is relevant to serving the needs of those communities? These proposals rely on information to build knowledge, understanding, and trust. The second type of proposal focused on making the judge more accountable to the community. These recommendations addressed opening up the appointment process, giving greater authority to the supervising judges over individual judges, or developing new accountability systems for judges, all of which sought to bring the public more purposefully into the process of judge selection and evaluation. Yet some of the proposals, such as creating an ombudsman who would collect complaints or requiring the court system to conduct yearly judge appraisals, could also have a negative impact on judicial independence.

One recommendation began to frame the relationship between the judge and the community through a geographic lens, breaking the borough-wide courts into smaller jurisdictions. Judging by zip code or community district, where several hundred thousand people live rather than several million starts to approximate the experience of Fulton County residents who know their Family Court judge. The judge and the community become more familiar if the judge presides over a smaller geographical location. But being familiar with a community is not the same as representing it. Family Court judges also could be required to live in the county or a smaller community district that would connect them more closely to the community. If they were required to live in the community and be elected, the representation would be complete. As part of their decision, the voters could then take into account whether a Family Court judicial candidate reflects the ethnic, racial, economic, and geographic constituencies of the district, as well as whether the candidate is suitable to fulfill the role of judge.

Opponents of electing Family Court judges in New York City have frequently argued that elections would simply shift control of judicial nominations from the Mayor to the political party operatives, undermining the promise of community representa-

tion.³⁴ But that may soon change, as the political parties may be losing their hold on the process of electing judges in New York State. In February 2007, the U.S. Supreme Court granted certiorari in *New York State Bd. of Elections v. Torres* to review the Second Circuit's determination that the federal district court did not exceed its authority when it found that the current system of nominating and electing state supreme court judges violates the political association rights of judicial candidates and voters.³⁵ Margarita Lopez-Torres, now Kings County Surrogate and formerly a civil court judge who sat in Family Court for several years, is the lead plaintiff in the case challenging the current nominating process. Judge Lopez-Torres fought a long and unsuccessful battle against the Kings County Democratic Party, and its boss Clarence Norman, for a place on the ballot as a state supreme court candidate before bringing suit to challenge the current process of judicial selection. If Judge Lopez-Torres prevails in the Supreme Court, our informational framework will shift significantly, allowing Family Court reformers to consider whether electing judges through open primaries will make judges more representative of the communities they serve.³⁶ Judge Lopez-Torres' own candidacy history also provides insight into whether New York City voters are capable of making informed judicial choices. When Judge Lopez-Torres was denied an opportunity to run for state supreme court judge and ran instead for re-election for civil court, she defeated the party-backed candidate in the primary and then won her seat with more votes than any of the judicial candidates for supreme court judge that year.³⁷ In 2005, she again defied her political party and defeated their chosen candidate in the primary for Surrogate.³⁸ Voters in New

34. For a deeper discussion of the current judicial election process in New York City see *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 171–81 (2d Cir. 2006), cert. granted, sub nom. *New York State Bd. of Elections v. Torres*, --- S.Ct. ---, No. 06-766, 2007 WL 506019 (U.S. Feb 20, 2007).

35. *New York State Bd. of Elections v. Torres*, --- S.Ct. ---, 2007 WL 506019, 75 USLW 3417, 75 USLW 3435 (U.S. Feb 20, 2007) (NO. 06-766).

36. See Despina Hartofilis & Kimberly McAdoo, *Separate But Not Equal: A Call for the Merger of the New York State Family and Supreme Courts*, 40 COLUM. J.L. & SOC. PROBS. 657, 663 (2007).

37. *Lopez Torres*, 462 F.3d at 180.

38. See Jonathan P. Hicks, *Winner Certified in Surrogate Race*, N.Y. Times, Nov. 2, 2005, at B8; Daniel Wise, *Less than a Year into Term, Surrogate May Resign*, N.Y.L.J., Dec. 19, 2006, at 1.

York City can and do pay attention to judicial elections when given the opportunity to vote for an independent candidate. Judges deeply involved in and committed to their local communities, like Judge Lopez-Torres, can be elected. The conference participants proposed numerous ways to improve judicial accountability and develop community connections. Electing Family Court judges may be one of the most simple and effective ways to accomplish those goals.

If accountability is the clarion call of the conference, each of the participants must consider his or her role in achieving that objective. The powerful messages that pervade the working group reports and final recommendations signal our ability to think deeply about the Family Court. To go beyond thinking and to begin acting requires a level of commitment to hard work and self-reflection that we've previously avoided. Perhaps there was a time when we could rationalize our inaction by pointing out the multiple barriers blocking the way. But that was when Clarence Norman ran Brooklyn and Margarita Lopez-Torres couldn't get her name on the ballot.³⁹ No excuses now.

39. Anemona Hartocollis, *Party's Ex-Boss in Brooklyn is Convicted*, N.Y. TIMES, Feb 24, 2007.