

HOW CLINICAL SCHOLARSHIP IMPACTED THE FAMILY DEFENSE CLINIC

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INTRODUCTION

I count as my most enduring contribution to clinical legal education having been around at the beginning when NYU joined forces with the AALS clinical section and CLEA to form the *Clinical Law Review*. I worked very closely with Bob Dinerstein and Nina Tarr, among several others, to create a journal that has played such a remarkable role in the growth and sustainability of clinical legal education across the country. The CLR has been many things to many people. It assured that aspiring clinicians could find a home for their scholarship in a world where student editors were relatively ill-equipped to evaluate, let alone support, emerging clinical scholarship. It also became a journal clinicians could read regularly with the understanding that, somehow, their professional lives would be advanced in the process. Clinicians are constantly in search of learning their craft and reading the carefully constructed ideas of other clinicians about clinical teaching has become a time-honored way for clinical legal educators to learn from each other. That, among many other things, is a reason to celebrate the first 25 years of the *Clinical Law Review*.

That said, neither clinical scholarship nor clinical theory had anything to do with my own clinical teaching in the beginning of my career. I began teaching at NYU in 1973 when I was appointed as a short-term contract clinician to create the Juvenile Rights Clinic (subsequently called the Juvenile Defender Clinic after Randy Hertz joined the NYU faculty more than a decade later and began co-teaching it with me). I taught the Juvenile Rights Clinic through the 1970s myself and, truthfully, gave no thought whatsoever to anything resembling what might be connected to clinical theory.

For the most part, clinical education, at least at NYU, in those very early days, was entirely uncoordinated. We had perhaps a dozen clinics at the time, but each was separate from one another and the clinical faculty teaching in different clinics very rarely engaged with each other to discuss their work. Towards the end of the decade, in

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what I recall having been 1979, a newly installed administrative director of the clinics, Steven Leleiko, convened the first full clinical faculty meeting I remember attending. Shortly after it began, he asked us to go around the room and say what we conceived our goals and purposes as clinical educators. I recall vividly experiencing that familiar increase in my heart rate as I struggled simultaneously to listen to what others were saying and searching furiously to figure out what I would say.

The truth is I had never asked myself that question in the nearly six or seven years I had already been teaching. When it came my turn to answer, all I could say was my goal was to win cases. I began the job as a clinical educator thinking of myself as a training supervisor for the legal services office I came from and where the students practiced under my supervision. I saw my relationship to my students no different from their supervisor at their first law job after they graduated and thought of the work I was doing as little more than accelerating the time they would be trained to be juvenile defenders.

Not a particularly auspicious start for someone who would eventually help launch the *Clinical Law Review*! Much changed at NYU over next 15 years or so. A year or two after that awkward first gathering of NYU clinicians, Anthony Amsterdam joined the NYU faculty becoming the faculty director of the clinics. Over the next several years, Tony gathered the clinicians together for a long series of “grand rounds,” out of which we developed a coherent understanding of the theory of lawyering and the theory of teaching lawyering. No scholar has had a greater influence on my clinical teaching than Tony and, once I was exposed to the depth and ambition of clinical teaching, my approach to my work and my understanding of my purpose was forever transformed.¹

I relate this background because I want to remind the reader that there was a time before clinical scholarship – but it was an impoverished time. By that I do not mean there were many other clinicians as clueless as I was back in the ‘70s. I know there were many who thought and cared about clinical theory from the beginning of their careers as clinicians. My confession that I was not among them is less to stress my shortcomings than to celebrate the value of clinical scholarship. And I am confident that just as I was transformed as a clinician once I was exposed to the world of clinical scholarship a generation of clinicians has grown up having benefitted from the articles that the *Clinical Law Review* has published since it began in 1994.

¹ Much of what we discussed in these amazing meetings became the core of Tony’s article, Anthony G. Amsterdam, *Clinical Legal Education – A 21st Century Perspective*, 34 J. LEGAL ED. 612 (1984).

I. MY DISCOVERY THAT CLINICAL THEORY MATTERS

Using this essay as an opportunity to continue to talk about my career as a clinician, I now want to shift the focus from my epiphany that clinical theory matters to a discussion of one of the potential benefits of clinical education which has received relatively little attention in the literature. We've long understood that clinical education is a vital way to train future lawyers to think deeply about interpersonal dynamics, intersectionality, legal theory, narrative and persuasion, among countless other core principles of our work. For the most part, these features of great lawyering are taught to help future lawyers improve the practice of law. But my own work as a clinician has helped me appreciate another important value of clinical education that deserves celebration.

This is the story of the creation of the Family Defense Clinic in 1990, which was the first clinic of its kind in the country. If Tony Amsterdam played a disproportionate role in influencing my understanding of the possibilities of clinical education, Gary Bellow was a close second. I always understood the crucial difference between the two of them to be that Tony was relatively agnostic concerning how students were being taught, regarding simulations and live-client fieldwork as equally suitable to the task, whereas Gary had a deeper commitment to using clinical education as a means to provide services to underserved communities and, accordingly, strongly preferred live-client fieldwork placements as his first choice clinical teaching opportunity.²

As a result of Gary's approach, I began asking myself whether and how I could use my clinical teaching to do more to provide legal services to an underserved community. I had spent all of my time in clinical teaching through the end of the 1980s supervising students who were representing accused juvenile delinquents. All of our cases were taken from the Legal Aid Society's Juvenile Rights Practice. As confident as I was that the clinic provided valuable legal services to a community which benefitted from it, I was also aware that, relatively speaking, accused juvenile delinquents in New York City were afforded decent legal representation already. In this sense, I no longer regarded the clinic as maximizing Gary's goal of using clinical education to serve underserved communities.

But if I were to change the fieldwork of my clinic, the challenge became, what would I teach? Most of my legal practice had been in

² See Jeanne Charn, *Service and Learning: Reflections on Three Decades of The Lawyering Process at Harvard Law School*, 10 CLIN. L. REV. 75, 99-105 (2003) (describing the clinical program Bellow designed at Harvard in the 1980s as "the clinic as Laboratory," and shifting the program in 1990 to become "the teaching law office" explained as "the correlative of the teaching hospital").

the New York City Family Court. It was clear to me that accused juvenile delinquents were not the highest priority of potential clients who would benefit from a cadre of committed law students to work on their legal cases. Instead, the community that jumped out at me as deeply in need of this support was parents accused of maltreating their children. These individuals were at risk of losing custody of their children, not just for a limited amount of time, but forever. With this in mind, it would be difficult to identify a field of practice impacting impoverished communities with higher stakes.

Even more, unlike the juvenile delinquency field, there was no highly trained law office already in existence representing parents in those proceedings. Instead, parents unable to hire their own lawyers were assigned lawyers from a panel of available court-assigned counsel. These lawyers were, in my experience, not nearly as good as the legal aid juvenile defenders. Whereas most of the Legal Aid staff was chosen from among highly successful law graduates who aspired to be juvenile defenders, panel lawyers in New York City at the time could more accurately be characterized as having been relegated to the job. Some were lawyers who could not get a better job. Others were simply looking for a way to earn a living without someone watching too closely what they did in their practice. Few were highly competent or excellent in the job.

Once I asked how my clinical teaching might maximize my clinic's contribution to serving underserved needs in my community, it quickly became clear that the answer would be to start the Family Defense Clinic and represent parents in child welfare cases. It was then, and sadly remains today, one of the few clinics of its kind in the country.³ There was one very high hurdle I had to overcome, however: courage! I had never been a parent's lawyer before in child welfare cases; unlike my juvenile defender clinic work where I had tried dozens of cases myself and represented hundreds of clients before daring to teach students how to do the job, I entirely lacked the experience I was now about to teach students to do.

In another essay I recently co-wrote, I told the story of how and why teaching a fieldwork clinic in an area in which the instructor is not

³ Benjamin N. Cardozo School of Law, CUNY School of Law, UDC David A. Clarke School of Law, Mississippi College of Law, Mitchell Hamline School of Law, and the University of Michigan are among the very few other law schools that have family defense clinics. See Kara R. Finck, *A Robust Defense: The Critical Components for a Reimagined Family Defense Practice*, 20 CUNY L. REV. 96, 103 n.31 (2017). I have long considered the national trend in law schools for the clinical community to have opted to represent children in child welfare cases over their parents to be very unfortunate. But that is for another article.

very well versed has enormous benefits.⁴ I will briefly summarize some of them here. But the major focus of this essay is to emphasize the virtues that can flow from applying clinical education to an area of the law that lacks a sophisticated practice. The bottom line of this story is not only has the Family Defense Clinic proven to be an outstanding fieldwork experience for students. More importantly it helped discover how to practice family defense with the broader impact of reimagining how to do family defense throughout New York City and, with some luck, in much of the rest of the country.

Starting a clinic in which the instructor has no prior experience in a jurisdiction that lacks a strong practice model created more than its share of challenges. The first question in every clinic, of course, is where the cases will come from. Surely, we would not have wanted to partner with the panel lawyers already assigned to represent parents. But, not counting them, there were, altogether, a tiny number of legal services offices that litigated a handful of these cases each year. Rejecting the option of my joining the panel and accepting direct court assignments, I chose the alternative of placing students in these several offices and having them work with the lawyers from those offices on their cases.

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

Fortunately, in the clinic's second year, the law school agreed to add a second clinical teacher to the clinic.⁵ This was transformative

⁴ Martin Guggenheim, Madeleine Kurtz and Chris Gottlieb, *Discovering Family Defense: A History of the Family Defense Clinic at NYU School of Law*, 41 N.Y.U. REV. L. SOC. CHANGE 539 (2017).

⁵ Madeleine Kurtz co-taught the clinic with me from 1991 until 2003. Since then Chris Gottlieb co-taught it with me. I was very fortunate to be able to work so closely with such gifted lawyers and teachers.

because we could now secure our own caseload which, in turn, meant that we could allow our students to become responsible for making and executing all decisions in each case. Just as importantly, the change transformed the clinical experience for the teachers as well. The first year's experience of having students work on other lawyers' cases not only offered less for the students, it offered less for me as well. What was missing in that year was engaging in the kind of clinical teaching that is close to the ideal: working in a student-faculty relationship in which the teacher does not know the answers and needs to engage in a genuine search for them with the students as partners. Rather than performing a role students have come to expect from law professors (possessing the answer and hiding the ball in pursuit of teaching students how to find it for themselves), there is a genuineness in the ideal student-teacher relationship when the teacher says, "I don't know what we should do next." It's even better when it's true!

When the clinic started becoming counsel of record in our own cases in the second year, the teachers quickly found ourselves in this ideal place: we didn't know what we were doing. We weren't performing a feigned role of ignorance or uncertainty. It was as genuine as it got. In this sense, I recommend clinicians trying to teach in an area they are relatively inexperienced. Although something is lost in such an arrangement, to be sure, there is much to gain as the faculty-student relationship necessarily becomes closer to the clinical ideal of non-directive instruction as it gets.

But the main focus of this essay goes beyond the pedagogical benefits of teaching in an underserved substantive field. When the quality of lawyering in that field is unacceptably poor, clinics provide an opportunity to reimagine the practice of law and elevating the field to new levels. By working in a field that was a laggard and had not yet identified best practices, the Family Defense Clinic learned through trial and error what was needed to be an effective family defender.

When the faculty and students became responsible for the outcome of the clinic's cases, we began a course of practice that cut new paths. Instead of working within the traditional framework of client representation, we were in a position to wholly reimagine the practice of defending parents in child welfare cases. Over the course of the next decade, this led to our discovering what needed to be done to be an effective parent defender in child welfare proceedings.

Child welfare cases are prosecuted along two tracks: the judicial and the administrative. On the judicial side, petitions are filed in family court and the allegations in the petitions are (sometimes) resolved through contested evidentiary hearings. Along the path of the case,

courts typically order that parents perform various services⁶ and ultimately order that children be allowed to remain with their families or be placed in another arrangement. But, arguably even more importantly, there is an administrative process that, in many cases, begins before the court proceedings and, in all cases, continues on a separate path during the court process.

In the agency process side of the case, parents are obliged to meet with caseworkers, supervisors and other employees of the agency responsible for monitoring the parent's actions throughout the life of the case. It would be difficult to overstate the importance of these agency meetings. One might reasonably suggest they are much more important than what happens in the courtroom itself. That's because what happens in court is often anti-climactic — the outcome of all that went before at the agency meetings. No good lawyer can afford to ignore the administrative process, which commonly begins when a family comes to the attention of an investigating caseworker following a report of suspected maltreatment made to the child protection agency.

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

We learned we needed to participate actively in case conferences that are held at the agency because that's where the substantive work of child welfare is developed.⁷ At these conferences, the case plan for each case is established.⁸ These plans set the stage for all that follows

⁶ Such services might include attending parenting skills or anger management classes or participating in therapy, counseling or drug treatment programs.

⁷ See, e.g., N.Y. SOC. SERV. LAW § 409-e(2) (2018) (mandating preparation of case plans by the social services district in active consultation with the child's parent or guardian).

⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6; see also § 428.3(f)(4) (requiring a service plan to be completed at the initial case assessment, which is to occur within thirty days of the case initiation date); § 428.3(f)(5) (requiring a service plan to be completed at the time of the comprehensive assessment, which is to occur within ninety days from the case initiation date); § 428.3(f)(6) (requiring a service plan to be completed at each case reassessment, which must occur every six months). Federal law requires states to have written case plans for every child in care in order to ensure that an appropriate long-term plan is identified for each foster child. 42 U.S.C. § 675(1) (2002). These reviews are essen-

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

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

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

What did all of this add up to? For one thing, we could no longer merely be a legal team composed of lawyers and law students. We had to become multidisciplinary. As we discussed next steps in our clinic case meetings with students, we concluded that we should be in contact with caseworkers on a regular basis and that we needed to be actively involved in these out-of-court agency-related matters. But

tial to the success of reunification efforts. See generally Subha Lembach, *The Right to Legal Representation at Service Plan Reviews in New York State*, 6 U.C. DAVIS J. JUV. L. & POL'Y 141 (2002).

when our students called the caseworkers or attempted to attend conferences, they were told they could not talk to the caseworkers or enter the meetings. The students were confused, as were the faculty. Our clients had the right to effective assistance of counsel. We reached the conclusion that it would be ineffective lawyering not to speak with caseworkers or attend conferences. How could it be that we weren't allowed to do these basic things? Even more, the regulations themselves are explicit in clarifying that parents may bring anyone they wish with them when attending agency conferences.⁹

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

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

We began working on cases thinking defense work would resemble the work of criminal defenders. But after doing the work ourselves, we began to understand we had to do considerably more than what is common to criminal defense work. Like criminal defense, family defense requires a careful investigation into the facts and circum-

⁹ N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(11) (2018).

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

In our third year, we secured a federal grant from the Department of Education, which was created to support clinical legal education.¹⁰ Ever since, the clinic has had both law and social work students. The social work students are placed in the clinic for their practicum for the entire academic year in fulfillment of requirements for the Master’s in Social Work degree at New York University. Since that year, we put three students on each case, two law students and one social work student. Instructors from both disciplines supervise each team.

After maintaining our own caseload for several years in the early 1990s, we came to realize handling our own cases was fast becoming unsustainable. Cases rarely end within an academic year. As a result, our summer caseload began swelling. Moreover, we realized the older cases were not well-suited for new students in the clinic. This meant we were carrying two caseloads: the faculties’ and the students’. We needed to change our practice.

During the mid-1990s, we began partnering with one of the legal services offices in Brooklyn – the Family Law Unit of South Brooklyn Legal Services. Before too long, two of our clinic students joined the office as staff attorneys. The office started appearing regularly in Family Court in child welfare cases when families from the community sought out their services. It still remained during this time that the only court-appointed lawyers parents could receive were panel attorneys.

II. USING CLINICAL FIELDWORK TO REIMAGINE HOW TO REPRESENT CLIENTS

The main story I want to tell is how by working in an ignored field, we ultimately made a contribution to practice far greater than training future generation of lawyers or serving clinic clients. Not only did we wrongly believe that family defenders simply needed to be

¹⁰ From 1978 through 1997, the United States Department of Education provided more than eight-seven million dollars to law schools for in-house clinical legal education. See Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & Soc. Just. 309, 324 (2012).

criminal defender-like when we began the clinic, adaptable to child welfare court, the administrators who run the parent representation systems in most of the country wrongly thought the same thing. When the modern child welfare system began in the 1970s,¹¹ jurisdictions created some form of parent representation systems throughout the country. By then, they already were familiar with the model they designed after the Supreme Court in 1963 ruled that the accused criminal had a constitutional right to court-assigned counsel if they could not afford to retain their own lawyer. Without giving a moment's thought to whether the kind of representation localities made available to accused criminals was appropriate for parents in child welfare cases, jurisdictions across the country borrowed from the criminal defender model they already knew.

That's what happened in New York City in the 1970s. After New York's highest court held in 1972 that parents have a state constitutional right to counsel in child welfare proceedings,¹² court administrators expanded the panel system previously used exclusively for criminal matters to also include family court matters. Thus, the court system our clinic first encountered in the early 1990s was saddled with an inapt legal representation system for parents. Virtually all parents entitled to court-assigned counsel in Family Court were assigned one of the solo practitioners who were already members of the court-assigned panel. None of these lawyers worked in an interdisciplinary way. Very occasionally, these lawyers would engage the services of a social worker and have their fees paid by the court.¹³ These lawyers spent virtually their entire professional time in the courtroom, either hanging around the halls for a new assignment or waiting for their cases to be called. As a result, they were unavailable to their clients out of court. The majority of court-assigned lawyers billed for less than five hours of out-of-court work in an entire case, even if it lasted years.¹⁴ In our clinic, we would spend 20 hours each week in out-of-court work on each case.

By the mid-1990s, we conceived of our job as clinical legal educators to be much broader than training law students or even than providing excellent representation for our clients. Our charge became changing the legal delivery system in New York City for parent repre-

¹¹ In 1974, Congress enacted the Child Abuse Protection and Treatment Act (CAPTA) which launched the modern child welfare system, a system that required judicial approval of children's placement into foster care.

¹² *In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

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

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

sentation, understanding that the extant model was ill-equipped to the task and we were sitting on a model that had proven to be extraordinarily successful. Our challenge became trying to persuade local officials to create parent defender offices that were interdisciplinary.

One of the clinic's projects was to lobby local officials to eliminate the panel model for parent representation or, at least, to supplement it with multidisciplinary parent defender offices. Our clinic met with judges, court administrators, and government officials responsible for paying for indigent legal services. We focused on the mistake of engaging solo practitioners who were not part of an interdisciplinary office. We told the stories of our many successes in the clinic and how those successes could be attributed to our out-of-court work. We laid out a vision for a new kind of family defender and explained how the extant system was borrowed from the criminal defense model and did not fit the needs of the families before the Family Court.

Progress was very slow. We learned there was intense counter pressure being applied by those with a vested interest in maintaining the status quo, most particularly the solo practitioners who were on the court-assigned panel. They and their supporters put up all kinds of objections to allowing any change. For a long time, it was not clear that anyone was listening. For the first sixteen years of the clinic's existence, little of the progress we were making in reshaping the tasks of family defenders had an impact on how lawyers practiced in New York City. The only kind of lawyer assigned to represent indigent parents in New York City until 2007 were solo practitioners who were on the panel of court-eligible assigned counsel.

Beginning in 2007, for the first time, New York City awarded contracts to legal services offices to provide parent representation in child welfare cases while maintaining the panel system. New York began cautiously, awarding one contract in three separate counties (out of the five counties that make up New York City). A different office was awarded the contract in each county. Naturally, Legal Services NYC—our clinic partner office—sought the contract for Brooklyn (which, as it happens, is, by itself, the fourth largest city in the United States). The three offices awarded these contracts—Legal Services NYC (Kings County), Bronx Defenders (Bronx County) and the Center for Family Representation (New York County)—were each multidisciplinary with staff lawyers, social workers, investigators and parent advocates on their staff. Each office spent considerable time on their cases out of court, working closely with their clients and advocating for and with them at agencies' meetings.¹⁵

¹⁵ In 2013, New York City Legal Services Corp. decided to cease handling parent representation cases and the South Brooklyn Legal Services Office that was handling the Brook-

In the beginning, the idea was that solo practitioners would represent about half of the cases and the defender offices would represent the other half. This meant that there was an opportunity to use the New York experiment (as the only major city in the country to provide multidisciplinary parental representation) for a formal study. New York City created something close to a natural study when it split the legal services delivery method in three counties.¹⁶

The next challenge became securing funding for the study. Parental representation is an orphan field and lawyers were never particularly appreciated by the child welfare establishment. As a result, securing money for the study became almost as great a challenge as persuading New York City to give the new contracts in the first place. So the next clinic goal was to find the money for the study. First, we were able to secure a generous grant from the Annie E. Casey Foundation to undertake an “evaluability study” – a study to determine whether a study could be usefully undertaken. We were able to retain the services of two preeminent child welfare researchers who produced a study that indicated that the study was indeed feasible, though it would require a very careful crafting of variables to ensure the key purpose of the study: to isolate as the only variable influencing the results the kind of lawyer parents received. Once we knew the study could be done, we now needed someone to fund it.¹⁷

Our thesis has long been that providing parents with the proper kind of legal representation would shorten the number of days children spend in foster care. With this in mind, we targeted the leading child welfare foundation in the country whose commitment is to reduce the needless placement of children in foster care, Casey Family Programs.¹⁸ The clinic met with the foundation, ultimately persuading it that the New York City method of representing parents actually reduces the time children spend in foster care and, if we can prove this, we can sell the model to the rest of the country and help achieve

lyn Family Court caseload merged with Brooklyn Defenders, a preeminent public interest law office with contracts to represent indigent defendants in criminal cases as well as immigration and other matters.

¹⁶ I later learned that my lay understanding of “natural experiment” was considerably misguided because cases were not randomly assigned to the different defenders. Nonetheless, I was right that the arrangement would prove to be an invaluable opportunity to be studied.

¹⁷ The researchers were Mark Country and Mark Testa. Courtney is the Samuel Deutsch Professor at the University of Chicago’s School of Social Service Administration. Testa is the Sandra Reeves Spears and John B. Turner Distinguished Professor at the University of North Carolina’s School of Social work.

¹⁸ Casey Family Programs, under the leadership of William Bell, has asserted for much of this century that the foster care population in the United States is too high and could, with appropriate changes in practice, be halved by 2020. See <https://www.casey.org/2020-building-communities-of-hope/>

its objective of shrinking the foster care population. In 2014, Casey Family Programs awarded NYU \$300,000 to undertake the largest study of its kind. In May 2019 the study was published and the results are very positive.¹⁹

This was a multi-year study of child welfare cases brought in the New York City courts to determine whether the kind of legal representation provided to parents can make a difference in the outcome of cases. The researchers examined over 28,000 child welfare cases in New York City between 2007 and 2014. They used a statistical design called “Propensity Score Matching,” that equalized the groups of families compared on nearly 20 factors split into hundreds of variables. These factors included demographic characteristics of parents and children, family size, severity of allegations and types of allegations, judge, court borough, and prior involvement with the child welfare system. This methodology allowed the researchers to attribute differences in outcomes between the two groups to the type of representation the parents received.

The study compared the outcome of cases based on whether parents were represented by panel lawyers and parents who were represented by one of the family defender offices. Ultimately, the researchers traced the outcomes of 9,582 families and their 18,288 children through a four year follow-up period. What follows are the findings.

The study found that the kind of representation afforded to parents makes a dramatic difference in the length of time children spend in foster care. Giving parents the right kind of legal team results in families being reunited far sooner than would otherwise happen. The family defense offices were able to secure the safe return of children to their families 43% more often in their first year than solo practitioners, and 25% more often in the second year. Giving parents lawyers from family defense offices allowed children to be permanently released to relatives more than twice as often in the first year of a case and 67% more often in the second year. These families may otherwise have been permanently dissolved or the children may have spent their childhood separated from their family. The study also found that 18 percent more children would be reunified with their families within 2 years if they had multidisciplinary representation than if their parents had been represented by panel lawyers. Of those children who could not be returned to their families, 40% more children ended up with a permanent disposition of guardianships when their parents had mul-

¹⁹ Luke A. Gerber, et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 *CHILD & YOUTH SERVS. REV.* 42 (2019), available at <https://doi.org/10.1016/j.chilyouth.2019.04.022>

tidisciplinary representation than children whose parents were represented by panel lawyers.

The study concluded that multidisciplinary parent representation also saves an enormous amount of money that would otherwise have been spent on children remaining unnecessarily in foster care. The study found that full implementation of a multi-disciplinary representation model would reduce the foster care population by 12 percent and annually reduce foster care costs by \$40 million as compared with exclusive reliance on panel lawyers.

These data are, by any measure, impressive. But the impact on creating high-level law offices devoted to representing parents in child welfare cases goes well beyond the statistics from the study. Since the family defender offices opened in 2007 in New York City, the community whose children have been wrested from poor families have had a collective voice in the form of lobbying efforts by the newly created family defender advocates. Family defense has been transformed in New York City. By 2014, five multidisciplinary offices had contracts to represent parents.²⁰ In some parts of New York City family defender offices handle nearly 90 percent of all new cases filed. We are currently in discussion with New York City officials to eliminate entirely the panel representation option and create conflict offices to handle all cases on the multidisciplinary model.

But even this doesn't begin to tell the full story. The family defender offices met regularly over the first decade of practice to strategize how to challenge unacceptable practices engaged in routinely by child welfare agencies. Instead of striving to win on a case-by-case basis in court, the defender community went on the offensive, insisting they secure a seat at the table to discuss poor practices with the highest level officials in charge of child welfare in New York City. For more than a decade, the defender community has also met regularly with the Administration for Children's Services and has made multiple changes to the way things used to be done. Countless aspects of practice have been improved through these macro advocacy efforts, none of which had ever been undertaken 20 years ago. To provide some perspective, without intending to give the defender community too much credit for the results, the foster care population in New York City has shrunk to an astonishing degree over the past 20 years (a trend not followed nationally). Consider this: in 2003, there were over 28,000 children in foster care in New York City; today there are

²⁰ Neighborhood Defender Services of Harlem shares cases in New York County with the Center for Family Representation and the Center for Family Representation has a second contract to provide parental representation in Queens.

fewer than 8,500.²¹

The active family defender community cannot take full credit for this dramatic shrinking of the foster care population. Every administrator of New York City's child welfare system in this century has been committed to the principle of eliminating the unnecessary placement or retention of children in foster care. But the defender community maintains meaningful pressure on the system to live up to this rhetoric. And when trouble brews and the local newspapers criticize government officials for failing to protect a child from harm (an unavoidable part of this work), the defender community actively participates in supporting the relatively low foster care population.

In 2005, the clinic began an on-going collaboration with Mimi Laver of the ABA's Center on Children and the Law and advocates around the country to establish the National Alliance for Parent Representation, which works to raise the quality of parent defense nationwide.²² Much has been accomplished at the national level, including the development of widely accepted standards of practice for parents' attorneys, an active listserv, which allows parent advocates to share legal information, practice tips and support, and a biennial national conference that provides legal education to hundreds of attorneys.²³

Finally, after many years of advocating for this change, in 2018 the Children's Bureau in the Department of Health and Human Services issued a path-breaking administrative rule change allowing for the first time federal cost sharing for legal services for parents in child welfare cases.²⁴ States across the country will have the double incentive to expand and improve their parental representation system. They will be able to secure federal money for any expansion and, with a well-designed multidisciplinary model, they will save tax revenue from

²¹ Compare CHILD WELFARE WATCH, TOUGH DECISIONS: DEALING WITH DOMESTIC VIOLENCE 15 (2003), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138debe4b037d2d5803f6b/1410567659179/CWW-vol9.pdf> [<https://perma.cc/P79M-8T6A>], with N.Y. CITY ADMIN. FOR CHILDREN'S SERVS., REPORT ON YOUTH IN FOSTER CARE (2018) <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2018/ReportOnYouthInFC2018.pdf>. It is impossible to wholly disentangle the many interrelated factors that affect how many children are in foster care at any given time, but there is little doubt the outstanding work of the family defenders, both in the courtroom and at high level policy meetings, has contributed to the continued shrinking of New York City's foster care population.

²² See https://www.americanbar.org/groups/child_law/project-areas/parentrepresentation/

²³ See ABA NATIONAL PROJECT TO IMPROVE REPRESENTATION FOR PARENTS, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf [<https://perma.cc/T5KU-VGV7>].

²⁴ See https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36. See also Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, CHILD LAW PRACTICE TODAY (February 26, 2019).

being wasted on the needless maintenance of children in foster care.

There's still more. There simply cannot be a great field fighting for social justice for poor communities unless there are jobs for aspiring law students to fill. To be a key player in progressive lawyering, you need to create a field. Back in the 1980s there simply was no such field. By the end of the 1990s, students began applying to NYU Law School for the purpose of learning to become a family defender. That was remarkable, considering that there were virtually no jobs for them to fill upon graduation. Many had to settle on becoming children's lawyers, biding their time until family defender offices began sprouting. When they did sprout, in Washington State in the early 2000s and in New York City starting in 2007, law graduates with an interest in the field could apply for jobs from law school to work in family defense in the same way that public defenders were able to do since the early 1970s. Once we built a family defender system, law graduates could join it. This meant we were now able to hire deeply committed social justice advocates directly out of law school to help build the practice. Today, more than 20 graduates of the Family Defense Clinic have practiced in the New York City family defender offices.

Moreover, family defender practices are being elevated in many states throughout the country. Washington State has long been a leader in the field. In addition, great strides have been made in Colorado, New Mexico, New Jersey and North Carolina, among others. In 2018, two of the Family Defense Clinic alumni, Zabrina Alegruere (Class of 2005) and Eliza Patten (Class of 2001) opened the East Bay Family Defender Office in Alameda County, California, the first family defender office of its kind in California. Finally, consider this: in the graduating class of 2019, six students who took the family defense clinic chose as their first job out of law school to become staff attorneys at one of the four family defender offices in New York City.

As more cities follow New York's lead and invest in this new form of family defense, there will be even more jobs for graduating law students right out of law school. As that happens, family defense will become as much a career opportunity as criminal defense has been since the days of *Gideon v. Wainwright*.²⁵ And, as family defense continues to grow, more law students than ever are expressing an interest in learning about it in law schools. Perhaps the next place to focus attention in growing this field is in the clinical legal community which remains behind the times in embracing family defense as an important trial-level fieldwork clinic that furthers social and racial justice.

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

