

## Reforming Family Court: Getting It Right between Rhetoric and Reality

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### INTRODUCTION

Last fall I was asked by the *New York Law Journal*, New York State's daily law newspaper, to comment on Chief Judge Judith S. Kaye's success at reforming family court. Judge Kaye was retiring after a long tenure as the Chief Judge of New York's highest court, a role that includes administering the state court system. In that administrative capacity, she had been an ardent instigator of a range of family court reforms begun in earnest in the mid-1990s. The central goal of the reform effort was to create a Family Division of the New York State Supreme Court—the trial court of general jurisdiction in New York—by merging the Family Court into the Supreme Court to expand the jurisdictional authority of Family Court judges and distribute resources more fairly throughout the court system.<sup>1</sup> Anticipating political barriers to court merger, Judge Kaye's

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\* Edward Ross Aranow Clinical Professor of Law, Columbia Law School. The basis for this Article was my keynote address for the Washington University School of Law Ninth Annual Access to Equal Justice Conference, sponsored by the Clinical Education Program, held on Friday, March 27, 2009. The title of the talk was chosen before I came across a 1982 publication that also highlighted the tension between rhetoric and reality in evaluating government operations. See JOE N. KAY & PEG KAY, GOVERNMENT OVERSIGHT AND EVALUABILITY ASSESSMENT 75–85 (1982). An earlier version of the talk was presented at the New York Law School Clinical Theory Workshop in February 2009. I am grateful to Stephen Ellmann, who chairs this wonderful workshop, and to the colleagues who provided such excellent critiques. The Columbia Law School Faculty Research Fund provided financial support. Much of the analysis of the 2007 *Synthesis of the 2005 Court Improvement Program Reform and Activities Final Report* and other court improvement project reports was done by Diana Kane, Yale Law School 2011 J.D. Candidate, whose dedication to uncovering the real meaning of these reports was extraordinary and unrelenting. This Article draws on the scholarship and inspiration of two Columbians, both of whom died before this work was done. My thanks to Charles Tilly and Alfred Kahn for leading the way and keeping us honest.

1. Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*,

reform agenda included a variety of measures that could be achieved through administrative actions, thus bypassing some controversial political decision-making.<sup>2</sup> At the same time that Judge Kaye was working to change New York's Family Court, she was highlighting the work of family courts on the national stage. As Chair of the Conference of Chief Justices, she shepherded a resolution establishing a "Statement of Principles Regarding Children and Families," which urged that children and family issues be given the highest priority in state court systems.<sup>3</sup> Family court reform is central to Judge Kaye's legacy.

So, when the *New York Law Journal* reporter called for my opinion, I faced a dilemma. On the one hand, I wanted to give Judge Kaye credit for her deep commitment to reforming family court;<sup>4</sup> on the other hand, I had to ask myself who was to blame—including perhaps Judge Kaye herself—for failing to achieve significant reform despite enormous effort. In the aftermath of struggling to answer the reporter's questions, I began to tie together some of the questions I would like to explore: What do we say about the reform work we do, and to what degree is what we say accurate? How does the way in which we talk about family court reform implicate our analysis of what we are achieving? How does our place or role within the system affect our perceptions of reform? What limits our willingness and ability to apply rigorous evaluative techniques to determine whether we are reaching our goals? And if we are failing, can we acknowledge failure and learn from it? Answering these questions may lead to a better understanding of why family court reform is

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2002 WISC. L. REV. 331, 350 (2002).

2. Thomas W. Church & Brian J. Nickerson, *New York's Courts*, in GOVERNING NEW YORK STATE 181–82 (Jeffrey M. Stonecase ed., 4th ed. 2001). See also MARC BLOUSTEIN, A SHORT HISTORY OF THE NEW YORK STATE COURT SYSTEM 15, available at [http://www.courts.state.ny.us/history/pdf/Library/History/Short\\_History\\_of\\_NY\\_Court\\_System.pdf](http://www.courts.state.ny.us/history/pdf/Library/History/Short_History_of_NY_Court_System.pdf).

3. Resolution 21: Statements of Principles Regarding Children and Families (2001), <http://ccj.ncsc.dni.us/ChildWelfareResolutions/resol21KidsStatement.html>.

4. The other chief judge who is credited for her significant commitment to children's issues is the Honorable Kathleen A. Blatz (retired) of Minnesota. See *Kathleen Blatz Resigns from Minnesota Supreme Court*, MINNESOTA PUBLIC RADIO, Sept. 29, 2005, [http://news.minnesota.publicradio.org/features/2005/09/29\\_stawickie\\_blatzresigns/](http://news.minnesota.publicradio.org/features/2005/09/29_stawickie_blatzresigns/); see also *Failure to Protect: A National Dialogue on Child Welfare* (PBS television broadcast Jan. 22, 2003), available at <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/symposium/>.

stuck between rhetoric and reality. Before I address these questions, I will provide a brief background on family court.

## I. FAMILY COURT

### *A. Historical Context*

Family court was one of several great public institutions established by American social reformers around the turn of the twentieth century to address the burgeoning complexity of societal issues in an increasingly urban environment. Family courts, still known as juvenile, dependency, domestic relations, or children's courts, began as an alternative to adult criminal court for children in trouble with the law but quickly expanded to include multiple areas of jurisdiction, including delinquency; child welfare; child support and paternity; status offenses; family offenses; divorce; custody and visitation; guardianship; and adoption.<sup>5</sup> The creators of family courts had imagined a court where informality, specially trained public servants, such as probation officers and social workers, and a kindly judge would work together to provide benign but effective assistance to children and families. By mid-century, however, a new generation of reformers was lamenting the family court's failures: inappropriate state intervention into family decision-making, inadequate services to support families, untrained and under-resourced social service systems, children placed in dangerous and inappropriate institutions, and court proceedings that failed to provide even a semblance of due process.<sup>6</sup>

State and federal courts, including the United States Supreme Court, began to issue decisions more clearly defining the rights and roles of parents and children. These decisions addressed conditions of care and established basic procedural due process rights for litigants, including the right to counsel for children in juvenile delinquency proceedings and stricter evidentiary standards in certain child welfare

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5. Jane M. Spinak, *The Family Court*, in *THE CHILD: AN ENCYCLOPEDIA COMPANION* 344, 344 (Richard A. Shweder ed., 2009).

6. *Id.* at 345. See, e.g., ALFRED J. KAHN, *A COURT FOR CHILDREN* 3–8 (1953).

proceedings.<sup>7</sup> During the last quarter of the twentieth century, the federal government passed a series of laws to increase its oversight of state systems of child welfare, juvenile delinquency, foster care, and adoption.<sup>8</sup>

This is the family court in which I began to practice. The idea of the court as a kindly intervener was at a low ebb, and the due process paradigm presented an alluring vision to improve the court.<sup>9</sup> Nevertheless, the core idea that family court can assist families to solve their problems remained intact. As the century drew to an end and the procedural reforms that earlier had been heralded remained unrealized, the court as a problem solver began to reemerge.<sup>10</sup> The National Council of Juvenile and Family Court Judges has spearheaded a “model court” project intended to reinvigorate the family court as a place where a team of professionals led by the judge can provide a range of assistance and services for complex familial needs.<sup>11</sup> In short, the court serves as a place for families to get help. I do not believe in this helping premise. People come to the family court either because they have to—a youth has been charged with a crime or a parent with mistreating his children or not paying child support—or because the court is the only or last remaining place to address their unresolved custody, visitation, domestic violence, or

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7. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding a state statute allowing the state to permanently terminate a parent’s interest in her child unconstitutional as a deprivation of due process of law under the Fourteenth Amendment to the United States Constitution); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles charged in delinquency proceedings are granted many of the due process rights adults are granted).

8. Child Welfare Information Gateway, *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (2009), <http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm> (outlining child protective, foster care, and adoption legislative history); Office of Juvenile Justice and Delinquency Prevention, *Legislation*, <http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm> (last visited Nov. 5, 2009) (reporting juvenile delinquency legislative history).

9. BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION* 8–18 (2d ed. 2003).

10. This reemergence parallels the development at the end of the twentieth century of the criminal drug court movement, which generally offers non-violent, drug-addicted offenders the alternative of court-ordered drug treatment to imprisonment through a “team” model in which the district attorney, defense counsel, judge, and treatment providers work together toward the goal of the defendant’s sobriety and lawful behavior. Spinak, *Adding Value to Families*, *supra* note 1, at 351.

11. See *id.* at 352–53; National Council of Juvenile and Family Court Judges, *Frequently Asked Questions about National Council Model Courts*, <http://www.ncjfcj.org/content/blogcategory/117/156/> (last visited Nov. 5, 2009).

paternity issues. If these families could resolve disputes themselves or receive readily available and appropriately crafted assistance to address their problems, they would come to court only when they needed a legal judgment.<sup>12</sup> But whether families come for general help or a legally binding decision, they currently get neither. Throughout the country, family courts have become clogged with cases that take months or years to reach resolution.<sup>13</sup> Many people respond that this is because the courts are overcrowded and under-resourced—and they may be right. Family courts always are going to have too many cases and too few resources. This forever has been and forever will be true.<sup>14</sup> But we cannot wait for resources to address

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12. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 440–41 (2002); Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 264 (2008). Two accounts written for the twenty-fifth anniversary commemoration of the founding of the juvenile court advocate using the court only as a last resort. Charles W. Hoffman, *Organization of Family Courts, with Special Reference to the Juvenile Court*, in THE CHILD, THE CLINIC, AND THE COURT 255, 260 (Jane Addams ed., 1925) (recognizing that preventive action within the community would diminish the need for court intervention); Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, in THE CHILD, THE CLINIC, AND THE COURT, *supra* at 310, 317–18. Mack’s account looked specifically at delinquency questions, declaring:

It is the last thing to do with the wayward child to bring him into any court. The wise probation officer will save him from the court, will endeavor to make the adjustment in the family, just as the wise parent will keep the difficulty to himself as long as he can, dealing directly with his child and not bring in any outsider.

*Id.* Judge Mack further recognized society’s need to acknowledge the cause of court intervention when he added:

The fundamental duty of society is to prevent that child from going wrong; the fundamental duty of society is to recognize the causes that lead to the wrongdoing. The fundamental duty of society is to see what the economic basis is that brings the children into court and correct the economic wrong. Tear down your hovels and your slums. Give your working man the leisure by enforced limitation of hours of work to give thought to the raising of his own family before you step in and say he is not competent to deal with his own children.

*Id.*

13. Emily Wall, *Finding a Right to a Speedy Trial in Child Welfare Cases: Recognizing the Value of Time* 23–29 (2009) (detailing the range of reasons why family court cases, especially child protective cases, are delayed) (unpublished note, on file with author).

14. Spinak, *Adding Value to Families*, *supra* note 1, at 339 n.42 (citing 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)). Inadequate resources contribute to any discussion about court reform. In 1954, in CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY: A REPORT BY A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND A STUDY BY WALTER GELLHORN ON THE ADMINISTRATION OF LAWS

reform. We must instead begin focusing on the following questions: Why are these cases in court at all? Why do child protective agencies and juvenile prosecutors flood courts with cases? Why do we use courts as ongoing arbiters in family disputes?

*B. The Problem-Solving Reform Paradigm and the Value-Added Reform Paradigm*

My answers to these questions differ from those of the architects of current family court reform efforts, who have re-embraced the court as a problem-solving system. Most reform efforts have expanded the court's jurisdiction and supervisory authority in recent years, heralding the family court judge as the leader of a team of professionals who are solving the problems of families that come to court.<sup>15</sup> The "one family/one judge" movement consolidates a family's cases before one judge so that the judge can use her leadership to address the family's needs more holistically.<sup>16</sup> The acceleration of specialized problem-solving courts within the family court, such as family drug treatment, similarly focuses on the judge's leadership role to create and monitor solutions to families' problems.<sup>17</sup> These problem-solving efforts are expressions of deep

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RELATING TO THE FAMILY IN THE CITY OF NEW YORK 7, 391 (1954), the authors noted the inadequacy of auxiliary services, facilities, and salaries for the court to function. The authors acknowledged that, without additional resources, other proposed reforms would not succeed. Almost fifty years later, Judge Kaye's first systemic reform plan for Family Court noted overwhelming caseloads, inadequate resources, and large numbers of litigants without lawyers as barriers to reform. See N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM PHASE III 1 (2001) (on file with author).

15. Judge Leonard P. Edwards is among the foremost proponents of the problem-solving court movement. On receiving the William H. Rehnquist Award for Judicial Excellence, one of the highest judicial honors in the country, Judge Edwards celebrated the juvenile court as "the original problem-solving court," noting that the family court judge is "an administrator, a collaborator, a convener, and an advocate." *Remarks of Judge Leonard P. Edwards at the Presentation of the William H. Rehnquist Award for Judicial Excellence, U.S. Supreme Court, Washington, D.C., November 18, 2004*, in J. CTR. FOR FAMILIES, CHILD. & CTS. 169, 170, 172 (2004).

16. 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, 527 (1998). For a simple explanation of "one family, one judge" see Access to Justice, One Family One Judge, [http://a2j.kentlaw.edu/A2J/system\\_design/Resolution/onef\\_onej.cfm](http://a2j.kentlaw.edu/A2J/system_design/Resolution/onef_onej.cfm) (last visited Nov. 5, 2009).

17. Spinak, *Romancing the Court*, *supra* note 12, at 262–63, 269–71.

concern for the people who use family court and come from strongly held beliefs that these efforts will work. I hold equally strong beliefs that they will not. Rather, I believe that the court's role is far more limited as a court of law.

Experience and research has led me to believe that if the state is going to intervene in families' lives via judicial proceedings, the court must add value to the intervention beyond what a social service, child welfare, or probation agency can provide. That value or purpose is protection of the family's substantive due process right of "family integrity." The court's role is to protect both parents' right to raise their children as they choose and children's right to grow up with their families.<sup>18</sup> The United States Constitution prohibits states from intervening in family life without establishing that a family is unable to protect a child from harm, neglect, abuse, or trouble.<sup>19</sup> If the family affirmatively seeks the assistance of the court, these requests must not automatically trigger additional court intervention without clear proof of harm. For example, when a woman seeks an order of protection in a domestic violence crisis, the court cannot interfere with her role as a mother without evidence of parental unfitness.<sup>20</sup>

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18. In its most recent reaffirmation of family integrity, the Supreme 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." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). In his dissent, Justice Stevens noted that, while the Court has yet to determine a child's liberty interest in his or her family bonds (including those beyond a parent), "it seems . . . 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." *Id.* at 88 (Stevens, J., dissenting). Such an interest was found recently by a federal district court in *Kenny A. v. Perdue*, where the court stated:

[C]hildren have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.

*Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

19. The state nevertheless maintains its *parens patriae* responsibilities, which requires adult caretakers of children, including parents, to comply with laws that serve to protect the health and safety of both the children and society in general. SARAH H. RAMSEY & DOUGLAS E. ABRAMS, *CHILDREN AND THE LAW* 14–17 (3d ed. 2007).

20. See *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 371–72 (N.Y. 2004). In *Nicholson*, the Court of Appeals of New York held:

Similarly, unless a legally defined harm can be established, the court cannot function as a problem solver no matter what positive consequence results.<sup>21</sup> The disproportionate representation of poor families and families of color in family court heightens my concern.<sup>22</sup> Our desire to “help” these families in particular—not through comprehensive medical, educational, and social welfare policies, but through the coercive power of a court—should make court intervention a last resort.<sup>23</sup>

This “value added” paradigm does not reflect the current family court reform movement, which heralds the court as a problem solver.

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Only when a petitioner demonstrates, by a preponderance of evidence, that both elements [the impairment or imminent impairment of a child’s physical, mental, or emotional condition, and that the actual or threatened harm is the result of the parents or caretaker failing to exercise a minimum degree of care] of section 1012 (f) [of the New York Family Court Act] are satisfied may a child be deemed neglected under the statute. When “the sole allegation” is that the mother has been abused and the child has witnessed the abuse, such a showing has not been made. . . .

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In such circumstances, the battered mother is charged with neglect not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.

*Id.* The court stated simply that “more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker.” *Id.* at 368.

21. See Edward P. Mulvey, *Family Courts: The Issue of Reasonable Goals*, 6 LAW & HUM. BEHAV. 49, 56–57 (1982).

22. A comprehensive synthesis of minority disproportionality studies in child welfare and related systems highlights the need for a more nuanced and rigorous research agenda in order to better inform policy decisions while nevertheless confirming both the overrepresentation of minority children in child welfare and the disparate treatment within child welfare that minority children receive. Robert B. Hill, *Disproportionality of Minorities in Child Welfare: Synthesis of Research Findings*, <http://www.racemattersconsortium.org/docs/whopaper4.pdf>. See also ROBERT B. HILL, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 1–2 (2007), <http://www.racemattersconsortium.org/docs/BobHillNCANDS&AFCARS.pdf>.

23. The United States is not the child-loving society that it makes itself out to be. As Martin Guggenheim discusses, the U.S. has the highest child-poverty rate among industrial nations, ranks sixteenth in the world for standard of living among the poorest one-fifth of children, has more than twelve million children living below the poverty line (almost seventeen percent of all children), and has staggering rates of child mortality, lead poisoning, asthma, homelessness, and lack of health insurance. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 196–98 (2005). Guggenheim discusses this point in the context of the correlation between out-of-home placements and poverty. *Id.*



First, I want to examine whether the problem-solving movement is achieving its own goals before positing whether the “value added” paradigm can be similarly held accountable.

## II. ANALYZING THE PROBLEM-SOLVING REFORM PARADIGM

### *A. The Rhetoric of Reform*

A great scholar of family court, Alfred J. Kahn, recently passed away at the age of ninety. His *New York Times* obituary noted an apprehension expressed earlier in life: “I represent a concern for what is being accomplished, rather than what is being done. ‘Services rendered’ are not enough. I want to know what’s going on.”<sup>24</sup> Inheriting Professor Kahn’s concern, I ask what is being accomplished by these problem-solving court reforms. To answer that question, this Article first examines the way the reforms are described, because the rhetoric<sup>25</sup> concerning a significant portion of reform efforts masks both the complexity of the problems being faced and the actual outcomes.

The rhetoric used to describe current family court reform has been persuasive because the reformers use stories, a most enduring form of human communication. But storytelling can be reductive, especially if it is relied on to convey factual analysis rather than conceptual ideas. I focus first on this form of rhetoric before turning to the equally disturbing conclusion that the information being conveyed so persuasively in these stories and in the supposedly more objective reports about family court reform may reflect more about who we are than what we are—or are not—accomplishing.

Stories simplify complexity; they are told to communicate a point, to render the conveyed ideas more accessible to an audience. The central story told in this Article is that we need to be very careful about heralding courts as problem solvers without sufficient proof of their problem-solving abilities. The late Charles Tilly, one of the

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24. William Grimes, *Alfred J. Kahn, 90, Expert in the Welfare of Children*, N.Y. TIMES, Feb. 21, 2009, at A33.

25. This Article uses the word rhetoric in its classic definition: persuasive speech or writing.

great sociologists and political scientists of the second half of the twentieth century, said stories make the world intelligible and simplify experience.<sup>26</sup> In his view, stories rework the relationships of social life, sorting through and shifting responsibilities, lending themselves to moral evaluations of people and actions.<sup>27</sup> But Tilly warned that stories mask the complex webs of cause and effect that allow us to distribute credit and blame and thereby accurately determine responsibility.<sup>28</sup> Success is the most common story in the rhetoric attached to the promotion of family court as a problem-solving court. When Judge Kaye speaks or writes about the family drug treatment courts created as part of her family court reform efforts in New York, she invariably tells a story about one of the treatment court's graduates who has overcome her substance abuse, been reunited with her children, and is moving forward with her life in remarkable ways. These wonderful success stories are repeated around the country in problem-solving family courts, criminal drug courts, and mental health courts. Richard Nolan, in his discerning critique of criminal drug courts, *Reinventing Justice*, called narrative the "defining feature" of criminal drug courts.<sup>29</sup> In fact, he describes these courts as "drug court theater."<sup>30</sup>

The touching stories of court participants—the professionals as well as the litigants—elevate emotion above the proven viability of the venture.<sup>31</sup> Dr. Henry Steadman, who studies the effectiveness of criminal mental health courts, warns that these anecdotes are so emotionally powerful that they can blind us from conducting rational critiques.<sup>32</sup> The stories that pull at our heartstrings are not false; they are just incomplete. They do not tell us about the mother who failed to complete the court program, the woman who returned to her abusive spouse, or the defendant who was sent to the wrong

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26. CHARLES TILLY, CREDIT AND BLAME 20 (2008).

27. *Id.* at 21.

28. *Id.* at 20–21, 39.

29. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 111 (2001).

30. *Id.*

31. *Id.* at 111–13.

32. Henry J. Steadman, President, Policy Research Assocs., Speech at Columbia Law School: The Phenomenon of U.S. Mental Health Courts: Dissynchronicity of Practice and Data (Dec. 3, 2008).

treatment. Nor do they tell us how many people began the program and failed. These shortcomings elicit the following questions: Were those who succeeded more likely to succeed than other participants? What were the measurements of success or failure? Can success occur only on a very small scale, or can it change the way the entire system works?<sup>33</sup> In short, the stories do not provide methods with which to measure the effectiveness of the reforms. As Tilly tells us, “narrative is the friend of communication, the enemy of explanation.”<sup>34</sup>

Why do we cling to these stories rather than the systematic analysis that may provide more effective reform? The answer, in part, is found in the scholarship of those disciplines that try to explain our decision-making processes in order to uncover the way we interact with each other as individuals and as part of complex organizations.<sup>35</sup> If we apply the lessons of these disciplines to family court reform efforts, we can begin to answer the questions this Article initially posed.

My first question was whether the way we talk about family court reform implicates our analysis of what we are achieving. I already have discussed this in the context of storytelling, but further discussion is warranted. I sit on the New York County Lawyers Association Task Force on the Future of Family Court in New York City, a task force created to help reform New York City’s Family Court. One member of the task force regularly calls for the abolishment of family court. Despite widespread agreement of task force members that the court is broken, few members agree that the

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33. For a discussion of the difficulty of answering these questions without careful study, see *JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE* (Jeffrey A. Butts & John Roman eds., 2004).

34. CHARLES TILLY, *ROADS FROM PAST TO FUTURE* 7 (1997).

35. For this Article, I have drawn only on a small number of authors and scholars who are concerned with how individuals and organizations make decisions that influence their own lives as well as broader societal policies and practices. Malcolm Gladwell’s books *The Tipping Point* (2000) and *Blink* (2005) have gained popular attention along with Cass Sunstein and Richard Thaler’s recent book *Nudge* (2008). The Project on Law and Mind Sciences at Harvard Law School has a website for “scholars, students, and citizens with an interest in understanding the implications of social psychology, social cognition, and other related mind sciences for law, policymaking, and legal theory.” The Project on Law and Mind Sciences at Harvard Law School, <http://isites.harvard.edu/icb/icb.do?keyword=k13943&pageid=icb.page63708> (last visited Nov. 5, 2009).

court should be eliminated altogether. Social psychology gives us some guidance as to why most of the task force members want the family court to continue.

### *B. Family Court as a Powerful Idea*

Family court is a powerful idea that has been part of our legal consciousness for over one hundred years. Our emotional attachment to ideas is a central component to resisting change. Psychologist and Harvard cognition and education scholar Howard Gardner points out that this emotional attachment, compounded by a public commitment to a particular idea, is among the key elements to resisting change.<sup>36</sup> Moreover, if the idea is embedded in a powerful story, its ability to survive in our consciousness is heightened.<sup>37</sup> A court that cares—a court that does not use the weapons of litigation to destroy but uses benign help to restore—is a powerful story. Even Justice Blackmun, struggling to decide whether a juvenile should have a right to a jury trial, rejected that due process right because it would destroy the very idea of juvenile court.<sup>38</sup> He said, “Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.” Instead, we reformulate the idea in ways that are both recognizable and limited. Problem-solving courts, judicial leadership, and team efforts are not modern reform concepts, but familiar and thus comfortable reincarnations of the powerful idea of a family court. They “satisfice” us, as Nobel laureate Herbert Simon said, allowing us to settle for an outcome that falls within an acceptable zone rather than maximizing our options.<sup>39</sup>

Our inclination to hold on to this powerful idea even as we try to reform it is reinforced by what sociologists identify as change occurring only at the edges of customary patterns.<sup>40</sup> We innovate in

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36. HOWARD GARDNER, CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS 57 (2004).

37. *See id.* at 72–73.

38. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971).

39. TILLY, ROADS FROM PAST TO FUTURE, *supra* note 34, at 39 (citing HERBERT SIMON, ADMINISTRATIVE BEHAVIOR (3d ed. 1976); HERBERT SIMON, MODELS OF MY LIFE (1991)). For additional definitions of “satisfice,” see Arnold Keller, Professional Writing 408, [http://web.uvic.ca/akeller/pw408/r\\_satisfice.html](http://web.uvic.ca/akeller/pw408/r_satisfice.html) (last visited Nov. 5, 2009).

40. *See* TILLY, ROADS FROM PAST TO FUTURE, *supra* note 34, at 45.

ways that firmly connect us to established practices.<sup>41</sup> The discomfort associated with the idea of abolishing family court is less palpable when it is discussed as a “merger” rather than an “abolition,” even if either measure accomplishes the same goal.

### *C. Framing Reform*

Reforms are further limited by the way they are framed.<sup>42</sup> In family court reform, we begin invariably with the goal of making the court more efficient.<sup>43</sup> This generally is met by a proposal for more resources: more judges, more lawyers, more everything. This is a comfortable convention to explain family court’s problems.<sup>44</sup> Even if there is some disagreement as to where court reform money should be spent, obtaining more money almost universally is seen as necessary to reform the court. While the frame of resources—or the lack thereof—fits our conventional understanding of what is wrong, this framework blinds us from considering alternative solutions. And then, if resources disappear, we have not created sustainable reform.<sup>45</sup> For example, New York State recently set a cap on the number of

41. *Id.* at 41.

42. Consider Erving Goffman’s definition of “framing”:

My aim is to try to isolate some of the basic frameworks of understanding available in our society for making sense out of events and to analyze the special vulnerabilities to which these frames of reference are subject. I start with the fact that from an individual’s particular point of view, while one thing may momentarily appear to be what is really going on, in fact what is actually happening is plainly [something else]

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... I assume that definitions of a situation are built up in accordance with principles of organization which govern events—at least social ones—and our subjective involvement in them; frame is the word I use to refer to such of these basic elements as I am able to identify. That is my definition of frame. My phrase “frame analysis” is a slogan to refer to the examination in these terms of the organization of experience.

ERVING GOFFMAN, *FRAME ANALYSIS* 10–11 (1974).

43. Spinak, *Adding Value to Families*, *supra* note 1, at 359.

44. Tilly notes that conventions “mark boundaries between insiders and outsiders . . . and convey accumulated ideas from one generation to the next.” CHARLES TILLY, *WHY?* 34 (2006). Blaming a “lack of resources” comforts Family Court players by placing blame on a problem for which they are not responsible, diminishing the necessity of searching for other causes that may disrupt insider relationships.

45. See GARDNER, *supra* note 36, at 17.

cases that children's lawyers handling child protective and delinquency cases may work at one time.<sup>46</sup> This reform was hailed as a major accomplishment. For many years, child advocates had lamented their inability to represent their clients effectively because of their heavy caseloads.<sup>47</sup> In the mid-1990s I ran the Juvenile Rights Division of the Legal Aid Society, which represents most of the children subject to the child welfare and delinquency systems in New York City. Each of my budget requests to the state sought more money to hire more lawyers in order to lighten lawyer caseloads. But even as I wrote those budget requests, I knew caseload management skills among the lawyers varied. Some lawyers could manage high caseloads well; some could not. Some were willing to learn innovative case management techniques; some were not. Some were able to draw on creative resources; some were not. But focusing on the numbers alone masked deeper problems in our practice and conveniently allowed us to frame most issues in terms of resources.

The anticipated consequence of the law limiting cases is that children will receive better representation. With more time, the lawyers will learn new skills, try different strategies, become better at their jobs, and be less traumatized by the work. But there may be one or more unanticipated consequences, including that the representation will be easier but not better, that the outcomes for children may not improve, or that the reform fails to consider the impact on the rest of the court system.<sup>48</sup> To thwart these potential consequences, we should embrace the opportunity the resources provide to examine and improve the way lawyers practice, by purposely framing the issue as something more than resources.

Consider an example of an alternative reform framework. Our reform efforts rarely include the opinions of litigants, though

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46. Joel Stashenko, *Law Guardian Cases are Capped at 150*, 239 N.Y. L.J. 1 (Apr. 2, 2008).

47. Caseload caps have garnered national attention and support. An important national gathering of child and family advocates resulted in a series of recommendations, including "strict caseload limits, and for attorneys representing children, caseloads limits should be based on the number of clients, rather than the number of cases." *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham: Introduction*, 6 NEV. L.J. 592, 599 (2006).

48. See Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497, 501 (2000).

occasionally there is representation on a board or committee, and sometimes community-based peer advocates attend public forums to voice their concerns.<sup>49</sup> Reformers might consider emphasizing in particular what the litigants seek from participation in family court. In the last several years, adolescents in foster care have spoken and written extensively about their desire to participate in the court proceedings affecting their lives. Their voices—and their very effective arguments for participation—have begun to change youth participation across the country.<sup>50</sup> Justifications for keeping youth out of court—that youth would be harmed by the information, hearings would take too long, youth would miss school, youth would not understand what is going on—were countered by the youths’ incredibly persuasive responses to these rationales which can be summed up principally: the court is making decisions about our lives, and we want to be there when those decisions are made.<sup>51</sup> Yet, many court professionals remain skeptical about youth participation. I fear that their real motivation for not wanting youth present is the fear of exposing what we fail to accomplish on their behalf. Greater transparency might require us to conduct our business very differently.

### III. USING SYSTEMATIC KNOWLEDGE TO ANALYZE REFORM

Even if we were prepared to frame our questions differently, to move beyond conventional reasons for our actions, and to analyze the

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49. See, e.g., Child Welfare Organizing Project, CWOP’s Core Activities, [http://www.cwop.org/activities\\_core.html](http://www.cwop.org/activities_core.html) (last visited Nov. 5, 2009).

50. For example, in California, children ten years and older have had a right to attend their family court proceedings since 2007. California Youth Connection, Legislation, <http://www.cal-youthconn.org/site/cyc/section.php?id=19> (last visited Nov. 5, 2009). This change was spearheaded by foster care youth and their advocates. See *id.* For information about a similar youth advocacy group and its recommendations, see YOUTH JUSTICE BOARD, STAND UP STAND OUT: RECOMMENDATIONS TO IMPROVE YOUTH PARTICIPATION IN NEW YORK CITY’S PERMANENCY PLANNING PROCESS, available at [http://www.courtinnovation.org/\\_uploads/documents/YJBreport%20final\\_2007.pdf](http://www.courtinnovation.org/_uploads/documents/YJBreport%20final_2007.pdf).

51. See Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL’Y 233, 245–46 (2008); see also Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children’s Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551 (2007) (discussing the positive correlation between youth satisfaction of their legal representation and their participation in the legal proceedings).

stories on which we have relied, we have yet another step to take. We must be willing to hold ourselves accountable for our efforts, to analyze critically whether we are accomplishing our goals.<sup>52</sup> Thus far, we have not required ourselves to erect a system of accountability grounded in what social scientists call “systematic knowledge.”<sup>53</sup>

In *Roads from Past to Future*, Tilly says that “[s]ystematic knowledge . . . consists of explanations for phenomena that more than one individual can observe, explanations that transfer logically and correctly from one situation to another.”<sup>54</sup> Systematic knowledge uses scientific processes that, according to social psychologists Carol Tavis and Elliot Aronson, force us “to confront our self-justifications and put them on public display for others to puncture.”<sup>55</sup> This is hard for any of us to do, especially if we have a professional expertise and identity to present to the world.<sup>56</sup> In their book *Mistakes Were Made (but Not by Me)*, Tavis and Aronson discuss the reluctance to be self-critical in analyzing how so many mental health professionals mistakenly came to believe in recovered memories in the 1980s.<sup>57</sup> They point out that even those practitioners steeped in scientific method lost their ability “not to be fooled and not to fool anyone else.”<sup>58</sup> These experts lost the essential skepticism that makes each of us consider whether we might be wrong or headed down the wrong path. But even properly applied social science is fallible. Nonetheless, I agree with Tilly when he says “[s]ystematic knowledge often fails, but it fails less often than common sense or

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52. See Jane M. Spinak, *Foreword: Framing Family Court through the Lens of Accountability*, 40 COLUM. J.L. & SOC. PROBS. 431, 436–38 (2007) (discussing the recommendation of Professor J. Lawrence Aber to participants in a family court conference to develop rigorous accountability measures to determine whether the family court is achieving its goals).

53. See *infra* notes 54–59 and accompanying text. The most significant effort to analyze family court effectiveness and workload measures is the model proposed in AM. BAR ASS’N CTR. ON CHILDREN & THE LAW ET AL., BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES (2004), <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/buildingabetterrecord.pdf>.

54. TILLY, *ROADS FROM PAST TO FUTURE*, *supra* note 34, at 30.

55. CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* 108 (2007).

56. *Id.* at 30–31.

57. *Id.* at 106.

58. *Id.* (quoting Paul Meehl, *Psychology: Does Our Heterogeneous Subject Matter Have Any Unity?*, MINN. PSYCHOLOGIST 4 (1986)).



conventional wisdom.”<sup>59</sup> In the realm of family court reform, common sense, lack of skepticism, and traditional framing have limited the ability to objectively examine the effectiveness of our reform efforts. For fifteen years we have been engaged in a nationwide effort to reform family court without bringing to that reform a critical eye.

#### *A. Court Improvement Project Reform Efforts*

Since 1993, the federal Children’s Bureau of the Administration for Children and Families has provided Court Improvement Project (CIP) funding to states in an effort to improve child welfare services throughout the country.<sup>60</sup> The funding initially provided “grants to State court systems to conduct assessments of their foster care and adoption laws and judicial processes, and to develop and implement a plan for system improvement.”<sup>61</sup> These initial assessments allowed states to identify those places in law and practice where improving the court system could result in overall improvements in child welfare systems throughout the state.<sup>62</sup> This initial assessment was a wake-up call for many states about the inadequacies of the way their court systems dealt with child welfare issues.<sup>63</sup>

##### 1. CIP Studies

To determine how initial CIP funding was being used, the Children’s Bureau commissioned a 1999 study of CIP efforts.<sup>64</sup> The authors of the study acknowledged that the CIP program was too young and the efforts too new and varied to apply rigorous analytical standards to the reforms.<sup>65</sup> Rather, they applauded the willingness of states to assess their own laws and practices and to begin to address

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59. TILLY, *ROADS FROM PAST TO FUTURE*, *supra* note 34, at 30.

60. Admin. for Children & Families, Court Improvement Program (2009), [http://www.acf.hhs.gov/programs/cb/programs\\_fund/state\\_tribal/ct\\_imprv.htm](http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/ct_imprv.htm).

61. *Id.*

62. *See id.*

63. JAMES BELL ASSOCS., *REVIEW AND ANALYSIS OF STATE PROGRAM REPORTS RELATED TO THE COURT IMPROVEMENT PROGRAM 12–15* (1999) [hereinafter “Bell 1999”].

64. *See id.* at iv.

65. *Id.* at 10, 20–23.

the issues they identified as problematic.<sup>66</sup> In particular the study noted that CIP efforts seemed to be a catalyst for getting disparate parts of the court system to work together.<sup>67</sup> Those involved in the initial efforts agreed that it suddenly felt like all parts of the system were collaborating to accomplish change, and that there finally was a meaningful opportunity to fix a very broken system.<sup>68</sup> Nevertheless, even in this early study, the authors warned that states needed to document both their efforts and the outcomes if they were going to be able to replicate successes and address challenges.<sup>69</sup> Two years later, the same authors were asked to determine whether the state CIP efforts were even capable of evaluation.<sup>70</sup> Their 2003 feasibility report provided the first real insight into how difficult it would be to assess these reform efforts: CIP funding had let a thousand flowers bloom—state and local initiatives—without asking states to keep track of the outcomes in any rigorous fashion.<sup>71</sup> A range of creative and perhaps effective projects were being piloted with almost no way to measure whether they were working or could be replicated.<sup>72</sup> After

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66. *Id.* at 40–44.

67. *See id.* at 42. Ironically, by 2005, the federal government was mandating collaboration as a condition for receiving CIP funding. Program Instruction from Admin. for Children & Families to Highest State Courts of Appeal (June 15, 2006), *available at* [http://www.acf.hhs.gov/programs/cb/laws\\_policies/policy/pi/2006/pi0605.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2006/pi0605.htm). The CIP grant instructions noted that “[m]eaningful, ongoing collaboration’ means that the courts and State child welfare agencies will identify and work toward shared goals and activities.” *Id.*

68. In New York State, The Permanent Judicial Commission on Justice for Children, chaired by former Chief Judge Kaye, held a conference in 1998 to energize Family Court judges about the CIP reform efforts in New York. The high point of the conference was an inspirational speech by former Judge Nancy Salyers about her efforts to reform the Chicago Family Court. *See* N.Y. STATE PERMANENT JUDICIAL COMM’N ON JUSTICE FOR CHILDREN, ACCOMPLISHMENTS: 15 YEAR REPORT (2006), <http://www.courts.state.ny.us/ip/justiceforchildren/pdf/Final%20Booklet%20to%20Print.pdf>.

69. Bell 1999, *supra* note 63, at 43.

70. JAMES BELL ASSOCS., FEASIBILITY OF EVALUATING THE STATE COURT IMPROVEMENT PROGRAM vi (2003), <http://www.acf.hhs.gov/programs/cb/pubs/statecip/volumeone.pdf> [hereinafter “Bell 2003”].

71. “Through the site visits, a group of diverse and innovative court reform activities were identified. All stakeholders believed their programs had vastly improved legal processes for children and families, yet most had little or no data to measure their impact.” Bell 2003, *supra* note 70, at vi. In fact, it would not be until 2006 that ACF finally would issue program instructions requiring states to include evaluative measures in their CIP grant proposals. *See* Program Instruction, *supra* note 67.

72. Bell 2003, *supra* note 70, at vi.

almost ten years of funding, this 2003 report was the first serious attempt to generate systematic knowledge.<sup>73</sup>

## 2. Analysis of CIP Studies

I am not suggesting that we have not been told—in Professor Kahn’s words—what is being done. A CIP-funded industry has emerged over the last fifteen years to assure us that systematic knowledge about how to reform family court has been developed. States have created commissions, used administrative arms of the judiciary, and drawn on national projects developed specifically to provide technical assistance or to assess CIP efforts.<sup>74</sup> Thousands of pages of information have been produced, generating powerful ideas and possibly improving family court outcomes. But when the analysis of these efforts is examined carefully, significant instances of our failure “not to be fooled and not to fool anyone else” are uncovered.<sup>75</sup>

For example, the 2003 feasibility study concluded that having a review of state projects at certain moments in time would provide a broader context for the more in-depth evaluations that were proposed.<sup>76</sup> In 2007, the first “snapshot” review was published.<sup>77</sup>

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73. Bell 2003 was explicit in its recognition that important information could be gathered from a range of CIP sites but that rigorous evaluative techniques could only be used in limited sites and that other, less rigorous processes would have to suffice for other sites. *Id.* at 35. Nevertheless, Bell 2003 was optimistic that the combination of evaluations would result in providing “valuable information on the process of reform and its effectiveness.” *Id.* at 36.

74. *See, e.g.*, National Child Welfare Resource Center on Legal and Judicial Issues, Child Welfare Court Improvement, <http://www.abanet.org/child/rcj/courtimp.html> (last visited Nov. 5, 2009); National Council of Juvenile and Family Court Judges, Permanency Planning for Children Department, <http://www.ncjfcj.org/content/view/82/146/> (last visited Nov. 5, 2009). In New York, that role was undertaken by the Permanent Judicial Commission on Justice for Children. *See* New York State Permanent Judicial Commission on Justice for Children, About the Commission, <http://www.courts.state.ny.us/ip/justiceforchildren/index.shtml> (last visited Nov. 5, 2009).

75. TAVRIS & ARONSON, *supra* note 55.

76. Bell 2003, *supra* note 71, at 45. The current federal CIP evaluation plan that developed out of the feasibility study includes synthesizing the previously unavailable state evaluations as well as three specific site studies. *Id.* at 47. Unfortunately, there is no set date for the evaluation—synthesis. *See* U.S. DEP’T OF HEALTH & HUMAN SERVS., THE NAT’L EVALUATION OF THE COURT IMPROVEMENT PROG., REVIEW AND SYNTHESIS OF STATE REASSESSMENTS, <http://www.pal-tech.com/cip/reassessments.cfm> (last visited Nov. 5, 2009).

77. THE NAT’L EVALUATION OF THE COURT IMPROVEMENT PROG., SYNTHESIS OF 2005 COURT IMPROVEMENT PROGRAM REFORM AND ACTIVITIES (2007), <http://www.pal-tech.com/cip/files/FirstSynthesis.pdf> [hereinafter “2007 Snapshot”]. The CIP Program Officer, Emily

Whether the 2007 Snapshot will provide that broader context cannot be determined until the proposed evaluations are complete.<sup>78</sup> In the meantime, the Snapshot is the single most important federal document on the current state of CIP, and the most likely to be read by state courts. According to Emily Cooke, the CIP project officer, the Snapshot is not intended to “assess the quality or impact of CIP reforms.”<sup>79</sup> Yet the report culminates in a chapter entitled, “Successes Attributable to State CIP Programs.”<sup>80</sup> The authors then list a surprising number of accomplishments that state CIP coordinators attribute to CIP, including improved representation of parties, enhanced collaboration among stakeholders in the system, and improved quality of hearings.<sup>81</sup> Yet, the forty-nine CIP reports that are reviewed allow the Snapshot’s authors to determine what the states have done in recent years, rather than—as Professor Kahn would demand—what they have accomplished.<sup>82</sup> That information was not available.<sup>83</sup> Accordingly, the Snapshot perpetuates a false sense of accomplishment, which ultimately undermines our ability to

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Cooke, stated that the report was intended “to provide a snapshot of State priorities as described in the fiscal year 2005 annual State program reports.” *Id.* at 2.

78. Those evaluations of three specific court improvement sites are intended to apply the most rigorous qualitative and quantitative analysis possible. A brief description of that analysis exists but no public date is set for completion. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE NAT’L EVALUATION OF THE COURT IMPROVEMENT PROG., REVIEW AND SYNTHESIS OF EXISTING COURT REFORM EVALUATIONS, <http://www.pal-tech.com/cip/evaluations.cfm> (last visited Nov. 5, 2009).

79. 2007 Snapshot, *supra* note 77, at 2.

80. *Id.* at 42. These “successes” fall into two categories: the court reform projects, which have affected the central goals of the 1997 federal Adoption and the Safe Families Act (“ASFA”) to improve child safety, permanency, and well-being; or, more generally, the major accomplishments of CIP identified over the life of the project. *Id.* at 42–43.

81. *Id.* at 43–45. The Snapshot also lists ASFA-related accomplishments. *Id.* at 42–43.

82. Grimes, *supra* note 24.

83. The 2003 feasibility report already had established that even the twelve CIP sites most promising to evaluate had “little or no data to measure their impact.” Bell 2003, *supra* note 71, at 19. Moreover, the 2007 Snapshot is supposed to contain the following information on each reform activity: description of the activity; its purpose, scope, and target population; reform implementation date; whether it was undertaken as part of a Program Improvement Plan in response to the state’s Child and Family Services Review (CFSR); whether the reform is expected to impact the ASFA outcomes of expediting permanency, maintaining child safety, and facilitating child well-being; use and type of funding—other than CIP—that supports the reform; and whether any evaluation of the reform has taken place (identified evaluations are requested). See 2007 Snapshot, *supra* note 77. Despite this clear mandate for information, the 2007 Snapshot does not contain this site-specific information.

bring a critical eye to CIP and create systematic knowledge about family court reform.

The Snapshot is based on three sources of information: 2005 state CIP reports submitted to the Children's Bureau;<sup>84</sup> the American Bar Association's National Child Welfare Center of Legal and Judicial Issues report, *Court Improvement Progress Report 2005* (a summary of state CIP efforts to enhance their court dependency processes); and telephone discussions with the state CIP coordinators or their designees.<sup>85</sup>

For the 2005 CIP reports, states were asked to *report* rather than *evaluate* their efforts for the year.<sup>86</sup> The relationship between the federal CIP funder and the states dictates the states' responses.<sup>87</sup> States were not asked to analyze their work, and they accordingly did not report their analysis. Instead, they reported their efforts in the best possible light. The study team then adjusted its methodology per phone calls to CIP staff, inquiring about which reforms were most effective and major accomplishments.<sup>88</sup> In light of these steps, it is well to recall Howard Gardner's caveat that public commitment to ideas makes us resistant to changing our minds.<sup>89</sup> The state CIP staff is employed to facilitate and support the goals of the CIP. Once such a commitment is made, we cannot expect the staff to undermine it by changing their opinions or challenging earlier assertions.<sup>90</sup> They are not being deceptive; they are remembering, describing, and confirming what is consistent with their earlier experience or commitment.<sup>91</sup> Here, the staff was not asked to analyze the reports, but only to embellish them. They were not asked to prove that the reforms were working, and they did not.

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84. The Children's Bureau is a division of the United States Department of Health and Human Services Administration for Children and Families, which administers the CIP funds. National Child Welfare Resource Center on Legal and Judicial Issues, <http://www.abanet.org/child/rcjji/home.html> (last visited Nov. 5, 2009).

85. According to the Snapshot, the forty-nine CIP reports describe "CIP-funded and/or initiated activities the states were implementing in FFY 2005." 2007 Snapshot, *supra* note 77, at 14.

86. *Id.* at 2.

87. See TILLY, *WHY?*, *supra* note 44, at 15.

88. 2007 Snapshot, *supra* note 77, at 5, 14-15.

89. GARDNER, *supra* note 37, at 57.

90. TAVRIS & ARONSON, *supra* note 55, at 23.

91. *Id.* at 37, 70.

The other source of information was the American Bar Association's National Child Welfare Resource Center of Legal and Judicial Issues (Center) report summarizing—in its words—the “progress” made by the states.<sup>92</sup> Like the CIP, the Center is funded by the Children's Bureau. The Center has collated promising practices from around the country so that states interested in reforming their systems can access these descriptions easily on the Center's website or in published reports.<sup>93</sup> The Center also provides technical assistance to the states for their CIP projects, and deserves credit for creating technical advice for states to evaluate their work.<sup>94</sup> However, along with other organizations deeply involved in the CIP, such as the Permanency Project of the National Council of Juvenile and Family Court Judges, the Center publicly applauds state CIP reforms while also serving as a paid consultant to states regarding those reform efforts.<sup>95</sup> This makes it very difficult for these organizations to critique the CIP projects publicly. While dedicated and talented people work at these organizations, the public commitment to the CIP along with the interdependence among these organizations, the federal government funders, and the state CIPs makes it very difficult for them to critique the states and, perhaps, the organizations' own potential failure in securing effective reform.<sup>96</sup> My concern that the process used to create the Snapshot undermines efforts to create systemic knowledge is reflected in the actual report.

The Snapshot transports one back to the heady beginning of CIP. With charts and graphs, the Snapshot provides a sweeping picture of

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92. National Child Welfare Resource Center on Legal and Judicial Issues, National Summary, <http://www.abanet.org/abanet/child/natsum/nationalcat.cfm?catid=14&subid=0> (last visited Nov. 5, 2009).

93. National Child Welfare Resource Center on Legal and Judicial Issues, National Court Improvement Progress Report and Catalog, <http://www.abanet.org/abanet/child/home.cfm> (last visited Nov. 5, 2009).

94. National Child Welfare Resource Center on Legal and Judicial Issues, National Summary, *supra* note 92; National Child Welfare Resource Center on Legal and Judicial Issues, Technology, <http://www.abanet.org/child/rcjji/technology.html> (last visited Nov. 5, 2009).

95. *See, e.g.*, National Council of Juvenile and Family Court Judges, Frequently Asked Questions About National Council Model Courts, <http://www.ncjfcj.org/content/blogcategory/117/156/> (last visited Nov. 5, 2009).

96. For a general discussion of how cognitive dissonance affects our ability to critique what we are doing and enhances our self-justification, see TAVRIS & ARONSON, *supra* note 55, at 11–39.

the many projects being attempted around the country.<sup>97</sup> The Snapshot identifies twelve categories of activities for the projects, asks the CIP coordinators to prioritize their reforms, and ultimately compares them to the projects and priorities identified in the 1999 Review and Analysis.<sup>98</sup> While the Snapshot intends to convey a sense of deeper commitment and expanded activity since 1999, it also invokes many unanswered questions. For example, why do states that identified priorities in 1999 continue to identify those same priorities? Have the reforms simply not yet been achieved, or are they unattainable? Why do training and judicial expertise remain near the top of the priority list?<sup>99</sup> Is training the best use of funds, or does staff turnover always require training funds? In other words, is increasing training funds a long-term reform solution, or a necessary component of judicial administration? If CIP funding were eliminated, would judicial training end? Each category should be examined by asking these types of questions; however, the Snapshot did not. Even a list of challenges to accomplishing the reforms would acknowledge how difficult it is to achieve systemic change. The Snapshot leaves us with the sense that these projects are working and should be replicated. This misleading sense can—and likely will—cause future problems.

#### IV. THE ROLE OF FAMILY COURT

This Article has posed a challenge to the dominant reform paradigm currently being implemented. I have suggested ways to test that paradigm that extend beyond the current approach and ask how

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97. 2007 Snapshot, *supra* note 77, at 22–24.

98. The twelve categories of activities identified in the 2007 Snapshot, in order of reform priority, are as follows: “Improved Representation of Parties”; “Multidisciplinary Training and Education”; “Judicial Expertise Concerning Child Abuse & Neglect”; “Communication and Collaboration Among Court Participants”; “Notification and Treatment of Parties”; “Timeliness and Efficiency of the Court Process”; “Quality of Hearings”; “Alternative Dispute Resolution Programs”; “Statewide Management Information Systems”; “Additional Research and Evaluation”; “Legislation and Court Rules”; and “Local Case Tracking.” 2007 Snapshot, *supra* note 77, at 22–36. These categories reflect generally the categories applied in Bell 1999, but seriously conflate the categorization developed by the ABA National Child Welfare Resource Center on Legal and Judicial Issues (ABA NCWCLJI) that allow for more nuanced analysis. Moreover, the Snapshot inflates the activities by identifying them in multiple categories. *Id.* at 16.

99. *Id.* at 25–26.

our own experiences, perspectives, and place within the system affect not only our ability to open our minds to creative solutions, but also to recognize where we have failed and how individual and group thinking limits our ability to change. We must be willing to subject our ideas and models to rigorous analysis rather than relying on anecdotal stories. We must commit to collecting information and analyzing it. We must be open to understanding the part each of us plays in the system being analyzed. Then, we might know whether some of these innovations are worth keeping. Yet, ultimately, a more foundational question must still be answered while we pursue court reform: What is the role of family court?

Twenty-seven years ago, Edward Mulvey asked whether we had created reasonable goals for family court.<sup>100</sup> He wrote that “the question of whether the court’s attempt [to resolve family problems] will produce gain far outweighing harm is unanswered although often assumed.”<sup>101</sup> I posed a similar question at the beginning of this Article, asking: What value does the family court add when it intervenes in a family’s life?<sup>102</sup> Both questions challenge the assumption that a court is the right mechanism to resolve family problems. They also raise the possibility that court intervention may prove more harmful than helpful.<sup>103</sup> These questions are deeply rooted in “the fundamental right of parents to make decisions concerning the care, custody, and control of their children,”<sup>104</sup> and in our failure to test whether this far more limited role for the family court is more effective than the problem-solving court.

#### *A. Testing the Due Process, Value-Added Paradigm*

Two model programs could be analyzed to test the effectiveness of a more limited due process court. Both models start with the

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100. Mulvey, *supra* note 21.

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

102. *See supra* notes 18–23 and accompanying text.

103. The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interests. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (N.Y. 2003).

104. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).



premise that families must be central to creating and controlling the solutions to their problems, and that court intervention can be eliminated or significantly diminished to the betterment of the families.

### 1. Eliminating Status Offenses

The first model would test whether we could eliminate family court jurisdiction entirely for cases involving youth status offenses. That is, the family court no longer would be the place where families, schools, and law enforcement come when children run away, ignore curfews, befriend troublemakers, use drugs, or skip school. In 2004, over 159,000 status offense cases were processed in courts with juvenile jurisdiction, a thirty-nine percent increase from 1995.<sup>105</sup> During the same period, the percentage of youth adjudicated as status offenders nearly doubled.<sup>106</sup> In 2004, over 12,000 youths were displaced from their homes.<sup>107</sup> Remember, these youths were not charged with any crime. Rather, families and community agencies have turned to the family court to help them deal, predominantly, with the problems of adolescents.<sup>108</sup>

Since the beginning of the decade, the Vera Institute of Justice (“Vera”) has been developing new programs to assist families with adolescents in crisis. Rather than parents, schools, and police taking these youth to court for proceedings that could result in detention, probation, and out-of-home placement, they are helping state and county authorities to develop immediate, family-focused alternatives to court intervention.<sup>109</sup> These new programs are based on earlier studies that found promising results when families received immediate, community-based help.<sup>110</sup> While status-offense

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105. ANNE L. STAHL ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2003–2004 70 (2007), <http://www.cjrs.gov/pdffiles1/opjjdp/218587.pdf>.

106. *Id.* at 82.

107. *Id.* at 84.

108. See Spinak, *Romancing the Court*, *supra* note 12, at 265.

109. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUSTICE, MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 2 (2008), [http://verastage.forumone.com/download?file=1796/status\\_offender\\_finalPDF.pdf](http://verastage.forumone.com/download?file=1796/status_offender_finalPDF.pdf).

110. *Id.* at 2, 6–7, 12. See also TINA CHIU & SARA MOGULESCU, VERA INST. OF JUSTICE, CHANGING THE STATUS QUO FOR STATUS OFFENDERS: NEW YORK STATE’S EFFORTS TO

jurisdiction is a classic example of using the family court as a problem-solving court for families, projects conducted by Vera have shown that diversion from court is far more effective in engaging the youth and family in needed services. Moreover, using a court-based model may actually divert attention and resources away from valuable family-based services.<sup>111</sup> In Vera's most recent study, examples from Florida, Connecticut, and upstate New York indicate that keeping children out of court is improving family stability, outcomes for children, and financial burdens on the state.<sup>112</sup> If these trends continue, eliminating status-offense jurisdiction may be possible. It would also embolden us to consider whether court jurisdiction could be eliminated or reduced by employing effective diversionary programs in other case matters.

## 2. Providing Lawyer Teams

My second proposal is to provide more lawyers in family court—not just any lawyers, but lawyers who work in offices with an interdisciplinary approach; specifically, lawyers who work with social workers and parent peer advocates. This team would be assigned, for example, to represent parents before a petition is filed, at the point where the child protective agency determines that it is likely to bring the case to court. The parent would have a confidential working relationship with the team, who would represent the parent from pre-petition through the completion of the case, which ranges from never filing to final appeal. Central to this model is the family's ability to access confidential assistance including expertise in law, social services, and life. The parent advocate who can draw on her own experience in proposing solutions may be as important to the case as the social worker who accesses services or the lawyer who gets the case dismissed. The key difference between this model and

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SUPPORT TROUBLED TEENS 1–2 (2004), <http://verastage.forumone.com/download?file=265/11b%2Bchanging%2Bthe%2Bstatus%2Bquo.pdf>.

111. *See, e.g.*, 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), [http://www.ocfs.state.ny.us/main/legal/legislation/pins/vera\\_pins\\_report2001.pdf](http://www.ocfs.state.ny.us/main/legal/legislation/pins/vera_pins_report2001.pdf).

112. MOGULESCU & CARO, *supra* note 109, at 5–8, 9–12.

the problem-solving court is that the family is not relying on the court to create and monitor the solution; the parent's advocacy team is helping the family do that.<sup>113</sup> Outcomes for families served by this model could then be compared to families who were not; if the outcomes of this model are better than the outcomes of unserved families, this model could be expanded. In New York City, where this model was recently implemented, the preliminary statistics are quite remarkable. During the pilot phase, in cases where the team was assigned before filing, ninety-five percent of the children served avoided foster care; if a petition already had been filed, children who went into foster care averaged 4.5 months in care compared to the state average of four years.<sup>114</sup> When funding was expanded in 2007 to include about half of the cases filed in Manhattan, the model was changed to apply only when a petition is filed. Nevertheless, children spend, on average, seventy-three percent less time in foster care than other children in the city and state, and in half of the cases, the children never entered foster care at all.<sup>115</sup> Numbers like these suggest that the model could significantly diminish the need for court intervention, allowing the court to focus on cases in which it would add value by protecting the legal rights of children and parents.

These models present a different vision of the court and they can be tested. If they are effective, they can challenge the problem-

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113. Called Community Advocacy Teams (CAT), the model was developed by the Center for Family Representation (CFR), which has been described as:

[A] groundbreaking, nonprofit law and policy organization whose mission is to guarantee that every family that can live safely together has the chance to do so. We assist families when the combination of poverty and a crisis—one borne of anything from addiction to inadequate day care—may lead to separation and a child being placed in foster care. We provide free legal services to parents in crisis, train practitioners in the child welfare and court systems on best practices to support families and provide leadership at the city, state and national level on how best to strengthen families.

Center for Family Representation, <http://www.cfrny.org> (last visited Nov. 5, 2009). In the interest of full disclosure, please note that I was the founding Chair of the Board of CFR.

114. Center for Family Representation, New Model of Legal Services—Community Advocacy Teams, [http://www.cfrny.org/new\\_legal.asp](http://www.cfrny.org/new_legal.asp) (last visited Nov. 5, 2009).

115. *Id.* The remarkable achievements of the pre-2007 results should encourage states to fund pre-petition representation to help avoid family disruption, stays in foster care, and lengthy family court proceedings.

solving paradigm with an alternative vision; if they are not, much more work will be required to reach a solution.

#### CONCLUSION

The questions I posed at the beginning of this Article ask that family court reformers be willing to subject their reform efforts to rigorous analysis and reflection. I presented those questions in the context of analyzing the dominant problem-solving paradigm that pervades current family court reform efforts. In doing so, I have begun to show that these efforts have not yet been proven to be effective and thus worth adopting more broadly. We have allowed ourselves to be “satisfied” with the reforms rather than uncovering their true measure of success or failure. That is because we have not yet framed our questions differently, moved beyond conventional reasons for our actions, scrutinized the stories on which we have relied, or subjected our efforts to rigorous study in order to hold ourselves accountable for our efforts. Until we take those steps, we fool ourselves at great human and financial cost.