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Symposium: Justice for the Child*

Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment

Bruce A. Boyer**
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I. THE RELATIONSHIP BETWEEN POVERTY AND CHILD MALTREATMENT

¶ In a groundbreaking paper published nearly fifty years ago, Dr. Henry Kempe and his colleagues coined the term “battered-child syndrome,” defining for the first time child maltreatment in pathological terms.¹ Dr. Kempe’s work is often recognized as the catalyst for our modern child welfare system due to its role in generating heightened public interest in, and concern about, abused and neglected children.² In the wake of this work, federal and state governments began aggressively developing mechanisms that allow for state interventions aimed at protecting maltreated children.³ From the outset of this movement, the medical, legal, and social work professionals who wrestle with child maltreatment have faced the challenge of understanding the relationship between socioeconomic status and the kinds of harms that may prompt the intervention of these public systems.

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¹ C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 17 (1962). The abstract for this paper notes,

[t]he battered-child syndrome, a clinical condition in young children who have received serious physical abuse, is a frequent cause of permanent injury or death. The syndrome should be considered in any child exhibiting fracture of any bone, subdural hematoma, failure to thrive, soft tissue swellings or skin bruising, in any child who dies suddenly, or where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma. Psychiatric factors are probably of prime importance in the pathogenesis of the disorder, but knowledge of these factors is limited. Physicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that no expected repetition of trauma will be permitted to occur.

Id.

² See, e.g., Susan V. Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW. ENG. L. REV. 69, 89 (2001) (crediting Dr. Kempe’s article as the impetus for the passage of laws in all fifty states mandating child abuse reporting).

³ Amendments to the Social Security Act passed in 1962 required states to pledge that they would make child welfare services available statewide by July 1, 1975. Public Welfare Amendments of 1962, Pub. L. No. 87–543, § 102(b)(1), 76 Stat. 172, 172 (1962). Every state had a reporting law by 1967. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456 (2008).

¶2 One of the most important legislative responses to the developing concept of child maltreatment was the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), which provided federal funding to states to support the prevention, assessment, investigation, and treatment of child abuse and neglect.⁴ At the time of CAPTA's passage, many observers thought it untenable to describe the problem of child abuse as a function of other, larger societal problems.⁵ Perhaps for these reasons, then-Senator Walter Mondale, the legislation's chief sponsor, went to great lengths to cast child abuse as unrelated to poverty when he lobbied the Senate for CAPTA's passage.⁶

¶3 The political effort to dissociate federal child protection programs from intractable economic and environmental conditions may have been wisely calculated to win support from a Congress beleaguered by welfare expansion, but it was probably difficult for medical workers, social workers, and legal practitioners to reconcile that picture with what they knew to be the daily challenges of raising children on a shoestring budget—particularly in neighborhoods riddled with unemployment, crime, and failing schools. In the years since CAPTA's passage, the parade of poor families who march through the halls of our juvenile courts continues to tell a very different story.

¶4 More than thirty years ago, Professor Leroy Pelton wrote about what he termed the “myth of classlessness,” positing that many of the problems associated with child maltreatment are better understood as a reflection of the conditions in which many families live.⁷ Pelton cautioned that miscasting child abuse and neglect as a medical or psychodynamic problem related to behavior, rather than as a socioeconomic problem, would interfere with society's ability and willingness to develop effective interventions aimed at the roots of child maltreatment.⁸ Critics of CAPTA and the underlying philosophy espoused by its chief sponsor continue to echo many of these same themes,⁹ raising questions that take on added importance in a time of a deepening economic crisis. If we do not understand how entrenched social problems shape child maltreatment, we cannot possibly hope to forge effective strategies or solutions—on either an individual or a macro level—that actually serve the interests of children at risk of becoming involved in the child protection system.

¶5 In the years since Professor Pelton's early work, social scientists have gathered a great deal of information about the relationship between poverty and child maltreatment. To be sure, child welfare professionals do not profess to understand fully the dynamics of how living in poverty aggravates either the occurrence of reports of child maltreatment or actual maltreatment itself. There is no single explanation for why children living in poverty are at a higher risk of reported abuse or neglect. Social scientists continue to debate the extent to which the root causes of this relationship arise from community

⁴ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 § 4(B)(1)–(B)(3), 88 Stat. 4 (1974).

⁵ Kurt Mundorff, *Opening Remarks: Advocating for Change*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 353, 354 (2005); see also BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 1–2, 106 (1984).

⁶ LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 37 (1989).

⁷ Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608 (1978).

⁸ *Id.*

⁹ See, e.g., Mundorff, *supra* note 5, at 354; RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 55–58 (1995) (discussing the medicalization of child abuse).

norms, social isolation, chronic resource deficits, or simply from the increased exposure of poor families to public systems that often lead to protective interventions.¹⁰

¶16 Regardless of what may explain this correlation, its existence is beyond any reasonable dispute. In the past several decades, study after study has documented that children living in poverty are substantially more likely than children of affluence to be defined as abused or neglected and taken into foster care.¹¹ Studies have documented increased rates of child maltreatment when measured in conjunction with nearly every marker of low socioeconomic status, including teen parenting;¹² single-parent families;¹³ large sibling groups;¹⁴ and children whose parents are unemployed,¹⁵ lack a high school education,¹⁶ or receive public assistance.¹⁷

¶17 While the relationship between poverty and all forms of maltreatment is significant, it is especially so with child neglect, which encompasses forms of maltreatment related to environmental deprivations such as inadequate food and shelter

¹⁰ See, e.g., Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56, 56–57 (1985) (suggesting that social class and race are the most important perpetrator characteristics that distinguish reported from unreported cases of abuse); Jonathan B. Kotch et al., *Risk of Child Abuse or Neglect in a Cohort of Low-Income Children*, 19 CHILD ABUSE & NEGLECT 1115–16 (1995) (exploring etiological theories underlying maltreatment); Brett Drake & Shanta Pandey, *Understanding the Relationship Between Neighborhood Poverty and Specific Types of Child Maltreatment*, 20 CHILD ABUSE & NEGLECT 1003, 1004–06 (1996). One common way in which poor parents face greater exposure to child protection interventions arises from the practice of testing newborn babies for exposure to illegal drugs, a practice far more common in public hospitals than in private facilities serving a more affluent clientele. See Kary Moss, *Legal Issues: Drug Testing of PostPartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406, 1407 (1989).

¹¹ See, e.g., Claudia J. Coulton et al., *How Neighborhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways*, 31 CHILD ABUSE & NEGLECT 1117, 1122 (2007) (summarizing twenty-five studies of the relationship between socioeconomic characteristics of neighborhoods and child maltreatment); see also Drake & Pandey, *supra* note 10, at 1012–14; Claudia J. Coulton et al., *Community Level Factors and Child Maltreatment Rates*, 66 CHILD DEV. 1262, 1273–1274 (1995).

¹² *Most Illinois Children in Foster Care were Born to Former Teen Mothers*, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO (2010), available at <http://www.chapinhall.org/research/inside/most-illinois-children-foster-care-were-born-former-teen-mothers>.

¹³ ANDREA J. SEDLAK ET AL., ADMIN. FOR CHILDREN AND FAMILIES, DEP'T OF HEALTH AND HUMAN SERVICES, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, EXECUTIVE SUMMARY § 5.3.2 (2010) [*hereinafter* NIS-4], available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_report_exec_summ_pdf_jan2010.pdf (indicating that, compared to those living with married biological parents, children whose single parent had a live-in partner had more than eight times the rate of maltreatment overall).

¹⁴ *Id.* (reporting child maltreatment incidence rates highest for children with three or more siblings).

¹⁵ *Id.* § 5.1.2, Tbl. 5-2 (indicating that, compared to children with employed parents, those with no parents in the labor force suffered more than twice the rate of abuse and more than three times the rate of neglect); see also Press Release, Am. Acad. of Pediatrics, Unemployment Linked with Child Maltreatment (Oct. 3, 2010), available at <http://www.aap.org/pressroom/Segeabstract.pdf>; Bill Gillham et al., *Unemployment Rates, Single Parent Density, and Indices of Child Poverty: Their Relationship to Different Categories of Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 79, 87–89 (1998).

¹⁶ See NIS-4, *supra* note 13, §5.2.1 (explaining that socioeconomic status includes, without limitation, education level).

¹⁷ *Id.* at Executive Summary. When determining whether families met certain socioeconomic status, study data forms asked whether anyone in the child's family participated in a poverty-related program, including subsidized school meals, Temporary Assistance to Needy Families (TANF), food stamps, public housing, energy assistance, or public assistance. *Id.*

or the failure to provide other forms of necessary care. Data collected by the United States Department of Health and Human Services for the 2010 National Incidence Study on Child Abuse and Neglect (NIS-4) indicated that among low socioeconomic status households,¹⁸ rates of reported child maltreatment were five times higher than for all other children and seven times higher in categories labeled as neglect.¹⁹ As the level of family income decreases, reports of neglect increase at an even faster rate than reports of abuse. One study found that, while all forms of maltreatment increase with lower levels of family income, the relationship between poverty and neglect is especially pronounced: for families living in the highest levels of poverty, neglect accounts for nearly two-thirds of all reports of harm.²⁰ The underlying message of all of these studies is succinctly described in Andrea Sedlak's *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4*: "[I]ncome, or socioeconomic status, is the strongest predictor of maltreatment rates."²¹

It is also important to acknowledge that state interventions aimed at child maltreatment continue to affect racial minorities disproportionately.²² A policy brief released in 2005 by the Annie E. Casey Foundation noted that while children of color made up 42 percent of the U.S. child population, they made up 57 percent of all children in foster care.²³ Staggeringly, African American children made up 15 percent of the total U.S. child population, yet they made up 33.9 percent of the population of children in foster care.²⁴ Compared to non-Hispanic white children, African American children were disproportionately represented at a rate of 3.09 to 1. Native American children were

¹⁸ The NIS-4 defines low socioeconomic status households as those with "household income below \$15,000 a year, parents' highest education level less than high school, or any member of the family a participant in a poverty program, such as TANF, food stamps, public housing, energy assistance, or subsidized school meals." *Id.*

¹⁹ *Id.* § 5.2.1.

²⁰ See Drake & Pandey, *supra* note 10, at 1011. The division of maltreatment reports between abuse and neglect is often complicated by overlapping definitions that suggest that the percentage of harms reasonably attributable to environmental conditions may be even higher. In Illinois, for example, as a routine, situations best fitting the definition of "environmental neglect," under 705 ILL. COMP. STAT. § 405/2-3(1)(b) (1987), are also charged as abuse based on an alleged "substantial risk of harm," under 705 ILL. COMP. STAT. § 405/2-3(2)(ii).

²¹ Andrea J. Sedlak et al., *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4*, ADMIN. FOR CHILDREN AND FAMILIES, DEP'T OF HEALTH AND HUMAN SERVICES (2010) [hereinafter *Supplementary Analyses of Race Differences*], available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_supp_analysis_race_diff_mar2010.pdf.

²² See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2003); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, *AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE* (2007), available at <http://www.gao.gov/new.items/d07816.pdf>.

²³ ANNIE E. CASEY FOUND. POLICY BRIEF, *DISPROPORTIONALITY: THE OVERREPRESENTATION OF CHILDREN OF COLOR IN THE FOSTER CARE SYSTEM* (2009) [hereinafter *CASEY POLICY BRIEF*]; see also ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE AFCARS [ADOPTION AND FOSTER CARE REPORTING SYSTEM] REPORT: PRELIMINARY ESTIMATES FOR FY 2005* [hereinafter *AFCARS REPORT*], available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm.

²⁴ *CASEY POLICY BRIEF*, *supra* note 23 (citing *AFCARS REPORT*, *supra* note 23); *Kids Count Data Center: Data Across States: Child Population by Race*, ANNIE E. CASEY FOUND. [hereinafter *Child Population by Race*], available at <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=103>.

disproportionately represented at a rate of 2.95 to 1.²⁵²⁶ Beyond the problem of overrepresentation, research indicates that children of color receive fewer supportive services than their white peers, stay in the system longer, are less likely to be reunited with their families, and take longer to be adopted.²⁷

¶9 The NIS-4, relying on data gathered in 2005 and 2006, reported, for the first time, race differences in child maltreatment rates, with black children experiencing several types of maltreatment at a higher rate than white children.²⁸ This statistic correlates closely with the increasing disparity in income distribution by race: according to NIS-4, only 21.8 percent of white children in the study were classified as low socioeconomic status, compared with 61.6 percent of black children.²⁹ From their analysis of the NIS-4 data, the study authors concluded that the higher incidence of maltreatment of black children most likely arises not because of their race, but because of their lower socioeconomic status.³⁰ The implications of this disparity, in a society that purports to administer justice without regard to race, are profound.

¶10 For many children taken from their families because of maltreatment, their placement in substitute care—whether short-term or long-term—is essential to protect them from immediate harm. Even accounting for the adverse consequences frequently associated with placement in foster care, removal from family through forced state intervention often represents the best available response to an immediate problem. Nonetheless, it is still critically important to recognize that, compared with the general population, children who have spent time in foster care face challenges that markedly diminish their prospects for successful transitions into adulthood. Poor outcomes for foster children may be reasonably attributed to a broad and complicated range of causes, including both the reported maltreatment that prompted state intervention and the general conditions of poverty from which many foster children come.³¹ Whatever the causes

²⁵ *Child Population by Race*, *supra* note 24.

²⁶ *Id.*

²⁷ See, e.g., ANNIE E. CASEY FOUND., DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM: THE DISPROPORTIONATE REPRESENTATION OF CHILDREN OF COLOR IN FOSTER CARE 2 (2007), available at http://www.mockingbirdsociety.org/files/reference/Cultural_Relevancy/Casey_Disproportionality_Fact_Sheet_rev3_14_07.pdf (citing Dorothy Roberts, *Racial Disproportionality in the U.S. Child Welfare System: Documentation, Research on Causes, and Promising Practices* (Annie E. Casey Foundation, Working Paper No. 4)); *Advocacy: National Fact Sheet 2002*, CHILD WELFARE LEAGUE OF AM. (2002), available at <http://www.cwla.org/advocacy/nationalfactsheet02.htm>.

²⁸ See NIS-4, *supra* note 13, at 1; see also CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO, RACIAL AND ETHNIC DISPARITY AND DISPROPORTIONALITY: CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM (2009), http://cjjr.georgetown.edu/pdfs/cjrr_ch_final.pdf; Andrea J. Sedlak & Dana Schultz, *Race Differences in Risk of Maltreatment in the General Child Population*, in THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM: RACE MATTERS IN CHILD WELFARE 47–61 (Dennette M. Derezotes et al. eds., 2005).

²⁹ See *Supplementary Analyses of Race Differences*, *supra* note 21, at 8 (“The child is classified as in a family of low socioeconomic status if the household income was less than \$15,000, the parent(s) were not high school graduates, or the household participated in a poverty program.”).

³⁰ See *id.* at 49.

³¹ Studies have demonstrated harmful consequences for children living in concentrated areas of poverty. See, e.g., Claudia J. Coulton & Shanta Pandey, *Geographic Concentration of Poverty and Risk to Children in Urban Neighborhoods*, 35 AM. BEHAV. SCIENTIST 238, 254 (1992) (describing elevated risks associated with poverty, including increased number of teen parents, reduced educational outcomes, and increased delinquency rates); CLAUDIA COULTON ET AL., AN ANALYSIS OF POVERTY AND RELATED CONDITIONS IN CLEVELAND AREA NEIGHBORHOODS (1990) (stating that social problems associated with poverty include

might be, the long-term deleterious effects of foster care are well documented with respect to measures including cognitive development, school performance, teen pregnancy rates, births to unwed mothers, substance abuse, juvenile delinquency, suicide, depression, and other health problems.³² Rational placement decisions must balance knowledge of the adverse effects of foster care against the risks associated with remaining at home.

II. THE IMPACT OF THE CURRENT RECESSION ON CHILD WELFARE

¶11 Both the documented correlation between poverty and neglect, and the knowledge that foster children face substantially diminished prospects as adults, provide important context for understanding the likely impact of the current recession on child welfare generally. The most recent data gathered during the 2010 census indicated that between 2008 and 2009, with the onset of the current recession, the number of children living below federal poverty standards in the United States increased from 18 percent to almost 21 percent, representing approximately 1.5 million children.³³ Some commentators project that child poverty in the United States will reach 24 percent in 2012.³⁴

¶12 For child welfare advocates, this economic data raises obvious questions about the potential impact of the recession on the protective systems responsible for answering calls about abused and neglected children. The complex nature of the social dynamics shaping child welfare trends make it difficult to reach any conclusions from available statistics regarding the incidence of child maltreatment. Indeed, in Illinois, the number of calls reporting allegations of abuse or neglect, as well as the number of substantiated calls, have actually declined between 2008 and 2010.³⁵ However, a closer look at the

high rates of delinquency, crime, unemployment, female-headed households, and public assistance, and teen births).

³² See, e.g., ADMINISTRATION FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT (2008),

http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm (summarizing research related to outcomes for abused and neglected children, including impaired brain development, school performance, teen pregnancy, substance abuse, delinquency and adult criminality, mental health and physical health problems); BARBARA T. KELLEY ET AL., IN THE WAKE OF CHILDHOOD MALTREATMENT, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE 2 (1997), <http://www.ncjrs.gov/pdffiles1/165257.pdf> (indicating that abused and neglected children more likely to experience delinquency, teen pregnancy, low academic achievement, drug use and mental health issues); Comm. on Early Childhood, Adoption and Dependent Care, Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care* 106 PEDIATRICS 1145,1147 (2000), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;106/5/1145.pdf> (neglect affects attachment ability, physical development and social behavior); Adam Zolotor et al., *School Performance in a Longitudinal Cohort of Children at Risk of Maltreatment*, 3 MATERNAL CHILD AND HEALTH J., 19, 26–27 (1999) (showing that substantiated maltreatment report significantly associated with poorer academic performance and adaptive functioning).

³³ See HIGHLIGHTS OF CURRENT POPULATION SURVEY, 2010 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, available at <http://www.census.gov/hhes/www/poverty/about/overview/index.html>; see also ANNIE E. CASEY FOUND., 2010 KIDS COUNT DATA BOOK 6 (2010), available at <http://datacenter.kidscount.org/databook/2010/OnlineBooks/2010DataBook.pdf>.

³⁴ Kathy Ryg, Fiscal Integrity and Social Responsibility: Confronting the State Budget Crisis (Aug. 3, 2010), available at <http://www.illinoisagriculturevision.org/files/VisionKRV.ppt>.

³⁵ See ILL. DEP'T OF CHILDREN AND FAMILY SERVS., CHILD ABUSE AND NEGLECT STATISTICS FISCAL YEAR 2010 Fig. 1, Tbl. 1, Tbl. 2 (2011), available at <http://www.state.il.us/DCFS/docs/CANTS2010.pdf>. One possible explanation for this circumstance is that the decision-makers responsible for threshold risk

relationship between specific markers of poverty and child maltreatment suggests the existence of a clear relationship between rising economic deprivation and the rising exposure of children to reports of maltreatment. For example, a recent study looking at data collected between 1990 and 2008 documents a small but significant rise in substantiated reports of maltreatment associated with every percentage point increase in the unemployment rate.³⁶ In that study, Dr. Robert Sege and his colleagues at the Boston University School of Medicine reviewed state-level unemployment statistics from the Bureau of Labor Statistics, comparing them with child maltreatment data from the National Child Abuse and Neglect Data System for the corresponding years. The study found that each 1 percent increase in unemployment corresponded with at least a 0.50 per 1,000 increase in confirmed child maltreatment reports one year later.³⁷ Dr. Sege's study provides direct support for the statistical observations of the NIS-4, which reported that children with no parent in the labor force had the highest rate of "endangerment standard" maltreatment,³⁸ an estimated 57.7 per 1,000 children, or more than three times the rate for children with a working parent.³⁹

¶13 According to the most recent Illinois Kids Count Report, Illinois families with children were 3.6 percent poorer in 2008—even before the onset of the recession—than they were in 1999, and households headed by single mothers were 7.9 percent poorer over this same period.⁴⁰ In the fourth quarter of 2009, nearly one million people living in Illinois were unemployed or underemployed.⁴¹ In some of Illinois' largest cities and counties, more than a quarter of the children were living in poverty between 2007 and 2008.⁴² The poverty rate statewide in 2009 was 13.3 percent, an increase from 12.2 percent in 2008; the child poverty rate statewide in 2009 was 18.6 percent, an increase from 16.8 percent in 2008.⁴³ In 2009, 32 percent of Illinois children in poor families did not have an employed parent.⁴⁴ All of these statistical markers of poverty describe a climate of increasingly severe deprivation.⁴⁵

assessments have already accounted for the reality that growing resource deficits within the child welfare system make the placement of children in foster care seem like a less attractive alternative by comparison.

³⁶ Press Release, Am. Acad. of Pediatrics, Unemployment Linked with Child Maltreatment (Oct. 3, 2010), available at <http://www.aap.org/pressroom/Segeabstract.pdf>.

³⁷ *Id.*

³⁸ NIS-4 defines its "Endangerment Standard" to include not just children actually harmed by abuse or neglect, but also children placed at serious risk of harm. NIS-4, *supra* note 13, § 3.2.

³⁹ *Id.* §5.1.2. The report casts these differences as "statistically significant." *Id.*

⁴⁰ VOICES FOR ILLINOIS CHILDREN, ILLINOIS KIDS COUNT DATABOOK 2010: "CHILDREN AND FAMILIES IN A TIME OF ECONOMIC CRISIS" 17 (2010), available at http://www.voices4kids.org/library/KC10_economic_crisis.html.

⁴¹ AMY TERPSTRA, AMY RYNALL & LINDY CARROW, 2010 REPORT ON ILLINOIS POVERTY 5 (2010), available at <http://www.heartlandalliance.org/whatwedo/advocacy/reports/2010-report-on-illinois-poverty-final.pdf> (citing Social IMPACT Research Center's analysis of U.S. Census Bureau's Population Survey Basic Survey Public Use Microdata Sample).

⁴² VOICES FOR ILLINOIS CHILDREN, *supra* note 40.

⁴³ HEARTLAND ALLIANCE FOR HUMAN RIGHTS AND HUMAN NEEDS, ILLINOIS: SNAPSHOT OF POVERTY, INCOME AND HEALTH INSURANCE COVERAGE Vol. 1 (2010), available at <http://www.heartlandalliance.org/povertyreport/2009-acs-fact-sheets/illinois-09-acs-final.pdf>.

⁴⁴ NAT'L CTR. FOR CHILDREN IN POVERTY, ILLINOIS DEMOGRAPHICS OF POOR CHILDREN, available at http://www.nccp.org/profiles/state_profile.php?state=IL&id=7.

⁴⁵ See RYG, *supra* note 34.

III. IMPLICATIONS FOR CHILDREN IN THE CHILD PROTECTION SYSTEM

¶14 What does all of this import for the foster care systems that carry the burden of caring for children whose circumstances require removal from their parents' homes? The statistics correlating poverty and foster care are clear. Presently, by some estimates, more than 70 percent of children enter the child protection system based on charges tied to neglect.⁴⁶ Plainly, in a climate of economic decline, many families face an increased threat of exposure to the child protection system. Beyond this, however, once children are taken into care, they become wards of child welfare agencies that also face financial challenges, including budget cuts and funding freezes that may lessen their capacity to ensure that children taken away from their families can thrive and achieve permanency.

¶15 In order to minimize the harm to which children are exposed as a result of widespread financial hardships, child welfare professionals must understand not only the growing difficulties faced by intact families, but also the ways in which systems of substitute care have been similarly impacted. Without such an understanding, advocates cannot reasonably expect to ensure that young people who have already suffered poverty-related trauma are not then unnecessarily harmed by systems with inadequate resources to address their needs.

A. *Reductions in Funding for Child Welfare Services*

¶16 As families and children face economic challenges, so too do state and local governments. Across the country, child protection and other human services agencies are facing budget shortages that have caused funding freezes and service cuts.⁴⁷ In Illinois, the Department of Children and Family Services (DCFS) has fared better than agencies in many other states, but it has experienced, and is still experiencing, extremely significant fiscal challenges. In January 2009, Illinois faced a \$12 billion deficit in general funds for fiscal years 2009 and 2010 combined.⁴⁸ In the face of this fiscal crisis, Governor Pat Quinn announced plans in May of 2009 to cut health services agency budgets in half, informing DCFS that its funding, in turn, would be reduced by almost half a billion dollars⁴⁹ and instructing it to inform its contracted private service providers that they too would experience drastic reductions in funding for child welfare services.⁵⁰ In response, DCFS wrote to the Governor explaining that, in order to accommodate the proposed cuts,

⁴⁶ CHILDREN'S DEFENSE FUND, CHILD WELFARE IN ILLINOIS (2010), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cwf/2010/child-welfare-financing-illinois-2010.pdf> (citing NATIONAL DATA ARCHIVE ON CHILD ABUSE AND NEGLECT (2007), <http://ndacan.cornell.edu/index.html>) (reporting that more than 72 percent of all charges of child maltreatment included allegations of neglect or medical neglect).

⁴⁷ Erik Eckholm, *States Slashing Social Programs for Vulnerable*, N.Y. TIMES, Apr. 12, 2009, at A1.

⁴⁸ LARRY JOSEPH & MANYA KHAN, PASSING THE BUCK: FY 2011 STATE BUDGET JEOPARDIZES PROGRAMS FOR CHILDREN AND FAMILIES (2010), http://illinoispartners.org/sites/default/files/June%202010_Voices%20For%20Children_Special%20Report.pdf.

⁴⁹ Telephone Interview with Kendall Marlowe, Deputy Dir., Commc'ns, Ill. Dep't of Children and Family Servs., in Chi., Ill. (Sept. 24, 2010).

⁵⁰ Press Release, ACLU of Illinois, Victory for Children in State Custody (June 30, 2009), available at <http://www.aclu-il.org/victory-for-children-in-state-custody>.

it would need to eliminate core services directly affecting the safety and welfare of its wards,⁵¹ and such cuts would endanger the children under its responsibility:

The Department can operate for six months without endangering the children we are mandated to serve . . . [but] with no restoration to the 50% [General Revenue Funds (GRF)] reduction, DCFS would virtually shut down. . . . [A]ny efforts to discern the impact of a 50% GRF reduction would fail to adequately describe the harm to children that would result.⁵²

¶17 Much of the planned cut to DCFS's 2009 budget was restored through the Governor's allocation of a sizeable part of his discretionary funding, but the situation remains dire. For DCFS, the most recent appropriations bill still reflects a dramatic funding gap, allowing for only \$579 million of its 2010 revised budget of \$865 million—a shortfall of roughly one third of its proposed annual budget.⁵³ As in 2009, much of this 2010 gap was eliminated by the Governor's application of discretionary funding beyond DCFS's block grant, pursuant to "emergency budget" powers extended to the Executive Office intended to allow it to address deficits in critical state programs.⁵⁴ Still, DCFS's budget shortfall for 2010 is in excess of \$34 million,⁵⁵ meaning that threats to core services remain extant.

B. The Consequences of Funding Cuts for Child Welfare Service Providers and Their Clients

¶18 The Department has openly acknowledged at least some of the expected consequences of this shortfall. In the summer of 2010, DCFS reported that it intended to phase in hiring more slowly,⁵⁶ consolidate field offices, eliminate some indirect contracts

⁵¹ Specific threatened service reductions included, among other things, layoffs of 38 percent of DCFS's work force, increasing caseload ratios from 15/1 to 50/1, reducing payments to foster parents by 50 percent, and eliminating crisis services, clinical assessments, counseling services, teen parenting services, adoption preservation services, daycare services, child advocacy centers, coordination of medical services, and many others. See Letter from Erwin McEwen, Director of DCFS, to Ginger Ostro, Governor's Office of Management and Budget, June 5, 2009. Director McEwen's letter was attached as Tab 7 to Plaintiffs' Motion for a Temporary Restraining Order and Other Injunctive Relief as evidence supporting Plaintiffs' request for emergency relief to enforce compliance with the terms of the *Hill* consent decree. Plaintiff Teen Class Members' Motion for a Temporary Restraining Order and Injunctive Relief to Enforce Compliance with the Terms of the *Hill* Consent Decree, No. 88 CO 296 (Ill. Cir. Ct. Cook Cnty. June 30, 2009). The Motion and other pleadings relating to *Hill v. Erickson* are available online. See CHI. COALITION FOR THE HOMELESS, <http://www.chicagohomeless.org/law/Hillcase>.

⁵² Letter from McEwen, *supra* note 51.

⁵³ COMM'N ON GOV'T FORECASTING AND ACCOUNTABILITY, STATE OF ILLINOIS BUDGET SUMMARY FISCAL YEAR 2011 167 (2011), *available at*

<http://www.ilga.gov/commission/cgfa2006/Upload/FY2011budgetsummary.pdf>.

⁵⁴ Governor's Office of Management and Budget, *Fiscal Year 2011 Budget, Children and Family Services* (Aug. 2, 2010), *available at*

<http://www2.illinois.gov/budget/Documents/FY2011%20Budget%20By%20Agency%20080210.pdf>.

⁵⁵ *Id.*

⁵⁶ Jamey Dunn, *Delving Deeper into the Budget Cuts*, ILL. ISSUES BLOG (Aug. 9, 2010, 4:01 PM), <http://illinoisissuesblog.blogspot.com/2010/08/delving-deeper-into-budget-cuts.html> ("Cuts to operations costs will be realized by holding off on filling 139 administrative positions, not caseworkers, shifting from

(including some outside professional services, training, and consultation services),⁵⁷ and “reestimate institution and group home demand.”⁵⁸

¶19 In Illinois, as in many jurisdictions, much of the State’s responsibility for providing child welfare services is discharged through contracts with private service providers. At present, statewide, roughly 80 percent of DCFS services are handled through contracts with service providers, with the percentage even higher in the Chicago metropolitan area, which accounts for roughly 75 percent of DCFS’s activities statewide.⁵⁹ In order to gauge fully the impact of child welfare budget cuts, one must thus also look at the impact of those cuts on private providers contracting with the state.

¶20 In late 2010, the Urban Institute conducted a nationwide study of the impact of the recession on human service nonprofits that deliver “pivotal services to individuals, families, and communities.”⁶⁰ The study was prompted by the recognition that the recession has depleted many nonprofit budgets, while at the same time increasing the demand for their services.⁶¹ It concludes that, as a result, many nonprofits have been forced to freeze or reduce salaries, draw on reserves, or scale back their operations.⁶² The Urban Institute’s data for Illinois nonprofit human service organizations reflect its deep financial crisis. During 2009, 65 percent of Illinois’ human service nonprofits reported having to freeze salaries; 38 percent reported having to draw on reserves; 54 percent reported having to lay off employees; 28 percent reported reduced benefits; 42 percent reported borrowing funds or increasing lines of credit to meet operating expenses; and 31 percent reported reducing programs or services.⁶³ In many of these categories, Illinois agencies reflected among the highest rates of problems in the country.⁶⁴

¶21 Late government payments may be at the heart of the problem. In 2009, 72 percent of nonprofits in Illinois reported late payments from government, the highest percentage in the country.⁶⁵ For example, Lutheran Social Services of Illinois, an established agency that provides foster care services, was owed almost nine million dollars in late payments from the State in November 2010; its president stated then that he did not know how much longer the organization could remain in operation.⁶⁶ Similarly, the Community

institutional placements to community-based services, cutting down on consultants including mental health service providers, and research into DCFS best practices.”)

⁵⁷ Telephone Interview with Marlowe, *supra* note 49.

⁵⁸ Governor’s Office of Management and Budget, *supra* note 54.

⁵⁹ DEP’T OF CHILDREN AND FAMILY SERVICES, BUDGET BRIEFING FY 2010 51-2 [hereinafter DCFS BUDGET BRIEFING 2010], *available at* http://www.state.il.us/DCFS/docs/FY10_budget_Book.pdf (“Over the last several years, the Department has moved increasingly from operating as a provider of services to operating principally as a purchaser of services. Over 80% of child welfare services are provided through purchase of service contracts.”).

⁶⁰ ELIZABETH T. BORIS ET AL., URBAN INST., NATIONAL STUDY OF NONPROFIT-GOVERNMENT CONTRACTING 1 (2010), *available at* <http://www.urban.org/UploadedPDF/412227-National-Study-of-Nonprofit-Government.pdf>.

⁶¹ *Id.* at 36.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Nationally, 41 percent of human service nonprofits reported late payments. *Id.* at 8.

⁶⁶ *State Budgets: The Day of Reckoning*, CBS NEWS 60 MINUTES, Dec. 19, 2010, *available at* <http://www.cbsnews.com/stories/2010/12/19/60minutes/main7166220.shtml?tag=contentMain;contentBody> (“Asked how long his organization can go on like this, Rev. Denver Bitner, the president of Lutheran

Counseling Centers of Chicago, an agency that provides counseling services for poor and working-class families, reported in July 2010 that the State was approximately \$2.2 million—six months worth of payments—in arrears; its chief administrative officer reported having to lay off and recall employees three times in two years.⁶⁷

¶22 Other anecdotal information confirms that even though DCFS avoided much of the worst of its threatened cuts, the ensuing disruptions in services to children in care have been extensive.⁶⁸ Practitioners in the juvenile court system described situations in which budget cuts and budget instability in the private sector interfered with critical relationships, limited access to essential services, and in some cases derailed efforts to achieve permanency for children.⁶⁹ When DCFS sent letters threatening drastic budget cuts in its private service contracts,⁷⁰ several agencies announced layoffs.⁷¹ In the wake of the announcements, some agencies began terminating relationships with clients who needed consistent care, including therapist-client relationships and drug recovery-coach-client relationships.⁷² While most of these relationships were later restored, practitioners reported that the damage was already done for many clients.⁷³

¶23 In recent years, larger agencies have remained open only by expanding operations outside of child welfare to ensure alternative sources of funding, and many smaller agencies have simply ceased operations. One practitioner noted that the private agencies seem to have lost their financial “float” in the last several years, which has caused delays in board payments to some foster parents and delayed referrals to service providers.⁷⁴ As a result, some qualified foster parents have faced financial turmoil, while others have

Social Services of Illinois, told [interviewer] Kroft, ‘Well, we wonder that too because we really don’t know.’”).

⁶⁷ Michael Powell, *Illinois Stops Paying its Bills, but Can’t Stop Digging Hole*, N.Y. TIMES, July 3, 2010, at A1, available at http://www.nytimes.com/2010/07/03/business/economy/03illinois.html?_r=1.

⁶⁸ In an effort to understand the way in which economic instability has affected the day-to-day lives of children and families involved in the Illinois child protection system, the authors collected anecdotes from a number of professionals who work in various capacities in the Child Protection Division of the Cook County Juvenile Court in person and on the telephone between September 30, 2010 and December 27, 2010. Confidential anecdotes from Juvenile Court professionals (Sept. 30–Dec. 27, 2010) (on file with authors). In order to comply with the confidentiality provisions of the Juvenile Court Act, individual professionals, clients, case numbers and other identifying information are not provided herein.

⁶⁹ The purpose of proceedings under the Illinois Juvenile Court Act is to secure safety and permanency for each child, with a preference for returning children to their own families. In the event that a child is removed from the parents’ custody, DCFS is instructed to take steps to ensure movement toward permanency for the child. See Juvenile Court Act of 1987, 705 ILCS §405/1-2 (1997). Permanency options are hierarchical and include, in order of preference, returning a child home, terminating parental rights, and freeing a child for adoption, long-term guardianship, and independence. See Juvenile Court Act of 1987, 705 ILCS § 405/2-28(2).

⁷⁰ See Letters from Erwin McEwen, Director of DCFS, to Private Service Providers, June 11, 2009. These letters were, attached as Tab 7 to Plaintiffs Motion for a Temporary Restraining Order and Other Injunctive Relief. See Plaintiff Teen Class Members’ Motion for a Temporary restraining Order and Injunctive Relief to Enforce Compliance with the Terms of the Hill Consent Decree, No. 88 CO 296 (Ill. Cir. Ct. Cook Cnty. June 30, 2009). The Motion and other pleadings relating to *Hill v. Erickson* are available online. See CHI. COALITION FOR THE HOMELESS, <http://www.chicagohomeless.org/law/Hillcase>.

⁷¹ Telephone Interview with Marlowe, *supra* note 49.

⁷² Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

⁷³ *Id.*

⁷⁴ *Id.*

simply walked away from the foster care system altogether.⁷⁵ In addition, some group homes and entire agencies have closed, disrupting important relationships between clients and child welfare professionals.⁷⁶

¶24 Practitioners are especially concerned about the availability of contract-based therapeutic services, which include evaluations that are critical to understanding the nature of a family's circumstances, and therefore essential to the development of an effective plan for the reunification of children and their parents. Several attorneys noted challenges obtaining evaluations and services for parents that support the goal of reunification. For example, attorneys described extensive waiting periods for psychological evaluations, which often form the foundation for meaningful therapy.⁷⁷ One attorney revealed that some agencies now send clients to public health services that provide free evaluations, resulting in both extensive delays in securing responses and a significant reduction in quality.⁷⁸

¶25 In addition, multiple attorneys expressed concerns that parents faced up to six-month waits for counseling services, possibly as a result of late payments.⁷⁹ As recently as December 2010, one private agency that has provided extensive counseling services for DCFS wards in Cook County announced that it was suspending all non-emergency services to its DCFS clients because of a lack of payments, explaining that, as a small agency, its "financial reserves are limited," and that "cash flow from DCFS for services rendered is the life blood that keeps our office open and clinicians able to provide services to families very much in need of them."⁸⁰

¶26 Therapist turnover is also a problem. One attorney noted that when a parent did obtain a counseling appointment, she was seen by a temporary intern, and when the intern departed, the disruption caused an additional delay in treatment.⁸¹ Attorneys also noted waiting lists for beds in in-patient drug treatment programs⁸² and dual diagnosis programs for parents experiencing both mental illness and substance addiction (MISA), forcing parents to do sequential treatment in two places instead of one and doubling the treatment time.⁸³ In some instances, agencies have failed to follow service plans because necessary services are simply not available. Under such circumstances, courts may face the dilemma of choosing between keeping children apart from parents willing but unable to complete services, or returning them home without designated services in place.⁸⁴

¶27 The lack of funding for transportation has also increasingly plagued the child welfare system. Even when children in substitute care are placed close to home, bus passes may be essential not only to enable participation in services, but also to support children's contact with their parents or siblings.⁸⁵ Despite this, agencies have been

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Confidential letter from private service provider to DCFS caseworker (Dec. 6, 2010) (on file with authors).

⁸¹ Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

reluctant to distribute bus or train passes, in many cases withholding them until ordered to provide them by the court.⁸⁶ One attorney noted that, in order to obtain bus passes to attend required therapy, a set of parents had to take two buses and a train each week from the north side of Chicago to the agency's office on the far south side of the city, because the agency would not provide monthly passes.⁸⁷ The attorney noted that transportation challenges extend the time that children are in substitute care because judges want to hear evidence of progress in therapy before allowing a child to return home.⁸⁸ These problems are obviously exacerbated when children are placed at greater distances from their families. Another attorney told of a troubling case in which a parent whose child was placed in a distant suburb asked for transportation help, and the agency advised the parent to go online at a library in order to request assistance through a private program accessible only through a computer-based intake. The parent, unfamiliar with the computer, was unable to do so and consequently had no visits with the child, leading eventually to a change in the child's permanency goal from return home to termination of parental rights.⁸⁹

¶28

As of December 2010, nearly 1,000 DCFS wards in Illinois were placed in transitional or independent living arrangements and planning for their independence.⁹⁰ With few exceptions, these children will age out of foster care at nineteen or twenty-one without being adopted.⁹¹ For these youths, obtaining life skills and education while in care is especially important because they must become independent within a short period of time. Teens frequently need supports and services that do not have a specific line item in a private agency contract.⁹² Even when subject to court orders directing payments for such expenses, agencies often lack the needed funds. One attorney observed that some private agencies no longer provide tutoring services mentoring services, or college tours for teen clients, which presents challenges for high-achieving foster youth who might be

⁸⁶ *Id.* Under Illinois law, when DCFS is given legal responsibility for a child, it is required by statute to provide and pay for any services deemed necessary through a service plan to the achievement of the chosen permanency goal. 20 Ill. Comp. Stat. 505/5(k) (2010). Legally, though they have become increasingly routine, court orders for such services—including transportation—are patently unnecessary. *See* 20 Ill. Comp. Stat. 505/5(i) (2010) (“The Department shall provide transportation for any of the services it makes available to children or families or for which it refers children or families.”).

⁸⁷ Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See* ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES EXECUTIVE STATISTICAL SUMMARY 21 (2010), available at <http://www.state.il.us/DCFS/docs/execstat.pdf> (open child cases by living type, including ILO (independent living) and TLO (transitional living)).

⁹¹ *See* 705 ILL. COMP. STAT. 405/2-31(1) (2010). DCFS reports that by the time they reach age sixteen, 80 percent of youth in care have a permanency goal of independence. DCFS BUDGET BRIEFING 2010, *supra* note 59, at 28.

⁹² While such expenses might be covered for children placed directly with DCFS, funds for private agencies are limited by contract that typically allow for no more than \$19.70 per month, to cover a wide range of “non-recurring incidentals” including replacement clothing, camp expenses, lessons, musical instruments, memberships, school supplies, gym shoes and equipment, graduation expenses, school trips, tutoring, summer school fees, travel unrelated to placement, medical expenses not otherwise covered, and interpreter/translation expenses. DEPARTMENT OF CHILDREN AND FAMILY SERVICES PROCEDURES, Part 359.40 App. A I(b), available at <http://dcfswebresource.dcf.illinois.gov/downloads/procedures> (follow “Procedures Part 359.pdf” hyperlink).

eligible for college or vocational school.⁹³ In certain circumstances, budget challenges present even more immediate problems. For example, an attorney revealed that some wards had complained that, when their teen living programs temporarily ran out of money, the programs cut stipends to the teens, sometimes even food money.⁹⁴ Another reported that his client, a high school student living in an independent living program and with a permanency goal of independence, had to wait three months after her eye exam to get eyeglasses.⁹⁵

C. Challenges and Strategies for Child Welfare Advocates

¶29

All of these circumstances suggest an increasingly difficult set of challenges for the advocates who represent the children and families who come into contact with our child welfare systems. For children already in the child welfare system, the description of systemic and day-to-day challenges in juvenile court underscores the need for conscientious, sometimes aggressive, advocacy. In individual cases, child advocates can utilize a variety of strategies to ensure that individual clients receive the services to which they are entitled. In the Juvenile Court of Cook County, when lawyers identify specific failures to meet the needs of children in care or their parents, and where those failures are rooted in budgetary shortfalls, some pressure may be brought to bear through the mechanism of judicial oversight. Lawyers routinely ask caseworkers in court to account for delays in procuring basic services or supports, either through regular status reports to the court, or, on occasion, through the more challenging and formal vehicle of a request for a written “report of the guardian.”⁹⁶ Attorneys may also ask for court orders directing agencies to address certain needs or circumstances, subject to enforcement through contempt proceedings.⁹⁷ Judges will sometimes order an agency to complete a task or institute a service, and then hold the case on call until the order is satisfied.⁹⁸ In more extreme circumstances, lawyers may file motions seeking either a finding that the agency has failed to make the reasonable efforts towards reunification required by law when the goal is to return the child home⁹⁹ or even to replace a caseworker or agency that has failed to exercise due diligence.¹⁰⁰

⁹³ Confidential anecdotes from Juvenile Court professionals, *supra* note. 68.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 705 ILL. COMP. STAT. 405/2-28(1) (2010) (“The court may require any legal custodian or guardian of the person appointed under this Act to report periodically to the court or may cite him into court and require him or his agency, to make a full and accurate report of his or its doings on behalf of the minor.”).

⁹⁷ See 705 Ill. Comp. Stat. 405/2-26 (2010) (enforcement of orders of protective supervision or of protection).

⁹⁸ Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

⁹⁹ The “reasonable efforts” requirement, rooted in federal law 42 U.S.C. § 675(a)(15)(B) (2006), is mirrored in several provisions of the Illinois Juvenile Court Act. See 705 Ill. Comp. Stat. 405/2-10(2), 2-28(2). Where a court concludes that the department or its contracted service providers have failed to make reasonable efforts as required by law, the consequence of the finding is a loss of federal funding to the department under the provisions of Title IV-E of the Social Security Act, 42 U.S.C. § 670, et seq (2006).

¹⁰⁰ The Illinois Appellate Court has held that the provisions of § 2-23(3) of the Juvenile Court Act, 705 Ill. Comp. Stat. 405/2-23(3) (2010), permit the court in extreme circumstances to compel a change in the staffing of a case, over the objection of the agency acting as the child’s legal guardian. *In re K.C.*, 759 N.E.2d 15 (Ill. App. Ct. 2001).

¶30 For understandable reasons, however, the effectiveness of all of these tools may be limited. To a large extent, Illinois law circumscribes the authority of the Juvenile Court to interfere with DCFS' exercise of discretion in its role as a child's legal guardian. Provisions of the governing statute explicitly prohibit the court from entering orders requiring specific services or service providers to be included in a child's service plan.¹⁰¹ Moreover, even where an agency's failure to meet the needs of a child is patent, judges are often reluctant to sanction DCFS, either out of concern that imposing sanctions leading to the loss of federal funds does not aid children, or because penalizing DCFS for the failings of contracting private agencies that operate with a large degree of autonomy seems inappropriate.¹⁰² Judges may also be conscious of their larger responsibility to state wards as a whole, fearing that in a time of fiscal austerity, forcing the provision of services for some individual children will only result in the reduction of services for other children equally in need.

¶31 On a larger scale, advocates in Illinois have had some degree of success with litigation strategies aimed at securing court orders in class actions suits aimed at protecting resources for children. Two examples of such tactics involved efforts to enforce longstanding consent decrees entered in state and federal court class action lawsuits. One of these cases, *Hill v. Erickson*, led to the entry of a consent decree in 1994 that required DCFS to create and maintain a series of programs and supports aimed at assisting pregnant and parenting teen wards of DCFS.¹⁰³ In the summer of 2009, after Governor Pat Quinn announced his "doomsday budget," DCFS notified the private agencies with which it contracted for services prescribed by the decree that their funding for class members would be cut on July 1, 2009.¹⁰⁴ In response, Plaintiffs' counsel filed a Motion for a Temporary Restraining Order and Injunctive Relief, seeking a court order prohibiting DCFS from eliminating any of the affected programs.¹⁰⁵ Rather than defend proposed service cuts in court, DCFS instead focused on communicating to the Governor's office the likely extent of the harms that would follow from the failure to restore its funding.¹⁰⁶ On December 4, 2009, the parties to the *Hill* suit agreed to dismiss their claims voluntarily, in exchange for DCFS' commitment to the creation of a process to precede any proposed service cuts.¹⁰⁷ The consent decree remains in effect.¹⁰⁸

¶32 During the same time frame, counsel for the plaintiff class in the federal class action lawsuit *B.H. et al. v. McEwen* filed a similar motion to enforce the consent decree entered in 1991, pursuant to which DCFS undertook a broad range of commitments relating to its child welfare programs and services.¹⁰⁹ In a hearing on the motion, DCFS

¹⁰¹ 705 Ill. Comp. Stat. §§ 405/2-23(3), 2-28(2). See generally Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377 (1995).

¹⁰² Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

¹⁰³ Consent Decree, *Hill v. Erickson*, No. 88 CO 296 (Cir. Ct. Cook Cnty. Jan. 3, 1994).

¹⁰⁴ Letters from McEwen, *supra* note 51.

¹⁰⁵ Plaintiff Teen Class Members' Motion for a Temporary Restraining Order and Injunctive Relief to Enforce Compliance with the Terms of the *Hill* Consent Decree, No. 88 CO 296 (Ill. Cir. Ct. Cook Cnty. June 30, 2009).

¹⁰⁶ Letter from McEwen, *supra* note 51.

¹⁰⁷ Supplement to the *Hill* Consent Decree, *Hill v. Erickson*, 88 CO 296 (Cir. Ct. Cook Cnty. Dec. 4, 2009).

¹⁰⁸ Final Order Approving Settlement, *Hill v. Erickson*, 88 CO 296 (Cir. Ct. Cook Cnty. Mar. 19, 2010).

¹⁰⁹ Consent Decree, *B.H. v. Samuels*, 1:88-cv-05599 (Cir. Ct. Cook Cnty. Dec. 20, 1991) (also known as *B.H. v. McDonald*, *B.H. v. Suter*, *B.H. v. Johnson*, *B.H. v. Ryder* and *B.H. v. McEwen*).

Director McEwen again explained that the proposed budget cuts would force DCFS to eliminate almost all services to children with special needs and families requiring financial and other assistance to care for children in foster care.¹¹⁰ He also noted that the cuts would create great hardship for many foster families, forcing some families to cease their care as foster parents.¹¹¹ Director McEwen appeared to seek the court's assistance in circumventing the likely consequences of a drastic budget reduction. The court, in effect, answered the call, ordering DCFS to comply with all provisions of the original decree and barring it from proceeding with "any reduction or cancellation of any programs or services . . . that violate the Decree so long as the Decree remains in effect."¹¹² The court also ordered DCFS to maintain its current caseload ratios for all personnel and to "[p]erform all necessary clinical and social assessments for all children entering and assure that appropriate services are available to meet the assessed needs."¹¹³

¶33 The successes of the attorneys in the *Hill* and *B.H.* cases are noteworthy, but the strategies pursued by counsel in these cases may be increasingly difficult to replicate. Both of these victories arose in the context of a political climate encouraging an unusual degree of cooperation between the litigants. More generally, the costs of pursuing impact litigation may be prohibitive for many attorneys, particularly in a legal climate that in many ways has become increasingly intolerant towards the strategies of reform-oriented class-action lawsuits. The federal courts' growing hostility to institutional reform litigation is reflected, most recently, in the decision in *Horne v. Flores*, in which the Supreme Court demanded a more flexible and forgiving application of the provisions of Federal Rule of Civil Procedure 60(b)(5) when institutional defendants seek relief from the burden of federally-mandated relief in class action suits.¹¹⁴ For plaintiffs' counsel in suits such as *B.H. v. Samuels*, *Horne* represents a substantial obstacle to engaging the continuing oversight of the courts in ensuring governmental compliance with laws protecting basic civil or other rights.

IV. CONCLUSION

¶34 Clearly, the deepening fiscal crisis in Illinois and in other states has presented increasingly demanding challenges for advocates trying to protect the needs and interests of both children in foster care and the members of their families working towards addressing the circumstances that led their children into care. In the day-to-day routine of the Juvenile Court, lawyers have been forced to become increasingly aggressive in addressing specific problems or failings rooted in resource deficits that have become more and more acute since the onset of the recession. Anecdotes from attorneys practicing regularly in the Juvenile Court suggest that, at least to some extent, these

¹¹⁰ Supplemental Order to Enforce Consent Decree, *B.H. v. McEwen*, 1:88-cv-05599 (Cir. Ct. Cook Cnty. June 30, 2009).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 129 S. Ct. 2579 (2009). In *Horne*, the Supreme Court reversed a lower court order holding state officials in contempt for failing to abide by the terms of a consent decree requiring educational supports for non-English speaking students, directing lower courts to take a "flexible approach" to the rule, in order to "ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Id.* at 2594–95.

efforts have forestalled some of the most egregious failings of DCFS and its contracting private agencies, arising from their resource limitations.¹¹⁵ In the arena of impact litigation, some limited successes have at least forestalled the impact of drastic budget cuts on some of the populations that can least afford them. All of these efforts serve to remind decision makers that when the state intervenes in the life of a child, it is and should be bound both morally and legally to maintain minimum standards of care.¹¹⁶ The importance of such reminders to judges, executives, and lawmakers alike cannot and should not be underestimated.

¶35 From a macro perspective, however, all of these efforts feel in many ways inadequate to the overall challenge of advocating for children and families in a time of severe budget cuts. Beyond all of the legal obstacles—obstacles that in any specific case may or may not be overcome—the fundamental economic problem remains. If the only consequence of a court order is to force a private agency to reallocate its already-limited funding, it is hard to see the advantage of shifting resources to one client, or set of clients, from other clients who are presumably equally needy.

¶36 All of this necessarily raises questions about whether, in any particular case, a child is likely to be better served by being taken into foster care, rather than by being left at home in marginal circumstances, ideally with appropriate home-based supports or interventions. This, at its core, was the challenge framed by Professor Pelton more than thirty years ago, when he asked whether our child protection systems adequately distinguish between poverty and neglect. This is not to suggest in any way that the foster care system ought to be dismantled in its entirety. To be sure, in most instances when children are taken forcibly into substitute care, child protection investigators are responding to serious problems that demand immediate interventions. However, decisions about whether or not to respond to an allegation of abuse or neglect by taking a child into care cannot be made in a vacuum and must account for the possibility that the interventions may ultimately do more harm than good.

¶37 A recent study conducted at the Universities of Utah and Arizona sought to determine whether a Child Protection Services investigation for suspected child maltreatment is associated with subsequent improvements in household, caregiver, and child risk factors.¹¹⁷ Looking at data reaching back to 1991 and an admittedly small

¹¹⁵ Confidential anecdotes from Juvenile Court professionals, *supra* note 68.

¹¹⁶ Federal courts have generally agreed that when the state places a child in foster care, it assumes an affirmative constitutionally-mandated duty to provide minimally adequate care, consistent with the principles governing prisoners and disabled adults involuntarily committed to state hospitals. *See, e.g., Doe ex rel. Johnson v. South Carolina Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010), *cert. denied* 131 S. Ct. 392 (2010) (finding that when a state involuntarily removes a child from her home and takes her into foster care, it has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing some responsibility for the child's safety and general well-being); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir.2000) (en banc) (same); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir.1993) (same); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848–49 (7th Cir. 1990) (same). *See generally Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that a mentally ill patient in involuntary confinement has a constitutionally protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraints); *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that deliberate indifference to prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment).

¹¹⁷ Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment*, 164 ARCHIVES PEDIATRICS ADOLESCENT MED. 943 (2010).

sample of subjects, the study reported several disturbing observations suggesting major shortcomings in the adequacy of the interventions that often follow the placement of a child into foster care:

Just 38% of children investigated for maltreatment receive any post-investigative services. While 42% of children have identifiable behavioral problems at the time of CPS investigation, only 28% of children receive mental health services during the 12 months following CPS investigation. Among caregivers reporting intimate partner violence at the time of CPS investigation, 40% report continued intimate partner violence 18 months later. In the years following a CPS investigation, 22% to 62% of children will be referred back for new concerns of maltreatment.¹¹⁸

¶38 From the observation that an investigation for suspected child maltreatment is often not associated with relative improvements in common modifiable risk factors, the study authors suggest that “[i]t is not clear that we are taking advantage of this opportunity to help families.”¹¹⁹

¶39 If this is indeed the case for children placed in care throughout the 1990s, the failures of the foster care system to “take advantage of the opportunity to help families” can only be expected to have worsened in a climate of economic decline. The statistics and other evidence of the impact of the recession on child welfare discussed above support the notion that this is exactly what has happened over the past several years. Clearly, our collective ability to recognize and respect the differences between poverty and neglect, embodied in Professor Pelton’s “myth of classlessness,” is as important now as it was when Dr. Kempe and his colleagues launched the modern child welfare movement almost fifty years ago. This is especially true in the face of deep and growing uncertainty about the ability of the child welfare system to actually improve the lives of its wards. For the child welfare system as a whole, it remains critically important going forward to be sure not just that the children who come into care are actually abused and neglected, but also that, when state systems intervene into the lives of poor families, they do so only when they can act with confidence that the affected children will be made better off as a result.

¹¹⁸ *Id.* at 943.

¹¹⁹ *Id.*