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Domestic Violence, Substance Abuse and Child Welfare: The Legal System's Response

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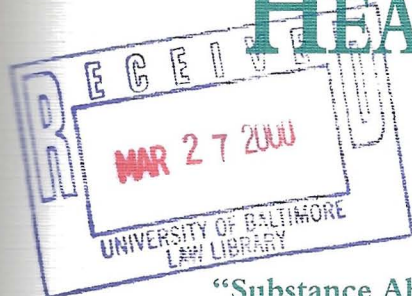
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University of Maryland School of Law
Law & Health Care Program

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DOMESTIC VIOLENCE, SUBSTANCE ABUSE, AND CHILD WELFARE: THE LEGAL SYSTEM'S RESPONSE*

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MARGARET J. POTTHAST, PH.D., M.A.***

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INTRODUCTION

Federal standards governing removal of children have recently shifted the emphasis from reunification with parents to expedited permanency planning for children. Under the Adoption and Safe Families Act (ASFA),¹ states' receipt of federal funds is conditioned upon establishing procedures that make child welfare bureaucracies move more quickly to rule out parents as caretakers, making children available for adoption sooner.² Critiques of ASFA accurately note the limitations of a child welfare policy that emphasizes termination of parental rights while doing nothing to build stronger support for families.³ The short time limits imposed by ASFA may limit the ability of the child welfare system to provide meaningful and effective services to families to permit reunification.⁴ Researchers estimate that half the families in the child welfare system include parents who are drug or alcohol addicted.⁵ The nexus between substance abuse and domestic violence further exacerbates the problem.⁶ Dorothy Roberts⁷ and others⁸ have also criticized the ASFA reform efforts on the grounds

1. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. §671(a)(15)(A)).

2. See discussion *infra* accompanying notes 53-64.

3. See, e.g., Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

4. See discussion *infra* accompanying notes 53-64.

5. See, e.g., THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY (CASA), NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 4 (1999) [hereinafter CASA, NO SAFE HAVEN]; U.S. DEP'T OF HEALTH & HUMAN SERVICES, BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILDREN 31 (1999) [hereinafter BLENDING PERSPECTIVES].

6. See discussion *infra* accompanying notes 27-39.

7. See Dorothy E. Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. POL'Y 72 (forthcoming 1999). See also Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 97-98 (1993); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 10-16 (1993); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 948-51 (1997).

8. See, e.g., Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285 (1998) [hereinafter Bailie, *The Other "Neglected" Parties*].

that state intervention in child protection cases has focused almost exclusively on poor families and that African-American children are disproportionately represented in the foster care population. This race-based critique is also supported by research and the experiences of practitioners in the child protection system.⁹ Such critiques, however, may not adequately address the overwhelming challenges facing child protection systems around the country today, particularly for families affected by domestic violence and substance abuse. In addition, the focus on reversing ASFA's pro-adoption policies might obscure the real barriers to reunification facing child protection workers every day—attempting to develop a long-term plan for children with drug or alcohol addicted parents in violent relationships in a system that provides little or no services for these families.

This Article begins by exploring and documenting the connections between domestic violence, substance abuse, and child abuse. Part II of the Article examines the legal system's response to child protection cases in which maternal abuse and, in some cases, substance abuse are present. This section begins by describing the shifting theories underlying child welfare in this country. It then contrasts these theories with child welfare practice by reporting the results of a study of eighty-five Child in Need of Assistance (CINA)¹⁰ cases in four jurisdictions in Maryland. Although the study examines a limited sample, the cases examined confirm the strong connection between do-

9. See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 689, 708-09 (1998) [hereinafter Murphy, *Legal Images of Motherhood*]; Annie W. Brown & Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 71, 74-75 (1997); Sheryl Brisset-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, 76 CHILD WELFARE 45, 60 (1997); Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 5 (1995); *Adoption and Support of Abused Children: Testimony Before the Senate Comm. on Finance*, 105th Cong. 255-56 (1997) (statement of Valora Washington, program director for the Families for Kids Initiative of the W.K. Kellogg Foundation); AMERICAN BAR ASSOCIATION PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTIONS 51 (1993) [hereinafter ABA AMERICA'S CHILDREN AT RISK]. See also Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63,79 (1995) (arguing that the application of a best interests standard in the context of adoption increases the likelihood that poor minority women will lose their children in contested adoptions).

10. For the statutory definition of a "child in need of assistance," see MD. CODE ANN., CTS. & JUD. PROC. §3-801(a) (1995 & 1997 Supp.) ("'Child in need of assistance' is a child who requires the assistance of the court [in part] because . . . [h]is parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems . . .").

mestic violence, substance abuse, and child protection intervention. In addition, the study reveals the substantial obstacles to developing appropriate child welfare policies in a system that is 1) severely underfunded; 2) not designed to appropriately screen for domestic violence and substance abuse problems; and 3) able to provide only the most rudimentary and boilerplate services and referrals to deal with these problems. Any effort to refocus child welfare politics on family preservation must begin by addressing these issues. Reform efforts that seek to repeal or change ASFA may shift attention from the real barrier to effective assistance to families at risk. The Article concludes by calling for a shift in public policy priorities and summarizing the most promising proposals for improving a child protection system which must respond to these multiple problems.

I. DOMESTIC VIOLENCE, SUBSTANCE ABUSE, AND CHILD WELFARE: EXPLORING THE CONNECTIONS

A. *Domestic Violence and Child Abuse*

The interconnectedness of domestic violence,¹¹ substance abuse,¹² and child welfare is well-documented. Children of battered mothers are at special risk for abuse and neglect because of 1) the direct risks of abuse and neglect of children in a family experiencing domestic violence, and 2) the increased likelihood that the adults in the household are abusing drugs or alcohol.

The children of battered women are at a substantially higher risk of direct emotional or physical harm than children from nonviolent homes.¹³ Physical abuse within a family very often extends to chil-

11. For purposes of this Article, domestic violence means abuse (physical, psychological, or sexual) by one intimate partner on another. The abusing partner will most often be male. See RONEI BACHMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (1994) (reporting that between 1987 and 1991 over 90% of the victims of recorded domestic violence were women); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BETWEEN INTIMATES 2 (1994) (showing the rate of victimization by an intimate is ten times greater for women than for men); Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992) (surveying police reports and court records indicating that 90-95% of victims of assault in the home are women).

12. For purposes of this Article, substance abuse is defined as dependence on or addiction to alcohol, legal, or illegal drugs. Unlike batterers, who are overwhelmingly male, substance abusers are "quite similar to the U.S. population as a whole . . . and are as likely to be mothers as fathers." BLENDING PERSPECTIVES, *supra* note 5, at 2.

13. One expert described the harm in the following manner:

In the vast majority of families, women are the primary caretakers of children. Therefore the devastation of their lives caused by their partner's abuse and coercion affects the children Battered women are physically and emotionally worn down by the abuse. This may interfere with a woman's capacity to meet her

dren.¹⁴ Abuse of children often represents an extension of a batterer's coercive tactics from mother to children "as part of an ongoing battering relationship."¹⁵ In a review of medical records, Stark and Flitcraft found that battered women are six times more likely to have a report of child abuse listed on their medical records than unbattered women.¹⁶ In homes with spousal abuse, the father or father-figure was three times more likely to abuse the children as compared with families without such abuse.¹⁷ The father abused approximately fifty percent of the abused children in these homes, the battered woman abused thirty-five percent of the abused children, and others or both the man and woman abused the remaining fifteen percent.¹⁸

In a national random survey, Strauss and Gelles also found a substantial correlation between wife abuse and child abuse: in homes where wife abuse was present, both partners were more likely to abuse their children than if there had been no wife abuse.¹⁹ The survey also found that when wife abuse was severe, seventy-seven percent of the

children's needs. The partner's efforts to isolate the woman may result in the children being denied access to other family members who could offer support and nurturance to the child.

Battering is the major cause of homelessness. Children suffer physical and emotional consequences when they are forced to leave their home . . . Children are also damaged when used as a pawn in the abuser's attempt to hurt his partner. Attempts to undermine the woman's authority as a parent, convince the child that the mother is worthless; initiating custody battles or violating visitation agreements are common tactics that harm children.

JANN JACKSON, INTERVENTION WITH CHILDREN WHO HAVE WITNESSED ABUSE 3 (1990), *quoted in* BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN 220-21 (1994); *see also* BONNIE E. RABIN, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112-14 (1995) (summarizing studies describing both direct and indirect harm to children living in homes where mothers are victims of domestic violence).

14. One Colorado study reported that 53% of husbands who battered their wives also abused their children. *See* LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 59 (1984); *see also* LIANE V. DAVIS & BONNIE E. CARLSON, *Observations of Spouse Abuse: What Happens to the Children?*, 2 J. INTERPERSONAL VIOLENCE 278 (1987) (reviewing the literature on children of battered women and presenting the results of a study of children in shelters with their mothers). A study of children in shelters for battered women found higher rates of child abuse in families where there is wife abuse than in other families. *See Women, Violence & the Law: Hearing Before the House Select Comm. on Children, Youth & Families*, 100th Cong. 4 (1987).

15. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1017 (1995).

16. Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERV. 97, 102 (1988).

17. *See id.* at 106.

18. *See id.*

19. *See* MURRAY A. STRAUSS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 409 (1990).

children also suffered physical abuse at some time during their lives.²⁰ More recently, a Boston emergency room project screening the parents of abused children found that almost half of the mothers were also being battered.²¹

Existing research has also documented that children are harmed from witnessing domestic violence.²² The harm ranges from excessive anger in children,²³ symptoms of posttraumatic stress disorder,²⁴ depression, hopelessness, and other life-threatening behavior as young adults.²⁵ Other problems reported in studying young adults who witnessed domestic violence as children include poor psychological well-being, poor relationships with parents, and violence in their own interpersonal relationships.²⁶ Not surprisingly, symptoms of trauma and

20. See *id.* Strauss and Gelles research found that in families where fathers abused their wives, approximately 50% of fathers and 27% of mothers surveyed abused their children three or more times a year. See *id.* See also NATIONAL CENTER ON WOMEN & FAMILY LAW, THE EFFECT OF WOMAN ABUSE ON CHILDREN 32-34 (1991).

21. See Sarah M. Buel, *Family Violence and the Health Care System: Recommendations for More Effective Interventions*, 35 Hous. L. Rev. 109, 144 (1998) (citing Advocacy for Women and Kids in Emergencies (AWAKE), Children's Hospital, Boston, Mass., The AWAKE Program Information Sheet (on file with the author)).

22. A number of studies have reported on the harm to the children who witness domestic violence. See Peter Lehmann, *The Development of Posttraumatic Stress Disorder (PTSD) in a Sample of Child Witnesses to Mother Assault*, 12 J. Fam. Violence 241 (1997) (examining the relationship between the development of posttraumatic stress disorder and a number of coping variables in child witnesses to mother assaults); Rabin, *supra* note 13, at 112-13 (indicating that "children who witness domestic violence demonstrate the same symptoms as physically or sexually abused children."). For example, one study focused on 25 children who witnessed their mothers being abused. See Jane H. Pfouts et al., *Deviant Behaviors of Child Victims and Bystanders in Violent Families*, in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 79-99 (Robert J. Hunner & Yvonne Elder Walker eds., 1981). Of the 25 children studied, 53% acted out with parents, 60% with siblings, 30% with peers, 33% with teachers; 16% had appeared in juvenile court, 20% were labeled truant, 58% were below average or failing in school; caseworkers labeled 40% as anxious and 48% as depressed. See *id.* at 95; see also Randy H. Magen et al., *Evaluation of a Protocol to Identify Battered Women During Investigations of Child Abuse and Neglect* (July 22, 1995) (paper presented at the Fourth International Family Violence Resolution Conference at the University of New Hampshire) (on file with the author).

23. See Jackie L. Adamson & Ross A. Thompson, *Coping with Interparental Verbal Conflict, Children Exposed to Spouse Abuse and Children from Nonviolent Homes*, 13 J. Fam. Violence 213, 213-32 (1998).

24. See Peter Lehmann, *The Development of Posttraumatic Stress Disorder (PTSD) in a Sample of Child Witnesses to Mother Assault*, *supra* note 22, at 241 (examining the relationship between the development of posttraumatic stress disorder and a number of coping variables in child witnesses to mother assaults).

25. See Jennifer Langhinrichsen-Rohling et al., *The Associations Among Family-of-Origin Violence and Young Adults' Current Depressed, Hopeless, Suicidal, and Life-Threatening Behavior*, 13 J. Fam. Violence 243, 243-61 (1998).

26. See Cosandra McNeal & Paul R. Amato, *Parents' Marital Violence: Long-Term Consequences for Children*, 19 J. Fam. Issues 123, 123-39 (1998).

depression become more pronounced as the severity of the abuse witnessed increases.²⁷

Children of battered mothers are also at higher risk of abuse and neglect because of the higher rates of substance abuse in families experiencing domestic violence.²⁸ While substance abuse is a major factor in child maltreatment cases across the board,²⁹ it is particularly devastating in families experiencing domestic violence. Battered women,³⁰ their partners,³¹ or both³² may abuse drugs or alcohol at higher rates than the general population. Not surprisingly battered women "self medicate," turning to drug and alcohol abuse to cope with their depression, pain, and fear.³³ Drugs and alcohol impair battered women's ability to care for their children³⁴ and make them particularly unsympathetic parties in abuse and neglect proceedings.³⁵

27. See Azmaira Hamid Maker et al., *Long-Term Psychological Consequences in Women of Witnessing Parental Physical Conflict and Experiencing Abuse in Childhood*, 13 J. FAM. VIOLENCE 574-89 (1999) [hereinafter Maker et al., *Long Term Psychological Consequences*].

28. There are other circumstances common to the lives of battered women that may either interfere with their ability to care for their children or put them at greater risk that the state will intervene in the care of their children. See Murphy, *Legal Images of Motherhood*, *supra* note 9, at 741-45 (discussing the isolation, mental and physical disabilities, and economic hardship experienced by battered women which interferes with their ability to care for their children). While the focus of this Article is on the impact of domestic violence and substance abuse on child welfare, it is important to recognize the interconnectedness of all of these circumstances. See also CASA, *NO SAFE HAVEN*, *supra* note 5, at 35 (noting that "depression, past and current histories of being battered, troubled relationships, employment problems and unplanned pregnancies" are "interwoven with a women's drug or alcohol use.").

29. See CASA, *NO SAFE HAVEN*, *supra* note 5, at 14-15.

30. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221-22 (1993); see also ANTONE C. FELIX III & KATHLEEN F. MCCARTHY, MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES, *AN ANALYSIS OF CHILD FATALITIES 1992* 12 (1994) (reporting that of the 67 child fatalities in Massachusetts in 1992, 29 were in families where the mother identified herself as a victim of domestic violence, and in half of the domestic violence cases, the mother was also reported to have a substance abuse problem).

31. See *supra* notes 27-28.

32. A recent study in which college-aged women reported on their experiences growing up in homes with parental domestic violence found, among other things, that marital violence co-existed with higher levels of parental substance abuse. See Maker et al., *Long Term Psychological Consequences*, *supra* note 27, at 584.

33. See, e.g., Evan Stark et al., *Medicine and Patriarchal Violence: The Social Construction of a "Private" Event*, 9 INT'L J. HEALTH SERV. 461, 461-93 (1979).

34. See CASA, *NO SAFE HAVEN*, *supra* note 5, at 15-16 (describing the devastating impact of substance abuse on child well-being).

35. See Deborah Richardson & Jennifer L. Campbell, *Alcohol and Wife Abuse: The Effect of Alcohol on Attributions of Blame for Wife Abuse*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 468, 468-76 (1980).

Substance abuse is also "a significant characteristic found in domestic violence assailants."³⁶ A recent emergency room-based study of risk factors for battered women found that a history of alcohol abuse by the male partner was the strongest predictor of acute injury to his female partner.³⁷

II. THE LEGAL SYSTEM'S RESPONSE: THEORY AND PRACTICE

A. *The Shifting Goals of Child Welfare Policy in the United States*

An understanding of the historical and cultural context in which courts hear child protection cases is critical to an analysis of the way the legal system responds to families experiencing child abuse, domestic violence, and substance abuse.³⁸ This history also provides a context for the current debate between the competing missions of 1) "rescuing" children from abusive homes and moving quickly to provide a permanent alternative or 2) strengthening families to permit reunification of children with their parents.³⁹

Britain's Elizabethan Poor Law,⁴⁰ which separated the children of the poor from their families, served as a model for early child welfare programs in this country. Seventeenth century laws of Maryland, Massachusetts, New York, and Pennsylvania, for example, specifically au-

36. Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 289 (1999) (citing Daniel Brookoff et al., *Substance Abuse a Significant Characteristic in Domestic Violence Cases*, 16 BROWN U. DIG. ADDICTION THEORY & APPLICATION: DATA, 1, 11 (1997) (study of 64 assailants and 72 victims of domestic violence finding that most of the assailants were under the influence of alcohol combined with cocaine at the time police were called to the domestic violence situation). See also Daniel Brookoff et al., *Characteristics of Participants in Domestic Violence: Assessment at the Scene of Domestic Assault*, 277 JAMA 1369, 1369-73 (1997). While substance abuse appears to be a significant characteristic of batterers and may exacerbate the violence, experts agree it is not the cause of the battering. See ANN JONES, NEXT TIME SHE WILL BE DEAD: BATTERING AND HOW TO STOP IT 89 (1994) ("[A] man at work on his own agenda, which is to train 'his' woman to be what he wants her to be, and only what he wants her to be, all the time."); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 219, 219-24 (1982) ("battering is purposeful behavior because it allows the man to remain in control at least temporarily.").

37. See Demétrios N. Kyriacou et al., *Emergency Department-Based Study of Risk Factors for Acute Injury From Domestic Violence Against Women*, 31 ANNALS EMERGENCY MED. 502, 502-06 (1998). See also Kathleen A. Oriol & Michael F. Fleming, *Screening Men for Partner Violence in a Primary Care Setting: A New Strategy for Detecting Domestic Violence*, 46 J. FAM. PRAC. 493, 493-98 (1998) (finding that variables significantly associated with self-reported partner violence included alcohol consumption greater than two drinks per day and illicit drug use).

38. This section is based on Murphy, *Legal Images of Motherhood*, *supra* note 9, at 702-12.

39. See generally Patricia A. Schene, *Past, Present and Future Roles of Child Protective Services*, in 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 23 (1996) (reviewing the history of U.S. child welfare policy and the shifts from private charity to public agencies).

40. See *An Act for the Relief of the Poor*, 1601, 43 ELIZ., ch. 2, § 1 (Eng.).

thorized magistrates to “b[i]nd out” or indenture children of the poor over parental objections.⁴¹ The juvenile court system in the United States was created a century ago to assist the State in its role of *parens patriae*, or parent of the country.⁴² Almost since the moment of their creation, juvenile courts have sparked criticism and calls for reform.⁴³ Under this system, lawyers,⁴⁴ child advocates⁴⁵ and, most often, a com-

41. See HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN* 9 (1971). When unwed mothers gave birth, the children were routinely separated from their mothers upon weaning and “bound out” to a master. See MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 24-36 (1994). The history of state intervention to separate black mothers from their children has an even longer history. “Black mothers’ bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care.” Dorothy Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 146 (1995).

42. See Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192-93 (1970). The concept of *parens patriae* was incorporated in the 1899 statute establishing the first juvenile court in this country. It provided that “the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents.” Act of April 21, 1899, §21, 1899 Ill. Laws 137. This statute became the model for juvenile court legislation throughout the country. Typically, a juvenile court has limited jurisdiction over child protection matters where the state has intervened. See Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 255 (1992). See also Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 326-27 (1972) (discussing the incorporation of the concept of *parens patriae* in the early Illinois child custody statute). The court of general jurisdiction commonly has jurisdiction over private custody and visitation disputes between parents. See *id.* A growing consensus in favor of integrating family disputes before a single court is emerging, but very few states have implemented this policy. See Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 ABA FAM. L.Q. 147 (Spring 1998).

43. See, e.g., ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 9-14 (1969); Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 1-2, 17 (1992). For a more recent critique focused on Baltimore’s juvenile court, see *Corridors of Agony*, TIME, Jan. 27, 1992, at 48.

44. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 582 (1997) [hereinafter Appell, *Protecting Children or Punishing Mothers*] (describing the heavy caseloads and inconsistent training of lawyers appointed to parents and, in some jurisdictions, children involved in child protection cases). “[M]others are the worst represented parties in juvenile court Nationally, parents frequently have no access to counsel, or courts may only assign intermittent representation, as in hearings to determine temporary custody or to terminate parental rights.” Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, *supra* note 9, at 5.

45. Volunteer lay advocates for children in abuse and neglect cases, known as Court Appointed Special Advocates (CASAs), often serve as the child’s advocate, even if the child has an attorney. For a description of this program, now operating in fifty states, see JOHN HUBNER & JILL WOLFSON, *SOMEBODY ELSE’S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA’S TROUBLED FAMILIES* 45-46 (1996).

plex child welfare bureaucracy⁴⁶ have assumed responsibility for investigating reports of abuse or neglect of children and presenting these cases to the courts.⁴⁷ Efforts to protect children from abusive or neglectful caretakers have taken many forms, from the creation of large orphanages and foundling homes to the relocation of children from the city to the country. Eventually, most jurisdictions settled on the present day foster care system as a way to “rescue”⁴⁸ and remove children from families who apparently could not care for them.

During the 1970s, elected officials and commentators began to examine the child welfare system and concluded, for the most part, that it was inadequately protecting children and their families.⁴⁹ The state too frequently, and sometimes unnecessarily, removed children from their families and placed them in foster homes or institutions.⁵⁰ Once removed, usually from their mothers, children were seldom reunited with their mothers, and lingered in temporary care rather than going to new homes with adoptive families.⁵¹ As a result, child welfare policy shifted from a child rescue orientation to a more family preser-

46. The central players in the bureaucracy are “workers.” The workers receive reports of abuse or neglect, conduct investigations, and throughout the process, make recommendations that play a key role in determining whether a mother keeps her children. See Appell, *Protecting Children or Punishing Mothers*, *supra* note 44, at 601 (citing Sheryl Brissett-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, 76 CHILD WELFARE 45, 60 (1997) (noting the “deprofessionalization” of child welfare bureaucracy). Not all people in the child welfare bureaucracy described as “social workers” or caseworkers are certified social workers. A social worker is one who engages in social case work, social work education, social work research, or any combination of the above in accordance with social work principles and methods. Certified social workers must have at least a master’s degree or equivalent degree in social work, and must pass an examination satisfactory to the State Board for Social Work. See John R. Carrieri, *Social Worker’s Legal Handbook*, in CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 1997: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM, THE ATTORNEY’S ROLE AND RESPONSIBILITIES, 7, 27 (PLI Litigation & Administrative Practice Course Handbook Series No. C-175, 1997).

47. The assignment to hear child protection cases may go to a judge or, very often, a lower-paid, less prestigious hearing officer. See Edwards, *supra* note 43, at 34 (describing the practice in many jurisdictions of assigning juvenile case to nonjudges to save money, and “because judges cannot or do not want to handle all the emotional and tiring work.”). *Id.*

48. See generally HUBNER, *supra* note 45 (for a good discussion of the history and development of child abuse and neglect prevention).

49. See generally Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

50. See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH, EDUCATION, AND WELFARE, MODEL CHILD PROTECTIONS ACT WITH COMMENTARY 24 (Aug. 1977).

51. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423-24 (1983) (discussing the harm to children as a result of “foster care drift”).

vation oriented policy.⁵² Under the Adoption Assistance and Child Welfare Act of 1980 (AACWA),⁵³ judges were required to determine whether the state had made "reasonable efforts" both to enable children to remain safely at home *before* placing them in foster care, and, if removal was necessary, to reunite foster children with their biological parents.⁵⁴

A decade after its enactment, there was broad consensus among child welfare advocates that AACWA had failed in its family preservation goals. Some of the failure could be attributed to the chronic lack of funding for juvenile court systems around the country.⁵⁵ The court facilities are inadequate.⁵⁶ Judges, attorneys, and child protection workers suffer from caseloads that are too high and lack both training and adequate compensation.⁵⁷ Critics also claim that the workers—the most critical players in the child welfare system⁵⁸—in many local DSS offices are plagued by attitudes that stereotype mothers and assume mothers are always adversaries of their children.⁵⁹

Perhaps most importantly, the agencies have failed to provide services to parents to help them address the problems contributing to abuse and neglect, particularly substance abuse. Since 1980, specific federal funding has been earmarked for family services, first under AACWA⁶⁰ and later supplemented by federal legislation.⁶¹ This fund-

52. See Schene, *supra* note 39, at 24.

53. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.) (conditioning state receipt of federal funds on compliance with federal policy and procedural standards governing placement, disposition, and review where children are in foster care or at risk of being placed in foster care).

54. See 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1994).

55. See Schene, *supra* note 39, at 24.

56. See *id.*

57. See, e.g., Appell, *Protecting Children or Punishing Mothers*, *supra* note 44 at 582; ABA AMERICA'S CHILDREN AT RISK, *supra* note 9, at 3-12.

58. One commentator described the key role of the local department of "agency" in child protection cases: at all times throughout these proceedings, the child welfare agency asserts great power and control over the parent. The agency seeks to convince the family court judge that the parent has mistreated her child, is fully responsible for creating the service plan imposed upon the family, and has the ultimate ability to authorize a child's return home. See Bailie, *The Other "Neglected" Parties*, *supra* note 8, at 2302.

59. See Murphy, *Legal Images of Motherhood*, *supra* note 9, at 692; Appell, *Protecting Children and Punishing Mothers*, *supra* note 44, at 611; David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 204 (1995).

60. AACWA removed AFDC foster care from Title IV-A of the Social Security Act and combined it and the adoption assistance program under a separate title of the Act, Title IV-E. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES 1-8 (1997). It also required states to establish programs of preventive and reunification services to obtain maximum funding. See *id.*

ing was intended to develop preventive services to aid families in a broad range of areas, including "child welfare, education, health, housing, mental health and substance abuse."⁶² Best practices have been developed by a number of experts to set standards for the states' use of this funding.⁶³ These guidelines suggest that caseworkers should consider "the relevance, availability, and acceptability of the service to the family."⁶⁴ Furthermore, simply referring or offering services is not enough. Rather, agencies should encourage and assist families in getting access to and using these services. The guidelines even go so far as to recommend that, to hold agencies accountable, judges should require them to provide services that are not routinely available. Despite the existence of this funding and guidelines, commentators and studies have consistently criticized state agencies for both failing to refer at-risk families to prevention services⁶⁵ and, when referrals are made, failing to craft effective plans. As one commentator noted:

[W]hen child welfare agencies do provide preventive services to needy families, the chosen services too often fail to address the problems that families in poverty actually encounter. Rather than taking the time to tailor a program that is unique and specific to the family's needs, "families often receive 'boilerplate' service plans which can add to, rather than alleviate the families' problems."⁶⁶

Rather than focus on ensuring meaningful services to needy families, the political response to the child welfare failures was to focus on *limiting* rather than expanding the obligation to provide those services. Critics argued that the problems facing child welfare were directly tied to AACWA because it had gone too far in the direction of family reunification. Some of these critics claimed that the AACWA

61. Family Preservation and Support Services Act of 1993, 42 U.S.C.A. §§ 629a - 629e (West Supp. 1998) (creating new federal funding to develop programs offering preventive services (family support services) and services to families at risk or in crisis (family preservation services)).

62. *Id.*

63. *See, e.g.*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 62 (1987); DEBRA RATTERMAN ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION 3 (1987).

64. *See* RATTERMAN ET AL., *supra* note 63, at 3.

65. *See, e.g.*, Christine H. Kim, Note, *Putting Reason Back Into Reasonable Efforts Requirements in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 299-300 (1999); Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311 (1996).

66. Bailie, *The Other "Neglected Party"*, *supra* note 8, at 2319 (citations omitted).

gave the bureaucracy a financial incentive to leave children with their parents by conditioning federal foster care funds on a state's compliance with the obligation to make reasonable efforts to keep families together.⁶⁷ Other critics claimed the AACWA had done little to curb foster care drift.⁶⁸ Perhaps the most politically popular critique against AACWA was the claim that its policies encouraged child welfare systems to leave children in dangerous homes.⁶⁹

In response to this broad-based concern that the AACWA had failed, the federal standards for governing removal of children have now shifted the emphasis from reunification with parents to permanency planning for children. In November, 1997, President Clinton signed into law the Adoption and Safe Families Act (ASFA),⁷⁰ with which states must now comply in order to receive federal funds.⁷¹ This statute seeks, among other things, to avoid the harm that children experience from failure to remove them from dangerous homes⁷² and, if removed, the harm from extended foster care placement.⁷³ Under ASFA, states' receipt of federal funds is conditioned

67. See HUBNER & WOLFSON, *supra* note 45, at 19.

68. A 1995 report found that one in ten foster children remains in state care longer than 7.4 years. See Conna Craig, "What I Need Is a Mom:" *The Welfare State Denies Home to Thousands of Foster Children*, 73 POL'Y REV. 41, 45 (1995). At least 40,600 foster children have been in care for five years or longer; another 51,300 have been in care between three and five years. See *id.* "System kids, on average, live with three different families, though [ten] or more placements is not uncommon." *Id.*; see also SALLY MILLEMAN, *ADVOCATES FOR CHILDREN & YOUTH, A STUDY OF BARRIERS TO THE PLACEMENT OF FOSTER CARE CHILDREN IN PERMANENT HOMES* 11 (1995) (finding that children remain in foster care in Baltimore City, Maryland an average of 4.5 years before adoption); Jill Sheldon, *50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, n.5 (1997); Louise Kiernan & Sue Ellen Christian, *Juvenile Court Plays the Waiting Game*, CHI. TRIB., Feb. 7, 1997, §2, at 1 (citing a study finding that over 90% of children who came into foster care in 1993 and 1994 had not been returned home by mid-1996). In 1986, slightly fewer than 60% of children in foster care were either reunited with their families or placed with a parent, relative, or other caregiver. See NATIONAL COMM'N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 288 (1991).

69. See, e.g., LOIS G. FORER, *UNEQUAL PROTECTION: WOMEN, CHILDREN, AND THE ELDERLY IN COURT* 41-42 (1991); RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996).

70. See *supra*, note 1.

71. See *id.*

72. The passage of ASFA followed a number of highly publicized cases in which, despite what appeared to be ample evidence of parental abuse, children were left in dangerous home, and died of abuse and neglect. See, e.g., Larry McShane, *Public Aware But Five Kids Die Daily*, ASSOCIATED PRESS, Dec. 19, 1988; David Stoesz & Howard Jacob Kerger, *Suffer the Children: How Government Fails its Most Vulnerable Citizens—Abused and Neglected Kids*, 28 WASH. MONTHLY 6 (June 1996).

73. Since the mid-1980s, the number of children in foster care has been rising. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, *ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES*,

upon establishing procedures that make child welfare bureaucracies move more quickly to rule out parents as caretakers, making children available for adoption sooner. The requirement to make efforts to reunify children with parents is removed altogether where children have been subjected to severe abuse or neglect,⁷⁴ and hearings to determine permanent placement of children removed from parents must now begin no later than twelve months after a child enters foster care, a reduction from the former eighteen-month limit.⁷⁵ Commentators have expressed concern about ASFA's impact on families, particularly poor women and children, since its enactment.⁷⁶ The impact of ASFA on child welfare practice is still too early to assess.⁷⁷ In order

NATIONAL SURVEY OF CURRENT AND FORMER FOSTER PARENTS 21 (1995). The average length of stay is three years. See NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, ADOPTION FROM FOSTER CARE 1 (n.d.). The harm children experience from long-term, multiple foster homes has been well-documented. See generally Sheldon, *supra* note 68; Cheryl Wetzstein, *Case Studies Expose Failings of Foster Care: Writer Champions Better Chance for 'Orphans of Living'*, WASH. TIMES, May 13, 1997, at A2.

74. See 42 U.S.C. § 671(D) (1999).

75. See 42 U.S.C. § 675(C). States must also move to terminate parental rights when a child has been in foster care for 15 of the previous 22 months. 42 U.S.C. § 675(5)(E). An impatience with the slow pace at which children move through the child welfare system encouraged legislators to develop such procedures even before the federal mandate. See, e.g., An Act Concerning the Reporting, Investigation and Prosecution of Child Abuse and the Termination of Parental Rights, 1996 Conn. Pub. Acts 246 (Reg. Sess.) (providing that a child under the age of one year could be put up for adoption if a parent had not been in contact with the child for sixty days). Since the early 1990s, some states have passed legislation permitting removal of a child at birth if a mother abuses drugs during her pregnancy. See 325 ILL. COMP. STAT. ANN. 5/3 (West 1993 & 1997 Supp.); IND. CODE ANN. § 31-6-4-3.1(1)(b) (Michie Supp. 1996); MASS. GEN. LAWS ch. 119, § 51A (Supp. 1990); NEV. REV. STAT. ANN. § 423B.330(1)(b) (Michie Supp. 1991); OKLA. STAT. ANN. tit. 10, § 7001-1.3 (West 1995 Supp.).

76. See *supra* notes 2 and 5. Of course the predictions that ASFA might hurt parents and children began during its debate in Congress. See, e.g., *The Safe Adoptions and Family Environments Act: Hearing to Consider S.511 Before the Senate Comm. on Finance*, 105th Cong. 62 (May 21, 1997) (testimony of Sister Rose Logan on behalf of Catholic Charities USA in which she states that "there is a danger that [ASFA's] very strong emphasis on adoption . . . will be a signal to state and local officials that they don't have to do anything to reunite families or keep them together, even when the abuse or neglect is not chronic or severe."); see also *Adoption and Support of Abused Children: Testimony Submitted to the Senate Finance Comm. for the Hearing on the Pass Act*, S.1195, 105th Cong. 147-48 (Oct. 8, 1997) (testimony by the Child Welfare League of America stating that the combination of ASFA's stringent time limits and failure to increase preventive or reunification services may result in prematurely sending a child home or unnecessarily terminating parental rights).

77. If one measure of the success of ASFA is increased numbers of adoptions, there are some preliminary signs of success. See Cheryl Wetzstein, *New Law Increases Adoptions of Children in Foster Care; But Incentives Are Draining the Program*, *Congress Told*, WASH. TIMES, Apr. 25, 1999, at C4 (finding that adoptions have increased by 30% in Maryland and by 11% in Virginia since the adoption of ASFA). By other measures of child well-being—e.g., numbers of children in foster care and child poverty—the early evidence is not as positive. See also Kate Shatzhin, *Fewer Cases are Entering Foster Homes*, BALT. SUN, Oct 11, 1999 at 1B; Rita

to begin to evaluate whether it has potential to improve the plight of abused and neglected children, it is helpful to understand the existing structure to which ASFA is being applied.

B. Practice: A Study of Child In Need of Assistance Cases in Maryland

1. Child Protection in the Maryland Juvenile Court: An Overview

Maryland's first juvenile court was established in Baltimore City nearly a century ago.⁷⁸ Today, each of Maryland's twenty-three counties and Baltimore City have a juvenile court.⁷⁹ The juvenile courts' jurisdiction includes Child in Need of Assistance (CINA) cases, and Termination of Parental Rights (TPR) cases.⁸⁰

CINA cases generally begin with a report of abuse or neglect followed by an investigation by child protective workers from the local Department of Social Services (DSS).⁸¹ If the investigation substantiates the existence of abuse or neglect, the case moves to a shelter care hearing.⁸² The law provides that a child may be placed in "shelter care"—a temporary placement in a home or institutional setting—if the judge determines that the child is at risk of abuse or neglect if the child remains in his or her home.⁸³ Given the increasing numbers of drug-addicted parents subject to CINA proceedings,⁸⁴ Maryland joined several other states⁸⁵ in the late 1990s in amending its statute to permit a presumption that a child is neglected if born "addicted" or with a "significant presence" of cocaine, or heroin, or derivative thereof in the child's blood.⁸⁶

Elkins, *Foster Care Crisis Worsens with No Homes to Offer*, FLA. TODAY, Nov. 15, 1999, at 1A; Michael Cottman, *New Staff Would Push for Adoptions: Study Urges Changes in D.C. Foster Care*, WASH. POST, Oct. 28, 1999, at B7; Richard Wexler, *Shattered Families: Rise in Adoptions Comes at a Cost*, CHARLESTON GAZETTE, Nov. 2, 1999, at 5A.

78. See Martin P. Welch, *Proper Terms Needed in Coverage of Courts*, BALT. SUN, Aug. 22, 1999, at C5.

79. The juvenile court is part of the Circuit Court, except in Montgomery County, where it falls within the District Court. See MD. CODE ANN., CTS. & JUD. PROC. § 3-803(a) (1999).

80. See MD. CODE ANN., CTS. & JUD. PROC. § 3-803 (1999).

81. See MD. CODE ANN., FAM. LAW §§ 5-704, 5-706 (1999) (establishing the obligation to report and the obligation to investigate reports of suspected abuse).

82. See MD. CODE ANN., CTS. & JUD. PROC. § 3-819 (1999).

83. See *id.*

84. NANCY K. YOUNG ET AL., RESPONDING TO ALCOHOL AND OTHER DRUG PROBLEMS IN CHILD WELFARE: WEAVING TOGETHER PRACTICE AND POLICY 5 (1998).

85. See, e.g., MASS. GEN. LAWS ANN. ch. 119 § 51A (West 1999); FLA. STAT. ch. 39.01 (1998); N.Y. FAM. CT. ACT § 1012 (Consol. 1999); see also *Brown v. Dep't. of Health and Rehabilitative Serv.*, 582 So. 2d 113, 115 (App. 3 Dist. 1991).

86. See MD. CODE ANN., CTS. & JUD. PROC. § 3-801.1 (1999). When this statute was passed in Maryland, its enactment was contingent upon the inclusion in the operating

After the shelter care hearing, an adjudicatory hearing may be held to determine whether the allegations set forth in the CINA petition can be supported.⁸⁷ If so, the case moves to the disposition. At disposition, the court may return the child to a parent under a specific order, place the child in foster care, or award custody and guardianship to someone who can provide appropriate care.⁸⁸

Since the enactment of the AACWA in 1980, Maryland's CINA law has required that DSS provide reasonable efforts prior to the shelter care hearing to prevent the removal of children⁸⁹ and reasonable efforts to reunify until the child is returned or placed for adoption.⁹⁰ The new timelines imposed by ASFA changed the standard CINA case in two significant ways. First, if the DSS alleges in its initial petition and the court finds that a parent has "subjected the child to torture, chronic abuse, or sexual abuse," or "chronic and life-threatening abuse," or "chronic and life-threatening neglect," the DSS need not make reasonable efforts to reunify the child with his or her parents and may move immediately to termination of parental rights and placement for adoption.⁹¹ In addition, even in those cases where reasonable efforts to keep children with parents must still be made, under the new timelines imposed by ASFA, if a child is in an out-of-home placement for a year or longer, the court must conduct a permanency planning hearing.⁹² At this hearing, the court determines whether the child should be returned to a parent or guardian or placed for adoption.⁹³ After the initial permanency planning hearing, a child may only be kept in foster care if DSS demonstrates a "compelling reason" to do so and a review hearing must be conducted every

budget of 1.7 million dollars for drug abuse treatment for mothers of children born drug exposed. The contingency was deemed to have been met with the passage of the 1997 operating budget, H.B. 175, ch. 3, Acts 1997.

87. See MD. CODE ANN., CTS. & JUD. PROC. § 3-819 (1999).

88. See MD. CODE ANN., CTS. & JUD. PROC. § 3-820 (1999). In CINA cases in Maryland, the adjudication and disposition hearings are usually held together.

89. See MD. CODE ANN., CTS. & JUD. PROC. § 3-815(2)(ii) (1999).

90. See MD. CODE ANN., CTS. & JUD. PROC. § 3-815(2)(ii) (1999).

91. See MD. CODE ANN., CTS. & JUD. PROC. § 3-812.1 (1999). Although the impetus for this change came primarily from the federal directive in ASFA, the legislation was enacted following a highly publicized case in which, despite what appeared to be ample evidence of parental abuse, a child was left in a dangerous home and died of abuse or neglect. See, e.g., Jay Apperson, 'Safety Net' Let Little Rita Fisher Fall To Her Death, BALT. SUN, Apr. 30, 1998, at 1A (describing the Department of Social Services decision not to remove Rita Fisher, a nine-year-old Baltimore County, Maryland resident, from her home despite repeated reports of suspected abuse. The girl was beaten and starved to death by her family).

92. See MD. CODE ANN., CTS. & JUD. PROC. § 3-826.1(a) (1999).

93. See *id.* Unless the parents consent, the child cannot be placed for adoption until DSS has obtained an order terminating the parental rights. See *supra* note 80.

six months until the child is returned home, placed permanently with a relative, or parental rights are terminated.⁹⁴

Although child protection proceedings are governed by state law,⁹⁵ they vary widely from jurisdiction to jurisdiction within Maryland.⁹⁶ They are marked by informality, particularly in the larger jurisdictions. There are few formal hearings because most adjudicatory and dispositional decisions are reached by "stipulations" entered into by attorneys and workers moments before scheduled hearings.⁹⁷ Further, a recent official study of Maryland's Juvenile Court confirms that, although all parties in CINA proceedings are entitled to counsel at all stages of the proceedings,⁹⁸ many parents are without counsel at the shelter care hearing and some lack representation throughout the proceedings.⁹⁹ Further, the quality of representation for all the parties to these proceedings—the children, the parents, and the Department of Social Services—is compromised by lack of training,¹⁰⁰ heavy caseloads,¹⁰¹ and inadequate compensation.¹⁰² Judges, and more

94. See MD. CODE ANN., CTS. & JUD. PROC. § 3-826.1(d) & (f) (1999). Once a child is under the authority of Juvenile Court, the court keeps that authority until it is terminated, or until the child turns twenty-one, whichever occurs first. See *id.* at § 3-806(a).

95. CINA cases are governed by MD. CODE ANN., CTS. & JUD. PROC. § 3-801 *et seq.* These cases are often followed by Termination of Parental Rights (TPR) cases which are governed by MD. CODE ANN., FAM. LAW § 5-301 *et seq.* The juvenile court also has jurisdiction over adults charged with contributing to conditions that cause a child to be CINA or whose parental rights are terminated. See MD. CODE ANN., CTS. & JUD. PROC. § 3-804 (1999).

96. See ANTHONY S. DIX, JR. & RANDI S. SEIGER, ADMINISTRATIVE OFFICE OF THE COURTS OF THE STATE OF MARYLAND, IMPROVING COURT PERFORMANCE FOR ABUSED AND NEGLECTED CHILDREN X (1997) [hereinafter IMPROVING COURT PERFORMANCE] (studying the child protection divisions of the Juvenile Court in eight jurisdictions in Maryland and finding that "a lack of uniformity exists among the jurisdictions in such elementary case activities as when a case is opened, when a case is closed, and what terminology should be used to describe a particular case event.").

97. See Interview with Linda Koban, former Chief Attorney for the Child in Need of Assistance Unit, Division of the Office of the Public Defender, State of Maryland in Baltimore, Md. (June 23, 1997) [hereinafter Interview with Linda Koban] (notes on file with author). These observations are also based on the author's personal experience and the experience of others. As Director of the Family Law Clinic at the University of Baltimore School of Law, the author has observed and participated in CINA hearings over the last ten years in Baltimore. In addition, the author participated in a training program for CPS workers from local departments of social service in Maryland.

98. See MD. CODE ANN., CTS. & JUD. PROC. § 3-821(a) (1999); Md. Rule 11-106(b)(3) (providing for representation at state expense of indigent parents or guardians of children); MD. CODE ANN., CTS. & JUD. PROC. § 3-834 (1999) (providing for representation of child at state expense).

99. See IMPROVING COURT PERFORMANCE, *supra* note 96, at 25, 29-30.

100. See *id.* at 34-36.

101. See *id.* at 36 (finding that attorneys for DSS carried the highest caseloads, with as many as 500 cases per year). Caseloads of over 300 per year were reported by agency attorneys in Baltimore, Montgomery, and Prince George's Counties, as well as Baltimore City. The average agency attorney caseload per day was eight cases with 22% having twenty

often masters,¹⁰³ are frequently assigned CINA cases with little or no experience or training in the issues involved in child abuse and neglect.¹⁰⁴ Data collected about the time and quality of hearings in CINA cases also reveals a lack of commitment of resources to developing meaningful reunification or permanency plans in these cases.¹⁰⁵

The authors' CINA study, described below, confirms that the system is compromised by inadequate resources at almost every level and almost all cases were characterized by ineffective "treatment" or service plans for families in which children had been removed.

2. Study Design and Procedure

To examine more closely the way the legal system responds to child protection cases involving domestic violence and substance abuse, we analyzed eighty-five CINA cases from three Maryland counties and Baltimore City.¹⁰⁶ The sources of data were cases files and interviews with attorneys in the Maryland Office of the Public Defender (OPD) Child In Need of Assistance (CINA) Division. Files were chosen from cases in which the OPD represented a battered mother in a CINA proceeding in one of four jurisdictions: Baltimore City (BALT), Montgomery County (MONT), Anne Arundel County (AA), and St. Mary's County (STM). These four jurisdictions were believed to adequately represent the geographic diversity of the state.¹⁰⁷

or more cases per day. Attorneys for children also reported caseloads of as many as 400 cases per year. See *id.*

102. See *id.* at 33-34.

103. See MD. CODE ANN., CTS. & JUD. PROC. § 3-813 (1999).

104. See IMPROVING COURT PERFORMANCE, *supra* note 96, at 17-20.

105. See *id.* at 39-48.

106. The original design of the study sought to examine cases in which both domestic violence and child abuse or neglect were present. As we analyzed the data collected, we realized that substance abuse by one or both of the adults in the household was also a significant factor in child protection cases and needed to be considered as well.

107. Baltimore City, an urban center, ranks 14th among U.S. cities in population. It has a per capita income of \$13,022, an unemployment rate of 9.3%, and 21.87% of its families are below the poverty level. Bordering on Washington, D.C., Montgomery County is a relatively affluent suburban county with a per capita income of \$25,541, an unemployment rate of 2.6%, and only 4.23% of its families are below the poverty level. Anne Arundel County is located on the Chesapeake Bay, has a per capita income of \$18,601, an unemployment rate of 3.9%, and 4.47% of its families are below the poverty level. Located 35 miles south of Washington, D.C., Saint Mary's County is primarily rural and has a per capita income of \$15,743, an unemployment rate of 4.6%, and 7.35% of its families are below the poverty level. See MARYLAND DEP'T OF BUSINESS & ECONOMIC DEVELOPMENT (1998-1999) (reporting per capita and unemployment statistics); MARYLAND 1989 POVERTY STATUS: MARYLAND OFFICE OF PLANNING, U.S. BUREAU OF CENSUS 62 (1997) (reporting poverty level statistics).

Random sampling from cases of the OPD was not feasible in that there is no database keyed to identify CINA cases in which the OPD represents the mother as opposed to the father.¹⁰⁸ In addition, not all CINA cases handled by the OPD involve mothers who have themselves been abused. Even in those cases in which the mother is abused, the mother's abuse is not always documented in the OPD file. As a result, random sampling would not necessarily yield any usable cases for the study. We, therefore, asked current public defenders in the four jurisdictions to identify cases in which a battered mother was accused of child abuse or neglect.¹⁰⁹

We reviewed the selected files with a pre-developed survey¹¹⁰ and later conducted a structured interview with the attorneys from the OPD.¹¹¹ The attorney interview was a means of corroborating findings in the file, obtaining additional information about the mother, and clarifying the role that the legal system played in the case.

3. Results

a. Demographics of Children¹¹²

Although a new CINA petition is filed for each child alleged to have been abused or neglected (even siblings living with the same parent), data exhibited multiple children of the same mother; thus we distinguish between the children and the mothers. We reviewed the cases of forty mothers who had a total of eighty-five children. They were distributed among the three jurisdictions as follows:

TABLE 1.

LOCATION	NUMBER & PERCENT CHILDREN		NUMBER & PERCENT MOTHERS	
BALT	37	43.5%	16	40.0%
MONT	31	36.5%	14	35.0%
AA	13	15.3%	7	17.5%
STM	4	4.7%	3	7.5%
Combined	85		40	

108. See Interview with Linda Koban, *supra* note 97.

109. Confidentiality of litigants involved in court proceedings was preserved—questionnaires and data files contain only numeric identification codes, and the list connecting numbers to names is secured.

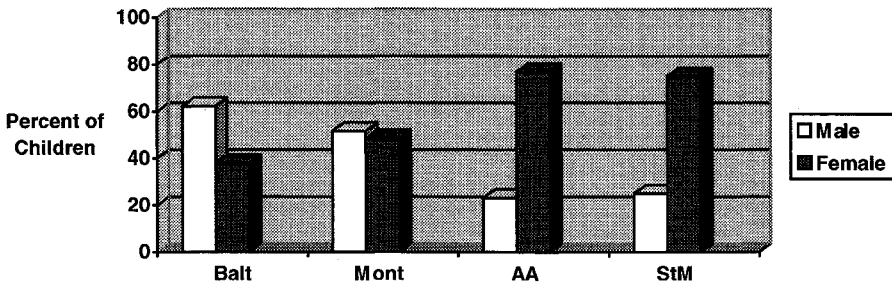
110. See CINA File Review, Appendix A.

111. See Attorney Interview, Appendix B.

112. Because representation by the Office of the Public Defender in CINA cases is only available to indigent parents, children in the study were all from families in which the caretaking parent was at or below the poverty level. See MD. CODE ANN., CTS. & JUD. PROC. § 3-821(c).

The children were 50.6% male and 49.4% female; however, as can be seen from the graph below, this percentage is not consistent across the locations. With respect to race, 59% of all children in the study are African-American, 30% are white, 6% are Hispanic, and 5% are other races.¹¹³ Again, the racial and ethnic background of the children differs in the various locations, with African-Americans comprising 100% of the children in the Baltimore cases,¹¹⁴ African-Americans and whites having relatively equal distributions in Montgomery County,¹¹⁵ and whites predominating in Anne Arundel¹¹⁶ and Saint Mary's counties.¹¹⁷

GRAPH 1: GENDER OF CHILDREN



We determined the age of each child at the time of the shelter hearing (or, if there was no recorded age at the shelter hearing, at the time of the adjudication/disposition).¹¹⁸ The average age of the children in the study is 5.86 years with a standard deviation of 4.55 (the ages range from twins who were less than one month old to a teen of

113. These statistics compare with the following statistics representing the overall population of children in Maryland: 31.7% African-American, 60.2% White/non-Hispanic, 3.5% Hispanic, 4.6% Other. See MARYLAND OFFICE OF PLANNING FROM U.S. CENSUS: U.S. BUREAU OF CENSUS POPULATION ESTIMATES OF RACE, SEX AND AGE (Sept. 1998). Race could not be determined for two children in the study.

114. One hundred percent of the children from Baltimore City in the study were African-American compared with an overall population of 74.1% African-American children in Baltimore City. See *id.*

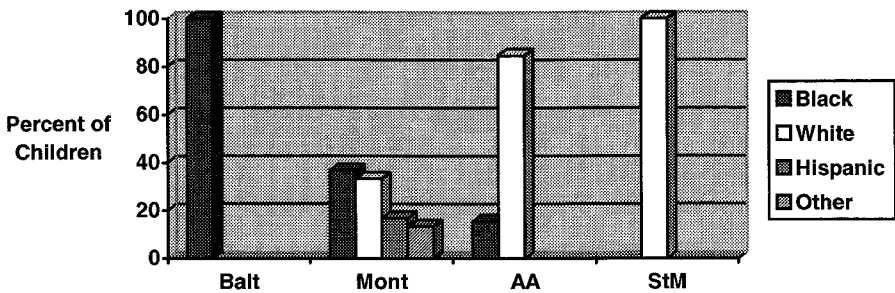
115. Fifty three point four percent of the children from Montgomery County in the study were African-American or Hispanic compared with an overall population of 28.6% African-American or Hispanic children in Montgomery County. See *id.*

116. Fifteen point four percent of the children in the CINA cases studied in Anne Arundel County were African-American or Hispanic compared with an overall population of 19.6% of African-American or Hispanic children in Anne Arundel County. See *id.*

117. All of the children in the CINA cases studied in St. Mary's County were white. This is consistent with the overall population of St. Mary's County which is predominantly (77.2%) white. See *id.* Again, because the sample in this county (4 children) was so small, very little significance can be attached to the racial characteristics of the families involved.

118. For one Baltimore City child the date of birth was missing.

GRAPH 2: RACE OF CHILDREN



16 years). The average ages of the children are seen to differ little from one location to another.

TABLE 2.

CHILDREN	BALT	MONT	AA	STM	COMBINED
AVERAGE AGE (YRS.)	5.5	6.6	5.3	6.0	5.9
STANDARD DEVIATION	4.4	5.0	4.5	4.1	4.6

b. Demographics of Mothers

Demographic data for the forty mothers (who had an average of two children with a range from one to four children) indicates that all are at or below the poverty level,¹¹⁹ 50% are African-American, 42.5% are white, and 7.5% are Hispanic. However, as with the children, the close percentages for African-American and white in the overall group do not exist within each location. The racial and ethnic background of mothers differs in the various locations, with African-Americans comprising 100% of the Baltimore cases,¹²⁰ approximately three times as many whites as African-Americans in Montgomery,¹²¹ and whites predominating in Anne Arundel¹²² and St. Mary's¹²³ counties. This can be seen in the following graph.

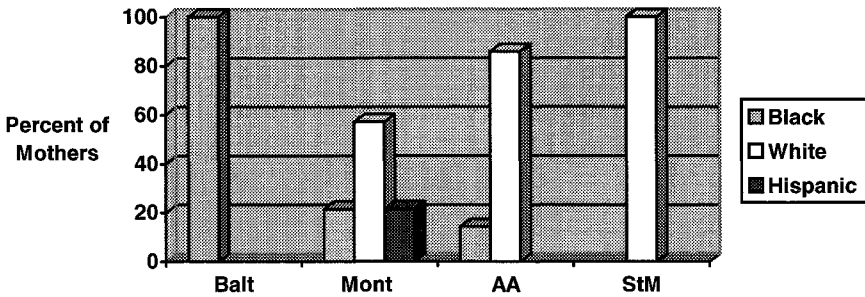
119. All of the mothers qualified for representation by the Office of the Public Defender, and thus were assumed to be indigent. *See supra* note 112.

120. In Baltimore City in 1995 there were 9,997 births reported to mothers of all races. Of these 2,766 (27.67%) of the mothers were white, 6,986 (69.7%) of the mothers were African-American, and 263 (2.6%) were mothers from other races. *See MARYLAND STATISTICAL ABSTRACT*, RESI 37 (1997).

121. In Montgomery County in 1995, 12,185 births were reported to mothers of all races. Of these, 8,281 (67.96%) of the mothers were white, 2,005 (16.45%) of the mothers were African-American, 1,899 (15.58%) of the mothers were other races. *See id.*

122. In Anne Arundel County in 1995, 6,598 births were reported to mothers of all races. Of these, 5,435 (82.37%) of the mothers were white, 919 (13.93%) of the mothers were African-American, 244 (3.70%) of the mothers were other races. *See id.*

GRAPH 3: RACE OF MOTHERS



The average age for thirty-five of the mothers is thirty-one years (30.9) with a standard deviation of 6.8 years.¹²⁴ There is little difference in the average ages across the locations, but Montgomery County mothers have a slightly lower average and Anne Arundel County mothers have a slightly higher average. In both Baltimore City and Montgomery County the range of ages is from eighteen or nineteen to forty-three; the spread of ages in Saint Mary's County is smaller than in the other jurisdictions.

TABLE 3.

MOTHERS	BALT	MONT	AA	STM	COMBINED
AVERAGE AGE (YRS)	31.7	28.9	32.7	30.3	30.9
STANDARD DEVIATION	6.4	7.8	7.2	5.0	6.8

c. Domestic Violence in Cases Studied

In every CINA case we studied the mother's batterer was male and, in just over three-fourths of the cases, the mother was married to the batterer or cohabiting with him. In addition, in 88% of the cases, the batterer was the father of the children.

In about 79% of the cases the fact that the mother was being abused was evident in the OPD CINA file. However, the various ways in which the domestic violence was revealed differed. Allowing for more than one method of revelation, domestic violence was revealed in a statement of the mother to her attorney (31.6%), in a police report (36.8%), in DSS reports (28.9%), in medical reports (28.9%), and through other sources (13.2%).

123. In St. Mary's County in 1995, 1,231 births were reported. Of these 998 (81.07%) of the mothers were white, 186 (15.11%) of the mothers were African-American, and 47 (3.82%) of the mothers were other races. *See id.*

124. The five missing ages (two in Baltimore City and three in Montgomery County) result from unknown birth dates.

In every case for which we have data about the type of abuse,¹²⁵ the abuse to the mother included physical abuse. Based on the results in the following table we can conclude that, except in Saint Mary's County, the mothers were experiencing domestic violence of more than one type.

TABLE 4.

LOCATION	TYPE OF DOMESTIC VIOLENCE		
	EMOTIONAL	SEXUAL	PHYSICAL
BALT	46.2%	38.5%	100.0%
MONT	35.7%	14.3%	100.0%
AA	33.3%	16.7%	100.0%
STM	--	--	100.0%
COMBINED	38.2%	23.5%	100.0%

d. Substance Abuse in Cases Studied

Substance abuse was a predominant factor in many of the CINA cases that we reviewed. It is notable that substance abuse by either the mother or her partner (who may have been the husband or boyfriend, the father, or not related to the children) was about equally reported in Baltimore and Montgomery County (75% and 71.4% respectively). However, substance abuse was the mother's problem in 56.3% of the Baltimore cases. In contrast, only half that portion of Anne Arundel mothers (28.6%) had a substance abuse problem. Drug and alcohol abuse by the mother was an issue in only 7.1% of Montgomery County cases and in none of the Saint Mary's cases. In the follow-up interviews, OPD attorneys in Baltimore indicated that, when the most pressing problem was substance abuse, they believed that introducing evidence of the domestic violence would increase the likelihood that the children would be removed from the mother's care. Consequently, they (attorney, client, and/or both) made a strategic decision not to introduce domestic violence into the proceedings. Examining the combined information collected from the four jurisdictions hides the pervasiveness of this problem in Baltimore.

125. Information about the type of abuse was obtained in 34 cases.

TABLE 5.

EXTENT OF SUBSTANCE ABUSE AS A FACTOR				
LOCATION	MOTHER ONLY	BATTERER ONLY	MOTHER & BATTERER	ANY PARTY
BALT	18.8%	18.8%	37.5%	75.0%
MONT	--	64.3%	7.1%	71.4%
AA	14.3%	14.3%	14.3%	42.9%
STM	--	--	--	--
COMBINED	10.0%	32.5%	20.0%	62.5%

e. Nature of Allegations of Abuse and Neglect of Children

1) Allegations Against Mothers

The allegations against the mothers in the study with respect to their children are summarized by jurisdiction in the following table.¹²⁶ In all jurisdictions, the greatest portion of cases involved failure to protect; two-thirds of all cases included this allegation. Baltimore showed a considerably larger percentage of child physical abuse cases than the other geographic areas.

TABLE 6.

ALLEGATIONS AGAINST MOTHER					
LOCATION	EMOTIONAL INJURY	SEXUAL ABUSE	PHYSICAL ABUSE	NEGLECT	FAILURE TO PROTECT
BALT	5.4%	--	21.6%	43.2%	56.8%
MONT	--	--	3.7%	40.7%	70.4%
AA	--	--	7.7%	15.4%	84.6%
STM	--	--	--	25.0%	75.0%
COMBINED	2.5%	--	12.3%	40.7%	66.7%

2) Allegations Against Batterers

Allegations against the batterer (with respect to the children) contrast somewhat with those against the mother. For batterers in the combined locations, the majority of allegations (52.9%) involve physical abuse of the child.

For our sample, 88% of these batterers were the fathers of the children. In our sample, the majority of these fathers were living in the house (76%).¹²⁷

126. Multiple responses were possible, so percentages do not add up to 100%.

127. The substantial number of fathers living with mothers and children was somewhat surprising given that our largest sample came from a jurisdiction—Baltimore City—in

TABLE 7.

ALLEGATIONS AGAINST BATTERER					
LOCATION	EMOTIONAL INJURY	SEXUAL ABUSE	PHYSICAL ABUSE	NEGLECT	NONE
BALT	--	--	29.7%	27.0%	48.6%
MONT	--	12.9%	77.4%	16.1%	6.5%
AA	--	--	53.8%	15.4%	30.8%
STM	--	--	75.0%	25.0%	--
COMBINED	--	4.8%	52.4%	21.4%	28.6%

f. Analysis of Dispositions

When we summarize the dispositions¹²⁸ of these cases, it is apparent that, in the majority (59%), the child was removed from the mother. However, Montgomery County differed from all the other jurisdictions in that only 30.8% of the cases was the child removed. In Baltimore, Anne Arundel, and Saint Mary's the percentage of cases in which the child is removed was much larger. Given the predominance of African-American mothers and children in the Baltimore sample, this supports other findings that race may play a role in the decisions of DSS workers and judges to remove a child.¹²⁹

TABLE 8.

DISPOSITION OF CASE	LOCATION				
	BALT	MONT	AA	STM	COMBINED
CHILD REMOVED	62.5%	30.8%	85.7%	100%	59.0%
Mother's Relative	60.0%	50.0%	50.0%	66.7%	56.5%
Father's Relative	20.0%	--	16.7%	33.3%	13.1%
Foster Care	20.0%	50.0%	33.3%	--	30.4%
CUSTODY W/MOTHER (CONDITIONAL)	31.3%	69.2%	14.3%	--	38.5%
CASE DISMISSED	6.3%	--	--	--	2.6%
NUMBER OF CASES	16	13	7	3	39

Perhaps the most disturbing data analyzed was that related to the nature of conditions or services prescribed by DSS for the mothers in the study. The conditions placed on the mothers to enable them to have custody of their children can be summarized using these broad

which the reported number of female-headed households is 52.6%. See MARYLAND STATISTICAL ABSTRACT, RESI 66 (1997).

128. Because the OPD only handles cases to disposition in Baltimore, files do not include information about the ultimate fate of the child beyond that point. For consistency, we analyzed cases only through initial disposition in all four jurisdictions.

129. See *supra* notes 120-123 and accompanying text.

categorizations: psychological evaluation and/or some therapy or counseling, parenting classes or programs, spousal abuse or domestic violence treatment, no contact/protective order, substance abuse related treatment, and other (e.g. stable housing, no physical violence, restricted visitation, and supervision).¹³⁰

In cases of substance abuse by the batterer alone, conditions related to the substance abuse were placed on the batterer in about half of the cases; there was no mention of the substance abuse in the other half. In cases of substance abuse by the mother alone, conditions related to treatment were placed on her in all cases. When substance abuse by both the mother and the batterer had occurred, there was no mention at all in the permanency plan of substance abuse treatment in four cases; conditions related to substance abuse treatment were placed on the mother only in another three cases; and on the batterer only in the remaining case. More often than not, it appears that substance abuse is addressed with the correct party, but it is not addressed thoroughly. The conditions include objectives such as "attend AA," "must refrain from drinking," "continue drug therapy," as well as "random urinalysis" and "complete substance abuse treatment/aftercare."¹³¹

Since all cases involved domestic violence, one might expect that all cases would include some condition for reunification related to the domestic violence issue. This was not the case. In 93.3% of the cases in which custody was granted to the mother with conditions, a "no contact order" or the continuance of a protective order was included as a condition of reunification. Clearly, the "no contact order" is the major method for dealing with domestic violence. In some cases (26.7%) the mother's participation in a spousal abuse or domestic violence treatment program was required. When the child was removed from the mother's care, however, the no contact requirement was only present in 43% of cases and the specification of participation in a domestic violence program was required in only 14.3% of cases. This was true even when eventual reunification rather than adoption was part of the permanency plan.

g. Interviews with Attorneys

Interviews with attorneys, conducted after the review of the CINA files, revealed the presence of certain attitudes (in DSS workers, attorneys, judges, and masters involved in the cases) likely to affect the

130. See CINA File Review, Appendix A.

131. *Id.*

outcome.¹³² First, despite the well-established connection between the abuse of the mother and the abuse of the child,¹³³ various participants in the legal proceedings often minimized this connection as revealed by statements such as “this is about the children, not about the mother.”¹³⁴ In addition, certain stereotypes of mothers were exhibited by the attorneys, workers, and judges. When mothers seem fragile, dependent, or victim-like, they elicit sympathy; when they do not, they are treated more harshly. “She looked good; she didn’t elicit sympathy” and “mother wasn’t popular because she was pretty and looked good” express these attitudes.¹³⁵ Mothers who can’t protect their children from the batterers are viewed as incompetent mothers regardless of whether the relationship with the batterer has been terminated. Statements such as “her choices in men put her children at risk” and “she was not a victim; she was non-protective” were among those reflecting this point of view.¹³⁶

Finally, some believe that even when the mother has been separated from the abuser the domestic violence remains a threat to the children. The mother gets blamed; the abusive father gets ignored.¹³⁷ And finally, the mother was sometimes faulted for failing to leave the situation, even though she was unable to find adequate housing, was disabled, or had disabled children.¹³⁸ This is substantiated by the following comments: “When the mother was confused on cross-examination, they took it as a sign she couldn’t protect herself,” “the judge/master was unsympathetic to her testimony that she couldn’t find housing,” and “she sought help for a difficult child who was too much for her.”¹³⁹ These attitudes are consistent with the tendency toward “mother blaming” reported in other studies of the child protection system.¹⁴⁰

4. Discussion

a. Limitations of Study

For the most part, empirical studies to validate the more tentative conclusions about how the legal system responds to cases of dual vio-

132. See Interviews with Attorneys, Appendix B.

133. See *supra* notes 11-21 and accompanying text.

134. See Interviews with Attorneys, Appendix B.

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.*

140. See *supra* notes 6-8.

lence are scarce.¹⁴¹ This may be partially a result of the way in which records are kept, at least in Maryland by both the court system¹⁴² and the OPD, the office providing the primary representation for parents in CINA cases.¹⁴³ The current manner of data keeping is not adequate for empirical research. Factual information about cases, which includes the kind of information we sought here, is not kept in a systematic way and certainly not electronically. Neither is it kept in the same manner across jurisdictions. The limited number of cases in the current study is a result of some of these inadequacies. Until something is done to improve data keeping, it remains difficult for social scientists to undertake the empirical research that will validate the provisional conclusions based on the experience of attorneys, judges, and social service workers.

Because of the very large number of CINA cases in Baltimore¹⁴⁴ and the high turnover of attorneys for the mother in the OPD offices in general,¹⁴⁵ we were not able to achieve exact proportional representation of cases across the jurisdictions. However, the actual proportion of dual violence cases for these locations is not known and, moreover, cannot be predicted to be in the same ratio as the number of CINA cases across these locations, which is known. The implications of this are that, while we can interpret the results within the jurisdictions (except Saint Mary's where the sample is so small) with confidence, we cannot interpret comparisons across the locations in that manner. Results must be interpreted cautiously; replication of this type of study is needed and encouraged.

b. Summary

Although the data is limited, the study confirmed a number of theories and, in some cases, findings from larger studies. Analysis of the demographic data in the sample supported the finding that African-American families are disproportionately represented in child protection cases.¹⁴⁶ Both African-American mothers and children

141. See Murphy, *Legal Images of Motherhood*, *supra* note 9, at 742.

142. See IMPROVING COURT PERFORMANCE, *supra* note 96, at 12-16.

143. See *supra* notes 106-07.

144. In FY 1999, there were 3151 CINA cases filed in Baltimore City compared with 1863 CINA cases in Montgomery County, a jurisdiction with a similar size population. ADMINISTRATIVE OFFICE OF THE COURTS, 1999-2000 ANNUAL REPORT OF THE JUDICIARY (forthcoming Dec. 1999).

145. Attorneys remain in the OPD/CINA division an average of two to three years while the average mother may remain a client of the OPD/CINA division for several years. See Interview with Linda Koban, *supra* note 97.

146. See *supra* Graphs 2 and 3, and notes 113-117 and 120-123.

were disproportionately represented in the CINA population.¹⁴⁷ The data also suggests that, at least comparing the larger jurisdictions, Baltimore City and Montgomery County, children were removed from parental care more frequently in African-American families.¹⁴⁸ Data revealing thirty-one as an average age of mothers and a majority of fathers living in the home are inconsistent with the stereotype of the CINA parent as a young single mother.¹⁴⁹

With regard to factors contributing to abuse or neglect, the cases confirmed the substantial role both domestic violence and substance abuse play. Given the design of the study, domestic violence was present in all cases we reviewed. The battering the mothers experienced clearly interfered with their ability to properly care for their children while trying to protect themselves. An expectation, particularly on the part of DSS attorneys, that abused mothers should simply leave their abusive partners discounted the complexity of such situations. Cultural expectations, financial insecurities, various disabilities, and emotional attachment to the batterer were not easily overcome by court order. Moreover, a disposition that dealt with domestic violence through a “no contact” order did not provide the mother with any services or resources to handle herself in the presence of a partner who batters her and/or her children.

Substance abuse was also present in the vast majority of these cases. When substance abuse dominated, the domestic violence was often ignored by attorneys in the CINA proceedings and not brought to the attention of DSS or the judicial offices. Further, while the different actors in the legal system seemed to at least acknowledge substance abuse by both mothers and batterers, the required treatments consistently lacked specificity, with no evidence that affordable and effective services existed to fulfill the expectation that parents would address their substance abuse problems. Because the domestic violence issue was not usually an issue explicitly addressed in the proceedings in these cases, the potential for the children to remain at risk when reunited with the mother was still present.

The interviews with attorneys for the mothers tended to support the view that DSS was adversarial and somewhat punitive toward mothers in abusive relationships. The relationships between the DSS attorneys, caseworkers, and the OPD attorneys in Baltimore appeared quite adversarial. In Montgomery County the DSS-OPD relationship

147. *See id.*

148. *See supra* Table 8.

149. *See supra* notes 106-107, 122 and accompanying text.

was much more cooperative. However, many of the prejudices (for example, about the mothers' inability to protect their children) exhibited by DSS personnel in Baltimore were seen among the judges or masters in Montgomery County. The belief prevails that if a mother cannot protect herself from domestic violence, then she certainly cannot protect her children. Many of these attitudes may be understandable given the present structure of the system and genuine concern for children in these circumstances. Placement decisions for children may not always be in their best interest, however, when mothers are excluded as caretakers simply because they are victims of domestic violence.

Perhaps the most disturbing findings in the study are those analyzing the disposition of cases. Because the cases were studied prior to ASFA, DSS should have made reasonable efforts to refer all mothers and children for services to prevent removal, or after removal, to work toward reunification. Almost all files examined in the study had "boilerplate service plans" to treat domestic violence or substance abuse. None had the type of treatment plan which is "unique and specific to the family's needs."¹⁵⁰ Moreover, referrals did not appear to be specific enough to connect the mother and children to actual services. In short, services fall far short of the federal mandate to provide services "delivered in the home or in community-based settings, [that] are flexible and responsive to real family needs, and are linked to other supports and services outside the child welfare system."¹⁵¹

CONCLUSION

There is broad consensus that the child protection system in this country has failed in its mission to protect children from abuse and neglect.¹⁵² The number of children languishing in foster care continues to rise and more children are left in dangerous and abusive homes.¹⁵³ While the criticism of the short time frames provided in ASFA may be justified, they must take into account the complexity and profound difficulty of protecting children in homes where poverty, domestic violence, and substance abuse are routinely present. The study of Maryland CINA cases confirms much of Dorothy Roberts' and others' observation that poor African-American families are subject to state intervention in disproportionate numbers. The study also begins to confirm the claim that the short time frames imposed

150. Bailie, *The Other "Neglected" Parties*, *supra* note 8, at 2319.

151. Kim, *supra* note 65, at 299.

152. *See id.* at 287.

153. *See id.*

by ASFA may be inadequate to provide meaningful services to parents experiencing multiple problems, particularly domestic violence and substance abuse.

Reinstating the pre-ASFA time frames, however, would do little to address the problems identified in this Article. Most of the cases studied revealed families needing intensive services and few receiving them. Although problems exist at several points in the child protection system—tracking of cases, quality of attorney representation, and availability of expert judicial resources—the most serious problem appears to be lack of effective services for families, particularly with regard to domestic violence and substance abuse. Efforts to improve child protection must focus on providing services to families. ASFA may need to be fine-tuned and strengthened by additional funding to provide appropriate treatment where reunification of children and parents may still be possible.

The first step toward ensuring adequate services for families in child protection cases is to recognize the ways in which the dual problems of domestic violence and substance abuse contribute to child abuse and neglect. Recent initiatives to encourage collaboration between domestic violence advocates and child protection workers in Maryland¹⁵⁴ and throughout the country¹⁵⁵ offer the promise of more

154. See Maryland Department of Human Resources, *Domestic Violence and Child Maltreatment: Identification and Interdisciplinary Training* (May 1997).

155. See generally LAUDAN Y. ARON & KRISTA K. OLSON, *EFFORTS BY CHILD WELFARE AGENCIES TO ADDRESS DOMESTIC VIOLENCE: THE EXPERIENCE OF FIVE COMMUNITIES* (1997); see also Mary McKernan McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 *CHILD WELFARE* 29, 32-33 (1994) (stating that "when agencies assisting victims of domestic violence interfaced with the child welfare system . . . philosophies and values clashed."); Jeffrey L. Edleson, *Mothers and Children: Understanding the Links Between Woman Battering and Child Abuse* (Mar. 31, 1995) (presented at the Strategic Planning Workshop on Violence Against Women, National Institute of Justice, in Washington, D.C.) (on file with the author); Susan Schechter, *Model Initiatives Linking Domestic Violence and Child Welfare* (June 8-10, 1994) (paper presented at Integrating Policy and Practice for Families, a conference on Domestic Violence and Child Welfare, in Racine, Wisc.) (on file with the author); Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies* (June 8-10, 1994) (a paper presented at Integrating Policy and Practice for Families, a conference on Domestic Violence and Child Welfare, in Racine, Wisc.) (on file with the author); Susan Schechter & Anne L. Ganley, *Domestic Violence: A National Curriculum for Family Preservation Practitioners* (1995) (presented at the Family Violence Prevention Fund in San Francisco, CA) (on file with the author). See also V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 *HARV. WOMEN'S L.J.* 229, 236-38 (1996) (describing Massachusetts' positive experience in training child protective tools for lawyers and judges to broaden the factual inquiry to more fully consider the circumstances of the mother and children before the court. See generally KAREN AILEEN HOWZE, *MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS* (1996);

effective responses from the child welfare bureaucracy when intervening with families experiencing domestic violence and child abuse. The comprehensive study of the connections between substance and child abuse required by ASFA¹⁵⁶ and similar studies¹⁵⁷ also offers the promise of more appropriate treatment plans for parents whose children have been removed from their care because of substance abuse. The CINA study, however, reveals how significant the gap is between 1) recognizing the scope and severity of the impact of domestic violence and substance abuse on child protection, and 2) translating those findings into effective and affordable reunification plans in child protection cases. Moving from plans that, at best, suggest mothers obtain "no contact orders," seek "domestic violence counseling," and "refrain from drinking" to plans that are specific, with realistic time frames, and backed up by available services will take a profound change in policy and priorities in this state and elsewhere. The recommendations to significantly improve child protection have been developed in Maryland¹⁵⁸ and throughout the country.¹⁵⁹ These recommendations address issues such as tracking data, and appropriate qualifications, compensation and caseloads for caseworkers, attorneys and judges, *and* providing effective services for families. In order to translate these recommendations into realistic public policy goals, priorities must be set. This study suggests that focusing on the key player—the local departments and their caseworkers—is essential. Better training and reasonable caseloads should contribute to fashioning better service plans for families at risk or in crisis. Rejecting the charade of justice through adversarial proceedings in child protection cases might also address caseload and training deficiencies in the present system; refocusing resources on services under the thera-

JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997), Paul Knepper & Shannon Barto, *Statewide Cross-Training as a Means of Court Reform in Child Protection Proceedings*, 36 BRANDEIS J. FAM. L. 511 (Fall 1997-98).

156. See BLENDING PERSPECTIVES, *supra* note 5, at 2.

157. See, e.g., CASA, NO SAFE HAVEN, *supra* note 5, at 88-120.

158. See MILLEMANN, *supra* note 68, at 44-61; see generally IMPROVING COURT PERFORMANCE, *supra* note 96.

159. See, e.g., BLENDING PERSPECTIVES, *supra* note 5, at 88-120; CASA, NO SAFE HAVEN, *supra* note 5, at 43-86; Mary B. Lerner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE CHILDREN 4 (1998). The American Bar Association's Center on Children and Law initiated a monthly newsletter in March, 1996, ABA CHILD LAW PRACTICE. These issues regularly provide recommendations on appropriate caseloads for CPS workers and attorneys, and, most importantly, detailed recommendation for treatment plans for families experiencing domestic violence and/or substance abuse. See, e.g., Janet Chiancone, *Substance Abuse Treatment in Child Welfare: A Guide for Lawyers Representing Children and Families*, 17 ABA CHILD LAW PRACTICE, at 1 (Aug. 1998).

peutic jurisprudence model discussed in this volume may offer an intriguing alternative.¹⁶⁰ Some promising experiments in providing intensive service to target CINA families have already been undertaken in Maryland¹⁶¹ and should be enlarged and replicated here and across the country. The ASFA directive not to expend services on families where reunification is likely to be ruled out due to the severe and chronic nature of the abuse or neglect should free up resources for the families where reunification should be the goal. Focusing reform efforts in these areas holds the greatest promise for achieving the widely shared goal of protecting our children.

160. See generally Barbara Babb & Judith Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y ____ (forthcoming 1999).

161. The Maryland Judiciary, Foster Care Improvement Project (described in IMPROVING COURT PERFORMANCE, *supra* note 96); Child Welfare League of America & Baltimore City Dept. of Social Services, Kinship Care Project in Baltimore City.

APPENDIX A

CINA FILE REVIEW

OPD # _____

Petition # _____

Judge/Master's Name (at disposition): _____
(please indicate one)

Date of Shelter Hearing: _____

Date(s) of Adjudication/Disposition: _____

Public Defender (PD) No.: _____

DSS Attorney No. _____

Child's Attorney No. _____

___ Baltimore City ___ Anne Arundel County ___ St. Mary's County ___ Montgomery

For "Race" in questions below use the following categories and/or codes:

- 1 Black/African American 2 American Indian or Alaskan Native 3 Asian or Pacific Islander
- 4 Hispanic 5 White 6 Other

First Name (Identifier) of PD Client [mother]: _____

Mother's Date of Birth: _____ Mother's Race: _____

Child named in CINA petition [respondent]:

First Name/ Last Initial	M/F	Date of Birth	Race	Father's Name	Father's DoB	F's Race

Did father participate in proceedings at any stage? ___yes ___no

If yes, what stage?

- ___shelter hearing ___adjudication ___disposition ___postdisposition
- ___other

Father represented? ___yes ___no

___ Granted custody

Conditions: _____

___ Granted visitation

Conditions: _____

Is mother's battering evident in file? Yes No

If Yes, at what stage of the process did this evidence surface?

petition adjudication disposition postdisposition
 other _____

Mother's Batterer:

First Name: _____

M F Date of Birth: _____ Race: _____

Relationship to mother: married divorced/separated cohabiting
 other _____

Identify unknown from file

Summary of allegations against Mother
(with respect to child):

- Emotional Injury
- Sexual Abuse
- Physical Abuse
- Neglect
- Failure to Protect

Comments _____

Summary of allegations against Batterer
(with respect to child):

- Emotional Injury
- Sexual Abuse
- Physical Abuse
- Neglect
- None

Comments _____

What conditions were placed on the mother at shelter care? _____

Was mother's disability a factor? Yes No physical mental none

In what way? To what extent?

Was substance abuse a factor? by Mother by Mother's Batterer

In what way? To what extent?

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CINA FILE REVIEW

OPD # _____

Petition # _____

Mother's Position at Time of Adjudication/Disposition:

- Consent to removal
- Unavailable for care
- Abuse/Neglect of child did not occur
- Abuser is in home and has accepted services
- Abuser is no longer in home/mother relocated
- Filed criminal charges against abuser
- Protection Order was obtained Ex Parte was obtained
- Other measures were taken _____

Disposition date: _____

- Child removed
 - Placement with mother's relative
 - Placement with father's relative
 - Placement in foster care
- Conditions for mother to achieve reunification
 - _____
 - _____
- Custody with mother with conditions
 - Conditions: _____
 - _____
 - _____
- Visitation with mother
 - Conditions: _____
 - _____
 - _____

Modifications, if any, after Review(s):

- _____ Date _____
- _____ Date _____
- _____ Date _____

Reviewer's Name:

_____ (Print name)

_____ (Signature)

Date file reviewed: _____

APPENDIX B

INTERVIEW WITH ATTORNEY # _____

PETITION # _____

1. How was abuse of the mother revealed in this case?

Mother's statements police report DSS report medical report
 other _____

2. What type? Emotional Sexual Physical

Describe _____

3. Did you reveal it to other parties in case?

DSS child's attorneys other parties' attorney(s) evident in file

4. Rank the following issues in order of importance to this case (1-most important):

domestic violence mental disability physical disability substance abuse
 other _____

Explain the rankings:

5. In what way, if any, did the presence of domestic violence in this case affect your representation of the mother?

6. Was a contested hearing held in this case? Yes No

If Yes, continue here. If No, skip 6(a) through 6(d) and go directly to question 7.

a. When? shelter adjudication disposition review

b. Did you attempt to admit testimony about domestic violence in the hearing before the court? Yes No

If no, why not? _____

Page 2 INTERVIEW WITH ATTORNEY #: _____ PETITION #: _____

If yes, did you seek to have testimony of **Mother only** admitted? ___ Yes ___ No

If yes, was it admitted? ___ Yes ___ No

OR, if yes, did you seek to have testimony of **both Mother and Expert** admitted? ___ Yes ___ No

If yes, what testimony was admitted?

___ Mother only ___ Mother & Expert ___ None

If you attempted to raise the issue of DV before a master/judge,

c. To what extent do you think the master/judge who heard the case understood the dynamics of DV?

___ a great extent ___ a moderate extent ___ a small extent ___ no extent
___ unsure

Explain: _____

d. Would it have been helpful to have the case heard by a master/judge who understands the dynamics of domestic violence? ___ Yes ___ No

Explain: _____

7. Were any comments made that relate to any of the following assumptions; if so, who made them and what were they?

Stereotypes of the mother: _____

Did not see connection between abuse to mother and abuse to children: _____

Assumption that domestic violence always put children at risk even if mother separated from abuser: _____

Assumptions about mother's autonomy/ability to leave household: _____

8. Did the adjudication/disposition or stipulation in this case account for the domestic violence?

Yes How? _____

No Why Not? _____

9. Were any criminal charges filed against the mother for abuse/failure to protect any of these or any other children? Yes No Don't know

Were criminal charges filed against any other adult for abuse of the children?

Yes No Don't know

If yes, first name of person: _____

relation to child(ren)? _____

10. Were criminal charges filed against the mother's batterer for abusing her?

Yes No Don't know

11. Other steps mother took to keep abuser from children: _____

Comments: _____

Interviewer's Name:

(Print name)

(Signature)

Date of interview: _____