A Public Health Approach to Child Welfare Law

by Josh Gupta-Kagan, JD


We generally describe our field as "child welfare"—we aspire to prevent maltreatment by addressing the all-too-common underlying causes such as mental health problems, substance abuse, and domestic violence. Indeed, the scope of these problems is huge, affecting millions of families. But our legal tools are better described as child protection tools—coercive and adversarial exercises of state power over the families we seek to help. Faced with a family in need, the law constrains what many professionals can do, forcing them to turn to a legal system that invades fundamental family liberties, blames and shames parents, and costs billions of dollars. This system fails to protect too many children from the most severe forms of maltreatment, and simultaneously fails to address the full scope of families in need—all while traumatizing too many children through unnecessary removals.

The scope of the problem and of the child welfare system

By any measure, the court system built to address child abuse and neglect cases is large—child protection agencies remove more than 250,000 children every year. This is the population most lawyers are familiar with—the children and families who become parties to family court abuse and

EXECUTIVE DIRECTOR’S MESSAGE:

Next Year Is Now

This year’s annual national conference was a big success: 675 of us in Denver, our second largest conference ever, and the largest such gathering in the country. The program was packed with can’t-miss topics and expert speakers who challenged us to advance our practice and reform the systems that serve our clients. And for many, the conference ended this August 20 with our heads filled with ideas for how the next conference could be better, bigger, and even more engaging and inspiring.

This note is just to urge all of us to jump on those ideas for next year’s convening, and to do it now. We’re in gorgeous and relaxing Monterey, California, next year—from August 24 to 27, 2015. Do you have an idea for a plenary or breakout session? Do you know the perfect speaker on a key topic that we’ve neglected in the past? Have you launched an initiative that will change child welfare that we all should join?

The open and competitive process for landing a slot at the NACC conference is one of our strongest traditions, and a big reason that our conference is so successful. We’re open this December for abstract submissions for

The NACC envisions a justice system that protects the rights of children by ensuring their voices are heard through the assistance of well-trained, well-resourced, independent lawyers.
neglect cases. But these families are just a small slice of the child welfare system—which touches millions of children every year. Only 8% of all children subject to child abuse or neglect reports were placed in foster care; the remaining 92% never left home.

In 2011, the federal government reports that the child welfare system had:

- 3.4 million child protection hotline referrals involving roughly 6.2 million children. About 15% of all American children—with higher numbers among the lowest socioeconomic strata—will be reported to a child protection agency by the time they turn eighteen.¹
- 1.6 million of those reports, involving a little more than 3 million children, were “screened-in,” meaning CPS agencies deemed the reports to allege facts which, if true, would constitute abuse or neglect. CPS agencies investigate almost all screened-in reports.
- CPS agencies “substantiated”—made an administrative finding that the child was abused or neglected—regarding 676,569 children, about 22% of the total children investigated.
- CPS agencies removed 252,320 children from their homes. About one-quarter of these children leave foster care and reunify with their families fairly quickly.

Research has consistently shown that families have serious levels of needs at all stages of these cases, and that these stages do not always identify the most severe cases. Even basic determinations—like whether CPS substantiates an allegation of abuse or neglect—has little correlation with children’s and families’ actual needs.² Leading studies show only a “weak relationship” between the severity of abuse and the likelihood that authorities removed a child from an abusive family.³ For instance, the majority of young children involved in any way with CPS agencies are at high risk of developmental delays; even cases closed after an investigation reveal “exceptionally high... developmental risk.”⁴

The present child welfare system’s failed response

Given the scope of the child welfare system and of real problems faced by families, the child

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welfare system should be judged based on how effectively it identifies cases for court intervention, and whether the law facilitates or hinders individuals’ and agencies’ ability to provide effective assistance to families who do not need court intervention. On both questions, the present legal system fails.

The present system centers on legal findings of parental faults, not children’s needs—and so the required actions focus on identifying faults, not providing services to meet needs. Parental fault is jurisdictional; without it, there are no legal grounds for the court system to intervene or for a child protection agency to force a family to work with it. Child protection agencies thus spend enormous resources investigating not whether children or families have particular needs, but whether a parent has done something wrong to endanger the child. CPS investigations are thus inherently adversarial, and involvement with the child protection system is stigmatizing—inherently adversarial, and involvement with the child protection system is stigmatizing—even to parents, and especially to the poor and black mothers who are disproportionately labeled as bad parents through the child protection system.

The severe cases for which a parental fault paradigm is appropriate are far outnumbered by less dangerous cases. The system largely deals with parents with inadequately addressed mental health conditions or substance abuse problems, and with families with a variety of poverty-related stressors—like unstable housing and employment, violent neighborhoods, and bad schools. These are cases with few true villains and many flawed but sympathetic victims—including the parents deemed perpetrators.

The system that has been in place for a generation thus places a parental fault paradigm on millions of families, most of whom are not good fits for that paradigm. In so doing, the system imposes at least five kinds of harm.

First, child welfare agencies develop unique knowledge of families’ needs, but fail to provide these families meaningful assistance—especially the millions of families not selected for court intervention. As a longitudinal study of families subject to CPS investigations found, the problems that existed when child welfare agencies made contact with them are not resolved several years later, even when the families present problems for which interventions known to be effective exist. In the words of the study’s authors, this is a tremendous “missed opportunity” to help millions of families and prevent much future maltreatment.3 Second, the present system’s wide scope prevents it from protecting children against the most severe forms of abuse. About 1,500 children are killed by abuse or neglect each year according to the federal government. U.S. fatality rates have remained fairly steady at least back to the 1970s—around the birth of the modern child welfare legal structure—and place the United States at the bottom of the scale of rich nations, and more than double the rates of comparable nations.4 Some of these deaths result from an overwhelmed child protection system forced to investigate millions of relatively minor allegations. Many of the affected families need assistance, but investigating them is unlikely to identify a child at risk of severe harm. Finding those cases is like searching for a needle in the proverbial haystack—except that the law’s response has been to pile on more hay.

Third, the wide scope imposes child protection investigations on millions of children and parents who have no need for that intervention. These investigations are themselves invasive of the right to family integrity and cause significant anxiety and other emotional distress,7 and they poison relationships with families, making it more difficult for agencies to work with them effectively.

Fourth, whenever CPS agencies substantiate abuse or neglect, they place parents on a child protection registry—even if the situation is not severe enough to remove the child. Placement on such registries prohibits those parents from working as bus drivers, child care workers, home health aides, and child care workers, to name a few of the jobs that may low income families depend on. Most affected children remain at home and thus depend on their parents’ economic support—so limiting their parents’ job opportunities hurts the children the system is designed to help. And in many of these cases, there is little public protection offered through these registries because most states’ do not distinguish between a child


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A therapist and a mother deemed to have failed to protect her children from an abusive boyfriend she subsequently left.

Fifth, the present child protection system removes many children who could be protected from abuse or neglect at home. Federal data shows that 35% of all children removed are not found to be victims by CPS investigations. Other recent studies show that many children removed from their families are harmed more by the state placing them in foster care than similarly at-risk children left at home with their families. Joseph Doyle compared children removed from their families and placed in foster care with children with similarly troubled family situations who CPS authorities left at home; children placed in foster care had higher juvenile delinquency and adult crime rates, higher teen birth rates, and lower earnings than children left at home.9

Unnecessary removals also harm children by hurting their parents’ rehabilitation efforts. Parents struggling with addiction, for instance, are often motivated to pursue sobriety so that they can be better parents for their children. Take their children away, and—surprise!—many parents will fall off the proverbial wagon. A study of New York City foster children whose time in foster care overlapped with their mothers’ incarceration found that the child protection agency’s decision to remove children from parents and place them in foster care correlated with increased criminal activity (usually non-violent drug offenses) by their mothers.9

A public health legal structure

Consider what a therapist, school social worker, or pediatrician—all mandatory reporters—can do when they meet a child who is possibly neglected due to a parental mental health condition, or substance abuse, or domestic violence. The reporter can call CPS. But very likely CPS will not do very much to help the child—unless the case is among the 8% most severe, there will be no removal, and if there is, it may do more harm than good. If there is no removal, CPS has a poor record of providing services, even when they are aware of families’ needs. The reporter can also break mandatory reporting laws and not report—as occurs with great frequency. These children may be spared some of the harms caused by CPS interventions, but they receive no interventions to address whatever may be occurring in their family life. In neither scenario is the child likely to be helped.

A public health approach would structure a different set of choices—allowing reports to CPS if a parent has committed a bad act—and impose a coercive legal regime on an overly broad category of cases. Mandatory reporting statutes have become canonical in the United States, but other developed countries, like Great Britain, protect children without them. And state legislatures have expanded them far beyond their original goal of requiring physicians to report serious physical abuse. Child welfare experts from competing perspectives have offered robust criticisms of these laws for overwhelming CPS agencies with large numbers of relatively minor allegations.

A public health perspective adds a new critique: Many mandatory reporters are the people best suited to coordinate a public health response, but the law prevents them from doing so. These laws require these professionals to risk their client relationships by breaking confidentiality, and disempower these professionals by turning authority for any intervention over to CPS—the law literally limits their job to phoning it in.

And after they phone it in, mandatory investigation laws remain the norm in most states; so CPS must investigate the allegations regardless of their severity or of alternative, less coercive ways to address underlying problems. These investigations are hallmarks of a parental fault paradigm—coercive actions which seek to determine if a parent has committed a bad act—and impose harms in their own right. Mandatory investigation statutes are beginning to fall out of favor—at least eighteen states have begun implementing “differential response” systems. These states triage less severe allegations, and offer voluntary services to affected families without an

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investigation and without placing parents on a registry. Child protection investigators are then freed to focus on more severe allegations.

Differential response begins with a legal change; in place of mandatory investigation laws, legislatures give child protection agencies the choice of how to respond to abuse or neglect reports—with a traditional investigation or a family assessment. Family assessments and subsequent services are voluntary and less stigmatizing than a finding of abuse or neglect. Unsurprisingly, the result is that families are more likely to participate in services, develop stronger relationships with social workers, and believe that child welfare agencies treated them fairly. The government is also able to provide services to families faster—perhaps because the families are more cooperative, or perhaps because the government does not first take time to document parental fault before arranging for services.10

Moreover, by limiting investigations of minor allegations, differential response should help state agencies focus their investigations on more severe cases and thus improve the legal system’s ability to protect children from the worst kind of abuse. A study of Missouri’s “differential response” pilot concluded that by reducing the number of less serious investigations, authorities had more investigatory time for sexual abuse cases. Those investigations were more comprehensive, and police were able to gather enough evidence to arrest more perpetrators.11

So a central reform is to limit dramatically the scope of mandatory reporting and investigation statutes. State and federal lawmakers should limit mandatory reporting laws to their original purpose—require reporting of only the most severe forms of maltreatment. Voluntary reporting would, of course, remain. And all states should adopt differential response laws to focus investigations on the most severe allegations and provide voluntary services to other families. States should separate the provision of voluntary services from CPS agencies as much as possible.

We also need legal reforms to facilitate more effective responses to families with problems than a CPS investigation. When schools, pediatrichians, or therapists encounter families with severe needs, a public health legal structure must provide a means to trigger some kind of effective intervention. Service providers should be able to contact agencies other than CPS. If states administer differential response programs separately from CPS agencies, they could call such agencies directly. When families’ problems include legal issues—like housing problems, or an abusive partner—referrals to legal clinics are essential steps.12 More ambitiously, states could create public health hotlines, so nurses or other public health providers could call service providers better equipped to provide the necessary assistance, and to do so without stigmatizing the family.

Finally, in some agencies, legal reforms can empower actions to address family needs. Schools are a particularly good example because they know students and their families well (and account for the largest source of reports to CPS hotlines). But school interventions tend to be focused on children to the exclusion of their families (and are often shortsightedly punitive). Many proven interventions require working with parents and caregivers together. So district, state, and federal education authorities should create administrative ties between schools and other health and social service agencies so schools and other agencies can more effectively collaborate.

Conclusion

Millions of families face the same underlying conditions that feature prominently in family court. A true child welfare system would find a way to help those families effectively, without invading their privacy or their legal rights unnecessarily. Our present legal structure has failed—it invades legal rights more than necessary, leaves far too many children unprotected from severe abuse, and fails to provide effective interventions. We need significant reforms to target coercive state intervention when it is most needed and to provide effective assistance to the millions of families left unassisted by the present system.
Practice Tips for Shelter Hearings

by Brooke Silverthorn, JD, CWLS, NACC Staff Attorney

As attorneys, we are taught to thoroughly prepare for hearings by identifying issues and applying the law to the facts of any given case. In some practice areas, attorneys have months and even years to prepare a case to go before a Judge for a contested hearing. In juvenile court, evidentiary hearings may occur within 72 hours of a child’s removal. But, the fast paced nature of juvenile court proceedings should never be a reason to be unprepared for a contested hearing. Here are some tips for making sure that you are ready for an initial removal hearing.

1. **Read the initial complaint.** The initial complaint is your road map for the issues in the case. Use the complaint to guide your interviews in preparation for a hearing. There will be some issues that need further exploration, but in preparing for the initial hearing, make sure you understand the specific issues that led to the removal of the child and which of those issues pose a barrier to your client’s position.

2. **Interview the person (i.e., case worker, police officer) who removed the child.** After you have a good timeline of events leading up to the removal, ask the person who removed the child to walk you through his thought process. Don’t be afraid to ask a lot of questions to clarify.

3. **Interview your client.** If you represent parents or children, you will often meet your client shortly before walking into a courtroom to advocate on their behalf. Even in the case of Agency attorneys, you may have just gotten word of the need for a court proceeding within hours of a hearing.
   i. Build a rapport with your client, but keep them focused on the issue at hand as well.
   ii. Because of the limited time to prepare for an initial hearing, it is extremely important to focus your client and redirect when necessary. Some clients will naturally want to tell you their life story. Remember, use your initial complaint as a road map to guide the discussion with your client.
   iii. Try to limit your use of open-ended questions. Ask specific and direct questions.

4. **Create a Shelter hearing trial notebook.** As lawyers, we apply the law to the facts in order to advocate our client’s position. For the initial removal hearing, we do not have the luxury of time to thoroughly research case law. Therefore, it is helpful to have a prepared notebook that outlines the removal statute and recent case law that addresses common issues of removal that you can bring with you to removal hearings. Remember to update the case law as needed in order ensure you are citing valid law.

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Inside the NACC Conference

Thank you to everyone who attended the 2014 National Conference, August 18–20 in Denver! Check out the event photos on our Facebook page (maybe you’re in one). We’re still gathering and updating photos, so check back regularly.

And if you were unable to attend this year, make sure you save the date for next year. The 2015 National Child Welfare, Juvenile & Family Law Conference is heading to Monterey, CA August 24–27. Abstracts will open December of this year and registration to attend the conference will open in April of 2015.

Save the Date, and Join Us by the Bay!

38th National Child Welfare, Juvenile & Family Law Conference

Hyatt Regency Monterey
Monterey, California
Pre-Con August 24
Three-Day Conference
August 25–27, 2015
A message from Lifetime Achievement Award Recipient John Ciccolella, JD

It is difficult for me not to start this note without thanking the NACC, its leadership and members, for honoring me with the NACC Lifetime Achievement Award in Child Welfare. It truly was a surprise. I suppose the reason for that, as I said at the Conference Luncheon, was I knew there were many in child protection that were equally or more deserving than I for that special recognition. If I had been on the work group to select an individual to honor, I certainly would have not even considered me, for there are scores of individuals, lawyers and other professionals, who have dedicated their lives to the improvement of the plight of children in need of counsel.

I am fortunate enough to be old enough to have started my career as an attorney at a time when children’s counsel were few but willing to create a profession dedicated to the representation of children and respondent parents. There were no CLEs to give direction to the unguided. In fact, there was no formal education at all for children’s advocates. I cut my teeth in juvenile law and tried to be innovative. The pay was minimal — $10 per hour for out-of-court effort and $15 per hour in court. It barely kept the lights on in the office. The hardships of representing children and their siblings who were literally dying from abuse over the years have been more than offset by my most gratifying times as a children’s lawyer. Over the course of the years, I have practiced or at least dabbed in almost every arena in law. My most satisfying accomplishments have not been in winning the big criminal case or achieving a good settlement “victory” in a personal injury case. Professional satisfaction at the highest level has come from protecting a battered and broken baby from further harm, from returning children, abused by their father, to a mother who did nothing wrong but fell on the bad side of a “no fault” dependency petition and from other such scenarios.

I like to consider myself as the first member of the NACC but there were others before me. Don Bross and the “founding mothers and fathers” were the true first members. Once the NACC was formally organized, I just happened to be the first person standing in line to join. It is a line that gets longer each day. Today NACC serves children by serving its attorney and non-attorney members in becoming more knowledgeable and trained in child advocacy.

I intend to keep my hand in juvenile law and in supporting the NACC. My membership in the NACC is of value to me, but just as importantly, my dues and gifts help improve the NACC and help children in need of counsel. Again, my heartfelt “Thanks” to the NACC and its membership in recognizing me and I accept that acclamation on behalf of the many who have also dedicated their professional lives for the betterment of children.

A message from the 2014 Outstanding Young Lawyer Award Recipient Daniel Senter, JD

This is a wonderful honor. I am very grateful to the NACC. I owe my progress as a young lawyer to my mentors at the East Bay Children’s Law Offices (EBCLO). As a young, inexperienced lawyer, it is essential to have knowledgeable, encouraging mentors. My mentors at EBCLO supported the development of our Education Advocacy Project at every step. The Project aims to increase school stability for court-involved youth. So often we in the juvenile justice world discuss the need to challenge systems. I am thankful that my mentors were not only willing to challenge the status quo, but to innovate and develop new systems to address our clients’ needs.
ments that were obtained in violation of his Fifth Amendment Miranda rights. The twelve-year-old IMM was playing outside with MM, his six-year-old female cousin, and MM’s five-year-old brother, near their grandfather’s trailer on an Arizona Indian reservation. The grandfather observed MM with her pants down in front of the boys. MM told her grandfather, “They told me to take my clothes off.” She showed no signs of distress until her grandfather yelled at her. MM and her grandfather then went inside. MM’s grandfather told MM’s mother that something had occurred between IMM and MM, but was not specific and they did not discuss it further. MM did not complain about pain to her mother, and MM’s mother did not check MM for signs of assault or take her for a physical examination. She first spoke to the police two hours after the incident. More than seven months later, a detective in plain clothes picked up IMM and his mother at their home and drove them to the police station 30-40 minutes away in an unmarked vehicle. The detective was visibly armed. The police station was staffed with uniformed police officers. The detective led IMM and his mother into a small room, and kept the door closed the entire time. The detective did not read IMM his Miranda rights. IMM did not sign a consent form. There was also no evidence that IMM was listening to or understood the detective when he read IMM’s mother the Parental Consent to Interview a Juvenile Form and had her sign it. IMM’s mother then waited in the lobby while IMM was questioned for 55 minutes by the detective, who had no experience with conducting juvenile suspect interviews. IMM was twelve, in special education classes, and had emotional problems stemming from his father’s attempted murder of his mother, and possible sexual abuse by his father. The detective told IMM he could stop answering questions at any time. The detective insisted that IMM’s grandfather had seen IMM sexually abuse MM, even though he had not. He reiterated to IMM that if he countered this statement, he would be calling his grandfather a liar. He also said that it could “‘turn into a big thing if [he wasn’t] going to be honest.’” IMM’s mother later testified that IMM’s grandfather was the “only positive role model” in IMM’s life, and IMM called him “dad.” For the first half of the interrogation, IMM denied that there had been any sexual conduct. When the detective kept pressing IMM, IMM

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1. U.S. v. I.M.M., 747 F.3d at 754, 757 (9th Cir. 2014).
2. Id. at 757.
3. Id.
4. Id.
5. Id. at 757-58.
6. Id. at 758.
7. U.S. v. I.M.M., 747 F.3d at 758.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
20. Id. at 760.
21. Id.
22. Id.
23. Id.
24. Id.
26. Id.
27. Id.
28. Id.
confessed to telling MM to take off her clothes and sit on top of him, and he “um, put [his] weenie in her butt or something.”

The court held that IMM was in custody, but IMM never agreed to an interview or understood it to be voluntary.

The court first considered the language that summoned the individual. The court held that IMM was in custody: “(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.”

The court of appeals then held that the district court should have suppressed IMM's inculpatory statement under Miranda. The court held that IMM was “in custody.” It applied the Stansbury v. California test, and considered whether a reasonable person would have believed that he or she was not free to leave. The court employed the five factors from United States v. Kim to determine if IMM was in custody: “(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.” The court determined that IMM was “in custody” because a reasonable person of IMM's age would not have felt he was free to leave the interrogation.

The court then considered the duration of detention. The court held that IMM was “in custody.” The court reasoned that because the interrogation was in a police station, and IMM was a juvenile, IMM was “in custody.” According to the court, juveniles are “more likely to be overwhelmed by entry into a police station staffed by armed, uniformed officers.” The fourth factor, the duration of detention, strengthened the court’s conclusion.

spent 30 to 40 minutes in the police car and almost an hour in the interrogation. Although there is not a precise time at which a detention becomes custodial, the court cited Kim again, in which an adult defendant who was interrogated for 45 to 90 minutes was “in custody.” The fifth and final factor, the degree of pressure applied to detain the defendant, supported the defense as well. The questioning was hostile and accusatory, and therefore pressured IMM to give certain responses.

The court decided that IMM was “in custody” during his interrogation. He was also not advised of his Miranda rights. The warnings were not read to him directly, nor did the detective explain the meaning or the consequences of those rights.

If so, please let us know. Email: advocate@NACCchildlaw.org.

Do you know of an important case which you feel NACC members should be made aware of?

NACC - the Guardian

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FULL SCREEN
IMM lastly contended that the evidence at trial was insufficient to support his conviction of knowingly engaging in a sexual act with a person under the age of twelve (citing 18 U.S.C. § 2241(c)). The law defines “sexual act” as “penetration, however slight” (citing 18 U.S.C. § 2246(2)(A)). IMM argued that the prosecution did not prove actual penetration beyond a reasonable doubt. There was no physical evidence of penetration. The government mostly relied on the testimony of IMM’s grandfather, MM’s brother, and MM’s mother; MM’s two excited utterances; and IMM’s videotaped statement. The court concluded that only the eyewitness testimony of the seven-year-old brother and IMM’s inculpatory statements to the detective actually implied any penetration. The court held that MM’s brother’s testimony would not be sufficient evidence to prove that penetration took place. The district court recognized that an inference of penetration could only arise if corroborated by other evidence. Therefore, the court of appeals found that the conviction ultimately stood or fell on IMM’s inculpatory statements in the interrogation. In the light most favorable to the government, that evidence would be sufficient to support the conviction.

The court of appeals ultimately held that the child was competent to testify, and the evidence at trial, including IMM’s inculpatory statements, could support IMM’s conviction. Even so, the court reversed and remanded because IMM’s statements were obtained in violation of his Miranda rights and should have been suppressed.

This case highlights how important it is for interviewers to understand the psychology of defendant interviewees, particularly when those interviewees are juveniles. Law enforcement officers frequently confront the delicate balance between considering the rights of individuals and pursuing the conviction of criminals. If more courts ruled in alignment with U.S. v. I.M.M., it would ensure that confessions from juvenile defendants would be valid pieces of evidence.

54. Id.
56. Id.
57. Id. at 759.
58. Id.
59. Id.
60. Id.
62. Id.
63. Id. at 770.
64. Id.
65. Id.
66. Id. at 771.
68. Id.
69. Id.
70. Id. at 771-72.
71. Id. at 772.
72. Id.
73. U.S. v. I.M.M., 747 F.3d at 772.
74. Id.
75. Id.
76. Id.
77. Id.
consideration of youthful characteristics and age-related circumstances on an individual basis. The brief urges the Supreme Court to vacate Edwin Ike Mares’ sentence and remand for re-sentencing.

In Wyoming v. Mares, Edwin Ike Mares, was sentenced to life in prison without parole for first-degree felony murder under Wyoming statutes. Edwin was a minor at the time he committed the crime. Wyoming’s legislature amended the statutes after the Miller decision rendered mandatory life without parole sentencing schemes unconstitutional, and the new enactments provided parole eligibility after twenty-five years for a juvenile sentenced to life in prison. But under these new statutes, juveniles committing violations after turning eighteen automatically lose parole eligibility.

Arguing that Miller renders the statutory amendments unconstitutional, the amicus brief cites the Miller Court’s rationale as grounds for a broad overhaul of juvenile sentencing. The Miller Court focused on the fundamental differences between adults and youth to conclude that mandatory life without parole imposed on a juvenile was an unconstitutional. The Supreme Court noted that research related to differences in risk-taking and maturity reveal a reduced “moral culpability” and a greater capacity for juvenile rehabilitation. These differences justify “individualized sentencing for... the most serious penalties.” Based on this rationale, the amicus brief argues that Miller calls for individualized, rather than mandatory, consideration of parole eligibility for juvenile delinquents regardless of whether the crime implicates the specific mandatory sentence (life in prison without parole) adjudicated in Miller.

The brief then considers the Wyoming statutory amendments under the Miller standard in light of concerns related to the lack of individualized sentencing in the amended Wyoming statutes under which Mares was convicted. Specifically, the Wyoming amendments are analyzed using five factors established in Miller as the minimum considerations required in juvenile sentencing: the juvenile’s age; family context; special circumstances of the offense; discrepancies between the adult criminal justice scheme and youth; and the prospect of treatment. Limiting parole eligibility to after twenty-five years of prison time and disqualifying juveniles who misbehave after the age of eighteen effectively precludes consideration of these five factors in determining a meaningful and proportional sentence for juvenile offenders.

The brief concludes that Wyoming’s new legislation offends the Miller standard of individualized sentencing for juveniles. Exploring the theoretical framework of felony murder, the brief then argues that individualized sentencing is even more vital when a juvenile faces a felony murder conviction. Specifically, the brief argues resting the conviction’s justification on the contested doctrine of transferred intent should not extend to juveniles in light of research

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2. Id. at 1-2.
3. Id. at 1-2.
4. Id. at 35.
5. Id. at 6.
6. Id. at 6.
7. Id. at 6.
8. Id. at 6.
9. Id. at 5.
10. Id. at 5.
11. Id. at 7.
12. Id. at 7 (referencing the Miller factors).
13. Id. at 7.
related to adolescent development. The reasonable person’s ability to foresee the consequences for their actions cannot be attributed to juveniles. The brief also uses Supreme Court mandates for individualized death penalty sentencing in adult felony murder convictions as further evidence that more personal attention must be afforded to juvenile life sentencing with regard to parole.

The brief asserts that the Wyoming amendments also fail to provide the requisite opportunity for release required in Graham and Miller. The prospect of release must be meaningful and provide for review before a juvenile ages significantly in prison, and accounting for age-related characteristics as a reducing factor in a juvenile sentence. Wyoming’s mere exchange of life without parole for life with parole after twenty-five years precludes the opportunity for meaningful release, as offenders are statutorily denied review without meaningful consideration of their individual, age-related circumstances.

Finally, the brief provides justification for the retroactive application of Miller to Mares’ case and other similarly situated juveniles despite the courts rendering final decisions. First, on policy grounds, the brief advocates for retroactive application of Miller in light of the benefit of a new Constitutional landmark to all persons affected, regardless of the their conviction date. Second, the brief justifies retroactive application based on Supreme Court actions in Miller with regard to a collateral case the Court effectively reviewed. Likewise, the brief cites Teague v. Lane, which codified two circumstances under which retroactive application of a Supreme Court rule is appropriate: (1) when the new rule is substantive or (2) when it serves as a “watershed” rule in criminal procedure. First, in accordance with established meanings of “substantive,” Miller makes a substantive rule change, because it forbids a particular type of punishment for a particular group of offenders. Specifically, Miller prohibits mandatory life sentences (a type of punishment) without parole for a specific group of persons (juveniles) and imposes requisite factors for consideration of sentencing.

Second, Miller announced an important “watershed” rule for criminal processes implicating juveniles. Because the Supreme Court declared sentencing as part of the criminal process, the brief asserts that Miller’s holding fulfills both requirements of a “watershed” rule: vitality in systems of practical liberty and a high risk of inaccurate proceedings should the rule not be applied retroactively. Protecting juveniles from punishment for which they are fundamentally less deserving is vital, and imposing mandatory life without parole on juveniles in the absence of individualized consideration presents significant risk of inaccuracy in light of these differences. The brief concludes that Miller changed the face of Eighth Amendment rights afforded to juveniles and warrants retroactive application.

Finally, the brief engages the inherence of “human dignity” and distaste for arbitrary punishment in the Eighth Amendment to bolster its argument for retroactive application of Miller. Noting the widely accepted trajectory of progress within Eighth Amendment jurisprudence, the brief asserts that historically appropriate punishments may become impermissible, justifying retroactive application of Eighth Amendment principles based on enlightened understanding. This is precisely the case in Miller: modern understanding of juvenile development renders any mandatory sentencing scheme disproportionately cruel with regard to juveniles regardless of whether their convictions are final.

The brief argues that finality of such sentences based on pure chronology is arbitrary and necessarily offends the Eighth Amendment itself. The arguments advanced in this brief fundamentally impact juvenile sentencing, repositioning the sentencing inquiry regarding juvenile culpability. Citing Graham, Roper and Miller, in their recognition of Constitutional differences between adult and juvenile culpability, this brief argues for an extension of Miller, stating that Miller stands for a broad condition on all sentencing structures.

The effect of implementing individualized sentencing in all cases of serious adolescent offenses would re-orient our legal and
social culture with regard to juvenile incarceration and more properly effectuate our nation’s long-recognized understanding that juveniles are fundamentally different—a concept that has been lacking uniform codification in our legal system. Should courts be required to consider the special circumstances of adolescence in all cases, not just those mandatory punishments specifically addressed in Roper, Graham and Miller; society would be turn its hand towards rehabilitation. And by requiring courts to consider five factors in sentencing juveniles, before the “harshest possible penalty,” one of which is the potential for rehabilitation, the Miller Court effectively repositioned youth in an adult criminal system.

Certification News

by Daniel Trujillo, Certification Director

QIC Waivers Gone!
The NACC would like to give a special thanks to QIC-ChildRep for providing certification subsidies for nearly 600 attorneys across the country. We’re estimating their support to triple the number of CWLS since its inception by the end of 2016. NACC will continue partnering with federal/state programs and foundations to keep up our rapid growth.

Welcome Louisiana
The NACC opened certification in Louisiana earlier this year. A big thank you to Louisiana Court Improvement for providing exam scholarships. Fifty hand-selected attorneys and judges from across the state were identified to be the state’s first class of CWLS. Their assistance puts Louisiana amongst the top states for number of applicants and they’ve just opened! Congratulations to those hard working individuals selected for this honor!

Red Book Training — Denver
We had 75 attendees in Denver for our pre-conference Red Book Training. Most were certification applicants and we had many that applied during the conference to snag those last QIC waiver slots. We look forward to working with you all and good luck to those headed to the exam! The next national Red Book Training will be in Monterey, California on August 24, 2015.

Looking for CWLS! King County Counsel’s Office, California
The King County Counsel’s Office is looking to hire a child welfare attorney and has mentioned additional incentives for CWLS. See full job posting online. Closing Date 9/26/2014.

For more information, please visit our Certification page at www.NACCchildlaw.org or contact Daniel Trujillo, 303-864-5359, or Daniel.Trujillo@childrenscolorado.org

32. Id. at 28 (citing Miller, 132 S.Ct. at 2469).
NACC Organization Spotlight

The Legal Aid Society of Milwaukee is the oldest and the only Guardian ad Litem (GAL) office in the State of Wisconsin providing legal services on behalf of 4,000 abused and neglected children in CHIPS (Children in Need of Protection or Services) cases, Termination of Parental Rights and Guardianship cases since 1980. In accordance with the Wisconsin law, the guardian ad litem attorneys independently consider the facts and independently advocate for each child’s best interest. The attorneys with assistance of the Legal Aid Society’s staff social workers always pursue independent discovery of facts: they always interview the child and the child’s caregiver. Often they interview family members and parents. They obtain and review school, medical, child protection, criminal, treatment and financial records. They interview family members and parents. They always prepare agency and lay witnesses for depositions, jury and court trials, and respond to subpoenas to compel children’s testimony. When appropriate they prepare children for courtroom testimony. Guardian ad litems develop independent case theories; participate in jury selection, examination of witnesses, opening and closing statements and in every aspect of litigation, including arguing significant cases in the Wisconsin Supreme Court and Court of Appeals.

The Legal Aid Society aspires to establish a nationally-recognized program of independent advocacy for children. One step towards that end, in 2007, Legal Aid adopted the Best Practices Guidelines for Organization Representation of Children in Abuse, Neglect, and Dependency Cases, which was promulgated by the NACC. Although Legal Aid has adopted many of the standards enumerated by NACC, it has been a pioneer since the 1980’s in the shared vision of incorporating a multidisciplinary approach to child advocacy. The Legal Aid Society currently deploys seven social workers, four possessing M.S.W. degrees, plus others possessing master’s degrees in Human Services Administration and Education. In addition, two GAL staff members are Child Welfare Law Specialists (CWLS) and one with a Ph.D. They also possess certifications in the areas of Batterer’s Intervention, Trauma Counseling, Child Nurturing, Crisis Intervention, Secondary School Psychology, and Domestic Violence Counseling.
Our People

When more than 600 NACC members converged in Denver for the 37th National Child Welfare, Juvenile, and Family Law Conference in Denver, they were recognizable. In and around the conference sessions, they had laptops, programs and swanky NACC lanyards. They wore attentive expressions that conveyed they had questions to ask, things to learn and information to share.

Yes, I thought, these are our people. I know these people. I read his book. I emailed her. I processed his membership dues.

Yet on Tuesday evening at 5:50pm, I stood in the Hyatt lobby waiting to lead a large group of NACC members to Coors Field and suddenly, I didn’t recognize anyone. The laptops, programs and lanyards were gone. The thoughtful, rapt expressions were no longer prominent.

Oh, I thought, our people look just like regular people.

It was a slight and immediate reminder that the work we do and are so passionate about, the work that brought us to this foremost conference, was still only a small part of who we are. We are so much more. And right there in the lobby I started really seeing the whole of our members.

We are diverse and complex. We are partners, mothers, fathers, sons and daughters. We are friends. We are athletes. We are clever and funny, generous and caring. We have fantastic stories to share and we are equally fantastic listeners. We have remarkable aspirations, talents and expertise that have nothing to do with our work.

We are the NACC.
NACC Mission

As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families