This book is written primarily for “family defenders”—lawyers and other advocates working with parents in court or administrative proceedings brought against them by the local child protection services agency. These proceedings are variously known as “dependency,” “child neglect,” “child abuse,” or “child protection,” depending on the locality. In some of these cases, the local agency may be seeking nothing more than a protective order of some kind, directing that a caregiver do or refrain from doing something. In other cases, the agency may be seeking a child’s removal from his or her family or the child’s continued placement in foster care. In still other proceedings, the agency may be seeking permanent termination of parental rights. In all these proceedings, the state, through the exercise of its *parens patriae* or police powers, charges parents or other caretakers with being inadequate in the rearing of children.

It would be difficult to find a more important type of legal proceeding implicating an individual’s rights. Many forms of state intervention potentially impact an individual’s basic rights, interfering with someone’s property or liberty. For many people, criminal proceedings are regarded as the form of state intervention that most threatens our most basic right: the right to remain free in society and avoid imprisonment. But child protection cases implicate rights that others would regard as even more fundamental. Many parents certainly agree with Justice Stevens’s observation more than thirty years ago that depriving a parent of rights to raise one’s child—“a deprivation of both liberty and property”—is “often . . . the more grievous” compared to sentencing someone to prison (“a pure deprivation of liberty”). *Lassiter v. Department of Social Services*, 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

All of this suggests that “family defense”—working on behalf of adults threatened by state intervention with the temporary and permanent loss of the custody and rights to their children—would be a well-known, highly prized legal field, at least comparable in status to criminal defense, and arguably, even more esteemed because of the importance of the threatened substantive rights. Sadly, this is anything but the case. Family defense is an outlier field, barely known to most lawyers and law school professors, let alone among Americans more broadly.

Why this is so is complicated. One reason has to do with its relative youth. Criminal prosecutions brought to punish law violators—well-known and feared by the Founding Fathers—are the focus of three specific Bill of Rights Amendments enacted when the country began. But the modern regime of state-initiated legal proceedings carrying
the potential power to remove children from their families and to cut permanently children’s ties with families only began in 1974 when Congress enacted the Child Protection and Treatment Act, federalizing much of the child welfare field. By that time, the Supreme Court had already interpreted the Sixth Amendment to require a lawyer for criminal defendants. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972). But in 1981, when it was first asked whether parents in family defense cases also have a right to counsel, the Supreme Court held that there is no such automatic right. See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

No less important a difference between criminal prosecutions and child protection cases is their relative impact on society as a whole. Though criminal proceedings are disproportionately brought against poor people, many prosecutions are brought against rich and powerful people each year. Most Americans know somebody who has been a defendant in a criminal case. Film and television regularly tell stories involving criminal prosecutions in which the defendants’ rights are commonly a prominent focus. Well ingrained in these stories is an understanding that even innocent people can become the target of prosecutions. Because of this, Americans have a widely shared understanding of the central importance of the right to a rigorous defense to prevent overreaching by state officials and to ensure the protection of individual rights.

Child protection cases are a very different matter. Rather than reaching into all parts of town, these cases tend to be prosecuted only against poor families. Although child protective services are very well known in poor communities (which often fear them), they are almost never seen in well-to-do communities. In New York City, for example, 96 percent of the foster care population is non-white. As a result, many fewer Americans know someone who has been accused of parental unfitness; even fewer know someone who has lost the custody of their children to the state.

Finally, even when Americans know about these cases, they are less likely to believe that family defense is as important as criminal defense. They have a greater confidence in child welfare officials to ferret out worthy cases from unworthy ones. Recognizing the good intentions of child welfare professionals, many believe that fewer roadblocks should be placed in their path because they would not prosecute cases unless they honestly believed it was appropriate to do so. In addition, many place a greater focus on the children, who stand to lose the most when cases are wrongfully dismissed. Many of the same people who believe in a vigorous criminal defense as the price of liberty, even when it results in the acquittal of a guilty person, are unable to feel the same way when wrongful dismissal of a case means exposing a child to risk of harm.

Law schools also have contributed to the outlier status of family defense in the United States. In sharp contrast with criminal defense, very few law schools even teach about child welfare. And when they do, they tend to stress the importance of child welfare as the means by which vulnerable children are protected from dangerous situations.
PREFACE

In those few schools that offer clinical experience in child welfare matters for students, the vast majority place law students with local agencies prosecuting child welfare cases or with law offices that represent children in those proceedings. Rarest of all are law school programs training the next generation of family defenders.

Much could be said in response. For some, including Justice Brandeis, the intentions of state officials are hardly a reason to be less vigilant to prevent overreaching. “Experience should teach us,” he wrote in 1928, “to be most on our guard to protect liberty when the government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

And history, even in the field of child welfare, buttresses his concerns. Two of the most famous child welfare efforts in American history, both carried out by people of goodwill intending only to further children’s well-being, have come to be seen in historical perspective as deeply flawed efforts. Charles Loring Brace’s work in the mid-1800s eventually led to as many as 250,000 “orphans” being sent to the Midwest from New York on “orphan trains,” even though many of the children were not orphans, none of them or their families were given the opportunity to seek official review of the decision to send them away, and many ended up working as indentured servants throughout their childhood. See Duncan Lindsey, *The Welfare of Children* 13–17 (1994). Those responsible for placing children on these trains were proud of their work. But the Catholic families whose children were taken from them had a very different grasp of the situation. See Nina Bernstein, *The Lost Children of Wilder: The Epic Struggle to Change Foster Care* 197–98 (2001).

Another blight on American history is the extensive use of American Indian boarding schools established by the Bureau of Indian Affairs during the late nineteenth century. In the name of achieving assimilation, the United States government engaged in a planned effort to eradicate Indian culture. See Robert A. Trennert, Jr., *The Phoenix Indian School: Forced Assimilation In Arizona*, 1891–1935 (1988). The plan was to extirpate Indian custom and culture from Indian children by denying them the opportunity to speak in their native languages and forcing them to dress in non-native clothing and to engage only in non-native habits. Nor was this merely a very old mistake. As recently as 1959, United States policy encouraged the removal of Indian children and placement in non-Indian families for the same purpose. H.R. Rep. 104-808, at 16 (1996). This practice was regarded by the families whose children were seized as the “ultimate indignity to endure.” David Fanshel, *Far from the Reservation: The Transracial Adoption of American Indian Children* (1972).

Perhaps least of all should the fear that insistence on fair procedures (of which a strong defender bar serves as the foundation) will endanger children be an obstacle to creating a highly competent defender system. For one thing, this fear entirely ignores the contrary danger: that children will be wrongly wrested from their families; forced
to become temporary or long-term state wards; have their lives permanently negatively impacted; threatened with abuse and other dangers disproportionately associated with foster children; and suffer long-term costs of poorer grades in school, lower graduation rates, higher incarceration rates, and considerably lower income levels over the course of their lives.

For another, family defense is conceptually very different from criminal defense. In many cases, criminal defense is focused on advancing the rights of the accused to prevent a conviction for reasons apart from factual innocence. As a consequence, a widely understood characteristic of criminal defense is defenders striving to achieve a victory for “technical” reasons (such as the enforcement of constitutional norms, which require suppressing statements, eyewitness identifications, or items seized by the police) even when evidence points to the defendant’s guilt. But there are no such technical defenses available in family defense. When parents’ lawyers are able to secure dismissal, it is either because the agency itself was persuaded that dismissal was appropriate or because a court found that the agency lacked evidence of parental wrongdoing required to permit intervention in the first place.

This leaves only the question whether children’s rights (or society’s interests) are better served by a legal system designed to prevent state intervention unless independent judges are satisfied there is a legal basis for the intervention. Differently asked, the question is whether children’s rights are served by living in a society devoted to the rule of law. To ask the question is to answer it. Children have reciprocal rights to be raised by their families, qualified, of course, by the important principle that they also have the right to be protected from parental misconduct. But the rule of law fully satisfies such rights and their limitations. It seeks to protect and implement children’s rights by ensuring that children are allowed to remain with their families when the law requires that result and that children are protected from maltreatment when the law requires it. Family defense does not undermine the values of child protection; it advances them.

This is true in still another way that is misunderstood by many professionals involved in child welfare. Of all the differences between criminal prosecutions and child welfare cases, perhaps the greatest involves the purpose of the intervention and its corresponding impact on almost everything that follows. Criminal proceedings are brought to punish criminals. The state’s interests and those of the accused are at odds when the case is first brought and when it ends with a conviction and sentence. The parties are true antagonists.

Though this is sometimes true in child protection matters, in the great majority of cases, the state’s interests are entirely consistent with the parents’. This is because the state’s purpose in virtually all cases is to help families find ways to be able to raise their children safely. In every state, the primary purpose of child protection intervention is to develop a plan that will allow children to be kept safely with their families of origin or be returned to them promptly. Instead of being punitive, the purpose is rehabilitative.
Rather than trying to prevent parents from getting a second chance to raise their children, child welfare professionals seek to assist families to overcome the obstacles to the safe return of their children and to do so quickly. Only when parents fail to change their ways or prove unable to raise their children safely for the foreseeable future do the state’s interests and that of parents’ truly diverge (with parents seeking to retain their parental rights and state officials seeking to terminate them).

But the time between the filing of a case until this fateful divergence is the critical time in all child protection cases when family defense can serve as a vital ally with child welfare personnel by focusing attention to the critical issues of what deficits exist in the family, what needs to be done to address them, and how it may be possible for children to remain safely at home or be safely returned there.

Many who have worked in the field, including the authors of this book, do not believe that the intentions of state officials are a sufficient protection against state overreaching. Nor do we believe that a vigorous defense system threatens anything worth preserving. A thriving family defense system is needed throughout the United States to protect vulnerable families from the loss of the most precious of American rights (for both children and their families)—the right of families to raise children and of children to be raised by their families except when the conditions at home are sufficiently harmful that children deserve to be removed. Nothing about family defense threatens those rights; only its absence does.

Despite all of this, family defense is still in its infancy in establishing itself as an important legal field. The publication of this book is the field’s coming out statement: we exist and we do important work. Those committed to civil rights should want to join the field because it advances the rights of poor families and children to be protected by the rule of law. And those many lawyers who represent children in child protection cases may come to appreciate the value to children’s interests served by ensuring that their parents have well-trained, highly skilled lawyers devoted to serving the parents’ interests. As adults think back on their lives, who would not have wanted their parents to be represented by the best lawyer in town when their right to remain in their family was at stake? This book is devoted to persuading the best lawyer in town to become a family defense lawyer and we hope the book will help lawyers become excellent in their practice.

The book is very different from those written about criminal or juvenile defense work because the things family defenders need to do to successfully negotiate the child protection system are very different from what is needed to defend criminal cases. Much follows from what is so different about the purpose of prosecuting child protection cases. Because the prosecution’s first goal is to strengthen families so that children can remain with or be safely returned to them, family defenders must pay a great deal of attention to this purpose. They must do considerably more than what is common to criminal defense work. Like criminal defense, family defense requires a careful investigation
into the facts and circumstances of the events that led to the prosecution. But unlike
in some criminal cases, in family defense, parents can achieve all of their objectives
(gaining the return of their children) whether or not they were “guilty” of something
in the past. When parents have not done something that justifies coercive intervention
in their families, family defenders should ensure that their rights are upheld. But what
matters most in most cases is whether parents are moving toward something the judge
or caseworker is demanding. Parents who comply with their case plan are most likely to
achieve their long-term objective of regaining their children’s custody.

For these reasons, family defense requires careful attention to the present and the
future. Lawyers representing parents should be actively engaged in fashioning the case
plan by participating in its creation. Many case plans are flawed from the beginning
because they were created without an accurate understanding of the parents’ needs.
Family defenders are able to advance the goals of child welfare intervention by helping
to identify more accurately what is going on in the parent’s life that should be addressed.
When case plans call for parents to engage in services that will not make them better
parents, no one wins. If parents do not complete services—even when those services
would not be of real help to them—parents will often pay the price by being found non-
compliant by the court. Courts and agencies weigh compliance heavily as a litmus test
for a parent’s concern and love for his or her child. For these reasons, eliminating from a
case plan services that will not be of any real use to the parent serves everyone’s interest.

To be an effective family defender requires getting to know each client, finding out
what she thinks will be of help to her and what she most wants from the court inter-
tervention. This attention to the present and the future—the period of time the case
will take to resolve—is the critical difference between criminal and family defense.
The book will describe what family defenders should do to increase the chances of fami-
lies remaining together. It is written by an experienced community of parents’ lawyers
and advocates who have joined together in a national effort headquartered at the Amer-
ican Bar Association’s Center on Children and the Law to advocate for every locality to
provide quality legal representation to parents at the earliest possible time when a child
protection case is being considered against a parent. We believe that high-quality legal
representation is a critical component of the child welfare field. This book is written to
provide advice, guidance, and encouragement to lawyers and other advocates who wish
to be a family defender.