

ARTICLE: USING STORYTELLING TO ACHIEVE A BETTER SEQUEL TO FOSTER CARE THAN DELINQUENCY

2013

Reporter

37 N.Y.U. Rev. L. & Soc. Change 553

Length: 20611 words

Author: Lisa Beth Greenfield Pearl+

+ Professor of Legal Writing, University of San Diego School of Law. The author thanks Miranda McGowan for her valuable comments on an earlier version of this article as well as Robert C. Fellmeth and Christina Riehl for sharing at the beginning stages of this project their insights into the intricacies of the dependency and delinquency systems. The author is indebted also to Legal Writing & Research Fellow Holly Krohel for lending her talent and support to the project and research assistant Kimberly Washington for her solid work.

Highlight

Abstract

California's child welfare system is failing its mandate to serve its neediest children. A significant portion of the 60,000 foster children that California cares for are dually involved with the dependency and delinquency systems. Children who have suffered abuse or neglect severe enough to be removed from their homes are more likely than well-treated children to come into contact with the delinquency system and possibly lose their dependency status in favor of delinquency status. For the young person for whom the state has taken on the parenting role under the dependency system, the blow of delinquency status is significant because of the resulting loss of the "parent" and the concordant services and rights that the "parent" has afforded. This article advocates that we use applied legal storytelling principles to direct more attention to the foster child's character, voice, and viewpoint to allow formal, earlier intervention at the phase where the child is at risk of delinquent behavior so that delinquency has a better chance at being avoided. By invoking applied legal storytelling concepts to focus child welfare advocates on children's unique narratives, this article suggests that we consider a new framework to help solve the present foster care-to-delinquency cycle to better serve foster young people and their communities.

This storm carefully creeps, hidden in its own silence, Twisting the scowling face, the breathless body, The weakening pulse of the sky Hold onto your children (!!!) Or they'll be swept away. - Lemn Sissay ¹

Text

[*554]

I. INTRODUCTION

Upon hearing about my project to address weaknesses in California's approach to dealing with foster children whose behavior requires involvement by the delinquency system, an intelligent and generally enlightened attorney I know declared, "Actually, I usually think of foster kids as being one step away from juvenile delinquents." Sadly, this

¹ Lemn Sissay, Storm (2002) (unpublished play) (on file with author).

off-the-cuff observation often reflects reality, and the legal system confirms this view. ² As a particularly candid juvenile court judge observed,

In my experience, foster care is just one of those preparatory steps before the kid commits a crime The vast majority of kids in foster care will do something - trespass, shoplift, assault, smoke marijuana, whatever. If you get in foster care, the risk factors go up, and you'll probably see the kid in the delinquency system. ³

In keeping with this viewpoint, one California Court of Appeal judge's [*555] justification for changing a foster child's life-long dependency status ⁴ to a delinquency status ⁵ rested on a "matriculation analogy": thirteen year-old Donald S. did what was expected of him by "making his unfortunate way up the ladder from dependent ... to delinquent." ⁶

Undeniably, a segment of the children under the jurisdiction of both the dependency and delinquency courts are the same. Research consistently connects children experiencing neglect and/or abuse with subsequent engagement in

² See Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice - Two Sides of the Same Coin*, *Juv. & Fam. Just. Today*, Winter 2008, at 17, available at <http://cjjr.georgetown.edu/pdfs/Fall%2008%20NCJFCJ%20Today%20feature.pdf> (discussing connection between childhood maltreatment and delinquency).

³ Leslee Morris, *Youth in Foster Care Who Commit Delinquent Acts*, *The Link: Connecting Juv. Just. and Child Welfare*, Summer/Fall 2004, at 1 (internal quotation marks omitted).

⁴ A child has dependency status under California law when she is removed from her home and adjudicated as a dependent under Section 300 of the California Welfare and Institutions Code as a result of having experienced or being at risk for severe neglect and/or abuse by a parent or guardian. *Cal. Welf. & Inst. Code § 300* (West 2007). Juvenile dependency proceedings require the court to determine "whether a child's home is unfit." *In re W.B., Jr.*, 281 P.3d 906, 912 (Cal. 2012). When "allegations of parental abuse or neglect are substantiated, the court assumes jurisdiction and removes the child from the family home," and the child then becomes "a 'dependent' of the court." *Id.* Once a child becomes a dependent, the state has responsibility for the child and by law must provide the child a proper home and other necessities such as food, clothing, and medical care. *Welf. & Inst. § 16001.9(a)(1), (3), (4)*. The state can place the child in a home with relatives or a non-relative foster family; other possible placements include a therapeutic or treatment foster care home and an institutional group home. Sandra Bass, Margie K. Shields & Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 *Future Child.*, no. 1, 2004 at 5, 6. After a child is placed, "the family generally participates in reunification services." *In re W.B., Jr.*, 281 P.3d at 912. Although reunifying the child and the family is not possible in every case, "the child's safe return to parental custody" is the goal. *Id. at 912-13*. If reunification is not possible, "child welfare workers [will] explore alternatives for a child's permanent placement outside the home through guardianship or adoption." *Id. at 913*. At the end of the dependency process, there is "a permanency planning hearing, at which the court determines whether the child can be safely returned home or, if not, whether parental rights might be terminated and the child released to a permanent placement." *Id.*

⁵ A young person becomes a ward of the juvenile court when she is habitually disobedient and/or truant in violation of Section 601 of the California Welfare and Institutions Code or commits a crime warranting this status under Section 602. The California Supreme Court recently explained that "in the broadest sense" cases "adjudicated under section 601 and section 602 are 'delinquency' proceedings." *In re W.B., Jr.*, 281 P.3d at 912. A child adjudicated under either of these sections becomes "a ward of the court." *Welf. & Inst. §§601, 602*. Although children adjudicated under either of these sections are often referred to as delinquents, a child adjudicated under section 601 is a really a "status offender" because section 601 applies exclusively to children who commit status offenses - "conduct that is not criminal but is nevertheless subject to punishment because of the offender's status as a person under age 18." *In re W.B., Jr.*, 281 P.3d at 912. The term delinquency more accurately refers to children adjudicated under section 602, which gives the juvenile court jurisdiction over a minor who "violates any law." *Welf. & Inst. § 602*.

⁶ Marc L. McCulloch, *Still Between a Rock and a Hard Place ... Victim or Delinquent: Dual Status Minors in California - An Illusory Promise?*, 28 *J. Juv. L.* 118, 123 (2007); *In re Donald S.*, 253 *Cal. Rptr.* 274, 276 (Ct. App. 1989).

conduct warranting involvement by the delinquency system.⁷ The independence of the child welfare and juvenile justice systems and the resulting difficulty of information sharing between the systems makes problematic knowing with any [*556] certainty how many children under California's care are "dually involved" with the dependency and delinquency systems. Nevertheless, researchers have found that the behavior of 9% to 29% of foster children at some point warrants the involvement of the delinquency system.⁸ Given that California has approximately 60,000 children in its care,⁹ this statistic means that a minimum of 5,400 children who enter foster care because they have been poorly treated at home will eventually have contact with the state's criminal justice system.

The young people who have contact with the criminal justice system while under the care of the child welfare system are the state's "most vulnerable youth"¹⁰ in part because of the likelihood that these children will experience mental health and substance abuse troubles.¹¹ Aside from the fact that young people who have suffered abuse or neglect have a higher chance than well-treated young people of becoming delinquent,¹² an encounter with foster care in itself appears to increase the chance of later delinquency.¹³ Once a child is placed in foster care, her general arrest risk as compared to non-foster children increases by 55%, and her arrest risk for violent crimes increases by 96%.¹⁴ The fate for many foster children displaying difficult behavior is placement in a group home, but group home placements exacerbate the situation - almost two-thirds of children arrested for criminal conduct at their placements live in group homes.¹⁵ Additionally, once a child becomes dependent, group home personnel and even foster parents may be more likely to report typical teenage acting-out [*557] as misconduct warranting the involvement of the criminal justice system.¹⁶ Accordingly, a young person in California under the jurisdiction of the dependency court lives with the strong possibility of losing dependency status in favor

⁷ Denise C. Herz, Joseph P. Ryan & Shay Bilchik, Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism, *48 Fam. Ct. Rev.* 305, 305 (2010) ("A history of maltreatment ... is widely recognized and accepted as a risk factor for delinquency ...").

⁸ *Id.* at 306.

⁹ Caroline Danielson & Helen Lee, Pub. Policy Inst. of Cal., Foster Care in California: Achievements and Challenges 5 (2010) [hereinafter Danielson & Lee].

¹⁰ Nell Bernstein, Cal. State Library, Helping Those Who Need it Most: Meeting the Mental Health Care Needs of Youth in the Foster Care and Juvenile Justice Systems 3 (2005), available at <http://www.library.ca.gov/crb/cafis/reports/05-01/05-01.pdf>.

¹¹ Herz, Ryan, Bilchik supra note 7, at 307-08, 309.

¹² *Id.* at 305; *In re W.B., Jr.*, 281 P.3d 906, 914 (Cal. 2012).

¹³ *In re W.B., Jr.*, 281 P.3d at 914.

¹⁴ Nash & Bilchik, supra note 2, at 17; Shay Bilchik, The Intersection of the Juvenile Justice and Child Welfare Systems 1 (Oct. 23, 2007) (unpublished paper presented at the OJJDP Training Conference, Denver, Colorado), available at <http://cjjr.georgetown.edu/resources.html>. Moreover, the effects spill over into adulthood. See Danielson & Lee, supra note 9, at 3 ("A wealth of evidence indicates that young adults who age out of foster care are at significant risk of poor outcomes in education, employment, health, homelessness, and crime."). One study concluded that for a certain segment of foster care children, "children placed in foster care have arrest, conviction, and imprisonment rates as adults that are three times higher than those of children who remained at home." Joseph J. Doyle, Jr., Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care, 116 J. Pol. Econ. 746, 748 (2008).

¹⁵ Denise C. Herz & Joseph P. Ryan, Judicial Council of Cal., Admin. Office of the Courts, Ctr. for Families, Children & the Courts, Exploring the Characteristics and Outcomes of 241.1 Youth Crossing Over from Dependency to Delinquency in Los Angeles County 5, 11 (2008), available at <http://www.courts.ca.gov/documents/AB129-ExploringResearchUpdate.pdf>.

¹⁶ Morris, supra note 3, at 4; McCulloch, supra note 6, at 133. See also John Petro, Child Welfare League of Am., Increasing Collaboration and Coordination of the Child Welfare and Juvenile Justice Systems to Better Serve Dual Jurisdiction Youth 11 (n.d.), available at <http://www.cwla.org/programs/juvenilejustice/jilitreview.pdf>.

of becoming a delinquency ward.¹⁷ For the young person for whom the state has taken on the parenting role under the dependency system, the blow is especially significant as it results in the loss of another "parent" and the concordant services and relationships the "parent" has provided.¹⁸ Part I of this article explores California's statutory scheme, which leads to this non-ideal treatment of some of the state's most needy dependent children.

In Part II, I posit that the state's faulty treatment of its dependents is due to the lack of attention paid to the child's character, voice, and point of view, all of which are necessary to achieving narrative power in dealings with the legal [*558] system.¹⁹ As Professor Kenneth D. Chestek suggests, a lawyer's neglect of character development in an appellate brief results in vagueness about the litigant's reasons for behaving in a certain way and therefore the lawyer misses the chance to show that those reasons "make sense at a human, emotional level ... [and are] emotionally appealing"; weak characters do not convey to the court that it should "want to assist one or more of the characters because what happened to them is unfair[.]"²⁰ In addition, in an appellate brief, the lawyer's goal is for the court to view the case through the client's eyes, or from her standpoint, so that this standpoint is more attractive than the opponent's.²¹ The lawyer achieves that goal by making the client as "credible and sympathetic" as

¹⁷ Interview with anonymous child advocacy expert (June 7, 2011) (notes on file with author); Herz & Ryan, *supra* note 15, at 6 (finding that in the sample studied almost one-third of dependent children with delinquency cases filed against them ultimately became wards of the juvenile delinquency court).

¹⁸ California promises rights and services to its foster children, including:

- (1) To live in a safe, healthy, and comfortable home where he or she is treated with respect.
- (2) To be free from physical, sexual, emotional, or other abuse, or corporal punishment.
- (3) To receive adequate and healthy food, adequate clothing, and for youth in group homes, an allowance.
- (4) To receive medical, dental, vision, and mental health services.

...

- (6) To contact family members, unless prohibited by court order, and social workers, attorneys, foster youth advocates and supporters, Court Appointed Special Advocates (CASAs), and probation officers.

- (10) To attend religious services and activities of his or her choice.

- (11) To maintain an emancipation bank account and manage personal income, consistent with the child's age and developmental level ...

- (13) To attend school and participate in extracurricular, cultural, and personal enrichment activities, consistent with the child's age and developmental level ...

- (14) To work and develop job skills at an age-appropriate level, consistent with state law.

- (15) To have social contacts with people outside of the foster care system, such as teachers, church members, mentors, and friends.

- (16) To attend Independent Living Program classes and activities if he or she meets age requirements.

[Cal. Welf. & Inst. Code § 16001.9.](#)

Accordingly, the range of possible adults with whom a foster child can potentially bond includes social workers, doctors, educators, spiritual advisors, employers, and community volunteers. Foster children also develop a variety of peer bonds. Disrupting a child's dependency status in favor of delinquency status risks severing these important bonds.

¹⁹ See Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, [14 J. Legal Writing Inst. 127, 142-45 \(2008\)](#).

²⁰ [Id. at 143.](#)

²¹ [Id. at 145.](#)

possible²² (while staying well within the bounds of professional ethics obligations of course). These concepts apply even more compellingly to the child advocacy arena, where, presently, the child's narrative is receiving short shrift. Young children are incapable of speaking for themselves while adolescents may be too rebellious, dependent on those encouraging bad behavior (such as peers or older persons involved in criminal behavior themselves), or embarrassed to defend themselves. Even when a young person has the opportunity to talk at the juvenile court hearings that concern her and is capable of doing so, her contribution ends up lacking significance in the broader context of the hearings about planning her own future.²³ Because storytelling is crucial to achieving persuasion in law,²⁴ the child welfare system's present inability to consider fully and meaningfully its children's stories causes the very system that [*559] is supposed to be caring for California's needy children to fail them.

Part III discusses California state cases dealing with foster children faced with delinquency proceedings in order to show how, in these cases, the courts appear to have neglected the children's narratives at the expense of the children themselves.²⁵

My observation that the current California system does not fully take into account its young people's voices leads to Part IV. I discuss two innovative programs, Restorative Group Conferencing, aimed at dependent children who commit delinquent offenses, and The Benchmark Permanency Hearings, aimed at foster children nearing emancipation age, both of which essentially rely on their participants' candidness in telling their own stories.²⁶ Young dependents of the state are at the heart of each program in that each requires their full input to operate.²⁷ The link between the achievement of these programs' goals and the young people being able to share in a meaningful sense their experiences and viewpoints on those experiences as well as on their futures allows triumph in the dependency world.

Finally, in the Conclusion, I assert that the state should heed the lessons learned from storytelling theory and the two aforementioned successful programs already formally considering dependents' narratives - Restorative Group Conferencing and The Benchmark Permanency Hearings. Both of these programs ensure that the state retains

²² Id.

²³ Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About it*, [6 Nw. J.L. & Soc. Pol'y 318, 319-20 \(2011\)](#) ("This is, in part, because it is hard for anyone other than the involved professionals to follow precisely which issues are being addressed in the hearing. These professionals, who handle case after case with one another in the same courtroom, follow hearing scripts and speak in a short hand that is familiar to them and obscure to everyone else. It is also in part because, in an important sense, most of the decisions have been made before the hearing begins. Some decisions have been worked out between the lawyers and government actors over the phone, in the hallway outside the courtroom, or at meetings. Many have been worked out by repetitive practice. There is a strong sense of 'the way things are done' that drives the planning and decision-making process in both the child welfare and juvenile justice systems. The hearing serves to make those decisions official and to get the court's endorsement, but there is often very little left to be worked out.

If a young person succeeds in following the jargon-ridden presentations of the lawyers and various agents of the state, he sees that his role is that of a polite listener with a chance to say some words, not that of an active and engaged participant, let alone a chief author and executor of the plans for his future. This lack of engagement should be a concern at all hearings, but it is particularly troubling at dispositional hearings and subsequent reviews, where those plans, and the steps required to achieve them, are the primary focus.").

²⁴ J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, [14 J. Legal Writing Inst. 53, 53-54 \(2008\)](#).

²⁵ *D.M. v. Superior Court*, [93 Cal. Rptr. 3d 418 \(Ct. App. 4th 2009\)](#); *In re Henry S.*, [44 Cal. Rptr. 3d 418 \(Ct. App. 5th 2006\)](#); *L.A. Cnty. Dep't of Children & Family Servs. v. Superior Court*, [104 Cal. Rptr. 2d 425 \(Ct. App. 2d 2001\)](#).

²⁶ Am. Humane Ass'n, *Restorative Group Conferencing for Dual-Jurisdiction Youths*, 24 *Protecting Child.*, no. 4, 2009, at 19, available at <http://www.americanhumane.org/assets/pdfs/children/protecting-children-journal/pc-24-4.pdf>; *Benchmark Hearings Keep Older Youth on Track to Adulthood*, Cook County Advoc., no. 4, 2007, at 1, [hereinafter *Benchmark Hearings*], available at http://www.state.il.us/dcf/docs/Cook_07V4_Summer.pdf.

²⁷ Am. Humane Ass'n, *supra* note 26, at 30; *Benchmark Hearings*, *supra* note 26, at 1.

rather than relinquishes its parenting role, requiring its continued involvement when the dependent child shows troubled behavior. If indicators point to a foster child's later delinquency and, therefore, the foster child is, in a sense, expected to become a delinquent youth, California should at the least permit the child to retain her dependency status even if adjudicated delinquent. At best, however, the state should integrate a prophylactic element into the present dependency system to try to prevent that later delinquency. It is the state, acting as the parent, that needs to be accountable for the child's conduct rather than forcing the child to take all the blame as in *In re Donald S.*²⁸ Moreover, a prophylactic approach would serve both the child's and the greater community's interests. The foster child would gain from the opportunity to emerge from her past hardships as a healthy person with plans, [*560] goals, and support who can mature into a productive citizen, and this improvement for the foster child in turn will improve society. By looking to applied legal storytelling as well as programs aimed at dependent children that integrate principles fundamental to storytelling, albeit unwittingly, we can focus child welfare professionals on listening to children's unique narratives; in this way legal storytelling can help those professionals craft a solution to the present foster care-to-delinquency cycle.

This article is no mere attempt to "replow [the] already fertile field" of using "outsider" narratives, or historically powerless people's stories, to try to prompt change in the law in order to better the circumstances of a certain population (here, foster youth) not part of the legal power structure.²⁹ It is, instead, an injunction that the legal system reframe the dependency story by considering the state's familial responsibility to its children as well as incorporate storytelling techniques into its dependency system, both of which would promote more fair and just outcomes for foster children. I cannot possibly tell every foster child's story; rather, I leave it to the state to elicit foster children's stories as part of its parenting role. Perhaps because of its very fertility, the outsider narrative field has plenty of room for the further planting of seeds.³⁰ In this article, my intent is to plant seeds and hope that they germinate and bloom.

II. CALIFORNIA'S FOSTER, DUAL JURISDICTION, AND DUAL STATUS CHILDREN MERIT MORE PROTECTION

The State of California can often behave as a neglectful, harsh, and unforgiving parent to children who have been abandoned and abused. California's disjointed system forces viewing the child either as dependent and deserving of protection and care, or delinquent and losing the right to that care.³¹ We would certainly condemn any parents who desert a child for breaking the law, yet that is precisely what California does to many of its children.

In order to protect children from neglect or abuse at home, California officially cares for approximately 60,000 foster children at present.³² "The foster care caseload ... encompasses the most severe and difficult cases of [*561] maltreatment and neglect," which warrant the state's removal of the children from their homes and their adjudication as dependent children of the court under section 300 of the California Welfare and Institutions Code.³³ When the

²⁸ McCulloch, *supra* note 6, at 123 ("The court deftly discharged the dependency providers from any responsibility and laid causation solely at the feet of Donald S."). See also *In re Donald S.*, 253 Cal. Rptr. 274 (Ct. App. 1989).

²⁹ See Chestek, *supra* note 19, at 137 (citing Mark A. Fajer, Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship, 82 *Geo. L.J.* 1845, 1862-64 (1994)).

³⁰ See Brian J. Foley, Applied Legal Storytelling, Politics, and Factual Realism, 14 *J. Legal Writing Inst.* 17, 21-23 (2008).

³¹ See *In re W.B., Jr.*, 281 P.3d at 914 (citing Cal. Welf. & Inst. § 202 (a), (b)) ("Whereas the dependency system is geared toward protection of a child victimized by parental abuse or neglect, the delinquency system enforces accountability for the child's own wrongdoing, both to rehabilitate the child and to protect the public.").

³² Danielson & Lee, *supra* note 9, at 5. See also *In re W.B., Jr.*, 281 P.3d 906, 913 n.4 (Cal. 2012) (citing to the same source).

³³ Danielson & Lee, *supra* note 9, at 3, 4 (noting that half the children removed from their families under section 300 are removed for general neglect). Examples of the maltreatment that these children have experienced include severe parental

state takes this dramatic step and reunifying the family is not possible, its intent is to "provide stable and beneficial home environments" ³⁴ for its dependents. In doing so, California promises various rights and services to each dependent, including the right to "live in a safe, healthy, and comfortable home where he or she is treated with respect," the right to "adequate and healthy food" and "adequate clothing," and the right to "medical, dental, vision, and mental health services." ³⁵ Perhaps most crucially, in promising its children "care" "as nearly as possible equivalent to that which should have been given by his or her parents," ³⁶ California assures its dependents that it will go beyond providing for their basic physical needs and attend to the well-being of the whole child.

Yet California falls short of fully achieving its goal of parenting its most desperate dependents. Children lingering as the state's dependents for greater time periods ³⁷ suffer instable home arrangements; most switch placements at least once and more troubled young people switch placements on average between three and four times. ³⁸ Moving from placement to placement can affect the child's schooling, and, in combination with past mistreatment, may explain, at least in part, these young people's academic difficulties, which include truancy, suspensions, learning disabilities, and poor grades. ³⁹ Moreover, healthy children, defined using a negative as "children without serious disabilities or special needs" (emphasis added) are likely to find homes with foster families. ⁴⁰ The neediest children, on the other hand, who may be contending with "serious special needs" such as mental health and/or substance abuse issues and whose conduct poses a challenge for caregivers, are more likely to have the more institutional group home placement. ⁴¹ Group homes aggravate children's [*562] emotional and behavioral issues, perhaps because staff relationships are not qualitatively the same as family relationships. The result is a dearth of strong guidance and support, leaving these children especially susceptible to peer pressure to engage in bad behaviors like joining gangs and selling drugs. ⁴² Group homes also may be ill-equipped to properly nurture their young residents and meet their often serious individual needs because they house so many young people with grave behavior issues. Combining these behavioral tendencies in close quarters can itself aggravate those tendencies. ⁴³ One teen group home resident explained his feelings:

neglect risking a child's well-being, emotional abuse, sexual abuse, physical abuse, abandonment, and parental cruelty. [Cal. Welf. & Inst. Code § 300](#) (West 2007).

³⁴ Danielson & Lee, *supra* note 9, at 1.

³⁵ Welf. & Inst. § 16001.9(a)(1), (3), (4).

³⁶ Welf. & Inst. § 202(a).

³⁷ About one in five of all children currently in foster care started his or her current stay at least five years ago." Danielson & Lee, *supra* note 9, at 6.

³⁸ *Id.*; Herz & Ryan, *supra* note 15, at 5; Herz, Ryan & Bilchik, *supra* note 7, at 309. See also Bass, Shields & Behrman, *supra* note 4, at 7 (stating that "the longer a child remains in care, the greater the likelihood that he or she will experience multiple placements" and that "placement instability increases with each year a child spends in the system").

³⁹ Herz & Ryan, *supra* note 15, at 5; Herz Ryan & Bilchik, *supra* note 7, at 308; McCulloch, *supra* note 6, at 137.

⁴⁰ See Danielson & Lee, *supra* note 9, at 6.

⁴¹ See *id.*; Herz & Ryan, *supra* note 15, at 6.

⁴² To illustrate the lack of "connectedness" between foster children without stable home placements and their caregivers, Morris quotes one foster child's observation about misbehaving: "You figure you got nothing to lose because you're not with your family." Morris, *supra* note 3, at 4. Because adolescents desire a stable family unit as much as younger children, they may feel that by sending them to a group home the State is meting out undeserved punishment. Bass, Shields & Behrman, *supra* note 4, at 12.

⁴³ Nash & Bilchik, *supra* note 2, at 19 (explaining that "problem behaviors are exacerbated when youths are placed with other behaviorally challenged young people.").

A lot of kids from group homes get into trouble because there's no guidance there. They don't ask you how you did in school today, if you did your homework. The staff is abusive; they talk down to you. A group home ain't nothing but a place to sleep. It shouldn't be called a group home it should be called a group house.⁴⁴

Those foster children whose behavior eventually results in authorities filing a delinquency petition against them fall under the jurisdiction of both the dependency and the delinquency systems.⁴⁵ If the dependent child is deemed to have acted out in violation of section 601 of the California Welfare and Institutions Code, governing habitual disobedience and truancy,⁴⁶ or section 602, addressing minors' commission of crimes,⁴⁷ then the county probation department, along with the child welfare department, recommends to the juvenile court whether the child should continue as a dependent or lose her dependency status in favor of becoming a delinquent ward of the state.⁴⁸ Ultimately, the juvenile court makes the final decision on the minor's status, and as of the writing of this article, the court may not "make a minor simultaneously both a dependent child and a ward of the court."⁴⁹

The state's legal prohibition against a minor's maintaining her dependency [*563] once she is adjudged delinquent results in more than a simple status change for the foster child. Rather, the young person in this situation loses the range of support that the state, up until this point, has been providing her in its role as parent. This young person is likely to be a troubled adolescent only about fifteen years old, a person of color, and poor; it is also quite possible that the young person is a girl whose vulnerability as a foster child has led her to be a sex trafficking victim.⁵⁰ Although imperfect, the dependency system is committed to ensuring the health and welfare of the children it has separated from their families. This commitment is the foundation for providing these children with a home, schooling, a social worker, an attorney, a judge and other mental, physical, social, legal, and spiritual support services.⁵¹ The interruption of the child's services and relationships, even when the probation department is required to duplicate those services,⁵² that goes hand-in-hand with the status change from dependency to delinquency is likely to be damaging, particularly given that adolescents are at a developmentally sensitive stage

⁴⁴ Morris, *supra* note 3, at 4.

⁴⁵ Am. Humane Ass'n, *supra* note 26, at 19.

⁴⁶ [Cal. Welf. & Inst. Code § 601](#) (West 2007).

⁴⁷ See *id.* § 602.

⁴⁸ See *id.* § 241.1(a)-(c).

⁴⁹ *Id.* § 241.1(c)-(d). See also [In re W.B., Jr., 281 P.3d 906, 914 \(Cal. 2012\)](#) ("In general, ... California law prohibits a minor from simultaneously being declared a dependent child and a dependent ward.")

⁵⁰ See Herz & Ryan, *supra* note 15, at 4-5; Ann Reyes Robbins, *Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children*, [41 U. Mich. J.L. Reform 243, 247-48 \(2007\)](#); Human Rights Project for Girls, *Foster Care, Juvenile Justice, and Domestic Minor Sex Trafficking 1* (n.d.), http://www.rights4girls.org/uploads/3/0/4/6/3046751/dualcrossover_dmst_fact_sheet.pdf; E-mail from anonymous child welfare professional to Lisa Beth Greenfield Pearl, Professor of Legal Writing, Univ. of San Diego School of Law (June 13, 2011, 04:44 PST) (on file with author).

⁵¹ [Cal. Welf. & Inst. Code § 16001.9](#).

⁵² Even when child welfare and juvenile justice professionals have the best of intentions, a good deal of confusion exists regarding the specific responsibilities of each of the systems when a youth is dually involved Probation officers and caseworkers, for example, frequently are uncertain of their roles and how to interact with the "other" system, which results in gaps in service." Morris, *supra* note 3, at 8. See also Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice - Two Sides of the Same Coin*, Part II, *Juv. & Fam. Just. Today*, Winter 2009, at 24 available at http://nc.casaforchildren.org/files/public/community/judges/March_2010/NashCrossover2.pdf (noting that in Los Angeles County prior to the dual status pilot project, social workers, attorneys, and judges assigned to foster children ceased their relationships once the children became delinquent wards).

when they are learning how to become self-sufficient and self-aware adults.⁵³ Moreover, whether the probation department is as capable as the child welfare department of providing qualitatively equivalent services is questionable due to the probation department's overarching concern with having the child take responsibility for her past wrongdoings as opposed to caring for the whole child.⁵⁴

Despite California's official prohibition of simultaneous jurisdiction by the dependency and delinquency departments, Assembly Bill 129, passed in 2005, [*564] gives counties the ability to "opt-out"⁵⁵ of the either dependency or delinquency system by developing written protocols allowing children to have "dual status," meaning that they will maintain their designation as dependents even as they become delinquent wards of the court.⁵⁶ Dual status, therefore, allows a child to keep her dependency status while, at the same time, taking responsibility for her transgressions as a delinquent.⁵⁷ At present, only nine of California's fifty-eight counties have opted out of the original legislative scheme that prohibits dual status.⁵⁸

⁵³ See Buss, *supra* note 23, at 322-23 (noting that people learn to make good decisions and form their own identities during adolescence).

⁵⁴ See Nash & Bilchik, *supra* note 52, at 24 ("The probation department has traditionally been more focused on accountability rather than the kinds of holistic services normally provided or set up by social workers.").

⁵⁵ This apt description of the law is attributable to one child welfare professional. E-mail from anonymous child welfare professional to Lisa Beth Greenfield Pearl, Professor of Legal Writing, Univ. of San Diego School of Law (June 13, 2011, 04:44 PST) (on file with author).

⁵⁶ Assemb. B. No. 129, 2003-2004 Leg., Reg. Sess. § 1 (Cal. 2004) (amending [Cal. Welf. & Inst. Code § 241.1](#)).

The probation department and the child welfare services department, in consultation with the presiding judge of the juvenile court, in any county may create a jointly written protocol to allow the county probation department and the child welfare services department to jointly assess and produce a recommendation that the child be designated as a dual status child, allowing the child to be simultaneously a dependent child and a ward of the court No juvenile court may order that a child is simultaneously a dependent child and a ward of the court pursuant to this subdivision unless and until the required protocol has been created and entered into.

Welf. & Inst. § 241.1(e).

⁵⁷ Designating a child as a "dual status child" "allows the child to be simultaneously a dependent child and a ward of the court." Welf. & Inst. § 241.1(e). But see *id.* § 241.1(e)(5)(A) (specifying that under the "on-hold system," which is one option for counties developing a dual status protocol, "the dependency jurisdiction shall be suspended or put on hold while the child is subject to jurisdiction as a ward of the court").

⁵⁸ See [In re W.B., Jr., 281 P.3d 906, 915 \(Cal. 2012\)](#); Assembly Bill 129: Dual Status Children, Cal. Courts, <http://www.courts.ca.gov/7989.htm> (last visited May 14, 2012); Placer Cnty, MOU for Dual Jurisdiction (2005), available at <http://www.courts.ca.gov/documents/AB129-Placer.pdf>; Stanislaus Cnty, Stanislaus County Agreement and Protocol Welfare and Institutions Code Section 241.1 Reports for Juvenile Court (2005), available at <http://www.courts.ca.gov/documents/AB129-Stanislaus.pdf>; Modoc Cnty, Dual Status Children WIC 241.1-AB 129 Protocol (2008), available at <http://www.courts.ca.gov/documents/ModocDualStatusProtocol.pdf>; San Joaquin Cnty, San Joaquin County Memorandum of Understanding and Protocol for Welfare and Institutions Code Section 241.1 Reports and Dual Status Protocol for Juvenile Court (2005), available at <http://www.courts.ca.gov/documents/AB129-SanJoaquin.pdf>; Cnty Probation Dep't & Cnty Dep't of Health and Human Services, Colusa Cnty, Colusa County Protocol for Welfare & Institutions Code Section 241.1 Proceedings (2006), available at <http://www.courts.ca.gov/documents/AB129-Colusa.pdf>; Inyo Cnty, Inyo County Protocol for Welfare and Institutions Code Section 241.1 Reports to Juvenile Court (2005), available at <http://www.courts.ca.gov/documents/AB129-Inyo.pdf>; Probation Dep't & Health and Human Services Dep't, Cnty of Sonoma, Dual Status Protocol (2006), available at <http://www.courts.ca.gov/documents/AB129-Sonoma.pdf>; Siskiyou Cnty, Siskiyou County Protocol Under Welfare and Institutions Code section 241.1 and California Rule of Court 5.512 (2008), available at <http://www.courts.ca.gov/documents/AB129-Siskiyou.pdf>; Riverside Cnty, W&I 241.1/AB 129 Protocol (2005), available at <http://www.courts.ca.gov/documents/AB129-Riverside.pdf>. See also Memorandum from Michael Nash, Presiding Judge Juvenile Court, to All Participants in the Los Angeles Juvenile Court System (May 24, 2007), available at <http://www.cwla.org/programs/juvenilejustice/jlaab241protocolpilot.pdf> (discussing Los Angeles County's WIC 241.1 Dual Status Protocol Pilot Project); San Diego Cnty, Protocol for coordination by County of San Diego's Probation Department and Health

[*565] The statutory allowance for dual status protocols, while apparently more sympathetic to the plight of the foster child coming into contact with the criminal justice system, fails to secure the welfare of that child because it does not go far enough. The main problem is that the law does not require counties to develop dual status protocols; therefore, whether or not they do so is voluntary, resulting in the small number of counties (nine of fifty-eight) that have thus far done so. Other weaknesses in the law's dual status opt-out provision go beyond the sheer problem of numbers. For instance, when a county promulgates a dual status protocol, it chooses between an "on-hold" or "lead court/lead agency" system to prevent "any simultaneous or duplicative case management or services provided by both the county probation department and the child welfare services department."⁵⁹ In an on-hold arrangement, "the dependency jurisdiction shall be suspended or put on hold while the child is subject to jurisdiction as a ward of the court."⁶⁰ It is only when the delinquency court's jurisdiction over the child is coming to an end that child welfare services re-enters the scene to determine, alongside the probation department, whether as opposed to when the child's dependent status should resume.⁶¹ "There is no statutory provision or procedure for reactivating the minor's dependency status once his delinquency status is terminated."⁶² In a lead court/lead agency arrangement, the lead court/lead agency is not statutorily designated and it is, therefore, up to the child welfare and probation departments to decide whether the lead court/lead agency is the dependency/child welfare services department or delinquency/probation department.⁶³ That department then takes charge of the child's case: it is [*566] "responsible for case management, conducting statutorily mandated court hearings, and submitting court reports."⁶⁴ Accordingly, under either an on-hold or lead court/lead agency model, the dependency system may fade into the background for the dual status child, possibly leaving the child in no better position than she would have been in without the dual status protocol.⁶⁵ Even when a county has a dual status protocol, therefore, the dependency system, with its goal of caring for a child who has been the victim of other people's misconduct, may still play second fiddle to the delinquency system, with its differing and perhaps conflicting goals of having a child take responsibility for her actions and rehabilitating a child from her own tendency to misbehave.⁶⁶

and Human Services Agency/Child Welfare Services in Dual Jurisdiction/Status Matters Before the Juvenile Court 11-18 (2010) (on file with author) (discussing San Diego County's Dual Status Pilot Project).

⁵⁹ [Cal. Welf. & Inst. Code § 241.1\(e\)\(5\)](#).

⁶⁰ *Id.* § 241.1(e)(5)(A). See also [In re W.B., Jr., 281 P.3d at 915](#) (noting that with "an 'on-hold' system, ... dependency jurisdiction is suspended while the child is a ward of the delinquency court").

⁶¹ § 241.1(e)(5)(A). The statutory language states the following: "When it appears that termination of the court's jurisdiction, as established pursuant to Section 601 or 602, is likely and that reunification of the child with his or her parent or guardian would be detrimental to the child, the county probation department and the child welfare services department shall jointly assess and produce a recommendation for the court regarding whether the court's dependency jurisdiction shall be resumed." *Id.* Interestingly, the statute appears to require the child welfare services department's participation only after an earlier determination that "reunification of the child with his or her parent or guardian would be detrimental to the child" thereby removing child welfare services from that initial determination - one that seems to be at the heart of its function.

⁶² McCulloch, *supra* note 6, at 138.

⁶³ *Id.* See also [In re W.B., Jr., 281 P.3d at 915](#) (noting that in "a 'lead court/lead agency' system ... the probation department and social services department decide which agency will take the lead in all case-management and court-related matters").

⁶⁴ § 241.1(e)(5)(B).

⁶⁵ Under a lead court/lead agency system, no matter whether probation or child welfare is designated as such, both agencies may serve dual status children so long as they do not duplicate services; nevertheless, the continued involvement of both agencies is permitted and not required. See Mary L. Ault, state of Cal. Dep't of Soc. Servs., Children & Family Servs. Div., All County Information Notice No. I-05-06: Implementation of Assembly Bill (AB) 129, Dual Status Children 3-4 (2006), <http://www.courts.ca.gov/documents/AB129-DSSACL-I-0506.pdf>.

⁶⁶ See [In re W.B., Jr., 281 P.3d at 914](#) (citing Cal. Welf. & Inst. § 202 (a), (b)) ("Whereas the dependency system is geared toward protection of a child victimized by parental abuse or neglect, the delinquency system enforces accountability for the child's own wrongdoing, both to rehabilitate the child and to protect the public."). One concrete reason why the child may suffer

Another problem with the current law is that the statutory permissiveness has resulted in significant disparities among counties' dual status protocols. For example, county protocols vary on whether a single attorney and/or single judge are to be assigned to a child involved in dependency and delinquency cases. Three counties strive for a single attorney to represent the child in the dependency and delinquency proceedings; one county mandates a single attorney unless the court finds that it would be inappropriate or not in the best interests of the minor.⁶⁷ Five counties are silent on the matter, though one of these counties details the legal responsibilities of attorneys representing dual status youth.⁶⁸ As for whether a single judge handles a child's dependency and delinquency cases, [*567] only four counties strive for a single judge, and two of those counties require a single jurist in "the event of co-occurring jurisdiction."⁶⁹ Five counties' protocols lack a one judge mandate.⁷⁰ There are no teeth in a dual status law that does not recognize the value of requiring, at the least, a one judge system supported by attorneys well-versed in both dual status and the particular children they represent.⁷¹ Ideal supervision and representation of a dual status child can only occur in a single judge/single attorney system.

The state faces many challenges arising from the needs of its foster children with a tendency toward misconduct severe enough to place them within the purview of the delinquency system. Neither California's dependency nor delinquency approach is capable of fully responding to those needs, and while the dual status opt-out in its present incarnation is a step in the right direction, it, too, is lacking.⁷² The goals of the dependency and delinquency systems are distinct: the child welfare system wants to protect the child as victim by providing a safe and nurturing home for the child, while the juvenile delinquency system wants to punish and rehabilitate the youth as offender by legally forcing the youth to accept responsibility for her transgressions.⁷³ The institutional separateness of the

from the dependency system taking a backseat to probation has to do with dollars: child welfare services receives state funding and therefore may be more financially able to serve its youth than California's probation departments, which are county funded. [Cal. Welf. & Inst. Code § 10102](#) (West 2007). See also McCulloch, *supra* note 6, at 140-42 (questioning on this ground whether services that a child receives as a dependent on the one hand and delinquent on the other hand are indeed comparable); Nash & Bilchik, *supra* note 2, at 19 ("Depending on which agency is assigned primary responsibility, a crossover youth may lose access to essential services due to the strict eligibility requirements of many funding streams.").

⁶⁷ [Modoc Cnty., supra](#) note 58 (single attorney aspiration); [Placer Cnty., supra](#) note 58 (single attorney aspiration); [San Joaquin Cnty., supra](#) note 58 (single attorney unless inappropriate or not in best interests of minor); [Stanislaus Cnty., supra](#) note 58 (single attorney aspiration).

⁶⁸ [Cnty. Probation Dep't & Cnty. Dep't of Health and Human Services, Colusa Cnty., supra](#) note 58; [Inyo Cnty., supra](#) note 58; [Probation Dep't & Health and Human Services Dep't, Cnty. of Sonoma, supra](#) note 58; [Riverside Cnty., supra](#) note 58 (detailing legal responsibilities of attorneys representing dual status youth); [Siskiyou Cnty., supra](#) note 58.

⁶⁹ [Inyo Cnty., supra](#) note 58 (single judge aspiration); [Modoc Cnty., supra](#) note 58 (single judge if co-occurring jurisdiction); [Placer Cnty., supra](#) note 58 (single judge if co-occurring jurisdiction); [San Joaquin Cnty., supra](#) note 58 (single judge aspiration).

⁷⁰ [Cnty. Probation Dep't & Cnty. Dep't of Health and Human Services, Colusa Cnty., supra](#) note 58; [Probation Dep't & Health and Human Services Dep't, Cnty. of Sonoma, supra](#) note 58; [Riverside Cnty., supra](#) note 58; [Siskiyou Cnty., supra](#) note 58; [Stanislaus Cnty., supra](#) note 58.

⁷¹ See Denise Herz, Miriam Krinsky, David Estep & Rebecca Dunlap, Children's Law Ctr. of L.A., Review of Dual Adjudication Approaches in Other Jurisdictions around the Country, 3 (2007), available at <https://www.cwla.org/programs/juvenilejustice/jjlareview.pdf> ("This one judge/one docket system is invaluable. It makes sense for all parties to be in the courtroom at the same time with one court order."); Nash & Bilchik, *supra* note 52, at 23 ("In the area of case assignment, it is important that the court, attorneys, and others who work in the courts and on cases involving crossover youths have knowledge and understanding of the youth, including family history and prior court history, as well as the dynamics of both child welfare and juvenile justice.").

⁷² For further criticism of Section 241.1(e) of the California Welfare and Institutions Code, see McCulloch, *supra* note 6, at 132-43.

⁷³ See [In re W.B., Jr., 281 P.3d at 914](#); Interview with anonymous child advocacy expert (June 7, 2011) (notes on file with author).

dependency and delinquency systems detracts from the state's ability to provide, and the troubled and vulnerable foster child's ability to receive, services to either prevent or best deal with delinquent conduct. Adjusting its treatment of foster children at risk of delinquency by avoiding abandoning them will allow the state to better serve its children's vast needs. Foster young people and their greater communities will benefit.

[*568]

III. GREATER FOCUS ON THE CHILD FINDS FIRM GROUND IN STORYTELLING AS A PERSUASIVE CONTEXT

A. Narrative Theory as a Framework

Only the lawyer who can effectively tell her client's story can commendably represent that client.⁷⁴ "The most powerful tool for persuasion may be the story."⁷⁵ One reason that storytelling in law has gained so much recent attention is that human beings may actually process information in terms of stories and, therefore, narratives are basic to human thinking.⁷⁶ This point should resonate with the legal writer who is accustomed to making points about her client's case using the techniques of analogy and counter-analogy, whereby the writer essentially contends that a past story (found in a prior case) is predictive of a certain conclusion for her client's present story (or case).⁷⁷ Of course, unless the situation in the precedent case is precisely identical to that of the instant case, the lawyer is in the position of explaining via storytelling how the cases are either the same or different: "Making an analogy is not so much a matter of discovering existing similarities, but rather an active process of reasoning dynamically, to forge an entire network of connections between two cases. In other words, making an analogy is like creating a story."⁷⁸ The necessity of the analogical process in convincing an audience - in this case the judge deciding the case - to see situations as favoring the client is one way that "narrative plays a fundamental role in legal reasoning."⁷⁹

For the purposes of this article, the traditional elements of story apply: character, voice, point of view, setting, theme, conflict, and plot.⁸⁰ The elements of setting, theme, conflict, and plot are bracketed, allowing this article to focus on character, voice, and point of view. I see those elements as both particularly ignored in the foster child context and as having the most significance in terms of helping the present child welfare system evolve.⁸¹ Of

⁷⁴ See Rideout, *supra* note 24, at 53 ("Storytelling lies at the heart of what lawyers do."); *id.* at 54 n.10 (listing scholarship that focuses on the use of story-telling in the law).

⁷⁵ Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer For Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections, [32 Rutgers L.J. 459, 465 \(2001\)](#).

⁷⁶ Lorie M. Graham & Stephen M. McJohn, Cognition, Law, Stories, [10 Minn. J. L. Sci. & Tech. 255, 258, 280-83 \(2009\)](#). See also Rideout, *supra* note 24, at 57-59 (engaging in an in-depth review of recent scholarship exploring the connection between narrative and human cognition).

⁷⁷ Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 62-63 (5th ed. 2008); Graham & McJohn, *supra* note 76, at 287-88.

⁷⁸ Graham & McJohn, *supra* note 76, at 288.

⁷⁹ *Id.* at 258.

⁸⁰ Chestek, *supra* note 19, at 139-50.

⁸¹ The decision to focus on specific story essentials jibes with Foley and Robbins' view that of all the story components, "the most important elements for lawyers [are]: character, conflict, resolution, organization and point-of-view." Foley & Robbins, *supra* note 75, at 466. In this formulation, Foley and Robbins equate organization to plot and, unlike Chestek, see resolution as a separate story element rather than part and parcel of the plot element. *Id.* See also Chestek, *supra* note 19, at 147 (noting "resolution/falling action" as a plot element). For another child welfare advocate who agrees with me on the value of encouraging child advocates to concentrate on children's narratives and in particular on children's voices and viewpoints, see Foley, *supra*

course, this piece does [*569] not propose to abandon the fundamentals of how we practice law. It is a given that lawyers advocating for children should continue to write and argue using critical legal reasoning based on precedent.⁸² It is also a given that judges should issue decisions based on an application of precedent to the cases before them. Instead, I propose layering onto those lawyering tenets other considerations that happen to be narrative based, namely those of the child's own character, voice, and point of view. This approach will help to achieve better representation of, and caring for, the child whom the state has separated from her family and taken on the responsibility of protecting.

In the literary sense, the concept of character can be the source of a story. After an author has created a character, the author can rely on the character to "generate story."⁸³ The foundational role that character plays in a story arises because character refers to the range of a single individual's qualities (or characteristics) - from virtuous to wicked - that define that individual at her core.⁸⁴ Understanding a person's character therefore supplies information about how she will act and react in certain situations.⁸⁵ Effective client representation depends on the lawyer's ability to integrate into that representation the client's entire identity⁸⁶ because "character, not action, is what interests readers most. It is character that makes action meaningful. Story is struggle. How a character struggles reveals who he is."⁸⁷ The literary concept of character allows an individual to embody seemingly contradictory qualities.⁸⁸ Any person in a moment of perfect candidness would admit to having experienced feelings that did not seem to fit her personality because human beings are multi-dimensional [*570] from a psychological standpoint: "We do not live in a single narrative mental space, but rather dynamically and variably distributed over very many."⁸⁹ Viewpoint (in this case, mental viewpoint)⁹⁰ embodies the character's "mental position" about the character's situation.⁹¹ It stems from a character's unique position in life and works hand-in-hand with character to give worth to our own lives outside of stories.⁹² Once again, due both to the human condition and the human's need to use language to express herself, that position is not static. Professor and Law & Literature movement founder James Boyd White, therefore, talks about writing to an audience "in a world ... in which we are always making and remaking our own characters and our communities."⁹³ White's elegant comments are relevant:

note 30, at 22 (citing Lisa Kelly, *Telling Children's Stories*, Presentation at the first Applied Legal Storytelling Conference, *Once Upon a Legal Time: Developing the Skill of Storytelling in the Law* (July 19, 2007)).

⁸² This point is meant to respond to the concerns voiced in Jean M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn From the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, [16 J. Legal Writing Inst. 163 \(2010\)](#). See *id.* at 165 ("We should not discount the other powerful tools at our disposal - precedent, reason, and analysis - while working too hard to shape our legal writing into stories.").

⁸³ Mark Turner, *The Literary Mind* 134 (1996).

⁸⁴ *Id.* at 133-36. See also Chestek, *supra* note 19, at 142; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, [29 Seattle U. L. Rev. 767, 776 \(2006\)](#).

⁸⁵ See Turner, *supra* note 83, at 134-36.

⁸⁶ Foley & Robbins, *supra* note 75, at 470-71.

⁸⁷ *Id.* at 470 (quoting James N. Frey, *How to Write a Damn Good Novel* xiii (1987)).

⁸⁸ See Turner, *supra* note 83, at 135-36 (exploring this idea through the concept of "blended spaces").

⁸⁹ *Id.* at 136.

⁹⁰ Mental, spacial, and temporal viewpoints are considered in Turner, *supra* note 83, at 116-132.

⁹¹ *Id.* at 127.

⁹² *Id.* at 126, 134 (explaining that character and viewpoint in stories help us "understand[] who we are, what it means to be us, to have a particular life").

⁹³ James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 128 (1985).

Many-voicedness; the integration of thought and feeling; the acknowledgement of the limits of one's own mind and language (and an openness to change them); the insistence upon the reality of the experience of other people, and upon the importance of their stories, told in their words - these values ... are all in fact essential to our own best ideas of justice.⁹⁴

Accordingly, if we are to achieve justice for the neediest in our population, it is crucial that we hear their stories, even if those stories give us discomfort. If the foster child is to receive the justice that her state cum parent has promised her, then that parent-state must be open to hearing the child's narrative, and it must be open to hearing it as she voices it from her viewpoint. In other words, what does she understand and think about her circumstances?⁹⁵ What is her mental perspective on her past experiences and future expectations for herself, the system, and others around her?⁹⁶ Not only must that parent-state desire to hear the narrative, but, equally important and perhaps more difficult to achieve, it must require a formal means both to listen to and take into account that narrative.⁹⁷

[*571]

B. Applied Legal Storytelling Theory as a Framework

Professor J. Christopher Rideout's discussion of the connection between narrative and legal persuasion⁹⁸ helps demonstrate that the foster child context is ripe for applied legal storytelling theory. According to Rideout, for a story to persuade, it must satisfy three requirements: "narrative coherence," "narrative correspondence," and "narrative fidelity."⁹⁹ To begin with, all lawyers want to engender enough trust from the adjudicator, whether judge or jury, to encourage the adjudicator to look to them and not to their opposing counsel for the correct version of the events. "The story that is presented most coherently will also be the story that seems most probable."¹⁰⁰ Just like all advocates, children's advocates should be operating under the requirement that the stories of the children they represent embody "narrative coherence,"¹⁰¹ or in other words, that the stories have both "internal consistency, [meaning] how well the parts of the story fit together, and completeness, [meaning] how adequate the sum total of the parts of the story seems."¹⁰² In order to achieve "internal consistency," the child's lawyer must ensure that the story maintains its likelihood when broken down into its components as well as when connected to the larger evidentiary context.¹⁰³ Additionally, because of the adjudicator's own familiarity with and expectations for narratives, "completeness," too, is necessary to achieve an adjudicator's favor.¹⁰⁴ Under this principle, the child's advocate is to ensure that she considers all relevant and necessary legal issues, facts, arguments, and counter-arguments.¹⁰⁵ Not only does this principle lead us back to the fundamentals of good lawyering, requiring solid

⁹⁴ Id. at 132.

⁹⁵ See Chestek, *supra* note 19, at 145 ("The limited perspective of telling the story from the client's point of view is essential.").

⁹⁶ See Turner, *supra* note 83, at 126-32 (illuminating the role of "mental viewpoint" in storytelling).

⁹⁷ Part IV, below, discusses alternative, successful youth programs implemented in other jurisdictions that embody the values emphasized in this article and are therefore at the heart of what is driving the author.

⁹⁸ Rideout, *supra* note 24, at 56.

⁹⁹ Id. at 63-78.

¹⁰⁰ Id. at 64.

¹⁰¹ Id. (quoting Walter R. Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* 47 (1989)).

¹⁰² Id.

¹⁰³ Id. at 65.

¹⁰⁴ Id.

¹⁰⁵ Id. (quoting Fisher, *supra* note 101, at 47).

legal and factual investigation, but it also results in encouraging the child's advocate to present, and juvenile court judge to hear, a child's entire story. Thus, an advocate telling an unclear, unlikely, and incomplete story risks confusing the court or, more detrimentally, leading the court to unfavorable inferences. Relating a believable, thorough story, on the other hand, can allow a judge to make inferences favorable to the child, resulting in child-friendly outcomes. ¹⁰⁶

The second requirement Rideout discusses, "narrative correspondence," is a "reality check on the story" in that it requires the story to "correspond to what [*572] 'could' happen, or what 'typically' happens, not to what actually happened." ¹⁰⁷ Whether or not a story seems realistic to a judge depends on whether the story correlates with one of the "stock stories" familiar to the judge because they "draw upon cultural archetypes." ¹⁰⁸ It is the work of the lawyer to determine which stock story will best resemble and serve the client. ¹⁰⁹ In this sense, Rideout's "narrative correspondence" closely relates to Professor Ruth Anne Robbins's advice that the lawyer develop a hero archetype for her client. ¹¹⁰ Presently, per the comments of the legal professionals noted above, one stock story applied to foster children is that they are one small step away from becoming delinquent youth and, therefore, the functional equivalent of young criminals. ¹¹¹ Obviously, this stock story needs to fade into the background before fresh, positive stories can come to light.

One way to bring to the forefront other stock stories better serving our foster youth is to view the foster child as the "hero" in her own story consistent with Robbins's advice. Because audiences expect heroes to have strengths and weaknesses and to undergo challenges, portraying the foster child as the hero provides the child's advocate with a framework in which to fully present to the adjudicator the details, both positive and negative, of the child's history. ¹¹²

Given that "[a] hero is imperfect by definition, ... casting the client as the main character and hero of the lawsuit story gives the client permission to be imperfect." ¹¹³ Robbins's explanation of heroes as "starting out as somehow flawed at a fundamental level that affects their daily life and/or prevents them from living up to their potential" ¹¹⁴ is helpful to child advocates and judges because assigning the child the hero role gives the judge, advocate, and child the ideal frame for the child's whole being. A hero is permitted to "grow[] and change[]" through the course of the journey ... searching for identity and wholeness." ¹¹⁵ For child advocates and foster children, this permission would be welcome. Moreover, "emotions and motivators at both ends of the spectrum are available to the hero; everything from love and joy to anger and a thirst for revenge to the middle emotions of loneliness, despair and the feelings of oppression." ¹¹⁶ Such a range of "emotions and motivators" are likely familiar to the foster child. For instance, the child may be enraged at her parents for their [*573] destructive behavior, yet she may also feel strongly attached to them and yearn for them; she may resent her present caretakers, yet appreciate that her needs are provided for; and she may have a deep desire to form attachments to social workers, teachers, clergy, and peers, yet fear

¹⁰⁶ See *id.* at 64-66.

¹⁰⁷ *Id.* at 67.

¹⁰⁸ *Id.* at 67-68.

¹⁰⁹ *Id.* at 69.

¹¹⁰ Robbins, *supra* note 84, at 768-69, 775.

¹¹¹ See *supra* pp. 1-2.

¹¹² See Rideout, *supra* note 24, at 68 (recognizing that stock stories involve "the idea of plight, or threat, or disruption"); Robbins, *supra* note 84, at 775-79.

¹¹³ Robbins, *supra* note 84, at 776.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

abandonment by new found mentors and friends. Encouraging child advocates and the judge to focus on the child's reasons for behaving in the way she did/does allows those legal professionals close to the child to feel sympathetic or, at least, empathetic toward the child. ¹¹⁷ Viewing the foster child as the hero character with a unique viewpoint meriting voicing enables an advocate to paint, unapologetically, a complete picture of that child, flaws and all, thereby allowing for the best possible representation of and outcome for the child. ¹¹⁸ Fully understanding the child's identity permits empathizing with the child's situation and imperfections as well as crafting a plan fit for that particular child instead of an idealized child. Robbins's further exploration of various hero archetypes available to lawyers even identifies one exceedingly applicable in this context: the "Every person/Orphan" who seeks her role in life. ¹¹⁹

Perhaps equally as helpful is Robbins's suggestion that we view "the judge ... as the hero's mentor" who bestows on the hero "through wise decision-making ... the mentoring lessons needed to allow the hero to move forward." ¹²⁰ Robbins discusses the judge's role in the context of decision-making in a criminal case; ¹²¹ this article encourages considering the judge as mentor in a broader sense and allowing the foster child/hero to have other, more ongoing opportunities to interact with the judge. Such opportunities would give the foster child further chance to benefit from the judge's own heroic qualities, e.g., wisdom, solid judgment, focus, motivation, and leadership, which are the very qualities that have produced the judge/mentor capable of helping the foster child/hero on her passage through juvenile court and, hopefully, toward a [*574] positive outcome. ¹²²

A child advocate seeking to zealously represent her client by telling her client's story to achieve narrative coherence, or, "internal consistency" and "completeness," ¹²³ and narrative correspondence, or, correlation with a culturally imbedded stock story such as the hero story, ¹²⁴ will necessarily have to engage in rigorous investigation of the child's background, including the adversities the child has confronted. It is this detailed knowledge of the child and her life that will allow the lawyer and other child welfare professionals to develop fully the child's character and integrate the child's voice and viewpoint for the purpose of the relevant proceedings. ¹²⁵ In addition to the facts about the child's dependency, her misconduct, and her views and feelings about her situation, the child's interests, successes, and thoughts about her "goals and needs" should come to the attention of the court so that the child is

¹¹⁷ Chestek's discussion of character suggests that a focus on character gives rise to the following questions:

Why did the parties act as they did? What was their motivation? Does that motivation make sense at a human, emotional level? Are their motivations emotionally appealing? Should the litigants be allowed to behave in such a manners? Do they deserve punishment for their actions? Should the court want to assist one or more of the characters because what happened to them is unfair?

Chestek, *supra* note 19, at 143.

¹¹⁸ See Robbins, *supra* note 84, at 779 (encouraging the lawyer to "carefully employ all of the client-centered skills that are the stuff of clinical education and scholarship [including] factual investigation of one's own client").

¹¹⁹ *Id.* at 778-79. This discussion should make it apparent that I disagree with Kaiser's view that the child protection agency as opposed to the child is the hero in child advocacy situations. See Kaiser, *supra* note 82, at 172.

¹²⁰ Robbins, *supra* note 84, at 782-83.

¹²¹ *Id.* at 783-86.

¹²² See *id.* at 783 ("By casting the judge in the role of the mentor, we are also acknowledging the judge's own heroism. Mentors in myth may be heroes themselves from a different quest who now impart the knowledge they have gained to the next generation of hero.").

¹²³ Rideout, *supra* note 24, at 64.

¹²⁴ *Id.* at 67.

¹²⁵ See Foley & Robbins, *supra* note 75, at 468 (describing character development and its importance for the audience).

"knowable as a person to the judge." ¹²⁶ Once the judge understands who the child is, she can better perform the mentor role because she will be equipped to decide on a result that best serves the child.

Rideout's final requirement for persuasive narrative is the substantive quality of "narrative fidelity" which is at the heart of his article. ¹²⁷ Narrative fidelity centers on asking if a narrative "rings true with the stories [people] know to be true in their lives." ¹²⁸ A story must "represent accurate assertions about social reality and thereby constitute good reasons for belief or action." ¹²⁹ Narrative fidelity and narrative correspondence are distinct because narrative fidelity is about whether the appropriate audience for the story would find the story normatively valid based on that audience's own value system. ¹³⁰ When the audience, or the adjudicator, uses its "practical judgment" in response to the legal narrative set before it, the audience itself undergoes further "self-definition," which serves to improve the entire community according to the values embodied by the narrative. ¹³¹ The apparent dilemma is that the defining [*575] of a single community with a single value system for the purpose of any given narrative may be elusive, even when we are talking about a group of people involved in the same enterprise, namely, that of protecting a child who has entered the dependency system. As Rideout notes, "We do not always adhere to the same narrative version of the particulars, to the same version of how we can best arrive at our ideals." ¹³² Consequently, human beings will have different viewpoints on, and therefore different reactions to, narratives of even the same underlying set of facts. ¹³³

In this sense, the "narrative fidelity" quality of persuasive narrative poses a challenge for child advocates aiming to emphasize the foster child's character, voice, and viewpoint. At first glance, it seems that this quality should allow the advocate, and in turn the child, to "win hearts as well as minds" of an audience adjudicator. ¹³⁴ Yet the variations within the audience itself, arising from that audience's unique cultural, ethnic, socio-economic, religious, and political background, among other things, present a significant hurdle to the child advocate.

This hurdle may be insurmountable under the present either/or system of dependency or delinquency, which seems incapable of responding to stories that attempt to persuade by getting at our human-ness because of the tunnel vision of each system. The disjointed system forces children into a story either about their dependency or about their delinquency, and, consequently, cannot produce appealing narratives about these children. Each system is so single-minded that it admits no complexity of character. The very attributes of a persuasive story that can adequately encapsulate our nature as human beings, therefore, point to the need for dual status at the least and, at best, another option supplementing dual status. Such an option would not hem in the child, advocate, or adjudicator as much as the present dependency/delinquency approaches do because it would allow a more complete response by the judicial system to the child before it. This response would take into account the humanity of the child and the people comprising the "system" by integrating a formal, consistent way to consider each young person's idiosyncrasies, namely her unique character, voice, and viewpoint. In doing so, we would achieve the

¹²⁶ See *id.* at 470-71 (advising lawyers to personalize cases to their clients).

¹²⁷ Rideout, *supra* note 24, at 69-78.

¹²⁸ *Id.* at 69-70 (quoting Fisher, *supra* note 101, at 64).

¹²⁹ *Id.* at 70 (quoting Fisher, *supra* note 101, at 105).

¹³⁰ *Id.* at 70-77. I recommend that the reader turn to Rideout's excellent, in-depth discussion of this complex concept, which I recognize I give short shrift to here.

¹³¹ *Id.* at 76-77 (Narrative fidelity "helps to account for normativity in legal arguments and, in doing so, goes beyond logic alone, to values; and ... it involves an act of self-definition, not only by the immediate audience, but for the community within which that audience - and those narratives - are situated.").

¹³² *Id.* at 85.

¹³³ See *id.* at 79-86 (discussing the various opinions of the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).

¹³⁴ *Id.* at 86.

developmental nurturing recently referred to by at least one child advocate, Professor Emily Buss, and would remind everyone involved that the child does "belong in the community that sets the rules."¹³⁵ In turn, an enriching of the community of children's lawyers and [*576] judges, and hopefully ultimately society as a whole, surely would result.¹³⁶

An emphasis on the foster child's character, viewpoint, and voice necessarily involves integrating into the legal process to which the child is subject more appeal to emotion than perhaps has up until now existed in California. An approach calling on advocates to invoke emotions while representing and counseling the child and, simultaneously, calling on the audience to respond emotionally is not novel. This view dates back to classical rhetoric theory with Aristotle's instruction that persuasion requires appeals to logos (reason), ethos (ethics), and pathos (emotion).¹³⁷ Any legal writing textbook worth its salt relies on this point, explaining that effective brief writing requires integrating emotion.¹³⁸ This advice is echoed in recent scholarship. For example, Chestek warns that "an appellate brief writer who overlooks the emotional appeal of her case does so at her client's great peril."¹³⁹ Thus, along with making logical appeals based on solid research of applicable precedent, critical analysis of that precedent, and application of the precedent to the client's case via analogical and other types of reasoning, the lawyer should artfully layer on appeals to emotion when crafting a persuasive narrative.¹⁴⁰ The idea of foster care naturally evokes emotions; child welfare professionals should sensitively use that available emotion to help them effectively advocate for foster children.

IV. CALIFORNIA CASES REVEAL THE PRESENT SYSTEM'S WEAKNESSES

Published cases dealing with a youth's dependency versus delinquency status confirm the system's failings as well as the fact that a better solution to the foster-to-delinquency cycle may lie beyond the present purviews of child welfare services and the probation department. The cases underscore that a mistreated child with a history of neglect, abuse, or both - who may also suffer from mental illness and drug addiction - presents a complex scenario with which the dependency and delinquency systems are not fully capable of dealing. A review of the cases also leads to the conclusion that, were the state to require that the child's character, voice, and viewpoint be taken into account, then child welfare professionals would be able to take the first step toward developing another approach to dealing with the at-risk foster child.

[*577] California courts recognize that "the focus of the [juvenile court] system is on the child."¹⁴¹ Thus, "the purpose of the California dependency system is to protect children from harm and preserve families when safe for the child."¹⁴² Nevertheless, without having an official way to focus on the full child, that system is not satisfactorily protecting its children. In *In re Henry S.*, fourteen-year-old Henry had been driving his father's car with his ten-year-old brother as a passenger when the authorities tried to take them into protective custody after his parents' arrest.

¹³⁵ Buss, *supra* note 23, at 320, 331.

¹³⁶ See *Rideout*, *supra* note 24, at 76-77.

¹³⁷ Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revealed*, [159 U. Pa. L. Rev. 751, 766 \(2011\)](#) (citing Aristotle, *Rhetoric*, reprinted in *The Rhetoric and the Poetics of Aristotle* bk. I, ch. 2, at 1356a (W. Rhys Roberts & Ingram Bywater trans., Random House, Modern Library College ed. 1984)).

¹³⁸ See, e.g., Shapo et al., *supra* note 77, at 366-69.

¹³⁹ Chestek, *supra* note 19, at 135.

¹⁴⁰ See *id.* at 135-36 n.27 (emphasizing the importance of using an optimal combination of logos and pathos in trial and appellate courts).

¹⁴¹ See, e.g., *D.M. v. Superior Court*, [93 Cal. Rptr. 3d 418, 428 \(Ct. App. 4th 2009\)](#).

¹⁴² See *id.* (quoting *In re Dakota H.*, [33 Cal. Rptr. 3d 337, 348 \(Ct. App. 4th 2005\)](#)).

¹⁴³ Henry said that he "snapped" and refused to stop the car. ¹⁴⁴ Henry led the sheriff's deputies and highway patrol on a high-speed chase along Highway 217 and through the University of California, Santa Barbara campus until the highway patrol pinned Henry's car against a telephone pole after Henry had crashed into two of its vehicles. ¹⁴⁵ The Santa Barbara County District Attorney then submitted a delinquency petition under section 602 of the California Welfare and Institutions Code claiming that Henry had violated several sections of the Penal Code by engaging in "assault with a deadly weapon likely to produce great bodily injury, child abuse, leaving the scene of an accident, evading a peace officer, hit and run driving, and driving without a license." ¹⁴⁶ Henry's attorney asked that the child welfare and probation departments prepare a section 241.1 joint assessment report "to assist the juvenile court in determining whether Henry should be treated as a dependent child under section 300 or a delinquent ward under section 602." ¹⁴⁷ Dual status was not an option for Henry because there was no dual status protocol in Santa Barbara County. ¹⁴⁸ Once the court granted Henry's counsel's request, counsel asked the court to permit a contested section 241.1 hearing to present evidence and call and cross-examine witnesses and the joint assessment report authors, contending that it was Henry's due process right to do so. ¹⁴⁹ The juvenile court denied Henry's request for a full evidentiary hearing, and instead scheduled a hearing limited to counsel presenting their opposing positions, which took place following a continuance for the court to consider Henry's psychologist's recent report. ¹⁵⁰

At this limited hearing, Henry's defense counsel argued that "Henry's best interest would be served by treating him as a dependent given his documented [*578] history of significant abuse beginning when he was three years old up to the night before the arrest when his father choked him for trying to protect his mother." ¹⁵¹ This attorney also attributed Henry's present run-in with the law to Henry's fright and sense of responsibility to look after his brother following their mother's and father's arrest. ¹⁵² Nevertheless, the juvenile court found as follows:

Clearly, with a [section] 600 approach there is the accountability factor that's been argued by counsel that is not found under [section] 300. I think it's a very close call. It is a tragic, tragic fact of life that Henry has been subjected to this terrible upbringing and all of the pitfalls that he's faced along the way and I wish we could go back in time and erase all of that and place him in a placement that would give him a lot better chance at life. But when the court looks at the best interests of Henry and also considers the protection of society, it does seem appropriate to treat Henry as a [section] 600 ward. That's going to be the finding of the court. ¹⁵³

¹⁴³ In re Henry S., [44 Cal. Rptr. 3d 418, 419 \(Ct. App. 5th 2006\)](#).

¹⁴⁴ [Id. at 420](#).

¹⁴⁵ [Id. at 419-20](#).

¹⁴⁶ [Id. at 420](#) (citations omitted).

¹⁴⁷ [Id.](#)

¹⁴⁸ See [id. at 422](#) (noting the lack of the required "written agreement" in this case to permit designating Henry as "both a dependent child and a delinquent ward of the court").

¹⁴⁹ [Id. at 420](#).

¹⁵⁰ [Id.](#)

¹⁵¹ [Id. at 420-21](#).

¹⁵² [Id.](#)

¹⁵³ [Id.](#)

Ultimately, the California Court of Appeal affirmed the juvenile court's decision that a minor lacks a due process right to a full evidentiary hearing under section 241.1, which was the sole issue before the court.¹⁵⁴ In doing so, it noted that under section 241.1, only a judicial determination of the child's dependency versus delinquency status is necessary.¹⁵⁵ When the section 241.1 assessment report gives the juvenile court the information it needs to arrive at "an informed decision," the report obviates the need for any hearing at all, let alone a full evidentiary hearing.¹⁵⁶ If the juvenile court sets a hearing, then only the parties and their attorneys need be heard and not the child's parents or guardians.¹⁵⁷ The Court of Appeal noted that, in the instant case, the juvenile court heard argument from both Henry's counsel and the prosecution and also took Henry's psychological evaluation into account before deciding that "the best interests of Henry and the protection of society ... [required] treating Henry under the delinquency laws."¹⁵⁸ As its final point in the opinion, the Court of Appeal asserted: "If [Henry] possessed testimonial or documentary evidence to suggest he lacked the capacity to have committed the offenses because of his abuse or neglect, he could have presented it during the section 602 delinquency [*579] proceedings."¹⁵⁹

Jaime M. was another child who endured the deficiencies of California's dependency and delinquency systems.¹⁶⁰ Jaime M.'s case came before the California Court of Appeal from the trial court's order to house her in MacLaren Children's Center, a facility designed for children who have dependency status under section 300 and not delinquency status under section 602.¹⁶¹ Because Jaime M., who was fifteen at the time, was deemed a delinquent, she could not live with dependent children.¹⁶² The trial court's order apparently was intended to remediate Jaime's living situation - she had been languishing in juvenile hall for many months, "untreated" with "her condition ... deteriorating."¹⁶³

Jaime M.'s story is heart wrenching: after being born with PCP in her system, she was declared dependent under section 300 at ten months old.¹⁶⁴ By the time her case arrived at the appellate court, at age fifteen, she had been in seventeen placements, including psychiatric hospitals.¹⁶⁵ During one hospital stay, after attacking a ward attendant, taking his keys, and trying to escape, Jaime became subject to delinquency proceedings. Then, due to her volatile behavior, housing facilities began rejecting her.¹⁶⁶ The court noted, "Indeed, the probation officer's report concerning Jaime M. described her as suffering substantial psychiatric and behavioral problems, stating "minor[s] psychosis can only be handled by individuals who are trained in the psychiatric field."¹⁶⁷

¹⁵⁴ [Id. at 419, 426.](#)

¹⁵⁵ [Id. at 425.](#)

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ [Id. at 425-26.](#)

¹⁵⁹ *Id.*

¹⁶⁰ See [L.A. Cnty. Dep't of Children & Family Servs. v. Superior Court, 104 Cal. Rptr. 2d 425 \(Ct. App. 2d 2001\).](#)

¹⁶¹ [Id. at 426-27.](#)

¹⁶² *Id.*

¹⁶³ [Id. at 429.](#)

¹⁶⁴ [Id. at 426.](#)

¹⁶⁵ [Id. at 426-27.](#)

¹⁶⁶ [Id. at 427.](#)

¹⁶⁷ *Id.*

At this point, the child welfare system began to desert Jaime M. even more dramatically than perhaps it had up until then. Neither the dependency system nor the delinquency system would accept jurisdiction over Jaime, and in fact, each fought to resist accepting jurisdiction.¹⁶⁸ Without the knowledge of the Department of Children and Family Services (DCFS), a delinquency court representative released Jaime to DCFS and directed it move her to MacLaren Children's Center.¹⁶⁹ DCFS learned of the release only when the representative informally remarked on it to a DCFS attorney; the delinquency court apparently felt that its system was incapable of caring for Jaime during an interim period when the mental health department was assessing her.¹⁷⁰ DCFS responded by [*580] moving to vacate that directive on the ground that, as a section 602 delinquent child, Jaime M. could not live with section 300 dependent children.¹⁷¹ The trial court denied this motion and ordered Jaime M. to be moved to MacLaren; DCFS appealed and the Court of Appeal stayed the trial court's order.¹⁷²

The Court of Appeal agreed with DCFS that MacLaren was not the appropriate placement for Jaime M. because she was alleged to be a section 602 delinquent and because MacLaren was not equipped to handle or treat Jaime's psychological problems.¹⁷³ The court reasoned that Jaime's earlier designation as a dependent did not make her fit for placement at MacLaren with other dependents once she "converted ... herself into a minor" falling under section 602 and, consequently, requiring a "segregated facility."¹⁷⁴

Eventually, the Court of Appeal pointed out that Jaime M.'s status with the juvenile court, either dependent or delinquent, had not yet been determined.¹⁷⁵ While acknowledging that the delay was due in part to the praiseworthy goal of collecting "input from countless experts and treatment facilities" familiar with Jaime M., the Court of Appeal also expressed its frustration with the delay.¹⁷⁶ The Court provided a timetable in its opinion for the juvenile court (pursuant to section 241.1) to settle the question of Jaime M.'s status "quickly" and thereby end her 21 month stay in no man's land without any treatment.¹⁷⁷

Jaime M. was a baby when the state took responsibility for her. The parent-state's subsequent mishandling of her upbringing helped create the situation where she was trapped between the dependency and delinquency systems because neither system wanted to contend with her, resulting in further damage to the well-being of an already disturbed child.¹⁷⁸ Moreover, the appellate court, while apparently sympathetic to Jaime's situation, simultaneously used language blaming the state's foster children themselves for conduct leading to delinquency proceedings.¹⁷⁹ Henry S.'s case reflects that at least one person, his attorney, took into account the abuse he suffered as an explanation for his misbehavior and as a reason to accord him dependency and not delinquency

¹⁶⁸ See *id.* (description of both systems' maneuvers follows).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ [Id. at 428.](#)

¹⁷⁴ *Id.*

¹⁷⁵ [Id. at 428-30](#) (relying on [In re Marcus G.](#), 87 Cal. Rptr. 2d 84, 90 (Ct. App. 1st 1999), in support of proposition that the juvenile court must decide whether to exercise dependency or delinquency jurisdiction over a minor).

¹⁷⁶ *Id.* at 429.

¹⁷⁷ *Id.* at 429-30.

¹⁷⁸ See *id.* at 427.

¹⁷⁹ See *id.* at 428 ("Rather, by acting in a criminal manner, a minor within the court's section 300 jurisdiction converts himself or herself into a minor [falling under section 602].").

status.¹⁸⁰ The juvenile court, however, could only pay lip service to Henry's "terrible [*581] upbringing and all of the pitfalls that he's faced along the way" before deciding to rule Henry a delinquent ward.¹⁸¹ The Court of Appeal's observation that "if [Henry] possessed ... evidence to suggest he lacked the capacity to have committed the offenses because of his abuse or neglect, he could have presented it during the section 602 delinquency proceedings"¹⁸² further demonstrates the disconnect between the ability of the child's attorney to provide information about past mistreatment of the child and the system's ability to actually take that information into account. Accordingly, even when the child's counsel raises the child's history of mistreatment in proceedings relating to section 241.1, the information appears to be inconsequential.

The legal system presently is not institutionally equipped to process the character, voice, and point of view information that could result in friendlier outcomes for foster children. Certain critical improvements, however, could change this situation - and these vulnerable children will benefit as a result.

V. SYSTEM ALTERNATIVES CAN TAKE INTO ACCOUNT THE FOSTER CHILD'S CHARACTER, VOICE, AND VIEWPOINT

A. Restorative Group Conferencing

Restorative justice programs exemplify an approach to dealing with foster children who behave or have the potential to behave in a delinquent fashion by incorporating applied legal storytelling principles. True, restorative justice emphasizes the crime victim's injuries and needs, but it also focuses on the offender's obligation to correct the situation.¹⁸³ That focus requires deeper knowledge about the offender, which is achieved through integrating that offender's character and voice. This focus on the offender comes about because dealing with the offender's qualities giving rise to the crime is integral to righting the wrongs that occurred.¹⁸⁴ This attention to a young offender's character flaws leads in turn to access to services that can help the young person to overcome those flaws, such as professionals who can provide treatment and counseling for mental health or substance abuse problems.¹⁸⁵

One specific program called Restorative Group Conferencing ("RGC") seizes on the proven successes of restorative justice¹⁸⁶ in combination with [*582] Family Group Decision Making, which encourages maintaining family involvement in decisions affecting even the child who is under the purview of the child welfare system,¹⁸⁷ to reach the dependent child who has come into contact with the delinquency system.¹⁸⁸ The RGC process begins once a dependent child comes into contact with the delinquency system by committing and being arrested for a criminal offense.¹⁸⁹ RGC focuses on holding the dependent child accountable for the offense by repairing the

¹⁸⁰ In re Henry S., [44 Cal. Rptr. 3d 418, 421 \(Ct. App. 5th 2006\)](#).

¹⁸¹ Id.

¹⁸² [Id. at 426](#).

¹⁸³ Am. Humane Ass'n, *supra* note 26, at 22-24.

¹⁸⁴ Id. at 23.

¹⁸⁵ Id.

¹⁸⁶ Restorative justice programs aimed at young offenders result in lowering recidivism rates and ensuring a sense of having been fairly treated. Victims too generally feel that restorative justice has allowed the offender to redress the crime. Id. at 23-24.

¹⁸⁷ Id. at 24-27.

¹⁸⁸ In particular, "The RGC process is intended to serve dependent youths (10 to 18 years old) in both the child welfare and juvenile justice systems; those youths in the juvenile justice system with dependency issues as identified in an assessment process; and those youths who are in the dependency system, commit an offense, and get arrested, launching them into the juvenile justice system." Id. at 28. Thus, RGC targets the situation that this article addresses.

¹⁸⁹ Am. Humane Ass'n, *supra* note 26, at 28.

harm done and, at the same time, takes into account the reasons why the child is under the child welfare system's jurisdiction in the first place.¹⁹⁰ In a restorative group conference, the young offender, accompanied by her social worker and other members of her social network, meets face-to-face with the victim and her support system.¹⁹¹ With the help of a coordinator, the participants ultimately reach an agreement meeting their needs.¹⁹² "The purpose of the restorative group conference is to share information about the offense and the child welfare issues that the [dependent/delinquent] youth has experienced, and to create plans that will yield positive outcomes."¹⁹³

Some characteristics fundamental to RGC success are the same as those fundamental to effectively dealing with dual status young people generally, such as having a single judge who understands both dependency and delinquency preside over any particular case and having a single informed attorney represent the child.¹⁹⁴ Notable in the RGC approach, however, is the equal amount of attention and respect afforded both the victim and dependent/delinquent child.¹⁹⁵ Integral to RGC is the recognition that the child who suffers from past abuse or neglect is also a victim; therefore, it is crucial to "offer victims and [dependent/delinquent] youths the opportunity to heal and discover a brighter future."¹⁹⁶ In particular, "healing" as a core value of RGC involves "restoring victims, youths, family groups, and the broader community to a state of wholeness."¹⁹⁷ To achieve healing, "participants express their feelings and [*583] needs" and "RGC plans address the needs of victims, youths, family groups, and the community."¹⁹⁸ RGC further emphasizes the core values of "fairness" when "addressing the needs of victims, youths, and family groups and in the representation of marginalized groups in the RGC process" and also "collaboration among child welfare and juvenile justice systems, courts, law enforcement, and communities to meet the safety and well-being needs of the victim, youth, and community."¹⁹⁹

As one of the "stakeholders" in RGC, and in preparation for the actual conference, the dependent/delinquent young person has an opportunity to provide her personal narrative.²⁰⁰ Ideally, the young person candidly discusses her version of the offense, responsibility for the offense, readiness to make amends, people belonging to the family or support network, and views on the reasons for and needs arising from the dependency and "what [she] would like to see happen."²⁰¹ RGC presents occasions for the young person to "provide[] his or her perspective" and for focus to be on "the young person's safety, permanency, and well-being."²⁰² RGC culminates in a "consensus-based plan ... including a detailed list of tasks, due dates, [and] check-in dates for plan monitoring." After RGC, the dependent young person receives ongoing "support and guidance" from the RGC coordinator to ensure plan success.²⁰³

¹⁹⁰ Id. at 26.

¹⁹¹ Id. at 29.

¹⁹² Id. at 31.

¹⁹³ Id.

¹⁹⁴ Id. at 33.

¹⁹⁵ To begin with, the delinquency and dependency aspects are split largely because the victim, while important, is not entitled to be privy to the minors' dependency issues. Id. at 31.

¹⁹⁶ Id. at 34.

¹⁹⁷ Id. at 28.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ See id. at 30 (specifying that a "coordinator ... helps the youth tell his or her story").

²⁰¹ Id.

²⁰² Id. at 32.

²⁰³ Id. at 31, 33.

B. The Benchmark Permanency Hearings

As long ago as 1999, the Presiding Judge for the Child Protection Division in Cook County, Illinois created The Benchmark Permanency Hearings ("Benchmark Hearings"),²⁰⁴ a lauded program²⁰⁵ integrating applied legal storytelling principles into an approach aimed at dependent young adults soon to be emancipated from foster care. After referral by a caseworker or guardian ad litem and acceptance into the program, the dependent young person participates in a series of "hearings" with a single judge that take place not in court but rather in a conference room.²⁰⁶ The young person's attorney is at the hearings but does not participate in the judge-young person conversation, "though in the best cases [*584] she has done considerable work with the young person in preparation for the hearing, and she is prepared to take action following the hearing to ensure compliance with the judge's orders."²⁰⁷ Another adult with whom the youth has a caring, positive relationship may attend the hearings too.²⁰⁸

During the hearings, the judge and dependent youth discuss the ramifications of independence from foster care and the young person's wishes for her future, focusing on "educational and career goals."²⁰⁹ The young person and judge together craft a contract memorializing the young person's responsibilities.²¹⁰ It is then up to the foster young person to fulfill the obligations in part by taking advantage of the services that the judge ensures will be available.²¹¹ The young person's progress in attaining the milestones identified in the contract is then visited and re-visited in subsequent hearings.²¹² Significantly,

as in other caring relationships between adolescent and adult, where the adult sees his role as that of helping the adolescent prepare for competent, independent decision making, the judge responds to the failures of the young person by expressing disappointment and exploring what can be done to avoid the failure in the future, rather than simply by lecturing or removing a privilege, as is standard fare at an ordinary court review.²¹³

C. Restorative Group Conferencing and The Benchmark Permanency Hearings Have Applied Legal Storytelling Qualities

RGC and the Benchmark Hearings are aimed at dependents of the state and embody applied legal storytelling values. To begin with, the programs satisfy Rideout's "narrative coherence" requirement for achieving persuasiveness because both programs devote time and resources to the learning and thorough telling of a dependent/delinquent (RGC) or foster (Benchmark Hearings) young person's narrative, guaranteeing "internal consistency" and "completeness" of the story.²¹⁴ Moreover, in both RGC and the Benchmark Hearings there is room for the young person to explore and communicate her range of emotions, various motivations, and unique

²⁰⁴ Benchmark Hearings, supra note 26, at 1.

²⁰⁵ Buss, supra note 23, at 327-28.

²⁰⁶ Benchmark Hearings, supra note 26, at 1. See also The Benchmark Hearing Program, St. Ill. Circuit Ct. Cook County, <http://www.cookcountycourt.org/ABOUTTHECOURT/JuvenileJusticeChildProtection/ChildProtection/BenchmarkHearingProgram.aspx> (last visited June 8, 2012) (discussing the Benchmark Hearing Program and listing the guidelines for determining whether "a teen ward is an appropriate candidate").

²⁰⁷ Buss, supra note 23, at 327.

²⁰⁸ Id.

²⁰⁹ The Benchmark Hearing Program, supra note 206.

²¹⁰ Buss, supra note 23, at 327.

²¹¹ Id. at 326-27.

²¹² Id. at 327.

²¹³ Id.

²¹⁴ See Rideout, supra note 24, at 64-65.

viewpoint - all of which are necessary to accurately and thoroughly portray the young person. ²¹⁵ In fact, both programs demand this type [*585] of frank self-examination by the young person as a part of the transformation process integral to dealing with an offense against another (RGC) or emancipating from foster care (Benchmark Hearings). Additionally, RGC and the Benchmark Hearings open the door to transforming Rideout's second criteria for persuasive narrative, "narrative correspondence," asking whether a story corresponds with a culturally familiar "stock story," into one that serves instead of disserves the dependent child with delinquent potential. By allowing this young person to take on the stock story of the hero archetype, reflecting Robbins's advice, RGC and the Benchmark Hearings can change the negative story of foster care as the first step toward becoming a juvenile delinquent into the positive story of foster care as the first step toward becoming a healthy, successful adult. ²¹⁶ Such a change would result in the improving of society that Rideout associates with his third criteria for persuasive narrative, "narrative fidelity." ²¹⁷

RGC and the Benchmark Hearings achieve "narrative fidelity" because their respective audiences are likely to find their proceedings normatively sound, though the Benchmark Hearings may more easily achieve it. ²¹⁸ The Benchmark Hearings are well crafted to achieve narrative fidelity because the participants typically are only a single experienced judge, a young person, her attorney, and possibly another compassionate adult. To be eligible for participation in the Benchmark Hearings, a dependent must meet certain criteria, including that she must not be incarcerated, have a pending criminal case or warrant, or have an alcohol or controlled substance abuse issue. ²¹⁹ Thus, due both to the audience's awareness of and sensitivities to the dependent's situation and the dependent's own personal qualities, the judge (as the audience) will likely be receptive to the foster child's story.

RGC also is positioned to attain narrative fidelity in spite of the variety of parties involved, which range from the dependent/delinquent young person and her family group to the victims and their support systems to child welfare workers and law enforcement. ²²⁰ Restorative justice programs have had success because the participants are there largely of their own volition because they are [*586] at the heart of the process. ²²¹ These programs "promote a holistic, inclusive, and collaborative approach that places youths, their family groups, their victims, and other stakeholders at the center of decisions." ²²² Thus RGC achieves an empowerment of all parties involved that the traditional criminal justice system is unlikely to achieve in dealing with its juvenile offenders. Accordingly, RGC participants will tend toward open-mindedness in terms of being able to recognize reasons for the youth's misbehavior, namely severe mistreatment and other difficult circumstances, and empathy toward the youth for those reasons.

D. Restorative Group Conferencing and the Benchmark Permanency Hearings Have Elements That Would Benefit California's Foster Children

²¹⁵ See *id.* (noting that a persuasive legal story has "all of its expected parts" which "fit together"). The need to take into account the child wholly reflects this advice.

²¹⁶ See Robbins, *supra* note 84, at 776 (stating that a hero is permitted to "grow[] and change[]" through the course of the journey ... to search for identity and wholeness"). Moreover, at least in the Benchmark Hearings, as the dual jurisdiction young person/hero makes her way on her journey, the judge guides her as a wise but firm mentor. See *id.* at 782-86.

²¹⁷ See Rideout, *supra* note 24, at 76-77.

²¹⁸ As a reminder, narrative fidelity is grounded in whether the appropriate audience for the story would find the story normatively valid based on that audience's own value system. *Id.* at 70-72.

²¹⁹ The Benchmark Hearing Program, *supra* note 206.

²²⁰ Am. Humane Ass'n, *supra* note 26, at 30-31.

²²¹ *Id.* at 30 (indicating that all participants at the start of the RGC process are reminded about the "voluntary nature of participation"; additionally, the young person is "asked ... whether he or she is ready and willing to make amends" while the victim is told "about the voluntary nature of the process").

²²² *Id.* at 28.

California should adopt an approach with its dependent children incorporating elements of RGC and the Benchmark Hearings, either as part and parcel of a dual status system or, better yet, as a dependency system program. This move would allow the state to help its children by utilizing their stories in a more positive way. RGC and the Benchmark Hearings elevate the dependent child to someone deserving not only of state resources but also of the respect and consideration we accord those whose viewpoints we value and whose abilities to help guide their own futures we do not doubt. ²²³ Such an approach should encompass the fundamental recognition that the dependent child who acts out or who has the potential to act out so extremely as to alert the delinquency system is not only an offender or potential offender, but also a victim who experienced severe mistreatment at an early age. ²²⁴ Moreover, due to her very difficult past, this child victim/offender merits being cast as the hero in her own story with the capacity not only to voice that story but also to evolve within it to make amends for or control egregious behavior and become a socially responsible individual. ²²⁵

To move down the path toward becoming that socially responsible individual, the dependent child - like any child - requires ongoing and meaningful parental help. Thus, as part of any new approach to dealing with its children, the parent-state must provide avenues allowing consistent involvement of the child's present support system, which may include attorneys, social [*587] workers, health workers, teachers, spiritual leaders, and other caring adults. ²²⁶ To the extent possible, the individuals comprising this support system should be a stable group; this group should include a facilitator who, in the spirit of RGC, is able to conduct in-depth conversations with the child to help the child voice her story and generally support the child navigating away from delinquency tendencies. ²²⁷ Such conversations would occur in preparation for the child's interactions with a judge; the intensity of those judicial interactions would depend on the severity of the child's behavior.

While the new approach will require the involvement of many people in the child's life, the focus must remain squarely on the child herself. One way to achieve this focus is to adopt the Benchmark Hearings strategy of having a judge and child meet not in a courtroom but in a less public, more intimate space such as a meeting or conference room or even the judge's office as part of a series of meetings held during an ongoing relationship that simulates the caring yet firm encounters between a parent and child. ²²⁸ While the other knowledgeable adults important to the child may be present during these meetings, it is the conversation between the child/hero and the judge/mentor that matters most. ²²⁹ During these meetings, the judge and child should build on the facilitator's efforts and agree to a long-term plan for the child that meaningfully takes into account the child's past difficulties but also recognizes the child's future potential. ²³⁰

Just as we expect parents to not abandon even their most challenging children, we should expect that the state will parent all of its children fully. Accordingly, ongoing monitoring of the child via interim meetings with the facilitator, regular involvement of the child's support group, follow-up meetings with the judge, check-in dates with the

²²³ Giving youth a voice in their care helps them to develop a sense of their future and can be empowering" Bass et al., supra note 4, at 13.

²²⁴ See Am. Humane Ass'n, supra note 26, at 19-20.

²²⁵ See id. at 27-33 (detailing the RGC process, which arose in part out of the strong commitment to the principle that rehabilitation of those young people who engage in delinquent conduct is achievable).

²²⁶ Id. at 29.

²²⁷ See Am Humane Ass'n, supra note 26, at 30-31 (discussing role of coordinator in Restorative Group Counseling).

²²⁸ Benchmark Hearings, supra note 26; Buss, supra note 23, at 326.

²²⁹ See Buss, supra note 23, at 327 ("The success of the Benchmark proceedings is tied to the judge's commitment to developing her relationship with adolescents in her courtroom to the maximum extent possible.").

²³⁰ See id. ("As in other caring relationships between adolescent and adult, where the adult sees his role as that of helping the adolescent prepare for competent, independent decision making, the judge ... explores what can be done to avoid ... failure in the future.").

facilitator and/or judge, etc. are necessary to provide the child with the support she will need to achieve both accountability for past errant conduct and the ability to move beyond that conduct. ²³¹

VI. CONCLUSION

California counties that allow a child to be both dependent and delinquent at [*588] the same time are better serving their foster children than those that require either dependency or delinquency status. For instance, benefits of Los Angeles County's AB 129 Dual Status Pilot Project include having "a Multidisciplinary Team (MDT) consisting of a probation officer, social worker, clinician from the Department of Mental Health (DMH), and an education advocate" carrying out the statutorily required joint assessment. ²³² The MDT remains integral to the child's case even after the court decides her status, taking on a leadership role in effectuating the court ordered case plan, whether the child ends up receiving dual status or not. ²³³ Additionally, the young person with dual status is able to keep an open case in both the dependency and delinquency courts as well as to hold onto her lawyers and social workers. ²³⁴ Because these elements have proved successful, California should mandate that each of its counties adopts a dual status protocol.

Nevertheless, dual status is not a panacea. Problems have arisen because dual status programs need to rely on the collaboration between the separate child welfare and probation departments. Referring again to Los Angeles County's Pilot Project, it has been noted that "it takes time for the members of the MDT, who are housed together, to function as a team." ²³⁵ Moreover, "it is difficult for youths to actually participate in the joint assessment process ... because of the tension created by the need to interview the youth as part of the assessment process and the need to protect each youth's Fifth Amendment rights in the Delinquency Court." ²³⁶ Also, Los Angeles County has experienced "difficulty in linking youths and families with the most appropriate services designed to meet their individual needs[.]" ²³⁷

Accordingly, California should go even further by implementing a third system, preferably connected with the dependency court, that could achieve more success by helping to rescue the dependent young person from cycling into the delinquency system in the first place. Foster children have suffered severe abuse and neglect; a lack of family and money; disruption in schooling and teacher and peer relationships; and mental, behavioral, and substance abuse disorders. Many foster children's delinquent offenses flow from their seeking something that is missing in their lives. For instance, it is understandable, although certainly misguided, that a foster child might think she will gain peer [*589] approval from joining a gang or agreeing to sell and take drugs. It is equally understandable (and misguided) that another child might view prostitution as a means to provide herself with shelter, financial independence, and a dependable adult relationship.

Obviously, a better solution to meeting each foster child's needs is for the parent-state to fully accept the responsibility of caring for the whole child. Incorporating into the dependency system a program having characteristics similar to those embodied by RGC and the Benchmark Hearings for children identified most at risk for delinquency would be a step in the right direction. These programs are capable of meaningfully taking into account an individual foster child's story by eliciting information about her character - in all its positive and negative

²³¹ See Am Humane Ass'n, supra note 26, at 31-33; Buss, supra note 23, at 327-28.

²³² Nash & Bilchik, supra note 52, at 24.

²³³ Id. ("Once disposition has been completed, the MDT serves as case manager for implementation of the case plan ordered by the court, regardless of whether the youth becomes a formal dual status youth or an informal dual status youth. The MDT oversees and coordinates the efforts of everyone from both departments who is responsible for providing services to each youth.").

²³⁴ Id.

²³⁵ Id.

²³⁶ Id. at 24-25.

²³⁷ Id. at 25.

glory - and listening to her voice and viewpoint about where she has come from and where she would like to go in life. In fact, the programs' successes depend on their ability to do so. To be effective these programs also rely on strong, supportive adults, and children being accountable to those adults, to implement plans.

The state's inadequate treatment of its dependents who turn (or who are at risk of turning) delinquent arises from the telling of only one side - either the dependent side or the delinquent side - of its children's stories due to its lack of attention to each child's true character, voice, and viewpoint. The present system promotes single rather than multi-faceted stories about children, and therefore, because people are not single-faceted in general, ²³⁸ these stories neither ring true nor serve children. Remedying this situation requires institutional change validating children's real characters, voices, and viewpoints. As one of society's least powerful and most vulnerable populations, foster children are undisputedly deserving of more protection than presently exists. Permitting children to have simultaneous dependent and delinquent status under the law as well as introducing a formal system to actively identify and sensitively, but firmly, deal with foster children on a path to delinquency would help to provide that protection and write a new chapter for California's dependents.

New York University Review of Law & Social Change

Copyright (c) 2013 New York University Review of Law & Social Change

New York University Review of Law & Social Change

End of Document

²³⁸ See Turner, *supra* note 83, at 137 ("We do not live in a single narrative mental space, but rather dynamically and variably distributed over very many.").