

RIGHTS MYOPIA IN CHILD WELFARE

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For decades, legal scholars have debated the proper balance of parents' rights and children's rights in the child welfare system. This Article argues that the debate mistakenly privileges rights. Neither parents' rights nor children's rights serve families well because, as implemented, a solely rights-based model of child welfare does not protect the interests of parents or children. Additionally, even if well-implemented, the model still would not serve parents or children because it obscures the important role of poverty in child abuse and neglect and fosters conflict, rather than collaboration, between the state and families. In lieu of a solely rights-based model, this Article proposes a problem-solving model for child welfare and explores one process born of such a model, family group conferencing. This Article argues that a problem-solving model holds significant potential to address many of the profound theoretical and practical shortcomings of the current child welfare system.

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INTRODUCTION

One of the central debates in family law focuses on the proper balance between parents' rights and children's rights. Although this debate plays out in numerous and varied contexts, including child custody,¹ religious freedom,² immigration proceedings,³ education,⁴ criminal law,⁵ and the participation of the United States in international treaties,⁶ the debate is particularly vociferous and the stakes especially high in the context of the child welfare system. In that context, the debate between advocates of parents' rights and children's rights is charged and polarized. Elizabeth Bartholet, for example, contends that a pervasive "blood bias" in the child welfare system sacrifices children's futures.⁷ She alleges that the state is overly deferential to parents' rights and far too unwilling to remove chil-

1. See, e.g., MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT* 65-92 (1999) (arguing that the law privileges parental rights, vis-à-vis children's rights, in custody determinations).

2. See, e.g., James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994) (arguing for the complete dismantlement of parents' rights, and instead using children's rights as the basis for protecting the interests of children, recognizing only a child-rearing privilege in parents).

3. See, e.g., David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002) (arguing that immigration law is decidedly not child-centered and instead relies on outdated notions of children as property, wards of the state, and mini-adults).

4. See, e.g., Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481 (2002) (arguing for children to have education rights apart from their parents, such as a voice in the decision whether to home school or receive sex education).

5. See, e.g., Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. (forthcoming 2006) (arguing for a child-centered view of the prosecution of parents who negligently leave children in cars, resulting in death).

6. See, e.g., Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. FIGHTING POVERTY 313 (1998) (arguing that U.S. opposition to the U.N. Convention on the Rights of the Child has its roots in the protection of parents' rights, which in turn, has its roots in the view of children as property).

7. See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7 (1999).

dren from homes where they have been abused or neglected.⁸ To Dorothy Roberts, on the other hand, the state intervenes too readily, especially in the lives of African American families. Roberts argues that the disproportionate number of African American children in the child welfare system leads to African American families being “systematically demolished.”⁹

To be sure, the debate between advocates of parents’ rights and children’s rights is complex. Those who promote children’s rights do not uniformly favor state intervention. For example, some scholars and advocates contend that the unwarranted removal of a child from her biological parent is as much a violation of the rights of the child as of the parent.¹⁰ In this way, the debate could more accurately be described as one between family preservationists (those who disfavor state intervention with a bias toward removal) and child protectionists (those who favor aggressive state intervention, even if it leads to removal).

Regardless of the frame, the debate misses the mark because it mistakenly privileges rights. As currently implemented, the rights-based model of child welfare protects neither parent nor child in the typical case. To give just three examples: First, despite parents’ rights, there is substantial evidence that official decisions are often driven by racial biases and political expediency. Second, procedural safeguards and court adjudications that are designed to protect rights often do not lead to careful, reliable decisions. Third, state intervention to protect a child’s right to be free from abuse and neglect may be essential in some cases, but also comes at a high cost to the child in the typical child welfare case.

Moreover, adding resources to the current system will not “fix” it because this will not resolve the fundamental problems associated with a myopic focus on rights within the child welfare system. The dominant conception of rights assumes the rights bearer is an autonomous individual seeking freedom from the state. Parents in the child welfare system need more than autonomy. They need concrete assistance. Children also need assistance, although most do not need state intervention in the form it is now provided. Thus, rights obscure the role of poverty in abuse and neglect, and relying on rights does not ensure poor parents will receive the help they need. Additionally, rights will never be the primary way to produce good results for families because the rights-based model creates, or at least perpetuates, an adversarial process for decisionmaking. This adversarial

8. *Id.*

9. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at viii (2002).

10. See *infra* text accompanying notes 75–79.

process impedes the thoughtful group collaboration among parents, children, and the state that is essential to devising beneficial solutions.

Indeed, the adversarial system, which is a direct outgrowth of a focus on rights, disserves the goals of both preservationists and protectionists. Preservationists contend that a misconstrued articulation of children's rights and de-emphasis of parents' rights results in too much intervention in the home in the form of removal (or threatened removal). Child protectionists claim that too much emphasis on parents' rights and a misconstrued articulation of children's rights results in too little intervention in the home. The reality is that the emphasis on rights has led to the wrong kind of involvement in the lives of troubled families, resulting in over- and underprotection of everyone's rights and a serious misallocation of resources. In this way, rights have created a largely ineffective process for addressing child abuse and neglect.

A new model, and a new process to implement that model, is needed. In searching for this new model, I contend that the central question is not where to draw the line between preservation and protection (the concern that animates the debate over parents' rights and children's rights), but rather how best to help families address the serious problems underlying child abuse and neglect.

To this end, in lieu of a rights-based model, I argue that a problem-solving model would better serve the goals of the child welfare system. In this new model, the substantive goals of the child welfare system—to promote family preservation and ensure the safety of children—would remain, but the means for achieving these goals would be different. The new model would focus on solving the problems underlying the abuse and neglect, viewing such abuse and neglect largely as products of poverty, not parental pathology. Additionally, the problem-solving model would generate a new process that would foster collaboration between the state and families.

Thus, at heart this Article is about the relationship between legal models and the processes that different models generate. To put it most simply, a rights-based model leads to an adversarial process, whereas a problem-solving model leads to a collaborative process. I argue the latter is better suited to serving the interests of both parents and children.

Although a number of collaborative processes could satisfy the problem-solving model, in this Article I focus on one especially promising process: family group conferencing. A form of restorative justice, family group conferencing is a legal process for resolving child welfare cases without relying on a family court judge as the decisionmaker. After a report of child

abuse or neglect has been substantiated, the state convenes a conference with immediate and extended family members, and other important people in the child's life, such as teachers or religious leaders, to decide how to protect the child and support the parents. At the conference, the family and community members devise a plan for protecting the child and addressing the issues that led to the abuse and neglect, such as substance abuse, lack of housing, or inadequate child care. The participants of the family group conference and the state then work together to provide necessary supports to the family. By concentrating on the underlying problems, family group conferencing both focuses on the root causes of abuse and neglect and also fosters collaboration among parents, children, and the state.

I should note that I argue for the adoption of a problem-solving model for all cases except the small minority of cases in the system that involve severe abuse or neglect.¹¹ In these cases, I contend that, at least as an initial matter, the rights-based model should be preserved. For reasons discussed below, it would appear that the adversarial process generated by the rights-based model is better suited to address the interests of parents and children in these cases. I do not, however, reach this conclusion as a definitive matter.¹² Rather, my point is that if we take this minority of cases off the table, it is apparent that a different model—and a different process to implement the model—is best suited to the majority of cases in the child welfare system.

Thus, this Article stakes a claim to a novel approach to the legal framework governing the child welfare system. Instead of a myopic focus on rights, this Article proposes shifting rights to the background (although not out of the picture entirely) in favor of a holistic, problem-solving model.¹³

11. See JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 124 (1998) (noting that only about 10 percent of all child welfare cases involve child abuse or neglect severe enough to warrant criminal justice intervention).

12. In New Zealand and elsewhere, family group conferencing is used for all cases, including severe abuse and neglect. See MARK HARDIN ET AL., ABA CTR. ON CHILDREN & THE LAW, *FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCES OF NEW ZEALAND* 3, 76 (1996); Pat McElroy & Cynthia Goodsoe, *Family Group Decision Making Offers Alternative Approach to Child Welfare*, *YOUTH L. NEWS*, May–June 1998, at 3–4. This suitability issue deserves further study.

13. The move toward helping biological families function better, rather than simply removing children and finding them alternative homes, is becoming quite widespread in the child welfare world. See, e.g., Patricia Schene, *The Emergence of Differential Response*, *PROTECTING CHILDREN: DIFFERENTIAL RESPONSE IN CHILD WELFARE* (Am. Humane Ass'n, Denver, CO), 2005, at 4, 4–6 (discussing the “differential response” approach to child welfare, which takes a more collaborative approach to working with low and moderate risk cases in the child welfare system; noting that the field of child welfare increasingly recognizes the importance of working with biological families and the hidden strengths in such families); see also *infra* text accompanying notes 199, 261 (describing reforms in Alabama and New York City, which build on strengths of biological families). But the

To advance this argument, the Article proceeds in four parts. Part I describes the rights-based model of child welfare, examining parents' rights, children's rights, and proposals that attempt to articulate a new approach within the current rights-based system. Part II explores the limitations of the rights-based model, concluding that parents' rights and children's rights, as implemented and as conceived, do not produce effective solutions for parents or children. Part III describes the problem-solving model and then describes in detail one process that embodies this model, family group conferencing. Part IV addresses how the new problem-solving model overcomes the limitations of the rights-based model, and discusses, briefly, forces that might impede the adoption of a problem-solving model.

I. THE RIGHTS-BASED MODEL OF CHILD WELFARE

The mission of the child welfare system is to protect children believed to be abused or neglected by their families and to strengthen families where children are at risk for abuse and neglect.¹⁴ The state uses its *parens patriae* authority to intervene in such families to offer "child protective services."¹⁵ These intervention services range from support to keep a family together, to removing a child from a biological family and placing the child in a foster home or institution (sometimes leading to the termination of parental rights and the adoption of the child). The system involves vast numbers of children: The number of children in foster care has grown dramatically over the past two decades, from 302,000 in 1980 to 523,000 in 2003.¹⁶ In 2003, child welfare agencies across the country investigated an estimated 2.9 million reports of alleged child maltreatment,¹⁷ and "substantiated" 661,210 of these reports.¹⁸ Neglect is by far the most prevalent form of maltreatment

law review literature has yet to delve into this issue in depth. This Article is an attempt to begin the discussion of necessary changes to the legal framework to facilitate as a legal matter what is already happening as a matter of social work practice.

14. See, e.g., GA. CODE ANN. § 19-7-5 (West 2004); MINN. STAT. § 626.556 (2004); N.J. STAT ANN. § 30:4C-1(a) (West 2005).

15. In this Article, I use the terms "child welfare system" and "child protective services" interchangeably to refer to the entire system designed to respond to the abuse and neglect of children.

16. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2003 ESTIMATES AS OF APRIL 2005, at 1 (2005) [hereinafter AFCARS FY 2003 ESTIMATES]. This number is down from a high of 581,000 in 1999. See U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: INTERIM FY 1999 ESTIMATES AS OF JUNE 2001 (2001).

17. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2003, at xiii (2005) [hereinafter CHILD MALTREATMENT].

18. *Id.* at 30 tbl. 3-1. There were an additional 106,662 "indicated cases." *Id.* In a "substantiated" case, the state concludes the allegation of abuse or neglect is supported in

(60.9 percent of cases), with physical abuse a distant second (18.9 percent); sexual abuse is less likely to surface in the child welfare system (9.9 percent).¹⁹ Younger children are more likely to be maltreated than older children,²⁰ and infants are particularly vulnerable to maltreatment.²¹

A rights-based legal framework currently governs the child welfare system. A central tension in the current system is whether to give greater primacy to parents' rights or a strain of children's rights. This part describes that debate.

A. Parents' Rights

The child welfare system operates in the shadow of a long-standing legal principle: A parent has a legally protected right to the care and custody of her child. This core principle has deep historical roots and significant contemporary adherents in the legal academy; it has driven federal and state legislation and shaped legal doctrine.

The idea of parents' rights is not new. Under Roman law, a father had nearly complete control over his children, and the courts had no role in mediating this relationship.²² This principle was embodied in the concept of *patria potestas*—"[t]he authority held by the male head of a family . . . over his legitimate and adopted children, as well as further descendants in the male line, unless emancipated," authority that included power over "life and

accordance with state law or policy; in an "indicated" case, the state suspects, but cannot substantiate, abuse or neglect. See CHILD TRENDS DATABANK, CHILD MALTREATMENT 1 (2004).

19. See CHILD MALTREATMENT, *supra* note 17, at 22. These percentages are from the total number of cases (substantiated and indicated). The remaining cases involved either emotional maltreatment, medical neglect, or "other" maltreatment. It is noteworthy that relatively few children in the child welfare system are reported to be victims of sexual abuse. In light of the very high incidence of child sexual abuse in the general population, see, e.g., Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 261 (2001) ("[A]pproximately 20% of female children experience a serious, unwanted sexual assault (ranging from manual interference with their genital area to completed intercourse) prior to their eighteenth birthdays . . ."), the low number of cases in the child welfare system involving child sexual abuse is startling. Because child sexual abuse occurs across all socioeconomic classes, see, e.g., KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 12 (1995); David Finkelhor, *The Scope of the Problem*, in INTERVENING IN CHILD SEXUAL ABUSE 9, 12 (Kathleen Murray & David A. Gough eds., 1991), this discrepancy is some evidence that the child welfare system is more focused on the maltreatment of children from low-income families than detecting and preventing child maltreatment per se. Throughout this Article, I set aside the issue of child sexual abuse, which raises distinct challenges that should be addressed separately.

20. The rate of victimization of children aged birth to three years is 16.4 per 1000 children, and for children aged four to seven years is 13.8 per 1000 children. See CHILD MALTREATMENT, *supra* note 17, at 23.

21. Children under the age of one account for 9.8 percent of all victims. See *id.* at 23, 42.

22. See WILLIAM BLACKSTONE, 1 COMMENTARIES *452.

death.”²³ This tradition persisted. For example, during the colonial period in this country, children were considered by divine authority to be the property of their father; and a father was presumptively entitled to the services and earnings of his children, provided he protected and educated them.²⁴

Although this view of children as parental property has faded,²⁵ the principle that parents control their children, with minimal state intervention, persists.²⁶ The modern expression of this legal principle is found in four iconic Supreme Court decisions,²⁷ which established that substantive due process protects parents’ fundamental right to the “care, custody, and management of their child.”²⁸

Solicitude for parents’ rights has played out in two important ways within the child welfare system. First, in deference to parents’ rights,²⁹ the state cannot remove a child from the custody of a parent absent a showing of imminent danger to the child.³⁰ When the state does intervene, state statutes afford parents

23. BLACK’S LAW DICTIONARY 1206 (8th ed. 2004). This authority was located solely in the father. See Sibylla Flügge, *On the History of Fathers’ Rights and Mothers’ Duty of Care*, 3 CARDOZO WOMEN’S L.J. 377, 383 (1996). It was only upon the death of the father that custody would vest in the mother. See *id.* Interestingly, however, the descriptions of the absolute rights (and concomitant duties) of fathers over their children set forth in this paragraph pertain only to children born to a marriage. See Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1682–85 (2000) (describing the common law tradition that fathers owed no obligation to, and had no parental rights over, children born outside of marriage); see also Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003) (discussing the same tradition).

24. See WILLIAM BLACKSTONE, 1 COMMENTARIES *452–*53 (describing the sacred common law right of a father to the custody, labor, and earnings of his minor children); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1–16* (1988) (discussing the role of the “Godly” family in Puritan New England).

25. See, e.g., Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 864 (2000) (discussing the shift away from parental entitlements and toward children’s interests as the organizing principle for family law; “[t]oday, parents’ rights are thought to derive from—and to be limited by—their children’s interests”). But see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 848–54 (2004) (challenging this widely adopted narrative and noting “the persistence of common law property norms in the law of parenthood”).

26. Not all scholars agree with this historical narrative of minimal state intervention, particularly as it relates to poor families. See, e.g., Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 329–47 (2002) (arguing that beginning in the last quarter of the nineteenth century, extensive family regulation existed to serve particularized state interests).

27. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

28. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (citing *Yoder*, *Prince*, *Pierce*, and *Meyer*).

29. As discussed below, see *infra* text accompanying notes 73–74, this standard also protects a child’s interest in remaining with her biological parent.

30. This is true as a matter of constitutional law, see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), as well as of state statutory law. To remove a child from the custody of her parents, a state

considerable procedural protections. For example, when a child is removed from her home, parents typically enjoy statutory rights to counsel,³¹ to notice of court proceedings,³² to a hearing,³³ and to introduce evidence at the hearing.³⁴

Second, until the late 1990s, federal child welfare legislation was crafted to reinforce parents' rights. For example, the articulated goal of the first large-scale federal regulation of child welfare, the Adoption Assistance and Child Welfare Act of 1980 (AACWA),³⁵ was to preserve families, with only a secondary goal of finding adoptive homes for children who could no longer live with their families.³⁶ Rather than emphasizing child safety at the expense of preserving ties to a biological family (as in subsequent legislation), AACWA focused on family preservation with the goal of keeping families together or reunifying them.³⁷ Unless the situation was so unsafe for a child as to make reunification impossible, termination of parental rights was discouraged.³⁸

The importance of parents' rights has been championed by a number of legal scholars. They argue that parents are best situated to determine and act in a child's best interest,³⁹ at least in areas not particularly within the state's

typically must show not that removal would be in the "best interests" of the child, the standard used for custody determinations in marital dissolutions, but rather that the child is "dependent" on the state. States typically define dependency as a child who has been "abandoned, abused, or neglected by the child's parent or parents or legal custodians," "ha[s] no parent or legal custodians capable of providing supervision and care," or "[is] at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians." FLA. STAT. ANN. §§ 39.01(14)(a), (e) & (f) (West 2005); accord CAL. WELF. & INST. CODE § 300 (West 2005).

31. See, e.g., CAL. FAM. CODE § 7862 (West 2005); FLA. STAT. ANN. § 39.013(9)(a); 705 ILL. COMP. STAT. 405/1-5 (2005); 42 PA. CONS. STAT. § 6337 (2004); TEX. FAM. CODE ANN. § 107.013(a)(1) (West 2004); see also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33-34 (1981) (holding that the Due Process Clause does not require the appointment of counsel for indigent parents in termination of parental rights proceedings, but stating in dictum that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well," and noting that at that time "33 States and the District of Columbia provide[d] statutorily for the appointment of counsel in termination cases").

32. See, e.g., FLA. STAT. ANN. § 39.801.

33. See, e.g., 705 ILL. COMP. STAT. 405/1-5.

34. See, e.g., *id.*; 42 PA. CONS. STAT. § 6338(a).

35. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (amending sections 420-27 and 471-79(a) of the Social Security Act) (codified as amended in scattered sections of 42 U.S.C.).

36. See *id.* § 103, 94 Stat. at 519 (codified at 42 U.S.C. § 625 (a)(1) (2000)).

37. See *id.*

38. See *id.* (listing goals, including "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible").

39. See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 35-38 (2005); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The Court stated in *Parham*:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making

expertise.⁴⁰ Thus, parents' rights create a buffer around parental decisionmaking: Unless parents make decisions that transgress certain limits, the state does not second-guess those decisions. This protection from state intervention, moreover, safeguards cultural and moral diversity in matters of childrearing by ensuring the state does not impose a uniform view of parenting.⁴¹ This diversity, in turn, serves democratic principles.⁴² Parents' rights also protect parents from state intervention on impermissible grounds, such as race, or for improper reasons, such as preferring one set of parents over another purely for the material benefits available from the alternative family. Such protections may be all that is available to a family otherwise vulnerable to state intervention.⁴³ Finally, procedural protections designed to protect parents' rights ensure the opportunity to counter the state's allegations of abuse and neglect, which is particularly important in light of the widespread dehumanization of parents involved in the child welfare system.⁴⁴

life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id.

40. See Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 33 (arguing that "relative competencies" should guide the allocation of developmental control between parent and state, giving parents greater control over matters with only private effects, and the state control over matters in which the state has a direct stake, such as education, which affects an individual's ability to participate in and contribute to "a healthy democracy and economy").

41. *Id.* at 27 (noting that leaving the upbringing of children to private actors "would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation"); see also Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 160 (1988) ("[T]here is a sense in which the whole rights approach itself is an elaborately constructed means of promoting pluralism.").

42. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 959 (1993). Dailey writes:

The family's role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes As the locus of potential political resistance, the family acts as an important institutional check on the power of the state to mold citizens in its own image.

Id.

43. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 758–87 (2001).

44. See Symposium, *The Rights of Parents With Children in Foster Care: Removals Arising From Economic Hardship and the Predictive Power of Race*, 6 N.Y. CITY L. REV. 61, 67–68 (2003). Martin Guggenheim stated:

It is the element of hatred that I wish to mention for a minute. There is a shocking presumption generated by fear, by otherness, by a lot of things—that the parents of children in foster care are bad for their children. They don't love them enough or they don't have the ability enough to raise them well. And I'm here to say that in my 30 years of work in this field, that is the most despicable slander of all, and the most difficult falsity to refute.

Id. at 74.

B. Children's Rights

As with parents' rights, the idea of children's rights has a deep (if more recent) provenance, has led to legislation recognizing the interests of children, and increasingly commands its own adherents in the legal academy. The chameleonic term "children's rights" may be invoked to justify various ends. In the child welfare context, children's rights are sometimes asserted against a parent, as a claim to be free from abuse or neglect, and sometimes against the state, as a claim against unnecessary state intervention that deprives a child of her right to remain with her biological parent.⁴⁵ In this section, I describe both strains of children's rights—which I term protectionist children's rights and preservationist children's rights—and discuss the ways in which the child welfare system recognizes and advances the claims of each.⁴⁶

Some scholars and advocates invoke protectionist children's rights as a counterweight to their perception that the parents' rights model of child welfare fails to protect children.⁴⁷ To such scholars and advocates, the organizing principle of the child welfare system should be a child's need for safety and permanence, not a parent's right to the care and custody of a child.⁴⁸

The call for protectionist children's rights is not new. In the nineteenth century, courts began to modify the view of divine parental authority

45. Annette Appell describes the difference between these two strains of children's rights as follows: rights that are akin to civil rights (such as the right to equal protection in education and at least a limited right to free speech) and rights that are better understood as dependency rights (located in a parent's responsibility to provide for a child and the concomitant right of the state to oversee parents in this regard). See Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 154–61 (2004); see also Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 20 (1986) ("[R]ights represent the coinage of opposition to two kinds of power: the power of the parents and the power of the state."). Appell notes the distinct difference between the two strains, arguing that dependency rights "arise out of the child protection strain of *parens patriae* doctrine, a tradition essentially aimed at social control, rather than tolerance or liberation, of non-dominant populations and, of course, women." Appell, *supra*, at 141.

46. In his recent book, *What's Wrong With Children's Rights*, Martin Guggenheim ruefully describes the split among children's rights advocates, noting that those who espouse protectionist children's rights typically are considered "true" children's rights advocates, whereas those who espouse preservationist children's rights (my labels, not his), are more commonly associated with parents' rights—that is, they are not seen as advancing the interests of children. See GUGGENHEIM, *supra* note 39, at 180.

47. See, e.g., *id.* at 34 (describing the growth of the children's rights movement as a reaction to the traditional doctrine of parents' rights).

48. Although this child-centered orientation is not outcome determinative, and could lead to reunification with a biological parent, the strongest supporters of child protection typically favor intervention and removal. See *infra* text accompanying notes 67–69.

to control children.⁴⁹ Instead, courts located the authority to control children as part of a parent's civic duty and with the understanding that the child was a future citizen. In this view, the state played a role in regulating parental authority by ensuring such authority was exercised in the interests of children and the public.⁵⁰ Not coincidentally, at the same time courts were articulating a new relationship among parents, children, and the state, there was a growing societal awareness of the rights of children independent of their parents. For example, the 1850s saw the beginning of a "child-saving" movement, in which thousands of poor immigrant children living in cities were sent to live on farms in the West, or were provided foster homes and schooling.⁵¹ By the end of the nineteenth century, the child-saving movement extended to removing abused children from their homes.⁵² The justification for this removal was framed as community control and, new to the consciousness, "children's rights":⁵³ Instead of viewing children as the property of fathers, property that could be used and abused, child-savers developed a language of children's rights, a notion that justified their actions.⁵⁴

This increased focus on children has shaped two notable aspects of the present child welfare system. First, nearly every state now requires the appointment of an advocate for a child in child welfare proceedings before a court.⁵⁵ Under federal law, such appointments are required as a condition of receiving federal funds.⁵⁶ These advocates, termed guardians ad litem in the federal law (and defined by federal law as either an attorney or a court appointed special advocate), typically represent the child's best interest, although state schemes vary.⁵⁷ The use of advocates for children does not

49. See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (G. Edward White ed., 1985).

50. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737–39 (1988); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1038 (1992).

51. See SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 131–32 (2003); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 69–87 (2004).

52. See Woodhouse, *supra* note 50, at 1052.

53. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880–1960*, at 46–57 (1988) (discussing the general claim by child protection organizations that they spoke for children's rights); Woodhouse, *supra* note 50, at 1052.

54. See Fineman, *supra* note 50, at 737–38; Woodhouse, *supra* note 50, at 1052.

55. See Howard Davidson, *Supervising and Administering the Family: Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 768–69 (1999).

56. See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(b)(2)(G), 88 Stat. 4, 7 (codified at 42 U.S.C. §§ 5101–5107 (2000)); see also 42 U.S.C. § 5106a(b)(2)(A)(xiii), § 5106a(a)(2)(B)(ii).

57. See Davidson, *supra* note 55, at 768–69.

necessarily reflect a protectionist or preservationist view of children's rights,⁵⁸ but it does reflect an attempt to give the child a voice in the legal proceeding.

Second, recent changes in federal law emphasize the child's health and safety as paramount concerns of the child welfare system, rather than family preservation. In 1997, both Congress and the Clinton Administration determined that the child welfare system was not serving the interests of children because family preservation efforts were keeping some children in dangerous homes, the problem of "foster care drift"—the term used to describe both long stays in foster care and placement in multiple homes—was getting worse, and children would be better served by promoting adoption rather than family preservation.⁵⁹ Congress acted on these concerns with the Adoption and Safe Families Act (ASFA).⁶⁰ In ASFA, Congress determined that permanency for the child was more important than preservation of the biological family.⁶¹ Congress therefore changed the laws governing child welfare to promote the adoption of children in foster care. To this end, Congress set strict time limits on how long a state agency could continue to work with the biological family, requiring states to commence proceedings to terminate parental rights for children who had been in foster care for fifteen of the most recent twenty-two months.⁶²

58. See Martin Guggenheim, *Ethical Considerations in Child Welfare Cases: Duties of the Law Guardian and the Parent's Attorney*, in CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 1988, at 657, 664 (PLI Litig. & Admin. Practice, Course Handbook Series No. C4-4220, 1998) (noting that children have the right "to remain in their parents' custody unless their parents have been inadequate," but also that children "have the right to be protected from their parents when their parents fall below the minimal standard of care established by law").

59. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 643, 646–50 (1999).

60. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. §§ 620–632, 670–679).

61. The Act conditioned federal funds on states developing a foster care and adoption assistance plan in which "the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A); accord Davidson, *supra* note 55, at 771 (noting that this provision was "based on [the] fear that AACWA had been too focused on parental rights, thus risking the lives of some children"). As one commentator has stated, the requirement that a child's interests take precedence over the parent "places the potential conflicts of interest between children and their parents . . . in stark relief." Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 178 (2004).

62. See 42 U.S.C. § 675(5)(E). Under the law, states are required to make "reasonable efforts" to "preserve and reunify families," see *id.* §§ 671(a)(15)(B), 672(a)(1), but if reunification is not possible, states must make "reasonable efforts . . . to place the child in a timely manner in accordance with the permanency plan." *Id.* § 671(a)(15)(C). There are three statutory exceptions to the requirement that states make reasonable efforts to preserve or reunify a family. See *id.* §§ 671(a)(15)(D)(i)–(iii) (providing for the immediate removal of a child if the parent has subjected the child to aggravating circumstances, including abandonment, torture, chronic abuse, and sexual abuse; the parent has murdered another child; or the parent's rights have been involuntarily terminated with respect to another child).

Many legal scholars advocate protectionist children's rights as the solution, or best approach, to the problems of the child welfare system. Elizabeth Bartholet takes perhaps the most uncompromising stance, decrying what she terms a "blood bias"⁶³ in the current child welfare system, and arguing that the system inadequately protects the well-being of children. She contends that a cult of family autonomy—perpetuated and protected by both ends of the political spectrum⁶⁴—and an unwavering devotion to same-race and kinship placement, compromise children's best chances for being raised in a stable family home.⁶⁵ Bartholet argues for an expansion of the "village" responsible for raising the child: from the extended family and community to the entire society.⁶⁶ To this end, Bartholet recommends that society err on the side of intervening in a family, contending that under-intervention bedevils the current child welfare system.⁶⁷ Society first should attempt to prevent child abuse and neglect, and, failing such prevention, Bartholet urges prompt removal of children from abusive and neglectful homes, expedited termination of parental rights, and placement of these children in adoptive homes.⁶⁸ As she summarizes her view:

The most extreme forms of intervention work best for children. Children placed in foster homes do better than children whose families are kept together, and children placed in adoptive homes do better yet. They would do even better if we moved them on to adoption promptly, rather than subjecting them to the kind of damaging delays that routinely occur in today's system.⁶⁹

In my view, advocates of protectionist children's rights typically are motivated by the well-documented adverse effects of abuse and neglect on children,⁷⁰ and two assumptions. First, a fundamental political and economic reorientation of our society to help low-income families is not forthcoming. Second, the current rights-based system of child welfare is not going to change. Based on these assumptions, protectionist children's rights

63. BARTHOLET, *supra* note 7, at 7.

64. *See id.*

65. *See id.* at 4–8, 13.

66. *See id.* at 2–4.

67. *See id.* at 99.

68. *See id.* at 199–201.

69. *Id.* at 110.

70. *See, e.g.,* Martin H. Teicher, *Wounds That Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM 50, 50–67 (2000). For a summary of this research, see Martin H. Teicher, *Scars That Won't Heal: The Neurobiology of Child Abuse*, SCI. AM., Mar. 2002, at 68 (discussing a recent study demonstrating that maltreatment during formative years can affect the development of the brain in ways that cannot later be cured).

advocates tip the balance between family preservation and child protection heavily in favor of intervention to protect the child.⁷¹

In contrast to the protectionist strain of children's rights, the preservationist strain of children's rights reflects the view that unnecessary state intervention in the family violates a child's right to remain with her biological parent. In this way, family preservation reflects both parents' rights (not to have a child removed unnecessarily) and children's rights (not to be removed unnecessarily). The Supreme Court has acknowledged, if not fully recognized, this preservationist view of children's rights. For example, in *Santosky v. Kramer*,⁷² the Court began its analysis of the burden of proof required by the Fourteenth Amendment in a proceeding to terminate a parent's rights by recognizing the right of a parent to the care and custody of a child.⁷³ The Court then stated that, until the state demonstrated parental unfitness, "the child and his parents *share* a vital interest in preventing erroneous termination of their natural relationship."⁷⁴

Some legal scholars contend that preservationist children's rights are essential to the well-being of children. For example, Martin Guggenheim decries the split among advocates of children's rights, contending that preservationists care deeply about children.⁷⁵ As Guggenheim argues, and as I

71. Other scholars have taken the call for children's rights to even greater lengths. For example, James Dwyer has argued for the complete abrogation of parents' rights, contending that protectionist children's rights should be the basis for protecting the interests of children, with only a child-rearing *privilege* residing in parents. See Dwyer, *supra* note 2, at 1373–76. Although Dwyer develops his approach in the context of parents' religious rights, he does not limit the applicability of his theory to this context. In another article, he suggests that a "best interests" standard may be a more appropriate standard to govern the termination of parental rights. See, e.g., James G. Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053, 1067 (1999). Both Dwyer and Bartholet argue that the construction of parents' rights as a barrier to state intervention, although widely accepted, has been roundly rejected in what they argue is the analogous circumstance of domestic violence. See *id.* at 1060, 1063; BARTHOLET, *supra* note 7, at 7–8.

72. 455 U.S. 745 (1982).

73. *Id.* at 753.

74. *Id.* at 760 (emphasis added); accord *id.* at 765 (noting that the appellate court's theory that a lower standard "properly allocates the risk of error *between* the parents and the child . . . assumes that termination of the natural parents' rights invariably will benefit the child. Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination."). Similarly, in *Parham v. J.R.*, the Court addressed the procedural due process requirements necessary when a parent commits a minor to a mental hospital for treatment. See 442 U.S. 584 (1979). The Court addressed a concern with a formalized, adversarial hearing reviewing the parent's decision, noting that "requiring a formalized, factfinding hearing . . . poses [] significant intrusion into the parent-child relationship. Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child." *Id.* at 610.

75. See GUGGENHEIM, *supra* note 39, at 180–81; see also ROBERTS, *supra* note 9, at 257 ("What is advocated as benefiting children in foster care contradicts the traditional understanding of children's need to maintain a relationship with their parents."); Naomi R. Cahn, *Children's*

discuss in greater detail below,⁷⁶ the foster care system is not populated solely with severely abused or neglected children who are placed in foster care because of serious threats to their safety.⁷⁷ Rather, most children are removed unnecessarily from their homes.⁷⁸ He concludes that “[t]he ease with which children enter foster care and the needless time they spend there should be among the highest concerns of those who care about children’s well-being.”⁷⁹

Thus, the debate about the appropriate balance of children’s rights and parents’ rights in the child welfare system is more accurately described as one between family preservationists (those who disfavor intervention with a bias toward removal) and child protectionists (those who favor more aggressive state intervention). Both sides criticize the other for undervaluing the welfare of children.⁸⁰

C. Alternatives and Compromises

Some scholars have tried to formulate alternatives to the stark choices between parents’ rights and children’s rights, or between family preservation and child protection. One move to distance the debate from rights talk is to posit a theory of children’s *interests*, rather than rights, because, the argument goes, children are not well served by rights.⁸¹ It has also been

Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189, 1206 (1999) (“Respecting families does not mean jeopardizing children. It is not a choice in which we respect either parents or children; their rights generally do not conflict. Instead of reifying a dichotomy between the interests of parents and the interests of children, we should recognize that, in most cases, they overlap significantly.”).

76. See *infra* text accompanying notes 149–154.

77. See GUGGENHEIM, *supra* note 39, at 192–96.

78. See *id.*

79. *Id.* at 195.

80. See, e.g., BARTHOLET, *supra* note 7, at 237 (“We make family preservation the primary goal even after serious abuse and neglect have been identified, with little regard to whether this serves children’s interests. We pretend that . . . parents’ interests and children’s interests can be equated, when we know better.”); GUGGENHEIM, *supra* note 39, at 208 (“In far too many cases, I have come to conclude that [the] person who cares most about the children who are the subjects of the case is my client—the one regarded by everyone else as the child’s greatest enemy. . . . Most disturbing of all, this unstated judgment of the parents’ unsuitability has been disguised and translated into a children’s rights claim.”).

81. A focus on interests has led some commentators to argue, for example, that children do better in two-parent households, and therefore that the law should not focus on rights but instead attempt to fortify relationships between parents by strengthening the institution of marriage. Lynn Wardle contends that rights talk diminishes the role of the family and that “[c]hildren’s rights advocates often are too quick to give up on families.” Lynn E. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 331 (1996); *accord id.* at 343–48 (arguing for the strengthening and protection of marriage, not as a panacea for all

argued that, as a strategic matter, a theory of children's interests will be more palatable to adult decisionmakers. These decisionmakers will identify with other adults, such as parents, and therefore may be hostile to a concept of children's rights because such rights will be perceived as diminishing the rights of adults.⁸²

Beyond changes to the nomenclature, some scholars have suggested specific changes to the legal system. For example, Marsha Garrison has argued for an accommodation between seeking a stable, permanent home for the child and continued contact with the biological parent.⁸³ She contends that even when reunification is not feasible and a child's need for permanence may justify depriving the parent of her right to custody, there is still room for a continued relationship between the biological parent and child.⁸⁴ In her view, there need not be an all-or-nothing approach to the termination of parental rights, and complete termination of such rights may, in many cases, be damaging to children. Garrison has proposed a higher standard for the complete termination of parental rights: Such termination may occur "only after a judicial finding that the child will otherwise suffer specific, significant harm and that any alternative short of termination will not avert that harm."⁸⁵

Barbara Bennett Woodhouse contends that parents are the trustees, not owners, of their children.⁸⁶ She argues that replacing "rights talk" with the language of parental obligation would focus the system on children rather than adults.⁸⁷ Woodhouse argues that a parent should have to earn a stake

problems facing children, but as one proven method for protecting children because children in two-parent homes do far better on all indicators than children from single-parent homes). Bruce Hafen has argued that recognizing children's rights—a claim for "democratic egalitarianism among all family members"—diminishes parents rights, and that such rights reinforce parental authority, which serves children's interests because it provides security, role-modeling, socialization, and leadership in the family. See Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 654.

82. See Martin Guggenheim, *Maximizing Strategies for Pressuring Adults to Do Right by Children*, 45 ARIZ. L. REV. 765, 774–78 (2003).

83. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 446–55 (1983). Garrison notes that permanency is the value most often cited in support of a child-oriented child welfare system. See *id.*

84. See *id.*

85. *Id.* at 425.

86. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1755 (1993) [hereinafter Woodhouse, *Hatching the Egg*]; see also Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 321 (1994) [hereinafter Woodhouse, *Out of Children's Needs*]. Woodhouse terms this perspective "generism," which she defines as a focus on the next generation rather than the present generation.

87. See Woodhouse, *Out of Children's Needs*, *supra* note 86, at 321.

in her child's life; that it should not be granted automatically as an incident of procreation.⁸⁸ Importantly, Woodhouse believes that "a child-centered perspective calls for a rhetoric that speaks less about competing rights and more about adult responsibility and children's needs," and therefore she consciously avoids the term "children's rights."⁸⁹ In the context of the child welfare system, Woodhouse has proposed an environmentalist model for child welfare that focuses on the ecology of the child, rather than the child as an isolated individual.⁹⁰

To address the reality that adults will still make decisions, even if doing so in a child-centered fashion,⁹¹ Elizabeth Scott and Robert Scott have argued for a fiduciary model of parenting in which parents are viewed as agents exercising their legal responsibility to protect their children, who, because of their age, are unable to act in their own best interests.⁹² Scott and Scott contend this model would serve the interests of both parents and children because it would encourage parents to act in the interests of children; to the extent parents do so, they would be rewarded with legal deference to their choices.⁹³ Although Scott and Scott conclude that family law generally accords with this principle,⁹⁴ they point out that this is less true in the child welfare context, where courts' reluctance to terminate parental

88. See Woodhouse, *Hatching the Egg*, *supra* note 86, at 1754, 1757 (arguing that the generism model "affirm[s] the centrality of children to family and society" and "defin[es] parenting as the meeting of children's needs").

89. *Id.* at 1841. Woodhouse distinguishes the civil rights movement and feminism, both of which sought to gain rights equal to white men, because of the unique position of children as nonautonomous beings. As she notes, children, while they remain children, do not "and likely never will directly exercise individual rights or collective political power." *Id.* at 1843.

90. See Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Child Welfare: An Environmentalist Paradigm*, 2004 CHI. LEGAL F. 85, 85 ("I would replace the paradigm in which parents and the state are pitted against each other with a paradigm in which parents and the state act as partners in ensuring an environment conducive to children's healthy development."). Woodhouse terms this approach "ecogenerism." See *id.* at 86.

91. See Guggenheim, *supra* note 82, at 781 ("[T]he [children's] rights discourse of the past thirty-five years masks the reality that children will never be given things by adults that adults do not want them to have."). Elizabeth Scott and Robert Scott note that:

Simply shifting the focus of legal regulation toward greater protection of the needs of children is unhelpful, in our view. This is so not because such a perspective misunderstands the social goals that drive the regulation of parent-child relationships, but rather because a child-centered approach, standing alone, will not lead reliably to legal rules that effect those objectives. . . . This goal is more likely to be achieved if the law focuses principally on the relationship between parent and child, rather than on the child's needs per se. Parents are not fungible child rearers.

Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2414–15 (1995).

92. See Scott & Scott, *supra* note 91, at 2401–03.

93. See *id.* at 2439–41, 2462–63.

94. See *id.* at 2462.

rights dilutes “the law’s instrumental function of encouraging parental commitment.”⁹⁵ In the child welfare context, Scott and Scott note that the typical criticism that states do not terminate parental rights because of deference to those rights is oversimplified. In their view, the threat of termination usefully motivates parents who are willing and, more importantly, able, to regain custody. But, as Scott and Scott describe, another category of parents exists: those parents who have lost custody of their children and are unable to make the necessary changes to their lives to regain custody, but who nonetheless maintain a significant relationship with their children. For these parents, courts often do not terminate parental rights, thus undercutting the threat of termination for all parents. These mixed messages prevent the child welfare system from living up to the fiduciary ideal.⁹⁶

Although these innovative perspectives move beyond the all-or-nothing aspect of the debate over parents’ rights versus children’s rights, as proposals they lack methods for meaningful implementation. In the current adversarial system, there is little room to craft alternatives to rights, or new accommodations between the rights of parent and child, between preservation and protection. Before searching for a new model that would better facilitate an alignment between parents, children, and the state, I will present my own arguments for rejecting the rights-based framework. As I show in Part II, the focus on rights simply does not serve families well and should not take center stage in the majority of cases.

II. LIMITATIONS OF THE RIGHTS-BASED MODEL

Despite the theoretical promise of parents’ rights and children’s rights (both preservationist and protectionist strains), rights do not sufficiently protect parents or children. A solely rights-based approach to the issues that surface in the child welfare system is misguided and, for the majority of cases, fails to devise effective solutions for parents or children. This part explores why this is, first identifying three failures of rights as implemented, and then examining two conceptual shortcomings of rights.

Before exploring the limitations of rights in the child welfare system, however, I want to clarify the cabined nature of my critique. First, I limit my critique to the context of the child welfare system. For example, I do not intend to undervalue the importance of rights to claims of racial and

95. *Id.* at 2469.

96. *See id.* at 2468–69.

gender equality.⁹⁷ Second, parents' rights and preservationist children's rights play a crucial role in the child welfare system, creating an important divide between the state and the family. I do not advocate weakening this divide such that it is easier for the state to insert itself into the lives of families, especially poor families.⁹⁸ Instead, my argument concerns the state's interaction with families who are already in the system. The argument assumes the state already has demonstrated an adequate need to intervene. My point is that some families face real problems—substance abuse, seriously inadequate housing, lack of appropriate child care—and that these problems can lead or contribute to child abuse and neglect. The issue is how the state will address these problems. In such cases, a myopic focus on rights risks obscuring the larger picture of the issues affecting families in the child welfare system, in turn doing a considerable disservice to both parents and children. Thus, my critique is largely about the incompleteness of parents' rights and children's rights, not the absolute disutility of such rights.

A. The Failure of Rights as Implemented

This subpart sets aside the question of the utility of rights as a conceptual matter, and instead examines the rights-based model as it is currently implemented. Looking at rights through this real world lens, I conclude that a solely rights-based system does not produce good results for parents or children. I focus on three main limitations of rights as implemented: the failure of rights to protect sufficiently against racially and politically driven decisionmaking, the limited effectiveness of procedural safeguards and court adjudications, and the high cost to children of state intervention.

Rights do not protect against racially and politically driven decisionmaking. As implemented, rights do not prevent state intervention based on impermissible grounds, such as race. It is undisputed that racial disparities in the child welfare system exist and are marked. For example, in 2002, although African American children accounted for 15 percent of all children in the

97. See, e.g., CATHARINE A. MACKINNON, SEX EQUALITY 216–47 (2001) (setting forth cases recognizing the right to sex equality); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–58 (1988) (critiquing critical legal scholars for discounting the importance of rights to advancing claims of racial equality).

98. See Appell, *supra* note 43, at 686 (critiquing various proposals to weaken parents' rights by arguing that such proposals do not sufficiently protect families who are most vulnerable to state intervention).

U.S., they accounted for 25 percent of substantiated maltreatment reports.⁹⁹ By contrast, white children accounted for 79 percent of all children and 51 percent of substantiated reports.¹⁰⁰ African American children enter foster care at a higher rate¹⁰¹ and leave at a lower rate.¹⁰²

The cause of these racial disparities is a hotly contested issue. Some scholars contend the disparities are due to racial bias.¹⁰³ Indeed, there is evidence that African American children are removed at greater rates than similarly situated white and Latino children,¹⁰⁴ and receive less effective services.¹⁰⁵ Other scholars contend that the disparities are explained by differential poverty rates.¹⁰⁶ If the disparities are the result of racial bias, then it is clear that, as implemented, parents' rights and preservationist children's rights are not sufficiently protecting African American families from such bias. If the disparities are due to poverty, rights are still not the proper tool for protecting parents and children.¹⁰⁷

Additionally, removal of children is often heavily influenced by political and social forces. For example, there is evidence that foster care placements

99. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 3 (2003).

100. *Id.*

101. Eight African American children for every 1000 enter foster care, versus three white children for every 1000. See Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, CHILD TRENDS RES. BRIEF (Child Trends, Washington, D.C.), Dec. 2002, at 1, 2 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., GREEN BOOK 2000).

102. Thirty-three percent of African American children left foster care in 1999 versus 53 percent of white children. See *id.* at 1.

103. See ROBERTS, *supra* note 9, at 47.

104. See *id.* at 47–49.

105. See CHILDREN'S BUREAU, *supra* note 99, at 8.

106. Naomi Cahn, while agreeing with Roberts that African American children are overrepresented in the child welfare system, argues that this overrepresentation could be attributed to poverty and not racial bias because the poverty rate for African American households is almost double the rate for white households. See Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 LAW & SOC'Y REV. 461, 474–75 (2002). Roberts rebuts the poverty explanation by arguing that poverty cannot account for the overrepresentation of African American children because equally poor Latino children are less likely to be involved in the child welfare system than their African American counterparts. See ROBERTS, *supra* note 9, at 48. She notes that African American and Latino children in San Diego, for example, have a similar socioeconomic status, but their rates of representation in the child welfare system are very different. Latino children were involved in the system "at a rate identical to their proportion of the population [however] African American children were overrepresented in foster care at a rate six times their census proportion." *Id.* (citing Ann F. Garland et al., *Minority Populations in the Child Welfare System: The Visibility Hypothesis Reexamined*, 68 AM. J. ORTHOPSYCHIATRY, 142, 145–46 (1998)). Moreover, the relationship between poverty and racism is complex. See, e.g., Michael Katz, *Reframing the Class Debate*, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER AND POLITICS 59 (Louis Cushnick & James Jennings eds., 1999).

107. See *infra* text accompanying notes 155–172.

soar in the aftermath of well-publicized cases of abuse,¹⁰⁸ and placement rates vary from state to state, even when the states are geographically proximate, and economically and politically similar.¹⁰⁹ State agencies also are more likely to err on the side of caution when determining if abuse or neglect has occurred, thus leading to the removal of many children who could have stayed home.¹¹⁰ If rights were sufficiently protective in practice, such variances would not occur because only considerations pertaining to particular parents and children, not external political and social factors, would affect the decision.

Procedural safeguards and court adjudications are insufficiently protective of parents. Procedural safeguards that should, in theory, guard against improper removals are virtually meaningless for many parents because they are often bypassed in real life. For example, most procedural protections, such as the assistance of counsel, are not triggered during the early and often dispositive stages of a case.¹¹¹ Parents often consent to a “voluntary” arrangement, agreeing to participate in specified programs and sometimes placing a child with an extended family member, in exchange for the state not placing the child in foster care.¹¹² Or a parent may agree to the placement

108. See John Courtney et al., *Aggressive Prosecutions Flooding the System*, CHILD WELFARE WATCH (Ctr. for an Urban Future, New York, N.Y.), Winter 1999, at 4, 4 (documenting a 55 percent increase in filings of neglect cases and a 57 percent increase in filings of abuse cases from 1995 to 1998 following the well-publicized death of Elisa Izquierdo, a six-year-old girl subjected to fatal abuse by her mother).

109. See *id.*

110. See GUGGENHEIM, *supra* note 39, at 194. Guggenheim states:

Courts and government reports alike regularly conclude that the current scheme results in a bias toward over-reporting and over-labeling child abuse and neglect. Indeed, one federal study found that investigators are more than twice as likely to “substantiate” a case erroneously than to mislabel a case “unfounded.” Moreover, many studies have found that as many as two-thirds of those cases labeled “substantiated” do not involve serious charges.

Id. Peggy Cooper Davis and Gautam Barua describe what they termed the “sequentiality effect” of custodial decisionmaking in the child welfare system, arguing that decisions made at one stage of the proceedings will be repeated and reinforced at later stages in the proceeding, regardless of the correctness of the first decision. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 146 (1995). Davis and Barua further conclude that “interim decisions [in child welfare proceedings] are more likely to err on the side of intervention” and removal of the child, therefore this bias persists and is compounded as the case proceeds. *Id.* at 157.

111. For example, initial investigations of abuse and neglect, which are often conducted by caseworkers with minimal or nonexistent training, put parents at a disadvantage. See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 7 (2d ed. 2004); Emily Buss, *Parents’ Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 433 (1996). Knowing that their ability to retain custody of a child is at stake, parents often cooperate with the investigation rather than resisting it from the start. See *id.* Parents do not have the assistance of counsel or the oversight of a judge when responding to the investigations. See *id.* at 434.

112. See Buss, *supra* note 111, at 434.

of a child with child protective services for up to six months, during which period there is no court review.¹¹³ Although these cases are ultimately reviewed by a court, any unnecessary placement negatively affects both parent and child.¹¹⁴

If and when a parent makes it into court, she is unlikely to receive meaningful review of her case. Lawyers for parents often do not provide adequate representation,¹¹⁵ and most courts simply do not have sufficient time or resources to dedicate to these cases. Consider one anecdotal description of family court:

In many jurisdictions, particularly those in large urban areas, the courts are overwhelmed by the size of their caseloads: Overtaxed judges hear “lists” of up to 100 cases a day, giving each case a maximum of five minutes. Families are sworn in *en masse* at the bar of the court, with little sense that what they say to the judge thereafter constitutes sworn testimony, rather than a free-for-all conversation. Judges bark at the parties, calling parents “Mom” or “Dad,” rather than by their names. Orders typically are entered without any articulation of findings of fact, conclusions of law, or even a recitation of the relevant legal standards in justification. If a party determines that she needs more than five minutes of the court’s attention to resolve a disputed issue—even an issue as important as whether a child should remain in foster care, whether a parent should be allowed to visit her child, or whether the state should be required to provide the parent with supportive services—she will have to wait months to get a new date in court.¹¹⁶

Thus, although parents’ rights theoretically entitle parents to certain procedural safeguards and court review of the state’s actions, in practice these entitlements offer little protection due to “voluntary” arrangements, overburdened courts, and poor counsel.

113. See *id.*

114. See LINDSEY, *supra* note 111, at 171 (finding that parents who have their children placed in foster care are less likely to receive the services they needed in the first place, thus exacerbating the problem). Buss concurs, observing:

While these cases will eventually be reviewed by a court, the damage to the parents and child of an inappropriate removal will already have been done. At a minimum, the families will have suffered up to six months of inappropriate separation. At a maximum, the removal will accelerate whatever problems the parents were having and undermine an already troubled relationship between parent and child.

Buss, *supra* note 111, at 434.

115. Although there are notable exceptions, many appointed counsel provide poor representation. See Buss, *supra* note 111, at 437.

116. *Id.* at 434–35 (footnotes omitted). But see Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 376–96 (1999) (describing the dangers of informal dispute resolution processes in child welfare and arguing in favor of, at least in the absence of a better alternative, the current procedural safeguards).

The state intervention required to enforce protectionist children's rights comes at a high cost to children. Protectionist children's rights, while appealing in theory, do not necessarily protect children. To begin, despite the widespread appointment of guardians ad litem and the changes required by ASFA, the child welfare system does not serve the vast majority of children well. As discussed more fully below, only about 10 percent of cases in the child welfare system involve severe abuse or neglect.¹¹⁷ For these children, removal and placement in a foster home is likely the best outcome because of the danger in the home. But for the remaining cases, although some intervention may be necessary, intervening by removing the child and placing her in foster care comes at high cost.

In addition to the pain associated with the (even temporary) loss of a biological family, consider the impact on a child of living in foster care. Once a child is placed in foster care, she is likely to remain there for nineteen months, with a substantial likelihood she will remain in care for three, four, or even five years.¹¹⁸ Approximately half of the children in foster care return to their biological families, but of the remaining children, only 18 percent are adopted; the remainder live with relatives, are emancipated, or live in legal limbo.¹¹⁹ Children who are freed for adoption often must wait years¹²⁰ before being adopted because there are not enough adoptive families.¹²¹ Therefore, adoptions do not keep pace with the terminations of parental rights.

117. See *infra* text accompanying notes 149–154.

118. Although the average stay in foster care is nineteen months, 11 percent of children remain for two to three years, 11 percent remain for three to four years, and 9 percent remain in care for five or more years. See NAT'L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE NATIONAL STATISTICS 4 (2003).

119. Fifty-five percent of the children who leave foster care return to live with their biological families, 18 percent are adopted, 11 percent live with a relative or guardian, 8 percent are emancipated, 4 percent have legal guardians, and the remainder are in legal limbo. See AFCARS FY 2003 ESTIMATES, *supra* note 16, at 3. The children in "limbo" were transferred to another agency or were runaways. See *id.* An emancipated child in the context of child welfare means a child who is not adopted or reunited with a biological parent, but rather moves from foster care to independent living. In 2001, 19,000 children "aged out" of foster care, becoming "emancipated" adults. See Wertheimer, *supra* note 101, at 1.

120. In 2003, there were 119,000 children awaiting adoption. See AFCARS FY 2003 ESTIMATES, *supra* note 16, at 4. Children waited an average of forty-four months for an adoptive home after parental rights were terminated, see *id.*, and a significant portion of children waited even longer (23 percent waited thirty-nine to fifty-nine months, and 24 percent waited sixty months or longer), see *id.* The report defines "children waiting to be adopted" as those "who have a goal of adoption and/or whose parental rights have been terminated. Children 16 years old and older whose parental rights have been terminated and who have a goal of emancipation have been excluded from the estimate." *Id.*

121. For example, in 2003, although 68,000 children had their parental rights terminated, only 50,000 were adopted out of foster care. See *id.* at 3, 5.

Children in foster care face many difficulties, both while in care and later as adults. A child in foster care is often moved from one home to another.¹²² Even if eventually reunified with a biological parent or placed in an adoptive home, children who were once in foster care typically suffer economic, educational, and psychological hardship.¹²³ Indeed, a recent study found the rate of post-traumatic stress disorder (PTSD) among adults previously placed in foster care to be twice as high as the incidence in combat veterans.¹²⁴ In addition to PTSD, former foster care children suffer from depression, social phobia, panic syndrome, and anxiety disorders.¹²⁵ Even if the removal is temporary, the experience of being removed from a home is deeply traumatizing to a child.¹²⁶

122. See PEW COMM'N ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 9 (2004) (reporting that in 2002, 44 percent of children exiting foster care lived in one home, 22 percent lived in two homes, 27 percent lived in three or more homes, and 10 percent lived in five or more homes).

123. Children in foster care exhibit significantly more behavioral and adaptive functioning problems than children in the general population. See June M. Clausen et al., *Mental Health Problems of Children in Foster Care*, 7 J. CHILD & FAM. STUD. 283, 284 (1998). Seventy-five to 80 percent of school-aged children in foster care score in the problematic range of behavior problem and social competence domains of the Child Behavior Checklist. See *id.* at 292. Furthermore, children who have been placed in foster care are also at risk of developmental problems, such as gross motor, fine motor, and cognitive delays. See Molly Murphy Garwood & Wendy Close, *Identifying the Psychological Needs of Foster Children*, 32 CHILD PSYCHIATRY & HUM. DEV. 125, 126 (2001). The long-term outcomes are particularly poor for children emancipated from foster care (youth who are not adopted or reunited, but rather transition from foster care to independent living). About half of these children do not finish high school, have histories of job instability, and are paid less than their nonfoster care peers. See Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK J. 419–40 (1990); Ronna J. Cook, *Are We Helping Foster Care Youth Prepare for Their Future?*, 16 CHILD. & YOUTH SERVS. REV. 213–29 (1994); Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685 (2001); Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 19* (2005), available at http://www.chapinhall.org/article_abstract.aspx?ar=1355&L2=61&L3=130 (last visited Dec. 15, 2005). As many as 25 percent report being homeless for at least one night, see *id.* at 710; 40 percent report receiving some sort of welfare, see Cook, *supra*, at 219–20; and, perhaps most troubling, 60 percent of young women leaving foster care were pregnant or already parenting within twelve to eighteen months after leaving the foster care system. See *id.* at 222.

124. Press Release, Casey Family Programs, *Former Foster Children in Washington and Oregon Suffer Post Traumatic Stress Disorder at Twice the Rate of U.S. War Veterans, According to New Study* (Apr. 6, 2005) (on file with author).

125. *Id.* This is not surprising given that, on average, children in foster care experience more than fourteen environmental, social, biological, and psychological risk factors that make them vulnerable to psychological problems. See Garwood & Close, *supra* note 123, at 126 (citing M.B. Thorpe & G.T. Swart, *Risk and Protective Factors Affecting Children in Foster Care: A Pilot Study of the Role of Siblings*, 37 CANADIAN J. PSYCHIATRY 616 (1992)).

126. See generally 3 JOHN BOWLBY, *ATTACHMENT AND LOSS* 7–14, 397–411 (1980); 2 *id.* at 13, 245–57 (1973); 1 *id.* at 27–30, 330 (1969) (documenting the psychological and emotional trauma to a child separated unnecessarily from her parent); Wendy L. Haight et al., *Parent-Child Interaction During Foster Care Visits*, 46 SOC. WORK 325, 337–38 (2000) (reporting that a study on parent-child visitation during separation indicates the importance of reducing the time the parent and child are separated because of the disruptive impact of the separation on the parent-child relationship, and the risk of attachment related issues for the child).

These studies often do not control for prior abuse or neglect. Thus, it could be argued that the poor outcomes are a result of abuse and neglect at the hands of the original parent and not because of the subsequent placement into foster care. At the very least, however, it is clear that foster care does not improve the lives of most of the children placed in that system. And there is good reason to believe that foster care is a contributing factor to the poor outcomes studied. While in foster care, there is substantial evidence that children are at risk for additional abuse, particularly sexual abuse. For example, a study in Maryland found that foster families were more likely to be reported for physical abuse, sexual abuse, and neglect than nonfoster families.¹²⁷ Of the abuse and neglect occurring in foster care, nearly half (48.7 percent) involved sexual abuse.¹²⁸ In addition, children in foster care are likely to suffer from medically related neglect. From a sample of foster children in California, New York, and Pennsylvania, the U.S. General Accounting Office estimated that “12 percent of young foster children received no routine health care, 34 percent received no immunizations, and 32 percent had at least some identified health needs that were not met.”¹²⁹

In sum, any theory of protectionist children’s rights necessarily entails greater state intervention in the family, and research demonstrates that such intervention comes at a very high cost to the well-being of children. For children who have suffered severe abuse and neglect at the hands of their biological parents, the foster care system may well be a better alternative. But for children who are removed from their homes for less serious abuse or neglect, placement in the foster care system is seldom a good solution. Although it is tempting to idealize a better home for the child—a loving, stable home with supportive adults—foster care too often fails to provide children with such homes. Further, the experience of being removed from the original home is typically so debilitating, and the ill effects are so long-lasting, that even a supportive foster home cannot compensate for the devastating experience of removal and the loss of a family.

127. See Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577, 581 (1994) (“[F]oster families were almost seven times more likely to be reported for physical abuse as compared to families in the community . . . [and] had a four-fold greater risk of report for sexual abuse. The same families were almost twice as likely to be reported for neglect than nonfoster families.”); see also *id.* at 577–85.

128. See Mary I. Benedict et al., *The Reported Health and Functioning of Children Maltreated While in Family Foster Care*, 20 CHILD ABUSE & NEGLECT 561, 563 (1996). The perpetrator was a foster father or other foster family member in more than two-thirds of the incidents and another foster child in the home in 20 percent of the incidents. See *id.*

129. U.S. GEN. ACCT. OFF., FOSTER CARE: HEALTH NEEDS OF MANY YOUNG CHILDREN ARE UNKNOWN AND UNMET, GAO/HEHS-95-114, at 2 (Washington D.C. May 26, 1995).

* * *

These are just three of the problems with the rights-based model as currently implemented. Certainly others exist.¹³⁰ One question, then, is whether these problems could be fixed while still retaining the rights-based model. It could be argued that an infusion of resources into the child welfare system would correct these problems by, for example, providing adequate counsel for parents and sufficient time for judges to hear cases. While it is possible that additional resources or other changes would at least mitigate the problems, such changes would not address the more fundamental, conceptual shortcomings of rights. It is to these shortcomings that I now turn.

B. The Conceptual Shortcomings of Rights

Regardless of the available resources, a solely rights-based framework is inadequate to address the problems in the child welfare system for two central reasons. First, rights assume autonomy, and most parents in the child welfare system need tangible assistance rather than autonomy.¹³¹ In this way, rights obscure the role of poverty in the child welfare system. Second,

130. For example, the rights-based system leads to a one-size-fits-all child welfare system, rather than context-driven decisions. See Ross, *supra* note 61, at 178–79, 192–93. Concepts of rights determine standards of removal of children. If preference is given to parents' rights and preservationist children's rights, then children will be removed only in extreme circumstances. If preference is given to protectionist children's rights, then children will be removed more frequently. As legal scholars have noted, this is a question of whether the system should be overinclusive or underinclusive. See Margaret F. Brinig & F.H. Buckley, *Parental Rights and the Ugly Duckling*, 1 J.L. & FAM. STUD. 41, 59 (1999) (noting that a disabled child is more likely to be abused than a nondisabled child, particularly if an unrelated adult is in the house, and concluding that taking disability "into account will increase the costs of over-inclusiveness: more disabled children will be taken from fit parents. But as we believe that present termination rules are too lax, we suggest that under-inclusiveness costs, including permanent damage to children, are a far greater concern than those of over-inclusiveness."). But the requirement that the system choose between removing too many children or too few children hardly seems like the best way to design a system. The relevant question should be what is best for *this* family. It may be that due to a particular history of relapse from substance abuse, a child should be removed more readily than a one-size-fits-all standard would permit. Conversely, where there is a particularly strong relationship between a parent and child, despite maltreatment of that child, there may be compelling reasons for keeping that family together, with adequate safeguards for the child. Although the current rights-based system could, in theory, permit individualized decisionmaking, it does not. This is because theories of rights drive legal standards, and also because in practice the state uses boilerplate approaches to working with families. See, e.g., Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 583 (1997); see also ROBERTS, *supra* note 9, at 79.

131. To be clear, I do not mean that the parents' rights doctrine should be abrogated for such parents. But rather that these parents need more social and economic supports from the state so that they can enjoy the same autonomy in decisionmaking afforded more economically stable parents. I intend to explore this issue more fully in a separate article.

rights create a win/lose mentality that fuels an adversarial process and an adversarial relationship between parents and the state, rather than fostering the true collaboration needed to address the difficult issues facing families.

Rights value autonomy, not assistance, and thus obscure the role of poverty. The common conception of rights is that rights-bearers are “separate, autonomous, and responsible individuals entitled to exercise rights and obliged to bear liabilities for their actions.”¹³² This conception of rights does not advance the interests of children in the child welfare system because children simply do not benefit from this sort of autonomy. Although there is certainly a range of capabilities among children, depending at least on age and individual development, it is a truism that most children rely on adults for their daily needs. They are not autonomous legally or practically.¹³³

Perhaps surprisingly, adults involved in the child welfare system also do not fall within, and are not served by, the dominant understanding of an autonomous rights-bearing individual. As Jennifer Nedelsky argues, it is a fundamental misconception of human nature to view individuals as wholly separate from one another and from the state. Contending that the dominant conception of rights is one-sided in its emphasis on individualism, rather than relationships,¹³⁴ she identifies our dependency relationships—between parents and children, students and teachers, and state and citizens—as essential to fostering the real autonomy needed in a democratic society (the ability to engage in the polity).¹³⁵ To Nedelsky, the question is how to

132. Minow, *supra* note 45, at 15; accord MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47–75 (1991) (discussing the dominant paradigm of the lone rights-bearing individual).

133. See Minow, *supra* note 45, at 18. Minow notes:

To the extent that the dominant conception of rights presumes both autonomy and a direct relationship between the individual and the state, rights for children are even more problematic than rights for adults. Conceptually and practically, children in our society are not autonomous persons but instead dependents who are linked legally and daily to adults entrusted with their care.

Id.

134. See Jennifer Nedelsky, *Reconceiving Rights as Relationships*, 1 REV. CONST. STUDIES/REV. D'ÉTUDES CONSTITUTIONNELLES 1, 7–8 (1993).

135. See *id.* As Nedelsky explains the relationship between rights and autonomy, [t]here is the idea that rights are barriers that protect the individual from intrusion by other individuals or by the state. Rights define boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy. This image of rights fits well with the idea that the essence of autonomy is independence, which thus requires protection and separation from others. My argument is that this is a deeply misguided view of autonomy. What makes autonomy possible is not separation, but relationship.

This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy but a precondition

structure rights such that they foster these autonomy-enhancing relationships.¹³⁶ Nedelsky contends that the dominant conception of rights, which is based on a model of “rights as trumps,”¹³⁷ has limited utility for advancing certain goals.¹³⁸ She urges instead a model of rights as relationships, in which “we always try to get people to see the patterns of relationship that a proposed law or interpretation will foster.”¹³⁹ In the “rights as relationship” model, rights are viewed as a means for structuring relationships,¹⁴⁰ and thus rights should be formulated in a manner that fosters *beneficial* relationships.¹⁴¹ By unveiling “the relational consequences of certain forms of rights,” Nedelsky aims to help “people see how different policies or legal interpretations will actually affect people and the ways they live together.”¹⁴²

Similarly, Mary Ann Glendon notes that the current conception of rights, in which a lone, autonomous rights-bearer asserts an absolute right to do as she pleases, ignores both relationships and responsibility.¹⁴³ For example, the motorcyclist who chooses not to wear a helmet because it is her right to make her own choices about her body ignores the impact of an injury on family, friends, and dependents, and on society through the cost

in the relationships—between parent and child, student and teacher, state and citizen—which provides the security, education, nurturing, and support that make the development of autonomy possible.

Id.

136. See *id.* at 8 (“The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined.”).

137. *Id.* at 6–8, 14, 17–18 (discussing this model and noting origins of phrase in Ronald Dworkin’s work).

138. Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286, 1295–96 (1993).

139. *Id.* at 1296. Nedelsky addresses the importance of framing arguments, noting the costs of using available legal doctrines rather than creating institutions that could resolve “problems in a genuinely feminist framework.” *Id.* at 1287–89.

140. In Nedelsky’s view, this is a descriptive rather than a normative statement. See Nedelsky, *supra* note 134, at 13 (“[W]hat rights in fact do and have always done is construct relationships—of power, of responsibility, of trust, of obligation.”).

141. See Nedelsky, *supra* note 138, at 1289–90.

142. *Id.* at 1296, 1300. Martha Minow also has addressed the importance of relationships to rights. She argues that the current conception of rights divides the world into winners and losers and that in this act of dividing, we overlook relationships. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 1–4 (1990). She argues neither for a wholesale abandonment of rights nor for business as usual. See *id.* at 15–16. Minow acknowledges that a critical examination of rights is essential because legal rules enforce patterns of private power, and thus the pressing question is “what relationships [do] existing rights establish between the rights-bearing individual, the government, and other people? If a right protects liberty, whose liberty does it protect and at what cost to whom?” *Id.* at 283.

143. See GLENDON, *supra* note 132, at 45–46.

of medical care.¹⁴⁴ The dominant view of rights “promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”¹⁴⁵ And this has far-reaching effects: “Our simplistic rights talk regularly promotes the short-run over the long-term, sporadic crisis intervention over systemic preventive measures, and particular interests over the common good.”¹⁴⁶ For Glendon, it is not the existence of rights per se that creates the problem, but rather the valorization of rights without concomitant responsibilities.¹⁴⁷

Applying these insights to the child welfare system, it becomes apparent that the dominant model of rights does little to protect the interests of parent and child. The autonomy principle embodied in parents’ rights and preservationist children’s rights is important in that it requires the state to satisfy certain threshold criteria before intervening in the life of a family.¹⁴⁸ But the benefit of the autonomy principle may end there. I focus on the point after child abuse and neglect has been identified and ask how the state should address this abuse or neglect. I assume that there are real problems facing poor families and that something should be done to address these problems. Thus, it is not simply a question of asserting autonomy—“state, go away”—but rather, once the state is present, ascertaining the most beneficial relationship between the state and families. I believe this is achieved by helping parents address the underlying causes of the abuse and neglect. When rights are conceived as freedom from the state (the traditional concept of autonomy), the need of parents and children to receive something from the state is obscured.

To elaborate, poor parents need the state. There is a widespread misconception that the child welfare system intervenes only where there is evidence of severe abuse and neglect. In reality, although such cases receive tremendous publicity, they are not the norm, constituting approximately 10 percent of all cases.¹⁴⁹ By contrast, approximately 50 percent of all cases involve poverty-related neglect,¹⁵⁰ which typically involves substance

144. See *id.*

145. *Id.* at 14.

146. *Id.* at 15.

147. See *id.* at 5, 45.

148. See *supra* note 30 (setting forth standards).

149. See WALDFOGEL, *supra* note 11, at 124–25 (citing a study finding that approximately 10 percent of the cases in the child welfare system involve child abuse and neglect warranting criminal charges).

150. See *id.* at 125.

abuse,¹⁵¹ inadequate housing,¹⁵² or inappropriate child care arrangements.¹⁵³ (The remaining 40 percent fall somewhere in between, involving abuse or neglect that is not considered severe and does not require intervention by the criminal justice system but still rises above the level of poverty-related neglect.¹⁵⁴)

The correlation between poverty and involvement in the child welfare system is striking.¹⁵⁵ Noted child welfare researcher Duncan Lindsey has concluded that “[i]nadequacy of income, more than any other factor, constitutes the reason that children are removed.”¹⁵⁶ Negative changes in income, especially when that income is derived from welfare benefits, have been shown to increase levels of child welfare involvement.¹⁵⁷ A national study of the incidence of abuse and neglect concluded that children from families with incomes of less than \$15,000 a year were forty-four times more likely to be neglected than children from families with income levels at or above \$30,000.¹⁵⁸ The study concluded that the findings could not be explained entirely by the supposition that “children in lower income families

151. U.S. DEP’T OF HEALTH & HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION ch. 4 (1999), available at <http://aspe.hhs.gov/hsp/subabuse99/subabuse.htm> (last visited Dec. 15, 2005) (“Most studies find that for between one third and two-thirds of children involved with the child welfare system, parental substance abuse is a contributing factor. Lower figures tend to involve child abuse reports and higher findings most often refer to foster care.”).

152. At the extreme—inadequate housing that endangers children—housing problems can lead to the removal of children. See, e.g., OREGON DEP’T OF HUMAN SERVS., FOSTER CARE TRENDS 4 (2003) (finding that inadequate housing was a factor for 7.7 percent of children entering foster care in Oregon). And inadequate housing is a major issue for returning children placed in foster care to their biological parents. See Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000) (citing a study of D.C. foster care system that concluded 33–50 percent of the children in foster care could be returned to their parents if the parents had adequate housing).

153. See WALDFOGEL, *supra* note 11, at 124–25.

154. See *id.* at 124. Although these categories are not perspicuous, distinctions among cases can be made, and it is clear that only a small percentage of cases fall into the severe category.

155. See, e.g., LINDSEY, *supra* note 111 (finding that the major determinant of children’s removal from their parents’ custody was not the severity of child maltreatment but unstable sources of parental income); Christina Paxson & Jane Waldfogel, *Work, Welfare, and Child Maltreatment* 1, 22–27 (Nat’l Bureau of Econ. Research, Working Paper No. 7343, 1999) (reporting their finding that “higher rates of poverty resulted in higher rates of substantiated reports of abuse and neglect”).

156. LINDSEY, *supra* note 111, at 175.

157. Paxson & Waldfogel, *supra* note 155, at 2; see also Kristen Shook, *Does the Loss of Welfare Income Increase the Risk of Involvement With the Child Welfare System?* 12 (Joint Ctr. for Poverty Research, Working Paper No. 65, 1999), available at <http://www.jcpr.org/wpfiles/shook.pdf?CFID=2761642&CFTOKEN=31487985> (documenting a study of welfare recipients in the Chicago metropolitan area).

158. See ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP’T OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 5-50 (1996).

more frequently come to the attention of . . . community professionals.”¹⁵⁹ Using data from Illinois, California, and North Carolina, the U.S. Department of Health and Human Services found that between 68 and 71 percent of children entering foster care had previously received federal welfare benefits or had been part of the Medicaid program.¹⁶⁰

Some states explicitly exempt poverty as a ground for a finding of neglect,¹⁶¹ but others do not.¹⁶² Although the issues associated with poverty-related neglect, such as substance abuse, poor housing, and inappropriate child care, are serious problems, the child welfare system does not address these underlying poverty issues.¹⁶³ Rather, operating with limited resources, the system preemptively removes children from their homes.¹⁶⁴ For these poverty-related neglect cases—again, half of all children in foster care—studies have found that placement in foster care is not the proper solution.¹⁶⁵ Instead, treating the underlying issues is a better approach. Although substance abuse is difficult to treat, and relapse is highly likely,¹⁶⁶

159. *Id.* at 5-51.

160. U.S. DEP'T OF HEALTH & HUMAN SERVS., DYNAMICS OF CHILDREN'S MOVEMENT AMONG THE AFDC, MEDICAID, AND FOSTER CARE PROGRAMS PRIOR TO WELFARE REFORM: 1995-1996, at 9 tbl. 1 (2000). A similar study was undertaken by the Joint Center for Poverty Research. See Kristen Shook, *Assessing the Consequences of Welfare Reform for Child Welfare*, POVERTY RES. NEWS (Northwestern Univ./Univ. of Chicago Joint Ctr. for Poverty Research), Winter 1998, at 8 (describing a relationship between children who had received Aid to Families with Dependent Children and placement in foster care).

161. See, e.g., D.C. CODE ANN. § 16-2301(9)(A)(ii) (Lexis 2005); FLA. STAT. ANN. § 39.01(30)(f) (West 2005); N.Y. FAMILY CT. ACT § 1012(f)(i)(A) (McKinney 2005).

162. See, e.g., ARIZ. REV. STAT. ANN. § 8-201(21) (2004); GA. CODE ANN. § 49-5-180(5)(B) (2004); S.D. CODIFIED LAWS §§ 26-8A-2(4) & (5) (2004). The studies finding that children are removed due to poverty do not specify whether this happens only in states that permit such removals.

163. Typically, the case plan for the parent is a “pretyped, generic form[] that obligate[s] the mother to submit to drug tests, go to counseling, submit to psychological evaluations, attend parenting classes, and visit the child.” Appell, *supra* note 130, at 583.

164. See Buss, *supra* note 111, at 433-34; Cynthia R. Mabry, *Second Chances: Insuring That Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 616-24 (2000).

165. See LINDSEY, *supra* note 111, at 166; see also WALDFOGEL, *supra* note 11, at 78. I do not mean to minimize the consequences of severe neglect. Indeed, severe neglect accounted for 35.6 percent of the 1500 abuse and neglect deaths in 2003. See CHILD MALTREATMENT, *supra* note 17, at 55-56. Moreover, as Waldfogel notes, the poverty-related neglect cases are not unimportant as some of them may be early warning signs of a situation that may escalate, or the signs of minor maltreatment may reflect undetected chronic abuse or neglect. See WALDFOGEL, *supra* note 11, at 125. But the question this Article asks is whether for the typical lower-risk case, foster care is the appropriate “service” to help this family.

166. See Dennis M. Donovan, *Relapse Prevention in Substance Abuse Treatment*, in DRUG ABUSE TREATMENT THROUGH COLLABORATION: PRACTICE AND RESEARCH PARTNERSHIPS THAT WORK 121 (James L. Sorenson et al. eds., 2003). Donovan observes:

Relapse is a common outcome following the initiation of abstinence, whether the abstinence was initially achieved with or without formal treatment. The rates of relapse

housing supports can play a key role in helping parents break the cycle of addiction and enabling them to care for their children again.¹⁶⁷

To be sure, there are multiple, interrelated risk factors for child welfare involvement,¹⁶⁸ and the connection between the factors and the involvement is not always clear. For example, homelessness is a very strong predictor of involvement in the child welfare system. Thirty-seven percent of families who have had one instance of homelessness become involved (although do not necessarily have their children removed) with the child welfare system, as compared with 9 percent of low-income families who have homes.¹⁶⁹ This pattern may reflect conditions related to homelessness, such as severe poverty and domestic violence. It may be explainable by referrals to shelters as part of service plans by child welfare agencies, or the greater scrutiny by child protective services of families in shelters. Or it may simply flow from the detrimental effect of homelessness on a parent's ability to raise a child effectively, and the compromise to children's development flowing from the upheaval of homelessness.¹⁷⁰

associated with alcohol, cocaine, heroin, and other drugs of abuse are quite high, with some estimates suggesting that 60% or more of individuals relapse after stopping their substance use.

Id. (citation omitted); see also *id.* at 122 (noting that relapse is a natural and normal part of recovery).

167. See Hilary Waldman, *A Second Chance as Mom: State Helps Troubled Parents Succeed by Providing a Home, and Advice*, HARTFORD COURANT, July 3, 2005, at A1 (describing a "Supportive Housing" program in Connecticut and early indications that permanent housing makes all the difference to successful drug treatment).

168. See, e.g., Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment: Findings of a 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 1065, 1070-72 (1998) (discussing risk factors for abuse and neglect, and finding that different combinations of factors are associated with physical abuse, sexual abuse, and neglect). Maternal sociopathy and maternal youth were associated with all types of child maltreatment; poverty and large family size were strongly associated with neglect; low maternal involvement, early separation from a mother, and perinatal problems were associated with physical abuse; a child's gender and disability, a deceased parent, and living with a stepfather were associated with sexual abuse. See *id.* at 1073. Additionally, this study demonstrates that the greater the number of risk factors, the greater the likelihood for maltreatment. See *id.* at 1074 (finding that with no risk factors, the likelihood of maltreatment was only 3 percent; the presence of four or more risk factors raised the likelihood of maltreatment to 24 percent). Finally, the study concludes that low-income families may have higher rates of physical abuse and neglect (although not sexual abuse) than families with greater income levels, and that this conclusion is not a result of biased reporting, investigation, or substantiation. See *id.* at 1066, 1074.

169. See Jennifer F. Culhane et al., *Prevalence of Child Welfare Services Involvement Among Homeless and Low-Income Mothers: A Five-year Birth Cohort Study*, 30 J. SOC. & SOC. WELFARE 79, 89-91 (2003). Another indicator was the number of children in the families: Among homeless women, 24 percent of women with one child were involved in the child welfare system, whereas 54 percent of women with four children or more were involved with the child welfare system. See *id.* at 92-93.

170. See *id.* at 91.

I do not mean to imply that poor parents have their children removed simply because the parents are poor. Rather, my point is that poverty is a fundamental underlying issue and that the state should address the deep-seated problems associated with poverty, rather than “assisting” poor parents by removing their children. The question is how best to address these problems.

I believe a rights-based model of child welfare does not help parents or children because the model obscures the real issue of poverty by placing a premium on autonomy rather than assistance. Although a parent may wish the state to leave her alone and let her raise her child, if she is unable to do so because of poverty, then to truly exercise the right to the care and custody of her child, she may need the assistance of the state.¹⁷¹ Similarly, children also need something from the state, but not necessarily the interventions they currently receive. The enforcement of protectionist children’s rights requires adult intervention—it is the right to receive something rather than the right to be left alone. But what children currently receive is, in most cases, not helpful because the intervention is simply removal and placement in the foster care system (with its attendant risks), rather than an attempt to address the underlying issues.¹⁷²

Rights create a zero-sum mentality, thus fostering an adversarial process and adversarial relationships. The child welfare laws are designed to be implemented in courts, which operate on the adversarial model. Thus, it is not surprising that rights become the focus of court proceedings. As described above, parents’ rights and preservationist children’s rights, on the one hand, are pitted against protectionist children’s rights, on the other, in a zero-sum fashion.¹⁷³ The court becomes the distributor of rights, fueling a win/lose

171. I do not mean to imply that poor parents have no need for the rights of decisionmaking that more affluent parents enjoy. Indeed, poor parents still need deference to their parental decisionmaking. Thus, my claim may be better stated as one for autonomy *and* assistance. This dual need is the subject of a future article.

172. The argument that society should help, not punish, poor parents is not new. As Dorothy Roberts described in a recent article, after the Civil War, African American women, who were excluded by white women from child-saving campaigns, created their own movement by forming clubs and church groups designed to address the well-being of children. See Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FLA. ST. U. L. REV. 957, 957–58 (2005). Instead of focusing on particular cases of abuse or neglect, this movement addressed the well-being of *all* children, and also tried to support, rather than penalize, mothers, believing that assisting mothers would assist the children. See *id.* at 958, 963–71.

173. See, e.g., Ross, *supra* note 61, at 176 (“In child welfare disputes, protections accorded to one party—parent, state, child or foster parent—almost inevitably diminish the substantive interests of another.”). In this context I do not mean to include *all* rights, such as the right to present evidence or receive notice of a hearing. Rather, my point is that the broader conception of rights—solicitude for either the parent or the child, preservation or protection—presents a zero-sum situation.

mentality among the parties. That most cases are not litigated does not diminish this mentality as settlements are, of course, conducted in the shadow of the rights-based system.

Setting aside the vast and rich literature written on this topic in the field of alternative dispute resolution, and focusing only on the child welfare system, it is clear that the adversarial process is a poor means for resolving the issues facing families. As noted above, only about 10 percent of the cases in the child welfare system involve severe abuse. In these cases, it is a fair claim that the rights of a parent who has severely abused or neglected a child and who wishes to retain custody of that child may be at odds with the right of the child to a safe home. This situation likely does pit the right of the parent squarely against certain rights of the child. In these relatively few cases I do not argue that the conception of rights creates a conflict between parent and child, but rather that there almost certainly is a conflict between the rights of parent and child. This dispute may well be best settled in court because the adversarial relationship between the parties is relatively clear.¹⁷⁴ But in the remaining cases, and in particular the approximately 50 percent of poverty-related neglect cases, the substantive rights of parent and child are not necessarily at odds with each other.

In less serious abuse and neglect cases, and especially in poverty-related neglect cases, helping a parent address the economic, psychological, and social issues that led to the abuse or neglect would help both parent and child. Put another way, the traditional assumption that a parent will act in her child's best interest cannot be truly tested without first helping the parent, because she may not be able to act in her child's best interest without substantial support from the state. For example, a parent may not be able to afford adequate housing without a subsidy. But this inability to provide adequate housing does not necessarily mean the parent is *unwilling* to act in the child's best interest, rather that she needs help doing so. In this way, the zero-sum orientation of the child welfare system obscures the alignment of interests between parent and child.

Such alignment does exist. In the typical child welfare case, parents and children share an interest in addressing the issues that led to the abuse or neglect. This observation is not the simple conclusion that parents and

174. As noted in the Introduction, I am not here resolving this question. Rather, my intent is to take these cases out of the equation in my attempt to determine the best legal model (and process to implement that model) for the majority of cases in the child welfare system.

children share an interest in preventing unwarranted intervention,¹⁷⁵ which is certainly true, but rather that even where intervention is required, that is, where there is some abuse or neglect, the interests of parent and child may still be aligned. The parent has an interest in retaining custody of the child, and the child has an interest in the parent receiving help such that the child can remain safe *and* in the parent's home.

Thus, what is needed in the majority of cases is not an adversarial proceeding, but rather a process that facilitates thoughtful group collaboration among parents, children, and the state to address the underlying issues related to the abuse and neglect. The rights-based model—with its inevitable win/lose mentality—impedes this collaboration.¹⁷⁶

* * *

There is a fundamental mismatch between rights as conceived and implemented and the needs of parents and children. Thus, legal scholars should not look to rights as the primary ground for reforming the child welfare system. In the next part, I explore a model of child welfare that would shift rights to the background and focus instead on the problems facing families.

III. A PROBLEM-SOLVING MODEL: THE EXAMPLE OF FAMILY GROUP CONFERENCING

Thus far I have described the rights-based model governing the child welfare system and explored the considerable limitations of this model. Because the current system—and the academic debate about how to fix it—is

175. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”).

176. On a related point, the individualist thinking fostered by rights does a disservice to children by excluding a “family systems” orientation to resolving family problems. Long-espoused by social workers, family systems theory proposes that the family is a living entity, with each part dependent on the other. The only way fully to understand an individual is to look at her in the context of her family and to understand the interaction of the family. See SALVADOR MINUCHIN, *FAMILIES AND FAMILY THERAPY* 9 (1974); STEPHEN J. SCHULTZ, *FAMILY SYSTEMS THERAPY: AN INTEGRATION* 16–17 (1984). To help a child, the whole family must be treated. In the view of family systems theory, the clash between parents’ rights and children’s rights simply misunderstands the problem: It is not a question of parent *or* child. Rather, the only possible solution must involve parent *and* child. Cf. Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL’Y 1 (1996) (discussing the need for a family systems approach to resolving child custody disputes).

so dominated by rights, other possible models are largely unexplored. But an alternative model is needed because the solution to child welfare will never be found solely in rights. A new model would acknowledge a parent's need for assistance—thus creating a better frame for the issues facing families in the child welfare system—and would foster collaboration, not adverseness, between the state and families. It would be a problem-solving model.

Carrie Menkel-Meadow first coined the term “problem-solving model,” noting that it reflected a move in negotiation away from adversarial, zero-sum thinking.¹⁷⁷ As she stated, a “problem-solving model seeks to demonstrate how negotiators . . . can more effectively accomplish their goals by focusing on the parties' actual objectives and creatively attempting to satisfy the needs of both parties, rather than by focusing exclusively on the assumed objectives of maximizing individual gain.”¹⁷⁸ As Robert Mnookin and his coauthors state, “[a]t its core, problem-solving implies an orientation or mindset—it is not simply a bundle of techniques.”¹⁷⁹ In this Article, I use the term “problem-solving” both in the sense it is used in the world of alternative dispute resolution, and also more generally to describe a model of child welfare that focuses proactively on the problems facing families, rather than on allocating blame for abuse and neglect.

A number of collaborative processes may satisfy the problem-solving model,¹⁸⁰ but one in particular seems promising. Family group conferencing, a radical departure from the adversarial process, has been used successfully

177. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 755–58 (1984).

178. *Id.* at 758; accord Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 906 (2000) (“[P]roblem solving negotiation means that the parties can do better than they might otherwise do, especially if they are employing an unnecessarily unproductive adversarial approach.”).

179. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 315 (2000).

180. Indeed, many courts self-identify as problem-solvers, using an interdisciplinary approach to the complex interaction of multiple problems, such as substance abuse, crime, and child abuse. See, e.g., Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 859–62 (1997). Kaye describes the Family Treatment Court in Manhattan's family court system, in which

the court is no longer a remote adjudicator but is heading a problem-solving team. The problem solving is on two levels. In any particular case, the court will be asking what do we do to get this particular parent off drugs. But on a larger scale, the court will be taking a leadership role in seeing that all the players—from Medicaid eligibility specialists to private foster care agencies to drug treatment providers to child welfare agency case-workers—work together.

Id.; see also Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 332–33, 367–74 (describing the successes of model courts, including the Manhattan Family Treatment Court, but also noting the failure of such courts to focus on family integrity).

in child welfare in a number of countries and embodies a problem-solving approach to child welfare. To show concretely the problem-solving model in practice, this part describes the theory and practice of family group conferencing. I offer this discussion of family group conferencing as simply one example of a collaborative process. My point is not that family group conferencing is perfect, or that it is the only process that embodies a problem-solving model of child welfare. Rather, I argue that family group conferencing represents a different approach to child welfare than the adversarial process born of the rights-based model, and that such approaches are very promising.

A. Origins, the Process, and Theoretical Underpinnings

Family group conferencing¹⁸¹ is part of the broader restorative justice movement, which seeks to reform the justice system to incorporate victims and to allow the offender to “restore” the status quo.¹⁸² Although largely focused on criminal justice, the restorative justice movement has also addressed other systems, including child welfare. In that context, family group conferencing is the practice of convening family members, community members, and other individuals or institutions involved with a family to develop a plan to ensure the care and protection of a child who is at risk for abuse or neglect.¹⁸³

181. “Family group conferencing” is the term used in New Zealand. As the practice has spread around the globe, alternative terms, and alternative practices, have emerged. For simplicity, this Article uses the term family group conferencing.

182. Mark S. Umbreit, *What Is Restorative Justice?*, in CTR. FOR RESTORATIVE JUST. & PEACEMAKING, U.S. DEP’T OF JUSTICE, *FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS* 1 (2000); accord John Braithwaite & Heather Strang, *Restorative Justice and Family Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 1, 4 (Heather Strang & John Braithwaite eds., 2002) (“The most general meaning of restorative justice is a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong.”). But see Mike Doolan, *Restorative Practices and Family Empowerment: both/and or either/or?*, FAMILY RIGHTS NEWSLETTER (2003), available at http://fp.enter.net/restorativepractices/au05/au05_doolan1.pdf (challenging the idea that family group conferencing is akin to restorative justice because the latter is focused on the victim and restoring the harm, whereas the former is focused on empowering the family). Family group conferencing differs from therapeutic jurisprudence, in which judges take a more active role in the lives of litigants, such as ensuring that drug addicts are attending drug rehabilitation treatment programs, rather than simply adjudicating guilt and innocence. By contrast, family group conferencing seeks to avoid court involvement altogether. Family group conferencing also differs from dependency mediation in that the latter concerns negotiations regarding matters pending before a court. See Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare and Policy Practice*, 42 FAM. CT. REV. 216, 217–18 (2004).

183. See Gale Burford & Joe Hudson, *General Introduction: Family Group Conference Programming*, in *FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE*, at xix (Gale Burford & Joe Hudson eds., 2000) [hereinafter

Simplified descriptions of two cases, one receiving traditional child welfare services and one receiving a family group conference, illustrate the marked differences between the two approaches. In a child welfare case under the current system, after the state agency receives a credible report of child abuse or neglect sufficient to warrant removal, a caseworker goes to the home and assesses the danger to the child. Assuming the caseworker finds sufficient evidence of such danger, the caseworker removes the child and places her in foster care pending a more thorough investigation. The state agency then files a petition in court seeking temporary custody of the child. The child is assigned a guardian ad litem to represent her interests. The caseworker then develops a case plan for the parents, requiring the parents to, for example, obtain drug treatment and attend parenting classes. If the parents do not comply with this case plan within the specified period, generally twelve to eighteen months, then the state agency files for a petition for the termination of parental rights. If the court agrees that parental rights should be terminated, the child is freed for adoption. The majority of decisions in this model are made by professionals: caseworkers, therapists, guardians ad litem, and judges.

In a family group conferencing case, the story and decisionmakers are decidedly different.¹⁸⁴ In a typical family group conferencing case, after receiving a report, a social worker conducts an initial investigation to determine if there has been abuse or neglect. If the social worker concludes there is evidence of abuse or neglect, she refers the case to a coordinator, who has the authority to convene a family group conference. The coordinator contacts the parents, the child,¹⁸⁵ extended family members, and significant community members who know the family. Before the conference, each potential conference participant meets separately with the coordinator to learn about the process. In these meetings, the coordinator screens for potentially

FAMILY GROUP CONFERENCING]. Although not addressed in this Article, family group conferencing is also used for juvenile offenses. See Umbreit, *supra* note 182, at 2 (describing the process for addressing crimes of juveniles).

184. The following description draws on a number of sources, including HARDIN ET AL., *supra* note 12, at 3–5; Paul Adams & Susan M. Chandler, *Building Partnerships to Protect Children: A Blended Model of Family Group Conferencing*, 40 FAM. CT. REV. 503, 505–06 (2002); Jolene M. Lowry, *Family Group Conferences as a Form of Court Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM 57, 66–76, app. (1997); Allison Morris, *Children and Family Violence: Restorative Messages From New Zealand*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 182, at 89, 99–101; Barbara White Stack, *CYF Program Allows Mother to Take Fate Into Own Hands*, PITTSBURGH POST-GAZETTE, Dec. 20, 2003, at B1.

185. If the child is developmentally able to participate in the family group conference, the coordinator will meet with the child. If the child is not able or willing to participate, the coordinator will still at least see the child.

complicating factors, such as a history of domestic violence,¹⁸⁶ to determine whether the case is appropriate for family group conferencing and, if so, what additional supports may be needed for the participants.

There are three stages of the conference. In the first stage, the coordinator and any professionals involved with the family, such as therapists, teachers, and the investigating social worker, explain the case to the family. In the second stage, the coordinator and professionals leave the room while the family and community members engage in private deliberation. During the private deliberation, the participants acknowledge that the child was abused or neglected and develop a plan to protect the child and help the parents. After the participants reach an agreement, they present the plan to the social worker and coordinator, who likely have questions for the participants. Parents, custodians, social workers, and coordinators can veto the plan produced by the conference and refer the case to court.¹⁸⁷ In practice, this rarely occurs: The participants come to a decision, and the social worker and coordinator accept the plan (perhaps with a few changes) if it meets predetermined criteria. The coordinator writes up the plan, sends it to all participants, and then sets a time for a subsequent conference to assess developments in the case.

The plan typically includes a decision about the safety of the child, including whether the child should be placed outside of the home for a certain period of time, and, if so, with whom. If the child is placed outside the home, she is almost invariably placed with a relative or other conference participant. The plan also identifies the services and supports needed by the parents. Finally, the plan determines which participants will both help the family and also check in on a regular basis to ensure the child is safe and the parents are complying with the plan.

As is apparent from this description, five principles characterize the philosophy of family group conferencing. First, children are raised best in their own families. Second, families have the primary responsibility for caring for their children, and these families should be supported, protected, and respected. Third, families are able to make reliable, safe decisions for their children, and families have strengths and are capable of changing the problems in their lives. Fourth, families are their own experts, with knowledge and insight into which

186. For a discussion of domestic violence and family group conferencing, see *infra* notes 235–238 and accompanying text.

187. This is the New Zealand model. See HARDIN ET AL., *supra* note 12, at 4 (“A number of people have the legal right to veto the family’s decision. This group includes parents, custodians, social workers, care and protection coordinators, and children’s lawyers.”).

solutions will work best for them. Finally, to achieve family empowerment, families must have the freedom to make their own decisions and choices.¹⁸⁸

As one of its proponents has stated, “[f]amily group conferences amount to a partnership arrangement between the state, represented by child protection officials; the family; and members of the community, such as resource and support persons; with each party expected to play an important role in planning and providing services necessary for the well-being of children.”¹⁸⁹ Family group conferences are not a means for child protection officials to relinquish their responsibilities, but rather are a different method for exercising those responsibilities. The intent is to strike a balance between the interests of child protection and family support. Family group conferencing represents a radical reorientation of child protection:

Many child protection approaches attempt to enforce community standards (accountability) but lack any way for the community to reach out and weave the family back into the community fabric with the development of shared, voluntary commitments to community standards. Consequently, those strategies often create short-term relief, but do not change behavior in the long term. Those strategies also rely heavily on outside enforcers, the professional system, to solve the problem.¹⁹⁰

Family group conferencing originated with the Maori and other First Nations around the world, and New Zealand was the first country to incorporate the process into its laws.¹⁹¹ To avoid the removal of Maori children

188. Donald N. Duquette, *Non-adversarial Case Resolution*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 354 (Marvin Ventrell & Donald N. Duquette eds., 2005).

189. See Burford & Hudson, *supra* note 183, at xix.

190. Kay Pranis, *Conferencing and the Community*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 40, 44. One of the premises of family group conferencing is that families involved in the child welfare system do better when they have input into the decisions affecting them. See Burford & Hudson, *supra* note 183, at x. Family group conferences “are predicated on the belief that, given the right information and resources, families will make better decisions for themselves than professionals The approach attempts to change the relationships between families and professionals, moving families from passive recipients of ‘professional wisdom’ to front-line decision-makers for their children.” See Paul Nixon, *Building Community Through Family Group Conferences: Some Implications for Policy and Practice*, in AM. HUMANE ASS’N, 1999 FAMILY GROUP DECISION MAKING NATIONAL ROUNDTABLE PROCEEDINGS AND INTERNATIONAL EVALUATION CONFERENCE: SUMMARY OF PROCEEDINGS 3, 3 (1999). Some proponents make even broader claims, contending that family group conferencing “is a process for acknowledging and then transforming conflict within and between people.” David Moore & John McDonald, *Guiding Principles of the Conferencing Process*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 49, 49 (emphasis omitted).

191. See Mike Doolan & Pam Phillips, *Conferencing in New Zealand*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 193.

to non-Maori families, and to incorporate Maori traditions of involving extended family members in decisionmaking, legislative changes were made to New Zealand's child welfare system in the Children, Young Persons, and Their Families Act of 1989.¹⁹² The changes were in response to several government reports documenting discrimination against Maori families in the child welfare system.¹⁹³ The legislative changes were not limited to Maori families. Rather, the law required that all substantiated cases of child abuse and neglect be referred for family group conferencing.¹⁹⁴ The premises of family group conferences resonated with the idea, long-espoused by social workers, "that lasting solutions to problems are ones that grow out of, or can fit with, the knowledge, experiences, and desires of the people most affected."¹⁹⁵

There are four hallmarks of the family group conferencing process (and these hallmarks reflect the principles set forth above).¹⁹⁶ First, the process is intended to find and build on a family's strengths, rather than to place blame.¹⁹⁷ One method for achieving this is to focus on the problem, rather than the person, and to concentrate on healing.¹⁹⁸ Although the current system is supposed to preserve families, in practice social workers often do not look for the strengths in a family and instead focus on the dysfunctional

192. See Children, Young Persons, and Their Families Act of 1989 § 428, 1989 S.R. No. 24 (N.Z.); Doolan & Phillips, *supra* note 191, at 193–97.

193. Catherine Love, *Family Group Conferencing: Cultural Origins, Sharing, and Appropriation—A Maori Reflection*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 15, 15–16; see also HARDIN ET AL., *supra* note 12, at 5 ("As in the United States, a very disproportionate number of children involved in the New Zealand child welfare system have non-European origins.").

194. Children, Young Persons, and Their Families Act of 1989 §§ 17–18.

195. Burford & Hudson, *supra* note 183, at xxiii.

196. These hallmarks are not unique to family group conferencing and are found in many alternative dispute resolution and problem-solving processes. See, e.g., ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 17–39 (2d ed. 1991) (discussing the need to focus on the problem, not the person); Jeanne M. Brett, *Culture and Negotiation*, 35 INT'L J. PSYCHOL. 97 (2000) (describing the importance of incorporating the relevant culture and values of participants); Lawrence E. Suskind, *Consensus Building and ADR: Why They Are Not the Same Thing*, in THE HANDBOOK OF DISPUTE RESOLUTION 361–62 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing a consensus-building approach to problem-solving as one that is more inclusive than court-based procedures, which include only the parties themselves, not all the stakeholders).

197. See Chandler & Giovannucci, *supra* note 182, at 219; Linda Richardson, *Family Group Decision Making: Transforming the Child Welfare System by Empowering Families and Communities*, in AM. HUMANE ASS'N, *supra* note 190, at 39, 39–40.

198. Pranis, *supra* note 190, at 42–44; Rupert Ross, *Searching for the Roots of Conferencing*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 5, 12 ("Relational justice tries to move [away from stigmatizing a perpetrator], to convince people that they are more than their antisocial acts, that they can learn how to respond in better ways to the pressures that affect them day to day."). It is this aspect of family group conferencing, and, more broadly, restorative justice, that often causes advocates for women and children concern. See *infra* notes 234–238 and accompanying text.

elements.¹⁹⁹ Thus, family group conferencing facilitates a strengths-based practice because it requires the family and community to look within to find solutions.²⁰⁰ Second, the process respects and values important cultural practices of the relevant community.²⁰¹ Third, the process involves the extended family and community.²⁰² Those individuals with information to share, individuals who love the child, and individuals with a stake in the outcome are all included in the conference.²⁰³ Finally, the process views the community as a resource for the family.²⁰⁴

In addition to the four hallmarks of family group conferencing, there are several key features of the process that set it apart from other alternative dispute resolution methods and are essential for its success. These key elements include sufficient preparation of the participants by the coordinator (often a total of thirty-five hours of preparation per conference²⁰⁵), private family time

199. For example, in Alabama, biological parents brought a class-action lawsuit challenging that state's child welfare practices because the state did not do enough to help families or protect children from abuse or neglect. The parties agreed to a settlement in 1991 requiring Alabama to completely reform its child welfare system. See BAZELON CTR. FOR MENTAL HEALTH LAW, MAKING CHILD WELFARE WORK: HOW THE R.C. LAWSUIT FORGED NEW PARTNERSHIPS TO PROTECT CHILDREN AND SUSTAIN FAMILIES 5 (1998); Erik Eckholm, *Once Woeful, Alabama Is Model in Child Welfare*, N.Y. TIMES, Aug. 20, 2005, at A1. The consent decree required the state to provide services based on the strengths of children and parents and that families be preserved whenever possible. See BAZELON CTR. FOR MENTAL HEALTH LAW, *supra*, at 51. One of the major barriers to this change was overcoming the views of the social workers, who were used to perceiving deficits, not strengths, in biological families. See *id.*

200. See Lowry, *supra* note 184, at 65–66; Richardson, *supra* note 197, at 39–40; Robert Victor Wolf, *Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 133, 134 (2003).

201. See Ross, *supra* note 198, at 5.

202. See Chandler & Giovannucci, *supra* note 182, at 219.

203. As one practitioner stated, “anybody who’s going to be involved—or be an obstacle—in planning for the children” should attend the conference. See Wolf, *supra* note 200, at 137. Although community may be an amorphous concept, proponents of family group conferencing contend that such ambiguity does not present a problem in practice. For example, Kay Pranis contends that

[m]uch has been written about the meaning of “community” and lack of clarity is often cited as a problem, which must be solved before we can proceed to work with communities. Practical experience demonstrates otherwise. Communities themselves do not worry much about academic definitions. They soon define themselves based on the issue at hand.

Pranis, *supra* note 190, at 40. This inclusiveness overlaps with Woodhouse’s model of generism, which grants parental rights to individuals who have established their ability and desire to take responsibility for a child, rather than relying on mere biology. See *supra* notes 86–88 and accompanying text.

204. Chandler & Giovannucci, *supra* note 182, at 219.

205. See Lisa Merkel-Holguin, *Diversions and Departures in the Implementation of Family Group Conferencing in the United States*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 224, 224–25 (finding that adequate preparation for conferences is essential and that this typically involves twenty-two to thirty-five hours of work for the coordinator).

without professionals present, consensus on the plan, and monitoring and follow-up by the conference participants and the state.²⁰⁶

Although no country other than New Zealand requires the use of family group conferencing, many countries have started to experiment with it.²⁰⁷ In the United States, child welfare agencies have been experimenting with family group conferencing since the early 1990s.²⁰⁸ Although its use is by no means widespread, states and localities are using some version of it with increasing frequency.²⁰⁹ Notably, in the United States, social workers, rather than lawyers and legislators, have pushed for its adoption.²¹⁰

B. Early Empirical Research

Studies on programs implemented around the world and in the United States demonstrate that family group conferencing has had substantial success in improving child welfare systems.²¹¹ First, studies suggest, but are

206. See Joan Pennell & Gale Burford, *Widening the Circle: Family Group Decisionmaking*, 9 J. CHILD & YOUTH CARE 1, 8–9 (1994); Laura Mirsky, *Family Group Conferencing Worldwide: Part One in a Series*, RESTORATIVE PRACTICES EFORUM, Feb. 20, 2003, at 1, available at <http://iirp.org/library/fgcseries01.html> (last visited Dec. 15, 2005).

207. See, e.g., PETER MARSH & GILL CROW, *FAMILY GROUP CONFERENCES IN CHILD WELFARE* (Olive Stevenson ed., 1998) (discussing family group conferencing in Great Britain); Paul Ban, *Family Group Conferences in Four Australian States*, in *FAMILY GROUP CONFERENCING*, *supra* note 183, at 232; Knut Sundell, *Family Group Conferences in Sweden*, in *FAMILY GROUP CONFERENCING*, *supra* note 183, at 198.

208. See Wolf, *supra* note 200, at 134–35. There are three main types of “family involvement” programs in the U.S., each falling along a continuum from simple involvement to complete empowerment. First, a form of family group conferencing that very closely resembles the New Zealand model, as of 2003 had been adopted in hundreds of communities in thirty-four states. See Lisa Merkel-Holguin & Leslie Wilmot, *Analyzing Family Involvement Approaches*, in *WIDENING THE CIRCLE: THE PRACTICE AND EVALUATION OF FAMILY GROUP CONFERENCING WITH CHILDREN, YOUTH, AND THEIR FAMILIES* 186 (Joan Pennell & Gary Anderson eds., 2005). Second, family team conferencing, first begun in Alabama as a result of a lawsuit challenging child welfare practices, involves family members as part of a team to make decisions. See *id.* at 186–87. Although the family members do not have private family time, as in family group conferencing, the practice is reported to offer meaningful involvement for the family. See *id.* Finally, team decisionmaking offers families the opportunity to participate in decisionmaking, although without the level of involvement as the other two models provide. The extended family is not necessarily involved, and one of the main goals is bringing in a variety of professionals to ensure that the social worker is not making a decision alone. See *id.*

209. See Burford & Hudson, *supra* note 183, at xxiv; Merkel-Holguin, *supra* note 205, at 224 (reporting that in 1995, approximately five communities used family group conferencing; by 1999, over one hundred communities used it); Larry Graber et al., *Family Group Decision-Making in the United States: The Case of Oregon*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE* 180 (J. Hudson et al. eds., 1996).

210. See Lowry, *supra* note 184, at 83.

211. See, e.g., Gary R. Anderson & Peg Whalen, *Identifying Short-Term and Long-Term FGC Outcomes*, in *WIDENING THE CIRCLE*, *supra* note 208, at 134–36; CAROL LUPTON & PAUL NIXON,

not uniform in concluding, that families who participate in family group conferences have lower levels of subsequent abuse and neglect than the typical child welfare case.²¹² This may be due in part to the way family group conferences enlist family members in monitoring the safety and welfare of children.²¹³

Second, research indicates that in the vast majority of cases families are able to devise a plan for the care and protection of their children.²¹⁴ Family members, including fathers, participate in numbers far greater than in the traditional child welfare model.²¹⁵ Caseworkers report that the plans devised

EMPOWERING IN PRACTICE? A CRITICAL APPRAISAL OF THE FAMILY GROUP CONFERENCE APPROACH 119–37, 155–77 (1999); CAROL LUPTON ET AL., UNIV. OF PORTSMOUTH, FAMILY PLANNING: AN EVALUATION OF THE FAMILY GROUP CONFERENCE MODEL 43–68, 105–19 (1995); MARSH & CROW, *supra* note 207, at 96. For a good discussion of the challenges of evaluating alternative processes like family group conferencing and the importance of doing so, both to the practice of family group conferencing and for persuading policymakers to adopt family group conferencing, see Gordon Bazemore & Jeanne B. Stinchcomb, *Restorative Conferencing and Theory-based Evaluation*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 284. Of course it is possible that selection bias played a role in the generally positive outcomes described in these studies. But this is not a risk in New Zealand, where family group conferencing is mandated for all child welfare cases and thus where a “cherry picking” phenomenon is highly unlikely.

212. See Nancy Shore et al., *Long Term and Immediate Outcomes of Family Group Conferencing in Washington State*, RESTORATIVE PRACTICES eFORUM, Sept. 10, 2002, at 1, available at <http://fp.enter.net/restorativepractices/fgcwash.pdf>. Shore reports:

Children who had a conference experienced high rates of reunification or kinship placement, and low rates of re-referral to CPS. These findings generally remained stable as long as two years post-conference. This study, the longest long-term follow-up study of FGC published to date, suggests that FGCs can be an effective planning approach for families involved with the public child welfare agency, resulting in safe, permanent plans for children at risk.

Id.; Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Women and Children*, 79 CHILD WELFARE 131, 145–47 (2000) (finding a decrease in abuse and neglect after a family group conference: The number of events triggering intervention declined from 233 to 117 for participating families; by contrast, nonparticipating families experienced an increase in triggering events from 129 to 165); see also Charles E. Wheeler & Sabrina Johnson, *Evaluating Family Group Decision-making, The Santa Clara Example*, PROTECTING CHILDREN: FGDM RESEARCH AND EVALUATION (Am. Humane Ass’n, Denver, CO), 2003, at 65, 68; Nat. Council of Juvenile & Family Court Judges, *Empowering Families in Child Protection Cases: An Implementation Evaluation of Hawai’i’s ‘Ohana Conferencing Program*, 7 TECHNICAL ASSISTANCE BULL., Apr. 2003. But see Knut Sundell & Bo Vinnerljung, *Outcomes of Family Group Conferencing in Sweden: A 3-Year Follow-Up*, 28 CHILD ABUSE & NEGLECT 267, 282–83 (2004) (noting higher rates of re-referral for child welfare agencies following a family group conference than comparison group, but also noting multiple explanations for higher rates).

213. See HARDIN ET AL., *supra* note 12, at 87 (“[T]he coordinators felt that family group conferences can enhance the safety of the child because they set up more whistleblowers who can be involved with the family far more frequently than any professionals.”).

214. See Burford & Hudson, *supra* note 183, at xxi.

215. See William Vesneski & Susan Kemp, *The Washington State Family Group Conference Project*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 312, 315; Shore et al., *supra* note 212, at 5 (noting that in service plans, 80 percent of parents mentioned mental health services, 61 percent mentioned substance abuse treatment or prevention, 61 percent mentioned behavioral interventions [anger management, domestic violence services, parenting, and stress management classes], and 30 percent mentioned housing resources).

by the participants often require more of the parent than the agency typically would.²¹⁶ Conference participants play an active role in finding a solution for the troubles facing the family by providing, for example, child care, home furnishings, transportation, housing, and help with managing the household.²¹⁷ Although participating family members have multiple problems, including substance abuse and histories of violence, these participants are able to create thoughtful and detailed plans to keep the children safe.²¹⁸ These plans draw on familial and professional resources.²¹⁹ An evaluation of a Washington project demonstrated that the family group conferences resulted in detailed plans drawing on the families' expertise about their children and their own resources. The plans also drew on social service supports, but as requested and defined by the families. To use the vernacular of family group conferencing, the process and results were "family-centered."²²⁰ The conferences were based on a "strengths-based practice," focusing not on pathology and dysfunction, but rather on resilience and potential for development and success.²²¹

Third, participants report satisfaction with the process and result.²²² For example, one mother described her experience as follows:

There comes a time when you think "I can take control now" and that's when I think the normal way of running social services departments falls down. Yes people come initially because they do need a certain amount of support and a certain amount of help. But if you go on trying [to] nursemaid and suffocate that person then their growth isn't going to take place. The social services, the way it's run at the moment actually doesn't allow the person who has to . . . take control, they're very reluctant to give that person back the control of the family. So social services becomes the head of the family, and the mother and the father, or one of them, becomes more or less like a child themselves, and they regress into no responsibility, because they're instructed all the way, what

216. See McElroy & Goodsoe, *supra* note 12, at 5–6.

217. See Richardson, *supra* note 197, at 45.

218. See Vesneski & Kemp, *supra* note 215, at 315, 318.

219. See *id.*

220. See *id.* at 315–19.

221. See *id.* at 320–22.

222. See Burford & Hudson, *supra* note 183, at xxi. For example, an evaluation of the Arizona Department of Economic Security's Family Group Decision Making program reported that 94 percent of respondents expressed satisfaction with the process and outcome immediately following the meeting. See ARIZ. DEP'T OF ECON. SEC., FAMILY GROUP DECISION MAKING: THIRD ANNUAL EVALUATION REPORT 2 (2003).

their responsibilities are. But they are not actually helped to rebuild their confidence to enable them to take up the full responsibility.²²³

Fourth, there is evidence that family group conferencing fosters development of a strong support network within the child's extended family and community. For example, when the plan does recommend placement outside of the immediate family, children are more often placed with extended family members.²²⁴ In the Washington project, 77 percent of children who were placed outside of the home as a result of the family group conference were placed with relatives, whereas only 27 percent of children not in family group conferencing but in need of out-of-home placement were placed with relatives.²²⁵ In New Zealand, 95 percent of all children who are removed from their homes are placed with a relative.²²⁶ The process also fosters stronger ties between the family and the community. Research has demonstrated that ties to the community are particularly important to help an at-risk child overcome difficult family circumstances and that emotional support outside of the immediate family can be a crucial protective factor for children who grow up in high-risk environments.²²⁷

Finally, to the extent the process prevents the placement of children in the foster care system, it could well generate significant savings for

223. MARSH & CROW, *supra* note 207, at 169–70.

224. See Burford & Hudson, *supra* note 183, at xxi.

225. See Vesneski & Kemp, *supra* note 215, at 319–20.

226. See Margaret Zack, *Program Will Try to Place Abused Kids With Relatives—It Aims to Cut Time in Shelter or Foster Care*, STAR TRIB. (Minneapolis), July 6, 1999, at 1B.

227. See Emmy E. Werner, *Children of the Garden Island*, SCI. AM., Apr. 1989, at 106 [hereinafter Werner, *Garden Island*]. A thirty-year study of 698 infants on the Hawaiian island of Kauai demonstrated the importance of the community to such children. See *id.* at 106, 108–10; Emmy E. Werner, *High-Risk Children in Young Adulthood: A Longitudinal Study From Birth to 32 Years*, 59 AM. J. ORTHOPSYCHIATRY 72, 74 (1989) [hereinafter Werner, *High-Risk Children*]. The two principal goals of the study were “to assess the long-term consequences of prenatal and perinatal stress and to document the effects of adverse early rearing conditions on children’s physical, cognitive and psychosocial development.” Werner, *Garden Island*, *supra*, at 106. The study evaluated the children both during the prenatal period and then after birth at ages one, two, ten, eighteen, and thirty-two. See *id.* One-third of the children were classified as high-risk because of exposure to perinatal stress and other factors such as poverty, an uneducated parent, an alcoholic or mentally ill parent, or divorce. See *id.*; Werner, *High-Risk Children*, *supra*, at 73. Despite these stressful events, one out of three of the children in the high-risk category developed into competent, caring adults. See Werner, *Garden Island*, *supra*, at 108; Werner, *High-Risk Children*, *supra*, at 73. The research indicated that emotional support outside of the immediate family greatly contributed to their resiliency. See Werner, *Garden Island*, *supra*, at 108–10; Werner, *High-Risk Children*, *supra*, at 74. While growing up, these children had at least one close friend, they relied on kin, neighbors, teachers, or church groups for support, and they participated in extracurricular activities. See Werner, *Garden Island*, *supra*, at 108–10; Werner, *High-Risk Children*, *supra*, at 74.

federal, state, and local governments.²²⁸ In fiscal year 2002, the total cost of child welfare spending from federal, state, and local government sources was \$22.2 billion.²²⁹ Of this amount, \$10 billion was spent on out-of-home placements.²³⁰ Family group conferencing could incorporate poverty-related programs already in place that are more cost-effective than foster care. For example, Connecticut has been experimenting with a Supportive Housing program in which the state partners with a private social services agency to provide both permanent housing and intensive social services to rebuild families. In one illustrative case, a mother had six children in foster care, at a total cost to the state of \$60,000. Once provided permanent housing and intensive supports, she was able to regain custody of her children and keep them out of foster care. The cost of this program was \$11,000 for the support services and approximately \$5500 for the housing.²³¹

Of course, the economic benefits of family group conferencing present a complex issue. For example, relatives caring for children in the current system still receive foster care payments from the state. To the extent children are placed with relatives through a family group conference, presumably such payments would continue. Additionally, the services requested from the family group conference come with their own substantial price tag. My intent here is not to conduct a definitive cost-benefit analysis of family group conferencing versus traditional child welfare services, but rather simply to raise the point that

228. A tentative analysis of family group conferencing in the United Kingdom postulated that there were “probable” or “possible” savings for the state in using family group conferences, due to reduced court costs, lower re-abuse rates, and more stable placements. See MARSH & CROW, *supra* note 207, at 172; see also Chandler & Giovannucci, *supra* note 182, at 222. Chandler and Giovannucci note:

The child placement data from Minnesota and Arizona for those cases where the FGC was used seems to point to a trend whereby children’s out-of-home placements are either less restrictive or avoided entirely. From this information, one could deduce that a reduction in overall cost to the child welfare system for placement-related services might offset the costs associated with an FGC program. Further analysis is likely to assist and inform programs in demonstrating these cost benefits.

Id.

229. See CYNTHIA ANDREWS SCARCELLA ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN IV: HOW CHILD WELFARE FUNDING FARED DURING THE RECESSION 6 (2004).

230. See *id.* at 10.

231. See Waldman, *supra* note 167. Although reports do not describe the cost of the housing voucher, the average subsidy costs the federal government \$457 per month, see OFFICE OF POL’Y DEV. & RESEARCH, U.S. DEP’T OF HOUSING & URBAN DEV., COSTS AND UTILIZATION IN THE HOUSING CHOICE VOUCHER PROGRAM 34 (2003), for a total cost of \$5484. See also INTERAGENCY COUNCIL ON SUPPORTIVE HOUSING AND HOMELESSNESS, REPORT TO THE HON. M. JODI RELL, GOV., STATE OF CONN. 4 (2005) (describing the cost of Supportive Housing versus alternatives, and noting the connection between homelessness and foster care placement).

vast sums of money are spent on the current child welfare system, but with very poor results. The question is how better to allocate these resources.

Despite these five successes of family group conferencing, there are important criticisms of the theory and the appropriateness of the process. First, one concern is whether a family challenged by tough issues can make its own decisions. Advocates of family group conferencing contend that there are healthy parts of families traditionally labeled dysfunctional, and functioning conference participants, found in the extended family or community, can help the family make decisions.²³² If the community is dysfunctional as well, the coordinator can bring in members from a larger community where there are resources.²³³ In this way, family group conferencing is able to adapt to each family's decisionmaking abilities.

Second, scholars have identified process concerns for women in alternative dispute resolution settings, noting, for example, that the flexibility and lack of legal constraints can recreate existing power imbalances.²³⁴ Of particular concern is a victim of domestic violence, who, through an alternative dispute resolution process, may be required to interact, or, worse, compromise, with her batterer. In the context of family group conferencing, there is considerable disagreement on the propriety of the process when there is a history of domestic violence. New Zealand mandates its use for all cases, including those with a history of domestic violence, and some experts support this practice, arguing that with proper protections for the victim, family group conferencing can work effectively.²³⁵ Other experts, however, view family

232. Moore & McDonald, *supra* note 190, at 50.

233. *Id.*

234. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–1607 (1991); see also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 454–56 (1992). Bryan states:

Research on marital negotiations shows that the greater income and education and the higher occupational level of husbands, compared to wives, confers upon husbands greater power over routine decisions . . . [U]nless the mediator intervenes, the husband's greater tangible resources will grant him the lion's share of power in divorce negotiations, particularly over critical financial issues.

Id. Of course we should be mindful of these critiques. Nonetheless, family group conferencing still holds considerable promise, especially for those women who currently have very little voice in the typical, adversarial child welfare proceeding. See *supra* text accompanying notes 111–116 (discussing practical problems with poor counsel and cursory legal proceedings).

235. See, e.g., Joan Pennell & Gale Burford, *Family Group Decision-Making and Family Violence*, in FAMILY GROUP CONFERENCING, *supra* note 183, at 171. John Braithwaite has asserted that “court processing of family violence cases actually tends to foster a culture of denial, while restorative justice fosters a culture of apology,” and that an apology, “when communicated with ritual seriousness, is actually the most powerful cultural device for taking a problem seriously, while denial is a cultural device for dismissing it.” John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 189 (2000).

group conferencing as being appropriate only “as a final step in a limited number of domestic violence cases . . . after safety mechanisms are first set in place that can be enforced through court sanctions” and that “for the incidence of domestic violence to be curtailed, clear and unambiguous messages must be given by our legal system that such violence is wrong.”²³⁶ Although protections offered by legal representation are absent in family group conferencing, there are advocates for women and children within the conference. “Support persons” are identified by the coordinator for both adult and child victims and these persons are supposed to protect victims who are emotionally and physically vulnerable.²³⁷ Additionally, in some programs, lawyers, guardians ad litem, and court-appointed special advocates participate in the conference.²³⁸

Third, there is a debate about the types of cases appropriate for family group conferencing. New Zealand has determined that all cases of child abuse and neglect are appropriate for family group conferencing, but some countries have chosen not to use it for cases involving child sexual abuse.²³⁹ The argument against addressing child sexual abuse in a family group conference is that the dynamics of sexual abuse can run across generations and reflect a deep denial within the family, thus undercutting the ability of family members in the conference to acknowledge the abuse and adequately protect the child.²⁴⁰ On the other hand, there may be some role for family

236. Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get It Wrong?*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE*, *supra* note 182, at 223–24. Busch argues that safety, not reconciliation, should be the primary goal, *see id.*, and that “[t]here are grave risks in assuming that all relationship conflicts can be patched by consensus. Since the consensual resolution of conflict requires an attitude of ‘give a little, take a little’ to reach an agreement, there are risks in translating these principles unthinkingly into relationships affected by violence.” *Id.* at 228. However, Busch commends the Pennell and Burford model for

its emphasis on protection of victims through extensive pre-conference preparation, through ensuring that victims will not be isolated or silenced during conference, the researchers’ willingness to use the criminal justice system’s protections when necessary, their commitment to ongoing monitoring and evaluation of families who have been through the conferencing process—these demonstrate that restorative justice processes may be useful in some domestic violence cases, at a late stage, after safety issues have been dealt with, in conjunction with other measures also aimed at providing safety and autonomy for victims.

Id. at 246–47.

237. See Merkel-Holguin, *supra* note 205, at 227; Gale Burford et al., *Measures to Ensure the Safety of Family Members Participating in the Family Group Decision Making Project*, in *MANUAL FOR COORDINATORS AND COMMUNITIES: THE ORGANIZATION AND PRACTICE OF FAMILY GROUP DECISION MAKING* 91 (1995). Some communities also offer support persons for offenders.

238. See Merkel-Holguin, *supra* note 205, at 227.

239. See *id.* at 225.

240. See *id.*

group conferencing in cases of child sexual abuse,²⁴¹ although it is important to note that child sexual abuse cases differ radically from the typical abuse or neglect case.²⁴²

* * *

Family group conferencing holds great potential for the child welfare system. Although it may be no panacea for the very difficult issues facing the system, the relevant question is whether family group conferencing, and a problem-solving model more generally, is a marked improvement over the current legal framework, which clearly is not serving the interests of parents or children.

IV. BEYOND THE MYOPIA OF RIGHTS

The basic interests underlying rights—that the state should not intervene in a family absent a showing of parental unfitness, and that children should be safe in their homes—should be retained in any legal model. But these interests are best protected by shifting our focus from rights to problem-solving. We should stop calibrating the proper balance between parents' rights and children's rights, and instead move beyond a fixation on rights as the savior of parents and children. In particular, I argue that we should pull decision-making authority away from distributors of rights, that is, the courts, and put it back in the hands of families and communities. A problem-solving model would protect the substantive interests of *both* parents and children by moving away from a process where rights dominate and focusing, in the vast majority of cases, on how to help parents overcome the underlying issues that led to the abuse and neglect. The family group conferencing process exemplifies

241. Some advocates contend that the offender apologizing to the victim, and the victim having the opportunity to tell the offender about her experience of the offense, can help heal sexual abuse. See Terry S. Trepper, *The Apology Session*, in *TREATING INCEST: A MULTIPLE SYSTEMS PERSPECTIVE* 93 (Terry S. Trepper & Mary Jo Barrett eds., 1986); see also HARDIN ET AL., *supra* note 12, at 22–23. Hardin writes:

[T]here are at least two major reasons for using family group conferences in all sexual abuse cases. The first is that the mother should not be left alone to protect the child and to decide whether or not to side with the father against the child. Second, there should be more rigor in making sure that all family members are properly informed about the nature of the situation, [and thus protected from the perpetrator].

Id. Moreover, distinguishing cases presents difficulties because some cases that appear to present “only” physical abuse or neglect may well involve sexual abuse as well, a fact that comes to light during the process. See Gale Burford & Joan Pennell, *Family Group Decision Making: New Roles for ‘Old’ Partners in Resolving Family Violence: Implementation Report Summary* 19 (Memorial Univ. of Newfoundland, Inst. Soc. & Econ. Research 1996).

242. See *supra* note 19 (discussing the distinct characteristics of sexual abuse).

the problem-solving model of child welfare. It is clear that such a model has significant advantages over the current rights-based model.

A. Benefits of the Problem-solving Model

A problem-solving model for the child welfare system does not abandon the interests underlying parents' rights and children's rights—the interest in family integrity and being free from abuse and neglect. These substantive interests still lie at the heart of the child welfare system. But the process for protecting these interests is not cast in terms of rights. As the rhetoric of rights recedes, the specific procedures designed to protect the interests are relinquished in favor of a more fluid process. In the problem-solving model, the first question is how to meet the needs of and safeguard the child as well as support the parents. In this way, the model does not assume a conflict between preservation and protection. Rather, the task is to widen the lens and see who has a role in creating the problem and who can help resolve it.

As a first step, and as discussed above, it is important to distinguish among the types of cases in the child welfare system, separating the approximately 10 percent of egregious cases from the remaining 90 percent of cases.²⁴³ This filtering would lead to a better allocation of the limited resources in the child welfare system. The state could focus its investigative resources on the egregious cases, and the court system could target its limited resources appropriately. If a family court had to reach decisions in only 10 percent of its current caseload, the court could devote the necessary time to determining the best outcome for these families. Not only would judges be focused, but limited resources, such as adequate counsel for parents, would be more available. Thus narrowed, in these egregious cases, the rights of parents and children would be better protected in practice. After segregating the egregious cases, the problem-solving approach could be adopted for the remaining cases. I now turn to a detailed discussion of the benefits of the problem-solving model.

243. See Ross, *supra* note 61, at 192 (discussing the need to distinguish cases with “a more sensitive filtering system, in which neglect that does not result in serious harm or danger would trigger benefits in the form of services, rather than potentially unwarranted removal”). This segregation builds on the relatively new practice in child welfare of “differential response.” Recognizing that cases vary and thus that different responses are appropriate for different cases, this practice uses an “assessment-oriented approach” for those cases where abuse and neglect are suspected or known, but are considered less severe; for cases of severe abuse and neglect, the traditional investigative (and adversarial) process is used. See Schene, *supra* note 13, at 4–6. Thus, although critics may contend that the state cannot distinguish among the types of cases, such a process is already in place and being used with some success. See *id.* at 4–5 (describing a Minnesota study on the benefits of differential response).

1. More Protection in Practice

As described in Part II, the rights-based model, as implemented, fails to protect parents and children in three important ways: It does not safeguard against racial and politically driven decisionmaking; it does not offer procedures and court adjudications that lead to considered, careful decisions; and it requires state intervention that often comes at a high cost to the well-being of children. The problem-solving model—and here I refer to the specific process of family group conferencing—is greatly superior to the rights-based model with respect to these three practical concerns.

First, family group conferencing protects the interests of parents and children in unnecessary removals because it better guards against racial bias and politically motivated decisionmaking. Implicit in the decision to remove a child and ultimately terminate parental rights is a cultural judgment by those with the authority to decide the child's future—child protective services and the family court. In family group conferencing, these decisions are made by (more) culturally sensitive actors.²⁴⁴ If family members and community representatives assess a family's well-being, that assessment likely will come less laden with the racial, class, and cultural biases of the predominantly white and middle class child welfare system.²⁴⁵ And because decisionmakers are not agency officials, there will not be the same tendency to overreach in the aftermath of well-publicized abuse and neglect cases. To be sure, child protective services could initiate more investigations in the wake of well-publicized cases, but the family group conference would decide for itself if removal was necessary, thus acting as an important check on the agency.

244. See Marian S. Harris & Ada Skyles, *Working With African American Children and Families in the Child Welfare System*, in RACE, CULTURE, PSYCHOLOGY AND LAW 98–99 (Kimberly Holt Barrett & William H. George eds., 2005) (calling for greater cultural competence among child welfare professionals working with African American families in the child welfare system). Of course family group conference participants would have their own biases and cultural values, but at least these biases would be more endogenous than those of social workers and judges who are not part of the community. Moreover, the decisions of the family group conference will be more contextualized because the participants actually know the family.

245. In the Indian Child Welfare Act of 1978 (ICWA), Congress recognized these cultural judgments and, fearing the ramifications of such judgments—the removal of children from Indian homes and their placement in non-Indian families—devised a statutory scheme that more heavily favors parental rights by permitting the removal of an Indian child only upon a showing of “clear and convincing evidence,” ICWA, Pub. L. No. 95-608, § 102(e), 92 Stat. 3071 (1978) (codified at 25 U.S.C. § 1912(e) (2000)), and the termination of parental rights only upon a showing of evidence beyond a reasonable doubt “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” *Id.* § 102(f) (codified at 25 U.S.C. § 1912(f) (Supp. 2002)). These standards are much higher than those used for non-Indian child welfare cases. See *supra* note 30.

Second, family group conferencing is not dependent on adequate counsel or a court with sufficient time and resources to determine a beneficial outcome. Rather, in family group conferencing, the participants can deliberate at their own pace. It also accounts for the multifaceted human problems that may not lend themselves to court-determined solutions.²⁴⁶ In family group conferencing, professionals do not *provide* a solution, rather, the individuals involved in the problem *devise* the solution. One advocate of family group conferencing describes the theory as follows:

The relationships between all the parties, and out of which the problems have arisen, are so numerous and ever-changing, and so interconnected that it is folly to believe that *outsiders to those relationships* could ever “know” them in a way that permits either accurate prediction or predictable intervention. The only ones who might have a chance at that are the parties themselves. For that reason it is *they* who must pool their perceptions of the relationships, of the problems arising within them, then search together for ways in which each of them, according to their own skills and inclinations, can make different and better contributions.²⁴⁷

It is precisely this personal expertise that is lost in the current system.

Third, the safety of children is better protected through family group conferencing because it leads to fewer removals and more placements with family members, while still ensuring that children are not abused or neglected. In the ideal model of family group conferencing the conference occurs before removal, thus the risk of damaging the bond between parent and child by preemptive removal is minimized. Children are not removed until the family group conference determines that is the proper course of action. Certainly difficult cases exist, such as substance abuse, where drug treatment can take years and relapse is highly likely.²⁴⁸ However, if the family group conference is able to devise a solution that both ensures the parent will obtain treatment and the child will be protected, perhaps by placing the child with a close relative, then a conflict between parent and child does not necessarily

246. See Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004) (“[T]he adversarial, rights-based model typically fails to serve the interests of children and families and may be more harmful than beneficial to children relative to other possible methods of dispute resolution.”); John E.B. Myers, *Children’s Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POL’Y 267, 281 (2004) (arguing that family courts are unable to solve “complex human problems” through an adversarial process).

247. Ross, *supra* note 198, at 13.

248. See *supra* text accompanying note 166.

exist. Continued contact between parent and child during treatment will maintain the bond, but the child's needs will still be met in the alternative home.

Finally, family group conferencing has additional practical benefits. For example, it gives greater voice to extended family and community members in the decisionmaking process. The current legal framework does not account for the reality of children's lives, in which many individuals beyond parents may play important roles. If we continue to adhere to the parents' rights and children's rights model, then it becomes necessary to determine who can assert parental rights, and important to limit that right to a defined set of individuals. Family group conferencing, by contrast, allows multiple adults to participate in decisionmaking relevant to the child's life, accounting for what is in fact a broader range of individuals with a stake in the child.²⁴⁹ Thus a child's relationships with these individuals will be accounted for in the decision without the necessity of assigning parental rights to a limited group or abrogating those rights in favor of alternative adults. Likewise, a strength of family group conferencing is that it acknowledges the importance of a child's connection to her community and reinforces those community ties. As noted above, these connections may make the difference in the life of an at-risk child.²⁵⁰

2. A More Apt Theoretical Framework

My two central theoretical concerns with a rights-based model—that it privileges autonomy while undervaluing assistance, thus failing to account for the important role of poverty in child abuse and neglect, and that it generates adversarial processes and relationships—are also better addressed in a problem-solving model.

First, the problem-solving model is a more apt framework for implementing Jennifer Nedelsky's model of rights, in which the relevant question is how to structure rights such that they foster desirable relationships. In this new model, rather than asserting a right of *autonomy* from the state, the parent asserts a claim for *assistance* from the state.²⁵¹ This

249. See Buss, *supra* note 40, at 29 (noting that the classic frame of parent versus state "oversimplifies the field of potential competitors considerably," notably excluding extended family members).

250. See *supra* note 227 (discussing the Kauai study).

251. Of course this is a complex issue. I do not, here, frame this as a *right* to assistance, largely because the U.S. legal system, at least constitutionally speaking, generally does not confer positive rights—our liberty is negative. Although my preference would be for a legally enforceable right to assistance from the state, because I think this so unlikely to happen, I state the right here as a "claim," thus diluting its power but also giving it a greater chance for recognition. I intend to explore this issue more fully in a subsequent article. In addition to the legal question of whether

dependency on the state is intended to foster true autonomy for the parent—ultimately the ability to care for a child without state support. This assistive approach of the problem-solving model²⁵² is more protective than the rights-based model because offering meaningful assistance to parents, such as job training, drug treatment, or subsidized housing, does far more to vindicate the rights recognized by the Supreme Court than a five-minute court hearing with poor counsel after children already have been removed from the home.²⁵³ Moreover, parents are invested in the solution because they chose it themselves. Indeed all conference participants have this “buy-in,” which would not happen to the same degree if the solution was imposed by the state, either through a social worker or the court.

This recognition of the need for assistance, not simply autonomy, better acknowledges the role of poverty and creates a more accurate frame for the issues facing families in the child welfare system.²⁵⁴ This frame will, in turn, reorient the substance of the child welfare system. As opposed to intervening to “rescue” a child and offering minimal, and often ineffective, services to the parent, the process of family group conferencing is a means for families to articulate what supports they need to function better, and an opportunity for the child welfare system, extended families, and the community to provide those supports. Although the risk factors for abuse and neglect are complex, they are not unknown, and can be addressed.

the parent has a right to receive support from the state, there are a host of practical questions. How much can the parent claim from the state? Should the state set a dollar limit on what it owes the parent? What if the state refuses to provide the requested supports, perhaps because of an independent determination that such supports will not help the family? Rather than explore these issues at length here, I only note that these are the right questions to be asking.

252. I am aware of the potential for increased state control of poor families in such a model, see, e.g., Appell, *supra* note 43, at 765–69 (describing the importance of rights to poor families to prevent the state imposing its own view of acceptable parenting and family forms); Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541, 1541 (2001) (noting that the “delicate act of translation—from private need to public obligation—demands acute sensitivity to the ways in which public responsibility inaugurates a new and complex encounter with a broad array of public preferences that deprive dependent subjects of primary stewardship over the ways in which their needs are met”). I intend to explore this issue more fully in a subsequent article.

253. See LINDSEY, *supra* note 111, at 318–19 (proposing “two simple programs” to end child poverty: a child allowance from the government to raise children and effective child support programs, combined with universal child care); ROBERTS, *supra* note 9, at 268 (arguing for addressing family poverty by increasing the minimum wage, creating jobs, establishing national health insurance, providing high-quality subsidized child care, and increasing the supply of affordable housing). In this Article I emphasize the role of the state in assisting families, but one of the benefits of family group conferencing is that it identifies the hidden resources of families and communities.

254. Family group conferencing is still relevant and beneficial for economically stable families. For example, the process provides them with greater decisionmaking authority than in a court-centric system.

Changing the frame for the child welfare case could help reorient society's views of abuse and neglect away from the view that abuse and neglect are products of parental pathology, and toward a view of social responsibility, where a broader group—both the immediate community and the state—claims responsibility for the larger circumstances that led to the abuse or neglect.²⁵⁵ Noted child welfare researcher Duncan Lindsey has described the “residual” nature of the child welfare system as one where the system intervenes in the lives of a subset of low-income families, those who experience, or are at great risk for, abuse and neglect, rather than intervening and offering services to all families who suffer from poverty.²⁵⁶ In this way, the child welfare system views abused and neglected children apart from the society that helped create their circumstances.²⁵⁷ Family group conferencing can help bridge this divide. It is not a radical reordering of our social system to redistribute wealth, but rather one step toward greater social responsibility for responding to the environment that led to the abuse or neglect.

Family group conferencing itself will not solve poverty. To the extent the needed services, such as subsidized housing, job training, or effective treatment for substance abuse problems, are not provided or available, family group conferencing will have limited utility. Thus, a ready criticism of family group conferencing is that even if it does focus the system on poverty, the resources to address the underlying issues may be unavailable.

There are two answers to this criticism. The family group conference would at least identify the real problem, instead of, for example, a

255. See GUGGENHEIM, *supra* note 39, at 181–85 (discussing the origins of child protection as part of an attempt to address child poverty, but describing political changes in the twentieth century, particularly the 1970s, that led away from framing child abuse as a product of greater social ills).

256. See LINDSEY, *supra* note 111, at 18. This is not true for child sexual abuse, which spans all classes. See *supra* note 19. Annette Appell argues that this view of child abuse is part of a larger discourse that locates responsibility for poverty and its related problems in the individual, rather than society. See Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 421 (2004). Appell writes:

The dominant discourse about poverty and racism has changed significantly in the past decade to reflect a view that poverty, problems attendant to poverty, and racial affiliation are matters of individual choice that have individualized solutions. In this discourse, poverty, homelessness, child neglect, and economically blighted and isolated communities reflect personal pathology; White supremacy is a relic and all race distinctions are bad. These beliefs are manifested in federal legislation that limits welfare benefits, promotes adoption of poor children, and removes barriers to transracial adoption. A common denominator of this legislation is the notion that poor (Black) families are pathological so they should be discouraged from having children and the children that they do have would be better off with other parents.

Id.

257. See LINDSEY, *supra* note 111, at 2 n.1.

caseworker removing a child for inadequate housing and referring the parent for parenting classes. In the family group conference, all would agree that the family needs help with housing. This focus would be a sea change from the current system, which typically does not meaningfully address the underlying causes of abuse or neglect.

Additionally, highlighting the real needs of the families involved in the child welfare system may require society to acknowledge these needs and thus reorder our social policies. This orientation is a far cry from the current trend of limiting benefits to low-income families, but this reorientation would at least force an honest public debate about whether society indeed wants to help reduce child abuse and neglect. In other words, if the question is whether the state should provide economic benefits to parents who abuse or neglect their children, the answer likely is no. But if the question is whether society wants less child abuse and neglect, the answer likely is yes. If reducing child abuse and neglect requires providing parents with adequate economic support, such as subsidized housing and child care, then society may view the provision of such supports more openly.²⁵⁸ Moreover, if the political will is there, and if family group conferencing delivers on the promise of fewer out-of-home placements, then some of the \$22 billion currently spent on the child welfare system²⁵⁹ could be redirected toward direct economic support for poor families, such as subsidized child care.

Second, family group conferencing facilitates a collaborative, not adversarial, relationship between parents and the state. The state is helping a parent resolve the underlying issues leading to the abuse or neglect, rather than trying to establish parental unfitness. In other words, the starting point is the assumption that the interests of the state, parents, and children are aligned: All would benefit from helping the parents overcome the issues facing them and be better able to parent.²⁶⁰ This will further support the move in the child

258. It could also be argued that the costs of the child welfare system far outweigh the costs of providing economic supports to families. See *supra* text accompanying notes 228–231. Moreover, in the long-term, the costs associated with the poor outcomes for children in foster care—increased involvement in the criminal justice system, lower rates of employment, higher rates of teen pregnancy—also argue in favor of investing sooner rather than later. Cf. Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL’Y 95, 110–11 (1996) (addressing the costs associated with not investing in child care).

259. See *supra* note 229 and accompanying text.

260. There will be cases where a party engages in strategic behavior or acts deceptively, or the interests of the parties do conflict. I do not mean to gloss over these realities of human behavior. Rather, I intend to highlight the orientation of a problem-solving model: The model assumes it is at least *possible* that the parties can work together toward a mutually beneficial outcome.

welfare field among social workers to recognize the strengths of biological families and to try and work with them to preserve families.²⁶¹

The problem-solving model as embodied in family group conferencing also fosters better relationships between parents and children because it is a legal framework that draws on the widely-respected “family systems” theory, which posits that the most effective intervention for a child occurs when the whole family is treated.²⁶² Family group conferencing does not isolate the child from the parent and determine whose interests should prevail, but rather assumes that the family, who played a role in the problem, can also play a role in a solution. Susan Brooks describes the five attributes of a legal framework that would reflect family systems theory: (1) identifying the members of the family system, (2) considering the mutual interests of all the members, (3) maintaining family ties and continuity, (4) emphasizing the present and future, rather than past misdeeds, and (5) focusing on a family’s strengths.²⁶³ Family group conferencing fits this bill. Instead of interrupting the important bond between parent and child, family group conferencing reinforces that bond, while still acknowledging that something has gone awry between parent and child. Children need a process that ensures their safety while simultaneously recognizing the complexity of family problems, the importance of original families, and the need for assistance to address underlying social and economic issues.²⁶⁴

261. See Schene, *supra* note 13, at 6. New York City has made this change on a policy level, reducing by half the number of children in foster care, and statistics appear to support the conclusion that this shift has not compromised the safety of those children not placed in foster care. See Fernanda Santos, *Placements in Foster Care Are at Lowest Since Mid-80’s*, N.Y. TIMES, Oct. 23, 2005, at A33. City officials attribute the reduction to a strong economy, a decline in the use of crack cocaine, and an explicit policy adopted by the Administration for Children’s Services (ACS) that strives to keep children in their own families. See *id.* The city offers substantial supports to parents, such as counseling, housing aid, and substance abuse treatment. See *id.* A policy emphasizing preservation is always vulnerable, however, as evidenced by the debate following a recent death of a child returned to his mother by the ACS. See Leslie Kaufman, *Mother of Boy Who Died Was Trained, Agency Says*, N.Y. TIMES, Nov. 10, 2005, at B3; Leslie Kaufman, *Baby Drowned as Mother Listened to CD’s, Prosecutor Says*, N.Y. TIMES, Nov. 9, 2005, at B1. Of course this shift is not complete around the country. For example, in Alabama, it took a consent decree to get social workers to start working with biological families, rather than simply to dismiss such families as dysfunctional. See *supra* note 199. Certainly the current legal framework, as embodied in the Adoption and Safe Families Act (ASFA), does not facilitate this social work approach. See *supra* text accompanying notes 59–62 (describing ASFA).

262. See *supra* note 176 and accompanying text (discussing the family systems theory).

263. See Brooks, *supra* note 176, at 14–20.

264. This filtering and reorientation would transform the scholarly debate. Part of the problem with the debate is that it is located in an overly broad context. The narrative of a severely abused or neglected child drives the legal theory of many scholars who advocate for state intervention. For example, in her call for prompt removal of children and termination of parental rights, Elizabeth Bartholet does not distinguish among the types of cases in the child welfare

B. Overcoming the Inertia of Rights

A move by a state away from the rights-based model and toward the problem-solving model likely would encounter some resistance. To discuss this issue, this subpart again uses family group conferencing as an example of a process that satisfies the problem-solving model. While some pilot programs are underway in the United States, if states were to adopt family group conferencing more comprehensively, for example by mandating its use on a statewide level, states could expect considerable opposition from judges, lawyers,²⁶⁵ and advocates for both parents and children. Many will protest that a move away from a rights-based orientation will not sufficiently protect parents and children. This section briefly explores this issue, suggesting responses to some anticipated arguments against family group conferencing.

First, lawyers and advocates for parents may argue that parents should not relinquish constitutionally protected rights to the care and custody of their children. However, this right is not absent in family group conferencing. In the problem-solving model embodied in family group conferencing, the right of a parent to the care and custody of her child is still in effect. Indeed, the parent who participates in the conference bargains in the shadow of this legal principle. But the process for protecting

system and instead uses extreme cases as illustrations of the need for greater protection of children. See BARTHOLET, *supra* note 7, at 67, 115–16. But surely such advocates do not mean to extend the proposal for expedited removal and termination of parental rights to *all* cases in the child welfare system. Thus narrowed, the debate may find greater common ground than expected. In the cases of severe abuse and neglect, advocates of family preservation may be more likely to concede the primacy of children's interests. Indeed, Dorothy Roberts makes this point. See ROBERTS, *supra* note 9, at 225. ("I do not argue that Black children who are abused and neglected should never be removed from their parents. Surely Black children deserve the same protection from injury as others."). Conversely, if such children are identified and protected by the state, children's rights advocates may be more willing to concede there is less need to intervene aggressively in poverty-related neglect cases (50 percent of all cases). By changing the filter device on the child welfare system, the two sides may seem closer together. Perhaps the dispute is about the appropriate approach to the approximately 40 percent of cases that involve less serious abuse and neglect, but not simple poverty-related neglect. Finally, family group conferencing is also a means for implementing some of the alternative proposals offered to the dichotomous world of parents' rights and children's rights. For example, family group conferencing could give effect to the fiduciary model proposed by Elizabeth Scott and Robert Scott. See *supra* notes 91–96 and accompanying text. They "seek to discover the means through which a scheme of legal regulation can best motivate parents to invest the effort necessary to fulfill the obligations of child-rearing." Scott & Scott, *supra* note 91, at 2416. Scott and Scott conclude that the current child welfare laws do not sufficiently motivate parents. A family group conference may be a better method for motivating parents if indeed there are sufficient support services available to the parents.

265. It is not an insignificant issue that family group conferencing anticipates a far smaller role for lawyers. For this reason alone, there is certain to be an outcry against the process.

it is less focused on the rhetoric of rights, and involves fewer procedural rights. The point here is not that rights completely disappear, but rather that they recede in importance and are replaced with a new process that is less rights-centric, and, as a result, less adversarial.

In this way, family group conferencing is not susceptible to constitutional challenge. For example, an aggrieved parent whose child was removed against her will after a conference could claim that her constitutional right to the care and custody of her child was violated by this process.²⁶⁶ But the procedures used in a family group conference would not violate the Constitution: Parents' liberty interest in the care and custody of a child is still cognizable, and the new procedures to protect that interest—procedures of family group conferencing—are both adequate safeguards and, even more importantly, not the sole recourse for a parent. Indeed, as noted above, a parent can veto the conference plan and choose to go to court.²⁶⁷ The ability to veto and proceed to court means that, constitutionally speaking, the family group conference is akin to a new level of administrative review. It could be argued that the availability of court review undermines the effectiveness of family group conferencing because it colors a parent's willingness to engage fully in the process and leads to parental holdouts. In practice, however, in countries and states where family group conferencing has been implemented, 95 percent of cases are resolved in the family group conference and do not entail court involvement.²⁶⁸ Indeed, the small number of cases that need to be resolved by the court is strong evidence that parents understand they are likely to have greater say and a better outcome through the conference than in court.

Second, lawyers and advocates for children (at least those in the protectionist strain) may argue that children will not be sufficiently protected in the family group conference, in part because child advocates, such as guardians ad litem, are not clearly involved in the process. By contrast, family group conferencing relies on the parents, extended family members, and community representatives to advocate for the interests of the child. Elizabeth Bartholet has argued against the use of family group

266. As a practical matter, the more likely scenario is that the parent would not agree to the plan and thus the family group conference would "fail," and would be referred to family court.

267. As discussed in Part III, if a parent does not agree to the plan, then the case is referred to court. See *supra* note 187 and accompanying text.

268. See Lisa Merkel-Holguin et al., *Learning With Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, PROTECTING CHILDREN: FGDM RESEARCH AND EVALUATION (Am. Humane Ass'n, Denver, CO), 2003, at 2, 2–11. I recognize the possibility of coercion in this statistic. But research shows a very high satisfaction rate for participants in family group conferences. See Sundell & Vinnerljung, *supra* note 212, at 276.

conferencing precisely for this reason. She contends that the process “is about giving *parents* accused of maltreatment, together with other *adult* family members, even greater power than they now have over the fate of their children. It is about limiting the state’s power to intervene to protect these children, and limiting the larger community’s sense of responsibility for them.”²⁶⁹ To me, the question is whether family group conferencing is oriented toward ensuring that multiple adults take responsibility for the child, or whether it is an endeavor that encourages adults to simply argue for a piece of the child. By all accounts, family group conferencing achieves the former result. Moreover, the bulk of the research indicates that children *are* protected by the process.²⁷⁰ State monitoring and follow-up can also protect children, as will family group conference members who have committed themselves to ensuring the safety of the child. Indeed, individuals who are involved in the day-to-day life of a child, and are empowered by the family group conference, are far better positioned to protect a child than an overburdened caseworker who visits the home infrequently.²⁷¹

Finally, some may argue that family group conferencing runs counter to American cultural values of individualism.²⁷² This may be true. But it is also true that if we want to address child abuse and neglect, we need to reconceive of society’s responsibility for such abuse and neglect—both our role in creating the problem and in solving it. The focus on individual pathology, rather than societal choices, has resulted in limited imagination regarding how best to address abuse and neglect. Moreover, by providing a formal, but nonadversarial forum for problem-solving, family group conferencing provides a productive and safe context in which parents can take ownership and responsibility for their shortcomings as parents. It also provides a process for the state to rectify its

269. BARTHOLET, *supra* note 7, at 146.

270. See *supra* notes 212–213 and accompanying text.

271. I do not mean to speak poorly of caseworkers. Many are highly committed, engaged professionals. Rather, my concern stems from the high caseload and limited training of caseworkers. For example in Texas, a study showed that caseworkers, often recent college graduates, had an average of twenty-one cases, with many handling thirty-five to forty cases. See CAROLE KEETON STRAYHORN, FORGOTTEN CHILDREN: A SPECIAL REPORT ON THE TEXAS FOSTER CARE SYSTEM 148 (2004). The Child Welfare League of America recommends a caseload ratio of twelve to fifteen cases per caseworker. See CHILD WELFARE LEAGUE OF AM., CHILD WELFARE LEAGUE OF AMERICA’S STANDARDS OF EXCELLENCE FOR FAMILY FOSTER CARE SERVICES (1995).

272. It could be argued that family group conferencing works in small, closely knit communities, but not large cities where social isolation may have played a role in the abuse and neglect in the first place. Advocates of family group conferencing contend that there is always a community to be found and that the process itself both creates and reinforces bonds between the family and the community.

failure to support the family earlier. In this way, family group conferencing is one step towards expanding responsibility for child abuse and neglect.²⁷³

I do not mean to dismiss important questions and concerns about family group conferencing.²⁷⁴ I am not arguing that family group conferencing resolves all the problems in the child welfare system, but rather that a problem-solving model is far more promising than a solely rights-based model. Indeed, once we move beyond the myopia of rights, it could be that we discover even more effective processes. But this first step is crucial.

CONCLUSION

The child welfare system is caught in the trap of ever greater emphasis on competing rights, at the expense of the very parents and children who are meant to be helped by the system. No amount of more careful calibration of those rights will solve the problems facing families in the child welfare system. We need to shift our focus away from rights and toward problems. A problem-solving model, as embodied in family group conferencing, is far more effective at protecting the interests at stake, for both parents and children. Family group conferencing has been shown to decrease abuse and neglect, preserve families, and bring communities together. Parents and children in the system deserve more than the empty promises of rights. A problem-solving model can deliver what a solely rights-based system never will.

273. I also note, however, that it could be seen as a means to privatize the problems of the family. I intend to explore this balance between state involvement and parental autonomy in a subsequent article.

274. Additional research is needed in several areas. For example, it should be determined whether family group conferencing is effective for socially isolated parents who may not have an existing network that could both help the parents and provide the extralegal enforcement contemplated by family group conferencing. I explore several such issues in a forthcoming publication. See Clare Huntington, *Family Group Conferencing in the United States: Questions for the Future*, in *FAMILY LAW: BALANCING INTERESTS AND PURSUING PRIORITIES* (forthcoming).