FAMILIAL RIGHTS IN CHILD WELFARE: A THIRD WAY
Clare Huntington, University of Colorado, U.S.A.*

For decades, legal scholars have debated the proper balance of parents’ rights and children’s rights in the child welfare system. Assuming the relevance and importance of rights, the debate pits the safety and well-being of children against the right of parents to the care and custody of their own children. This article argues that the current rights-based approach to child welfare does not protect parents or children, and in fact interferes with the interests underlying the asserted rights. After describing the limitations of rights in the child welfare system, this article proposes an alternative legal framework based on family group conferencing, a form of restorative justice. This alternative framework holds the potential to reformulate rights in the child welfare system and produce far better results for both parents and children.

INTRODUCTION ...................................................................................................................... 2

I. RIGHTS IN THE CHILD WELFARE SYSTEM ................................................................. 7
   A. Parents’ rights ........................................................................................................... 9
   B. Children’s rights ...................................................................................................... 17
   C. Alternatives ............................................................................................................. 27

II. LIMITATIONS OF RIGHTS ............................................................................................... 31
   A. The failure of rights to protect parents or children ................................................. 31
   B. The shortcomings of rights, as currently conceived ................................................ 50
      1. Rights create zero-sum orientation ...................................................................... 57
      2. Rights obscure the real issue: poverty ................................................................. 61

III. FAMILY GROUP CONFERENCING ................................................................................. 64
   A. Origins, the process, and theoretical underpinnings .............................................. 65
   B. Benefits and concerns—the early research ............................................................. 75

IV. REFORMULATING RIGHTS ............................................................................................ 81
   A. A new model of familial rights ............................................................................... 82
      1. Protecting parents and children ......................................................................... 82
      2. Fostering better relationships ............................................................................ 90
   B. Implementing family group conferencing ............................................................... 94

CONCLUSION ...................................................................................................................... 99

* Associate Professor of Law, University of Colorado School of Law; B.A. Oberlin College, J.D. Columbia Law School. An earlier version of this article was presented at the 2005 Annual Meeting of the Law and Society Association. I would like to thank Nestor Davidson, Sarah Krakoff, Pierre Schlag, and Philip Weiser for their comments. I would also like to thank Tricia Leakey, Catherine Madsen, Renee Neswadi, Mitra Pemberton, Jennifer Sloan, Michelle Swardenski, and Cynthia Sweet for their research assistance.
INTRODUCTION

An enduring debate in family law centers on the proper balance between parents’ rights and children’s rights. Although legal scholars debate this issue in numerous contexts, including child custody disputes, religious freedom, immigration proceedings, education, criminal law, and the participation of the United States in international treaties, the debate is particularly vociferous and the stakes especially high in the context of the child welfare system. In that context the choices are stark, with a parent’s right to the care and custody of a child pitted against a child’s right to a safe

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1 See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L.J. 293, 294, 296, 314-15 (1993) (arguing that current custody regime encourages the view of children as property, and proposing alternative regime embracing “a view of parenthood based on responsibility and connection. The law should force parents to state their claims, and courts to evaluate such claims, not from the competing, individuated perspectives of either parent or even of the child, but from the perspective of each parent-child relationship. And in evaluating (and thereby giving meaning to) that relationship, the law should focus on parental responsibility rather than reciprocal ‘rights,’ and express a view of parenthood based upon the cycle of gift rather than the cycle of exchange”); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 499 (1984) (“[a]dult interests need not be ignored as a matter of first principle and probably should not be as a matter of sensible policy so long as they can be kept subordinate to the interests of children”); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 16 (1987) (rejecting the best interest of the child standard because it does not account for parents’ rights); 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).


4 See Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging “The Power to Control the Education of Their Own,”* 11 Cornell J. L. & Pub. Pol’y. 481, 490, 492 (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).


home. The rights-based framework governing the child welfare system treats these rights as zero-sum: the recognition of the rights of a parent necessarily entails a loss of rights for the child, and vice versa.

The debate between those who would articulate and advocate for a set of parents’ rights and those who would do the same for children’s rights is both highly charged and polarized, with participants quick to vilify each other. To give just one example, Elizabeth Bartholet contends that the state is overly deferential to parents’ rights and is unwilling to remove children from homes where they have been abused or neglected; as a result, children’s futures are sacrificed because of this pervasive “blood bias” in the child welfare system. In contrast, Dorothy Roberts contends the child welfare system discriminates against low-income, African-American families by removing African American children from their homes at far greater rates and for less serious abuse and neglect than white and Latino children. As a result of these racial disparities, Roberts argues, “black families are being systematically demolished.”

Who is right? More importantly, do we need to decide? In my opinion, the answer is no, at least in the majority of cases. The debate, as currently framed, misses the mark because rights are the wrong tool for building or fixing the child welfare system. First, in practice the rights-based model of child welfare does not protect either parent or child in the typical case. For example, there is substantial evidence of racial disparities in

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7 See Elizabeth Bartholet, Nobody’s Children: Abuse and Neglect, Foster Drift and the Adoption Alternative 7 (1999).
9 See id. at viii.
the child welfare system, with African American children removed at far higher rates than similarly situated white and Latino children. Additionally, high numbers of children are removed from their homes due to poverty-related neglect. Such neglect may threaten a child’s well-being, but it is far from clear that foster care is the proper solution. Similarly, children’s rights do not ensure that children are in safe, nurturing homes because the vindication of such rights requires state intervention. Research amply demonstrates that state intervention is associated with very poor outcomes for the vast majority of children. Even more importantly, removal of children and placement in foster care is likely not the best course for at least half the children in the child welfare system. Indeed, approximately fifty percent of all cases are attributable to poverty-related neglect, such as lack of housing or inadequate child care arrangements.\textsuperscript{10} Although these issues are serious problems, removal of children from their homes and placement into foster care is seldom the appropriate remedy. In these cases, the rights of the parent and child are not necessarily in conflict.

Second, although important interests underlie the labels “parents’ rights” and “children’s rights”—the care and custody of a child and the safety of children—asserting these interests in the form of rights does little to protect the interests. The dominant conception of rights assumes the rights bearer is an autonomous individual seeking freedom from the state. Parents in the child welfare system typically do not need autonomy, they need assistance. Similarly, children need assistance, although not in the form of the state intervention now provided. The child welfare system needs a new

model of rights that both guards against unnecessary state intervention but also facilitates meaningful assistance from the state to the family.

A few scholars have offered innovative solutions that attempt to accommodate the interests of both parents and children, but these solutions still operate within the current rights-based system. The focus of these alternative proposals is understandable given the current legal framework, and the apparent absence of a satisfactory alternative. What has been lacking in the debate thus far has been a material process that represents a true departure from the rights-based framework entrenched in child welfare. What is needed is a new process for moving beyond rights as currently conceived and aligning the interests of the state, parent, and child.

Family group conferencing, a form of restorative justice, holds the potential to move the child welfare system beyond the current rights deadlock. Begun in New Zealand and now spreading to other countries, including the United States, family group conferencing is a legal process for resolving child welfare cases without relying on a family court judge as a decision-maker. After a report of child abuse or neglect has been substantiated, the state convenes a family group conference. In this conference, the immediate and extended family members, along with other important people in the child’s life, such as a teacher or religious leader, meet to decide how to protect the child and support the parents. Although professionals convene the meeting, and share information, only the family and community members devise the plan for protecting the
child and addressing the issues facing the parents that led to the abuse and neglect, such as substance abuse.

The approach assumes that families have hidden strengths, are able to make responsible decisions, and, if provided with adequate support, can make meaningful changes in their lives and be held accountable for their actions. After the conference, family and community members ensure the parents adhere to the plan agreed upon at the conference and provide oversight of the family, who are likely to be better safeguards of children’s safety than an overburdened caseworker.

Family group conferencing holds the potential to reorient the legal framework in the majority of child welfare cases, thus leading to a new model of familial rights. In this new model, the substantive interest of a parent to the care and custody of her child, and the interest of a child in a safe home would remain central organizing principles for the child welfare system. But the current framework intended to protect these interests would be relinquished in favor of the non-rights-based process of family group conferencing.

By focusing on the underlying problems that led to the abuse and neglect, family group conferencing helps families stay together in the long-run while simultaneously ensuring children are protected during the period parents are seeking help. In this way, the child welfare system would protect the rights of parents and children, without, in the majority of cases, choosing between parent and child. Family group conferencing is a
new process, not a new set of rights. This process has the potential to reorient the substance of the child welfare system into one that perceives the alignment of the interests of parent, child, and state.

Like any process, family group conferencing is no magical solution. The underlying societal reasons for families becoming entangled with the child welfare system will persist and continue to complicate even the best process. But by all indications, family group conferencing is an excellent start, and one that has the capacity to address many of the most profound theoretical and practical objections to the current child welfare framework. Given our current underachieving regime, it is at least worth a try.

This article proceeds in four parts. Part I describes the various rights-based approaches to child welfare, examining models of parents’ rights, children’s rights, and proposals that attempt to articulate a new approach but still operate within the current rights-based system. Part II explores the limitations of a rights-based approach to child welfare, concluding that parents’ rights and children’s rights, as currently conceived, do not produce effective solutions for either parents or children. Part III describes family group conferencing and the early research on its benefits. Part IV proposes a new model of familial rights and discusses, briefly, how family group conferencing can be implemented in the United States, suggesting that one state implement it on a trial basis.

I. RIGHTS IN THE CHILD WELFARE SYSTEM
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. The state uses its parens patriae authority to intervene in such families to offer what is often termed “child protective services.” These intervention services range from the provision of support to keep a family together to the removal of a child from a biological family and the placement of that child in a foster home or institution. The child welfare system involves vast numbers of children: the number of children in foster care has grown dramatically over the past two decades, increasing from 302,000 in 1980 to 532,000 in 2002. In 2003, child protective services investigated an estimated 2.9 million reports of alleged child maltreatment, and “substantiated” 661,210 of these reports. The neglect of children is by far the most prevalent form of

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11 See, e.g., N.J.S.A. 30:4C-1.1 (“[l]egislature finds and declares that: a) New Jersey must improve the ability of its child welfare system to protect children from abuse and neglect, and to provide services to at-risk children and families in order to prevent harm to their children”); Minn. Stat. § 626.556 (“legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse. In furtherance of this public policy, it is the intent of the legislature under this section to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused or neglected children.”); O.C.G.A. § 19-7-5 (Georgia finds “(a) The purpose of this Code section is to provide for the protection of children whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection”).

12 In this article, I use the term “child welfare system” and “child protective services” interchangeably to refer to the entire state systems designed to respond to the abuse and neglect of children.


14 U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2003 xiii (2005). Child protective services agencies in the United States received more than 50,000 referrals for alleged child abuse and neglect each week. See id. The rate of children who received an investigation or assessment increased from 36.1 per 1,000 in 1990 to 45.9 per 1,000 children in 2003. See id. at 21. This is a 27.1 percent increase. See id. Forty-four states contributed to the data in this study. Id. at 2.

15 U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2003 at 30 (2005). The total number of “indicated cases” was even higher:
maltreatment (60% of cases), with physical abuse a distant second (19%) and sexual abuse even less likely to surface in the child welfare system (10%).\textsuperscript{16} Younger children are more likely to be maltreated than older children,\textsuperscript{17} and infants are particularly vulnerable to maltreatment.\textsuperscript{18}

A rights-based, adversarial legal framework governs the child welfare system. This Part describes that framework, with a particular focus on the shift from a historical emphasis on parents’ rights to an increasing solicitude for children’s rights.

A. Parents’ rights

\textsuperscript{16} See U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2003 at 23 (2005). These percentages are from the total number of cases (substantiated and indicated). The percentages do not total 100 because some children suffer multiple types of harm, e.g., physical abuse and neglect. 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—statistics vary, but a conservative estimate is that [put in numbers for girls and boys, esp noting that it’s family members, perhaps use Robin Fretwell Wilson’s Cornell article here for stats]—the low number of cases in the child welfare system involving child sexual abuse is startling. 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. Sexual abuse occurs across all socioeconomic classes, see, e.g., KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 12 (1995) (“sexual abuse of children can be found in all socioeconomic classes and family settings”); David Finkelhor, The Scope of the Problem in CHILD SEXUAL ABUSE 12 (Murray & Gough eds., 1991) (“In spite of the fact that cases that come to the attention of the reporting system have a clear bias towards deprived and lower socio-economic status, the surveys have demonstrated that there seems to be no relationship between social class background and the risk of being a victim of child sexual abuse.”), and yet only a small percentage of children sexually abused are in the child welfare system. Throughout this article, I set aside the issue of child sexual abuse, which raises distinct challenges and must be addressed separately.

\textsuperscript{17} For example, the rate of child victimization of children aged birth to three years is 16.4 per 1,000 children, and for children aged four to seven years is 13.8 per 1,000 children. See U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2003 23 (2005).

\textsuperscript{18} Children under the age of one account for 9.8 percent of all victims. See U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2003 23, 42 (2005).
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 principle has deep roots. During the colonial period, children were considered to be the property of their father; a father was presumptively entitled to the services and earnings of his children, provided he protected and educated them. 19 The authority to

19 See Woodhouse, Who Owns the Child?, supra note __, at 1037; Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making, 101 HARV. L. REV. 727, 737-39 (1988); see also Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 GEO. L. J. 299, 310 (2002) (“The Anglo-American common law understood the connection between parent and child as a relation of both reciprocal obligation and hierarchical obedience.”); Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401, 2407 (1995) (“Parents’ interest under traditional law was property-like in many respects. A parents’ right to the custody of his children so approximated property ownership that it could be transferred by contract, and lost only by abandonment or unfitness.”). The concept of ownership predates the colonial period. Under Roman law, a father had near “near absolute right to his children, whom he viewed as chattel,” and courts had no role in mediating this relationship. See Kathryn L. Mercer, A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination, 5 Wm. & Mary J. Women & L. 1, 14 (1998). This principle was embodied in the concept of patria potestas, which Black’s Law Dictionary defines as “[t]he authority held by the male head of a family over his children and further descendants in the male line, unless emancipated,” and that this power initially included “the power of life and death.” Black’s Law Dictionary 1188 (7th ed.1999). This authority was located solely in the father, with no concomitant rights for the mother. See Sibylla Flugge, 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 a mother. Jacobus tenBroek notes, however, that, in the draft codes of New York and California during the mid-nineteenth century, mothers had primary entitlement to custody (and therefore had the obligation to educate and support) of illegitimate children, but their rights regarding legitimate children were entirely secondary. See Jacobus tenBroek, California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I, 16 STAN. L. REV. 257, 314 (1964) (citing draft N.Y. Civ. Code § 89; Cal. Civ. Code § 196). At this time, and for a long time after, fathers were given presumptive custody of their children, often regardless of fitness. See Hasday, supra, at 310; see also id. at 311 (“Over the entire course of the nineteenth century, common law courts and legal writers in the United States remained highly respectful of the control that parents, particularly fathers, exercised over their household and their children, and committed to doctrines that made legal intervention to counter parental excess or abuse very unlikely.”). For example, fathers had a presumptive right to his child’s wages, labor, and services. See, e.g., Benson v. Remington, 2 Mass. 113 (1806) (finding father entitled to earnings of infant child); Shute v. Dorr, 5 Wend. 204 (N.Y. Sup. 1830) (finding father entitled to earnings of minor child in absence of agreement, express or implied, that payment be made to child); Weimhold v. Hyde, 294 S.W. 899 (Tex. Civ. App. 1927) (finding father’s creditors could garnish earnings of emancipated minor to satisfy father’s debts); McDowell v. Georgia R.R., 60 Ga. 320 (1878) (barring father from recovering for homicide of minor daughter, but permitting recovery for loss of her services to the time of her majority); Stovall v. Johnson, 17 Ala. 14 (1849) (finding father entitled to earnings and services of minor child who lived with father under his governance, protection, and support).
own and control children was considered divine. Although this view of children as property has abated over time, the principle that parents control their children, with minimal state intervention, persists today. The modern expression of this legal principle is found in four iconic Supreme Court decisions. In these cases the Supreme Court held that the substantive component of the Due Process Clause protects a parent’s fundamental right to the “care, custody, and management of [her] child.”

The Supreme Court has applied this principle in the context of the child welfare system, finding that the Constitution mandates procedural protections for parents when a parent’s right to custody is at stake. In Santosky v. Kramer, the Court addressed the burden of proof required by the Fourteenth Amendment in a proceeding to terminate a

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20 See 1 WILLIAM BLACKSTONE, COMMENTARIES 446-455 (describing sacred common law right of a father to the custody, labor, and earnings of his minor children); id. at 440 (ancient Roman law is understood to have allowed a father the power of life and death over his children: “[H]e who gave had also the power of taking away.”); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1-16 (1988) (discussing role of the “Godly” family in Puritan New England).
21 See Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972). Emily Buss has dissected the Court’s parental rights cases, noting that scholars and even the Court lump together two logically distinct lines of cases. Buss posits a more persuasive taxonomy in which one strain of cases—Meyer v. Nebraska, Pierce v. Soc’y of Sisters, Prince v. Massachusetts, and Wisconsin v. Yoder—addresses parental authority over children where the identity of the parents is clear. The other strain of cases—Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robinson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972)—addresses the extent to which the state can choose among individuals claiming parental authority. See Buss, supra, at 654-55. As Buss notes, the latter line of cases has been “misconstrued to support a qualification of parental rights of authority.” See id. at 657-66. Thus divided, it becomes clear that the Supreme Court, at least when faced with undisputed parents, has not derogated from the fundamental right of a parent to the care and custody of her child. For purposes of this article, only the first line of cases is relevant because the typical child welfare case does not involve an issue of disputed parentage.
parent’s rights.\textsuperscript{23} Noting that a child’s interests are subsumed in and represented by the interests of the parent, the Court stressed parents’ fundamental right to the custody and care of children, emphasizing the “Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”\textsuperscript{24} The Court determined that this interest is at its zenith when the state is attempting to sever the parent-child relationship.\textsuperscript{25} While acknowledging the “important liberty interests” of the child and foster parent, the Court concluded that the existence of such interests “does not justify denying the natural parents constitutionally adequate procedures.”\textsuperscript{26} Moreover, the Court found that claims of abuse or neglect did not negate these constitutionally protected parental rights.\textsuperscript{27}

The considerable solicitude for parents’ rights plays out in two important ways in the child welfare system. First, in deference to parents’ rights, the state cannot remove a

\textsuperscript{23} There is no corresponding Supreme Court case addressing the evidentiary standard for the temporary removal of a child, and state statutes generally require unfitness to be shown by a preponderance of the evidence.\textsuperscript{24} 455 U.S. at 753.

\textsuperscript{25} The Court stated

\textsuperscript{26} Id. at 754 n.7 (emphasis in original); see also id. at 759 (recognizing the interests of the child and the foster parent in the outcome of the proceeding, but noting that “at the factfinding stage of the New York proceeding [as opposed to the subsequent determination about the best interests of the child], the focus emphatically is not on them”).

\textsuperscript{27} Id. at 753 (parents’ liberty interest in the care and custody of children “does not evaporate simply because [the parents] have not been model parents or have lost temporarily the custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family”).
child from the custody of a parent absent a showing of parental unfitness.\textsuperscript{28} When the state does intervene, state statutes afford parents considerable procedural protections. For example, when a child is removed from his home, parents typically have the right to counsel,\textsuperscript{29} the right to notice of court proceedings,\textsuperscript{30} the right to a hearing,\textsuperscript{31} and the right to introduce evidence.\textsuperscript{32}

\textsuperscript{28} This is true as a matter of constitutional law, see \textit{Quillioin v. Walcott}, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest’”) (quoting \textit{Smith v. Organization of Foster Families}, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)), as well as state statutory law. To remove a child from the custody of her parents, a state 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.” States typically define dependency as a child who has been “abandoned, abused, or neglected by the child’s parent or parents or legal custodians,” “have no parent or legal custodians capable of providing supervision or care,” or “[t]o be at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians.” FLA. STAT. ANN. § 30.01(14)(a), (e) & (f). \textit{See also Cal. Welf. & Inst. Code} § 300.

\textsuperscript{29} \textit{See, e.g.}, CAL. FAM. CODE § 7862 (2005) (“If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent….”); FLA. STAT. ANN. § 39.013(9)(a) (2005) (“[T]he court shall advise the parents of the right to counsel. The court shall appoint counsel for indigent parents.”); 705 ILL. COMP. STAT. 405/1-5 (2005) (“[P]arents … have … the right to be represented by counsel. At the request of any party financially unable to employ counsel … the court shall appoint the Public Defender or other such counsel …”); 42 PA. CONS. STAT. ANN. § 6337 (2004) (“[A] party is entitled to representation by legal counsel at all stages of any proceedings … and if he is without financial resources or otherwise unable to employ counsel, to have the court provide counsel for him.”); TEX. FAM. CODE ANN. § 107.013(a)(1) (2004) (“In a suit filed … in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of … an indigent parent of the child who responds in opposition to the termination”). Although the Supreme Court held in \textit{Lassiter v. Dep’t of Soc. Servs.}, that the Due Process Clause does not require the appointment of counsel for indigent parents in termination of parental rights proceedings, see 452 U.S. 18, 33-34 (1981), all states provide such a right as a matter of statutory law.

\textsuperscript{30} \textit{See, e.g.}, FLA. STAT. ANN. § 39.801 (2005) (“Before the court may terminate parental rights … Notice of the date, time, and place of the advisory hearing for the petition to terminate parental rights and a copy of the petition must be personally served upon the parents of the child.”).

\textsuperscript{31} \textit{See, e.g.}, 705 ILL. COMP. STAT. 405/1-5 (2005) (“[P]arents … have the right to be heard …”); 23 PA. CONS. STAT. ANN. § 6315(f) (2004) (“A conference [for] the child taken into temporary protective custody … shall be held within 48 hours of the time that the child is taken into custody”).

\textsuperscript{32} \textit{See, e.g.}, 705 ILL. COMP. STAT. 405/1-5 (2005) (“[P]arents … have the right … to present evidence material to the proceedings”); 42 PA. CONS. STAT. ANN. § 6338(a) (2004) (“A party is entitled to the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine witnesses.”).
Second, until the late 1990s, federal child welfare legislation was crafted to reinforce parents’ rights. For example, the goals of the first large-scale federal regulation of child welfare, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), were to preserve families and find adoptive homes for children who could no longer live with their families. The emphasis of AACWA was on family preservation with the goal of keeping families together or reunifying them. Unless the situation was so unsafe for the child as to make reunification impossible, termination of parental rights was strongly discouraged. To further these goals, Congress required states to make several changes to the child welfare system as a condition of receiving federal funds. First, a state had to

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36 See Libby S. Adler, The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997, 38 Harv. J. on Legis. 1, 3 (2001). The goals of the Act were as follows:

(a)(1) For purposes of this title, the term 'child welfare services' means public social services which are directed toward the accomplishment of the following purposes:

(A) protecting and promoting the welfare of all children, including handicapped, homeless, dependent, or neglected children;
(B) preventing or remediying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children;
(C) 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;
(D) restoring to their families children who have been removed, by the provision of services to the child and the families;
(E) placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate; and
(F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.

make “reasonable efforts” to prevent a child from being removed from her parents and to return a child back home after removal.  

Second, a state had to ensure each child in foster care had a “case plan” to ensure she was receiving appropriate services. Finally, a state had to implement a judicial review system, guaranteeing review of each case every six months and a “dispositional hearing” within a specified period of months after a child entered care.

Legal scholars locate numerous theoretical benefits of parents’ rights. To begin, the doctrine of parents’ rights embraces the view that parents are best situated to determine and act in a child’s best interest, at least in areas not particularly within the state’s expertise. Thus, parents’ rights create a buffer around parental decision-making—unless the decisions parents make transgress pre-determined limits, the state will not second-guess those decisions. This protection from state intervention safeguards

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40 See MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 35-38 (2005); Emily Buss, Adrift in the Middle: Parental Rights After Troxel v. Granville, 2000 S. Ct. Rev. 279, 284-90 [insert paren]; Scott & Scott, Parents as Fiduciaries, supra n. __, at 2415 (“the state is not well suited to substitute for parents in the job of childrearing”); see also Parham v. J.R. 442 US 584, 602 (1979) (“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 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.”) (quoting 1 W. Blackstone, Commentaries 447) (internal quotations omitted).
41 Emily Buss argues 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 direct stake, such as education, which affects an individual’s ability to participate in and contribute to “a healthy democracy and economy.” Emily Buss, Allocating Developmental Control Among Parent, Child and the State, 2004 U. CHI. LEGAL F. 27, 33 (2004). Buss contends the state has a special competence “in shaping children to become citizens capable of meeting the demands of a successfully functioning society,” and in “assess[ing] societal consensus about child-harm.” See id. at 32.
cultural diversity in matters of childrearing.\textsuperscript{42} This cultural diversity, in turn, serves democratic principles. As Anne Daily has stated,

\begin{quote}
[V]irtues of family life—and in particular the loving authority of the parental role—are necessary for the promotion and encouragement of a responsible citizenry. Yet families also play a vital role in maintaining the diverse moral values and traditions that comprise the pluralist foundation of our liberal political order, values and traditions that in turn serve to counter the threat that unmediated state power poses to moral diversity. The family’s role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes committed to the elimination of the ‘private’ spheres of social life. 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.\textsuperscript{43}
\end{quote}

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. Finally, by requiring procedural protections when a parent’s right to the care and custody of a child is threatened, parents’ rights ensures that a parent will have the opportunity to counter the

\textsuperscript{42} Emily Buss, Allocating Developmental Control Among Parent, Child and the State, 2004 U. CHI. LEGAL F. 27, 27 (2004) (noting, in the context of assessing competency of private versus public actors to influence child development, 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”); Eliza Patten, The Subordination of Subsidized Guardianship in Child Welfare Proceedings, 29 N.Y.U. Rev. L. & Soc. Change 237, 238-39 (2004) (“noting that “[c]hild-rearing is largely about value-inculcation. We as a society have chosen to give families a presumptive right to play that value-inculcating role to ensure the diversity of citizenry that is fundamental to our republican democracy,” but that termination of parental rights and subsequent adoption do “a grave injustice to the true diversity of our American society. A nation of immigrants, we are not bound by one common ‘ideal’ of the family; the denial of this reality is perhaps one of the more potent forces driving morality legislation and other attempts by the state to conform families to one particular ‘norm.’”)); Carl E. Schneider, Rights Discourse and Neonatal Euthanasia, 76 Cal. L. Rev. 151, 160 (1988) (“[S]ome of the holdings and language of courts seem to intimate that parents are accorded rights because that is best for society. On this view, parental rights promote society’s interest in what we loosely call ‘pluralism,’ that is, society’s interest in social and ideological diversity. In some ways this seems to have been the value most expressly served by the Court’s leading ‘parent’s rights’ decisions. Indeed, there is a sense in which the whole rights approach itself is an elaborately constructed means of promoting pluralism.”)); Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1835-39 (1985) (discussing the legal tradition of noninterference in the family, a doctrine that rests, in large part, on “the practical difficulties of enforcing family law and the practical consequences of trying to do so”).

\textsuperscript{43} Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 958-59 (1993)
state’s allegations of abuse and neglect, which is particularly important in light of the widespread dehumanization of these parents.\footnote{See ASS’N OF THE BAR OF THE CITY OF NEW YORK, The Rights of Parents with Children in Foster Care, 6 N.Y. CITY L. REV. 61, 67 (2003); see id. at 74 (statement of Martin Guggenheim) (“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.”).}

This is the theory. I explore the reality of parents’ rights in Part II.

B. Children’s rights

Arguing that the parents’ rights model fails to protect children, advocates and legal scholars have called for a recognition of children’s rights in the child welfare system.\footnote{See, e.g., MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS? 34 (2005) (describing growth of children’s rights movement as reaction to traditional doctrine of parents’ rights); 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 non-disabled child, particularly if a 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”).}

This section traces the history of children’s rights and the legal developments in the child welfare system that can be attributed to the call for such rights.

To begin, the chameleonic term “children’s rights” covers rights asserted against state power and rights asserted against parental authority.\footnote{See Martha Minow, Rights for the Next Generation: A Feminist Approach to Children’s Rights, 9 Harv. Women’s L.J. 1, 20 (1986) (“rights represent the coinage of opposition to two kinds of power: the power of the parents and the power of the state”).} This article explores children’s rights in this latter sense—rights invoked in the name of the child against a parent. In the context of the child welfare system, in lieu of a parent’s right to the care
and custody of a child as the organizing principle of the system, under a children’s rights model, the child welfare system would focus on the needs of the child. Thus, a child’s interest in a safe home would take precedence over a parent’s right to the care and custody of the child. If parents’ rights are understood as freedom from state intervention, then the parallel for children is the freedom from abuse and neglect. (Of course these are not exact parallels because the freedom from abuse and neglect requires affirmative intervention by the state. These nuances are addressed below.) Although there are other aspects of children’s rights in the child welfare system, I use this abbreviated formulation in this article because it highlights the most important aspect of the debate between advocates of parents’ rights and children’s rights: the need to choose sides between parents and children. Although advocates of children’s rights may vary in their specific proposals, these proposals all reflect this orientation: the rights of children are in opposition to the rights of parents.

The call for children’s rights has deep historical roots but has gained traction in particular during the last four decades.\(^47\) In the Nineteenth Century, courts began to modify the view of divine parental authority to control children. Instead, courts located the authority to control children in the parent as 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.\(^48\) Not coincidentally, at the same time courts were

\(^{47}\) For an excellent summary of this history, see Martin Guggenheim, What’s Wrong with Children’s Rights? 1-16 (2005).

\(^{48}\) Woodhouse, Who Owns the Child?, supra note __, at 1038 (discussing cases and concluding that “[i]nfluential courts in the mid-1800’s, however, began to articulate a theory that parental control was not an absolute power conferred by God, but a civic duty conferred and regulated by the state, in the interests of children and the public”); Fineman, Dominant Discourse, supra note __, at 737-39. Barbara Bennett Woodhouse also takes issue with this historical understanding, arguing that although Meyer v. Nebraska,
articulating a new role between parent, child and state, there was a growing societal awareness of the rights of children separate from their parents. For example, in the 1850s, a “child-saving” movement began, in which thousands of immigrant children living in cities were sent to farms in the West, or were provided foster homes and schooling.\(^49\) By the end of the Nineteenth Century, the child-saving movement extended to removing abused children from their homes.\(^50\) The justification for this removal was framed as community control and, new to the consciousness, children’s rights.\(^51\) The language of children’s rights that emerged during this period has been attributed to the

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\(^{49}\) Woodhouse, *Who Owns the Child?*, supra note __, at 1052; Sanford N. Katz, *Family Law in America* 131-32 (2003); Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence From Colonial Times to the Present* 3-13, 69-87 (1987). In the mid-1800s, children made up about 40% of almshouse populations, sparking a movement to remove children to orphanages and other child-centered institutions. In 1877, the Society for Prevention of Cruelty was established, and soon states passed laws giving it and other private child welfare organizations the legal authority to protect children by taking away parents’ custody and sending them elsewhere. For example, Protestant “child-savers” sent Catholic children away to the Midwest on “orphan trains.” Specialized juvenile courts were not established until the twentieth century, and the “legal authority to remove children from homes was transferred from the private organizations to the courts. See Martin Guggenheim, *What’s Wrong with Children’s Rights* 181-82 (2005).

\(^{50}\) See Woodhouse, *Who Owns the Child?*, supra note __, at 1052.

\(^{51}\) See id.; Linda Gordon, *Heroes of Their Own Lives* 46-57 (1988) (discussing the general claim by child protection organizations that they spoke for children’s rights). The framing of children’s rights pitted against parental rights, Barbara Bennett Woodhouse argues, “operated both as standards for parental behavior and as limitations on parental power. Parental failure to live up to these standards violated children’s rights and justified community intervention.” See Woodhouse, *Who Owns the Child?*, supra note __, at 1052. See also Fineman, *Dominant Discourse*, supra note __, at 737-39. Certainly, views as to the legitimacy and benefit of such “child-saving” are debatable.

These children who were later to be called ‘the children of the orphan trains’ were basically kidnapped by social service agencies in the name of advancing children’s welfare. The agencies said that the children would be freed from the foul air of the cities and experience the openness of the midwest and west where the air was clean and the opportunities limitless. Such statements were, of course, nonsense. Children of the orphan trains were lied to and sold to farmers for farm hands or kitchen maids.

need to articulate a justification for removing children from homes. 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 the actions of the child-savers.

A century later, advocates reiterated the call for children’s rights. Until then, parents, who clearly did have rights, were thought to represent the interests of children. Therefore, children had no need for rights. Rejecting this assumption, advocates of children’s rights argued for changes on numerous fronts, such as freedom of religion, freedom of expression, an end to racially segregated education, and a voice in the child welfare system. Two notable aspects of the child welfare system can be traced to a

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52 See Woodhouse, Who Owns the Child?, supra note __, at 1052; Pleck, supra note __, at 69-87.
53 Woodhouse, Who Owns the Child?, supra note __, at 1052; Fineman, Dominant Discourse, supra note __, 737-38.
54 See, e.g., THE CHILDREN’S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE passim (Beatrice Gross & Ronald Gross eds., 1977); Henry H. Foster, Jr. & Doris J. Freed, A Bill of Rights for Children, 6 FAM.L.Q. 343, 347 (1972) (“A child has a moral right and should have a legal right: (1) To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult; . . . (3) be regarded as a person, within the family, at school, and before the law; . . . (5) To earn and keep his own earnings; . . . (7) To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority”); Hillary Rodham, Children’s Rights: A Legal Perspective in CHILDREN’S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 22-24 (Patricia A. Vardin & Ilene N. Brody eds., 1979); Nationwide Drive for Children’s Rights, U.S. NEWS & WORLD REPORT (1974) (describing “children’s liberation” movement in which “the growing trend is to view [children] as at least semi-independent persons with their own rights—not automatically subservient to parental or official authority”). Although this movement consciously called for children’s rights, at least some advocates and scholars recognized that rights without concomitant services were meaningless, see Introduction in THE CHILDREN’S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE 7 (Beatrice Gross & Ronald Gross eds., 1977) (quoting state court judge, Justine Polier, as saying “Rights without services are meaningless.”).
56 In the context of the child welfare system, the newly asserted rights sometimes took the form of rights of autonomy, such as the power to decide whether to live at home or opt for an alternative arrangement, see Richard Farson, A Child’s Bill of Rights in THE CHILDREN’S RIGHTS MOVEMENT: OVERCOMING THE
model of children’s rights: the use of guardians ad litem in child welfare proceedings, and recent changes in federal law requiring that “the child’s health and safety shall be the paramount concern” of the system. This section addresses each development in turn.

In 1967, the Supreme Court held in In re Gault that children involved in delinquency proceedings that could lead to the commitment to an institution were entitled to due process, including the right to representation by counsel.\(^57\) Prior to In re Gault, the assumption was that children were adequately protected by the court “as an arm of the state.”\(^58\) In re Gault rejected this assumption and, as a result, the use of guardians ad litem (“GAL”) to represent children became widespread not only in the juvenile court system, but also in abuse and neglect cases.\(^59\) Ohio first enacted a statute providing for the appointment of a GAL to represent children in abuse and neglect cases in 1969.\(^60\) New York and Colorado followed in the early 1970’s with legislation requiring that the GAL appointed in all abuse and neglect cases be an attorney.\(^61\) In 1974, the federal

\(^{57}\) 387 U.S. 1, 41 (1967) (“We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”).


\(^{61}\) Kearns, supra n. ___, at 706.
government passed the Child Abuse Prevention and Treatment Act ("CAPTA"), requiring states, as a condition of receiving federal funds, to provide a GAL to every child involved in an abuse and neglect proceeding.\textsuperscript{62} CAPTA was amended in 1996 to include that the GAL “may be an attorney or a court appointed special advocate (or both)” and that the role of the GAL is to determine the best interests of the child.\textsuperscript{63} Thus, although CAPTA mandates that every child in an abuse and neglect proceeding receive a GAL, in practice every child is not receiving legal representation. Only half of the states require that the GAL be an attorney.\textsuperscript{64} In other states, the GAL might be a social worker, mental health professional, or lay volunteer.\textsuperscript{65}

A focus on the needs of children is also reflected in federal legislation governing the child welfare system. 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\textsuperscript{66}—was getting worse, and children would be better served


\textsuperscript{64} Mandelbaum, \textit{supra} n. \textbf{____}, at 23.

\textsuperscript{65} Hastings, \textit{supra} n. \textbf{____}, at 294.

\textsuperscript{66} Although it is unclear who coined this term, one of the first studies to document the problem was published in 1959, finding that “of all the children we studied, better than half of them gave promise of living a major part of their childhood years in foster families and institutions. Among them were children likely to leave care only when they came of age, often after having had many homes—and none of their own—for ten or so years.” \textit{Henry S. Maas & Richard E. Engler, Jr.}, \textit{Children in Need of Parents} 356 (1959).
by promoting adoption rather than family preservation.67 There was a widespread understanding that states were leaving children in foster care for years while making unsuccessful efforts to rehabilitate parents.68

Congress acted on these concerns with the Adoption and Safe Families Act (“ASFA” or “Act”).69 In ASFA, Congress made clear that children’s interests came first: the Act required states, as a condition of receiving federal funds, to develop a foster care and adoption assistance plan in which “the child’s health and safety shall be the paramount concern.”70 To this end, Congress required states to expedite permanency planning by first making “reasonable efforts” to “preserve and reunify families,”71 and then, if reunification is not possible, to make “reasonable efforts . . . to place the child in a timely manner in accordance with the permanency plan.”72 These efforts are not consecutive; rather states are permitted to engage in concurrent planning, trying simultaneously to reunify the family while also making plans to place the child

67 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, 646-50 (1999). ASFA received broad bipartisan support, see id. at 637, and in many ways grew out of a proposal by the U.S. Department of Health and Human Services, with the encouragement and direction of President Clinton, see id. at 647 & n.51.
68 See Gordon, Drifting Through Byzantium, supra n. ___, at 649.
70 42 U.S.C. § 671(a)(15)(A) (“in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern”). 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).
72 42 U.S.C. § 671(a)(15)(C). There are three statutory exceptions to the requirement that states make reasonable efforts to preserve or reunify a family. See 42 U.S.C. § 671(a)(15)(D)(i)-(iii) (parent has subjected the child to aggravating circumstances, including abandonment, torture, chronic abuse, and sexual abuse; parent has murdered another child; parent’s rights have been involuntarily terminated with respect to another child).
permanently with another family. Concurrent planning is intended to ensure a child will have a permanent home available in the event that reunification with her biological parents fails.

Although ASFA requires states to make reasonable efforts to preserve or reunify a family, it also sets time limits on these efforts. States are required to commence proceedings to terminate parental rights for children who have been in foster care for fifteen of the most recent twenty-two months. This cap on reunification efforts was intended to curb foster care drift, thus protecting the interests of children, but it also meant that many parents would have their rights terminated because this compressed timeline often does not accommodate the lengthy periods of time it may take a parent to address the problems underlying removal, such as drug abuse. In practice, the exceptions to the termination requirement—placement of the child in kinship foster care, a compelling reason for concluding termination of parental rights would not be in the best interests of the child, or the failure of the state to provide the family or child with the

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73 See 42 U.S.C. § 671(a)(15)(F) (“reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts” to reunify the family).
74 GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, at 191-92 (The enactment of AFSA left “little doubt that child welfare policy dramatically shifted in the late 1990s. For the first time in American history, federal policy supports as a prominent aspect of foster care the permanent severance of all legal ties between foster children and their parents. This is an important shift in policy, made all the more pertinent because it was advocated in the name of children’s rights”).
76 Gordon, Drifting Through Byzantium, supra n. __, at 651. (citing 143 Cong. Rec. H10,787 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) (“This legislation we can all agree on is putting children on a fast track from foster care to safe and loving and permanent homes.”); id. at H10, 788 (statement of Rep. Camp) (“This bill will ensure that a permanent, loving home is within the reach of every child.”); id. at S12,671 (statement of Sen. Rockefeller) (saying that the bill would “move children out of foster care and into adoptive and other permanent homes more quickly and more safely than ever before”)).
services that were set forth in the case plan—mean that ASFA did not actually change the child welfare system or curb foster care drift, and instead the time limits remain on the book but are not exercised in practice.

Many legal scholars advocate 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” in the current child welfare system, and arguing that the system inadequately protects the well-being of children. She contends that the cult of family autonomy—which, she notes, is perpetuated and protected by both ends of the political spectrum—and an unwavering devotion to same-race and kinship placement, compromise children’s best chances for being raised in stable, family homes. Bartholet argues for an expansion of the “village” responsible for raising the child, from the extended family and community to the entire society. To this end, Bartholet recommends that society err on the side of intervening

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80 See BARTHOLET, NOBODY’S CHILDREN, supra n. __ , at 194-96.
81 See id. at 7.
82 See id. at 7 (“At the core of current child welfare policies lies a powerful blood bias—the assumption that blood relationship is central to what family is all about. Parents have God-given or natural law rights to hold on to their progeny. Children’s best interests can be equated with those of their parents because parents have a natural inclination to care for their young. These beliefs are deeply entrenched in our culture and our law. And they are common to the thinking of people from one end of the political spectrum to the other, although left and right may articulate different concerns. Some speak of children’s rights to their roots and heritage. Others speak of adults’ rights to procreate and of parents’ rights to guide and control the children they produce. But most share a deep sense that children belong to their biological parents.”).
83 Bartholet devotes much attention to the question of race, arguing that the preference of the current child welfare system for placing children with members of the same race disadvantages children by limiting their placement options and overemphasizing race, to the detriment of other factors, such as a loving, stable home. See id. at 4-6, 13. It should be noted that Bartholet readily anticipates criticism of her view as a racist one. See id. at 5. Although the issue of racial matching is beyond the scope of this article, family group conferencing was first adopted as a mechanism for ensuring Maori children in New Zealand were not placed with non-Maori families. See infra TAN ____.
84 See BARTHOLET, NOBODY’S CHILDREN, supra n. ___, at 6-8.
85 See id. at 2-4.
in a family, contending that underintervention bedevils the current child welfare system. 86

Bartholet recommends first that society attempt to prevent child abuse and neglect, 87 and, failing such prevention, promptly remove children from abusive and neglectful homes, expedite the termination of parental rights, and place these children in adoptive homes. 88

As Bartholet summarizes her orientation,

[t]he 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. But while adoption is extremely likely to be the intervention that best serves children who have been subjected to severe forms of abuse and neglect, only about 10 percent of children who are removed from their parents are ever adopted. 89

Advocates of children’s rights typically are motivated by the well-documented adverse effects of abuse and neglect on children, 90 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

86 See BARTHOLET, NOBODY’S CHILDREN, supra n. __, at 99. For an opposing view, see GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, at 194 (“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”).

87 See BARTHOLET, NOBODY’S CHILDREN, supra n. __, at 99-101 (arguing that the best prevention method would be “eliminating the social and economic conditions of poverty, unemployment, homelessness, and deprivation that produce dysfunctional families”; absent such sea changes, Bartholet recommends early intervention, providing services to families at risk for abuse and neglect, and an increased willingness to use the criminal justice system to punish parents who abuse or neglect their children, which, she contends, would prevent such maltreatment).

88 Id. at 110

89 Id.

90 See, e.g., Martin H. Teicher, Wounds that Time Won’t Heal: The Neurobiology of Child Abuse, 2 CEREBRUM 50-67 (2000); for a summary of this research, see Martin H. Teicher, Scars That Won’t Heal: The Neurobiology of Child Abuse SCIENTIFIC AMERICAN 68-75 (Mar. 2002) (discussing a recent study demonstrating that maltreatment during formative years can affect the development of the brain in ways that cannot later be cured).
not going to change. Based on these assumptions, children’s rights advocates tip the balance between parents’ rights and children’s rights heavily in favor of the child.\textsuperscript{91}

C. Alternatives

Some scholars have tried to formulate alternatives to the stark choices between parents’ rights and children’s rights. 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. There are a variety of reasons for this move. For example, it has been argued that children need relationships, not rights, and children do better in two-parent households, therefore the law should attempt to strengthen relationships between parents by strengthening the institution of marriage.\textsuperscript{92}

\textsuperscript{91} 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 children’s rights should be the basis for protecting the interests of children, with only a child-rearing privilege residing in parents. See James G. Dwyer, Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights, 82 U. CAL. L. REV. 1371 (1994). Although Dwyer develops his approach in the context of parent’s 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., Dwyer, A Cautionary Note, supra n. ___ at 1067. Both Dwyer and Bartholet argue that the construction of parent’s 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 Dwyer, A Cautionary Note, supra n. ___ at 1060, 1063; BARTHOLET, NOBODY’S CHILDREN, supra n. __, at 7-8.

\textsuperscript{92} For example, Lynn Wardle contends rights talk diminishes the role of the family and that “[c]hildren’s rights advocates often are too quick to give up on the family.” See 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 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); see also Bruce C. Hafen, Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,” 1976 B.Y.U. L. REV. 605; Bruce C. Hafen, The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests, 81 MICHE. L. REV. 463 (1983). Wardle also argues that framing children’s interests in terms of rights glosses over the need of children for relationships, see Lynn E. Wardle, The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children, 27 LOY. U. CHI. L.J. 321, 333 (1996), and the indeterminacy and instability of rights, see id. at 336. Finally, Wardle contends that parents should not be “encouraged to think about their children in abstract legal terms and concepts that foster separation and boundaries.” See id. at 336.
Alternatively, it has been argued that, as a strategic matter, a theory of children’s interests will be more palatable to adult decision-makers. These decision-makers will identify with other adults, e.g., 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. The frame of children’s interests is more likely to lead to the desired outcome for children.

Apart from changes to the nomenclature, some scholars have suggested specific changes to the legal system to create alternatives to parents’ rights and children’s rights. For example, Marsha Garrison [n. 134 from 5/18 draft, not all or nothing, instd try to split difference; n. 172 from same draft – sum this section with following: so real problem is not that no one has seen need for third way, but rather that need process for recognizing a third way]

Additionally, Barbara Bennett Woodhouse has advocated a “generist” perspective on parental rights, contending that parents are the trustees, not owners, of their children, and that “generism” focuses on the next generation, rather than the present generation. She argues that replacing “rights talk” with the language of obligation, nurturance, and

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93 See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 774-78 (2003) (arguing a children’s rights frame may provoke the decision-maker, who will identify with the adult whose rights will necessarily be infringed by the asserted right, and thus lead to a negative result, whereas the decision-maker could have come to the favorable result simply by framing the issue as protecting a child’s interests, and additionally noting that children’s rights “victories” may prove hollow in the long-run). As Guggenheim states, “the [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.” Id. at 781.

94 See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 774-78 (2003).

collaboration would focus the system on children rather than adults. Woodhouse does not abandon the concept of a parent having a stake in a child’s life, but argues that this stake must be earned, rather than automatically granted as an incident of parenting a child. 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. Woodhouse does not specifically address how generism would play out in the child welfare context, apart from stating that the perspective requires a child-centered, rather than adult-centered, perspective on child welfare.

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97 See Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 CARDOZO L. REV. 1747, 1754 (1993) (arguing generism model “affirms the centrality of children to family and society” and “defin[es] parenting as the meeting of children’s needs). Woodhouse developed this model in response to her concerns over a legal system that objectified children. As she explains the current system, “[r]ather than seeking to provide adults for children who need them, law seems intent on securing children for adults who claim them.” Id. at 1812. She finds this perspective pervasive, including the rhetoric of rights, which speaks of “parents’ rights in children rather than children’s rights to parents,” id., and views the child as an object rather than an “actor and subject,” id. at 1813. Under the generism model, Woodhouse discards a model of parents’ right based on ownership, and instead proposes a model of parenthood based on stewardship, a model that locates the authority to wield control over children in obligation and earned responsibility. Id. at 1755. The generist model is a rejection of “adults’ possessive individualism,” id. at 1811, which, she contends, “objectifies children and places physical control and possession of the children, rather than demonstrated service or shared concern for their well-being, at the center of the controversy,” id. Woodhouse is careful to note that the generist perspective does “not simply substitute children for adults as autonomous rights-bearers in an adversarial system,” id., at 1756, because children simply are not autonomous. Woodhouse acknowledges the unalterable fact that adults must act on behalf of children until children grow into their own autonomy, see id., but contends the “purpose of the generist perspective is to help adults—judges, policy makers, and parents—make wiser, more principled, and more authentic decisions for and about children.” Id. at 1756-57.
98 See id. at 1841. Woodhouse distinguishes the civil rights movement and feminism, both of which sought to gain equal rights to white men, because of the unique position of children as non-autonomous 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.
To address the reality that adults will still make decisions, even if doing so in a child-centered fashion, Elizabeth 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. The Scotts contend this model would serve the interests of both parents and children because it encourages parents to act in the interests of the children, not their own, because to the extent parents do so, they are rewarded with legal deference to their choices. Although the Scotts conclude that family law generally accords with this principle, they point out that this is less true in the child welfare context, where courts’ reluctance to terminate parental rights dilutes “the law’s instrumental function of encouraging parental commitment.” In the child welfare context, the Scotts 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 motivates parents who are willing and, more importantly, able, to regain custody, but parents who are not able to make the necessary changes to their lives to regain custody of their children, but

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100 See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 781 (2003) (“the [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 S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401, 2414-18 (1995) (“[s]imply 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 these objectives. . . . The 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.”).


102 See id. at 2439-41, 2462-63.

103 See id. at 2462.

104 Id. at 2469. The Scotts’ article was written before the passage of the Adoption and Safe Families Act, which, in theory, was intended to promote permanency by requiring courts to reunify families or terminate parental rights within 18 months of removal. See supra at TAN ________. As discussed above, however, this has not happened. Therefore, the Scotts’ criticism remains relevant.
nonetheless maintain a significant relationship with their children, do not in fact have their rights terminated. As a result of these mixed messages, the fiduciary model is diluted in the child welfare context.\footnote{Id. at 2469.}

These innovative proposals lack a method 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. Before searching for a new model that could accommodate the interests of parent \textit{and} child, however, I want to describe my own arguments for rejecting the rights-based framework. As I show in Part II, a rights-based system simply does not serve families well and should be abandoned for the majority of cases.

II. LIMITATIONS OF RIGHTS

Despite the theoretical promises of both parents’ rights and children’s rights, neither framework protects parents or children in practice. A rights-based approach to the issues that surface in the child welfare system is misguided and, for the majority of cases, does not devise effective solutions for parents or children. This Part explores why this is, concluding that the rights-based approach to child welfare is not working and should not be pursued, at least for the mine run case.

A. The failure of rights to protect parents or children

\footnote{Id. at 2469.}
Legal theories aside, rights do not produce good results for families. For parents, the substantive right to the care and custody of a child offers little protection against the well-documented racial and economic discrimination in the child welfare system. For children, the right to a safe home is not advanced, in the typical child welfare case, by state intervention. Rather, many children are removed from their homes for little more than poverty-related neglect. Once removed, a deeply traumatizing and scarring experience, children are placed in a foster care system that does not address the underlying causes that led to the removal, thus nearly ensuring that reunification with the biological parent will not occur. Moreover, the foster care system is rife with its own dangers. This section explores the negligible protection afforded most parents and children, despite substantive and procedural rights, in today’s child welfare system.

To begin, despite a parent’s constitutionally recognized right to the care and custody of a child, the child welfare system removes many children from their homes due to poverty-related neglect. 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 ten percent of all cases.\(^{106}\) By contrast, fifty percent of all cases involve poverty-related neglect, such as lack of housing or inadequate child care arrangements.\(^{107}\)

\(^{106}\) See Jane Waldfogel, The Future of Child Protection 124-25 (1998) (citing study finding that approximately ten percent of the cases in the child welfare system involve child abuse and neglect warranting criminal charges).

\(^{107}\) See id. Several states explicitly exempt poverty as a ground for a finding of neglect, see, e.g., A.C.A. § 12-12-503(12)(B) (defining neglect as “[f]ailure or refusal to provide necessary food, clothing, shelter, and education required by law … except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered or rejected”); D.C. Code § 16-2301(9)(B) (defining neglect to include a child “who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental,
or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian"); F.S.A. § 39.01(f) (defining neglect to mean “the parent … responsible for the child’s welfare fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so or although offered financial or other means to do so”); LSA-Ch.C. Art. 606B (“A child whose parent is unable to provide basic support, supervision, treatment or services due to inadequate financial resources shall not, for that reason alone, be determined to be a child in need of care”); N.Y. CLS Family Ct. Act § 1012 (f)(i)(A) (defining neglect as parent’s failure to supply “the child with adequate food, clothing, shelter or education . . . or medical . . . care, though financially able to do so or offered financial or other reasonable means to do so”); Tex. Fam. Code § 261.001(4)(B)(iii) (neglect includes “the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused”); W.S.A. 48.981(1)(d) (defining neglect as “failure, refusal or inability on the part of a parent … for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter”), other states do not create an exemption for poverty-related neglect, see, e.g., A.R.S. § 8-201(21) (defining neglect as “the inability or unwillingness of a parent … of a child to provide that child with supervision, food, clothing, shelter or medical care ...”); C.R.S. 19-3-102 (1) (d) & (e) (child is neglected or dependent if “a parent … fails or refuses to provide the child with proper or necessary subsistence, education, medical care, or any other care necessary for his or her health, guidance, or well-being”); O.C.G.A. § 49-5-180(5)(B) (defining child abuse as “[n]eglect or exploitation of a child by a parent or caretaker thereof if said neglect or exploitation consists of a lack of supervision, abandonment, or intentional or unintentional disregard by a parent … of a child’s basic needs”); S.D. Codified Laws § 26-8A-2 (4) & (5) (“Whose parent … fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child’s health, guidance, or well-being”). The studies finding that children are removed due to poverty do not specify whether this happens only in states that permit such removals.


109 See DUNCAN LINDSEY, THE WELFARE OF CHILDREN 170, 166 (2004 ed.); see also Waldfogel, supra n. ___, at 78. I do not mean to minimize the consequences of severe neglect. Indeed, severe neglect accounted for 36% of the 1,500 abuse and neglect deaths in 2003. See Child Maltreatment 2003: Reports from the States to the National Child Abuse and Neglect Data Systems—National statistics on child abuse and Neglect (2005). Moreover, as Waldfogel notes, these 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 n. ___, at 125. But the question this article asks is whether for the mine run lower-risk case, foster care is the appropriate “service” to help this family. Thus, in this article I refer to poverty-related neglect that although detrimental to children, is not life-threatening, and, more importantly, is remediable by the provision of services. For a discussion of the interplay between poverty and placement of foster care, especially after the passage of the Adoption and Safe Families Act, see Cynthia R. Mabry, Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty, 102 W. Va. L. Rev. 607 (2000).
Removal of children due to poverty is not new. Even in the heyday of parents’ rights, such rights were not necessarily extended to low-income families. While children of economically stable parents lived under the near-complete control of their fathers, children of poor parents were often indentured as apprentices. The parents of such apprentices, after losing physical custody, lost all parental rights to the children. This well-entrenched disparity in treatment is the precursor for what one commentator has deemed a “dual system of family law.”

\[\text{See, e.g., N.Y. Sess. Laws 1788, chs. 15, 62 (Overseers of the poor authorized to bind out as apprentices or servants children who became chargeable to the public. Refusal to be apprenticed was punishable by jail time), cited in Jacobus tenBroek, *California’s Dual System of Family Law, Part I*, 16 STAN. L. REV. 257, 295 (1964); An Act for the Support of the Poor (1791), Acts and Laws of the Commonwealth of Massachusetts 1788-89, at 99 (1894) and VI Statutes at Large of Virginia 32 (W. Hening ed. 1819), both cited in 1 CHILDREN AND YOUTH IN AMERICA 265, 263 (Richard Bremner ed. 1970). The colonial versions of these laws were based on the Elizabethan Poor Laws. The Elizabethan laws, too, “emphasized apprenticing as the method to provide for the maintenance of children of the poor.” tenBroek, *California’s Dual System of Family Law, Part I*, supra, at 280. “The Poor law … was thus not only a law about the poor but a law of the poor. It dealt with a condition, and it governed a class. The special legal provisions were designed not to solve the causes and problems of destitution but to minimize the cost to the public of maintaining the destitute.” Id. at 286. For a description of American attitudes toward children over the last three centuries, see Mason D. Thomas, Jr., *Child Abuse and Neglect: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 299-315 (1972); see also MINTZ & KELLOGG, supra note __, at 7 (“Puritan law permitted local authorities to remove juveniles from their families ‘and place them with some master for years … and force them to submit unto government’”); Edward MORGAN, *The Puritan Family* 78, 88 (1966).

\[111\] See Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257 (1964). tenBroek discusses specific examples of the differences in application of what he calls “civil family law” from the “family law of the poor” for parental liability for the support of minor children, and other examples, under the common law of New York. Id. at 302-304. In this view, historically there has been one version of family law for the poor, and one for everyone else. See Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 262 (1964); see also Garrison, *Why Terminate Parental Rights?, supra note __*, at 433-34. The family law of the poor administer[s] public aid to children who are destitute or otherwise deprived of parental care. This public family law has seldom deferred to parental rights. The doctrine of parental rights descends instead from common law inheritance and property concepts which developed to resolve private disputes, and it has largely remained so confined. Thus, as between a parent and another private individual, courts have generally recognized superior parental rights to the custody and control of children, but under the family law of the poor, courts have routinely ordered parents to cede custody to the state without any showing of fault.

Garrison, *Why Terminate Parental Rights?, supra note __*, at 434. See also tenBroek, *California’s Dual System of Family Law, Part I*, supra note __, at 286. For example, the common law deference shown to fathers was due only to affluent parents. See Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 938 (2004) (“While rich
Today, poverty-related neglect often involves inadequate housing\textsuperscript{112} or inappropriate child care arrangements,\textsuperscript{113} typical problems facing low-income families. Although poor housing and inappropriate child care are serious problems, many scholars argue that the removal of children from their homes and placement into foster care is not the appropriate remedy.\textsuperscript{114} The child welfare system does not address these underlying poverty issues. Rather, operating with limited resources, the system preemptively removes the children from their homes.\textsuperscript{115}

To be sure, there are multiple, interrelated risk factors for child welfare involvement,\textsuperscript{116} and the connection between the factors and the involvement is not always

\textsuperscript{112}See Guggenheim, \textit{supra} n. \_\_, at 1724 (citing study of D.C. foster care system that concluded 33\% to 50\% of the children in foster care could be returned to their parents if the parents had adequate housing).

\textsuperscript{113}See \textit{JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION} \_\_\_ (1998).

\textsuperscript{114}See Guggenheim, \textit{supra} n. \_\_, at 1725; DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE \_\_\_ (2002).

\textsuperscript{115}See Buss, \textit{supra} n. \_\_, at 438.

\textsuperscript{116}See, e.g., Jocelyn Brown et al., \textit{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 \textit{CHILD ABUSE & NEGLECT} \_\_\_ \_\_ \_ \_ (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 \textit{id.} at 1073. Additionally, this study demonstrated that the greater the number of risk factors, the greater the likelihood for maltreatment. See \textit{id.} at 1074 (with no risk factors, likelihood of maltreatment only 3\%; presence of four risk factors raised likelihood of maltreatment to 24\%). Finally, the study confirmed that low-income families may have higher rates of physical abuse and neglect (although not sexual abuse) than
clear. For example, homelessness is a very strong risk factor for involvement in the child welfare system. Thirty-seven percent of families who have had one instance of homelessness become involved with the child welfare system, as compared with nine percent of low-income families who have homes.\textsuperscript{117} There are many possible explanations for this correlation, for example, the conditions related to homelessness, such as severe poverty and domestic violence, or referrals by child welfare agencies to shelters as part of service plans, the compromise to children’s development flowing from the upheaval of homelessness, the greater scrutiny by child protective services of families in shelter, or the effect of homelessness on a parent’s ability to raise a child effectively.\textsuperscript{118} For purposes of this article, it is sufficient to conclude that poverty, including homelessness, is correlated with child welfare involvement.

If parents’ rights do little to protect low-income families from the unnecessary removal of their children, such rights offer even less protection for low-income, African American families. Racial disparities in the child welfare system led Dorothy Roberts to describe that system as one in which “black families are being systematically families with greater income levels, and that this conclusion is not a result of biased reporting, investigation and substantiation. See id. at 1066, 1074.

\textsuperscript{117} See Jennifer F. Cuhane et al., \textit{Prevalence of Child Welfare Services Involvement Among Homelessness and Low-Income Mothers: A Five-year Birth Cohort Study}, 3 J. SOCIOLOGY \& SOCIAL WELFARE 79, 89-91 (Sept. 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.

\textsuperscript{118} See id. at 91. In another twist on the housing issue, one study found that women fleeing domestic violence chose homelessness, i.e., a family shelter, rather than seeking aid from the child welfare system, for fear the “support” from that system would be removal of the children. See \textit{HOMES FOR THE HOMELESS/INSTITUTE FOR CHILDREN AND POVERTY, The Hidden Migration: Why New York City Shelters are Overflowing with Families} 1 (April 2002) (tracking decline in foster care placements and noting correlation with increase in family shelter placements; concluding that “[m]any of these parents fleeing domestic violence have first-hand knowledge of the foster care system and do not want their children to experience the same”). This was particularly true for women who had themselves been in foster care as children. See id.
There is evidence that African American children are removed at greater rates than similarly situated white and Latino children, and receive less effective services. There is also evidence that African American families lack important information about how the child welfare system works and have less financial resources to navigate the system, including knowing how to hire an attorney. In 2002, although African American children accounted for fifteen percent of all children in the U.S., they accounted for twenty-five percent of substantiated maltreatment reports. By contrast, white children accounted for seventy-nine percent of all children and fifty-one percent of substantiated reports. African American children enter foster care at a higher rate and leave at a lower rate.

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120 Id. at ii.
121 Id. at 3.
122 Id.
123 Id.
124 Eight African American children for every 1,000 enter foster care, versus three white children for every 1,000. See CHILD TRENDS, CHILD TRENDS RESEARCH BRIEF (PUBLICATION #2002-59) 1 (2002) (citing U.S. DHHS: Children’s Bureau (2001a)). In forty-six states, the proportion of African American children in foster care is more than two times the states total population of African American children, with seven states with a proportion four times. See CENTER FOR THE STUDY OF SOCIAL POLICY, FACT SHEET 1: BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN AMERICANS IN THE FOSTER CARE SYSTEM 1-2 (2004). The states with the highest rates of disproportionality of African American children in foster care in 2000 are: California, Oregon, Wyoming, Minnesota, Idaho, New Hampshire and Wisconsin. For a further listing of states having moderate, high, and extreme disproportion, see id. For a state-by-state statistical profile of racial overrepresentation in foster care, see CENTER FOR THE STUDY OF SOCIAL POLICY, FACT SHEET 2: STATE-BY-STATE STATISTICAL PROFILE OF RACIAL OVERREPRESENTATION IN FOSTER CARE (2004). The disproportionality ratio for the entire United States is 2.43. See CENTER FOR THE STUDY OF SOCIAL POLICY, FACT SHEET 1: BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN AMERICANS IN THE FOSTER CARE SYSTEM 2 (2004).
Roberts argues that this disparity is driven by racial bias towards African-Americans.126 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.127 Cahn explains that poverty and child abuse are closely linked, and that families earning less than $15,000 a year are twenty-two times more likely to have a report of abuse and neglect than families earning more than $30,000 a year.128 The poverty rate for African-American households is almost double the rate for white households.129 These statistics taken together indicate that poverty could be the driving force behind higher numbers of African-American children in the child welfare system and not racial bias. Roberts counters this criticism by showing that poverty cannot account for the overrepresentation of African-American children because Latino children who are equally poor are less likely to be involved in the child welfare system than African-American children.130 Likewise, there is evidence that when presented with similar injuries, health care providers are more likely to suspect abuse for African American children than for white children.131

126 See, ROBERTS, SHATTERED BONDS, supra n. ___, at 47.
129 See Cahn, supra n. ___, at 475.
130 See, ROBERTS, SHATTERED BONDS, supra n. ___, at 48. African-American and Latino children in San Diego, for example, have a similar socio-economic 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. African-American children, however, were placed in foster care at a rate six times higher than their proportion of the population.” Id. at 48 (citing Garland et al., “Minority Populations in the Child Welfare System,” pp. 145-146).
131 See ROBERTS, SHATTERED BONDS, supra, n. __, at 49-50 (describing various studies, including a 1999 study of head injuries in a Denver children’s hospital where doctors were twice as likely to misdiagnose abusive head trauma in white children than in African American children’ “In other words, doctors were more likely to suspect that [abusive head trauma] symptoms indicated child abuse in the case of minority children. They were more trusting of white parents whose children presented the same symptoms.”).
In addition to racially and economically driven decision-making, removal of children is often arbitrary and driven by political and social forces. For example, there is evidence that foster care placements soar in the aftermath of well-publicized cases of abuse, and placement rates vary from state to state, even when the states are geographically proximate, and economically and politically similar.

Thus, in keeping with the dual system of family law, the constitutionally recognized right to the care and custody of a child may protect economically stable, non-African American families, but it does not sufficiently guard against racial and economic discrimination.

Additionally, procedural safeguards, which should, in theory, guard against racially and economically driven decision-making, are ineffective for many parents. Most procedural protections, such as the assistance of counsel, are not triggered during the early and often dispositive stages of a case. For example, initial investigations of abuse and neglect, which are often conducted by case workers with minimal or nonexistent training, put parents at a disadvantage. Knowing that their ability to retain custody of a child is at stake, parents often cooperate with the investigation rather than fighting it from

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132 See Center for an Urban Future, Families in Limbo: Crisis in Family Court, Child Welfare Watch 4 (Spring/Summer 1999) (documenting 55% increase in filings of neglect cases and 57% increase in filings of abuse cases from 1995 to 1998 following well-publicized death of Elisa Izquierdo, a six-year-old girl subjected to fatal abuse by her mother); See Guggenheim, supra n. __, at 1725. (citing this statistic and noting no known change in rate of child abuse during this period).
133 See Guggenheim, supra n. __, at 1725.
Parents do not have the assistance of counsel or the oversight of a judge when responding to the investigations, and often consent to a “voluntary” arrangement where a parent agrees to participate in specified programs and sometimes the placement of a child with an extended family member, in exchange for the state agreeing not to place the child in foster care. Or a parent may agree to the placement of a child with child protective services for up to six months, during which period there is no court review. Although these cases are ultimately reviewed by a court, an unnecessary placement will negatively affects both parent and child.

Finally, 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

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135 See Buss, supra n. ___, at ___ 433.
136 See id. at 434.
137 See id. at 434.
138 See Emily Buss, Parents’ Rights and Parents Wronged, 57 Ohio St. L.J. 431, 434 (1996). State regimes vary, but voluntary placement agreements are common. See, e.g., CAL. WELF. & INST. CODE § 16501.1 (11)(A) & (B) (2005) (“In any voluntary service or placement agreement, the parents or legal guardians shall be required to review and sign the case plan … However, they shall also be advised that the parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in the child welfare services case plan may be used in any hearing … as evidence”); C.R.S. 19-3-701 (1) (2004) (“Whenever it appears necessary that the placement of a child out of the home will be for longer than ninety days, which placement is voluntary and not court-ordered … a petition for review … shall be filed … before the expiration of ninety days in such placement.”); FLA. STAT. ANN. § 39.301 (14) (a) & (b) (2005) (“If the department or its agent determines that a child requires immediate or long-term protection … such services shall first be offered for voluntary acceptance … The parents or legal custodians shall be informed of the right to refuse services, as well as the responsibility of the department to protect the child regardless of the acceptance or refusal of services. If the services are refused and the department deems that the child's need for protection so requires, the department shall take the child into protective custody or petition the court as provided in this chapter.”).
139 See Emily Buss, Parents’ Rights and Parents Wronged, 57 Ohio St. L.J. 431, 434 (1996) (“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.”); LINDSEY, THE WELFARE OF CHILDREN, supra n. ___, 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); id. at 58-59 (describing poor outcomes for children in foster care).
140 Although not constitutionally, required, see Lassiter v. Dep’t Soc. Servs., 452 U.S. 18, 33-34 (1981) (holding that the Due Process Clause does not require appointment of counsel for indigent parents in all
counsel, 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.

termination of parental rights proceedings, but noting in dictum that noted in dictum that “[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel ... in dependency and [termination] proceedings.... [and] 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases”), most states authorize the appointment of counsel where the custody and control of a child is at stake and parents cannot afford to pay for counsel. See supra n.____. However, courts and child welfare agencies often persuade parents not to request counsel. See Buss, supra n.____, at 436.

Although there are notable exceptions, many appointed counsel simply provide poor representation. Buss describes appointed counsel as follows:

While many parents are represented with tremendous competence by public defender and legal services offices and by private attorneys, many others are appointed counsel who only accept these cases because they are the only cases they can get. Non-paying clients involved in the family or juvenile court system because they have been accused of abusing or neglecting their children are among the lowest-status clients a lawyer can have. The hourly rate paid for this work is at the bottom of the scale and is capped at a level too low to allow for effective representation in many cases. While these cases attract their share of dedicated, zealous advocates, they attract more than their share of lawyers who are merely desperate for work.

Among these lawyers, I have witnessed a startling lack of professionalism. The low pay and the lack of commitment to the work inspires these lawyers to give little or no attention to the cases. They rarely make an effort to speak with their clients out of court, even those clients, such as incarcerated clients, who may not be readily available for consultation in court. They often show up after a hearing is over, so that they can receive credit (and therefore pay) for an appearance, regardless of their lack of actual participation. They readily confess their open dislike for their clients to their adversaries, and their satisfaction with court decisions strongly opposed by their clients. In their frustration, many parents declare that they would have done better to represent themselves. While they would not have done well, they might, indeed, have done better.

Buss, supra n.____, at 437.

Buss, supra n.____, at 434-35 (footnotes omitted).
In sum, although parents’ rights ensure that children may not be removed from their homes without an after-the-fact judicial determination of parental unfitness, this right has little meaning when that judicial determination comes after a child has been removed, and thus severe damage done to the parent-child relationship, and is protected through procedures that offer little protection due to overburdened courts and poor counsel. More importantly, the current system does nothing to address the underlying causes that led to the abuse and neglect. If the underlying causes are left unaddressed, the removal issue is typically a foregone conclusion.

Similarly, children’s rights, while appealing in theory, offer little protection in practice. 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. For the ten percent of cases involving severe abuse or neglect, removal and placement in a foster home is likely the best outcome. But for the remaining cases, and particularly the fifty percent of cases involving poverty-related neglect, foster care is not the appropriate solution because it entails the removal of a child from the custody of her parent who is not necessarily unfit, but rather economically unable, to care for her child. The failure to provide, for example, adequate child care, does not necessarily speak to the quality of the relationship between the parent and child, and thus the need to supply an alternative parent. Rather, inadequate child care likely says far more about the parent’s financial means. By removing the child from her home because her parent is poor, the child welfare system is choosing to interfere with the bond between parent and child.
rather than address the underlying problem. This type of intervention comes at a high cost.

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. Approximately half of the children in foster care return to their biological families, but of the remaining children, only seventeen percent are adopted; the remainder live with relatives, are emancipated, or live in legal limbo. Children who are freed for adoption often must wait a long time before being adopted because adoptions do not keep pace with the terminations of parental rights.

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143 This is an example of a “neglectful” parent, but the same analysis could easily apply to an abusive parent. [address connection between abuse and poverty – stress]

144 Although the average stay in foster care is 19 months, 11 percent of children remain for two to three years, 11 percent remain for three to four years, and nine percent remain in care for five or more years. See NATIONAL ADOPTION INFORMATION CLEARINGHOUSE (NAIC), FOSTER CARE NATIONAL STATISTICS 4 (2003).

145 Fifty-four percent of the children who leave foster care return to live with their biological families, seventeen percent are adopted, ten percent live with a relative or guardian, seven percent are emancipated, and four percent remain in legal limbo. See U.S. DEPT. HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE ANALYSIS SYSTEM AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: PRELIMINARY FY 2002 ESTIMATES AS OF AUGUST 2004 3 (2004). These statistics are based on the most recent data, from 2002, tracking the 281,000 children who exited foster care in that year. The children in “limbo” were transferred to another agency or were runaways. 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.

146 Children waited an average of sixteen months for an adoptive home after parental rights were terminated; 22% of children waited eighteen to thirty-five months, and eight percent waited three to five years or more. See U.S. DEPT. HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE ANALYSIS SYSTEM AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: PRELIMINARY FY 2002 ESTIMATES AS OF AUGUST 2004 5 (2004).

147 For example, in 2002, although 67,000 children had their parental rights terminated, only 48,871 were adopted out of foster care. See U.S. DEPT. HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE ANALYSIS SYSTEM AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: PRELIMINARY FY 2002 ESTIMATES AS OF AUGUST 2004 3, 5 (2004). In 2002, 126,000 children were waiting to be adopted. See U.S. DEPT. HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE ANALYSIS SYSTEM AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: PRELIMINARY FY 2002 ESTIMATES AS OF AUGUST 2004 4 (2004). These were children who were identified as having the goal of adoption and/or whose parental rights have been terminated. In 2002 foster parents (including kinship foster parents) adopted 61 percent of the children, relatives who were not foster parents adopted 24 percent of the children, and non-relatives adopted 15 percent of the children. U.S. DEPT. HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE
Children in foster care face many difficulties, both while in care and later as adults. On average, a child in foster care is placed in three different homes. Even if placed in a permanent home, either when reunified with a biological parent or in an adoptive home, children who were once in foster care typically suffer economic, educational, and psychological hardship. Indeed, a recent study found the rates of


Adopted children tend to experience a greater number of foster care placements, perhaps, in part, due to their longer stay in foster care. See United States General Accounting Office (GAO), Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children, But Long-Standing Barriers Remain 17 (June 2002), GAO-02-585. In 2000, 24 and 26 percent of children adopted from foster care experienced one or two placements respectively, and 41 percent experienced 3 or more placements, with 14 percent experiencing 5 or more placements. See United States General Accounting Office (GAO), Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children, But Long-Standing Barriers Remain 18 (June 2002), GAO-02-585.

Foster children 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 & FAMILY STUDIES 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 Clausen, supra, at 292; Molly Murphy Garwood & Wendy Close, Identifying the Psychological Needs of Foster Children, 32 CHILD PSYCHIATRY & HUM. DEV. 125 (2001), a widely used, empirically validated measure in child psychology. See Fasttrack Child Behavior Checklist (2005), available http://www.fasttrackproject.org/techrept/c/cbc/. Furthermore, children who have been placed in foster care are also at risk for developmental problems, such as gross motor, fine motor, and cognitive problems. See Murphy Garwood & Close, supra, at 126. 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 non-foster care peers. See R. Barth, On Their Own: The Experiences of Youth After Foster Care, 7 CHILD & ADOLESCENT SOCIAL WORK 419-40 (1990)); R. Cook, Are We Helping Foster Care Youth Prepare for Their Future? 16 CHILDREN & YOUTH SERVS. REV. [insert first page of article once we have it], 213-29 (1994); M.E. Courtney et al., Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care, 80 CHILD WELFARE 685-717 (2001). As many as 25 percent report being homeless for at least one night, see Courtney, supra, at 685-717; forty percent
post-traumatic stress disorder ("PTSD") among adults who were previously placed in foster care to be twice as high as combat veterans. In addition to PTSD, former foster care children suffer from depression, social phobia, panic syndrome, and anxiety disorders. Moreover, even if the removal is temporary, the experience of being removed from a home is deeply traumatizing to a child.

These studies often do not control for the prior abuse or neglect. Thus, it could be argued that the poor outcomes are a result of the abuse and neglect at the hands of a parent and not because of the subsequent placement in foster care. At the very least, it is clear that foster care does not improve the lives of most of the children placed in that system. And, as shown below, there is good reason to believe foster care is a contributing factor to the poor outcomes.

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 report receiving some sort of welfare, see Cook, supra, at 213-29 (1994), and, perhaps most troubling, sixty percent of young women leaving foster care were pregnant or already parenting within twelve to eighteen months after leaving the foster care system, see Cook, supra, at 213-29.


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 M.M. Garwood & W. Close, Identifying the Psychological Needs of Foster Children, 32 Child Psychiatry and Human Dev. 125, 126 (2001) (citing M. Thorpe & G. Swart, Risks and Protective Factors Affecting Children in Foster Care: A Pilot Study of the Role of Siblings, 37 Canadian J. Psychiatry 616 (1992)).

See generally JOHN BOWLBY, ATTACHMENT AND LOSS, VOLUME 3: LOSS 7-14, 397-411, (1980); JOHN BOWLBY, ATTACHMENT AND LOSS. VOLUME 2: SEPARATION 4-5, 8-9, 13, 15-16, 245-257 (1973); JOHN BOWLBY, ATTACHMENT AND LOSS. VOLUME I: ATTACHMENT 27-30, 209, 326, 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, Social Work, October 2001, at 325, 338 (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 to attachment related issues for the child.).
foster families were more likely to be reported for physical abuse, sexual abuse, and neglect compared to non-foster families.¹⁵³ Of the abuse and neglect occurring in foster care, nearly half (48.7%) involved sexual abuse.¹⁵⁴ Children abused or neglected in foster care are significantly more likely to be reported as having physical health, developmental, behavior, and mental health problems compared to children in foster care who are not abused or neglected in their foster homes.¹⁵⁵ In addition, children in foster care are likely to suffer from medically related neglect. From a sample of foster children from 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.”¹⁵⁶

It could be argued that the high reporting rates of abuse and neglect do not necessarily reflect higher incidence rates than the general population because foster families generally receive closer scrutiny than a non-foster family.¹⁵⁷ But there is some evidence that this is not the case: once a report was made, foster homes had almost

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¹⁵³ Mary I. Benedict et al., *Types and frequency of child maltreatment by family foster care providers in an urban population*, 18(7) CHILD ABUSE & NEGLECT 561, 581 (1994) (“[F]oster families were almost seven times more likely to be reported for physical abuse as compared to families in the community… [F]oster families 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 id. at 577-585.

¹⁵⁴ Benedict M., Zuravin S., Somerfield M., & Brandt D. (1996). The reported health and functioning of children maltreated while in family foster care. *Child Abuse & Neglect*, 20 (7), 561-571. The breakdown of substantiated maltreatment reports was as follows: 48.7% sexually abused, 24.4% physically abused, and 26.9% neglected (at 563). In the sexual abuse cases, 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 twenty percent of the incidents. See id.

¹⁵⁵ Id. at 565.


¹⁵⁷ See Benedict et al, *supra* n. __, at 567.
double the rate of substantiated physical abuse findings and almost four times the rate of substantiated sexual abuse findings than non-foster homes.\textsuperscript{158}

Apart from abuse and neglect, there is evidence that at least some foster parents are inadequate parents. A survey of data from the 1997 and 1999 National Survey of America Families (NSAF) reported that seventeen percent of children in the child welfare system are living with caregivers with symptoms of poor mental health.\textsuperscript{159} This survey also found that twenty-six percent of children live with a “highly aggravated” caregiver\textsuperscript{160} and that more than a quarter of children under age six lived with caregivers who provided “minimal cognitive stimulation.”\textsuperscript{161}

In sum, any theory of 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 due to poverty-related neglect, at least half the cases, placement in the foster care system is rarely a good solution. Although it is tempting to idealize a better home for the child—a loving, stable home with supportive adults—foster care generally does not provide children with such

\textsuperscript{158} Id. at 582.
\textsuperscript{160} Id. at 4 (“how often in the last 30 days the child did things that really bothered them a lot, they felt they were giving up more of their lives to meet the child’s needs than expected, they were angry with the child, and they felt the child was harder to care for than most”).
\textsuperscript{161} Id. at 5 (“26 percent live with a caregiver who reads to them two or fewer times a week, and 24 percent live with a caregiver who takes them on outings (e.g., park, grocery store, church, playground) two or three times a month or less.”).
homes. The experience of being removed from the original home is typically so debilitating and the ill effects so long-lasting, even a supportive foster home cannot compensate for the devastating experience of removal and the loss of a family.

Before turning to my second main critique of rights, I briefly want to mention three additional practical shortcomings of rights in the current system. First, the current rights framework leads to one-size-fits-all child welfare system, rather than context-driven decisions. For example, concepts of rights determine standards of removal of children. If preference is given to parents’ rights, then children will be removed only in extreme circumstances. If preference is given to children’s rights, then children will be removed more frequently. As one commentator has noted, this is a question of whether the system should be overinclusive or underinclusive. 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.

162 Catherine Ross argues that a one-size-fits-all child welfare policy does not allow for the natural variations among families, especially families within the child welfare system. See 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, 178-79 (2004). In this view, the supremacy of parents’ rights does not allow for a more individualized determination of what is best for a particular family, a determination that could be adjudged by giving the child a greater voice in the child welfare proceedings. See id. at 192-93.

163 See, e.g., 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 non-disabled 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”); See also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 134 (1991) (advocating “ecological approach to family policy,” which would “avoid[] the court-imposed uniformity that would follow from excessive constitutionalization of family issues”).
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. But the current rights-based approach does not permit such individualized decision-making.

Second the dyad of parent and child does not account for the variety of individuals who may be relevant to a particular case. Extended family members or unrelated adults living in the home may play important roles in a child’s life. The doctrine of parents’ rights does not permit recognition of such individuals. Thus the rights-based approach neglects the importance of extended family members.

Third, and in a related point, the rights-based approach looks only at parents and children and does not examine ties between families and their communities. 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 major protective factor for children who grow up in high-risk environments.\textsuperscript{164} A thirty-year study of 698 infants on the Hawaiian island of Kauai demonstrated the importance of the community to such children.\textsuperscript{165} 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


\textsuperscript{165} Werner, \textit{Garden Island, supra n. 164}, at 106, 108D-110; Emmy E. Werner, \textit{High-Risk Children in Young Adulthood: A Longitudinal Study from Birth to 32 Years}, AMERICAN JOURNAL OF ORTHOPSYCHIATRY, January 1989, at 72, 74 [hereinafter Werner, \textit{High-Risk Children}].
physical, cognitive and psychosocial development."  \(^{166}\) The study evaluated the children both during the prenatal period and then after birth at ages one, two, ten, eighteen, and thirty-two.  \(^{167}\) 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.  \(^{168}\) Despite these stressful events, one out of three of the children in the high-risk category developed into competent, caring adults.  \(^{169}\) The research indicated that emotional support outside of the immediate family greatly contributed to their resiliency.  \(^{170}\) 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.  \(^{171}\) This study is evidence that strengthening community ties is important for at-risk children.

With these practical shortcomings of rights in mind, I turn now to theoretical objections to the rights-based approach.

B. The shortcomings of rights, as currently conceived

It could be argued that parents’ rights and children’s rights are not protective in practice because neither right is complete and the child welfare system has come to an uneasy and ineffective compromise between the two rights. In this view, parents’ rights are not sufficiently protective because of the incursions of children’s rights. Or,

\(^{166}\) Werner, Garden Island, supra n. __, at 106.

\(^{167}\) Id.

\(^{168}\) Id.; Werner, High-Risk Children, supra n. __, at 73.

\(^{169}\) Werner, Garden Island, supra n. __, at 108D; Werner, High-Risk Children, supra n. __, at 73.

\(^{170}\) Werner, Garden Island, supra n. __, at 108D-110; Werner, High-Risk Children, supra n. __, at 74.

\(^{171}\) Werner, Garden Island, supra n. __, at 108D-110; Werner, High-Risk Children, supra n. __, at 74.
conversely, children’s rights are not sufficiently protective because of continued
deferece to parents’ rights. The answer to this problem would be to fortify one set of
rights, those of parents or those of children. I contend, however, that choosing one set of
rights over another is not the proper course for the child welfare system because rights, as
currently conceived in our legal system, will never be able to solve the problems facing
families in the child welfare system.

To begin, 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.”172 This conception of rights does not advance the interests of
parent or child because neither parents nor children in the child welfare system benefit
from this sort of autonomy. By definition, children do not fit within the dominant model
of rights. Although there is certainly a range of capabilities among children, depending at
least upon 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.173

Perhaps surprisingly, adults also do not fall within, and are not served by, the
dominant model 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. She contends that the dominant conception

172 Martha Minow, Rights for the Next Generation: A Feminist Approach to Children’s Rights, 9 HARV.
WOMEN’S L. J. 1, 15 (1986); accord MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF
173 See Martha Minow, Rights for the Next Generation, supra n. __, at 18 (“To the extent that the dominant
conception of rights presumes both autonomy and a direct relationship with 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.”).
of rights is one-sided in its emphasis on individualism, rather than relationships.\textsuperscript{174} 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).\textsuperscript{175} To Nedelsky, the question is how to structure rights such that they foster these autonomy-enhancing relationships.\textsuperscript{176}

Nedelsky contends that the dominant conception of rights, which is based on a model of “rights as trumps,”\textsuperscript{177} has limited utility for advancing certain goals.\textsuperscript{178} 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.”\textsuperscript{179} In the “rights as relationship” model, rights are viewed as a means for structuring relationships,\textsuperscript{180} and thus rights should be formulated in a manner that fosters beneficial

\textsuperscript{174} As Nedelsky states, the problem with the Anglo-American conception of rights is that it views rights [as] 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.

\textsuperscript{175} See \textit{id}.
\textsuperscript{176} See \textit{id}; see also \textit{id}. (“The constitutional protection of autonomy is then no longer an effort to carve out a space 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.”).
\textsuperscript{177} See \textit{id}. at 6-8, 14, 17-18 (1993) (discussing model noting origins of phrase in Ronald Dworkin’s work).
\textsuperscript{179} See \textit{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.” \textit{Id}. at 1287-89.
\textsuperscript{180} In Nedelsky’s view, this is descriptive rather than normative statement. See Nedelsky, \textit{Reconceiving Rights as Relationships}, supra n. \textsubscript{174} at 8 (1993) (“what rights in fact do and have always done is construct relationships—of power, of responsibility, of trust, of obligation”).

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relationships. 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 way they live together.”

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. 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

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181 Nedelsky, The Practical Possibilities of Feminist Theory, supra n. ___, at 1289-90. The structure of Nedelsky’s argument is more nuanced than this summary overview. She argues first that rights are a means of structuring relationships, but that society often does not acknowledge the relationship structuring aspect of rights. Second, in some circumstances judges do recognize that legal rights structure relationships. Third, feminist theorists and practitioners need to recognize that rights structure relationships, and thus should ask how a given formulation of rights will affect relations—will it, for example, foster relations of equality between men and women? Or only do so for affluent men and women? This inquiry, in turn, requires us to determine basic values, and thus decide what kinds of relationships are part of those values. Thus, the underlying question is “what formulation of rights will foster those relationships.” Id. Martha Minow makes a similar point. Rights are “a vocabulary used by community members to interpret and reinterpret their relationships with one another.” MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 306 (1990). “Interpreting rights as features of relationships, contingent upon renegotiations within a community committed to this mode of solving problems, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process.” Id. at 309.

182 Nedelsky, The Practical Possibilities of Feminist Theory, supra n. ___, at 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 business as usual. See id. at 15 (“I reject both the claim that we must abandon rights as illusory or insufficient and the claim that we must preserve existing forms of rights as protections for individual autonomy. Embedding rights within relationships, I argue, offers another and more promising alternative. I advocate self-consciousness about the concepts we use and their effects on what we think we know and who we are.”). 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?” See id. at 283. But in her view a “relational approach” is not a complete solution either because it may deny women and children the basic rights that others enjoy. See id. at 268. As Minow readily acknowledges, a relational approach cannot be easily summarized. But it involves changing relationships such that power dynamics shift. For example, a relational approach would “invite the classmates of a hearing impaired child to learn sign language and thus learn to communicate with her.” Id. at 227. As Minow states, “this approach remakes the relationships within which she otherwise experiences isolation.” Id. Minow argues that we should locate rights within actual relationships, which would permit a construction of rights that acknowledges important differences. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 269 (1990).

the impact of an injury on family, friends, and dependents, and on society through the
cost of medical care.\textsuperscript{184} 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."\textsuperscript{185} 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."\textsuperscript{186} For Glendon, it is not the existence of rights per se,
that creates the problem, but rather the views of rights without the concomitant
responsibilities.\textsuperscript{187}

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. To be
sure, important interests lie underneath parents’ rights and children’s rights, but rights are
a poor tool for advancing these interests. 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. Rights in the current legal system assume and
reinforce autonomy, but neither parent nor child is autonomous.

Poor parents need the state. Although a parent may wish the state to leave her
alone and let her raise her child, if the parent is unable to do so because of poverty, then
to truly exercise the right to the care and custody of her child, a parent may need the

\textsuperscript{184} Id. at 45-46.
\textsuperscript{185} Id. at 14.
\textsuperscript{186} Id. at 15.
\textsuperscript{187} Id. at x, 15, 45.
assistance of the state. The parent is not asking for autonomy from the state, but connection to the state—in the form of meaningful, effective help to address poverty. The assistance parents need is typically not the “help” provided by foster care. Although some parents may benefit from removal of a child during a crisis period, once a child is removed, it becomes exceedingly difficult for the parent to regain custody. An effective model of state assistance would be one in which the state helped the parent address the underlying issues that led to the abuse or neglect.

Similarly, children also need something from the state, but not necessarily the intervention they currently receive. As noted above, children’s rights do not rest on autonomy in the traditional sense. Rather, the assertion of children’s rights requires 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. Where a child has been the victim of severe abuse and neglect (again, approximately ten percent of the current caseload), prompt removal of the child and placement in foster care, with a view to an expedited adoption, is likely the best course. But in the fifty percent of poverty-related neglect cases, removing the child is not the type of assistance that will benefit most children. These children are removed from homes where they may well have strong bonds with their parents, even if the parents are not able to provide for them, and placed in alternative homes where they are at risk for abuse and neglect. These children would do far better in a system that helped their parents address the underlying issues that led to the abuse and neglect, rather than, in effect, penalizing the children for being born to low-income parents.
The individualist thinking fostered by rights also does a disservice to children by excluding a “family systems” orientation to resolving family problems. Long-espoused by social workers, family systems theory believes the family is a living entity, with each part dependent on the other. In this theory, 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. In this approach, 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 but rather the only possible solution must involve parent and child.

In sum, there is a fundamental mismatch between rights as conceived and the needs of parents and children. To underscore this mismatch, it is probative to ask how, in the context of the child welfare system, the current conception of rights structures relationships and whether these are the types of relationship we, as a society, want to foster. Although this begs the question of how to determine societal preferences, in the context of the child welfare system it is safe to assume that society would prefer less, rather than more, child abuse and neglect. The question then is whether the current construction of parents’ rights and children’s rights fosters relationships between parents.

189 See Susan L. Brooks, A Family Systems Paradigm for Legal Decision Making Affecting Child Custody, 6 Cornell J. L. & Pub. Pol’y 1 (1996) (“Discussions concerning so-called ‘children’s rights,’ which often pit themselves against so-called ‘parents’ rights,’ have become a fixture in the dialogue among scholars and advocates concerned about child custody matters. When viewed through the lens of family systems therapy, however, this discussion reveals itself to be not only unproductive but misconceived. From a family systems perspective, the rights, as well as the needs and interests of children and parents, are inextricably intertwined. It thus makes no sense to speak of them as dichotomous, or worse, opposed to each other.”).
and children, and between the state and families, that leads to less child abuse and neglect. In my opinion, the operation of rights in child welfare system does not foster such relationships.

1. Rights create zero-sum orientation

The current conception of rights is zero sum, requiring a choice between parent or child. Recognizing the rights of a parent necessarily entails a loss of rights for the child, and vice versa. This zero-sum orientation informs child welfare legislation, and judicial decision-making. Although this orientation is largely unchallenged in policy and legal theory debates, in my opinion it is not an immutable aspect of the child welfare system, at least for the majority of cases. There is no room in this zero-sum model for an orientation that accommodates the rights of both parent and child, although such an accommodation is vitally important to both parents and children.


191 As discussed above, Congress has vacillated between favoring parents’ rights, as in AACWA, see TAN at ____, and children’s rights, as in ASFA, see TAN ____. Thus the emphasis on family preservation from the 1980s and early 1990s gave way to an emphasis on adoption. See Gordon, Drifting Through Byzantium, supra n. ___, at 649. This shift is evidence of Congress’s belief that the interests of parent and child are in tension—legislation must either favor parents or children, but not both.

192 For example, in Santosky v. Kramer, the Supreme Court subscribed to the prevailing view that the interests of the child are subsumed in the interests of the parent, at least until the parent is proven unfit. See Parham v. F.R., 442 U.S. 584, 602 (1979) (“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 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.”). This is true as a matter of constitutional law, see Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest’”) (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)), as well as state statutory law, see supra n. ____. Courts do not balance these interests: the law must side either with the parent or the child and could not, simultaneously, consider the interests of both.
To elaborate, this zero-sum view of the rights of parents and children is inaccurate, or at least incomplete. As noted above, only ten percent of cases in the child welfare system involve severe child abuse and neglect. 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. In these cases, removal of the child and placement in an alternative home, likely leading to adoption, may well be the best solution. This situation does pit the right of the parent squarely against the right of the child.\footnote{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 is a conflict between the rights of parent and child and the legal system will need to decide which right to prioritize. My point here is that the presumption of shared interests between parent and child should not be rejected until proven unfounded. In this way, I differ from Martha Minow’s assertion that there is necessarily a conflict between parent and child. As she states, “[t]o believe that rights, when claimed and recognized, create conflict and adversarial relations between children and adults is to presume that there would otherwise be community and shared interests. I suggest instead that legal language translates but does not initiate conflict.” MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 291-92 (1990). I contend that this likely is true for the few cases of severe abuse and neglect, but the presumption of shared interests is well-founded for at least the fifty percent of cases due to poverty-related neglect.} But in the remaining cases, and in particular the approximately fifty 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 will help the parent and the child. Put another way, the traditional doctrine that a parent will act in her child’s best interest needs to be tested before proven untrue. A parent 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.

Moreover, once the word “rights” is replaced with “interests,” it is easier to see the potential alignment between parent and child. 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 children share an interest in unwarranted intervention, which is certainly true, but rather that even where intervention is required, i.e., 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,

194 The distinction between rights and interests may well be dispositive, and is certainly a strategic and substantive one. For example, the same “thing” could be characterized as either a right or an interest, and the characterization may be dispositive. For example, in the child welfare context it could be argued that a child has a “right” to a continued relationship with a biological parent, or it could be argued that a child has an interest in this continued relationship. Conceiving of this “thing” as a right would require a judge to articulate a justification for not giving effect to the right. Conceiving of this “thing” as an interest might make it into a data point for a judge to consider when deciding placement or terminating parental rights, thus giving the judge greater discretion and the possessor of the “thing” fewer legal protections. Conversely, the frame of children’s rights may provoke decision-makers and ultimately lead to a less protective or desirable outcome for children. See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 774-78 (2003) (arguing a children’s rights frame may provoke decision-makers and ultimately lead to a less protective or desirable outcome for children. See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 774-78 (2003) (arguing a children’s rights frame may provoke decision-makers and ultimately lead to a less protective or desirable outcome for children. See Martin Guggenheim, Maximizing Strategies for Pressuring Adults to do Right by Children, 45 ARIZ. L. REV. 765, 774-78 (2003) (arguing a children’s rights frame may provoke decision-makers and ultimately lead to a less protective or desirable outcome for children.

195 See, e.g., Santosky v. Kramer, 455 U.S. 645, 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.”).

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and the child has an interest in the parent receiving help such that the child can remain safe and in the parent’s home.

From a child’s perspective, parents are not fungible. As shown above, there are very high costs associated with removing children from their biological homes and placing them in foster care. To the extent these costs can be avoided, the child will benefit. Of course children need to be kept safe, but the current system assumes that the poverty-related neglect cases are best served by placement in foster care rather than assistance to the family. Moreover, although it is tempting to idealize a better home for the child—a loving, stable home with supportive adults—foster care generally does not provide children with such homes. The experience of being removed from the original home is typically so debilitating and the ill effects so long-lasting, even a supportive foster home cannot compensate for the devastating experience of removal and the loss of a family.

Critics will suggest that an assumption of the alignment of the interests of parent and child is simply a revival of the debate over family preservation programs. These programs provided intensive services to families in an attempt to prevent foster care placements. Proponents argued the programs kept families together and critics contended the programs simply postponed the inevitable removal of children. My argument is for a refined approach to the rights of parent and child, one in which the child welfare system does not assume a zero-sum approach to the rights of parent and child. The point here is that the current conception of rights leads to either/or thinking. This may be appropriate
in the minority of cases where the parent has severely abused or neglected the child. In these circumstances there is a real conflict between the rights of the parent and the rights of the child. But we need to save this conflict for cases where it is deserved. For the poverty-related neglect cases, we need to develop a new model of rights that permits an alignment of interests between parent and child.

2. Rights obscure the real issue: poverty

Rights do not properly frame the real issues in the child welfare system. When the issue is framed in terms of individual rights (parent versus child), this obscures the fact that in most cases abuse and neglect are symptoms of a deeper, systemic problem: poverty. The failure to frame the issues properly leads to a system that does not address the underlying issues.

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196 Martha Minow contends that the assertion of rights does not necessarily create conflict because that conflict may already exist. Rather, the recognition of the conflict and the language of rights “gives existing conflict public expression and invites public resolution.” MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 292 (1990); accord id. (“The language of rights may give voice to what would have been silence, but not consensus.”).

197 Throughout this article I do not intend to oversimplify the problems child abuse and neglect with a single conclusion that low-income families abuse or neglect their children and if such families were not poor they would not do so. Certainly, the causes of child abuse and neglect are manifold, see supra n. ___. and many, many low-income families do not abuse or neglect their children. I intend, rather, to highlight the typically overlooked correlation between poverty and abuse and neglect, and to note that poverty-related neglect is the primary reason a large percentage of families are in the child welfare system. Although others have made this point as well, see, e.g., ROBERTS, SHATTERED BONDS, supra n. ___ at ___; GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, supra n. ___, at ___, the criticism has gone unheeded.
Although the focus of the child-saving movement used to be on poverty, a focus that was revived with the 1960s War on Poverty, this focus was obscured in the 1970s. As Martin Guggenheim explains, when Nixon was elected in 1968, poverty programs were viewed increasingly as providing tax money for poor minorities. As a result, public support for such programs eroded. Conservatives were able to suggest in public debate that liberal anti-poverty legislation had exacerbated the problems of the poor. Fearing that their influence in national politics was on the wane as the country seemed poised to reject poverty programs, liberals seeking to ameliorate conditions of poverty needed a new strategy to secure bipartisan support for government spending toward that end.

Accordingly, to get CAPTA enacted in 1974, Senator Mondale’s strategy involved “[a] conscious plan to prevent the proposal from being viewed as a disguised poverty program, [and] emphasized that child abuse was a ‘national’ problem, not a ‘poverty problem’” Guggenheim argues that this was a devastating shift in child welfare efforts: “Ever since, much of the public debate has ignored or understated the evidence suggesting a correlation between abuse and neglect on the one hand and poverty on the other.”

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198 There is a long and interesting history of the connection between poverty and the child welfare system. That history is beyond the scope of this article, but for those who are interested, see GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, supra n. ___, at 3; Hasday, Parenthood Divided, supra n. __, at 348; Woodhouse, Who Owns the Child?, supra note __, at 1040; Garrison, Why Terminate Parental Rights?, supra n. __, at 435-36; Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 899 (1975).

199 GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, supra n. __, at 182-83.

200 Id. at 184.

201 Id. at 185 (“The consequences of this strategy have been profound. In recent years, most observers have come to see child abuse and neglect primarily as a defect in particular families, particularly those with limited or nonexistent social roots. No longer a social problem, child welfare is conveniently defined as a matter of individual failure. Because the broader social conditions suffered by low-income children who end up in foster care have been defined as outside of the proper boundaries of the subject matter, the most serious problems facing children in the United States—all related to poverty—are consistently being ignored.”).
Part of the disconnect between poverty and abuse and neglect is the view that child abuse and neglect are manifestations of individual pathology, not products of societal neglect. The noted child welfare researcher, Duncan Lindsey, describes the “residual” nature of the child welfare system. The residual approach to helping families means that the child welfare system will step in only at a point of crisis to address the immediate needs of the child, and not to address poverty, which is the primary underlying cause of abuse and neglect. The residual approach means 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. In this way, the child welfare system views abused and neglected children apart from the society that helped create their circumstances.

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202 See Duncan Lindsey, THE WELFARE OF CHILDREN 2, 18 (2d ed. 2004). This is not true for child sexual abuse, which spans all classes. See, e.g., KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 12 (1995) (“sexual abuse of children can be found in all socioeconomic classes and family settings”); David Finkelhor, The Scope of the Problem in CHILD SEXUAL ABUSE 12 (Murray & Gough eds., 1991) (“In spite of the fact that cases that come to the attention of the reporting system have a clear bias towards deprived and lower socio-economic status, the surveys have demonstrated that there seems to be no relationship between social class background and the risk of being a victim of child sexual abuse.”).

203 See LINDSEY, THE WELFARE OF CHILDREN, supra n. __, at 2 & n. 1. Federal legislation has followed the shift from social responsibility for poverty-related ills to a model of individual pathology necessitating intervention between the child and problem parent. For example, the federal government initially provided money for low-income families regardless of any finding of abuse or neglect in such federal programs as the Social Security Act of 1935 and Aid to Dependent Children. See Social Security Act of 1935, ch. 531, §521, 49 Stat. 620, 633 (repealed 1968). But responding to a sense that the public would no longer support such programs, liberals in the early 1970s re-focused their efforts to help low-income families by channeling money to abuse and neglect programs, rather than programs to address the underlying causes of much of this abuse and neglect. See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15, 97-103 (1984). This led to the passage of the Child Abuse Prevention and Treatment Act (“CAPTA”) in 1974. See Pub. L. 93-247 (codified as amended at 42 U.S.C. §§ 5101-5107). CAPTA provided funds to states to protect children from abuse and neglect. The program was specifically pitched as an effort to address abuse and neglect, not poverty. See Nelson, supra n. __, at 107 (quoting Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93rd Cong. 17-18 (1973) (statement of Sen. Mondale)). The sponsor, Senator Walter Mondale, emphasized that abuse and neglect affected families from all economic classes. See id. This orientation toward helping children who are abused and neglected, rather than helping families who may be driven by poverty to abuse or neglect their children, continues today, and the correlation between poverty and abuse and neglect has largely been ignored by public debate.
The negative effects of a residual approach are manifold. Because intervention occurs only at a crisis stage, the children who enter the system have already been harmed.\textsuperscript{204} Moreover, because the residual orientation does not address the underlying causes of abuse and neglect, it can, at best, prevent the worst cases of abuse and neglect, but cannot help the millions of children who live in poverty lead more economically and socially stable lives.\textsuperscript{205}

In sum, the rights-based frame of individual rights obscures both the need of the parent and child for effective state intervention and the role of poverty in creating the abuse and neglect. A new model of rights is needed. This new model would both acknowledge and facilitate a (healthy) dependency relationship between the state and parent and create a new frame for better understanding the issues facing families in the child welfare system.

III. FAMILY GROUP CONFERENCE

Thus far I have described the rights-based legal framework governing the child welfare system and explored the considerable limitations of this framework. As I noted, some scholars have proposed variations on the rights-based framework, in an attempt to better protect both parents and children, but these proposals have lacked a means of implementation. In light of the failures of the rights-based approach to child welfare, the question is whether there is an alternative process that would better safeguard and promote

\textsuperscript{204} See Lindsey, The Welfare of Children, supra n. \_\_, at 2-3 (“Because the damage to children is so great by the time they enter the system, the number who survive and benefit is minimal.”).

\textsuperscript{205} See Lindsey, The Welfare of Children, supra n. \_, at 3.
the interests of parents and children. Family group conferencing, a radical departure from
the current legal framework, appears to be such a process. This Part describes the theory
and practice of a group conference.

A. Origins, the process, and theoretical underpinnings

Family group conferencing is part of the broader restorative justice movement,
which seeks to reform the justice system to incorporate victims and allow the offender to
“restore” the status quo. Although largely focused on criminal justice, the restorative

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206 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.” The American Human Association one of the leading proponents of family
group conferencing in the United States, prefers the term “family group decision making” as an umbrella
term to refer to family-involvement models of child welfare. See [cite forthcoming]. Although not
interchangeable, the terms refer to processes that are similar enough for purposes of this article. By
contrast, “family unity meetings,” although often grouped together with family group conferencing, differ
in that this process does include the key element of private family time. See Lisa Merkel-Holguin, Putting
Families Back Into Child protection Partnership: Family Group Decision Making, 12 PROTECTING
Children 4, 7.

207 As one of its main proponents in the United States describes it, restorative justice

is a victim-centered response to crime that allows the victim, the offender, their families, and
representatives of the community to address the harm caused by the crime. Restorative justice
emphasizes the importance of providing opportunities for more active involvement in the process
of offering support and assistance to crime victims; holding offenders directly accountable to the
people and communities they have violated; restoring the emotional and material losses of victims
(to the degree possible); providing a range of opportunities for dialogue and problem solving to
interested crime victims, offenders, families, and other support persons, offering offenders
opportunities for competency development and reintegration into productive community life; and
strengthening public safety through community building.

Office for Victims of Crime, U.S. Dep’t of Justice, Family Group Conferencing: Implications for Crime
Victims at 1 (2000). [get a Braithwaite description of RJ for here, b/c want to emphasize RJ, not family
group conferencing] The movement to a system based on restorative justice, rather than the traditional
western penal model of criminal justice, is far-reaching and fast-moving. A discussion of this movement is
beyond the scope of this Article, but others have written about it extensively. See, e.g., RESTORATIVE
Family group conferencing differs from therapeutic jurisprudence, in which judges take a more active role
in the lives of the litigants, such as ensuring drug addicts are attending drug rehabilitation treatment
programs, rather than simply adjudicating guilt and innocence. See Bruce J. Winick, [get one or two
Winick cites describing TJ] By contrast, family group conferencing seeks to avoid court involvement
altogether. Family group conferencing differs from dependency mediation in that the latter concerns
justice movement has also addressed other systems, including child welfare. Family group conferencing is used in two contexts: offenses committed by juveniles, and families involved in the child welfare system. This article addresses only the latter context. In that context, family group conferencing is the term used for 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 children who are at risk for abuse or neglect.

Simplified descriptions two cases, one in the current child welfare system and one in a family group conferencing system, will illustrate the marked differences between the two approaches. In the typical child welfare case, after the state agency receives a credible report of child abuse or neglect, a caseworker goes to the home, removes the child, and places him in foster care pending an investigation. The state agency then files a petition in court seeking temporary custody of the child. The caseworker develops a case plan for the parents, typically requiring the parents to obtain drug treatment and attend negotiations regarding matters pending before a court, whereas family group conferencing is typically used before a case is sent to a court, or it is diverted from a court, as an alternative to the involvement of the judiciary. See Susan M. Chandler & Marilou Giovannucci, Family Group Conferences: Transforming Traditional Child Welfare and Policy Practice, 42 FAM. CT. REV. 216, 217-18 (2004).

208 See OFFICE OF VICTIMS, U.S. DEP’T OF JUSTICE, at 2 (describing the process for addressing crimes of juveniles); Mark S. Umbreit, Univ. of Minn., Family Group Conferencing: Implications for Crime Victims (U.S. Dep’t of Justice 2000). In this context, the family group conferencing is similar to victim-offender mediation, in which the offender meets with the victim of the crime to discuss the impact of the crime on the victim. In family group conferencing for youth offenders, the family of both the offender and the victim are present, as well as a trained facilitator. The process is used to determine how best the offender can make reparations to the victim and community. The process is also designed to provide the victim with an opportunity to articulate the impact of the crime on her life. See id.

209 See Gale Burford & Joe Hudson, General Introduction: Family Group Conference Programming in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE xix (Gale Burford & Joe Hudson eds., 2000). In this model, typically, cases are either sent to a group conference with no court involvement or, less often, referred from the court. In this way, family group conferencing is both an early intervention as well as a court-diversion approach to child welfare. See, e.g., Pat McElroy & Cynthia Goodsoe, Family Group Decision Making Offers Alternative Approach to Child Welfare, XIX YOUTH LAW NEWS 3, 3 (May/June 1998) (describing court diversion aspect of New Zealand family group conferencing)
parenting classes. If the parent does not comply with this treatment 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 and the state agency seeks an adoptive home for the child. The majority of decisions in this model are made by professionals: caseworkers, therapists, guardians ad litem, and judges.

In a family group conference, the story and decision-makers are markedly different.210 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, extended family members, significant community members who know the family, and sometimes the child depending on his age. 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 complicating factors, such as a history of domestic violence.211

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211 A history of domestic violence will not preclude a family group conference, but it would require the coordinator to make alterations to the conference to compensate for power differentials and to protect the victims of domestic violence.
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 and the family and community members engage in private deliberation. During the private deliberation, the participants decide if the child was abused or neglected and, if so, develop a plan to protect the child and help the parents. This stage can take several hours or even days. After the participants have reached an agreement, they present plan to the social worker and coordinator, who likely have questions for the participants. Parents, custodians, social workers, and coordinators have the legal right to veto the plan produced by the conference and refer the case to court. In practice, this rarely occurs: the participants come to a decision and the social worker and coordinator approve the plan, perhaps with a few changes. 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 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.”

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. This means using family group conferences to support families in caring for their children, as well as building stronger links between the family and children when out-of-home care is necessary.” It 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.

212 See Gale Burford & Joe Hudson, *General Introduction: Family Group Conference Programming in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice* (Gale Burford & Joe Hudson eds., 2000). An interesting question is the role of the coordinator, who plays an essential role in determining which individuals should attend, preparing these individuals for the conference, bringing them together, starting the conference, monitoring implementation of the plan developed at the conference, and reconvening a conference if necessary. See Gale Burford & Joe Hudson, *General Introduction: Family Group Conference Programming in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice* (Gale Burford & Joe Hudson eds., 2000). In this way, it is possible to see the coordinator as more of a state actor, if not in literal legal terms, then in a metaphoric sense. The coordinator wields tremendous control.


214 Kay Pranis, *Conferencing and the Community in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice* (Gale Burford & Joe Hudson eds., 2000). Some proponents make even broader claims, contending that family group conferencing “is a process for acknowledging then transforming conflict within and between people.” David Moore & John McDonald,
Family group conferencing began in New Zealand as an effort by the Maori to address state intervention in their families.\textsuperscript{215} To avoid the removal of their children to non-Maori families, and to incorporate Maori traditions of involving extended family members in decision-making, legislative changes were made to the child welfare system in the Children, Young Persons, and Their Families Act of 1989.\textsuperscript{216} The changes were in response to several government reports documenting discrimination against Maori families in the child welfare system.\textsuperscript{217} The legislative changes were not limited to Maori families. Rather, the law required all substantiated cases of child abuse and neglect be referred for family group conferencing.\textsuperscript{218} 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.”\textsuperscript{219}
There are four hallmarks of family group conferencing. First, the process is intended to find and build on a family’s strengths, rather than place blame. One method for achieving this is to focus on the problem, rather than the person, and to concentrate on healing. This shift of focus from a family’s failings to a family’s strengths is a sea change in child welfare. Second, the process respects and values cultural practices, although its usefulness is not limited to aboriginal communities. Third, the process involves the extended family and community. Those individuals with information to share, individuals who love the child, and individuals with a stake in

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220 For details on program design and implementation, see Section III, FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. __, at 193-283. It should be noted, however, that there are no practice standards ensuring uniformity of program design and implementation. See Lisa Merkel-Holguin, Diversions and Departures in the Implementation of Family Group Conferencing in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. __, at 225.


222 Kay Pranis, Conferencing and the Community in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 42-43 (Gale Burford & Joe Hudson eds., 2000); Rupert Ross, Searching for the Roots of Conferencing in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 12 (Gale Burford & Joe Hudson eds., 2000) (“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. For example, in the context of domestic violence, [insert debate on RJ and DV]. Some advocates of family group conferencing recommend that it not be used for cases involving domestic violence and sexual abuse. See Chandler & Giovannucci, supra n. at 222. Other advocates, however, note that with the proper protections for the victim, family group conferencing can work effectively for domestic violence. See, e.g., Joan Pennell & Gale Burford, Family Group Decision-Making and Family Violence in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. __, at 171-83.


224 See Rupert Ross, Searching for the Roots of Conferencing in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 5 (Gale Burford & Joe Hudson eds., 2000). Because the perception by the participants that the process is fair is essential for an intervention to succeed, see David Moore & John McDonald, Guiding Principles of the Conferencing Process in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 55 (Gale Burford & Joe Hudson eds., 2000), culturally relevant practices may foster a greater sense of fairness.

225 See Chandler & Giovannucci, supra n. __ at 219.
the outcome are all included in the conference. Finally, the process views the community as a resource for the family.

As compared with the current child welfare system in the United States, family group conferencing is a radical reorientation. The theoretical paradigm for family group conferencing can be summarized as reflecting a shift “from a metaphor of individual pathology to a metaphor of ecology.”

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226 As one practitioner stated, anyone the parent “defines as family. Family can be a neighbor, a brother or sister, a partner. Anybody who’s going to be involved—or be an obstacle—in planning for the children,” should attend the conference. See Wolf, supra n. __, at 137. The family group conference coordinator plays a key role in determining which family members should attend the conference. See Gale Burford & Joe Hudson, General Introduction: Family Group Conference Programming in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE xix (Gale Burford & Joe Hudson eds., 2000). Although community may be an amorphous concept, proponents of family group conferencing contend that such ambiguity does not present a problem in practice. See Kay Pranis, Conferencing and the Community in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 40 (Gale Burford & Joe Hudson eds., 2000) (“Much 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.”). Offered definitions include “a group of people with a shared interest and a sense of connection because of that shared interest,” and “shared joy and pain,” and “a group of people whose destinies are intertwined.” Kay Pranis, Conferencing and the Community in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 40-41 (Gale Burford & Joe Hudson eds., 2000). This inclusiveness overlaps with Bennett Woodhouse’s model of generism, which grants parential rights to individuals who have established their ability and desire to take responsibility for a child, rather than relying on mere biology. See supra text accompanying notes __.

227 Handler & Gionvannucci, supra n. __, at 219. Based on the inclusive definitions, community can develop around different aspects of the life of family, such as work, religion, hobbies and interests. In addition to these non-geographic communities, however, which should be recognized in planning a conference, geographic communities also play an important role in the life of a family. As one proponent points out, a geographic community is important for a family in crisis because family conflict affects those living nearby, even if they are not emotionally close with the family. Lower income families may not have the luxury of defining community apart from a geographic location, thus raising children is heavily influenced by the location of the family home. A sense of safety likely is related to a place. And the immediate needs of family in crisis may be best served by resources that are close at hand. See Kay Pranis, Conferencing and the Community in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 41 (Gale Burford & Joe Hudson eds., 2000).

228 David Moore & John McDonald, Guiding Principles of the Conferencing Process in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 50 (Gale Burford & Joe Hudson eds., 2000). This reorientation also includes a recognition that the process must include emotional and spiritual components because recognizing the emotional harm is essential to healing, and healing is essential to stopping a cycle of abuse in a family across generations. See Rupert Ross, Searching for the Roots of Conferencing in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 11 (Gale Burford & Joe Hudson eds., 2000).
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. 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.”

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 methods and are essential for its success. These key elements include sufficient preparation of the

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229 See Gale Burford & Joe Hudson, General Introduction: Family Group Conference Programming in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice xx (Gale Burford & Joe Hudson eds., 2000) (“A central premise of family group conferences is that families with children seen to be in need of care and protection do better when decisions affecting them have been arrived at by respecting the integrity of the family unit, focusing on strengthening family and community supports, and creating opportunities for parents and other adults, including extended family members, to feel responsible for their children. Family members should have an active voice in matters affecting them. This elementary notion is all too often lost sight of in child protection work, yet it is the core of good social work practice. Unless families have voice, the safety and well-being of their children will likely be jeopardized and their capacity diminished for dealing with problems of abuse and neglect.”).

230 Paul Nixon, Building Community Through Family Group Conferences: Some Implications for Policy and Practice, in 1999 Family Group Decision-making National Roundtable Conference: Summary of Proceedings (Am. Humane Ass’n 2002). In relational processes, solutions are not found in professionals – social workers, judges, lawyers – because “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.” Rupert Ross, Searching for the Roots of Conferencing in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice 13 (Gale Burford & Joe Hudson eds., 2000).
participants by the coordinator (which can total 35 hours per conference\textsuperscript{231}), private family time without professionals present, consensus on the plan, and monitoring and follow-up by the conference participants and the state.\textsuperscript{232}

Although no other country requires the use of family group conferencing, many countries have started to experiment with it.\textsuperscript{233} In the United States child welfare agencies have been experimenting with family group conferencing since the early 1990s.\textsuperscript{234} Although it use is by no means widespread, states and localities are using some version of it with increasing frequency.\textsuperscript{235} In the U.S., social workers, rather than

\textsuperscript{231}See Lisa Merkel-Holguin, \textit{Diversions and Departures in the Implementation of Family Group Conferencing in the United States in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. \_, at 226 (finding that adequate preparation for conferences is essential and that this typically involves 22-35 hours of work for the coordinator).


\textsuperscript{233}See, e.g., \textit{Peter Marsh & Gill Crow, FAMILY GROUP CONFERENCES IN CHILD WELFARE} (1998) (family group conferencing in Great Britain); Knut Sundell, \textit{Family Group Conferences in Sweden in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. \_}, at 198-205; \textit{Paul Ban, FAMILY GROUP CONFERENCES IN FOUR AUSTRALIAN STATES IN FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. \_}, at 232-41.

\textsuperscript{234}See Wolf, supra n. \_, at 134-35.

\textsuperscript{235}See Gale Burford & Joe Hudson, \textit{General Introduction: Family Group Conference Programming in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE} xxvi (Gale Burford & Joe Hudson eds., 2000); Lisa Merkel-Holguin, \textit{Diversions and Departures in the Implementation of Family Group Conferencing in the United States in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. \_}, at 224 (in 1995, five communities used family group conferencing, by 1999, over communities used it); L. Graber et al. \textit{Family group decision-making in the United States: The case of Oregon} in \textit{J. Hudson, A. Morris, G. Maxwell and B. Galaway (eds), FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE at the Manhattan Family Treatment Court, 4 J. Center for Families, Child. & Cts. 133, \_\_\_} (2003). At least one commentator has criticized the constant experimentation in the field of child welfare, including family group conferencing, attributing the current crisis in child welfare not to a lack of funding, lack of staff, lack of training, or the legal system—the “usual suspects”—but rather to a failure to examine the interventions and services provided children and families to determine which are successful. See \textit{Gelles, supra n. \_}, at 10-11, 24-25; \textit{see also Margaret F. Brinig, Promoting Children’s Interests Through a Responsible Research Agenda, 14 U. FLA. J. L. & PUB. POL’Y 137, 141-43} (2003) (arguing that legislators and courts do not determine which policies and rules are effective).
lawyers and legislators, have pushed for its adoption. One issue in the United States, however, is the confusion that arises from the various forms of family group conferencing used around the country. Although it is beyond the scope of this article to explore the strengths and weaknesses of the different models, I do note that any form of family group conferencing that does not involve the four hallmarks and key components outlined above likely will not facilitate the positive changes I identify in this article.

[FGC part of larger movement, such as peacemaker courts, cite Donna Coker, Bluehause]

B. Benefits and concerns—the early research

Studies on programs implemented around the world and in the United States demonstrate that family group conferencing has had substantial success in improving the child welfare system. First, early studies indicate that there is no increased risk of

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\(^{237}\) There are three main types of “family involvement” programs in the U.S., each falling along a continuum from complete empowerment to simple involvement. 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. [cite forthcoming] 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. [cite forthcoming] 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. [cite forthcoming] Finally, team decision-making offers families the opportunity to participate in decision-making, although without the level of involvement as the other two models. 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 (and his supervisor) is not making a decision alone. [cite forthcoming]

\(^{238}\) There are a number of outstanding issues regarding the implementation of family group conferencing. It is not my intent to address or certainly resolve these programmatic issues. Rather, I intend to highlight the potential family group conferencing holds the debate about parents’ rights and children’s rights, and to demonstrate that there is a third way in this debate.

\(^{239}\) See, e.g., Peter Marsh & Gill Crow, *Family Group Conferences in Child Welfare* 96 (1998); insert Boffa, Evaluation of family group conferencing [source from Marsh & Crow – insert cite]; Peter
abuse or neglect when the family participants in the conference, and some studies suggest that families who participate in group conferences have lower levels of subsequent abuse and neglect than the typical child welfare case.

Second, research indicates that families are able to devise a plan for the care and protection of their children. Family members, including fathers, participated in numbers far greater than in the traditional child welfare model. Caseworkers report that the plans devised by the participants often require more of the parent than the agency typically would. 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.\textsuperscript{245} Although participating family members had multiple problems, including substance abuse and histories of violence, these participants were able to create thoughtful and detailed plans to keep the children safe.\textsuperscript{246} These plans drew on familial and professional resources.\textsuperscript{247} An evaluation of a Washington State 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.”\textsuperscript{248} 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.\textsuperscript{249}

Third, participants report satisfaction with the process and result.\textsuperscript{250} \begin{quote} [insert quotes from the mom in source C]\end{quote}\textsuperscript{251}

Fourth, family group conferencing appears to provide a culturally competent practice.\textsuperscript{252}


\textsuperscript{246} See William Vesneski & Susan Kemp, \textit{The Washington State Family Group Conference Project} in \textit{FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. \textordmasculine}, at 315, 318.

\textsuperscript{247} See id.

\textsuperscript{248} See id. at 315-19.

\textsuperscript{249} See id. at 320-21.


\textsuperscript{251} [source C]
Finally, when the plan does recommend placement outside of the immediate family, children are more often placed with extended family members.\(^{253}\) For example, in a Washington State project, seventy-seven percent of children who were placed outside of the home as a result of the family group conference were placed with relatives, whereas only twenty-seven percent of children not in family group conferencing but in need of out-of-home placement were placed with relatives.\(^ {254}\) In New Zealand, ninety-five percent of all children who are removed from their homes are placed with a relative.\(^ {255}\)

Despite these successes, there are important criticisms of the theory and appropriateness of family group conferencing. First, one concern is whether a dysfunctional family can make its own decisions. Advocates of family group conferencing contend that functioning conference participants, found in the extended


\[\text{\textsuperscript{253}}\text{See Gale Burford & Joe Hudson, General Introduction: Family Group Conference Programming in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE xxi (Gale Burford & Joe Hudson eds., 2000).}\]

\[\text{\textsuperscript{254}}\text{See William Vesneski & Susan Kemp, The Washington State Family Group Conference Project in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE, supra n. , at 319-20.}\]

\[\text{\textsuperscript{255}}\text{See [e-forum reports]}\]
family or community, mitigate this concern. If the community is dysfunctional as well, the networks can be extended to a broader community where there are resources.

Second, numerous scholars have identified process concerns for women in alternative dispute resolution settings. [develop more here, citing DV discussion] Protections offered by legal representation are absent in family group conferencing. But there are advocates for children within the conference. “Support persons” are identified by the coordinator for both adult and child victims and these persons are supposed to protect the victims who are emotionally and physically vulnerable. Additionally, in some programs, lawyers, guardians ad litem, and court appointed special advocates participate in the conference.

Third, there is a debate about the types of cases appropriate for family group conferencing. Although New Zealand has determined that all cases of child abuse and neglect are appropriate for family group conferencing, some countries have chosen not to

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258 [Tonya Grillo; Fineman, The Illusion of Equality, chapter nine].
259 Bartholet is concerned about giving up legal representation for the child. *See Bartholet, Nobody’s Children,* supra n. __ , at 143-46.
use it in instances of domestic violence or child sexual abuse.\textsuperscript{262} There may be some role for family group conferencing in cases of child sexual abuse,\textsuperscript{263} although it is important to note that child sexual abuse cases differ radically from the typical abuse or neglect case.\textsuperscript{264}

Finally, family group conferencing is not necessarily a cost-savings mechanism, although to the extent it prevents the placement of children in the foster care system, it could well save a state significant funds.\textsuperscript{265} [expand]

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In sum, family group conferencing holds great potential for the child welfare system. Although no panacea for the very difficult issues facing the system, the relevant question is whether family group conferencing is a marked improvement over the current legal framework,\textsuperscript{266} which clearly is not protecting parents or children. I address this issue in the next Part.

\textsuperscript{262} See Lisa Merkel-Holguin, Diversions and Departures in the Implementation of Family Group Conferencing in the United States in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice, supra n. ___, at 226.
\textsuperscript{263} There is some evidence that the principles of restorative justice—especially the principle of the offender apologizing to the victim and the victim having the opportunity to tell the offender about her experience of the offense—can play an important role in healing sexual abuse. See Terry S. Trepper, The Apology Session, in Treating Incest: A Multimodal Systems Perspective 93-101 (Terry S. Trepper & Mary Jo Barrett eds.1986) (describing the critical importance of an “apology session” when treating a family for incest, and its role as a turning point for meaningful change in the family, changes that will create a new family dynamic that will not foster sexual abuse). [also add Canada Report – participatory justice – talking about Hollow – large, loose-leaf printout]
\textsuperscript{264} See supra n. ___ (discussing distinct characteristics of sexual abuse).
\textsuperscript{265} [insert cite re: cost per year of child in fc, and esp year in residential care]
\textsuperscript{266} See Gale Burford & Joe Hudson, General Introduction: Family Group Conference Programming in Family Group Conferencing: New Directions in Community-Centered Child and Family Practice xxi (Gale Burford & Joe Hudson eds., 2000) (“While there is ample evidence available on
IV. REFORMULATING RIGHTS

The scholarly debate over the child welfare system takes the rights-based framework as a starting point. As shown in Part II, there are considerable practical and theoretical limitations to a rights-based approach to child welfare. The challenge is to achieve both a better child welfare system—one that assists parents and protects children—and develop a theory of rights that promotes these goals. Family group conferencing holds the potential to reorient the legal framework of the child welfare system and thus the debate about parents’ rights and children’s rights, by creating a new model of familial rights. This new model protects the substantive interests of both parent and child by relinquishing rights (both the rhetoric of rights as well as certain procedural rights, such as representation by counsel) and focusing, in the vast majority of cases, on how to help parents overcome the underlying issues that led to the abuse and neglect. This focus permits children to remain in, or return expeditiously to, their homes. In this way family group conferencing offers a path forward in the debate between parents’ rights and children’s rights. This Part explores the new model of familial rights that emerges from family group conferencing and then briefly discusses how family group conferencing could be implemented in the United States.

conferencing practices in various countries, as with any practice innovation, there is a danger of setting grandiose expectations that will inevitably fall short of what can feasibly be delivered. Several points need to be considered about what can reasonably be expected from family group conferences. . . . A critical point concerns the appropriate comparison to be used in assessing conferencing practice. Most reasonably this would be the actual performance of the current child protection system and the extent to which families are satisfied with the services provided, feel they have been treated fairly and respectfully, and have had adequate opportunities to express their views, participate in decision-making, and have their children safely provided for.”).
A. A new model of familial rights

Family group conferencing opens the door to a new model of rights in the child welfare system. This new model does not abandon the interests underlying parents’ rights and children’s rights—the interest in raising a child and being free from abuse and neglect. These 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—the rhetoric of rights would recede, and the specific procedures designed to protect the substantive interests would be relinquished in favor of a more fluid process. This fluid process would replace the current win/lose system in which the legal system asked whose rights should trump: parent or child? In family group conferencing, the first question is how to meet the needs of and safeguard the child as well as support the parents. In this way, family group conferencing does not assume a conflict between parent and child. Rather, the task is to widen the lens and see who has a role in creating the problem and who can help resolve it. This new model of rights addresses the limitations of rights described in Part II. I will address each in turn.

1. Protecting parents and children

My main concern with rights is that they do not lead to good results for parents or children. Family group conferencing protects both parents and children. First, family group conferencing is a means for distinguishing the various types of cases in the child
welfare system.\textsuperscript{267} When there is evidence of severe abuse and neglect, the current legal framework and policy approach should apply: the child should be removed immediately from the home and the issue resolved in court, with lawyers for both the parent and child.\textsuperscript{268} For these cases, the current rights-based, adversarial system is necessary because the state will be arguing for termination of parental rights and thus there is a conflict between the parent and the state (representing the interests of the child). In these cases, an articulation of children’s rights may serve these children well if it leads to more aggressive intervention and protection.

Filtering the cases has two main benefits. First, segregating the egregious cases for aggressive state intervention would lead to a better allocation of the limited resources in the child welfare system. Child protective services could focus its investigative resources on these egregious cases, rather than on all cases in the system. And the court system could allocate its limited resources to these few cases where there truly is a conflict between parent and child. If a family court had to reach decisions in only ten 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.


\textsuperscript{268} In New Zealand, family group conferencing is used for all cases, including severe abuse and neglect [check Hardin book on this] and advocates for the process argue that it works well even in such hard cases. \textit{See} Pennell & Burford (Nova Scotia study). This suitability issue deserves further study.
Second, after segregating the egregious cases, a different approach can be adopted for the remaining cases. When there is not evidence of severe abuse or neglect, then the case should be referred to a family group conference. For these cases, there likely is no need to resort to rights talk. Referral to a family group conference will help determine whether this is the type of case that would benefit from assistance to the parents to address the underlying issues. For these cases, the starting point is the assumption that the interests of the state, parent, and child are aligned: all would benefit from helping the parents overcome the issues facing them and be better able to parent.

For the family group conferencing cases, because of the alignment between state, parent, and child, there is no need to articulate rights in the conventional sense: there is no need for freedom from the state, rather the parent will seek and receive assistance from the state. This is more protective in practice 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 have been removed from the home. For poverty-related neglect cases, an articulation of rights is unnecessary and arguably unproductive. Both parents and children need to move beyond poverty. And poverty is best addressed by offering concrete services to the family, such as subsidized housing and child care,\textsuperscript{269} not

\textsuperscript{269} See ROBERTS, SHATTERED BONDS, supra n.__, 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); LINDSEY, THE WELFARE OF CHILDREN, supra n. ____ at 313, 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).
the “service” of foster care. This winnowing would permit the child welfare system to focus its limited rehabilitative resources on poverty-related neglect cases.

A child’s right to a safe home will be protected by family group conferencing because a main goal of family group conferencing is ensuring the safety of the child. Moreover, because family group conferencing typically occurs before removal, the risk of damaging the bond between parent and child by a preemptive removal is minimized. Children are not placed in another home until the 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.\textsuperscript{270} However, if the 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 exist. Continued contact between the parent and child during treatment will maintain the bond, but the child’s needs will still be met in the alternative home.

This filtering and reorientation would positively affect the scholarly debate. Part of the problem with 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 children’s rights. For example, in her call for prompt removal of children

\textsuperscript{270} Dennis M. Donovan, Relapse Prevention in Substance Abuse Treatment, in DRUG ABUSE TREATMENT THROUGH COLLABORATION: PRACTICE AND RESEARCH PARTNERSHIPS THAT WORK 121 (James L. Sorensen et al., eds, American Psychological Association 2003) (“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 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. at 122 (noting that relapse is natural and normal part of recovery).
and termination of parental rights, Elizabeth Bartholet does not distinguish among the types of cases in the child welfare system and instead uses extreme cases as illustrations of the need for greater protection of children. But surely advocates of children’s rights 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 parents’ rights may be more likely to concede the primacy of children’s interests. 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 on behalf of the approximately fifty percent of cases due to poverty-related neglect. By changing the filter device on the child welfare system, the two sides may seem closer together. Perhaps the dispute is about the appropriate

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271 See Elizabeth Bartholet, Nobody's Children, supra n. __, at 115-16 (citing well-known case of Elisa Izquierdo in New York City who was born drug-exposed, removed from her mother’s care at birth and placed with her father until age five, when he died; then reunified with mother who had had two other children removed due to neglect but who were back in home; a year after placement, Elisa died from repeated abuse and torture at the hands of her mother); see also id. at 67 (“available evidence indicates that the great preponderance of today’s neglect cases pose extremely serious threats to children’s welfare. Many cases involve a combination of abuse and neglect, or circumstances that could fall into either category. [Child welfare] workers often opt to use the neglect category because the requisite proof is easier to make out. But even in cases of pure ‘neglect,’ the type of neglect today’s [child welfare] workers take seriously is likely to be extreme and chronic, and as a result to cause harm.”).

272 Indeed, Dorothy Roberts makes this point. See Roberts, Shattered Bonds, supra n. __, at 255 (“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.”).

273 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 and Robert Scott. 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.” As noted above, the Scotts 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. Another example is the potential family group conferencing holds to incorporate the “irrationality” of parents’ actions by focusing on real human relations, rather than legal abstractions. In her argument against the use of law and economics in family law, As Barbara Bennett Woodhouse has stated that “market analogies feed
approach to the approximately forty percent of cases that involve less serious abuse and neglect, but not simple poverty-related neglect.

I myself am ambivalent about these “in-between” cases. My proposal focuses on the cases of severe abuse and neglect and poverty-related neglect. For the in-between cases, I am uncertain of the appropriate balance between parents’ rights and children’s rights. I do believe, however, that where there is no risk of imminent harm to the child, referral to a family group conference would be a good means for exploring the appropriate course of action. In other words, although there may be less of alignment of interests of parent and child, these cases would still benefit from a process that explored various solutions, including removal of the child, rather than resorting to court.

As a final note to the protective aspects of family group conferencing, I note that the process holds the potential to answer the three additional practical concerns I outlined in Part II: context, the extended family, and the community.

Family group conferencing accounts for the reality of multifaceted human problems that may not lend themselves to court-devised solutions. Rather than a one-

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the image of parental property rights in children” and, more generally, “[t]he rhetoric of rational self-interest, of infinite unfettered choice, subtly contributes to a devaluation of that other-centered, irrational attachment that we know as parenthood in action.” Family group conferencing permits parties to delve, in a supportive setting, into the reality of the conduct, which then leads to healing. This stands in stark contrast to the rights-based, but also blame-based, model of the current system.

273 See 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 less able to solve “complex human problems” through an adversarial process); Gregory Firestone & Janet Weinstein, In the Best Interests of Children: A Proposal to Transform the Adversarial System, 42 FAM. CT. REV. 203, 203 (2004) (“adversarial, rights-based model often 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”).
size-fits-all approach, family group conferencing is context specific, devising different solutions for different families. In family group conferencing the state is not an expert, rather the players themselves are, and the state defers to that expertise. Professionals do not provide a solution, rather, the individuals involved in the problem provide the solution. One advocate of family group conferencing describes the theory for deference to the group as follows:

[t]he 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.275

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

Part of incorporating context into a solution is taking account of cultural differences.276 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. If family members and community representatives assess a family’s well-being, that assessment likely would

276 See Marian S. Harris & Ada Skyles, Working with African American Children and Families in the Child Welfare System in Race, Culture, Psychology & Law 98-99 (Holt & George ed., 2005) (calling for greater cultural competence among child welfare professionals to enable such professionals to work with African American families in the child welfare system and, perhaps, reduce any racial bias that may lead to greater child welfare involvement for African American families).
come less laden with the racial, class, and cultural biases of the predominantly white and middle class child welfare system.\textsuperscript{277}

Family group conferencing is also a mechanism for involving the extended family. The current legal framework also 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 the parental rights, and important to limit that right to a defined set of people. Family group conferencing allows multiple adults to participate in decision-making relevant to the child’s life, accounting for what is in fact a broader range of individuals with a stake in the child.\textsuperscript{278} 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.

Finally, 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.

\textsuperscript{277} In the Indian Child Welfare Act, 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,” Indian Child Welfare Act of 1978, Pub. L. 95-608, Title I, §102, 92 Stat 3071 (codified at 25 USC §1912(e)), 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.” Pub. L. 95-608, Title I, §102, 92 Stat 3071 (codified at 25 USC § 1912 (f)). These standards are much higher than those used for non-Indian child welfare cases. See supra n.\textsuperscript{278}.

In sum, to best protect the interests of parents and children, the legal framework governing the child welfare system should be bifurcated. The rights-based model should be used for cases of severe abuse and neglect. Family group conferencing should be used for all other cases. This segregation would permit the allocation of limited court resources to the severe cases and preserve the important procedural protections for both parent and child that are needed when the state seeks to sever the parent-child relationship. For the remaining cases, family group conferencing would facilitate the alignment of the interests of parent and child.

2. Fostering better relationships

Family group conferencing is a mechanism 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 right to assistance from the state. This 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 state involvement does not create an adversarial relationship between the state and parent because the state is helping a parent resolve the underlying issues leading to the abuse or neglect, rather than trying to establish parental unfitness.

This model also fosters better relationships between parent and child because it is a legal framework that draws on widely-respected “family systems” theory, which posits
that the most effective intervention of a child occurs when the whole family is treated.\textsuperscript{279} Family group conferencing does not isolate the child from the parent and ask 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.\textsuperscript{280} 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. Family group conferencing fits the 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 recognizes the complexity of family problems, the importance of original families, and the need for assistance to address underlying social and economic issues, while simultaneously ensuring the safety of the children.

Importantly, family group conferencing better acknowledges the role of poverty, thus creating a more accurate frame for the issues facing families in the child welfare system. Through an alternative process, family group conferencing holds the potential to 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, 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

\textsuperscript{279} See supra at TAN ______ (discussing family systems theory).
community to provide those supports. Although the risk factors for abuse and neglect are complex, they are not unknown, and can be addressed. To be sure, poverty is a deeply entrenched problem in our society, but the group conference would at least be focused on the real issue, poverty, not the manifestation of that poverty in a parent’s conduct.

By changing the frame for the child welfare case, family group conferencing also could help reorient society’s views of abuse and neglect away from the residual model, where abuse and neglect are products of parental pathology, and toward a model of social responsibility, where a larger group claims responsibility for the context that led to the abuse or neglect. Family group conferencing is not a radical reordering of our social system to redistribute wealth, but rather one step toward greater social responsibility for the creation of 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, effective treatment for substance abuse problems, are not provided or available, family group conferencing will not help families. 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 not be available. For example, if the group conference is convened because of inadequate housing for a family, the conference likely would recommend a housing subsidy to enable the family to move into adequate housing. This recommendation would reflect a proper focus on the real issue: poverty. But if such a subsidy were unavailable, and the child was then removed, then the family group conference would have achieved nothing.

281 See Guggenheim, supra n. ___, at 1736-37 (discussing origins of child protection as part of 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).
There are two answers to this criticism. First, the group conference would at least identify the real problem, such that the case worker would not remove the child for inadequate housing and refer the parent for parenting classes. Instead, all would agree that this family needs help with housing. This focus would be a sea change from the current system, which typically does not address the underlying causes of abuse or neglect.

Second, 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. Admittedly, 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 supports, such as subsidized housing and child care, then society may view the provision of such supports more openly.282

282 Although typically not a winning argument, it could also be added that the costs of the child welfare system far outweigh the costs of providing economic supports to families. 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). 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.
B. Implementing family group conferencing

While some pilot programs are underway in the United States, I advocate a more comprehensive, yet still conservative, approach to the adoption of family group conferencing: I propose that one state legislate family group conferencing on a state-wide basis for all cases where there is no evidence of severe abuse and neglect.\footnote{Of course Congress could require states to implement family group conferencing as a condition of receiving federal funds. In light of the uncertainties still surrounding family group conferencing, my preference is for one state to adopt this new process, rather than move the entire country in this direction. [TL on whether AZ, MN & HI already doing this on a state-wide basis]} One state’s experience will demonstrate to other states the benefits of family group conferencing and illuminate the issues that should be addressed by other states interested in adopting the process. This section briefly explores a few issues key to the successful implementation of family group conferencing.

Rather than implementing family group conferencing as a new policy, a state should enact legislation requiring the use of family group conferencing. This legislation could be modeled after the New Zealand Children, Young Persons, and Their Families Act of 1989.\footnote{See Children, Young Persons and Their Families Act, 1989, § 428 (N.Z.).} There are several key aspects to that legislation. First, the legislation must identify its goals, noting that the state is shifting decision-making responsibility from child welfare agencies to families. The goals should also make clear that the state intends to assist families with concrete services, such as subsidized housing, job training, child care, and drug treatment. Second, the legislation must clarify that cases with evidence of severe abuse and neglect should proceed directly to the courts.\footnote{Interestingly, New Zealand does not segregate such cases. I am not recommending this approach. Additionally, in another article I intend to address the applicability of family group conferencing to cases} Third, the legislation
must make clear that the role of the coordinator is essential to the success of family group conferencing. The legislation should mandate specialized training for the coordinator and ensure sufficient funds are set aside for coordinators such that the coordinators can spend adequate time preparing the participants for the conference. Finally, the legislation must ensure that the more complete form of family group conferencing is adopted, whereby professionals are not allowed in the room during private family time and the family is truly the decision-maker. Family involvement in decision making is important, but only the power-shifting process of family group conferencing holds the potential to change the stalemate between parents’ rights and children’s rights.286

Without adequate safeguards, there is a danger that family group conferencing will simply be another iteration of the pretense that is the current comprehensive planning process required by federal law.287 As Emily Buss describes that process,

while the intention of this process is to involve agency and family in a collaborative process to establish goals and intermediate objectives and to allocate responsibilities among the parties, this process, in practice, is little more than a charade. Families are informed of a pre-set meeting time, without being consulted about which dates and times are convenient to them. Once notified that the meeting will occur (perhaps only a day or two before the scheduled meeting date), parents are penalized if they fail to show up. Far from being developed as the product of a group process, these case plans are generally drafted ahead of the meeting by child welfare workers for the parents’ and children’s consent. Where parents, children or their attorneys raise concerns or suggest changes to the plan, whether or not this discussion is reflected in the final version of the plan depends on the will of and competence of the agency representative, who holds the

286 See supra n. _____ for other forms of family-involvement programs in the United States.
exclusive editor’s pen. At the end of the meeting, a signature page is passed around (often detached from the substance of the agency’s document) which parents are urged to sign. Under heavy pressure to show their cooperative commitment to retaining or regaining custody of their children, parents rarely refuse.  

Although family group conferencing holds the potential to reorient the child welfare system, if it is purely a means for delivering the same product—removal of a child without addressing underlying issues—it will do nothing to help families.

In the move to implement family group conferencing, a state can expect resistance. Legal scholars, advocates, jurists, and legislators, will need to embrace fewer rights in exchange for greater protections. Many will protest that a move away from a rights-based orientation will not sufficiently protect parents and children. More specifically, the first criticism is likely to be that a parent should not relinquish her constitutionally protected right to the care and custody of her child. For example, a parent could argue her constitutionally protected parental rights were violated when the outcome she preferred was overridden by participants in the group conference and her children were removed.

In the typical child welfare proceeding parents often object to the removal of their children and those preferences may not be followed. The parent could console herself that she fought for her rights, but that the state’s parens patriae interest in protecting the child took precedence over her parental rights. The one consolation to the parent would be that her rights were at least considered. This consolation would be lost in family group conferencing.


289 As a practical matter, the more likely scenario is that the parent would not agree to the plan and thus the group conference would “fail,” and would be referred to family court.
One counter to this argument would be that the “protection” of parents’ rights is, in practice, nominal, especially for low-income, African American parents. Although such parents do possess rights, they are easily overridden by the state in child welfare proceedings. In a family group conference, a parent will have greater influence than in a hurried court proceeding represented by an overworked, often poorly trained lawyer. Parents will also trade the all-or-nothing current approach for less complete, but more weighty influence. In the current system, parents either retain custody of their children, along with the full rights accorded parents, or the children are placed in foster care, with a concomitant loss of parental decision-making authority. In family group conferencing, parents do lose some decision-making authority because although they may participate in the group conference, they are not the sole decision-makers. In practice, this compromise will afford parents greater influence than under the current system, a system that supposedly protects parents’ rights.

The second counter is that the procedural protection of court review will still be available if the group conference does not succeed. In this way, parents’ rights are backup protection. It could be argued that this undermines the effectiveness of family group conference because the availability of court review would color a parent’s willingness to engage fully in the process and lead to parental holdouts. In practice, however, ninety-five percent of cases are resolved in the family group conference and do

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290 The New Zealand statute provides this protection. Cite.
not entail court involvement. 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.

The second major criticism is likely to be that children will not be sufficiently protected in the group conference. In the current system, a guardian ad litem has responsibility for determining and advocating for the best interests of the child. 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 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.” 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 counts, family group conferencing achieves the former result. Moreover, the research indicates that children are protected by the process. 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.

\[\text{See Lisa Merkel-Holguin et al., Learning with Families: A synopsis of FGDM Research and Evaluation in Family Decision Making, 18 PROTECTING CHILDREN 2-11.}\]

\[\text{[insert statutory std from several jurisdictions]}\]

\[\text{BARTHOLET, NOBODY’S CHILDREN, supra n. ___, at 146 (emphasis in original).}\]

\[\text{See supra at TAN ____. Additionally, the adversarial process will remain in place for the minority of cases where the interests of a child and parent truly are divergent. In cases of severe abuse and neglect, family group conferencing will not be an option because the coordinator will have screened them out and the case will proceed directly to family court.}\]
Indeed, individuals who are involved in the day-to-day life of a child, and are empowered by the group conference, are far better positioned to protect a child than an overburdened caseworker who visits the home infrequently.295

CONCLUSION

Mary Ann Glendon argues that refining the rhetoric of rights to include obligations and compromise would lead to a more complete and meaningful protection of the rights we value.296 Similarly, I contend that shedding the language of parents’ rights and children’s rights will lead to greater actual protection of parent and child. We need not sacrifice the interests underlying these rights—the care and custody of a child and growing up in a safe environment—but if we embrace an alternative process for ensuring these interests, a process that does not rely on rights, but rather focuses on needs and responsibilities, there is a greater chance we will find protection for parent and child.
