

Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children

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INTRODUCTION

You might think that the child welfare system *would* be child friendly. After all, its name proclaims its focus on child well-being, and those in the system regularly talk as if the child's best interest is their guiding principle. Fifty states have laws making state child protective services agencies responsible for protecting children against maltreatment by their parents.

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But the child welfare system actually focuses not on child welfare but rather on adult rights and interests—parental autonomy rights to raise children without intervention by the state and related racial and other group rights to control the fate of the group's children. Federal and state constitutions help shape this regime by giving parents constitutional rights to parental autonomy, while denying children any comparable constitutional rights to be raised by nurturing parents, free from maltreatment. This constitutional scheme, in turn, shapes interpretation of child protection laws in ways that limit the state's ability to intervene to protect children.

Child welfare policy-makers work within the considerable discretion law leaves them, shaping policy in ways even more inconsistent with actual child welfare. Over recent decades, they have regularly promoted family preservation policies as the primary response to child maltreatment.

By family preservation policies, I refer to the broad range of policies that emphasize parents' right to keep their children, limit state intervention to extreme demonstrations of parental unfitness, require state efforts to rehabilitate parents before children can be removed, or parental rights terminated even in cases where such rehabilitation efforts seem hopeless, and limit consideration of children's best interests including their need for nurturing parenting from early infancy on. The term "family preservation" is sometimes used narrowly to refer to the Intensive Family Preservation Services (IFPS) programs I discuss in Part II, but I see those IFPS programs as but one example of family preservation policies that characterize the entire child welfare system, placing a very high emphasis on keeping children with their parents.

Child welfare policy-makers have also regularly sponsored research designed to vindicate family preservation policies, without adequate regard for whether children might be better served by policies which more readily removed them from maltreating parents and placed them with nurturing adoptive families. While the child welfare field seems to place a high value on research and "evidence-based practice," research has often been designed

and manipulated to serve a predefined ideological agenda. There is, of course, much excellent research in the field, and I have relied extensively on such research throughout my career as an academic in this area, including in this Article. Nonetheless, I believe that there has been an unfortunate tendency for much of the research in the field simply to promote family preservation, rather than illuminate the degree to which family preservation may or may not serve child interests.

While policy-makers regularly claim that family preservation policies are designed to serve children's interests, there is good reason to think that, actually, children would generally be better served by policies encouraging child protection workers to intervene earlier and more often to remove victimized children from maltreating parents, to terminate parental rights, and to place children in adoption.¹ Despite the fact that child welfare research has generally been biased in the direction of vindicating family preservation, a wide range of persuasive studies indicate that reducing the emphasis on family preservation would improve children's prospects for health and happiness. For example, we know from early brain development research that nurturing parenting in the early months and years is vital to normal development.² We know that children victimized by maltreatment are at a very high risk for repeat maltreatment if kept at home—roughly one-third to one-half or even more will be revictimized.³ We know that children removed to foster care

1. I have explored all these issues in some depth in ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999); see also Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

2. See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 179 & n.73 (2007) (citing Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 DEV. & PSYCHOPATHOLOGY 885, 886-88 (2003)).

3. BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 96-97, 109-10, 120; see also Diane DePanfilis & Susan J. Zuravin, *Rates, Patterns, and Frequency of Child Maltreatment Recurrences Among Families Known to CPS*, 3 CHILD MALTREATMENT 27 (1998), available at <http://cmx.sagepub.com/content/3/1/27>

are at very low risk for maltreatment—much lower than the risk for those identified as victimized who are kept at home or those returned home from foster care, though higher than the risk for those adopted.⁴ We know that children placed in adoption will likely receive superior parenting—the adoptive parent maltreatment rate is lower than the norm for the general population.⁵ We know that most adopted children do very well, with those who have suffered significant damage pre-adoption helped to repair the damage.⁶ And we know that children placed earliest in adoption will have the best chance for healthy development.⁷

Child welfare research is generally designed to serve the dominant parental autonomy ideology in the early intervention area—the focus of this Article—just as it has been more generally. Thus, such research generally measures success in terms of the degree to which programs succeed in achieving family preservation, avoiding questions as to whether children victimized very early in life do better if kept at home, as compared to being removed before too much damage is done and placed in adoption at an early age.⁸

This Article grows out of my work over the past three decades and focuses in particular on two recent conferences sponsored by the Harvard Law School Child Advocacy Program that I direct.⁹ The first was on a topic known as

(reviewing forty-five maltreatment recurrence studies and concluding that the rates for mid to high risk cases are high, ranging up to over 50%).

4. Richard P. Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in CHILD WELFARE RESEARCH REVIEW 323, 334 (Richard Barth et al., eds., 1994) (national studies indicate that foster parents are alleged abusers in 0.5% of all child abuse reports).

5. *Id.* at 330, 333-34 (“[R]eabuse is most likely when the children are returned home and least likely when they are adopted.”).

6. BARTHOLET, NOBODY’S CHILDREN, *supra* note 1, at 178-79.

7. *Id.* at 179. For early brain development research see, for example, Bartholet, *International Adoption*, *supra* note 2.

8. See discussion *infra* Part III.

9. See *Child Advocacy Program*, HARV. L. SCH., <http://www.law.harvard.edu/programs/about/cap/> (last visited Aug. 28, 2012).

“Racial Disproportionality.”¹⁰ A powerful coalition of foundations and nonprofits called the Casey Alliance had taken the position that racial discrimination by mandated reporters and Child Protective System (CPS) workers was responsible for the large number of black children in foster care.¹¹ They called for a reduction in the number of black children removed to foster care, so that their percentage of the foster care population would match their percentage of the general population.¹² We cosponsored a conference at Harvard Law School with Chapin Hall at the University of Chicago in January, 2011, designed to present the best recent social science assessing whether black child removal rates actually did reflect discrimination as opposed to high rates of parental maltreatment. The research presented demonstrated that black children were, in fact, maltreated at much higher rates than white children, as would be expected given socioeconomic differences between black and white families and other established predictors for maltreatment. The research showed that official reporting and removal rates closely tracked actual maltreatment rates, indicating that while there might be pockets of discrimination within the system operating in different racial directions, there was no overall pattern of discrimination. The conference also revealed that those promoting the Racial Disproportionality Theory had been using a seriously misleading research report to persuade others of the truth of their discrimination claim.

Those of us responsible for organizing the Racial Disproportionality Conference coauthored a paper summarizing its significance, which concluded that future reform work should focus on doing more to protect both black and white children against maltreatment:

10. See *Race and Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options*, HARV. L. SCH. (Jan. 28-29, 2011), <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-index.html> (last visited Aug. 28, 2012) (detailing conference proceedings, including presentation videos, power points, and related papers).

11. See Bartholet, *The Racial Disproportionality Movement*, *supra* note 1, at 873, 880-89 (2009).

12. See *id.* at 873, 882-90.

We hope that this conference will mark an important turning point. Given the considerable evidence of a black/white maltreatment gap, the field needs to focus more attention on the problems facing black families and their children, and the related risks to black children victimized by maltreatment and in need of protection and services. It needs to pay more attention to the high rates of maltreatment among children of all races and ethnicities growing up in poverty. It needs to pay more attention to the harmful developmental impact of maltreatment, and the importance of developing more and better programs designed to prevent maltreatment and provide protective services.¹³

This conclusion was consistent with views I had set forth in an earlier article entitled *The Racial Disproportionality Movement: False Facts and Dangerous Directions*. There, I argued that the movement's call for a reduction in the number of black children removed to foster care posed a danger, given the evidence that these children were being removed not because of discrimination but because of serious maltreatment. I argued that "those who care about black children [should] do something more to protect them against abuse and neglect."¹⁴

A recent report on a research workshop sponsored by the Institute of Medicine and the National Research Council (hereinafter the *IOM/NRC Research Workshop Summary*) helps demonstrate just how high maltreatment rates are, particularly for black children.¹⁵ "[A]bout 1 in 7 children between the ages of 2 and 17 [are] victims of child maltreatment during a 1-year time frame."¹⁶ Rates of black

13. Elizabeth Bartholet et al., *Race and Child Welfare*, CHAPIN HALL ISSUE BRIEF 4 (June 2011), available at www.chapinhall.org/sites/default/files/publications/06_27_11_Issue%20Brief_F.pdf. This piece was coauthored by Fred Wulczyn, Richard P. Barth, and Cindy Lederman.

14. Bartholet, *The Racial Disproportionality Movement*, *supra* note 1, at 932.

15. STEVE OLSON & CLARE STROUD, INST. OF MED. & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., CHILD MALTREATMENT RESEARCH, POLICY, AND PRACTICE FOR THE NEXT DECADE 39 (2012) [hereinafter *IOM/NRC Research Workshop Summary*], available at http://www.nap.edu/catalog.php?record_id=13368. This workshop report represents a preliminary step in the process of revising the IOM's 1993 report on maltreatment research; the new report is to be issued in 2013.

16. *Id.*

child maltreatment are much higher: 49% of black children in a Cleveland study were reported as victims of maltreatment by their tenth birthday, and one-third of black children in a California study were reported by their fifth birthday.¹⁷

In May 2012, our Child Advocacy Program sponsored a “Prevention & Protection Brainstorming Workshop” as the logical follow-up to the Racial Disproportionality Conference. We invited leaders in the child welfare field to present and discuss promising reform proposals and programs designed either to prevent maltreatment from occurring in the first place or to provide earlier and more effective protection to children already victimized by maltreatment.¹⁸

This workshop took as a given that actual maltreatment rates were indeed too high for all children and particularly for black children. Our goal was to explore how we might reduce maltreatment for all children, black and white. Our belief was that success in reducing maltreatment would serve the interests of black children far better than simply reducing black removal rates.

Our assumption was that programs that succeeded in preventing maltreatment from ever occurring would, in any event, likely reduce the rate at which black children were removed. However, programs which intervened more aggressively to protect children already victimized might well result in higher removal rates, and to the degree black children were at higher risk they would then be removed at higher rates. Accordingly, it is hard to predict how early prevention and protection efforts would net out in terms of the impact on black removal and foster care rates. Our belief was that the focus should, in any event, be on doing better at protecting all children from maltreatment,

17. *Id.*

18. See *Prevention & Protection Brainstorming Workshop Website*, HARV. L. SCH., <http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/ppworkshopparticipantinformation.html> (last visited Aug. 28, 2012) (containing workshop agenda, list of participants, and papers submitted in connection with the workshop which will be referred to below).

whether that reduced or increased the rate of black versus white child removal.

This workshop helped illustrate that we could indeed do better by children if we chose to. We could provide new parents the kinds of support they need to maximize the chances they will succeed at parenting. We could make coercive CPS systems work better to protect children who have been maltreated.

But the workshop also revealed the ongoing power of the parental autonomy ideology, and the constraints it puts on promising reforms in this area. For example, the intensive health visitation systems that have shown promise in preventing maltreatment fail to reach many of the families most at risk for maltreatment. This is because these systems depend on parents volunteering to participate. Health visitation proponents have resisted any suggestion that systems be made mandatory. They argue that mandatory programs would not work as well, but it seems likely that a significant part of the resistance has to do with respect for parent autonomy rights. Family drug court programs have the potential to protect some of the children most at risk for maltreatment by requiring that parents cooperate with drug treatment regimens or risk losing their children. But most drug court programs pride themselves on keeping children with their original parents if at all possible, rather than on giving children nurturing parental care as early in life as possible, whether with their original or adoptive parents.¹⁹

The workshop also revealed how the research that is supposed to assess the pros and cons of policy initiatives in the early intervention area is itself limited by the parental autonomy ideology. Several workshop participants described research equating program success with success in keeping more children at home. There was no discussion of research assessing whether such family preservation counted as success from the child's perspective—how children kept at home fare in terms of maltreatment and various well-being measures as compared to children

19. See discussion *infra* pp. 1341-65.

removed to foster care and moved on relatively promptly to adoption.²⁰

Henry Kempe is famous for his 1962 article *The Battered Child Syndrome*,²¹ which helped create nation-wide reporting systems bringing maltreated children to the attention of CPS authorities. He wrote another article that has received much less attention, but could be similarly transformative, if policy-makers were receptive. Titled *Approaches to Preventing Child Abuse*, it was published in 1976. It calls for a *truly universal* health visitor system guaranteeing each child's *right* to grow up healthy and free from abuse, regardless of whether parents agree to be visited or not, and it calls for a child's right to "divorce" from parents incapable of parenting:

[W]e must now insist that each child is entitled to effective comprehensive health care, and that when parents are not motivated to seek it, society, on behalf of the child, must compel it. It seems incomprehensible that we have compulsory education, with truancy laws to enforce attendance and, I might add, imprisonment of parents who deny their child an education, and yet we do not establish similar safeguards for the child's very survival between birth and age 6

We must [work with problem families] first by persuasion and education and trying to be as helpful as we can, but if that fails, we must initiate active intervention through child protection services

When marriages fail, we have an institution called divorce, but between parent and child, divorce is not yet socially sanctioned. I suggest that voluntary relinquishment should be put forth as a desirable social act—to be encouraged for many of these families. When that fails, legal termination of parental rights should be attempted. However, such termination is a difficult thing to achieve in our country. . . . In my state of Colorado, for example, parents must be proved to be untreatable, and remain so, before the state will uphold terminations by our juvenile court judges, a process that could take five to ten years. But each child is on a

20. *Id.*

21. C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

schedule of his own emotional development. He doesn't give us the luxury of waiting five years. He needs loving parents right now, and the same parents, not a series of ten foster homes. For 20 years, courts have lectured me on the rights of parents, but only two judges in my state have spoken effectively on the rights of children

The really first-rate attention paid to the health of all children in less free societies makes you wonder whether one of our cherished democratic freedoms is the right to maim our own children. When I brought this question to the attention of one of our judges, he said, "That may be the price we have to pay." Who pays the price? Nobody has asked the child

Let us now resolve to fight for [our children's] total civil rights. Let us not, I beg of you, settle for anything less.²²

Henry Kempe's challenge remains as relevant today as it was in 1976. If we truly value children, if we believe they are as entitled as adults to have their rights and interests taken into account, we should transform our child welfare system. We *could* create a system that does a much better job at preventing maltreatment in the first instance and protecting already victimized children against further maltreatment. We *could* create a system designed to give children the nurturing parenting they need early in life to grow up healthy with a fair chance at future happiness. But it won't be easy because our current system is built on ideas about parental rights and individual autonomy that are deeply entrenched.

I. THE FAMILY PRESERVATION BACKGROUND

All child welfare reform moves take place against a background in which the system places an extremely high value on family preservation. Just how high a value varies from one period to another, as different forces contend with each other, some pushing for more family preservation, and others pushing for more recognition of children's need for protection and nurturing.

22. C. Henry Kempe, *Approaches to Preventing Child Abuse: The Health Visitors Concept*, 130 AM. J. DIS. CHILD. 941, 941-47 (1976), available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/ppworkshopmaterials.html>.

Over recent decades, powerful forces, including major foundations and public and private agencies, have worked together to promote a series of family-preservation-oriented reform moves. While different ideas are at work in the different reform programs, they share the goal of keeping more children at home. Indeed, Casey Family Programs, a foundation enormously influential in the child welfare field, has established, as a general goal, the reduction of out-of-home placements nationally by half by 2020.²³

Those responsible for policy advocacy promoting these reform programs have often been simultaneously responsible for the research used to make claims for the programs' success. And the research has often judged success only in terms of whether the programs succeed in their family preservation goals, not whether they succeed in doing better by children in terms of providing them with nurturing parenting and with protection from maltreatment.

Family Group Decision Making (FGDM) is one such program.²⁴ In FGDM, CPS reaches out to the extended family members of parents accused of maltreatment, both for help in decision making about children at risk, and for substitute families if the children need to be removed from their parents.²⁵ The goal is to prevent children from entering stranger foster care and moving on to adoption.²⁶ The idea is that if they stay with kin, they will be more likely to return to their parents, and, in any event, they will remain in the extended family and be more likely to maintain relationships with their parents.²⁷ Original claims for the success of this model in New Zealand were based largely on

23. BRUCE BARRON, ALLEGHENY CNTY. DEP'T OF HUMAN SERVS., TRANSFORMING LIVES THROUGH SYSTEMS INTEGRATION: THE "IMPROVING OUTCOMES FOR CHILDREN AND FAMILIES" INITIATIVE 3 (Jan. 2010), available at [http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/25_transforming-lives-through-system-integration\[1\].pdf](http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/25_transforming-lives-through-system-integration[1].pdf).

24. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 142-46.

25. See *id.* at 142-43.

26. See *id.* at 144.

27. See *id.*

the high percentage of cases in which child welfare authorities went along with the family decision.²⁸ Ongoing claims for success have been based largely on claims that more children are kept with their parents, the extended family, or the racial community of origin.²⁹

But there are many reasons to question whether, as a general matter, giving extended family more influence over the CPS decision and keeping more children in their extended families serves children's interests. It is highly likely that while some children will be helped by such policies, others will be hurt, given the fact that child maltreatment is often an intergenerational problem.³⁰ The research we need if we care about children would look at whether children in FGDM programs do better in terms of maltreatment and various child well-being measures than they would if they were not in such programs, whether extended family care is better for children than stranger foster care, or early placement in adoption.

IFPS programs swept the country in the 1980s through the early 1990s, with massive support from the Edna McConnell Clark Foundation.³¹ These programs were built on the assumption that child maltreatment and removal had largely to do with family crises, so that provision of intensive support for a relatively brief period, usually six weeks, would enable children "at risk of placement" to be kept at home.³² Self-serving research made claims that the programs succeeded in keeping children at home and thus saved the state foster care costs.³³ Independent research eventually questioned the validity of these claims.³⁴ More importantly, it pointed to the failure of the early research even to consider whether IFPS served children's interests by, for example, looking at how children kept in their homes

28. *See id.* at 144-45.

29. *See id.* at 144.

30. *See id.* at 90-93, 145-46.

31. *Id.* at 42-43, 118-21.

32. *Id.* at 121.

33. *Id.* at 118-19.

34. *Id.* at 120.

actually fared as compared to how they would have fared had they been removed.³⁵ At the time, the obvious limitations and self-serving quality of the early IFPS research was seen as something of a scandal.³⁶

Differential Response (DR) systems³⁷ are another kind of family preservation program introduced in part in response to the debunking of the IFPS programs. DR systems are designed to divert some 50-80% of the cases now reported to and investigated by the coercive CPS system to a noncoercive system of supportive services.³⁸ DR proponents note that a high proportion of CPS cases are closed without provision of services, even though these families often need services, as demonstrated by the fact that roughly one-third of the children in these cases are rereported for maltreatment within about a year.³⁹ They

35. *Id.*

36. See, e.g., Amy M. Heneghan, *Evaluating Intensive Family Preservation Programs: A Methodological Review*, 97 PEDIATRICS 535 (1996). This thorough review of the IFPS research provided a devastating critique, noting methodological failures, absence of proof of success in reducing removal, and failure to focus adequately on child wellbeing. It concluded:

[M]ore attention should be directed toward determining whether the child's overall functioning has improved because of the services received. Has abuse or neglect reoccurred? Have the child's growth and development been optimized? Has the child's cognitive and social development shown changes for the better? These and other outcomes will need to be addressed to obtain a clearer understanding of the benefits and limitations of family preservation. . . . Alternatives to family preservation, such as permanency planning (adoption) and foster care, also must be reexamined in the context of child safety and child well-being. . . . Applying family preservation to every family, as a matter of policy, may actually be placing children at risk.

Id. at 541.

37. These are also known as Alternative Track, Alternative Response, and Community Partnership systems. See BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 146-54.

38. See *id.* at 151; C. Nicole Lawrence et al., *Multiple Response System: Evaluation of Policy Change in North Carolina's Child Welfare System*, 33 CHILD. & YOUTH SERVS. REV. 2355, 2364 (2011).

39. Amy Conley, *Differential Response: A Critical Examination of a Secondary Prevention Model*, 29 CHILD. & YOUTH SERVS. REV. 1454, 1454-55 (2007) (noting the large proportion of children that are screened out at hotline or unsubstantiated after an investigation and eventually come back into contact

argue that children and families will be better served by getting the services which could be provided by a nonstigmatizing voluntary system. DR proponents also argue that there is no need for a coercive system to protect these children because a large majority of CPS cases are minor, a claim they say is supported by the fact that a majority of CPS cases are categorized as neglect rather than abuse.⁴⁰

There are many problems with the DR position. First, there is no reason to think that a majority of CPS cases are minor. Most neglect cases involve serious parental substance abuse issues which put children at risk for very real harm, including death at high rates.⁴¹ Many neglect cases are abuse cases categorized as neglect because the latter is easier to prove.⁴²

Second, if the goal is to provide children and families now *not* getting services *with* services, the issue is largely one of financial resources. CPS now closes cases in which families have significant service needs largely because of limited resources—it has to triage cases to provide its limited services to the most serious cases. The impoverished communities in which most maltreated children live are not rich with supportive organizations. The question is whether new resources for services should be funneled through CPS or through community organizations providing services on an entirely voluntary basis.

with CPS, at which point family problems have deepened and the family is threatened with dissolution); Amy Conley & Jill Duerr Berrick, *Community-Based Child Abuse Prevention: Outcomes Associated With a Differential Response Program in California*, 15 CHILD MALTREATMENT 282, 282 (2010), available at <http://cmx.sagepub.com/content/15/4/282> (highlighting that in the current system about one-third of all cases reported to a child welfare hotline are re-reported within a year).

40. See, e.g., Conley, *supra* note 39, at 1455.

41. BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 65, 67.

42. *Id.* at 67; see also Conley & Berrick, *supra* note 39, at 289 (many DR families—indeed here almost half the sample—are identified either as “high risk” or “very high risk” even though the families not receiving CPS services and diverted to DR should be low risk; this reflects the fact that CPS triage policies result in very troubled families often being turned away without services).

A child-friendly system would be interested in finding out whether maltreated children would do better in a system in which their parents are provided voluntary services, or in a system in which CPS can require that parents cooperate with the service plan and can remove children and terminate parents' rights if parents fail to cooperate and improve their parenting capacity.

DR proponents claim that parents will be more likely to cooperate with voluntary community organizations than with the coercive CPS system they may see as the enemy. But there are many reasons, based on both research and common sense, to think that parents responsible for maltreating their children will be more likely to cooperate with an agency backed by coercive power. For example, parents caught in the coils of drug and/or alcohol addiction find it very hard to give up their habits and may well have a somewhat higher chance of sticking to a treatment regimen if they know that failure to do so means they may suffer sanctions including the loss of their children.⁴³ One recent DR study revealed that more than half the families offered DR voluntary services refused to participate.⁴⁴

Also, once parents are identified as maltreating their children, research shows that services are unlikely to enable parents to recover from their problems sufficiently to avoid ongoing maltreatment.⁴⁵ Coercive monitoring by CPS

43. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 219, 286-87 (highlighting research that demonstrated the effectiveness of coercive pressure). At the P&P Workshop, two family drug court experts noted the useful coercive power of jail as a penalty for failures to abide by treatment program requirements: Sharon Boles, Evaluation Director for Sacramento Drug Court Program and Judge Jeri Cohen of the Miami-Dade Family Drug Court. See Sharon Boles, Sacramento Early Intervention & Dependency Drug Court Programs, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 11, 2012); Jeri Cohen, Miami-Dade Family Drug Court for Infants and Children, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 11, 2012).

44. Conley & Berrick, *supra* note 39, at 290.

45. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 109-10; see also Harriet L. MacMillan et al., *Effectiveness of Home Visitation by Public-Health Nurses in Prevention of the Recurrence of Child Physical Abuse and Neglect: A Randomized Controlled Trial*, 365 *THE LANCET* 1786, 1791 (2005) (showing that model home visitation program, which has been promising in reducing

enables it to remove children and terminate parental rights in cases where ongoing maltreatment indicates that such action serves a child's interests.

DR proponents might argue that CPS has limited coercive power in these relatively low risk cases because the courts would be unwilling to require parents to cooperate with services. In the end, the only real threats CPS has are to remove children and to terminate parental rights, and both actions are subject to court approval. Courts are both bound by the law to make family preservation a priority, and they have internalized parental autonomy values in ways that make them reluctant to approve coercive intervention.

However, CPS and the courts have a good deal of discretion to act more or less coercively in the cases categorized as low risk. And, if CPS has jurisdiction over a case, it is in a better position to monitor and assess whether if parents refuse to cooperate with service plans, and maltreatment continues, the case should be categorized as higher risk and more coercive action taken.

Also, law is not fixed, but malleable. It is subject to interpretation and it can be changed. This is true not simply of legislative, but also of constitutional, law. Child welfare policy-makers and researchers should be designing policy and research in ways that help illuminate the need for changing the law in child-friendly directions.

In a child-friendly system DR systems and related research would provide some basis for learning whether DR voluntary systems work better for children *than other systems we might devise if we set out to provide children better protection*. We should be able to compare how children in relatively low-risk cases do in (1) DR programs, *as compared to* (2) CPS voluntary services programs when CPS is provided additional resources for services, *as compared to* (3) CPS programs with such additional

likelihood of maltreatment among first-time parents identified during pregnancy, had no success in reducing maltreatment among parents once identified as having victimized their children); *see also* discussion *infra* p. 1354.

resources which use coercive pressure to insist on parent compliance with service plans.

Instead our child welfare system is dramatically expanding the use of DR, conducting research largely designed to validate DR, rather than to genuinely assess whether it serves children's interests or indeed their parents' interests. If services are not being provided in DR programs in ways that enable parents to recover from their problems, those parents may in the end both lose their children and lose out on other opportunities for fulfilling lives.

DR has been spreading rapidly throughout the nation, and has now been instituted in some twenty to thirty states.⁴⁶ In some areas up to 80% of the children previously reported to and investigated by CPS are now diverted to the DR system.⁴⁷ The DR research focuses simply on how successful DR is in accomplishing its goals of diverting children from CPS, and whether children are worse off when their families are offered DR services than they would have been if CPS had taken their cases but failed to offer any services. At best, the research shows that children may not be worse off as a result of DR programs as compared to children offered no services.⁴⁸ However, the recent *IOM/NRC Research Workshop Summary* noted above states that the studies assessing harm "have not been able to rule out the possibility that increased harm might occur."⁴⁹

46. *IOM/NRC Research Workshop Summary*, *supra* note 15, at 84 (estimating that twenty to thirty states have differential response systems); see Conley & Berrick, *supra* note 39, at 282 (highlighting that approximately twenty states had begun incorporating DR as of 2003, and eleven states had implemented the program statewide as of 2008).

47. See Lawrence et al., *supra* note 38, at 2364.

48. Conley & Berrick, *supra* note 39, at 286 (highlighting that one-third of the control and one-third of the research group were rereported during the nine-month treatment period).

49. *IOM/NRC Research Workshop Summary*, *supra* note 15, at 86; see also Deborah Daro & Kenneth A. Dodge, *Creating Community Responsibility for Child Protection: Possibilities and Challenges*, 19.2 THE FUTURE OF CHILD. 67, 84 (Fall 2009), available at http://www.chapinhall.org/sites/default/files/Creating_Community_Responsibility_FOC-Daro.pdf. (evaluating similar "community partnership" programs and

*Success is claimed based on this kind of research, even though the statistics demonstrate that the system continues to fail children miserably. Roughly one-third of the children reported for maltreatment whose families are offered DR, resume maltreatment of their children within a relatively short period of time.*⁵⁰

These various family preservation movements all started with the highly dubious premise that maltreated children would do better if more were kept with their parents rather than removed to foster care and placed with adoptive parents. These movements have been propelled forward with the help of self-serving research that looks at success primarily in terms of whether more maltreated children are kept with their parents. The research fails to ask whether maltreated children would be better off if CPS took jurisdiction over more rather than fewer cases, and if the CPS system removed more children at earlier stages of life to foster care and placed more children more promptly in adoption.

II. THE RACIAL DISPROPORTIONALITY MOVEMENT

The latest major family preservation movement focused on what its proponents called Racial Disproportionality (RD).⁵¹ The goal was to reduce the number of black children removed to foster care. The claim was that removal rates reflected racial discrimination by mandated reporters and by CPS workers.⁵² This claim was backed by research funded by the same forces as those pushing the policy changes. The primary research report relied on was the National Incidence Study (NIS), a study designed to assess *actual* levels of maltreatment, as distinguished from levels

finding “few positive effects on the initiative’s four core outcomes—child safety, parental capacity and access to support, child welfare agency and network efficiency, and community responsibility for child protection . . .”).

50. Conley & Berrick, *supra* note 39, at 286.

51. See generally Bartholet, *The Racial Disproportionality Movement*, *supra* note 1 (detailing the story of the racial disproportionality movement and refuting its claims).

52. *Id.* at 873, 886-90.

indicated in *official* CPS system reports. NIS-3,⁵³ published in 1996, stated that actual maltreatment measures showed no difference between black and white rates, and accordingly concluded that racial bias must be the explanation for the fact that official reporting and removal rates were higher for black children than for white.⁵⁴ These NIS-3 statements were endlessly repeated by proponents of the RD movement, including in many additional research reports that the movement funded and propagated.

The problem is that the statement denying any difference between black and white maltreatment rates was not true. NIS-3 provided no footnotes explaining the basis for this statement. But, by the time of our RD Conference, one enterprising social scientist, Brett Drake, had found and analyzed the underlying statistics for the NIS-3 report, which were buried within an enormous appendix published in 1997.⁵⁵ These statistics showed that, in the sample assessed, black maltreatment rates were actually much higher than white maltreatment rates, but the sample was insufficient to find statistical significance. Yet, the

53. See ANDREA SEDLAK ET AL., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS. (1996), <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>.

54. See Brett Drake & Melissa Jonson-Reid, *NIS Interpretations: Race and the National Incidence Studies of Child Abuse and Neglect*, 33 CHILD. & YOUTH SERVS. REV. 16, 17 (2011) ("The NIS-3 final report states that 'The NIS-3 found no race differences in maltreatment incidence' and that 'The NIS findings suggest that the different races receive differential attention somewhere during the process of referral, investigation, and service allocation, and that the differential representation of minorities in the child welfare population does not derive from inherent differences in the rates at which they are abused or neglected'" (citing ANDREA J. SEDLAK & DIANE D. BROADHURST, EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS. 7 (1996), <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>).

55. ANDREA SEDLAK ET AL., THIRD NATIONAL INCIDENCE STUDY OF ABUSE AND NEGLECT: FINAL REPORT APPENDICES, U.S. DEP'T OF HEALTH & HUMAN SERVS., Tbls. B-5A, B-22, B-23 (1997), <http://www.childwelfare.gov/systemwide/statistics/nis.cfm#n4> (follow "Related Publications for NIS-3" hyperlink; then follow "Third National Incidence Study of Child Abuse and Neglect: Final Report Appendices, Data Collection Report, Public Use Files Manual" hyperlink); see also Drake & Jonson-Reid, *supra* note 54.

sophisticated social scientists responsible for NIS-3 failed to use language indicating that they had simply failed to find any *statistically significant* difference in rates. And they came to a conclusion—racial bias—which would have been warranted only if they had found that the rates *were the same, and their sample was large enough to produce statistically significant conclusions*.⁵⁶ The subsequent NIS-4 study had a larger sample, and concluded that, in fact, black maltreatment rates were significantly higher than white.⁵⁷ Drake's analysis revealed that not only did the underlying data for the NIS-3 and earlier NIS-2 show higher black maltreatment rates, but the difference between black and white maltreatment rates in these earlier NIS studies was roughly the same as that revealed in NIS-4 and in the official child maltreatment and removal statistics.⁵⁸

Was the NIS-3 claim deliberately misleading? Did some of those who used the NIS-3 in their policy advocacy and related research know that it could not fairly be used to make the claim that racial discrimination was responsible for the black child foster care rates? Certainly the above facts raise questions as to the bona fides of the claim, particularly given that there was so much evidence apart from the NIS indicating that actual black maltreatment rates were likely much higher than white maltreatment rates.⁵⁹

56. See Drake & Jonson-Reid, *supra* note 54, at 17 (“A common logical fallacy occurs when one argues that the lack of ability to prove an assertion stands as disproof of the assertion . . .”).

57. See ANDREA SEDLAK ET AL., FOURTH NATIONAL INCIDENCE STUDY OF ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS. 9-2 (2010), <http://www.childwelfare.gov/systemwide/statistics/nis.cfm#n4> (follow “Fourth National Incidence Study of Child Abuse and Neglect” hyperlink; then follow “Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress” hyperlink).

58. *Id.* at 18; see also Brett Drake & Melissa Jonson-Reid, Front-End Disproportionality in CA/N: Some Things We Know For Certain, Powerpoint Presentation at the Working Conference at Harvard Law School: Race and Child Welfare: Disproportionality, Disparity, Discrimination, 13-15 (Jan. 28-29, 2011), <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-papers/drakerd.pdf>.

59. See Bartholet, *The Racial Disproportionality Movement*, *supra* note 1, at 898-920 (concluding based on analysis of available evidence that black

At a minimum, the RD claim regarding discrimination was irresponsible, and grounded on bad social science that flew in the face of a large body of contrary evidence. It helped make the case for keeping more black children with parents accused of maltreatment, despite the fact that if black children were subject to disproportionately high rates of maltreatment, they should for their own protection be removed at similarly high rates.

The RD conference helped demonstrate that the RD movement was putting black children at risk. The organizers' coauthored paper concluded:

[W]e find no evidence that initiatives that emphasize reducing the high representation of black children will provide a path to more equitable services. The evidence instead provides powerful reason for policymakers to focus on what we know are very real and challenging problems: the devastating nature of life circumstances for too many black families, the high rates of serious maltreatment victimizing black children, and the harmful impact of such maltreatment.⁶⁰

My paper summarizing the conference proceedings concluded:

I hope that this conference will mark an important turning point away from the focus on alleged child welfare system bias, with its emphasis on anti-racism training and on immediate reduction in the number of black children removed to foster care based on general population percentages. This focus not only diverts attention from the most significant problems facing black families and their children, but poses dangers to black children victimized by maltreatment. Given the considerable evidence of a black/white maltreatment gap, the field needs to focus more attention on the problems facing black families and their children, and the related risks to black children victimized by maltreatment. It needs to pay more attention to the high rates of maltreatment among children of all races and ethnicities growing up in poverty. It needs to pay more attention to the harmful developmental impact of maltreatment, and the importance of developing more and better

maltreatment rates were likely significantly higher than white maltreatment rates).

60. Bartholet et al., *supra* note 13, at 4.

programs designed to prevent maltreatment and provide protective services

I hope this conference has enabled the child welfare field to move forward armed with clear evidence to direct attention and resources where they are most needed. Reducing the number of children in care without reducing the prevalence of child maltreatment itself will endanger our children. The work that needs to be done to facilitate real reform is much more challenging.⁶¹

It is too early to tell what impact that conference, and related developments calling the RD theory into question, may have had, and whether the RD movement has indeed been derailed. Even if the movement has been significantly affected, its proponents may simply move to some other family preservation strategy, either an existing one like the Differential Response approach discussed above, or some new variation on the theme. But my hope is that many child welfare leaders will instead focus new energy on early prevention and protection.

III. EARLY PREVENTION AND PROTECTION

The two papers summarizing the significance of our RD Conference pointed to the importance of early prevention and protection strategies. The coauthored paper concluded: "Given the considerable evidence of a black/white maltreatment gap, the field needs to focus more attention on the importance of developing more and better programs designed to prevent maltreatment and provide protective services."⁶²

My post-conference paper added:

We need to build a network of early intervention programs, including programs that will reach substance-exposed infants. We need to expand programs designed to move children more

61. See ELIZABETH BARTHOLET, RACE & CHILD WELFARE: DISPROPORTIONALITY, DISPARITY, DISCRIMINATION: RE-ASSESSING THE FACTS, RE-THINKING THE POLICY OPTIONS 13-15 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889235.

62. Bartholet et al., *supra* note 13, at 4.

expeditiously out of foster care into healthy forms of permanency, including reunification and adoption.⁶³

Our Prevention & Protection Brainstorming Workshop, held in May 2012, helped demonstrate that there is indeed much we could do to protect children more effectively against maltreatment. Our goal was to bring together a select group of leaders in the policy, program, and foundation worlds to discuss some of the most promising ideas about how we could do better at preventing maltreatment from occurring in the first place and at protecting children already victimized by intervening early and more effectively to protect them against further maltreatment. Workshop presentations, papers, and related discussions revealed many promising ideas and developments.

England provides an illuminating example of the possibility for significant change in the direction of more child-friendly policy. In the past decade, the English government has commissioned several reports on child welfare policy, all of which proposed changes that would make child interests more central and emphasized the importance of early prevention and protection.⁶⁴ The government endorsed all these reports, and also issued its own report on adoption, calling for a reduction in the barriers limiting children's early access to nurturing, adoptive homes.⁶⁵ And just recently the government announced plans to enormously expand the use of concurrent planning for infants, placing them in fost-adopt homes, so as to speed the adoption process while minimizing disruption for the children.⁶⁶

63. BARTHOLET, RACE & CHILD WELFARE, *supra* note 61, at 14.

64. Mary Welstead, *Child Protection in England—Early Intervention* 1 (Apr. 2012), http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/27_welsteaddoc.pdf.

65. *Id.* at 7-8.

66. See Angela Harrison, *Adoption: PM Unveils Foster to Adopt Plan*, BBC NEWS (July 6, 2012), <http://www.bbc.co.uk/news/education-18724999>; *Government Announces Plans To Speed Up Adoption Process*, FAM. L. (July 6, 2012), <http://www.familylaw.co.uk/articles/Government-announces-plans-to-speed-up-adoption-06072012-853>.

However, the workshop also revealed the powerful constraints imposed on meaningful reform in the United States by parental autonomy values. Below, I will discuss both promising proposals and developments, as well as problematic limitations inherent in such initiatives. This Article presents my own positions—my interpretation of the significance of the presentations and related research, and my opinions on the issues. My positions often differ from those of the various workshop participants whose presentations and work I discuss.

A. *Early Prevention*

1. *Promise.* One exciting idea in the prevention area is to apply a public health approach to child welfare. This would mean assessing families on a population-wide basis in terms of the risks to healthy child development and devising strategies to prevent maltreatment from occurring, just as we try to protect populations at large from disease.⁶⁷ While this idea has in some form been around for a while, it is today arguably a bit closer to reality given the growing health visitation movement, other early intervention initiatives, new research demonstrating our capacity to

67. Zeinab Chahine, Overview of Public Health Approach, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012); Emily Putnam-Hornstein et al., *A Public Health Approach to Child Maltreatment Surveillance: Evidence from a Data Linkage Project in the United States*, 20 CHILD ABUSE REV. 256, 256-57 (2011), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/3_public-health-approach_putnam_hornstein.pdf; Vincent J. Palusci & Michael L. Haney, *Strategies to Prevent Child Maltreatment and Integration Into Practice*, APSAC ADVISOR 8-17 (Winter 2010), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/4_strategies-to-prevent-child-maltreatment_palusci.pdf; DEBORAH DARO ET AL., KEY TRENDS IN PREVENTION: REPORT FOR THE NATIONAL QUALITY IMPROVEMENT CENTER ON EARLY CHILDHOOD 10 (2009), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/1_daro_key-trends-in-prevention.pdf; Deborah Daro & Genevieve Benedetti, Emerging Themes in Child Abuse Prevention Research: Filling the Gaps, Powerpoint Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop 10 (May 10-11, 2012), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/2_daroemerging-themes_child-abuse-two-slides.pdf.

predict which children are at greatest risk for maltreatment, and new enthusiasm among child welfare experts.

Deborah Daro, Senior Researcher at Chapin Hall at the University of Chicago, presented one promising public health approach: universal support for new parents combined with targeted services for the families at greatest risk for maltreatment.⁶⁸ All families could be linked to a medical home, which would monitor children's health and development on a regular basis, and educate families regarding the availability of other resources in the community. The services would be largely provided through home visitation programs, for which there is significant evidence of effectiveness in helping support families in ways that reduce the likelihood of maltreatment.⁶⁹ All families might get one home visit, with additional visits and related services provided to those with the greatest needs. Daro argued for this universal support approach in preference to home visitation programs limited to high-risk families or families living in high-risk neighborhoods. She noted the advantages in terms of reaching families that might be missed in such targeted approaches but still be at risk for maltreatment, and the ability to limit costs through adjusting the level of services based on individual needs.⁷⁰

68. DEBORAH DARO & KENNETH A. DODGE, STRENGTHENING HOME-VISITING INTERVENTION POLICY: EXPANDING REACH, BUILDING KNOWLEDGE, *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/5_daro_strengthening-home-visiting.pdf; Palusci & Haney, *supra* note 67, at 12.

69. *See* DARO ET AL., KEY TRENDS, *supra* note 67, at 20; *see also* DARO & DODGE, *supra* note 68; RAND CORP., PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS, RAND RES. BRIEF (2005), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/7_proven-benefits-early_childhood-interventions.pdf; PROMISING PRAC. NETWORK, PROMISING PRACTICES FOR PREVENTING CHILD ABUSE & NEGLECT, PPN ISSUE BRIEF (2010), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/8_promising-practices-network_-_ppn-issue-briefs-.pdf.

70. *See* DARO & DODGE, *supra* note 68, at 6 (noting the relatively limited costs of various universal screening and home visitation programs).

Dr. Rebecca Kilburn of the RAND Corporation provided an economic analysis supporting the cost-effectiveness of varying the package of services to suit the needs of different families. Her paper summarizes:

Traditionally, policymakers have sought to identify the “best” program, policy, or approach and support that. . . . Economics would argue that an approach that would generate the most benefit per dollar allocated would be to identify an optimal portfolio of early childhood investments, rather than selecting one early childhood approach and putting all resources in that basket.⁷¹

Robert Murphy, Associate Professor at the Duke University School of Medicine, and Phil Redmond, Associate Director at The Duke Endowment, described a program they have helped initiate called Durham Connects, which illustrates this approach. Launched in 2008, in Durham County, North Carolina, it is designed as a universal home visiting service.⁷² It reaches out in the hospital to all parents of newborns, and provides both initial counseling and ongoing home visits to all who accept its services. It claims success in reducing hospital emergency and other visits, increasing appropriate parental practices and use of community resources, and reducing community-wide maltreatment rates. Its costs have been limited to \$500 per family, far lower than the highly reputed David Olds Home

71. See REBECCA KILBURN & LYNN A. KAROLY, RAND CORP., THE ECONOMICS OF EARLY CHILDHOOD POLICY: WHAT THE DISMAL SCIENCE HAS TO SAY ABOUT INVESTING IN CHILDREN 30 (2008), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/kilburn_rand_econofearlychild.pdf; REBECCA KILBURN, RAND CORP., WHAT DOES ECONOMICS TELL US ABOUT EARLY CHILDHOOD POLICY (2008), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/kilburn_rand_whatdoesecon.pdf.

72. See Robert Murphy & Phil Redmond, Durham Connects Overview, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/6_durham-connects.pdf; see also K.A. Dodge et al., *Community-Level Prevention of Child Maltreatment: The Durham Family Initiative*, in PREVENTING CHILD MALTREATMENT: COMMUNITY APPROACHES 68-81 (K.A. Dodge & D.L. Coleman eds., 2009); Daro & Dodge, *supra* note 49, at 79-83.

Visitation Model which targets only certain families, providing a defined packet of intensive services to all.

Dr. Robert Sege described a somewhat similar program he runs at the Boston Medical Center in Massachusetts, reaching out to all parents of newborns to engage in a research program in which the experimental group is offered parental assistance, which includes counseling by a family specialist, legal advice on issues like housing and financial support, and home visitation.⁷³

Universal support programs have enormous potential as early prevention programs. Reaching out to provide support to families *before* they have committed maltreatment, during the pregnancy and early infancy period when they are likely highly motivated to be good parents, is supported both by common sense and available research. At least some home visitation programs directed toward parents of newborns have demonstrated success in reducing maltreatment reports and predictors for maltreatment. By contrast, home visitation and other support services directed at families which have already maltreated their children have a poor record, with one-third to one-half the families repeating the maltreatment.⁷⁴

Universal outreach is promising also because it is designed to reach both the low-risk and the high-risk end of the parent spectrum. It is important to reach the low-risk end because many parents identified as low risk have needs for support to avoid parenting problems. It is important to reach the high-risk end because at least some of these parents can avoid trouble if they receive support, and others can be identified as requiring coercive intervention by CPS to protect children against maltreatment.

While universal services might seem expensive to policy-makers focused on short-term election results, they would be cost-effective if policy-makers were willing to take

73. See Robert Sege, Remarks at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012); see also Interview with Robert Sege, Physician, Boston Medical Center (June 4, 2012) (notes on file with author).

74. See discussion *supra* pp. 1340-42.

into account the long-term costs of maltreatment. These costs are staggering, not just to the children involved, but to the larger society—the costs, for example, of CPS intervention, foster care, court proceedings surrounding CPS decisions, and the predictable aftermath of child maltreatment, juvenile delinquency, unemployment, crime, homelessness, substance abuse, and maltreatment of the next generation.⁷⁵

However, there was some discussion at the workshop as to whether it would be possible, in these economic times, to persuade policy-makers to adopt universal programs, and accordingly whether instead the emphasis should be on programs targeted at high-risk populations.

Targeted programs can of course be combined with the universal approach. Rick Barth, Dean of the University of Maryland School of Social Work, presented a compelling case for one kind of targeted program, focused on youth in foster care. He told of the high rates of pregnancy and parenting by foster youth,⁷⁶ a population at obvious risk for poor parenting given their own history of maltreatment by their parents, as well as their youth.⁷⁷ He discussed the potential for programs designed to prevent pregnancy and improve parenting skills among foster youth.

Recent research demonstrates that we have the capacity today, based on objective data universally collected at the time of birth, to predict with significant accuracy those children at greatest risk of maltreatment. This gives us the

75. See Palusci & Haney, *supra* note 67, at 8 (discussing cost-effectiveness research related to prevention strategies); RAND CORP., PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS, *supra* note 69; KILBURN & KAROLY, *supra* note 71, at 29-30; KILBURN, *supra* note 71.

76. See Deborah V. Svoboda et al., *Pregnancy and Parenting Among Youth in Foster Care: A Review*, 34 CHILD. & YOUTH SERVS. REV. 867, 873 (2012), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/10_pregnancy-and-parenting-among-youth-foster-care.pdf (noting range of pregnancy incidence among young women in foster care was 16% to 50%).

77. See *id.* at 868; see also Rick Barth, Targeting Prospective Parents Among Foster Youth (Both to Prevent Pregnancy and Enhance Parenting Skills), Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012).

ability to develop targeted intervention programs at birth designed to prevent maltreatment from occurring. This new capacity could be used in conjunction with a universal support program of the kind proposed by Daro, assessing which families should receive what levels of supportive services. It could also be used in the absence of any universal support system, to identify which families should be targeted for intervention.

Emily Putnam-Hornstein and Barbara Needell, of the University of Southern California and the University of California at Berkeley respectively, describe this research in their groundbreaking 2011 article, *Predictors of Child Protective Service Contact Between Birth and Age Five*.⁷⁸ Based on a study of the entire 2002 California birth cohort, they found that, looking at risk factors available in infant birth records, they could predict with great accuracy which children will be reported for maltreatment before their fifth birthday.⁷⁹ Looking at children with three risk factors they found they could identify 50% of the children reported for maltreatment before the age of five. They were able to predict that a child characterized by seven risk factors has an 89% likelihood of being reported for maltreatment before the age of five.⁸⁰ They concluded:

[O]ur analysis highlights that objective data collected at birth can be used to identify those children in a given birth cohort who are at greatest risk of being reported for maltreatment during the first five years of life. . . . Although it is unlikely that a “one-size fits all” intervention will ever be developed, that does not mean we cannot make an informed assessment of the probability that a given child will be referred for maltreatment, and take steps to

78. Emily Putnam-Hornstein & Barbara Needell, *Predictors of Child Welfare Contact between Birth and Age Five: An Examination of California’s 2002 Birth Cohort*, 33 CHILD. & YOUTH SERVS. REV. 2400 (2011), available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-papers/putnamneedellrd.pdf>.

79. *Id.* at 2402 (reporting data is used because of the considerable evidence indicating that reports reveal likelihood of actual maltreatment risk as well as or better than subcategories like substantiated reports).

80. *Id.* at 2406; E-mail from Emily Putnam-Hornstein to Elizabeth Bartholet (July 13, 2012, 13:20 EST) (on file with author).

provide services and support to prevent all that occur downstream from a first report of maltreatment.⁸¹

The data Putnam-Hornstein and Needell are talking about exists now in infant birth records. But we could add enormously to our power to predict for maltreatment risk if we took advantage of other existing databases containing, for example, criminal arrests and conviction records, mental illness hospitalization records, hospital records of child accidents and injuries, CPS records of prior child maltreatment reports and removals, income maintenance records, and much more.⁸² Increasing our predictive capacity would enable us to build preventative programs targeted very accurately to those in greatest need.⁸³

2. *Limitations.* Despite the enthusiasm among some experts for the idea of a universal public health approach, it is very far from realization today. Home visitation programs represent the closest thing we have to such an approach, and today they are offered only to about 6% of the new parent population nationwide, even with the new federal funding recently made available.⁸⁴

Another problem is that home visitation and related early support programs fall far short of being universal even

81. Putnam-Hornstein & Needell, *supra* note 78, at 2406. In another paper they note the predictive value of such individual risk factors as single parenting (33.7% of children reported for maltreatment before age of five), poverty as shown by Medi-Cal coverage (22% of children so reported), and teenage parenting (25.4% of children so reported). Putnam-Hornstein et al., *supra* note 67, at 270-71.

82. See James Dwyer, *A Constitutional Birthrights; The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 811-12 (2009) (describing need to collect and make available to CPS at birth information including substance abuse history, history of violent felonies, and child welfare records). Putnam-Hornstein is now working with researchers in New Zealand who have developed a predictive model for substantiated maltreatment before age five based on a large, integrated, database stemming from that country's public benefit system. E-mail from Emily Putnam-Hornstein to Elizabeth Bartholet (Sept. 2, 2012, 2:24 EST) (on file with author).

83. I am grateful to Brett Drake for this idea and for highlighting the significance of the risk-prediction work done by Putnam-Hornstein and Needell.

84. E-mail from Deborah Daro to Elizabeth Bartholet (Aug. 3, 2012, 16:58 EST) (on file with author).

where they have been implemented—they are all designed as voluntary rather than mandatory programs, and as a result, they have generally failed to reach a very substantial percentage of the eligible parent population—almost certainly those at disproportionately high risk for maltreating their children.⁸⁵

Daro acknowledged the problem and took an unusual step, for a home visitation proponent, in saying that she had reluctantly come to the conclusion that home visitation programs needed to develop a coercive element in order to deal with the really challenged families.⁸⁶ She believes that parents dealing with serious issues such as mental illness, substance abuse, and domestic violence may require either more intensive intervention or direct referral to CPS.⁸⁷ Jeanne Miranda, Professor at the University of California, Los Angeles, stated based on her work with substance-abusing parents that as a group, they were both at very high risk for maltreating their children and unlikely to use voluntary services.⁸⁸

85. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 169-70. Thus Durham Connects prides itself on reaching a significant number of families in the hospital—some 80%, and on getting many families to agree to at least one home visit—some 68.6%. But that still leaves almost one-third not allowing any home visit. Murphy & Redmond, *supra* note 72. Similarly, Dr. Robert Sege indicated that in his Boston Medical Center program, only 50% of the families agree to be part of the research group, of which half will be selected as the experimental group offered parental assistance services which include a supportive “family specialist” and home visitation. And of those offered these services, 20% refuse even the first home visit, with presumably a larger percent refusing subsequent home visits. See Interview with Sege, *supra* note 73.

86. Deborah Daro, *Connecting our Understanding of Child Maltreatment (Root Causes, Facilitating Conditions) to the Design of Effective Prevention & Protection Approaches*, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012).

87. Daro notes that in the initial implementation of the Hawaii Healthy Start program, the first home visiting program to include a universal assessment of all new births, families with multiple risk factors were referred directly to CPS. Other home visitation programs augment their traditional services to provide home-based mental health services in an effort to improve outcomes with more challenged parents. See E-mail, *supra* note 84.

88. Jeanne Miranda works extensively with children born drug-affected, both those raised for a period of time by their birth parents, and those placed in foster-adopt families and later adopted. See Jeanne Miranda, *Support for Children &*

Research on home visitation programs tends to emphasize their success rates in terms of those parents who agree to accept services. This not only exaggerates the actual success of the programs in reducing child maltreatment rates overall but also hides the significance of not making these programs mandatory. If we don't look at the maltreatment rates of those parents who refuse to participate in home visitation, then we don't know the cost from the children's point of view of letting those parents opt out.

The reason that early home visitation programs are, to date, entirely voluntary is, in my view, largely because policy-makers place such a high value on parental autonomy rights. These rights to limit state intervention in decisions about raising children are assumed to include the right to shut the door to home visitors.

But if we place a high value on children's rights to grow up healthy and free from maltreatment, then we should be willing to balance these rights against parental autonomy rights. Mandatory home visitation would not constitute a major invasion of the privacy of home life. Even in the more intensive programs, home visitors come to the home for a scheduled visit only once every two weeks or every month during the child's infancy and on a less frequent basis during the next couple of years. What really makes home visitation threatening to parental autonomy is that if the child is at serious risk for maltreatment, or is actually being victimized, then the home visitor, as a mandated reporter, is required by law to report the parents to CPS, enabling coercive intervention to protect the child. We should welcome this limit on parental autonomy.

In the education area, mandatory education was once seen as an invasion of parental autonomy, but our society decided that children had rights to education that should be

Their Fost-Adopt Families, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012); *see also* JEANNE MIRANDA, TIES TRANSITIONAL MODEL FOR CHILDREN ADOPTED FROM FOSTER CARE (Apr. 2012), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/16_ties-presentation.pdf.

enforced regardless of their parents' autonomy rights.⁸⁹ We should see children's rights to grow up healthy and free from maltreatment as similarly important.

There are promising indications that some are at least thinking about how to encourage more families to cooperate with home visitation programs. Rebecca Kilburn noted a current research project analyzing the group that fails to participate in home visitation and experimenting with incentives designed to induce participation.⁹⁰

Another issue surfaced in connection with the targeted program Rick Barth discussed related to parenting by foster youth. Many who see foster youth as at high risk for maltreating any children they have seem to think that reform program options are limited to advising foster youth how to avoid becoming parents and helping those who give birth to develop parenting skills. They are reluctant to discuss advising such youth to relinquish parenting rights and place their children for adoption.⁹¹ This reluctance presumably relates to an assumption that if foster youth choose to give birth, they will want to keep their children. Parental autonomy values make suspect any effort to encourage parents to surrender their children.⁹² But if we

89. BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 171; *see also* Kempe et al., *supra* note 21 (comparing compulsory universal health visitation to compulsory universal schooling).

90. *See* Rebecca Kilburn, Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012).

91. Barth, *supra* note 77; *see* Svoboda et al., *supra* note 76, at 867-68, 873-74. *But see* Cohen, *supra* note 43 (in her drug court program, foster youth are counseled both how to avoid pregnancy and about the option of placing their child for adoption). *See also* Daro remarks during the P&P Workshop, suggesting that foster youth who produce a baby be enrolled in an ongoing home visitation program.

92. Professor Jim Dwyer, Professor of Law at William & Mary, is one of very few academics to have argued for creating significant limits to the biological parent's right at birth to keep the child until and unless they commit serious maltreatment demonstrating unfitness. He advocates that in a number of categories where parents are predictably at extremely high risk for maltreating their children, we should change the legal presumptions so as to make it easier to remove children and place them at birth with adoptive parents. *See generally* Dwyer, *supra* note 82; JAMES DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006); discussion *supra* p. 1341.

thought of children as having rights to grow up healthy and free from maltreatment, we would question whether foster youth and other vulnerable, high-risk parents should be seen as having the kind of absolute right to parent that means they cannot even be encouraged to relinquish their children. Children raised by foster youth are at high risk for maltreatment if left at home. Barth noted estimates indicating that 20-30% of children born to foster youth end up in foster care themselves.⁹³ These numbers suggest that a significant proportion of the children now raised by foster youth would be better off if placed for adoption. The evidence also indicates that many foster youth would themselves be better off if they surrendered their children, freeing themselves up to pursue educational and employment opportunities.⁹⁴

B. *Early Protection*

1. *Promise.* We have a coercive child protective system in place which could work to provide children greater protection earlier in life against maltreatment. At present, this system receives reports of many at-risk children—some six million—pursuant to our mandatory reporting system.⁹⁵ These reports put CPS in a position to investigate and to insist that parents pursue substance abuse treatment, mental health, or other services with the potential to help them parent better. CPS also has the power to remove children at ongoing risk to foster care and to terminate parental rights so that children can be placed in nurturing adoptive families.

This system now fails children miserably. The system identifies only about 700,000 children as victims of

93. Barth, *supra* note 77; *see generally* Svoboda et al., *supra* note 76 (summarizing statistical data regarding pregnancy and parenting among youth in foster care).

94. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PROTECTION, 179 & n.29 (1999).

95. Emily Putnam-Hornstein, *Strengthening CPS Ability to Protect Infants and Young Children Against Maltreatment* 1 (Apr. 2012), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/21_strengthening-cps_putnam_hornstein.pdf.

maltreatment, although the NIS-4, designed to estimate the number of children actually maltreated (as compared to those identified by the system to have been maltreated), found that 1.2 million children are demonstrably harmed or injured by maltreatment annually, and that 3 million (1 in 25) children are endangered by maltreatment annually.⁹⁶ CPS intervenes in a significant way—to require parents to engage in rehabilitative programs, to remove children, to move children on to adoption—in only a small fraction of the cases reported.⁹⁷ It leaves children at home and returns them home from foster care, even when they are significantly at risk. Research on family preservation services and family reunification programs show that roughly one-third to one-half or more of children in these programs are subject to repeat maltreatment.⁹⁸ The system moves children to foster care only in very high-risk cases, and then moves them on to adoption only relatively rarely and often only after significant delay. As a result, children once victimized by maltreatment are likely to suffer ongoing maltreatment and, in the end, serious damage limiting their life prospects. We know that if maltreated children were moved relatively promptly to adoption, they would have an excellent chance of recovery from damage suffered and of healthy development.⁹⁹

Our child welfare system continues to promote the failed strategy of prioritizing family preservation for children who have been maltreated in the face of evidence that that strategy is not working and will not likely work. One recent study helps demonstrate this reality.¹⁰⁰ Noting the high rates of maltreatment recurrence, this study set

96. *Id.*

97. *IOM/NRC Research Workshop Summary, supra* note 15, at 40 (noting that “only one-third of the children with screened-in reports in CPS get some kind of intervention” and that typically such intervention “consists only of assessments or low-intensity case management approaches, which typically depend on referrals to other sources”).

98. See BARTHOLET, *NOBODY’S CHILDREN, supra* note 1, at 96-97, 109-10; DePanfilis & Zuravin, *supra* note 3, at 27.

99. See BARTHOLET, *NOBODY’S CHILDREN, supra* note 1, at 176-86.

100. MacMillan et al., *supra* note 45.

out to determine whether a home visitation program with promising results when used with first-time parents not yet responsible for maltreatment, would work to reduce maltreatment recurrence among parents who had been responsible for maltreatment. The conclusion was that even such a model intervention failed:

[T]he intensive 2-year programme of home visitation by nurses was not more effective than standard services in preventing recurrence. . . . Although the results of this trial are disappointing, they are very important. They suggest that prevention of recurrence of child physical abuse and neglect is very difficult in families within the child protection system. The effectiveness of [child protection agencies'] standard services is unproven; typically, they do not have the intensity or duration of the intervention assessed in our study. . . .

....

When a child remains in the home, interventions are expected to reduce the risk of subsequent maltreatment. The results of this study indicate that there is a high risk of recurrence when children remain in the home, and up to now there is no intervention proven to reduce that risk. . . . [T]he high rates of recurrence in this study suggest that substantive efforts must be invested in prevention of child abuse or neglect before a pattern is established.¹⁰¹

This study also noted the absence of meaningful research assessing family preservation programs, including the fact that “the measure of success in home-based interventions is usually avoidance of alternative placement,” which is “distinct from recurrence of maltreatment.”¹⁰²

Congress has taken action to help move things in a positive direction for children. The Adoption and Safe Families Act of 1997 (ASFA)¹⁰³ reduced, at least to some degree, the priority placed on family preservation,

101. *Id.* at 1791-92.

102. *Id.* at 1786.

103. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

emphasizing the importance of child safety, and encouraging state systems to place a higher priority on adoption. More specifically, ASFA limited the time children should spend in foster care and allowed states to bypass family preservation efforts entirely in egregious maltreatment cases so that children could move on more promptly to adoption.¹⁰⁴ ASFA also indicated approval of concurrent planning which puts children removed to foster care on a dual track, planning for both reunification and adoption simultaneously, so that if the decision is made to terminate parental rights, the children can be adopted relatively expeditiously.¹⁰⁵ Ideally, concurrent planning places the children at the time of removal in foster-adopt homes so that if parental rights are terminated the children can stay in the same home while awaiting adoption finalization. Congressional amendments to the federal Child Abuse Prevention and Treatment Act (CAPTA)¹⁰⁶ provided that children identified at birth as drug-affected should be reported to CPS, and CPS should investigate, enabling and encouraging states to intervene at birth to protect some of the children most at risk for maltreatment. Congress amended CAPTA again very recently to provide similar protections for children born with fetal alcohol spectrum disorder, enabling these highly vulnerable children to receive similar protection.¹⁰⁷

ASFA and CAPTA have had some influence in moving state CPS systems in child-friendly directions. ASFA timelines have had an influence in encouraging somewhat prompter action, limiting, at least by some months, the average time spent in foster care. CAPTA has increased the number of drug and alcohol-affected newborns reported to CPS.

104. See 42 U.S.C. § 675(5)(E).

105. *Id.*

106. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq., 42 U.S.C. § 5116 et seq. (1974), *amended by* Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 800 (2003).

107. The CAPTA Reauthorization Act of 2010, Keeping Children and Families Safe Act, Pub. L. No. 111-320 (2010) 108-36, 117 Stat. 800 (2003).

But CPS systems remain overwhelmingly oriented to family preservation. Almost no CPS systems have made use of their freedom to bypass family preservation in egregious cases. Most children in foster care are returned home rather than moved on to adoption. Few of those who do move on to adoption do so without significant delays. Limited use is made of the concurrent planning programs that would reduce the delays and enable children placed in foster-adopt homes to stay in the same home at the time of adoption finalization. And despite CAPTA, most infants born drug- or alcohol-affected still go home from the hospital ICU to live with their parents—parents whose addictions make it almost impossible to nurture these fragile, needy, challenging infants.

At the P&P Workshop, Emily Putnam-Hornstein, Assistant Professor at the University of Southern California, presented work in progress showing that “for those children known to CPS, [there are] high rates of re-reporting and maltreatment recurrence” revealing “widespread system failures to adequately and appropriately respond to child abuse and neglect.”¹⁰⁸ Her study focuses on children reported to CPS in infancy, “the group that stands to benefit the most from efforts that successfully reduce maltreatment recurrence, both because maltreatment that begins during infancy is likely to be quite chronic in duration and because its timing is quite developmentally consequential.”¹⁰⁹ She found that of the California 2006 birth cohort, some 5.3% were referred for maltreatment before their first birthday. *Out of these, 82% remained in the home, and among those kept at home, 56% were referred again before the age of five. Out of those remaining home following substantiation of the initial maltreatment allegation, 58% of those who received no formal services were re-referred, and 65% of those receiving such services were re-referred, by the age of five.*¹¹⁰

108. Putnam-Hornstein, *supra* note 95, at 1.

109. *Id.* at 1-2.

110. *Id.* at 2.

These statistics demonstrate appalling CPS failure. They should, along with other evidence, prompt consideration of radical reform. This should include, for children left at home, more careful CPS monitoring, more meaningful services and treatment, and strict requirements that parents comply with rehabilitation programs at risk of losing their children. It should also include willingness to move a larger percentage of infants out of such homes and into nurturing, adoptive homes before they are irremediably damaged by ongoing maltreatment.

But Putnam-Hornstein's research simply confirms, in dramatic form, basic realities that have long been obvious. Children are paying the price for family preservation and reunification priorities in maltreatment and related current and future suffering. If we wanted to do better by children once identified as victims of maltreatment, we would reduce these traditional priorities. We would intervene more forcefully earlier in children's lives, we would require more parents to engage in more meaningful rehabilitation services, we would remove children from parents who cannot demonstrate promptly that they have solved their problems and have become capable of providing nurturing parenting, we would terminate parental rights earlier and more readily, and use concurrent planning to reduce the likelihood that children adopted will suffer delays in permanency.

If we wanted to do better by children, we would also pay special attention to those born drug- or alcohol-affected. We would have CPS intervene forcefully in all such cases, requiring that parents engage in drug and alcohol treatment programs at risk of losing their children and would remove children and terminate parental rights in all cases where parents cannot demonstrate early and ongoing successful engagement with treatment regimens. We would place virtually all children removed in concurrent planning programs, based on the realistic assessment that only a minority of their parents will be able to demonstrate early success in overcoming addiction and other problems interfering with parental fitness. We would enforce strict

time deadlines so that children could anticipate placement in a permanent nurturing home early in life.¹¹¹

If we wanted to do better by children, we would do more to identify other infants at birth who are at high risk for maltreatment and to trigger CPS investigation and appropriate intervention. Jim Dwyer, Professor of Law at William and Mary, has argued that a child rights approach would require that in extremely high-risk cases we change the at-birth presumption of absolute parental rights and consider whether to move children to adoptive parents based on something short of the extremely heavy burden that CPS must now satisfy to demonstrate parental unfitness.¹¹² He points out that at present we have no systems in place even to notify CPS of most such high-risk cases at birth, which means that children must suffer maltreatment until and unless it is identified before they can hope for any protective intervention.¹¹³ At the workshop he and Rick Barth pointed out that two states—but only two states—had systems for notifying CPS of children born to parents whose parental rights have previously been terminated.¹¹⁴

The changes in policy I propose would of course be expensive. But like universal home visitation programs, if

111. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 207-32 (advocating for intervention to “provide support *and* to demand accountability” for parents, balancing their rights with children’s rights to nurturing parental care).

112. See Dwyer, *supra* note 82, at 811-12; see also DWYER, *RELATIONSHIP RIGHTS*, *supra* note 92, at 93-94.

113. See *id.*

114. Maryland and Michigan were the states identified. See MD. DEP’T OF HUMAN RES., 2009 LEGISLATIVE SUMMARY 1 (2009), *available at* <http://www.dhr.state.md.us/co/pdf/legup0514.pdf> (highlighting the “Birth Match” program, which allows interagency sharing “birth records of parents whose parental rights have been terminated”); MICH. DEP’T OF HUMAN RES., CHILDREN PROTECTIVE SERVICES MANUAL 3 (2011), *available at* <http://www.mfia.state.mi.us/olmweb/ex/PSM/713-9.pdf> (noting Michigan’s own “Birth Match” program, which “is an automated system that notifies the local [Department of Human Services] office when a new child is born to a parent who has previously had parental rights terminated in a child protective proceeding, caused the death of a child due to abuse and/or neglect or has been manually added to the birth match list”).

they would reduce child maltreatment and related ongoing damage to children, they would likely be cost-effective in the long term.¹¹⁵

While some argue that current family preservation oriented policies actually do serve children's interests better than the kinds of changes I propose, we should, at a minimum, be experimenting with different reform directions and doing research designed to honestly assess which types of programs in fact serve children's interests best.

The P&P Workshop revealed some promising developments in coercive child protection policy, both in the administrative and court systems. John Mattingly, former Commissioner of the NYC child welfare system, is working as a Senior Fellow with the influential Annie E. Casey Foundation to improve the capacity of child welfare administrative systems throughout the nation.¹¹⁶ He argued for the need to transform CPS systems so that they give greater weight to children's interests, noting that when he started as commissioner of the NYC system he found that the staff basically felt that their client was the family, which translated as the parent and not the child. He called for a fundamental shift so as to create a balance between parents' rights and children's needs.¹¹⁷

Judge Cindy Lederman spoke about her creation of a model court in Miami-Dade County, Florida, designed to improve the coercive capacity of the court to protect children against ongoing maltreatment and to place a higher priority on child interests.¹¹⁸ She described her groundbreaking work

115. See discussion *supra* at 1346-47; see, e.g., Mary Hansen, *The Value of Adoption*, 10(2) ADOPTION Q. 65, 65-67 (2007) (discussing the cost-effectiveness of adoption out of foster care versus kids aging out of foster care).

116. John Mattingly, Systems Analysis & Other CPS Reform Ideas Presentation, Harvard Law School Prevention and Protection Brainstorming Workshop: Systems Analysis & Other CPS Reform Ideas (May 10-11, 2012).

117. *Id.*

118. Cindy Lederman, Miami-Dade Problem-Solving Court as an Approach to Improving Prevention & Protection, Harvard Law School Prevention and Protection Brainstorming Workshop (May 10-11, 2012); Cindy Lederman, Building Bridges Across the Judiciary, Child Welfare and Child Mental Health:

requiring parent participation in evidence-based programs designed to improve parenting capacity and helping maltreated children access helpful services.¹¹⁹ Presentations on family drug court models in California and Florida revealed efforts to reach the parents of drug-affected newborns to involve them in drug treatment and to abide by ASFA deadlines in drug cases, thus limiting time spent in foster care limbo and expediting permanency for children.¹²⁰

2. *Limitations.* The P&P Workshop provided much evidence, however, that the child welfare field as a whole continues to put primary emphasis on family preservation.

Efforts to improve coercive CPS systems seem dwarfed by ongoing efforts to divert child maltreatment cases from the CPS coercive system to entirely voluntary systems. Marc Cherna, Director of the Allegheny County Department of Human Services, described the widely praised effort he has led there to divert as many child protective cases as possible from the coercive CPS.¹²¹ Reports on his program

The Miami Child Well-Being Model, National Child Welfare Evaluation Summit Presentation: (Aug. 30, 2011), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/23_excerpts-from-mcwbc-safety-outcomest.pdf.

119. *Id.*

120. *See* Boles, Sacramento Early Intervention, *supra* note 43; Cohen, Miami-Dade Family Drug Presentation, *supra* note 43; Sharon Boles et al., Sacramento County Family Related Drug Court Programs Informational Sheet, (Apr. 2012), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/15_sacramento-court-program-informational-sheet.pdf; *see generally* BRIEF REPORT ON DDC DEPENDENTS PLACEMENT AND PERMANENCY, (Jan. 1, 2010–Dec. 31, 2011), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/17_brief-report-on-dds_dependents-placement-and-permanency.pdf; NAT'L COUNCIL OF JUV. AND FAM. COURT JUDGES, DEVELOPMENT OF THE MIAMI-DADE COUNTY DEPENDENCY DRUG COURT (2003), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/19_development-miami_dade-dependency-drug-court.pdf; OJJDP FY 09 FAM. DRUG COURTS PROGRAM, ABSTRACT, MIAMI-DADE DEPENDENCY DRUG COURT EXPANSION AND ENHANCEMENT INITIATIVE (2009), *available at* http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/20_ojjdp-fy-09-family-drug-courts-prog_abstract.pdf.

121. Marc Cherna, Allegheny Cnty. Dep't. of Human Servs.: Incorporating CPS in a Program Emphasizing Extensive Family Support Services,

show that it makes extensive use of Family Group Decision Making and Differential Response strategies, and prides itself on keeping as many children as possible at home. CPS workers are trained to focus all efforts on family preservation, and to treat adoption as a “failure.”¹²²

Cherna’s program literature advertises its success by pointing primarily to its success in achieving its family preservation goals—a 24%-34% reduction in foster care placements, 79% reunification rate, and 62% kinship care placement rate, along with reductions in the length of out-of-home stay, and in reentry into foster care.¹²³ It points to only very limited evidence that these policies serve child interests, citing the absence of child deaths in the target area during a three-year period.¹²⁴ But, any genuine effort to assess the benefits of his program as compared to other programs from a child-friendly perspective would look at broad indicators of child well-being and compare how children do when kept at home to how they do when removed to foster care and moved on to adoption.

Rob Geen, a senior program director at the Annie E. Casey Foundation,¹²⁵ presented work on kinship care that, for me, raised serious questions about the degree to which

Presentation at Harvard Law School Prevention and Protection Brainstorming Workshop (May 11, 2012); see also AN EFFECTIVE CHILD WELFARE SYSTEM AND EVIDENCE-BASED PRACTICE FOR THE CHILD WELFARE SYSTEM, NAT’L FAM. PRESS NETWORK 1 (2006), available at http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/pp-materials/24_effective-child-welfare_system.pdf (arguing that to be effective, a child welfare agency must “excel at strengthening families and avoid unnecessary out of home placements”); BARRON, *supra* note 23, at 1 (discussing performance outcome improvements of the Allegheny DHS under the direction of Marc Cherna).

122. Cherna, *supra* note 121; see also AN EFFECTIVE CHILD WELFARE SYSTEM, *supra* note 121, at 2, 7.

123. AN EFFECTIVE CHILD WELFARE SYSTEM, *supra* note 121, at 1.

124. *Id.*; BARRON, *supra* note 23, at 15.

125. Rob Geen serves as the Director of Family Services and Systems Policy for the Research and Communications Group of the Annie E. Casey Foundation. *Annie E. Casey Foundation Management Committee*, ANNIE E. CASEY FOUND., <http://www.aecf.org/AboutUs/LeadrsHpMgmtTrustees/ManagementCommittee.aspx> (last visited Sept. 15, 2012).

current policies serve children's interests. He later submitted the related written report published by the Foundation shortly after the workshop, referred to here as the *Casey Report*.¹²⁶

Placing maltreated children in kinship care has been an increasing priority of the child welfare system, primarily because of the assumption that if children can't be kept with their original parents, they will do better with those parents' kin, in part because this increases the chances they can maintain relationships with their parents and eventually be returned home. Kinship care fits with family preservation values.

But it has never been clear that placing a high priority on kinship placement serves children's interests, and there are powerful reasons to question whether it does. Child maltreatment is very often an intergenerational problem, so grandparents and other relatives are a risky population to look to for parenting. Kinship care providers are quite low on the socioeconomic scale and are generally much older than the parenting norm, often suffering related physical limits. There is no research to date that can really tell us whether the level of kinship preference currently at work serves or disserves children's interests.¹²⁷

The *Casey Report* on kinship care makes the importance of addressing this issue even clearer than it has been previously. The report shows that kinship foster care now represents a significant percentage of all foster care—roughly one-fourth nationwide.¹²⁸ It shows that many of these kinship foster parents are unlicensed.¹²⁹ And it shows that many kinship foster parents have seriously limited

126. ANNIE E. CASEY FOUND., STEPPING UP FOR KIDS: WHAT GOVERNMENT AND COMMUNITIES SHOULD DO TO SUPPORT KINSHIP FAMILIES (2012) [hereinafter CASEY REPORT], available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/pp-workshop/ppworkshopmaterials.html>.

127. See BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 145-46; *id.* at 90-93. But see CASEY REPORT, *supra* note 126.

128. CASEY REPORT, *supra* note 126, at 3.

129. *Id.* at 9.

finances.¹³⁰ None of this is new, but the report's details highlight the importance of addressing questions as to kinship foster parents' capacity.

The *Casey Report* provides stunning evidence of the degree to which kinship care functions as a form of diversion from the coercive CPS system. Some 400,000 children referred to CPS for child maltreatment are diverted to informal kinship care,¹³¹ a figure almost as high as the total number of children in formal foster care. The report says that typically there is no effort to assess what happens to children in these "Kinship Diversion" families.¹³² Surely a child-friendly system would question such a massive diversion program and insist at a minimum on research assessing how children do in such informal, uncompensated, and unsupervised kinship care as compared to formal foster care.

More broadly, a child-friendly system would insist on research comparing formal and informal kinship foster care to how children would do if kin were more strongly encouraged to adopt, or if children were placed in stranger foster care and moved relatively promptly to permanent adoptive homes.

But neither Geen's presentation nor the *Casey Report* raised any serious questions about the current emphasis on kinship placement. The *Casey Report's* only call for research on Kinship Diversion is for studies tracking such families to see if they are "safe and stable."¹³³ It calls for only the kinds of program reforms that would encourage kinship care, such as financial support for families, including for unlicensed and informal kinship care families and removal of barriers to licensing kin providers.¹³⁴

Family drug treatment courts began with a dual promise. First, they would provide drug-abusing parents

130. *Id.* at 5-7.

131. *Id.* at 2.

132. *Id.* at 9.

133. *Id.* at 12.

134. *Id.* at 9, 12.

priority access to treatment and other support enabling them to achieve rehabilitation and keep their children. Second, they would provide children the nurturing parenting they require to grow up healthy by moving children on to foster and adoptive parents if their biological parents were unable to achieve rehabilitation in a reasonable period of time—reasonable from the child's perspective.¹³⁵

But over the years family drug courts have increasingly emphasized the promise to parents and ignored the promise to children. They have focused primarily on rehabilitation with the goal of promoting family preservation, and when, as is predictable given the difficulties of treating addiction, parents continue to abuse drugs and alcohol, children have often been left in homes where substance abuse continues to limit parenting capacity, or if removed have often languished in foster care for years.¹³⁶

Also, while increasing numbers of infants have been reported to CPS over the years, thanks in part to the CAPTA amendments noted above, testing of newborns and related reporting is by no means universal—it is still concentrated in the poorer public hospitals. And even when reports are made and CPS investigates, meaningful intervention—removing children and/or imposing requirements that parents engage successfully in drug treatment at risk of losing their children permanently—is usually limited to cases in which there is significant evidence beyond substance abuse during pregnancy demonstrating parental unfitness.

We chose the family drug court programs described at the workshop based on evidence that they were among the most successful in the country at reaching newborns and at enforcing meaningful deadlines limiting the time that

135. See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1, at 207-09, 221-25.

136. See Joseph P. Ryan & Hui Huang, *Substance Abuse and Child Welfare*, in *CHILD WELFARE FOR THE 21ST CENTURY, A HANDBOOK OF POLICIES, PRACTICES AND PROGRAMS 19-20* (Mallon and Hess eds., 2d ed., Columbia Univ. Press, forthcoming); Joseph P. Ryan, et al., *Integrating Substance Abuse Treatment and Child Welfare Services: Findings from the Illinois Alcohol and Other Drug Abuse Waiver Demonstration*, 30(2) *SOC. WORK RES.* 95, 95, 96, 104 (2006).

children would wait for parental rehabilitation. But even these programs demonstrate a powerful commitment to family preservation as the dominant value. The Sacramento Early Intervention Program, created to deal with drug-affected newborns, is designed to keep these infants at home “whenever possible” while working to get their parents off drugs.¹³⁷ Program research claims success largely in terms of achieving the family preservation goal. Statistics are proudly cited showing that the program keeps more children at home than in the control sample.¹³⁸ But it may well be that the children removed to foster care in the absence of the program are better off. And children would likely be even better off in what I would consider a model program—one that used concurrent planning, and set meaningful deadlines for parental rehabilitation, terminating parent rights if parents failed to meet them so that children could move forward with adoption. However no effort is made by the Sacramento program or those responsible for research on the program to compare how children kept at home pursuant to this program do as compared to how they would do if removed.¹³⁹ Similarly, the Sacramento Program for older children—those identified as victims of post-birth maltreatment—defines its goals and its success largely in terms of how many children it reunifies.¹⁴⁰ The research fails to reveal if those reunified do better than those in the control sample who as a group moved on to adoption and other permanency at higher rates.¹⁴¹

The Miami-Dade drug court literature described its goals as including children’s interests in timely nurturing permanency.¹⁴² But its research also describes program success largely in terms of success in achieving family

137. Boles et al., Informational Sheet, *supra* note 120, at 5.

138. *See id.* at 6.

139. *See id.*

140. *Id.*

141. *See id.* at 3-5.

142. *See* BRIEF REPORT, *supra* note 120; OJJDP FY 09, *supra* note 120; Cohen, *supra* note 43.

preservation and reunification.¹⁴³ Judge Jeri Cohen, the court's driving force, similarly emphasized success in achieving these goals in her presentation. When questioned about the absence of evidence that family preservation and reunification works better for these children, she noted that judges must work within the law, and that the law forbids consideration of whether children would do better if removed. Current state law, she said, insists that children be kept at home so long as the parents can be gotten to a level where they provide a minimum of nurturing, love, parenting, and sobriety. Cohen is right about the bias of current law. But recent legal developments, such as ASFA and CAPTA, provide some leeway and, indeed, some encouragement, for states to reshape their law in more child-friendly directions.

CONCLUSION

If we placed as high a value on child rights as on adult rights, it seems clear we would change our child welfare policy. We would find the high rates of maltreatment and high recurrence rates when maltreated children are kept at or returned home, unacceptable.

The risks that we regularly subject children to would not be considered acceptable for adults. We systematically require maltreated children to stay at home when we can predict that one-third to one-half or more of them will be revictimized. We would not try to coerce or even advise adult victims of domestic violence to stay home at similar risk. We systematically send infants born drug-affected home to the parents who continue to abuse drugs. We would not counsel adults to marry partners who are addicted to drugs and have already done them harm equivalent to the harm suffered prenatally by these infants.

If we genuinely wanted to know how our current policies and various proposed reforms affected children, we would also design research so that it illuminated this issue. We would try to compare how children do when kept at home, or returned home, as compared to how they would do

143. See BRIEF REPORT, *supra* note 120; OJJDP FY 09, *supra* note 120; Cohen, *supra* note 43.

if moved on to adoption early in life. Instead, most research today is designed simply to validate policy directions chosen on the basis of parental autonomy ideology. Research generally looks only at the narrowest questions: Do programs designed to keep children at home succeed in doing so? Are children kept at home with services safer than those kept at home without services? Are children kept at home with services as well off as those kept in foster limbo, bounced around from one foster home to another, and in and out of the original home?

At the workshop some noted the difficulty of structuring research to compare how well family preservation works for children, given that we can't ethically experiment with children in the interest of designing "gold-standard" social science, by randomly choosing some to keep at home, some to move to foster care, and some to move on to adoption. But the challenge of designing social science studies in the child welfare area provides no excuse for limiting our programs and our research in ways that simply provide justification for programs that put children at obvious risk. Researchers determined to do the best they could to honestly assess whether children would fare better if family preservation priorities were reduced could devise research that would illuminate the issue.¹⁴⁴

Researchers may feel limited by the law surrounding child welfare. As noted at the opening of this Article,

144. For an example of enterprising social science design see Charles H. Zeanah et al., Ethical Considerations In International Research Collaboration: The Bucharest Early Intervention Project 8 (unpublished manuscript), available at <http://www.law.harvard.edu/programs/about/cap/assignments/packet7.pdf>. Designed in connection with the Budapest Early Intervention Project, this research is the first gold standard social science assessing the damage done by institutional care, comparing children kept in institutions to those removed to model foster care; see also Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (describing research comparing child outcomes in different investigator caseloads where the investigators had different philosophies regarding whether to remove children in marginal cases); Mogens N. Christoffersen, *A Study of Adopted Children, Their Environment, and Development: A Systematic Review*, 15 ADOPTION Q., 220 (2012) (comparing development of adopted children with those kept in orphanages and foster homes, noting the general absence of such research helping illuminate the difference that adoption makes).

constitutional and statutory law protect parental autonomy, limit child rights, prioritize family preservation, and limit states' ability to protect children.¹⁴⁵

But child welfare policy-makers have generally promoted family preservation in ways that go far beyond the requirements of law. The reform movements discussed above—Family Group Decision Making, Intensive Family Preservation Services, Differential Response, and Racial Disproportionality—were not required by law but were instead initiated by child welfare policy-makers.

And law is not fixed in stone. The United States had no laws protecting children against child maltreatment until the latter half of the nineteenth century. We had no reporting system for maltreatment until the latter half of the twentieth century.¹⁴⁶ The Federal Constitution has no language specifically recognizing parent or child rights. Parental rights were found by the U.S. Supreme Court in vague Fourteenth Amendment “due process” language only in the early twentieth century.¹⁴⁷ The Court could decide one day to find child rights to nurturance and protection in that or some other place in the Constitution. It could decide to limit constitutional protection for parental rights, giving states more freedom to protect children, as indeed appears to some degree to have been happening.¹⁴⁸ The United

145. See Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 83-94 (2011), available at <http://ann.sagepub.com/content/633/1/80.full.pdf+html> (discussing constitutional and statutory law relating to children's rights and parental autonomy, and how such law would be affected by United States's ratification of the Convention of the Rights of the Child).

146. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 284-86 (4th ed. 2010).

147. Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923).

148. David D. Meyer, Gonzales v. Carhart *and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 90-92 (2009); see David Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 530-31 (2000) (arguing that past Supreme Court cases have begun to articulate a reasonableness standard that may result in a more “comprehensible and flexible regime of constitutional limitations”); David Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1127, 1133 (2001) (discussing the Supreme Court's shift from considering abortion a “fundamental” right, to a more recent “qualified” status).

States could decide to ratify the Convention on the Rights of the Child, as every other nation in the world but Somalia has done. This Convention gives children full human rights status, equivalent to adults, and ratification would push the United States in the direction of fuller recognition of child rights to nurturance and protection.¹⁴⁹ Our statutory law, federal and state, has changed in recent decades in a significantly more child-friendly direction. Congress has enacted ASFA and important CAPTA amendments, as discussed above. It has eliminated what were very significant racial barriers to the adoption of children out of foster care.¹⁵⁰ State and local jurisdictions have developed laws and policies limiting family preservation excesses and promoting timely adoption placements.¹⁵¹

Law changes in response to felt needs and new learning. Child welfare policy-makers and researchers have the responsibility to educate the courts and legislatures about children's needs for nurturing and protection in ways that will help shape the law of the future.

I recognize that children's rights and interests should not necessarily be *determinative*. There are other values that are important. Adult rights should count for something. Impoverished community rights should count for something. Family preservation policies may serve to channel more resources into poor families and communities. Those promoting family preservation may think that these resources are essential and will serve children's interests in the long run, enabling more families to raise children free from the strains that produce maltreatment.

But children's rights and interests should count for *something*. If they are to be sacrificed in favor of other values, we should have honest research that illuminates just how extreme the sacrifice is. We should have research

149. See Bartholet, *Ratification by the United States*, *supra* note 145, at 85.

150. Multiethnic Placement Act of 1994, Pub. L. No 103-382, 551-54, 108-Stat. 3518, 4056-57 (1994) (codified at 42 U.S.C. § 5115a (1996), amended by US H.R. 3448, Small Business Job Protection Act of 1996, 1808 Removal of Barriers to Interethnic Adoption (1996)).

151. BARTHOLET, NOBODY'S CHILDREN, *supra* note 1, at 189-92.

that illuminates, to the extent possible, the nature of the trade-off—what it is various groups are arguably gaining as compared to what children are losing. My instinct has long been that the gains are not that great. Family preservation support services will never be sufficient to truly empower poor families and communities. We need radical social change for that kind of empowerment. In the meantime, condemning children to suffer maltreatment is likely simply to exacerbate social injustice, creating ongoing generations of victimized children.