1999

"WHY WON'T MOM COOPERATE?": A CRITIQUE OF INFORMALITY IN CHILD WELFARE PROCEEDINGS

Amy Sinden
“WHY WON’T MOM COOPERATE?”:
A CRITIQUE OF INFORMALITY
IN CHILD WELFARE PROCEEDINGS

Amy Sinden†

INTRODUCTION

Reams of paper have been filled with the ruminations of countless judges and legal scholars on the subject of criminal procedure. It is the central concern of four of the ten constitutional amendments that make up the Bill of Rights. It is a major course offered at every law school. And it is the paradigmatic context in

† Senior Attorney, PennFuture, Philadelphia, PA. B.A. 1984 Swarthmore College, J.D. 1991 University of Pennsylvania Law School. I would like to thank Ed Baker, Susan Sturm, Lani Guinier, Barbara Woodhouse, Seth Kreimer, Julie Shapiro, Carol Sanger, Sarah Gordon, Martha Minow, Peggy Cooper Davis, Cathy Miller-Wilson, Peter Schneider, and Yuki Ishizuka for their helpful comments and support. Most of all, I thank Marian Nowell, whose passion in defending those unjustly entangled in the child welfare system originally inspired me and so many others. Finally, I dedicate this article to the memory of Jim Lafferty, who devoted the last four years of his life to defending parents in the Philadelphia child welfare system. The depth of Jim’s caring, kindness, and commitment to those whom others had written off was extraordinary and immeasurable.

Copyright © 1999 by the Yale Journal of Law and Feminism
which we frame much of our debate about the relationship between the state and the individual in a democratic society.

But there is another system that exists in every county across the country, in which the state hauls private citizens into court against their will, accuses them of acts that trigger severe social reprobation, and threatens them with a deprivation of liberty that, for many people, strikes at the very core of their identity and threatens to remove the most profound source of purpose, fulfillment, and happiness from their lives. This is the child welfare system. Yet despite the indisputable importance of the interests at stake, judges and scholars have devoted relatively little attention to the procedures employed by the courts that decide whether to remove children from their homes when their parents are accused of abuse or neglect.¹

The Constitution, of course, guarantees procedural rights to more than just criminal defendants. It accords a right of "due process of law" to all those whom the government deprives of life, liberty, or property. The procedural due process ideal embodied in this constitutional phrase encompasses two fundamental goals: first, to promote accurate decision-making, and second, to provide the "opportunity to be heard." In child welfare cases, both of these goals are particularly compelling. When the courts make inaccurate decisions the results can be tragic. Inaccuracy in one direction may result in a child suffering serious injury in her home. Inaccuracy in the other direction may result in a child being wrenched from a healthy and loving family. Additionally, the gravity of the charge—there is perhaps no more socially abhorrent act than the mistreatment of one's children—demands that courts give the accused ample opportunity to be heard in defense of her reputation and dignity. In this Article I will examine the procedures employed in child welfare cases and consider the extent to which such procedures achieve these two goals.

I draw on feminist theory to inform my analysis for two reasons. First, the vast majority of the parents caught up in the child welfare system are women.² Second, the liberty interest at stake—the relationship with one's child—is central to female identity, at least as it has been culturally constructed.³ Surprisingly, despite the enormous number of women acutely affected by the child welfare

¹. My focus here is solely on civil, not criminal, child abuse and neglect proceedings. The name for these proceedings varies from state to state, but I will use the term "dependency" to refer to those cases in which temporary removal of children from their families is threatened, "termination" to refer to those cases where the state seeks to permanently sever a parent's relationship with her child, and "child welfare" to refer to both types of proceedings.

². This is inevitable in light of the facts that women remain the primary caretakers of children in our culture and that single mothers are so prevalent. In the poor communities most affected by the child welfare system. Statistics maintained by the Philadelphia Juvenile Court on active dependency cases in 1997, for example, show that there were 4,975 cases involving mothers and only 1,694 cases involving fathers. See PHILADELPHIA JUVENILE COURT, ACTIVE DEPENDENT CASE APPOINTMENTS FOR PARENTS AND GUARDIANS (June 8, 1997) (on file with the Yale Journal of Law and Feminism). There may be overlap between these two numbers (i.e., cases involving both a mother and a father), but clearly most cases involve a mother and no father.

Increasing Formality in Child Welfare Proceedings 341

system, feminist legal scholarship on the subject is virtually non-existent. I suspect this is due, at least in part, to the fact that the child welfare system does not fit neatly within the established framework of feminist thought.

Feminist discussions of child abuse almost always lump it together with the abuse of women by husbands and boyfriends under the rubric of “domestic violence.” With battered women as their paradigm, feminists have aligned themselves with women and children as the victims of domestic violence, and against the male perpetrators. Based on this model of the heterosexual, two-parent, nuclear family, feminists have fought—with a great deal of success—against the traditional liberal notion of the family as a closed private unit, immune from public scrutiny or state intervention, viewing that notion as a mechanism that has served to perpetuate the power of male heads of household over women and children. Rejecting the traditional liberal focus on protecting the individual against intrusion by the state, feminists have instead viewed the state as an ally, seeking state intervention into the family to regulate violence in the private sphere.

Due in part to the efforts of feminists, every state now has an extensive legal and bureaucratic child welfare system designed to protect children from abuse.

4. The existing literature mostly focuses on “bad mothers” and either explains their behavior as a rebellion against the patriarchy or excuses it based on the mother’s brutalization at the hands of an abusive man. See, e.g., Marie Ashe, Postmodernism, Legal Ethics, and Representation of “Bad Mother” in MOTHERS IN LAW 142 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Marie Ashe & Naomi Cahn, Child Abuse: A Problem for Feminist Theory, 2 TEX. J. WOMEN & L. 75 (1993); Linda J. Panko, Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children From Their Male Partner’s Abuse, 6 HASTINGS WOMEN’S L.J. 67 (1995); Tonya Plank, How Would the Criminal Law Treat Sethe?: Reflections on Patriarchy, Child Abuse, and the Uses of Narrative to Re-Imagine Motherhood, 12 WIS. WOMEN’S L.J. 83 (1997); Dorothy E. Roberts, Motherhood and Crime 79 IOWA L. REV. 95 (1993). The dearth of feminist literature on the child welfare system is especially glaring in light of the vast feminist literature on battered women.


7. See supra note 5. Linda Gordon argues that the original nineteenth century movement against child abuse was an attack on patriarchal power—even though then, as now, single mothers were over-represented in child neglect cases. See Linda Gordon, Child Abuse, Gender, and the Myth of Family Independence: Thoughts on the History of Family Violence and its Social Control 1880-1920, 12 N.Y.U. REV. L. & SOC. CHANGE 523, 524, 527 (1983-84).

8. See Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973, 973-94 (1991). This traditional notion of family privacy has its roots in the separate spheres ideology of the nineteenth century, under which women and children were viewed as properly confined to the domestic sphere of family life, while the public sphere of politics, business and government was the domain of men. Many feminists view this strict public/private dichotomy as a primary element of women’s oppression, and thus see dismantling this distinction as necessary not only to open private family violence to public scrutiny but also to liberate women economically. See, e.g., Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COL. L. REV. 1118, 1165 (1986). Dorothy Roberts, however, has pointed out that this analysis does not apply to African-American women, who have never been confined to the private sphere but have always been in the work force. While many white women have viewed work outside the home as a liberation from motherhood, African-American women have viewed the family as a refuge from an oppressive work environment. See Roberts, supra note 4, at 130; see also Schneider, supra at 994-99 (exploring ways in which privacy can be both affirming and oppressive to women).
and neglect at the hands of their parents. The irony, of course, is that the vast majority of the families subjected to government scrutiny and control under this system are not traditional male-headed nuclear families, but single mothers and their children. Because the child welfare system affects almost exclusively poor and minority communities, however, it is outside the personal experience of most feminist theorists. This may also explain, in part, the extent to which feminists have viewed the issue of child abuse from the top down—suffering to the temptation to fit it into the existing theoretical paradigm that has developed around the issue of domestic violence, rather than looking up from the bottom—grounding theory in the experiences of those women whose lives are directly affected by the child welfare system.

Paradoxically, a feminist analysis of the procedures employed in child welfare cases appears to point in two diametrically opposite directions. On one hand, a feminist critique of the value system that ranks autonomy over connection and the public over the domestic sphere supports the argument that the loss of the care and companionship of one's child constitutes as grievous a deprivation of liberty as imprisonment. Under standard due process principles, this leads to the conclusion that a high level of procedural protection and formality is appropriate in these proceedings.

On the other hand, the same strand of feminism that offers this critique of values has also questioned the assumption embedded in our due process jurisprudence that formal methods of dispute resolution are superior to informal ones and that disputes involving more important interests therefore warrant more formal procedures. Some feminists reject formal adversarial processes as reflective of a one-sided male norm and promote instead a "female" mode of problem solving that emphasizes cooperation, relationships, and mediation.

Many in the child welfare system embrace this notion of a kinder, gentler, female mode of dispute resolution with particular enthusiasm because they view these disputes as centering on "women's issues" of children, family, and emotions.

This conflict illustrates both the power and the danger of the feminist critique of values and the importance of remaining vigilant to the feminist commitment to grounding theory and generalization in concrete experience and particularized context. We can dislodge this theoretical logjam only by carefully examining the

10. See supra note 2.
11. See infra note 59.
12. See Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1471 (1991) ("The primary concern for white middle-class women with regard to child custody is private custody battles with their husbands following the termination of a marriage. But for women of color, the dominant threat is termination of parental rights by the state.").
13. See Katherine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 849 (1990) (arguing that feminism was born out of the consciousness-raising method which "starts with personal and concrete experience, integrates this experience into theory, and then in effect, reshapes theory based on experience and experience based on theory.").
14. See infra notes 160-63 and accompanying text.
practical implications of de-formalization in child welfare cases in light of a thorough understanding of the particular incentives and power dynamics influencing individual behavior in these proceedings. This closely grounded look reveals that de-formalization of these proceedings is actually antithetical to feminism's paramount concern with equalizing power imbalances and undermines the goals of due process by disempowering mothers, generating false agreements, and increasing the risk of inaccurate fact-finding.

This Article proceeds in three parts. Part I provides an overview of the existing system. First, it describes the statutory and constitutional standards governing procedure in child welfare cases. It then describes the pressures toward further de-formalization that come from both within and outside the system. Part II examines how courts analyze the procedural due process issues raised in child welfare proceedings. Part IIA critiques the assumption, evident in much of the case law, that the deprivation of liberty caused by the forcible separation of parent and child is less grievous than the deprivation of liberty caused by imprisonment in a criminal case. Part IIB examines how altering that assumption to treat the deprivation of liberty at stake in a child welfare case as equivalent to that in a criminal case would affect the overall due process calculus in these cases. Part III then questions the assumption, implicit in the traditional due process framework, that formal procedure is better than informal procedure and that stronger interests demand more formal procedures. Looking contextually at how formality and informality play out amidst the peculiar power dynamics and incentive structures of the child welfare system, I conclude that, in most instances, formality better serves the outcome and process goals of the procedural due process ideal.

I. THE EXISTING SYSTEM: INTERMEDIATE DUE PROCESS PROTECTION AND THE PRESSURE FOR FURTHER DE-FORMALIZATION

We can envision various types of adjudicative proceedings on a scale from less to more formality. Informal processes that provide relatively few procedural safeguards and protections occupy one end of the scale. The criminal system, with its elaborate set of formal rules and procedures, occupies the other end of the scale. As a matter of constitutional and statutory law, courts and legislatures generally have located child welfare cases at an intermediate point on this scale.15

From outside this statutory and constitutional scheme, there is significant pressure to further de-formalize these proceedings.16 That pressure comes from two sources. First, a subtle dynamic arises on a day-to-day level in these cases,

---

15. See infra Part IIA.
16. Some scholars have observed a general trend in this direction in other areas as well. See, e.g., Judith Resnik, Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century, 41 U.C.L.A. L. Rev. 1471, 1529 (1994) (noting trend in federal courts away from adjudication of disputes and toward resolution through settlement or ADR).
due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist. Second, an explicit movement among some commentators and reformers is currently promoting the adoption of informal, non-adversarial alternative dispute resolution mechanisms in child welfare cases. Before describing these pressures toward de-formalization, I will provide a brief overview of the stages of a child welfare case and the governing substantive and procedural standards.

A. The Anatomy of a Child Welfare Case

At the core of the child welfare system are the state-administered child welfare agencies charged with protecting children from abuse and neglect.17 These state agencies typically employ hundreds of social workers to investigate reports of suspected child abuse and neglect and work with families when such reports are substantiated. These agency social workers usually serve as case managers, contracting with other private non-profit agencies to provide particular services, such as intensive social work or foster care.18

The typical case proceeds as follows. First, a hotline administered by the child welfare agency receives an anonymous report of suspected child abuse or neglect.19 The agency then assigns a social worker to investigate the report. The social worker begins by knocking on the family's door and attempting to interview the parent and other adults that live in the household, as well as the child who is the subject of the report.20 If the child attends school, the social worker may go to the school to interview her. Depending on the nature of the allegations, the social worker may also talk to school personnel, medical providers, neighbors, or others who may have relevant information.

Based on her investigation, the social worker then makes one of several decisions. She may determine that the alleged abuse or neglect did not occur and close the case.21 Or she may determine that it did occur but did not sufficiently endanger the child to warrant removing the child from the home. In that case she will usually seek to have the family placed under agency supervision to provide those social services she thinks will help to alleviate the problem she has identified. Or, if she determines that some one in the home has perpetrated abuse or neglect sufficient to endanger the safety of the child, she may seek to have the

child removed from the family and placed in foster care.\textsuperscript{22}

Under any of these scenarios, the social worker can seek court intervention at various stages of the case if the parent does not accede voluntarily to the social worker’s plan. If, when the social worker first knocks on the family’s door, the parent refuses to let her in, refuses to talk to her, or refuses to allow her to talk privately with the child, the social worker may ask the agency’s attorneys to file a petition seeking a court order compelling the parent to cooperate with the investigation. If the social worker completes her investigation and determines that the family needs agency supervision and services but the parent refuses to submit to supervision or cooperate with the provision of services, the social worker may ask the agency’s attorneys to file a petition seeking court-ordered supervision of the family.\textsuperscript{23}

Finally, if the social worker concludes that the situation warrants the removal of the child from her parents, the social worker will try to accomplish this in one of two ways. First, she will try to convince the parent to sign a voluntary placement agreement.\textsuperscript{24} Such an agreement will typically authorize the state to keep the child in foster care for some specified amount of time (30 days to six months), at the expiration of which a court hearing will be scheduled to determine whether the placement should continue.\textsuperscript{25} Second, if the parent refuses to consent to placement, the social worker will seek to have the agency’s attorneys petition the court to remove the child.

Child welfare agencies often remove children from their homes on an emergency basis. All states authorize social workers (or in some instances police) to immediately remove children from their homes where they are deemed to be in imminent danger.\textsuperscript{26} In some states the social worker must first obtain an ex parte order from a judicial officer, and in others the social worker acts independently in making the initial removal decision.\textsuperscript{27} In either case, the court

\textsuperscript{22} In some instances, where the perpetrator is not the primary caretaker of the child, the social worker may attempt to remove the perpetrator from the home instead of the child, either by agreement or by court order. In many such instances, however, the social worker is unwilling to take that approach to protecting the child because the non-caretaker perpetrator is romantically involved with the caretaker (usually the mother) and the social worker does not trust the caretaker to keep the perpetrator out of the home.

\textsuperscript{23} \textit{See}, e.g., N.Y. SOC. SERV. LAW \textsection 424(10), (11) (1992); 23 PA. CONS. STAT. ANN. \textsection 6370 (1997).

\textsuperscript{24} \textit{See}, e.g., N.Y. SOC. SERV. LAW \textsection 358-a, 384-a (1992); 55 PA. CODE \textsection 3130.65 (1999). A surprisingly large percentage of foster care placements begin in this way. In some states, over 50\% of the children in foster care were placed there through voluntary placement agreements. \textit{See} \textsc{Richard Wexler}, \textsc{Wounded Innocents: The Real Victims of the War Against Child Abuse} 119 (1990). Especially since parents almost never have the benefit of legal counsel when signing these agreements, the practice raises substantial questions about coercion by agency social workers. \textit{See infra} note 194 and accompanying text.

\textsuperscript{25} Under the Adoption Assistance and Child Welfare Act of 1980, states lose federal foster care payments if a child remains in foster care under a voluntary placement agreement for more than six months without a judicial determination. \textit{See} 42 U.S.C. \textsection 672(e) (1994).

\textsuperscript{26} \textit{See}, e.g., N.Y. SOC. SERV. LAW \textsection 417(l)(a) (1992) (social worker authorized to take child into custody if reasonable cause to believe child in “imminent danger”); VT. STAT. ANN. tit. 33, \textsection 5510 (1991) (law enforcement officer authorized to take child into custody when reasonable grounds to believe child in immediate danger). Some states require a lesser standard than imminent danger. \textit{See}, e.g., OKLA. STAT. ANN. tit. 10, \textsection 7003-2.1 (1998) (authorizing peace officer or employee of court to take child into custody without court order “if the child’s surroundings are such as to endanger the welfare of the child”).

\textsuperscript{27} \textit{See}, e.g., MONT. CODE ANN. \textsection 41-3-301(1) (1997) (emergency removal by social worker permitted
holds a preliminary hearing at which the parents are entitled to appear (often called a “detention” hearing) within a proscribed period of time, generally ranging from three days to six days, but sometimes as long as two weeks. At this hearing, the court addresses only the limited issue whether the evidence warrants holding the child in foster care until a full hearing can be held.

Once in court, and following any preliminary hearing on emergency removal, cases usually proceed in two phases. At the first phase, in some states termed the “adjudicatory” hearing, the court determines whether the allegations of abuse or neglect rise to a level warranting state interference with the parent-child relationship and, if so, whether they are true. If the court finds that the state has made a sufficient showing on these issues, it makes a finding to that effect, in some jurisdictions termed an “adjudication of dependency.” If the court makes such a finding, it then moves on to the second phase, usually termed the “dispositional” hearing. At this hearing the court determines where the child should be placed. Choices may include leaving the child in the home with agency supervision and provision of services, placement in foster care, or placement with a relative or friend.

It is important to note that, while these proceedings involve the custody of children, their substantive standards differ fundamentally from those that govern custody disputes between parents. In the latter case, the dispute is between private parties, each of whom stands in the same legal relationship to the child, and the governing substantive standard is the “best interests of the child.” A dependency case, in contrast, pits parent against state. This raises the specter of state interference with the fundamental civil rights of private citizens. In this

without court order where child in immediate or apparent danger of harm); Conn. Gen. Stat. Ann. § 17a-101(g)(c), (d) (West 1998) (social worker authorized to remove child in immediate danger without court order); Tex. Fam. Code Ann. § 262.101(1) (West Supp. 1998) (agency may request permission from court to take possession of child in emergency by showing, through affidavit, that child faces immediate danger to physical health or safety, or that child has been the victim of neglect or sexual abuse, and that continuation of child in the home is contrary to her welfare).

28. See, e.g., 42 Pa. Cons. Stat. Ann. § 6332(a) (West Supp. 1999) (informal hearing must be held within 72 hours of removal); Wash. Rev. Code § 13.34.060(1) (1998) (hearing must be held within 72 hours, excluding Saturdays, Sundays, and holidays), Tex. Fam. Code § 262.103 (child may be held for up to 14 days without hearing) (West 1996). Note that if Saturdays, Sundays, and holidays are excluded from the 72-hour period, only parents whose children are taken on a Monday or a Tuesday have a right to a hearing in less than five days, and where holidays intervene, the period may be six days.


context, courts reject a best-interests-of-the-child standard because it would allow the state to interfere in private family functioning simply because the parents were not providing the best possible care.\textsuperscript{33} Especially in light of the indeterminacy of the best interests standard and its vulnerability to distortion by cultural and class bias,\textsuperscript{34} such a standard would clash irreconcilably with our political system’s commitment to individual freedom.\textsuperscript{35}

For these reasons the state must meet a higher standard to interfere in family functioning. At the adjudicatory phase, the state must show parental unfitness by proving acts or omissions on the part of the parent that bring the child within the statutory definition of a “dependent” child or a “child in need of assistance.”\textsuperscript{36} Even at the dispositional stage, after the court has already made a finding of parental unfitness, some states require a stronger showing than the best interests of the child in order to remove a child from her parents.\textsuperscript{37}

Following a dispositional hearing, the court reviews the case periodically, often every six months.\textsuperscript{38} Except in certain exceptional cases of severe abuse,
once a child is placed outside the home, state agencies must make "reasonable efforts" to reunify children with their families in order to receive federal funding for foster care. Accordingly, when a child welfare agency first removes a child, the agency social worker meets with the parent and draws up a plan for reunification of the family. This plan specifies steps the parent needs to take and services the agency needs to provide to meet that goal. Tasks identified for the parent may include completing a parenting course or a program of mental health or drug treatment, or finding a suitable place to live. Services to be provided by the agency may include referrals to or payments for drug or mental health treatment or logistical or financial help finding housing.

If reunification does not occur within a certain period of time, the agency may try to have the child adopted. This requires the agency's lawyers to first petition the court for an order terminating the natural parent's rights. To obtain such an order, the agency must generally prove in court that the parent is unable or unwilling to care for the child presently and in the foreseeable future. With the passage of the Adoption and Safe Families Act of 1997, the pressures on agencies to move quickly toward termination of parental rights once removal has occurred have increased substantially. Under the Act, the agency must file a petition for termination twelve months after placement in most instances. Where the court finds "aggravated circumstances," the agency must move for termination in just 30 days.

State statutes and case law interpreting constitutional due process protections direct trial courts to conduct dependency and termination proceedings at an intermediate level of formality. These proceedings therefore include most of the standard trappings of the traditional adversarial model of dispute resolution. The state must set forth its allegations in a petition and serve it on the parent. Cases are heard by judges. Witnesses testify under oath. A court reporter transcribes the proceedings. Rules of evidence apply, with some exceptions. The parties may be represented by lawyers and may appeal adverse decisions.

However, parents in dependency and termination proceedings do not receive many of the procedural rights that criminal defendants—even those facing minor charges—enjoy. Thus, as a matter of federal Constitutional law, an indigent parent in a dependency or termination case has no right to appointed counsel.

39. The Adoption Assistance Act of 1980 conditioned federal foster care payments to states on a requirement that state child welfare agencies make "reasonable efforts" to prevent the removal of children from their homes and to make it possible for children who have been removed to be returned to their families. See 42 U.S.C. § 671(a)(15)(A)(1997). The Adoption and Safe Families Act of 1997, § 103, PUB. L. 105-89, 111 STAT. 231, has created exceptions to the "reasonable efforts" requirement for certain categories of cases, including, among other things, where "aggravated circumstances," as defined by state law, are present and where parental rights to another child have already been terminated. See 42 U.S.C. § 671(a)(15)(D).


42. See 42 U.S.C. § 675(5)(c).


Increasing Formality in Child Welfare Proceedings

A number of states provide a right to appointed counsel by statute, but even in those states, courts have held that parents have no right to effective assistance of counsel because the right to counsel is not constitutionally mandated. An indigent parent facing termination of parental rights has a right to a free transcript on appeal but she does not have this right in a dependency proceeding. The constitutionally required standard of proof in a termination of parental rights proceeding is the intermediate clear and convincing evidence standard. The civil "preponderance of the evidence" standard of proof governs dependency proceedings in many states. Although termination and dependency cases generally provide the parent an opportunity to confront and cross-examine witnesses (with exceptions for child witnesses), courts in many instances apply relaxed evidentiary rules. For example, many jurisdictions allow social workers' hearsay reports to be admitted into evidence. Courts do not construe the due process rights of parents and children in dependency and termination proceedings to include rights analogous to the criminal prohibition on double jeopardy or the right against self-incrimination contained in the Fifth Amendment. Courts do not require social workers investigating reports of child abuse to comply with the Fourth Amendment's warrant and probable cause requirements before searching a home, and no exclusionary rule limits the


49. See, e.g., WASH. REV. CODE § 13.34.130 (1998); IND. CODE ANN. § 31-34-12-3 (Michie 1997).

50. See, e.g., Alsager v. District Court of Polk County, 406 F. Supp. 10, 24 (S.D. Iowa 1975) (admission of hearsay evidence in termination hearing held not to violate parents' procedural due process rights). Procedural rules may be relaxed as well. See, e.g., In re Maria F., 428 N.Y.S. 2d 425 (Fam. Ct. Bronx County 1980) (Family court judge has discretion whether to apply civil rules of procedure in a dependency case). Statutes often provide for an even further relaxation of evidentiary rules at the dispositional hearing. See, e.g., WASH. REV. CODE § 13.34.120 (1998) (requiring court to consider social studies and reports at dispositional hearing); PA. STAT. ANN. tit. 42, § 6341(d) (West Supp. 1999) ("[A]ll evidence helpful in determining the question presented . . . may be received by the court . . . even though not otherwise competent in the hearing on the petition.").


But we cannot glean the full flavor of the system that actually confronts a
mother accused of child abuse from case books and statutes. Overlaying the
constitutional and statutory procedural scheme is a subtle dynamic arising in the
day-to-day human interactions within the child welfare system that implicitly
suppresses rights talk and discourages parties from using those procedural
protections that are available to them. The next section attempts to describe that
dynamic.

B. The Implicit Promotion of Informalism in Dependency Proceedings

A woman who has been subpoenaed to court to answer charges that she
mistreats her children maneuvers up the wide stone staircase at the entrance to
the family court building in Philadelphia—children, stroller, diaper bag in tow—
where she is greeted by a long line of adults and children waiting to be admitted
through a metal detector. Professional looking people with briefcases rush past
the line and pass quickly around the metal detector with a smile and a nod from
the guard. After about forty-five minutes, the woman finally reaches the front of
the line, her children nervous and whining. The guard opens her bags and
examines their contents. When he comes to the sandwiches she has packed for
the children, he sets them aside with a gruff “sorry, no food in the courtrooms or
waiting rooms.” She starts to protest that her three-year-old and five-year-old

Courts also routinely apply a more lenient standard in evaluating due process
vagueness challenges to
civil child abuse statutes then they do to criminal statutes. See, e.g., Doe v. Staples, 706 F.2d 985, 988 (6th Cir. 1983) (noting “[w]hen a statute is not concerned with criminal conduct or first amendment considerations, the
court must be fairly lenient in evaluating a claim of vagueness,” court rejected vagueness challenge to statute
authorizing removal of children from parent’s custody without a prior hearing where “necessary for [the
child’s] welfare or in the interests of public safety”). But see Roe v. Conn., 417 F. Supp. 769, 777, 780 (M.D.
Ala. 1976) (statute authorizing summary removal of child “if it appears that . . . the child is in such condition
that his welfare requires” held unconstitutionally vague); Alsager v. District Court of Polk County, 406 F. Supp.
10 (S.D. Iowa 1975) (termination of parental rights standards of “necessary parental care and protection” and
“parental conduct detrimental to the physical or mental health or morals of the child” held unconstitutionally
vague).
Increasing Formality in Child Welfare Proceedings

are already getting fidgety and won't last without something to eat if she has to stay past noon and that she doesn't have money to buy them something, but the guard has already waived her through and turned his attention to the next family in line...

She leads her children in the direction the guard indicated, diagonally across the lobby to where she sees lots of people coming in and out of a short corridor. The corridor leads to a large square windowless room filled with rows of wooden chairs and a din of voices punctuated periodically by a crying child or an adult's angry shout. There are perhaps 200 people in the room; most of the chairs are taken. Some sit staring vacantly into space. Others try to comfort crying children. Others sit huddled in groups. Around the perimeter, groups of people stand talking. Some are laughing, others talk intently. Some write on pads of paper while they talk. Others carrying files or briefcases push through as if in a hurry. Our visitor unfolds her subpoena. It says report to courtroom I by 9:00 a.m. After waiting in line it is now almost 10:00, but she can't see any sign indicating she's in the right place. At one end of the room there are two desks with chairs behind them, but the chairs are empty. She approaches a woman in a silk dress who sits next to one of the desks concentrating on a file. The woman looks up from her file and points vaguely to a door. "The court officer should be coming out in a while. Check in with him. He'll probably have a blue jacket on."

She turns back to her file. The visitor spots a few empty chairs in the middle of the row. Squeezing past with her children, she reaches them and sits down with a sigh, looking nervously at the door for someone with a blue jacket...

The day-to-day proceedings in child welfare cases are shaped in large part by the prevalence of "repeat players": professionals who appear repeatedly in the same forum on many different cases. Indeed, it is not unusual for the lawyers for all sides—parents, children, and state child welfare agencies—to all be specialists, handling child welfare cases exclusively or nearly exclusively. A special unit of the city solicitor's or state attorney general's office typically "prosecutes" these cases on behalf of the child welfare agency. Since the vast majority of families in the system are poor, where parents and children receive representation at all, it is usually from legal aid or public defender organizations with specialized units of lawyers who handle these cases exclusively. Court systems also often assign particular judges and magistrates to specialize in this area. Finally, a host of social workers regularly appear in court on multiple cases. They may work for the government child welfare agency or for private social service agencies that contract with the state to provide foster care and/or in home services. Thus, it is common for everyone involved in a case—except for the

55. The passages in italics (here and infra at parts III(A)(1) and III(A)(2)) are based on my experiences representing parents in child welfare proceedings in Philadelphia. All are based loosely on actual events, but are offered as broad-brush illustrations, not as accurate historical accounts.

parents and children who are its objects—to be repeat players, familiar with each other and familiar with the workings of the system.

This specialization no doubt proves useful in that professionals develop the expertise necessary to handle cases effectively and efficiently. The dominance of repeat players, however, can also create a “clubby” atmosphere, in which all of the individuals in the courthouse—from the lawyers and social workers to the judges, their courtroom deputies, stenographers and clerks—have well-established relationships and a kind of collegiality that comes from daily contact. This atmosphere fosters the development of a set of unwritten rules and shared expectations that govern the expected and accepted behavior of players in the system. Familiarity and collegiality can become a cliquishness in which newcomers and outsiders feel an intense pressure to conform to established rules of behavior in this “microsocial” setting. For those who would depart from established norms, the phrase “things just aren’t done that way around here” becomes a familiar refrain.

A mother subpoenaed to court on allegations of abuse or neglect is likely to feel particularly vulnerable and insecure as she enters this environment. In light of the allegations against her, she may be especially eager to be accepted and viewed as normal and respectable. She may be particularly sensitive to any cues she receives from professionals as to how she should act to fit in with the norms of this microsocial setting. Race and class often exacerbate this outsider dynamic. The professionals in the system are by and large well-educated, middle-class, and predominantly white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education.

57. These are generalizations, of course, that do not necessarily hold true for all individuals in the system. In particular, attorneys for parents who attempt to make use of procedural protections and the formal rules of the adversarial system on behalf of their clients may themselves be ostracized and treated as outsiders. See Sandra Anderson Garcia & Robert Batey, The Roles of Counsel for the Parent in Child Dependency Proceedings, 22 GA. L. REV. 1079 (1988).

58. Tina Grillo has discussed this informal law that evolves in “microsocial” settings in the context of divorce mediation proceedings:

The norms that govern microlegal systems are unwritten and often not consciously perceived, but they are always present. Violation of these norms may produce strong reactions. What makes such norms distinguishable from the mere “shoulds” of daily conversation is the presence of sanctions: additional communications which accompany the “shoulds” and which punish the deviant or reward the conformist. Many of these sanctions might appear trivial at first glance—for example, laughing at or dismissing someone—but they are powerful nonetheless. According to Michael Reisman, an actor enforcing norms within a micro-legal system is often both unaware of the nature of the system and oblivious to his own functional role in it. It is not the actor’s motive or self-awareness that renders his reaction a sanction, but the effect of the reaction on those sanctioned.


In the negotiations leading up to and surrounding courtroom proceedings, a mother may often find herself the only outsider in a room full of professionals. Indeed, the sheer number of lawyers and social workers involved in a single family’s case can be mind-boggling. In addition to the state agency social worker, there may be a social worker from a private agency contracted to provide more intensive social work services to the family, a social worker with the foster care agency (or in cases with more than one child in different foster homes, several social workers from different foster care agencies), a social worker working for the child advocacy organization, a guardian ad litem, a court-appointed special advocate, a lawyer representing the state child welfare agency, a lawyer representing the child, a lawyer representing the mother, and in some cases a lawyer representing one or more fathers or other involved family members. With some exceptions, all of these people speak with the intonation and dialect of the professional, educated class. This is usually not the native tongue of the mother. Additionally, as in any insular microsocial setting in which a limited group of people interact repeatedly, a host of catch phrases, acronyms, short-hands, and jargon develop that are unknown to outsiders.

Social work norms and discourse predominate in this setting. Perhaps this is due to the considerable power wielded by social workers, who initially exercise the discretion as to whether the coercion of the court process will be invoked against a family and to whom judges are often inclined to defer once a case gets to court. Perhaps it is also attributable to the tendency of both lawyers and social workers to view these cases in therapeutic terms, as an emotional crisis or breakdown in communication, rather than a legal question about whether the allegations of abuse are true and warrant state intervention.

In any case, the predominance of social work norms and discourse creates significant pressure on parents to resolve these cases through non-adversarial, informal means. Social workers are trained to be effective by building non-adversarial relationships characterized by cooperation and trust. From a social worker’s point of view, she fails professionally if her relationship with her client becomes adversarial. While lawyers’ training steeps them in the discourse of
individual rights and prepares them to operate in formal, procedure-bound
environments, social workers are steeped in the discourse of relationships and
cooperation and trained to value informality over formality as a means of
gaining trust and building rapport.

A key word in the prevailing social work discourse is thus “cooperation.”
This word often forms the focal point of the meetings and conversations that
take place in the hallways of the courthouse: “If mom would just cooperate . . .”
Running as an undercurrent to this refrain are powerful cultural stereotypes and
expectations attached to motherhood. Mothers are supposed to be nurturing,
loving, and above all protective of their children. Conflict is viewed as harmful
to the child, and therefore the mother accused of child abuse who creates conflict
by failing to “cooperate” harms her child a second time.62 This language of
“cooperation” cloaks the substantial power differential that exists between the
child welfare agency and the accused mother. The word “cooperation” implies a
collaboration between equals in which each party contributes and makes
compromises. In the child welfare context, however, “cooperation” is frequently
just a code word for the parent doing whatever the social worker tells her to do.
Where there is disagreement between the parties, it is the mother, not the social
worker, who is labeled “uncooperative,” and therefore blamed for creating
conflict.

Another common element of this social work discourse is the claim: “we’re
all really on the same side; we just want what is best for the children.” By
creating an illusion of shared goals, this claim makes cooperation the obvious
best solution. Two people working toward a shared goal clearly work more
effectively if they cooperate. Conflict is again subverted and the power dynamic
hidden. The fallacy, of course, is that this claim treats the “best interests of the
child” as some objectively determinable absolute, when in fact it is an extremely
malleable and subjective standard.63 In fact, the parent and the agency social
worker may have two entirely different ideas of what is in the child’s “best
interests.” In such a case, their goals are not shared and “cooperation” may be an
impossibility.64

These dynamics—operating either within the hallways of the courthouse or
in families’ homes or social workers’ offices before court involvement has even
been initiated—create pressure to cooperate rather than to assert rights, and to

62. See Grillo, supra note 58, at 1604 (observing in the context of divorce mediation that “the intimation
[to a mother] that she is not being cooperative and caring or that she is thinking of herself instead of thinking
selflessly of the children can shatter her self-esteem and make her lose faith in herself.”).
63. Additionally, at least at the initial phases of the proceeding, it is not the correct legal standard. See
supra notes 32-37 and accompanying text.
64. The illusion of intimacy and shared goals is also promoted by the common practice by the
professionals in the system of referring to the accused mother as “mom.” Whether it comes from a desire to
build rapport or the inability of a professional juggling numerous cases to remember a particular parent’s name,
to be the only participant referred to as “mom” in a room where everyone else is consulting files, carrying
briefcases, handing out business cards, and being called by name is, no doubt, highly demeaning and
disempowering. Moreover, by creating an illusion of intimacy—pretending we’re all in the family—it
contributes to the creation of an atmosphere in which secrets must be shared and dissent is unacceptable.
resolve cases through a process of compromise and agreement rather than through litigation. This is not simply to say that the parties tend to resolve these cases through negotiation rather than contested hearings. Where negotiation occurs against the backdrop of the formal procedures and rights afforded by the adversarial process, it reflects—at least roughly—the likely outcome of that process. Accordingly, such negotiation is a product of the formal rules and procedures that would apply if the case went to a hearing. For example, a litigant might gain concessions from her opponent by pointing out in negotiations that a particular witness’s testimony would be barred as hearsay, and thus gain the protection against unreliable evidence afforded by the rules of evidence without actually invoking those rules in a contested hearing.

But the dynamics I describe above do more than simply push participants to resolve cases through negotiated settlement rather than trial. Instead, they serve to devalue and suppress rights talk, treating any effort to frame problems in an adversarial context as unmotherly and harmful to the child. Accordingly, they discourage participants from asserting, either in negotiations or contested hearings, the rights and procedural protections that are available to them. As such, these dynamics push the actual day-to-day functioning of these proceedings to an even lower level of formality than that proscribed by the due process analyses of courts and legislatures.

C. The ADR Movement

In addition to these implicit pressures that operate on a day-to-day level to de-formalize the existing adversarial system, there is currently a movement to explicitly de-formalize the child welfare court system by introducing alternative dispute resolution (“ADR”) mechanisms, primarily mediation. A number of jurisdictions in California, Oregon, Kansas, Illinois, Connecticut and elsewhere have established pilot programs in dependency court mediation. These programs usually allow cases to be referred to mediation at any stage of the proceeding by order of the court or agreement of the parties. A trained


mediator, or sometimes a male-female mediator team, meets with the parties and other interested persons. The participants discuss the case and attempt to reach an agreement. The mediator acts as a facilitator, not a decisionmaker, remaining neutral and helping the participants to communicate effectively. There are relatively few rules. No relevancy or hearsay standards limit the range of subjects that can be discussed.69 No rules limit who can participate. Foster parents, extended family members, and service providers, all of whom would be excluded from adversarial proceedings as nonparties, are often included in mediation at the discretion of the mediator.70 Attorneys may or may not be included.71 All mediation participants are bound to keep statements made during mediation confidential, except for information that requires a mandated reporter to report new allegations of child abuse or neglect.72

Proponents of mediation cite a number of benefits in addition to its ability to ease crowded dockets.73 Mediation is said to encourage participation by parents by giving them a sense of inclusion, validation, and empowerment.74 This

---

69. See Thoennes, An Evaluation, supra note 68, at 192 (mediation often addresses issues not legally in dispute).
70. The dependency mediation guidelines for Alameda County, California, for example, allow the mediator to include “[a]ny other interested party . . . whose involvement may facilitate decision making or resolution.” Elizabeth M. Dunn, ALAMEDA COUNTY JUVENILE DEPENDENCY MEDIATION PROGRAM, PROGRAM GUIDELINES (1998) (on file with author) [hereinafter PROGRAM GUIDELINES]; see also Steve Baron, Dependency Court Mediation: The Roles of the Participants, 35 Fam. & Conciliation Courts Rev. 149, 158 (1997) (“the wider the net cast” with regard to involving other participants in mediation, the better); Hon. Leonard Edwards, Dependency Court Mediation, The Role of the Judge, 35 Fam. & Conciliation Cts. Rev. 160, 162 (1997) (social workers should “actively recruit the attendance and participation of other interested family or community members”); Marilou T. Giovannucci, Understanding the Role of the Mediator in Child Protection Proceedings, 35 Fam. & Conciliation Courts Rev. 143, 144 (1997) (foster parents, service providers, and others may be invited to participate in mediation); Thoennes, An Evaluation, supra note 68, at 185 (“[M]any individuals attended the mediation process who would not ordinarily be involved with a court hearing.”).
71. See Baron, supra note 70, at 149 (noting that some California mediation programs officially exclude attorneys while others include them); Edwards, supra note 70, at 162 (suggesting that mediation sometimes more effective without lawyers).
72. See Baron, supra note 70, at 158; Edwards, supra note 70, at 162. This standard is often so vague as to make the confidentiality rule fairly toothless.
73. See Thoennes, Child Protection Mediation, supra note 68, at 15; see also Jerold S. Auerbach, Justice Without Law? Non-Legal Dispute Settlement in American Law 57 (1983) (arguing that, since the civil war, arguments in favor of ADR have primarily expressed a desire for judicial efficiency more than community justice).

Various efforts have been made by proponents of mediation to measure the “success” of pilot programs, see, e.g., Megan G. Orlando, Funding Juvenile Dependency Mediation through Legislation, 35 Fam. & Conciliation Cts. Rev. 196, 197 (1997), but an empirical measure of such an amorphous concept is, of course, elusive. Measuring the percentage of cases in which agreements are reached obviously leaves many questions unanswered. See Thoennes, An Evaluation, supra note 68, at 191. Surveys showing high rates of “satisfaction” among participants in mediation are also problematic. One study, for example, reported that parents were happy with one mediation pilot program because they actually got more face time with their lawyers than they had in the traditional adversarial system. This study suggests that the adversarial system that the mediation program replaced was severely broken: “In a system where attorneys admit they often appear in court before they know who their clients are mediation ensured parents got some undivided attention. Parents’ attorneys also acknowledged that parents got a lot of practical information in mediation, which was important because not all attorneys take the time to answer questions and ensure that clients fully understand the situation.” Id. at 190.
decreases the likelihood that parents will withdraw from the process and leave their children feeling rejected.75 The parties' sense of inclusion and investment in the process is also said to give mediated agreements a greater chance of long-term success.76 But primarily, mediation is touted as an antidote to the adversarial process, which is viewed as inherently destructive to families and harmful to children.77 The adversarial process is said to break down communication, polarize disputants, create hostility, and "tear at the thin fabric that holds these families together."78 Indeed, one pilot program makes the extraordinary claim that the "adversarial process can be as traumatic [to children and families] as the child abuse and neglect which brought the child to the attention of the juvenile justice system."79 Mediation, in contrast, is presented as an alternative that opens lines of communication, promotes sharing of information and joint problem solving, and assists the participants in reaching mutually beneficial and constructive solutions.80

---

75. See Thoennes, supra note 74, at 137.
76. See Giovannucci, supra note 70, at 147; Edwards, supra note 70, at 161; Firestone, supra note 66, at 228.
77. See Giovannucci, supra note 70, at 144.
78. Thoennes, supra note 74, at 137. The assumption is made that "these families" involved in the child welfare system are all by definition in need of treatment. See infra text accompanying notes 221-32.
79. PROGRAM GUIDELINES, supra note 70; see also Fineman, supra note 61, at 754 ("The image of the legal system constructed by the helping professions is adversarial, combative, and productive of divisions, misunderstandings, and hostility; mediation is seen as the cure --- serving to open up blocked channels of communication"); Mamma, Mediating Disputes, 42 Pub. Welfare 22, 25 (1984) (asserting that "the litigation process is little more than an institutionalized form of emotional abuse to children"). Social workers and mediation advocates also believe that the antagonism between the parties in legal disputes is created by the adversary system and that therefore elimination of that system will eliminate antagonism. In the divorce context, see Meyer Elkin, Conciliation Courts: The Reintegration of Disintegrating Families 22 FAM. COORDINATOR 63, 70 (1973) ("The elimination of adversary proceedings eliminated adversary roles and therefore reduced the need to fulfill antagonistic roles and the need to strike out at each other"). In contrast, Richard Abel takes the position that mediation suppresses conflict. See infra notes 204, 206 and accompanying text.

A parallel but largely separate reform movement called Family Group Decision Making ("FGDM") originated in New Zealand in the late 1980's and has recently been garnering attention in this country as well. See generally MARIE CONNOLLY & MARGARET MCKENZIE, EFFECTIVE PARTICIPATORY PRACTICE: FAMILY GROUP CONFERENCING IN CHILD PROTECTION (1999); BRONWYN DALLEY, FAMILY MATTERS: CHILD WELFARE IN TWENTIETH-CENTURY NEW ZEALAND (1998). It arose specifically in response to objections voiced by the indigenous Maori people to what they viewed as an imperialist and racist child welfare bureaucracy that was wrongfully removing Maori children from their native communities and culture and denying Maoris the sovereign right to deal with child welfare issues in conformance with their own cultural traditions and standards. FGDM attempts to integrate the government child welfare system with a family-centered process modeled on traditional Maori methods of conflict resolution.

In this process, the child welfare agency convenes a meeting that includes the usual cast of professionals (social workers and possibly lawyers), family, extended family members and kin, tribal elders, and other community members (neighbors or clergy) that the family views as supportive. The participants open the meeting with traditional Maori "rituals of engagement," which include songs or incantations acknowledging the supernatural, the ancestors, and the living. See Harry Walker, Whanau Hui, Family Decision Making, and the Family Group Conference: An Indigenous Maori View, 12 PROTECTING CHILDREN 8, 9 (1996). The social worker who investigated the case then presents the basis for her concern about the family, but does not share any opinions or recommendations. The professionals and other non-family members then leave the room, leaving the family to discuss the case in private and develop a plan. Once the family has reached consensus, they invite the other participants back in the room and present and explain their plan. The agency, the parents,
The current system, then, provides an intermediate level of formality and procedural protection, but is subject to both implicit and explicit pressures toward further de-formalization. Having described the system that currently exists, I now turn to the normative question of what level of procedural protection and formality should be provided in dependency and termination proceedings. I begin with a critical examination of the due process analysis that has been employed by the courts.

II. THE DUE PROCESS ANALYSIS OF CHILD WELFARE PROCEEDINGS

A. The Assumed Primacy of the Criminal Deprivation

Dependency and termination proceedings involve a government deprivation of the parent’s and child’s liberty, and hence invoke the due process clause of the Fourteenth Amendment. The “process that is due” exists on a continuum from more to less formality depending on the severity of the threatened deprivation, the risk of error, and the importance of the governmental interest involved. The standard due process framework assumes that more formal proceedings produce more accurate results, so that the more important the interests at stake and the higher the risk of error, the more formal the process that is “due.” The criminal system occupies one end of this scale, defining the highest degree of formality and procedural protection that our legal system offers. Minor deprivations of property occupy the other end of the scale.

In placing dependency and termination cases at an intermediate level on this due process scale, courts often rely primarily or solely on the unexamined and unelaborated assertion that loss of one’s child is a less severe deprivation than...
the loss of physical liberty effected by imprisonment. In *Lassiter v. Department of Social Services*, for example, where the Supreme Court faced the question of whether indigent parents have a due process right to appointed counsel in termination proceedings, the Court held up imprisonment as the ultimate deprivation of liberty against which all other deprivations must be measured. It began with a "presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty." Having set up this hierarchy of deprivations, the Court was unwilling to extend to all parents facing termination of parental rights the same blanket right to appointed counsel that it had ten years earlier extended to all criminal defendants facing any potential jail time, "even where the crime is petty and the prison term brief." Instead, the Court held that the right to counsel would vary depending on the circumstances of each case. In a final bow to the primacy of the individual right to freedom from physical restraint, the Court suggested that those termination cases in which the parent's interest did rise to the level requiring appointment of counsel would be those in which the parent also faced a threat of criminal prosecution.

In the 1996 term, the Supreme Court issued a decision that marked the first time the Court had ever accorded to parents in termination cases a procedural protection of the same magnitude as that afforded criminal defendants. In *M.L.B. v. S.L.J.*, the Court held that an indigent parent appealing a termination decision has a right to a waiver of record preparation fees on appeal. Even there, however, the Court declined to place the permanent deprivation of a parent's right to maintain a relationship with her child on a par with the deprivation of individual physical liberty effected by even a short term of imprisonment.

---

84. Sometimes courts discount the strength of the parent's interest by reciting the truism that dependency proceedings are remedial not punitive. See, e.g., *In re Benjamin E.*, 51 Cal. Rptr. 2d 584 (Cal. Ct. App. 1996). This is no doubt less than convincing to a parent facing removal of her child. The Supreme Court has acknowledged that government systems intended to be remedial can in fact result in harmful and arbitrary treatment of individuals. See *In re Gault*, 387 U.S. 1, 17-19 (1967).


86. See id. at 31; see also *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling.").


88. *Id.* at 25.

89. This was the same approach the court had taken in criminal cases until *Gideon v. Wainwright*, 372 U.S. 335 (1963), where the Court recognized that "[n]ot only . . . precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344.

90. See *Lassiter* 452 U.S. at 31, 32. The second-class status accorded to the deprivation of the parent-child relationship by the Court in *Lassiter* cannot be explained by reference to the state's compelling *parens patriae* interest in protecting children from abuse. The only state interests the Court identified as weighing against the parent's interest in the appointment of counsel were those of "the expense of appointed counsel and the cost of the lengthened proceedings [counsel's] presence may cause," which it found to be *de minimus*. The Court viewed the state's *parens patriae* interest in protecting the child as weighing in favor of the increased accuracy that appointment of counsel would promote.


92. *Id.* at 128 (1996).
Instead, the Court based its holding on an analogy between termination of parental rights cases and "petty offense appeals"—criminal cases that carry no threat of jail time. The Court had previously held that criminal defendants appealing convictions for petty offenses were entitled to a waiver of transcript fees and used that case to justify the same result for parents facing termination of parental rights. 93

But is this hierarchy of deprivations that ranks the right to freedom from physical restraint above the right to relationship with one's child really valid? 94 Particularly when we juxtapose a brief period of incarceration, which entitles the defendant to the full panoply of procedural protections offered by the criminal system, 95 to the permanent severance of the parent-child bond at stake in a termination of parental rights proceeding, this value judgment seems highly questionable. 96 What parent would not rather undergo a few days of imprisonment than be denied the right to ever see her child again? Even the temporary removal of a child effects a grievous deprivation of liberty. Children experience time much differently than do adults. A few days or even a few hours can seem an eternity to a small child, particularly one too young to understand that the separation from her family is temporary. 97 Considering the fear and

93. Id. at 123. Indeed, this case was made particularly easy by the fact that the right to waiver of record preparation fees had already been extended beyond the criminal context into the realm of family law. See Bodie v. Connecticut, 401 U.S. 371 (1971) (divorce); see also Lindsey v. Normet, 405 U.S. 56 (1972) (landlord-tenant). In M.L.B., the Court obliquely suggested that dependency proceedings might not warrant the same level of protection since those proceedings deprive parents of custody only temporarily, rather than permanently severing the parent-child bond. See M.L.B., 519 U.S. at 110. Here, as in Lassiter, the Court did not consider the state's parens patriae interest in protecting children from abuse to weigh against the parent's interest in this context. The only countervailing government interest identified by the court was financial.

94. A similar hierarchy is evident in one district court's Fourth Amendment analysis of a child abuse investigation. In Daryl H. v. Coler, 585 F.Supp. 383, 388 (N.D. Ill. 1984), the court concluded that a family's consent to a search of their home by a child welfare social worker was voluntary, reasoning that because the social worker presented no physical threat or intimidation (she was five feet two inches tall and pregnant), there were no factors indicating the family had been coerced. No mention was made of the coercion inherent in the family's perception that the five-foot-two-inch tall social worker wielded the power to remove their child. See Hardin, supra note 53, at 503. Not unlike the Supreme Court in Lassiter and M.L.B., the court in this case seemed to rely on an unstated assumption that a threat of physical restraint is more severe than a threat of interference with the parent-child bond. Interestingly, it was a pregnant woman—a symbol of femininity and motherhood—who the court viewed as not wielding significant power according to what might be viewed as a peculiarly male standard that views physical restraint or violence as the ultimate form of power and coercion. See infra text accompanying notes 125-31; see also id. at 521, n.102 (suggesting that since many child abuse and neglect investigations do not have criminal prosecution as the ultimate objective, they "should be deemed less intrusive than criminal searches").

95. An exception to this is the right to a jury trial, which does not attach unless imprisonment for six months or more is threatened. See Duncan v. Louisiana, 391 U.S. 145 (1968).

96. See State v. McMaster, 486 P.2d 567, 569 (Or. 1971) (stating in termination of parental rights case, "[a]dmittedly, a serious interest of the parents is in issue which can be assumed to be as important to the parents as their freedom, which is in jeopardy in a criminal proceeding"); State v. Jamison, 444 P.2d 15, 17 (Or. 1968) (stating in termination case, "[w]hile the case at bar is not a criminal matter, the consequences of the denial of counsel are as serious as they are in most criminal prosecutions."); Guggenheim, supra note 35, at 555 (calling termination of parental rights the "most awesome" exercise of state power short of capital punishment).

97. JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 40 (1973) ("infants and toddlers cannot endure separation from their parents for more than a few days without feeling overwhelmed; [for most children under the age of five years, an absence of parents for more than two months is equally beyond comprehension."). But see Everett Waters & Donna M. Noyes, Psychological Parenting vs. Attachment
trauma that removal can invoke in a child, it seems reasonable to suppose that many parents, if given the choice, would rather themselves spend several days in prison, than see their child taken away from all people and things familiar to spend even a few nights with well-meaning strangers in foster care.

Indeed, some court opinions betray a certain ambivalence, even as they assert this hierarchy of deprivations as unquestionable and unassailable fact. The Fourth Circuit's opinion in *Jordan v. Jackson*, 98 provides a good example. In the course of rejecting a challenge to a Virginia statute that allows courts to remove children from their parents and keep them in foster care for up to four days without a hearing, the court made the assertion that criminal cases threaten a more severe deprivation of liberty than child welfare cases because "arrest is virtually a complete deprivation of a person's liberty." 99 But in the very next sentence, the court acknowledged the weakness of that assertion, stating that the removal of a child is "unquestionably significant, and perhaps in some ways even more emotionally traumatic" than a criminal arrest. 100 The court, however, did not confront the obvious dissonance in the notion that the injury that is "more emotionally traumatic" effects the lesser deprivation of liberty. Instead it summarily dismissed the inquiry, asserting simply that the deprivation involved in removing a child "is less comprehensive in scope than that resulting from an arrest." 101 With that conclusory assertion, the court went on to analyze the case on the basis of the assumed primacy of the criminal deprivation. 102

What is the source of this ambivalence? Is it true, as the Fourth Circuit asserts, that imprisonment is a "virtually complete deprivation of a person's liberty," while the removal of one's child is "less comprehensive in scope?" Or do the two deprivations simply strike at different but equally important aspects of citizenship and personhood?

One could expand the Fourth Circuit's reasoning by arguing that the deprivation effected by the removal of one's child is really just a subset of the all-encompassing deprivation effected by imprisonment. Certainly, an incarcerated parent also suffers a physical separation from her child. One could say she suffers both the injury of the parent who loses her child in a dependency case and the loss of her own physical freedom of movement that is the *sine qua non* of imprisonment. If two deprivations are worse than one, this reckoning would seem to suggest that imprisonment entails a more grievous deprivation of liberty than the involuntary removal of a child.

But such reasoning vastly oversimplifies. The child welfare deprivation is not simply a subset of the range of deprivations suffered by a prisoner. The child

---


98. 15 F.3d 333 (4th Cir. 1994).
99. 15 F.3d at 350.
100. Id.
101. Id.
102. See id.
welfare deprivation does not simply effect a physical separation of parent and child. Additionally and more fundamentally, it deprives the parent of the liberty to direct and control the care and upbringing of her child. This latter deprivation is absent from the criminal context. Although imprisonment prevents a parent from acting as the daily caretaker of her child, the prisoner still retains ultimate decisionmaking power with respect to the care and control of her child. She may, for example, decide in what household the child will live and what relatives or friends will provide daily care for her child. In contrast, the parent who loses her child in a child welfare proceeding has no control over—and indeed often no knowledge of—where the child lives or who makes decisions about the child’s day-to-day life.

For many people, raising children is the primary source of fulfillment, purpose, and meaning in their lives. For some biological parents, part of this fulfillment may come simply from the knowledge that some part of their self is being carried forward in the genetic make-up of their offspring. But surely the greater part of the drive to parent must arise from the allure of the opportunity to shape and influence a developing person. This aspect of parenting happens in the day-to-day activities, decisions, and interactions that define a child’s life—deciding what she eats for breakfast, who she plays with after school, whether she says grace before dinner or prayers before bed, when she watches television, when she does her homework, and whether she is scolded or comforted when she cries. When a court removes a child from her home, not only are parent and child physically separated, but the parent loses all ability to control these day-to-day decisions and interactions that are the essence of parenting. Furthermore, the parent loses that control in the context of an official decision directed precisely at her abilities and identity as a parent.

103. See Carol Sanger, Separating From Children, 96 COLUM. L. REV. 375, 421 (1996) (arguing that physical separation of mother and child, including that caused by the mother’s imprisonment, “does not necessarily relieve a mother from the obligations (or satisfactions) of motherhood” and noting that mothers who are physically separated from their children often “continue to demonstrate and provide care and support . . . by arranging substitute care.”).

104. See Grillo, supra note 58, at 1606 (That which is at stake in a custody dispute—“access to one’s children—may be the main reason one has for living, as well as all one’s hope for the future.”).

105. One aspect of the deprivation of liberty at issue in a dependency proceeding may make it harder to bear than its criminal counterpart: that is, the fact that the removal of a child in a dependency case is almost always of uncertain duration. Once a child is removed and adjudicated dependent, return is entirely within the discretion of the child welfare agency social worker and/or the judge (who will in most instances defer to the judgment of the social worker). Child welfare agencies are required to develop a plan for reunification that specifically delineates actions to be taken by the parent, services to be provided by the agency, goals that—once achieved—will allow the child to return home, and time frames for achieving those goals. However, the goals are often amorphous and subject to interpretation. For example, the plan will often state something like, “mom will improve parenting skills.”

Even where goals are more specifically defined, their achievement may be partially outside the parent’s control. A common goal, for example, is “mom to find suitable housing.” But where affordable housing is scarce, where the parent has no job skills, and where she is no longer eligible for a welfare grant because she no longer has custody of her children, such a goal may pose an insurmountable barrier, even to the most dedicated apartment hunter. Another common goal is “mom to complete a drug rehabilitation program.” But even a parent who makes a concerted effort to enroll in such a program may run up against delays beyond her control, such as long waiting lists or the unwillingness of her health insurance carrier to pay for treatment.
For a person whose central purpose in life is to raise children and whose sense of self derives primarily from her relationship with her children and her role as a parent, the disruption of that relationship—even temporarily—may be the most grievous injury short of death that the state can inflict. We view imprisonment as a grievous deprivation because it deprives the prisoner of her liberty to act in the world. But if a person’s whole reason for acting in the world is her children, then the removal of her children effects an equivalent deprivation of liberty. It deprives her of her liberty to act in the world in the only way that really matters to her: as a parent to her children.

The deprivation of liberty associated with a child welfare proceeding affects the child directly as well. The child has an interest in the care and companionship of her parent and suffers a considerable loss of liberty when she is thrust into strange surroundings with perhaps no understanding of why this traumatic event is happening or when it might end. A stable, ongoing, intimate relationship with an adult is imperative for a child. In some instances the disruption of this relationship through removal may inflict a harm even worse than the one it was intended to prevent. Moreover, the deprivations suffered by parent and child are not independent, but reciprocal and synergistic. Thus, the knowledge that her child is suffering fear and anxiety adds palpably to the parent’s injury. Similarly, the parent’s incapacitation by feelings of inadequacy

This uncertainty seems to make the deprivation more difficult to bear. In representing parents in dependency cases, I found that they were often comforted significantly by a social worker’s promise that the children would be returned in some specified amount of time (usually six months), and were more amenable to agreeing to placement where such promises were made. Of course, since return was in fact contingent on the alleviation of the circumstances that led to placement—an event that no one could predict with certainty—such promises of a definite time limit could never be genuinely made and were rarely kept.

Certainly, where the child’s life, health, or bodily integrity is at substantial risk in the home, this loss of liberty is a small price to pay. Still, even in instances of severe abuse, the bond between parent and child should not be discounted. One of the paradoxes of child abuse is the extent to which abused children can retain strong emotional attachments to their abusers.

For examples of the horrors of erroneous removal, see Wexler, supra note 24. See also Martin Guggenheim, The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care: An Empirical Analysis in Two States, 29 Fam. L.Q. 121, 140 (1995) (empirical study of impact of termination of parental rights on foster children concluding that an increase in terminations without a corresponding increase in adoptions is leaving children worse off because they are “unnatural orphans”).

See Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977)(“This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the ‘companionship, care, custody, and management of his or her children,’ Stanley v. Illinois, 405 U.S. 675 (1972), and any of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association’ with the parent.”). See also Peggy C. Davis, Use and Abuse of the Power to Sever Family Bonds, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 572-73 (1984) (noting importance to children of preserving relationships with biological parents and that rights of parents and rights of children are not separate and independent: “A legal system may not dilute parental rights without facing the risk of diminishing parental responsibility.”).
and helplessness and the child's perception that her parent's authority and omnipotence are being questioned compound the child's injury.

Certainly, the degree to which a temporary or permanent severance of the parent-child bond cuts to the core of a person's sense of self and deprives her of an essential aspect of her personal liberty varies from individual to individual.\textsuperscript{110} Termination of the parental rights of an absent father will inflict relatively little injury when compared with termination of the parental rights of a mother who has shaped her entire identity around her role as parent and has attached all her hopes, dreams, and ambitions to her child.\textsuperscript{111} This individual variation is probably less extreme in the dependency context, where the affected parent is, by definition, a custodian of the child. But even if some disaffected parents experience relatively little pain at the removal of a child, we should not design our system specifically for them, any more than we design our criminal system for the occasional defendant who might welcome prison for a warm bed and regular meals.

While the two deprivations strike at somewhat different aspects of personhood and liberty, it is difficult to contend that imprisonment is uniformly a more grievous deprivation of liberty than the removal of a child. It is probably more accurate to say that that one deprivation is worse for some people, that the other deprivation is worse for others, and that many people would be hard-pressed to choose between them. But if it is true that—at least for many people—the child welfare deprivation inflicts as grievous an injury as the criminal deprivation (or even if it is at least arguable), why have the courts treated it as a non-question?\textsuperscript{112}

One part of the problem may stem from the courts' tendency to treat the question in the abstract, as if the hypothetical people going to prison and losing their children have no color, no social class, and no gender.\textsuperscript{113} In fact it is no

\begin{itemize}
\item \textsuperscript{110} See Minow, supra note 9, at 8 (noting the danger of ignoring "the possibility that people exhibit a range of capacities and abilities" when we create two classes of people).
\item \textsuperscript{111} I do not wish to suggest by my attachment of gender of these two hypothetical parents that these roles could never be reversed. Nonetheless, I suspect that cultural conditioning remains strong enough that, where individuals actually do fit within the two extreme types I have described, they usually conform to the gender stereotypes suggested by my example.
\item \textsuperscript{112} A few courts have suggested that termination of parental rights may be as grievous a deprivation as imprisonment. See, e.g., Danforth v. State Dept' of Health & Welfare, 303 A.2d 794, 800 (Me. 1973) (in holding that parents have right to counsel in dependency cases under state constitution, observing that "[i]n some instances, the loss of one's child may be viewed as a sanction more severe than imprisonment."); State v. McMaster, 486 P.2d 567, 569 (Or. 1971) (stating in termination of parental rights case, "[a]dmittedly, a serious interest of the parents is in issue which can be assumed to be as important to the parents as their freedom, which is in jeopardy in a criminal proceeding"); State v. Jamison, 444 P.2d 15, 17 (Or. 1968) (stating in termination case, "[w]hile the case at bar is not a criminal matter, the consequences of the denial of counsel are as serious as they are in most criminal prosecutions.").
\item \textsuperscript{113} It is perhaps telling that Justice Stevens, in his dissenting opinion in \textit{Lassiter}, was the only Justice to suggest that the deprivation of liberty occasioned by the termination of parental rights could be equal to or even more egregious than that occasioned by incarceration, and the only Justice to attribute a female gender to the hypothetical parent: A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty and property,
secret that the people affected by the child welfare system are some of the least powerful members of our society: women, many of whom belong to racial minority groups and virtually all of whom are desperately poor.\textsuperscript{114} Indeed, the Supreme Court declared as much twenty years ago.\textsuperscript{115} Except for gender, this is also generally true of the population of people subject to criminal prosecution, but it is true to a lesser extent.\textsuperscript{116} As anecdotal evidence of this fact—at least as to social class—consider how many lawyers make a living representing paying clients in child welfare proceedings versus the number who do so in criminal proceedings.\textsuperscript{117} Indeed, this disparity creates a kind of circular momentum: The very fact that there is a well-heeled private criminal defense bar with no counterpart in the child welfare arena no doubt explains in part the relative lack of prestige attached to representing parents in dependency and termination cases and contributes to the general perception that the rights at stake in child welfare cases are of lesser importance than those at stake in criminal proceedings.\textsuperscript{118}

On a broader level, it is perhaps not surprising that a deprivation that affects almost exclusively the disenfranchised is treated as less important and less deserving of attention than a deprivation that—at least occasionally—is visited upon wealthy and politically powerful members of society. Indeed, the privacy rights of minorities and the poor have never been accorded strong protection.\textsuperscript{119}

because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.

Lassiter v. Department of Soc. Servs., 452 U.S. 18, 59 (1981) (Stevens, J., dissenting). Indeed, the notion that the loss of one's relationship to one's child is "more grievous" than the loss of one's physical freedom through incarceration may reflect a peculiarly female point of view. See infra 125-31; See also Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 BERKELEY WOMEN'S L.J. 39, 62 (1985) (speculating that if a women's ethic of care were incorporated into substantive constitutional law, the narrow definition of liberty as encompassing only the loss of physical liberty "would probably be enlarged to include the permanent disconnection from one's child" effected by termination of parental rights).

114. See supra note 59.


116. See Guggenheim, supra note 35, at 549 (Child protective laws are applied to the poor and nonwhite "to a considerably greater degree" than the criminal laws.).

117. Perusing Martindale-Hubbell's Areas of Practice Index reveals that the names of private lawyers listed as practicing criminal law (excluding the subcategories of "Drugs and Narcotics," "Fraud and Deceit," "RICO," and "White Collar Crime") cover 39 pages. In contrast, the only four categories in the index that could possibly cover child welfare cases ("Children—Dependency," Children—Abuse and Neglect," "Parental Rights," and "Parental Rights—Termination") collectively cover less than a third of a page. See MARTINDALE-HUBBELL LAW DIRECTORY, Areas of Practice Index AP268N, AP274N, AP276N, AP600N-AP639N (1999).

118. Peggy Cooper Davis observes "an unfortunate tendency among lawyers to trivialize" child welfare issues, and family law issues generally—a tendency that is exemplified by the federal courts' disinclination to address such matters on the grounds that they are more appropriately left to state control. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 243 (1997); see, e.g., Moore v. Sims, 442 U.S. 415, 436 (1979) (federal court required to abstain from exercising jurisdiction over suit challenging constitutionality of pending state court child abuse and neglect proceedings in part because "[family relations are a traditional area of state concern"); Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1112 (1st Cir. 1978) (holding no writ of habeas corpus available in federal court to challenge state court judgment terminating parental rights, in part based on "a long history of state predominance and federal deferral in family law matters); see also Sylvia Law & Patricia Hennessey, Is the Law Male? The Case of Family Law, 69 CHI.-KENT L. REV. 345 (1993) (arguing that law tends to devalue child custody issues, noting as an example the dearth of appellate opinions concerning child custody).

119. See Wyman v. James, 400 U.S. 309 (1971) (Fourth Amendment does not protect against mandatory
Historically our society has tolerated, and even expected, a high degree of
government regulation of the private lives of poor and minority citizens.\(^{120}\) The
failure to accord importance and protection to the child welfare deprivation is
consistent with that tradition.

But gender, race and class subordination operate at other more subtle levels
as well. The assumption that putting someone in prison is a worse deprivation
than taking their child reflects a failure to account for the possibility of
difference among individuals. Thus, a woman who has been culturally
conditioned to view motherhood as the ultimate purpose of her life and the focus
of her identity might very well experience the removal of her children in a
dependency proceeding as equally grievous, or even more grievous, than her
own imprisonment.\(^{121}\) In contrast, a man who derives his identity and sense of
purpose primarily from work might experience imprisonment as the more
grievous deprivation.\(^{122}\)

For African-Americans, the legacy of slavery may add another layer of
cultural meaning to the experience of child removal. One of the grossest
deprivations of slavery was the frequent and arbitrary obliteration of parent-child
bonds.\(^{123}\) Slavery began by wrenching men, women, and children from their
families and communities in Africa and transporting them among strangers to a
life of slavery in America, where, in turn, parents and children lived in constant
fear that they would be sold away from each other at the whim of the plantation
owner. "For enslaved family members, it was a subtext of panic in every parental
script."\(^{124}\) Accordingly, the involuntary removal of children in child welfare
proceedings may have a special sting and significance for African-American
families by virtue of the echoes of slavery it evokes.

This is not to say that all women or all African-Americans will experience
the child welfare deprivation in the ways I have suggested. Nor will all white
men experience it as less painful. However, these generalizations do suggest a
failure of the courts' analyses to consider ways of experiencing the world that
may differ from the culturally constructed white male norm. This failure to

---

\(^{108}\) See Gordon, supra note 7, at 528 (nineteenth century movement against child abuse was an attempt
by the dominant class to control and impose its values on immigrant groups); Lela B. Costin, The Historical
Context of Child Welfare, in A HANDBOOK OF CHILD WELFARE, CONTEXT, KNOWLEDGE AND PRACTICE 34, 43
(Joan Laird & Ann Hartman, eds. 1985). Washington State's definition of "neglect" provides a telling
testament to the fact that child abuse and neglect laws have been used against the poor. The Washington
legislature apparently found it necessary to specify that "[t]he fact that siblings share a bedroom is not, in and

\(^{122}\) See supra note 58, at 1603 ("Whether the ethic of care [attributed to women by relational
feminists] is to be enshrined as a positive virtue, or criticized as a characteristic not belonging to all women,
one truth emerges: many women see themselves, and judge their own worth, primarily in terms of
relationships.").
account for difference reflects a value scheme that is fundamentally skewed by
the power structure embedded in our society and culture.

Arguably the most important and powerful insight of feminist theory has
been to reveal how male domination, in addition to affecting the relative position
of women themselves in the social hierarchy, also has relegated to inferior status
all things associated with women. "A history of almost exclusive male
occupation of dominant cultural discourse has . . . created a self-referencing
system by which those things culturally identified as 'male' are more highly
valued than those identified as 'female,' even when they appear to have little or
nothing to do with either biological sex."¹²⁵ Thus, our culture devalues a whole
host of stereotypically feminine traits—wearing dresses, speaking softly, raising
children.¹²⁶ Whether those traits are inherently or biologically female or whether
they describe all women is beside the point. This subordination of the social
category of female occurs regardless of whether the traits are naturally or
inherently female.¹²⁷ The point is that the devaluation of these traits stems from a
system of male hegemony rather than from any legitimate value judgment.
Therefore, when we identify a hierarchy of values as "gendered"—that is to say
that traits or values associated with women are devalued in relation to
corresponding traits or values associated with men—we should view it
skeptically in order to discern whether the hierarchy is simply a reflection of
sexism or is in fact supported by some convincing non-gendered justification.¹²⁸

Here, the hierarchy of deprivations that ranks imprisonment as more
grievous than the removal of one’s child is grounded in such a gendered
hierarchy of values. Imprisonment is directed fundamentally at the individual.
First and foremost it curtails the individual’s physical freedom of movement.
From that fundamental limitation flows a series of consequences to public and
domestic life, including the curtailment of the individual’s ability to practice a
profession, to earn a living, and to live and associate with people of her
choosing, including her children. But the separation of parent and child affected
by incarceration is incidental to the deprivation, not its focus. Indeed, it is the
curtailment of the public aspects of life—the deprivation of the ability to earn a
living and the reputational injury suffered by the criminal defendant—on which
the courts most often focus in analyzing this deprivation.¹²⁹ The child welfare

¹²⁶. See Mary Anne Case, Disaggregating Gender from Sex and Orientation, 105 YALE L.J. 1, 3 (1995);
see also Ellen Smith Pryor, Flawed Promises: A Critical Evaluation of the American Medical Association’s
Guides to the Evaluation of Permanent Impairment, 103 HARV. L. REV. 964 (1990) (Book review of AMA
guide widely used to set levels of compensation for various impairments in worker’s compensation proceedings
that criticizes the Guide for assigning higher values to loss of male sexual function than to equivalent loss of
female sexual function).
(1995); Littleton, supra note 125, at 1297. Accordingly I do not find it necessary to take sides in the debate
over essentialism in feminist thought.
¹²⁸. See Littleton, supra note 125, at 1321-23.
however short a time will seldom be viewed by the accused as a trivial or petty matter and may well result in
deprivation, on the other hand, aims fundamentally at the parent-child relationship rather than at the parent as an autonomous individual. It strikes at the parent's role and identity as a parent and curtails the primary function and activity of the domestic sphere—child rearing.

Thus, the criminal deprivation strikes at the core of those aspects of personhood historically and culturally associated with men—individual autonomy, freedom of movement, ability to earn a living and otherwise function in the public sphere—while the child welfare deprivation strikes at those aspects of personhood historically and culturally associated with women—connection, intimacy, motherhood, and domestic life. There appears no legitimate reason to rank one set of values above the other. In recent years, as women have begun to enter the work world, and "new-age men" have begun to embrace the roles of nurturer and caregiver, a new cultural consensus has begun to emerge that views these two aspects of personhood as equally important and expects a full, well-rounded individual to strive to experience both. The hierarchy of deprivations that views imprisonment as more grievous than the temporary or permanent removal of a child, therefore, appears to be based on an outmoded structure of sexist thought rather than any legitimate value scheme.

If we reject this hierarchy of deprivations, how will that effect our due process analysis? How does it affect the original question: Where on the scale from informality to formality should dependency and termination cases be located? I turn to these questions in the next section.

B. A New Balance

Courts standardly use the Mathews v. Eldridge three-part balancing test to address the question "what process is due" in dependency and termination cases. This test analyzes the due process question as a kind of utilitarian cost-benefit problem of identifying the procedural scheme that will produce outcomes quite serious repercussions affecting his career and his reputation.

130. Professor Christine Desan of Harvard Law School has occasionally conducted an informal survey of her first-year civil procedure class when she teaches the Lassiter case. She asks her students: if they were facing both a criminal prosecution and a termination of parental rights proceeding, but could only have a lawyer represent them in one of the two cases, which one would they choose? In the responses she receives, Professor Desan has noticed a correlation with the gender of the student -- women are more likely to want a lawyer to represent them in the termination proceeding while men are more likely to want a lawyer for the criminal case. While this is not a controlled, scientific study, it does suggest an interesting area for further research.

131. Indeed, courts' unwillingness to accord due weight to the liberty interests of mothers accused of abuse and neglect may also stem in part from disapproval at their having transgressed their proper role as caregivers and nurturers. See Dorothy Roberts, Motherhood and Crime, 79 IOWA L. REV. 95, 107 (1993) (The law "treats women who commit crimes as mothers the harshest for violating their traditional role.").


that maximize social welfare. The test weighs the value of the private interest at stake magnified by the risk of an erroneous decision and discounted by the social costs of additional procedures (the government's interest).

If we accept the equivalence between the deprivation of liberty effected by imprisonment and that effected by the temporary or permanent severance of parent-child bonds in child welfare cases, then the first prong of the Mathews test—the parent's interest in the care and companionship of her child (and the child's reciprocal interest)—is as weighty as the analogous interest in a criminal case. The second Mathews prong is the risk of error. In this respect, child welfare cases are also equivalent to criminal cases. Indeed, the Supreme Court has held so on several occasions. In dependency and termination cases there is usually a substantial disparity in litigation resources between state and parent; the courts often apply imprecise substantive standards; the parents are often vulnerable to cultural or class bias, and the courts frequently rely heavily on technical expert medical and psychiatric testimony. These factors suggest that the risk of error in such cases is at least as high, if not higher, than in criminal cases.

Thus, the first two prongs of the Mathews analysis weigh in favor of the highest degree of procedural protection and formality in child welfare cases—equivalent to that provided to criminal defendants. The third prong, the government's interest, includes two aspects. The first is the government's parens patriae interest in protecting children. This encompasses both an interest in protecting children from parental abuse and neglect and an interest in avoiding unnecessary interference with children's bonds to healthy and loving parents. The second aspect of the government's interest is far less weighty than this parens patriae interest. It is the government's interest in avoiding the increased fiscal and administrative burdens associated with additional procedural


135. It is not entirely accurate to characterize the private interest involved here solely as an individual interest of the parent. Clearly the child also has an interest in the continued care and companionship of her parent. Indeed, the interest at stake is really a relationship interest held jointly by parent and child. See Katherine T. Bartlett, Re-expressing Parenthood, 98 YALE L.J. 293, 339 (1988). I speak of the parent's interest as a kind of short-hand for the parent's interest plus that aspect of the child's interest that favors preservation of the parent-child bond.

136. Since the due process clause is intended to protect individual liberty against collective action, the weight of the private interest at stake is arguably the linchpin of the analysis. See Mashaw, supra note 134, at 106.


138. See supra note 36.

139. See supra note 36.

140. See supra note 36.

141. Certainly, the uncertainty and inconsistency caused by vague substantive standards is worse in the child welfare context than the criminal context. See supra note 36.

142. See Santosky v. Kramer, 455 U.S. 745, 766 (1982)(state's interest includes protecting the child by preserving her familial bonds where "there is still reason to believe that positive, nurturing parent-child relationships exist.").
Child welfare cases also involve a fourth interest that is missing from the standard Mathews analysis: the interest of the child. Like the government’s *parens patriae* interest, the child’s interest shifts with the facts of each case.\textsuperscript{144} If the parent is in fact committing acts of abuse or neglect, the child’s interest in bodily integrity weighs heavily in favor of any procedure that will ensure state intervention on her behalf. If, on the other hand, the parent is not committing acts of abuse or neglect, the child’s strong interest in the care and companionship of her parent coincides with her parent’s interest in family integrity and weighs heavily in favor of any procedure that will ensure that state intervention is not permitted where it is not warranted.

In an ideal world, the child’s interest would be identical to the government’s *parens patriae* interest because the government would in fact be protecting children’s true interests. In the real world, of course, we recognize that institutional pressures and errors in judgment can conspire to make the government take positions in individual cases that are not consistent with the child’s interest. For this reason, courts often appoint child advocates or guardians ad litem, and these advocates sometimes oppose the government’s position in particular cases.\textsuperscript{145}

When analyzing these cases at a generic level rather than at a case-by-case level, however, the child’s interest does merge with the state’s *parens patriae* interest. At this level, the “child’s interest” can be no more than a court’s attempt to identify on an abstract level what is in the best interests of children, just as the *parens patriae* interest is a court’s attempt to identify what the government construes to be children’s best interests.\textsuperscript{146} Accordingly, in attempting to craft generally applicable rules about the procedural protections to be applied in dependency and termination cases, denominating the child’s interest as a

---

143. See *Lassiter*, 452 U.S. at 28.

144. It may even shift within a given case, since a child’s relationship with an abusive or neglecting parent may also have positive aspects. For a particularly compelling and nuanced fictional account of the complexities of the relationship between an abusive parent and child, see KERI HULME, *THE BONE PEOPLE* (1983).

145. The child’s interest is an example of a legal principle that gives rise “to conceptual and practical problems that are resolvable only in specific contexts.” *MINOW*, supra note 9, at 321. Martha Minow discusses this phenomena with respect to decisions about medical treatment for seriously disabled infants, where seemingly absolute principles like the “right-to-life,” when applied in context, dissolve into ambiguity over such questions as when a particular treatment actually preserves life or only prolongs dying. Such ambiguities, like those embedded in the term “best interests of the child,” are in some sense ultimately unknowable, and can only be resolved through contextual judgments made on a case-by-case basis. See *id.* at 321-22.

146. Some people may argue that by folding the child’s interests into those of the parent and the state, I have failed to accord them adequate importance. Barbara Woodhouse, for example, argues for a child-centered perspective in which parent’s rights are derivative of children’s interests. See Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent’s Rights*, 14 CARDOZO L. REV. 1747 (1993). Giving content to a child-centered perspective presents considerable difficulty, however, in a context such as this in which the child’s interests are indeterminate. Cf. Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998) (arguing that in individual child welfare cases, where the legal interests of the child are not clearly ascertainable from substantive law, lawyer for child should not take a position, or should present multiple options to judge).
Increasing Formality in Child Welfare Proceedings

separate factor does not further the inquiry. In the analysis that follows, I use the term “parens patriae” as a shorthand for this joint child-state interest. Using that term, rather than referring to “the child’s interest,” helps to remind us that any attempts we make to characterize children’s interests are ultimately no more than second guesses, several steps removed from the children themselves.

The parens patriae interest varies fundamentally depending on the type of procedure at issue. Where the procedural protection will improve the accuracy of the decision making but will not actually shift the risk of error from one party to another, the parent’s interest and the parens patriae interest converge: both weigh in favor of increased accuracy. The only interests that weigh in the other direction in such a case are the fiscal and administrative burdens associated with the particular procedural protection at issue. These interests vary, but are unlikely to rise above the de minimus level in the face of the profound interests of parent, child, and state in accurate decision making. Examples of this kind of procedural protection include the right to appointed counsel for indigent parties and the right of indigents to a waiver of transcript or record preparation fees on appeal. Accordingly, in such instances, all three Mathews factors weigh in favor of maximum procedural protection and formality, and the level of protection should therefore be equivalent to that afforded to criminal defendants.

Where, on the other hand, the procedural protection at issue is one that actually re-allocates the risk of error from the parent to the state, the parens patriae interest conflicts with the parent’s liberty interest. Examples of such procedures include increasing the standard of proof to beyond a reasonable doubt or the imposition of an exclusionary rule precluding the government from using evidence obtained in violation of fourth amendment strictures. Any such procedural protection that makes an erroneous decision to leave a child in an abusive home more likely than an erroneous decision to remove a child, disserves the parens patriae interest in protecting children from abuse and neglect. Accordingly, for this set of procedural protections, the parent’s profound and compelling liberty interest in the care and companionship of her child is directly at odds with the state’s compelling parens patriae interest in protecting children from abuse and neglect.

This, of course, is exactly the kind of situation in which balancing tests are of limited help. Despite the promise of mathematical certainty that the cost-benefit formulation suggests, these two conflicting interests cannot be expressed in quantitative terms, and the resolution of this balance must at bottom rest on a value judgment. Nonetheless, the simple exercise of describing in qualitative terms the profound interests at stake on each side of this balance is of some

147. On the other hand, the fact that the Mathews test does not consider the child’s interest as an independent factor does raise problems with regard to the application of the Supreme Court’s ruling in Lassiter, holding that the Mathews test should be employed on a case-by-case basis to determine whether appointed counsel is constitutionally required.
value. Courts have sometimes framed the issue in roughly this way. They have in most instances failed, however, to pursue any in-depth analysis that honestly confronts the gravity of the liberty interest that both parent and child possess in the continuation of their relationship and that grapples seriously with the difficult question of how to balance those interests against the compelling *parens patriae* interests of the state and the child.

In the criminal context we have confronted the analogous conflict between the individual and the state head-on and have come to a resolution, which—while perhaps troubling to some—reflects a deep analysis of the structure and values of our political system as well as a hard-nosed assessment of the bureaucratic realities of law enforcement. That is, in the words of Justice Harlan, "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."\(^{150}\) There are, of course, important differences between the criminal context and the child welfare context, although they are not adequately captured by merely asserting, as many courts do, that the former is punitive and the latter remedial.\(^ {151}\) Like the child welfare system, the criminal system serves, in part, a protective function of preventing criminals from committing future crimes, at least for the period of their incarceration. The future victims of those crimes, however, are usually indeterminate and are not living in the same household with and under the sole care and custody of the perpetrator. Thus, while the government's interest in criminal proceedings can in part be expressed as protecting future crime victims, the causal link is much weaker and the interest therefore substantially less compelling than the state's analogous protective interest in child welfare cases.

Accordingly, I do not suggest that the same balance we have struck between individual and state in the criminal context simply be imported wholesale into the child welfare context. I do suggest, however, that we need to give the question much more careful thought than we have. Formalistic, categorical thinking that, for example, relies on the distinction between civil and criminal cases pervades much of the existing analysis of these questions. Much of it is also based on misperceptions about the nature of the cases most frequently seen by child welfare systems and the extent of harm to the child flowing from error in either direction. Accurate information is essential to making a value choice in this context. Most people would balance the scales differently if they believed that ninety percent of child welfare cases involved allegations of severe life-threatening abuse than if they believed that ninety percent of the cases involved allegations of low-level, poverty-induced neglect.\(^ {152}\) But too often policy choices in this area are driven by the periodic horror stories that make the front pages of newspapers rather than a sober assessment of the full range of families affected by the system.\(^ {153}\) Accurate information about the nature and extent of the

---

151. See supra note 84.
152. See supra note 19.
153. See id. at 1622 ("Tragic stories generate extensive attention from every facet of the media, eclipsing
psychological harm suffered by children erroneously removed from healthy families is also essential.

Accurate empirical information will not make the hard decisions for us, but it provides a necessary foundation. From there we must avoid the temptation to resort to meaningless exhortations about the best interests of children and instead acknowledge that the liberty interest at stake in dependency and termination proceedings is of equivalent "transcending value" to that of a criminal defendant. We should then think deeply and reflectively about the balance we want to strike in light of both our society's commitment to personal liberty and the realities of the child welfare bureaucracy.

III. RE-EVALUATING THE *MATHEWS* FRAMEWORK: IS FORMALITY REALLY BETTER THAN INFORMALITY?

In Part IIA, I questioned the hierarchy of values that views imprisonment as a more grievous deprivation than the loss of one's child. I argued that this hierarchy reflects a cultural value scheme fundamentally skewed by sexism and should therefore be rejected. In Part IIB, I reanalyzed the question of what process is due under the *Matthes* framework and concluded that, while many questions remain unanswered, treating the removal of a child as a deprivation of liberty equivalent to imprisonment should generally lead us to favor increased formality and procedural protection in dependency and termination proceedings.

The *Matthes* framework, however, begs several important questions. First, as a number of commentators have pointed out, it focuses solely on the social utility and accuracy of outcomes and fails to account for the "process values" of due process: the notion that the "opportunity to be heard" has social value not only because it contributes to the accuracy of results, but because it respects the dignity of the accused and promotes a perception that the procedure is fair. Certainly, the importance of promoting these process values—like the importance of promoting socially valuable outcomes—increases proportionately with the strength of the interests at stake. But does the *Matthes* formulation, which calls for more formal procedures where more grievous deprivations are threatened, serve the process values as well as the outcome values of due

---

process? Or do informal proceedings perhaps provide the accused a fuller sense of being included in the decision making process and treated with dignity?

Second, the hierarchy of formality over informality which is implicit in Mathews is itself subject to the same feminist critique that I applied in Part II to question the hierarchy of values that ranks autonomy over connection and views imprisonment as a more grievous deprivation of liberty than the removal of a child. Indeed, some feminists have argued that the adversarial model of dispute resolution is a male institution and that a women’s lawyering process would emphasize instead relationships, collaboration and cooperation, favoring mediation and negotiation over adversarial courtroom battles. These feminists favor informal dispute resolution methods in part because they view them as better serving the process values of due process. By providing an atmosphere that is less intimidating and more accessible to those not trained in law, informal mechanisms are said to promote empowerment of the participants and fuller participation in the decision making process.

Much of this strand of feminist legal theory that promotes informality as a “women’s way” of dispute resolution grew out of the work of moral psychologist Carol Gilligan. In her 1981 book, In a Different Voice, Gilligan critiqued Lawrence Kohlberg’s theory of moral development. Based on empirical research on male subjects only, Kohlberg theorized six “universal” stages of human moral development. When the theory was applied to girls and women, however, their development appeared to be arrested at stage three, where morality is conceptualized in terms of interpersonal relations and caring for and pleasing others. Many women never reached Kohlberg’s higher stages, at which moral problems are solved by reference to abstract rules and universal principles.

Rather than locating the problem in women’s development, Gilligan hypothesized that women’s failure to fit the existing model pointed instead to the shortcomings of the model itself—its failure to account for the full range of human experience. Studying both male and female subjects, Gilligan identified a “different voice” expressed by many girls (and some boys) that reasons morally based on relationships and context rather than separation and abstract principles. Gilligan’s emphasis on women’s differences from men was particularly appealing to many feminist legal theorists who were beginning to identify the limitations of pushing for gender equality based only on women’s similarities to men. Arguing for women’s equality based on women’s sameness to men would only achieve, at best, the right to compete with men on men’s terms.


158. One of the first feminist scholars to point out the importance of taking differences between the sexes into account was Sylvia Law. See Sylvia Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV.
work legitimized a new approach. What if, rather than de-emphasizing women's differences from men, feminists embraced those differences and held them up as an alternative that was equal to, or maybe even better than, the male norm?

Gilligan's work spawned a spate of optimistic literature speculating on how women's different ways of knowing, reasoning, solving moral problems, resolving disputes, and relating to people have the potential to transform various institutions, including law, that have been historically inhabited, controlled and defined by men. Based on a female "ethic of care," these authors have attempted to construct a women's lawyering process, a women's constitution, and a women's judging style, to name a few. They present the ethic of care as an alternative to the traditional male model of moral reasoning. That model views moral problems in terms of competing individual rights and abstract rules and sees disputes as best resolved by a neutral, detached decision maker who listens to competing adversaries present their cases and then, through a process of applying abstract principles, declares one party the winner. The ethic of care, in contrast, tries to account for all parties' needs and searches for solutions that satisfy all of them and preserve relationships. Those who promote the ethic of care view communication, rather than adjudication, as the key to dispute resolution. They believe that if parties talk directly to each other they will appreciate the importance of each other's needs and reach mutually beneficial solutions. They distrust the detached, rule-bound, adversarial approach of traditional adjudication and promote instead informal mechanisms of dispute resolution, like mediation.

Indeed, mediation seems, at least superficially, to promote many of the values that feminism embraces. It puts the parties in control of the process and thereby eliminates the power imbalances inherent in the judge-litigant and lawyer-client relationships. Also, because there are no rules of evidence or procedure limiting the range of subjects that can be discussed, it holds out a promise of more contextualized decisionmaking that builds up from the parties'
experience rather than down from an objective, hierarchical set of rules. Finally, mediation allows emotions and subjective experience to be taken into account, and emphasizes relationships rather than competing rights.

But feminism is, of course, not monolithic. There are many strands of feminism and much disagreement among feminists. Those who have built on the work of Carol Gilligan, focussing on women’s differences from men in order to construct a feminine alternative to the male norm—often called “relational feminists”—have been roundly criticized by others in the feminist community for positing a unitary female essence that fails to account for the many differences among women based on race, class, and so forth. It is no surprise that feminists do not speak in a single voice with respect to the virtues of informal dispute resolution. A number of feminists, for example, have criticized the use of mediation in domestic relations cases for failing to counteract inherent power imbalances between the parties, particularly in cases involving battered women.

Nonetheless, feminism at least forces us to ask the question: Is formality really better than informality for resolving disputes involving important interests? A close examination of how formal and informal procedures play out on the ground in child welfare proceedings reveals that a number of factors specific to this context prevent the realization of informality’s promise of a dispute resolution mechanism that promotes feminist goals. Indeed, the de-formalization of child welfare proceedings is antithetical to feminism’s fundamental concern with equalizing power imbalances. Rather than liberating a wrongfully suppressed women’s voice or promoting “process values” of participation and a sense of fairness, de-formalization relegates those proceedings and their participants to a female ghetto that disempowers mothers.

Additionally, some have suggested that the ethic of care is simply a reflection of women’s powerlessness and victimization in patriarchal society. For example, in the words of Catharine MacKinnon:

[I]t makes a lot of sense that women might have a somewhat distinctive perspective on social life. We may or may not speak in a different voice—I think that the voice that we have been said to speak in is in fact in large part the “feminine” voice, the voice of the victim speaking without consciousness. But when we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way.


This approach is consistent with feminism’s inherent skepticism toward reasoning that is based on abstract principles rather than on context and experience. See supra note 13.
by generating inaccurate fact finding and false agreements and subjecting mothers to unwarranted state intrusion into the intimate details of their private lives.

A. De-formalization of Child Welfare Cases: The View from the Ground

We can ask two basic questions about process. First, does it produce good outcomes? And, second, apart from outcomes, how does the process itself affect the participants? With respect to outcomes, the obvious goal is factual accuracy. Because the goal of a child welfare proceeding is ultimately prospective—the protection of the child—factual accuracy in this context really means making accurate predictions about the future. Without getting into debates about whether psychologists can accurately describe a child abuser profile or whether other reliable methods might exist for predicting abuse before it happens, I will proceed from the proposition that regardless of the substantive standard applied, this prediction must be made on the basis of factual findings about past events, whether those events are actual incidents of abuse or neglect or parental actions or behaviors that can be strongly correlated with abuse or neglect. Good outcomes, then, depend on accurate factual determinations about past events.

A just outcome requires more than accurate fact finding, however. Once factual findings have been made, a second layer of decision making situates those facts among legal categories. In the child welfare context, this involves determining whether any acts of abuse or neglect the court finds to have occurred are severe enough to warrant state intervention or removal. We want this level of decision making to lead to outcomes that are fair and just, i.e., that comport with principles of equality and liberty. This means we want results that, first, are consistent—such that similar fact patterns lead to similar decisions about removal (the equality principle)—and, second, reflect our collective judgment about when sub-optimal treatment of a child rises to a level warranting state intervention or removal (the liberty principle).

Next, under the heading of "process values," we ask whether the process treats participants with dignity, gives them a sense that they are participating in and contributing to the decision making process, promotes a perception among participants that the process is fair, and preserves relationships between the parties. This set of questions arises out of two important insights about procedure. The first is a recognition that processes themselves, as well as outcomes, affect individuals in important ways. The second is a recognition that in order for a dispute resolution system to have legitimacy, the participants must perceive it as fair and that participants' perceptions about the fairness of a process are to some degree distinct from their level of satisfaction with the

---

167. See supra note 155.
168. See Mashaw, supra note 134, at 50; Summers, supra note 155, at 3.
This concern is related to the outcome question, since participants who perceive a process as fair are more likely to comply with its outcomes.

Thus, when we ask whether formal or informal processes "work," we are really asking about the extent to which the processes serve or disserve the two outcome goals— I will call them "factual accuracy" and "just results"—as well as "process values." In the following sections I will examine the extent to which formality and informality serve or disserve each of these goals in the context of child welfare proceedings and attempt to identify the conditions under which each type of process is most and least successful in meeting these goals.

1. Factual Accuracy

Her dirty blond pony-tail danced behind her head as she talked, her face red with agitation. "That child welfare lady said it would be okay—she said she was my friend—now she's taking my baby." The case was in court for a review hearing. This young mother had been under agency supervision for a number of months, but the relationship between her and the social worker had been amicable. There had never been any allegations that Sheila hurt her baby, just that she was young, living in an apartment with no heat or hot water, with insulation and wires hanging from the ceiling, and that her baby had been born with severe medical problems. Her social worker had been friendly and helpful, negotiating with the landlord, and now the apartment was being fixed. Her baby had been in the hospital for a month and now was being released, though he'd still be on an apnea monitor. Her social worker was telling her that she couldn't bring the baby home because there was still no heat or hot water in her apartment and that he would be placed in a foster home. Sheila didn't want to bring him home because the apartment was still in bad shape, but her mother was willing to take him until the repair work was finished. She didn't see why her baby should be cared for by a stranger when his grandmother was willing.

Sheila and I made our way through the crowded waiting room and found the agency social worker talking to the child advocate. I presented Sheila's plan to them. The social worker's resistance was immediate and unyielding: "The grandmother hasn't been trained on the apnea monitor so the hospital won't release the baby to her anyway." The child advocate chimed in: "Besides, we don't know anything about this grandmother. Who is she? We'd have to at least send someone out to see her house first and I know I can't do that until next week."

I suggested to the social worker that maybe the hospital could train the grandmother to use the apnea monitor. Did she know how long the training would take? Had she talked to anyone at the hospital to find out what they thought of the grandmother? The social worker said she had talked to the hospital staff several days ago and they had made it very clear that the baby

169. See Tyler, supra note 155.
would only be released to someone with the proper training. "I've found an excellent medical foster home and they're willing to take him today." The child advocate nodded and smiled encouragingly at Sheila.

I had been feeling Sheila's frustration building and now it broke. "Why you talking about foster care? My baby don't need to be with a bunch of strangers when his own grandmother can take him." The social worker gave her a big grin. "Now mom, there's no need to get excited. You know we all just want what's best for your baby. This foster home is very nice. And it will only be for a month or so until we can get those repairs finished. Remember what we talked about. Let's keep our eye on the ball and try not to get distracted by these silly details. Let's all try to work together." Sheila's face was red and her voice shrill with anger. "But you ain't working with me! I tol' you my mom could take him but you don't care. You just tryin' to steal my baby!" Her eyes brimming with tears, Sheila turned and walked off. The social worker looked at me disapprovingly. "You know, until you got involved, Sheila was being very cooperative."

I found Sheila in a corner, still fighting back tears. "I guess I better go along coz if that lady gets mad at me, I'll never get my baby back." I explained that we could also put a case on and let the judge decide but that we would need more evidence. "Do you think the people at the hospital would support your mother taking the baby?" Sheila looked up, despondent. "I don't know. They seemed nice I guess."

I went to a phone and called the hospital. When I finally got through, the hospital social worker and attending physician gave rave reviews of Sheila and the grandmother. Both had been visiting regularly, were very bonded to the child and understood the seriousness of his condition. Sheila had made a mature judgment that she shouldn't take the baby home right now, but the grandmother was willing. They had given the grandmother the training and were planning to send the baby home with her today. I explained what was going on and the hospital social worker agreed to come to the courthouse at 4:00 to testify if necessary...

The formal adversarial process is designed to produce accurate decisions by bringing out all relevant facts and limiting bias and prejudice. Because adversaries each present their position in an attempt to persuade the judge to rule in their favor, each side is motivated to ferret out all the evidence that supports its position. Each side is also motivated to view its opponent's evidence critically and to undermine it through cross-examination and the introduction of contradictory evidence or evidence showing bias or lack of credibility. This motivation is critically important, particularly in a system in which professionals are juggling high caseloads. The parties’ adoption of a conciliatory stance toward each other raises the danger that they will accept statements uncritically and fail to seek out contradictory evidence.

The formal rules that govern trial procedure also help to assure accuracy.
Witnesses testify under oath under threat of penalty for perjury. The judge excludes unreliable evidence, like hearsay, as well as evidence likely to cause prejudice. The requirement that judges state the basis for their decisions helps to ensure that decisions are based on a rational view of the evidence and not on prejudice or bias. Numerous rules governing judges' conduct in adversarial proceedings encourage impartiality and the appearance of impartiality. Thus, judges sit higher than and at some distance from the parties, and usually address only the lawyers. When they do address the parties directly they do so formally and on the record. And they do not communicate with one party out of the presence of the other party.  

Of course, these mechanisms are far from perfect, and it is beyond question that trials can and often do reach inaccurate results skewed by judges' prejudice and partiality. Where decision making occurs without these formal constraints, however, it is even more susceptible to being swayed by prejudices, stereotypes, and snap judgments based on innuendo and rumor. Mediators are trained to maintain impartiality and neutrality, but because their role is to facilitate communication between the parties rather than to judge, they do not maintain the same kind of physical and psychological distance from the parties that judges do. They sit closer to the parties, talk to them directly in an informal style, and may speak to one party without the presence of the other and without subsequently relating to the other what was said. This more intimate and informal setting may make mediation "an environment in which prejudices can flourish." The danger that prejudice or incomplete or unreliable information will distort decisions is particularly acute in the emotionally-charged arena of dependency and termination cases. Where so much is at stake—the suffering of children—the players in the system are all the more likely to make snap judgments based on gut feelings and instinct and to cut corners in an attempt to manipulate decisions to conform to their own view of the right outcome. Imagine, for example, a social worker who is convinced in his gut that a mother is severely beating her child. Maybe it is because the look in her eyes is exactly the same one he saw in another mother who seriously injured her child after he failed to act quickly enough. In the face of such a feeling, imagine how tempted the social worker must be to remove the child immediately without bothering to confirm all the facts—to perhaps accept at face value the estranged father's hearsay statement that the doctor had said the broken bone could only have been the

170. In my experience, these formalities were not always observed by judges in child welfare cases. The therapeutic mindset that pressures participants to abandon procedural formalities in these cases can affect judges as well. Thus, ex parte communications and other irregularities were not uncommon.


172. See Richard Delgado, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359, 1387-88 (1985); Grillo, supra note 58, at 1589-90 ("The very intimacy that renders mediation such a potentially constructive process may facilitate the mediator's projection of her own conflicts onto the parties.").

173. See Delgado, supra note 172, at 1403 (arguing ADR poses heightened risk of prejudice when issue touches sensitive or intimate area of life).
product of abuse. Because of these pressures, the evidentiary constraints and protections against bias and prejudice afforded by formality are particularly important in the child welfare context.

On the other hand, proponents of de-formalization claim that the adversarial process heightens distrust among the parties, encouraging them to be evasive and to use procedural maneuvering to avoid disclosing information. By removing the adversarial edge, they argue, informal proceedings encourage participants to be more open and honest, thereby increasing factual accuracy.

There are two problems with this analysis. First, it fails to take account of the substantial disparity of power between the state and the parent in a child welfare proceeding. At least since *Miranda v. Arizona*, we have recognized that informality in the context of the power imbalance that exists when the state elicits information from an individual under a palpable threat of a substantial deprivation of liberty (there, physical restraint—here, removal of child) is a recipe for coercion and that such coercion can actually result in inaccurate information being elicited.

Second, the argument that informality increases honesty and accuracy assumes that formal adversarial processes create conflict where otherwise there would be community and shared interests. More often than not, however, in a child welfare proceeding conflict inheres in the substantive postures of the parties and precedes any choice of procedure. Where the state attempts to remove a child from a parent, the parent will almost always be opposed. Moreover, the central issue in a dependency or termination case—the welfare of the child—is frequently fraught with sufficient ambiguity that it accommodates multiple reasonable yet conflicting points of view. Usually the interests of the parties only appear to be shared when expressed in abstract terms, like, “we all want what’s best for the child.” But at the concrete level—which is the level at which decisions must be made—the interests of the parties become decidedly adverse, the state viewing removal as “best for the child” and the parent viewing preservation of the family unit as “best for the child.” In such a situation, where conflict is inherent and the power imbalance between the parties substantial, the process is unlikely to create conflict where none existed before. The more significant danger is that the process will mask the conflict that does exist by discouraging the weaker party from expressing her true feelings or position, encouraging her instead to “go along to get along.”

174. See supra notes 77-79 and accompanying text.
175. See id.
177. See id. at 515.
178. MINOW, supra note 9, at 291.
179. Jean Koh Peters calls the “best interests of the child” the “looming legal standard” that tends to preoccupy judges and parties “throughout all phases of all [child welfare proceedings] . . . even when, at a given phase of the proceeding, another standard, such as parental fault, is controlling.” Jean Koh Peters, The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings, 64 FORDHAM L. REV. 1505, 1515 (1996).
2. Just Results

The court officer catches me looking harried between cases. There is another detention hearing and the mother is here, he tells me, but don't worry about picking it up—there's an agreement. I'm tempted to take his word for it and focus instead on the five other cases I have scheduled for today, one of which is threatening to blow up into a last minute trial for which I am not prepared. Instead, I pull an empty yellow pad out of my brief case, take a deep breath and walk over to the group indicated by the court officer. Two well-dressed African-American women sit talking in low voices. A young man sits next to them listening. He is also African-American, perhaps in his late 20's, neatly dressed in jeans and a polo shirt, with a county child welfare agency badge hanging from a chain around his neck. I ask for the mother by the name given me by the court officer, and one of the women identifies herself. I briefly explain who I am and ask her to talk to me in private. She glances questioningly at the man with the tag, who raises his eyebrows and shrugs. Looking bewildered, she follows me to another corner of the waiting room, out of earshot of the others.

She tells me she moved to Philadelphia several months ago from Virginia with her three-year-old daughter. She has no close connections here—a few cousins—but she moved to try to get away from her old community, to try to kick her cocaine habit, and to start a new life. She's been living in a small, privately run shelter for three months. The people there have been very supportive, and she had been clean since she moved in—until two days ago when she screwed up. She left the shelter in the afternoon. She left her daughter with another resident, telling her she was doing errands and would be back in an hour. She went to northeast Philly to find one of her cousins, hoping to borrow some money. She found him, but he's heavily into crack. One thing led to another; she ended up using again, and she didn't get back to the shelter until after midnight. By that time, the shelter had called the child welfare agency and her daughter had been taken into custody.

The next day she called the number on the card left by the social worker who took her daughter, and eventually was able to get through to him—the man with the tag. He told her that she needed to get six months of drug treatment before she could get her daughter back and asked if she had any relatives who could take her daughter during that time. She arranged with him to send her daughter to live with her mother-in-law in Virginia while she goes into inpatient drug treatment in Philadelphia. He told her she will get her daughter back in 6 months.

"What do you want?" Her expression is blank, uncomprehending. "I'm gonna send my daughter down to Virginia so I can go into treatment and kick my habit and learn to be a good mother." "And is this the way you want to do that?" Again, a blank stare, no response. "Pretend the worker didn't tell you what you have to do. How would you want to deal with this problem if it was entirely up to you?" She looks confused and startled, as if she's so used to
thinking within the confines of what she has been told is permissible that the concept of thinking about what she wants is entirely foreign.

Eventually, she expresses to me that she's terrified of leaving her daughter for six months—terrified that her daughter will feel abandoned, terrified that her mother-in-law won't treat her daughter well, terrified that her mother-in-law will try to get permanent custody, terrified that being separated from her daughter will make it harder to give up the habit. It is seeing her daughter's face every morning that gives her the resolve to keep fighting her addiction. When I suggest the idea of a drug program where she could live with her daughter, she brightens considerably for a moment, but then looks doubtful. Someone at her shelter had suggested that, but her social worker said it wasn't possible. She seems unsure whether to trust me or her social worker, who are now saying contradictory things.

Formality incorporates a number of mechanisms designed to promote just outcomes in terms of both consistency with each other (the equality principle) and consistency with collective norms (the liberty principle). First, formal processes generally require judges to explain the bases for their decisions. This requires the judge to be able to defend her decision as consistent with past cases and consistent with collective norms. It also facilitates public scrutiny of decisions for conformance with equality and liberty principles. Second, formal processes require the application of formal rules and standards, which helps to promote consistency, both among cases and with collective norms. A system of formal rules and legal standards provides a mechanism for the articulation of a collective standard through legislative and judicial action. These standards are applied to decisions in individual cases to ensure consistency of individual outcomes with the collective norms reflected in those standards.

---


181. Public scrutiny may be frustrated in many existing formal adversarial child welfare systems by rules that close these proceedings to the public and the press. Though appellant decisions will often be published (identifying the parties by initials to preserve confidentiality), trial level decisions are rarely in writing and thus escape public scrutiny altogether.

182. In the context of welfare benefit programs, William Simon argues that formal legal rules are not actually effective in ensuring consistency with social norms because they are necessarily both over- and under-inclusive and preclude front line workers from exercising discretion to respond to the particularized needs and circumstances of claimants. See William H. Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 YALE L.J. 1198, 1227 (1983). More broadly, Simon argues that the formalization of public welfare programs as a result of the legal reforms of the 1960s and 1970s, which established welfare as a legal right and sought to rein in the discretion of front line workers, has not actually resulted in any improvement in the treatment of recipients. The pathology of condescending moralism that the legal reformers sought to eradicate has simply been replaced by a new set of pathologies stemming from the proletarianization and alienation of front line workers from the purposes of their work and from the recipients themselves.

As an alternative to formalism, Simon promotes "professionalism" as a mechanism for preventing abuses of state power. Front line social workers would exercise broad discretion but within a set of standards instilled through the course of professional training and socialization. Social workers would receive relatively high status and reward, would be "active participants in a vital professional culture," id. at 1242, and would participate in a collegial supervision process involving extensive review and dialogue between worker and supervisor regarding individual cases. See William H. Simon, The Invention and Reinvention of Welfare Rights, 44 MD. L. REV. 1, 21 (1985).
In this context, for example, the collective judgment about the balance between individual liberty and social welfare that has been made by state legislatures and courts generally requires a showing of parental unfitness and actual harm to the child before a child can be removed from her family.183 Informal processes, however, tend to devalue the kind of formal legalistic analysis that requires precise application of legal standards in favor of vague therapeutically-styled generalizations about the "best interests of the child."184 This highly contingent social standard is essentially indeterminate and particularly susceptible to bias and prejudice.185 Its dominance in the therapeutic discourse that reigns in informal proceedings leads to results that are inconsistent with each other (disserve the equality principle) and inconsistent with collective norms (disserve the liberty principle).186

Rather than reflecting collective or democratically determined norms,

Simon's critique of formality is not entirely transferable to the child welfare context. First, the level of rigidity and specificity in the formal rules governing public benefits programs—which often take the form of numeric formulas—go much further in constraining discretion than rules in the child welfare context probably ever could. Because of the complex nature of the judgments involved, child welfare workers—even when constrained by legal rules—retain enormous discretion. It is hard to imagine that the determinations involved in a child welfare case could ever be reduced to the kind of formulaic rules that would lead to the level of proletarianization and alienation of front line workers that Simon decries in the welfare benefits context. In that sense, the child welfare system perhaps already looks more like the system of professionalism that Simon promotes. Child welfare workers' level of prestige, education and engagement with the purposes of their work is no doubt considerably higher than that of the front line clerks employed in public benefits offices. Yet, while even higher levels of education, pay, prestige, and professionalism among child welfare workers would no doubt benefit these systems immensely, because of the peculiar dynamics of the child welfare system, I am skeptical that professionalism alone could ever provide the kind of check on arbitrary treatment that Simon envisions.

Simon describes a therapeutic relationship between social worker and client in which the autonomy of the client is the ultimate goal. See id. at 16. The social worker does not pretend to be a neutral faceless bureaucrat, but rather individualizes herself by expressing her own judgments about the client's best interests. This enables "the client to see the worker as a distinct individual capable of empathizing and feeling solidarity with her," but the social worker avoids the pitfalls of paternalism or coercion by honoring the client's choice should she decline to engage in dialogue or should she "express a decision contrary to the worker's judgment." Id. at 19. This latter aspect of the therapeutic relationship is, of course, far more problematic where the social worker is judging not only the client's interests but the client's child's interests, and thus may have to override the client's choice where, in the worker's judgment, it endangers the child.

In a response to Simon's 1983 article, Joel Handler made a similar observation on the limits of Simon's theory. He noted that home visits by welfare benefits caseworkers were usually "pleasant and attitudes toward the caseworker were positive," except in those instances in which the caseworker had control over something the client wanted. "[T]hen negative feelings arose—feelings of dependency and coercion." Joel F. Handler, Discretion in Social Welfare: The Uneasy Position in the Rule of Law, 92 YALE L.J. 1270 & n.1 (1983).

183. See supra notes 36-37 and accompanying text.

184. See, e.g., Hon. Leonard P. Edwards & Steven Baron, Alternatives to Contested Litigation in Child Abuse and Neglect Cases, 33 FAM. & CONCILIATION CTS. REV. 275, 278, 279 (1997) ("[M]ediation should always focus on preserving . . . the best interests of the children.").

185. See supra note 34. It also is not the correct legal standard. See supra notes 32-37 and accompanying text.

186. The capacity for reforms labeled as purely procedural to effect changes in substantive law has been observed in other related contexts. See Fineman, supra note 61, at 760-65 (arguing that the procedural trend toward use of mediation in child custody disputes actually masks a change in substantive law toward a preference for joint custody); Martin Guggenheim, Reconsidering the Need for Counsel for Children in Custody, Visitaton, and Child Protection Proceedings, 29 LOYOLA U. CHI. L. J. 299 (1998) (noting that advocates for children have sometimes sought indirectly to effect changes in substantive law with which they disagree by advocating for increased procedural rights for children).
informal proceedings tend to produce results that reflect the disparity of power between the parties. Decisions are based on the extent to which each side is willing to compromise rather than on a neutral evaluation of evidence and arguments. While they are not perfectly effective, formal processes are designed to equalize power disparities between the parties to some degree. Each party (theoretically) has an attorney, versed in the language and rules of the forum, and formal rules limiting the evidence and arguments that can be presented are applied equally to both sides. Informal proceedings provide no equivalent check on power imbalance.

In child welfare cases, where the individual is pitted against the vast power and resources of the state, the power imbalance is particularly extreme. And in the vast majority of cases, the fact that the parent is female, poor, uneducated, and nonwhite, exacerbates this inherent power disparity. Parents frequently come to court unfamiliar with the system, unversed in the prevailing professional discourse, unaware of their legal rights, eager to prove themselves respectable, rational, reasonable, and cooperative, and eager to please the agency social worker, whom they (rather accurately) perceive as enormously powerful. Moreover, when a parent first comes to court, the social worker is often the only familiar face she sees. What passes for an agreement may often be the parent’s capitulation to the agency’s wishes out of intimidation and coercion. Even where coercion is not intentional on the part of the social worker, parents are often too quick to accede to the agency social worker’s suggested resolution of their case, resulting in false agreements that do not accurately reflect either the result that would have been achieved in court or our society’s chosen balance between intervention and family privacy.

---

187. See Auerbach, supra note 73, at 59 (“Informality, in a social setting of disparate power relations, inevitably served the interests of the dominant group”); Richard Abel, Informalism: A Tactical Equivalent to Law, 19 Cleainghouse Rev. 375, 379 (1985) (“When informalism is freed from all formal constraints, law simply reflects the distribution of power in the larger society.”); see also Fiss, supra note 180, at 1076 (settlements distorted by disparities in resources between parties).

188. Cf. Fiss, supra note 180, at 1078 (Judgment “knowingly struggles against” inequalities between the parties, while settlement, which is based on bargaining, “accepts inequalities of wealth as an integral and legitimate component of the process.”).

189. See Auerbach, supra note 73, at 120 (“Court intervention is most appropriate in a setting where conflict occurs among unequal strangers, when a court can, at least in theory, rectify an imbalance by extending the formalities of equal protection to the weaker parties.”).

190. See supra note 59.

191. See supra notes 55-65 and accompanying text.

192. See id.

193. Cf. Hardin, supra note 53, at 503 (noting the “inherently coercive nature of child abuse investigations” and suggesting that even a parent who is confident that her child has not been maltreated may feel even less free to refuse entry in a child abuse investigation than a typical suspect in a criminal investigation).

194. This problem is particularly evident in the widespread practice of placing children in foster care through the mechanism of “Voluntary Placement Agreements” (VPAs). A VPA is a document signed by the parent voluntarily relinquishing temporary custody of her child to the agency. The agreement usually allows the agency to keep the child in foster care without a court hearing for 30 days to 6 months. Because it avoids the necessity of an emergency court hearing, VPAs are the preferred mechanism for placement by many social workers. In some states, more than half the children in foster care were placed there by a VPA. See Wexler, supra note 24, at 119. Parents almost never have the benefit of legal counsel when they sign VPAs and are
Proponents of de-formalization, however, argue that informal proceedings lead to more just outcomes because when parties are not locked in an adversarial win/lose posture and are able to step back from the rhetoric of blame and rights that dominates formal proceedings, they are able to find a third way—creative solutions that meet all parties needs.\footnote{Certainly it is possible to imagine such a dynamic producing positive results in a child welfare case. A mediation process may encourage the parties to think outside the box of the adversarial paradigm that insists on winning and defines winning narrowly: for the parent, a dismissal; for the agency, placement of the child in foster care. Instead, in the non-confrontational, needs-centered atmosphere of mediation, the mother may be able to admit that she needs drug treatment while communicating to the agency the sincerity of her desire to improve and the strength of her bond with her child. The agency may be able to re-frame its position from insisting on foster care to simply needing assurance that the child will be safe. Out of this softening of positions the possibility for a third way—placement of the mother and child together in a mother-child drug treatment program—might arise.}

But in the child welfare context, the vast disparity in power between the parties distorts this process. Too often informality results in the weaker party—the parent—simply capitulating to the agency rather than pushing the agency to find the creative third way. The “win-win” solution so frequently touted by the proponents of informality requires a creative tension between the parties that tends to arise only when the parties are roughly equally matched in power. Otherwise there is no leverage to dislodge the stronger party from its position. This is particularly true in the child welfare context where the agency’s position can often be well entrenched. First, because the agency inevitably equates its own win with the best interests of the child, it may often approach a dispute resolution proceeding with the intransigence of those who believe they are “on the side of the angels.” Secondly, in the child welfare context, the creative third way often involves the agency providing some innovative service to the family that allows the parent and child to stay together while addressing the problem.

\footnote{frequently coerced into signing by social workers who threaten that the child will be placed for a longer time period or even permanently removed by court intervention if the parent does not sign. See Smith v. Organization of Foster Families, 431 U.S. 816, 833-34 (1977); In re Burns, 519 A.2d 638, 640-41 (Del.1986) (finding that 17-year-old mother signed VPA on understanding that if she did sign, her child would stay with her and if she did not, the court would take him away); In re David R., 420 N.Y.S.2d 675, 677 (N.Y. Fam. Ct. 1979) (involving a woman, fluent only in Spanish, who signed VPA in English without the aid of interpreter that relinquished custody of grandchild); Robert H. Mnookin, Foster Care—In Whose Best Interest?, 43 HARV. EDUC. REV. 599, 601 (1973); Musewicz, The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence, 54 S. CAL. L. REV. 633, 639 (1981). An American Bar Association report in 1983 called coerced “voluntary” placement a “recurrent problem.” See DIANE DODSON, THE LEGAL FRAMEWORK FOR ENDING FOSTER CARE DRIFT: A GUIDE TO EVALUATING AND IMPROVING STATE LAWS, REGULATIONS AND COURT RULES 6 (Wash. D.C., Foster Care Project, National Legal Resource Center for Child Advocacy and Protection, American Bar Association, August 1983).}

\footnote{See, e.g., Edwards & Baron, supra note 184, at 279-80 (by reducing resistance and defensiveness, mediation allows constructive communication and problem solving and permits consideration of options formerly ruled out or never considered); Thoennes, Child Protection Mediation, supra note 68, at 137 (mediation “identifies] mutually acceptable, but often nonobvious, solutions” and facilitates joint problem solving).}
that led to the agency's involvement—for example a mother-child drug treatment program, a supervised group home for teenage mothers, or financial assistance in obtaining housing. But these solutions are usually more costly than the standard package of services and require initiative on the part of the agency social worker. Unless the parent has sufficient power to exert some leverage on the agency, such solutions are frequently out of reach. Parents can sometimes exert leverage in a formal adversarial process by seeking a court order compelling the agency to provide innovative services in order to fulfill its legal mandate to make reasonable efforts to preserve the family.196 No such leverage is available in an informal proceeding, however.

Additionally, the "win-win" solution depends on the parties having a set of shared values so that there is some set of cultural norms in common that can form a basis for agreement.197 Otherwise informality will simply result either in a stand-off or in the weaker party capitulating to the cultural norms of the more powerful party.

3. Process Values

a. Children

Advocates of deformalizing child welfare proceedings often point to the negative effects that formal, adversarial processes can have on children. Certainly, a number of aspects of the process can cause emotional trauma to children who are old enough to have some awareness of its meaning.198 First, there is the disruption, uncertainty, and anxiety of knowing that strangers are making decisions about where and with whom they will live. Second, there is the trauma of being questioned by strangers about the personal details of family life, and possibly being asked to recount some painful or embarrassing event. Third, there is the stress of being put in the middle of a dispute and perhaps pressured by each side or pushed to say things that might betray a parent. And fourth, there is the fear and intimidation invoked by the formal courtroom setting.

196. See supra note 39.
197. See Auerbach, supra note 73, at 16 ("Only when there is congruence between individuals and their community, with shared commitment to common values is there a possibility for [informal dispute resolution to achieve justice."]); Richard Abel, The Contradictions of Informal Justice, in The Politics of Informal Justice 285 (Richard Abel ed., 1983) (conflict in homogeneous societies reinforces shared norms by creating occasions on which they may collectively be asserted); William L.F. Felstiner, Influences of Social Organization on Dispute Processing, 9 L. & Soc'Y REV. 63 (1974) (mediation works best within small social groups where social and cultural norms and experiences are shared and where mediator understands the personal experiences and perspectives of the disputants). But see Grillo, supra note 58, at 1560 (suggesting mediation works better than adjudication in the environment of a pluralistic society with conflicting moral codes and values, because as long as both parties accept an agreement, no third party need decide which moral code governs).
For the most part, however, these factors arise from the very fact that there is a dispute rather than the process used to resolve it. Whether the process involved is formal or informal, a child old enough to have awareness of it will be affected by the knowledge that the adults in her life are in crisis and that decisions that profoundly affect her are being made by strangers—whether a judge or a group of social workers or lawyers who meet in a mediation session. Moreover, informal process does not remove the necessity of having strangers question the child or the possibility that the two sides to the dispute will pressure the child, either subtly or explicitly, to take sides or betray a loved one. Indeed, to the extent that informality is generally less successful than formality at lessening the power disparity between the parties, informality may actually increase the likelihood that a parent—feeling powerless to effect the process through legitimate channels—might resort to illegitimate means, like pressuring the child, in a desperate attempt to sway the decision making process.

Before a case ever gets to a court or an ADR process, the child may already have been interviewed several times by teachers, medical personnel, or social workers. Once in court (or ADR) the child will be interviewed again by a child advocate, if one is appointed. If the case is one in which the child’s version of events is critical to the factual determination at issue, the child is likely to be interviewed by others as well, whether the process is formal or informal. These may include the state’s lawyer, the parent’s lawyer, and the judge or mediator. The difference between a formal and informal proceeding is primarily that testimony before a judge in a formal proceeding requires the simultaneous presence of the attorneys and the court reporter, which will usually add up to at least five people. An informal process, on the other hand, might allow the child to be interviewed individually or in smaller groups.

The relative formality of the courtroom atmosphere, however, is of limited consequence in the context of a child’s testimony, which usually occurs in the judge’s chambers. Most judges try hard to set an informal tone that will put the child at ease, perhaps giving the child a toy to play with and starting out by asking non-threatening questions and explaining the process in language appropriate to the child. Most judges also keep a tight rein on counsel, keeping cross-examination short and cutting off questioning that becomes hostile or aggressive in tone. Certainly, the judge’s black robes, the court reporter, the air of deference to the judge’s authority, and the inevitable lawyerly discourse all lend an atmosphere of formality that may be intimidating to a child. It is also possible, however, that a child who is aware that the adults in her life are fighting over her and who feels profoundly affected by the dispute but powerless in the face of it may, in some instances, benefit from participating in an orderly, formal proceeding presided over by an authoritative decision maker to whom she has

199. In some instances, there may even be more than one individual serving in a child advocacy role, each of whom will interview the child. There may be some combination of a lawyer, a guardian ad litem, a social worker, and/or a volunteer from the Court Appointed Special Advocates program.

200. The child advocate will usually want to be present while others interview the child in any case.
the opportunity to speak directly.

Finally, it is important to note that even in formal adversarial systems, children do not usually testify.201 Most cases are resolved through negotiation against the backdrop of formal rules and procedures, and even those that go to a hearing may not necessarily require the child's testimony. In short, while formal adversarial processes no doubt present risks to children, many of these risks are not obviated by de-formalization and may in many instances be overstated.202

b. Parents

Mediation and other informal processes are generally touted for their capacity to empower participants by giving them a sense of inclusion and participation. By dispensing with the intricate procedural rules and arcane language of the adversarial system, informal processes create a setting that is less intimidating and more accessible, allowing disputants to participate directly in the process. This is said to serve process values by according the participants the respect and dignity of speaking on their own behalf. Moreover, by promoting a sense of ownership in the decision making process, informality is said to increase the likelihood that participants will buy in to the agreements reached and comply with them over the long term.203

These process values, however, may be frustrated where informality is employed in child welfare cases. In Part IB, I described the dynamic that can arise in the microsocial setting of child welfare proceedings due to the prevalence of “repeat players,” the dominance of social work norms and discourse, and the vast power disparity between the parties. Parents, as newcomers and outsiders, feel an intense pressure to conform to established rules of behavior. The therapeutic rhetoric of “cooperation” and the illusion of shared goals embedded in the repeated insistence that “we all want what is best for the child” subvert conflict, create an illusion of intimacy in which the power dynamic is obscured, and suppress any assertion of rights by the parent as unmotherly and creating conflict harmful to the child.204 In this environment, informalism may often disable parents from even articulating their own point of view and instead push them into a position of passivity that is profoundly disempowering.205 Similarly, the notion, promoted by some proponents of

201. It is also important to remember that most cases do not involve allegations of severe abuse. See supra note 19.
202. Cf. Grillo, supra note 58, at 1609 n.293 (asserting that there is no evidence that children whose parents reach a mediated settlement are any better adjusted after divorce than those whose parents used traditional processes).
203. See supra notes 74-76 and accompanying text.
204. See supra text accompanying notes 62-64; Abel, supra note 197, at 271 (“Informalism . . . disguis[es] the coercion that both stimulates resistance and justifies the demand for the protection of formal due process.”).
205. For a mother whose neglect or mistreatment of her children stems from depression, a legal process that makes passivity appear to be the best coping mechanism may be counterproductive from a therapeutic perspective. Cf. Grillo, supra note 58, at 1603 (discussing how mediation in divorce cases can be particularly
informality, that informal processes provide the parent a chance to “vent”\(^2\) reveals a patronizing attitude toward parents—that their speech is purely emotive, serves only a therapeutic goal, and contributes nothing to the substantive decision being made.

Furthermore, it is not clear that formality is necessarily wholly disempowering to participants. The formality of the courtroom setting creates an aura of seriousness and gravity that can convey to a participant a sense that she and her case are considered important by the state. Additionally, while proponents of informality insist that representation by an attorney disempowers participants by disabling them from speaking in their own voice and on their own behalf,\(^3\) I suspect that having an attorney speak on one’s behalf can also be experienced as empowering, giving a parent a sense that she does not stand alone, that her position has legitimacy, and that it commands attention and respect from the judge.\(^4\)

Informal proceedings are often promoted for their ability to preserve an ongoing relationship between the parties.\(^5\) Even Richard Abel, who has been an outspoken critic of informality, supports this view. Abel suggests that we can gain important insight into the situations in which informal dispute resolution mechanisms are useful by examining the circumstances in which rich and advantaged members of society voluntarily choose them. Those are situations in which the disputants are of relatively equal power and wish to preserve an

---

206. Thoennes, An Evaluation, supra note 68, at 187; see C. Moore, The Mediation Process 129-31 (1986); Donald T. Saposnek, Mediating Child Custody Disputes: A Strategic Approach 85-86 (1998); Abel, supra note 197, at 294 (noting that in some forms of informal dispute resolution, “the ‘full airing’ of the complainant’s grievances becomes an end in itself”); Grillo, supra note 58, at 1575 (criticizing rhetoric of mediation that participants be permitted to “vent” as not taking anger seriously enough—“anger that is merely vented has lost its potential to teach, heal, and energize”).

207. The attorney-client relationship, of course, embodies a significant and complicated power dynamic of its own. Lucie White has suggested that lawyers for the poor “inevitably replay the drama of subordination” in their own relationships with their clients. See Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 Brook. L. Rev. 861 (1990).

208. These are, of course, phenomena that are difficult to measure empirically. Mediation in child welfare cases has been touted as a success based on parents’ self-reported satisfaction with the process. See Thoennes, An Evaluation, supra note 68, at 190. Of course, these reports must be viewed in the context of the deficiencies of the court system to which mediation is being compared. See supra note 73.

209. See Auerbach, supra note 73, at 102 (noting that commercial arbitration originally developed as an alternative to litigation within trade associations whose members engaged in continuous trade of particular products and within which “the value of an enduring commercial relationship far exceeded the value of a particular commodity”); Christine V. Harrington, Shadow Justice: The Ideology and Institutionalization of Alternatives to Court 99 (1985) (identifying the “central thesis” of the ADR movement as the notion that “conflict in continuing relationships is best dealt with in an informal setting”); Frank E. A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 120 (1976) (noting that disputes between parties involved in long-term relationships are particularly amenable to mediation); Linda Silberman & Andrew Schepard, Court-Ordered Mediation in Family Disputes: The New York Proposal, 14 N.Y.U. Rev. L. & Soc. Change 741, 742 (1986) (arguing that mediation is particularly appropriate to divorce and custody cases because of its capacity to help parties resume a constructive relationship). Disenting in Goss v. Lopez, 419 U.S. 565, 593-94 (1975), Justice Powell decried the majority’s decision to apply formal due process principles to public school discipline cases, precisely because he believed it would be unnecessarily destructive to the maintenance of an ongoing relationship between teacher and student.
In the child welfare context, the disparity in power between the parties may lessen informality's effectiveness in this regard. It is certainly possible to imagine situations in which an informal proceeding pressures the parent, as the weaker party, into suppressing her point of view in order to achieve agreement, thus creating unexpressed resentment that adversely affects the ongoing relationship. In such a situation, an adversarial courtroom battle might serve a cathartic function, after which the parent might feel that she had said her piece and be able to sit down and work with the agency social worker in accordance with the judge's order. Nonetheless, with their emphasis on communication and meeting the parties' needs and their de-emphasis of blame and rights, informal processes in most instances probably tend to be more successful at preserving a functioning relationship between the parties during and following dispute resolution. As I discuss in the next section, however, the preservation of an ongoing relationship between the parties should not necessarily be a primary goal in child welfare proceedings, at least not at the initial stages.

In sum, the above discussion suggests that in the particular context of child welfare cases, informal procedures are unlikely overall to be as successful as formal ones in meeting the outcome and process goals of due process. The substantial power disparity between the parties, the emotionally charged nature of the subject matter, and the lack of a shared set of interests and values between the parties all tend to distort the decision making process. Traditional formal adversarial processes have mechanisms that, while far from perfect, are designed to combat the distortion caused by such conditions. But informality generally offers no equivalent protections. In the next section, I explore further why the particular dynamics of child welfare cases are so ill-suited to informality, particularly in comparison to domestic relations cases, in which the use of mediation is widespread.

B. The Domestic Relations Model: Mandatory Family Therapy as State Intrusion

Much of the rhetoric promoting the use of informal procedures in child welfare cases is borrowed from the domestic relations context, where mediation has been used extensively for many years in divorce and custody cases. But the domestic relations paradigm cannot simply be transplanted to the dependency context. The alignment of the parties is fundamentally different.

210. See Abel, supra note 187, at 381.
211. Research has shown that people tend to accept the outcome of a given dispute resolution procedure if they perceive it as fair, and that people's perceptions of the fairness of a procedure is unrelated to the outcome (i.e., whether they win or lose). See Tyler, supra note 155, at 7.
212. See Grillo, supra note 58, at 1552; Saposnek, supra note 206; Silberman & Schepard, supra note 209, at 741.
213. See supra notes 32-37 and accompanying text.
Domestic relations cases involve disputes between private parties. There may be some disparity of power between them, and, indeed, many feminists have criticized the use of informal procedures in domestic relations cases for that reason, especially in instances where the power disparity is particularly acute, like those involving battering. Still, in domestic relations cases the vast power disparity between the individual and the state that exists in child welfare cases is absent. Moreover, in the domestic relations context, the parties have an existing intimate relationship which they entered into voluntarily and which they will often need to preserve—though in some altered form—in order to continue to share parenting responsibilities. Thus, often in a domestic relations case, determining accurately what occurred in some past event is less important than reaching a compromise that addresses both parties’ needs and preserves a workable relationship for the future. Additionally the fact that there was at some point a voluntary intimate relationship between the parties indicates a set of shared values or at least a commitment to reconciling conflicting values.

The move to de-formalize child welfare cases attempts to squeeze these disputes into the domestic relations paradigm, locating them in the realm of family therapy rather than adjudication. Thus, one particular mediation program is touted as “cathartic” and as providing the parents a chance to “vent.” The issue is viewed not as whether the parent committed some act of child abuse or neglect that warrants state intervention, but how to facilitate communication between the participants and how to reach a compromise that meets all of their needs. Principles of blame and rights are replaced with the rhetoric of compromise and relationship. The conflict is “styled as a personal quarrel, in which there is no right and wrong, but simply two different equally true or untrue views of the world.”

By identifying communication as the problem, however, the proponents of mediation presume that the state is entitled to have a relationship with the parent. This involves two false assumptions: first, that all parents are guilty (i.e., intervention is warranted), and, second, that intervention is always helpful to a family (or at least not harmful).

The first assumption is unwarranted because the parent may not have done the act of which she is accused, or the act she did do may not rise to the level of

214. See Grillo, supra note 58.
215. See supra note 165.
216. See Keys, supra note 80, at 13 (noting that the Family Unit Meeting—a U.S. variant on Family Group Decision Making—grew out of family therapy).
220. Grillo, supra note 58, at 1560.
221. See Abel, supra note 197, at 271.
222. See Edwards, supra note 70, at 162 ("[M]ediation has never resulted in any harm.").
Increasing Formality in Child Welfare Proceedings

abuse or neglect warranting state intervention. These are the first questions that a dependency proceeding must resolve. Though ultimately the aim of the dependency proceeding is prospective—to prevent harm to the child in the future—these initial determinations are essentially retrospective in nature. Since we cannot predict the future, we must rely on past events as predictors of likely future events. And only when past events are proven that show a likelihood of harm in the future, do we allow the state to intervene in the private functioning of families. Thus, the initial inquiry is fact-based and retrospective, rather than an attempt to reach a middle ground between different sets of needs and emotions.

The second assumption is also unwarranted. Intervention—even at the level of simply talking—can be harmful in itself. Even if a child is not removed, the social worker’s act of knocking on the door and questioning a parent about her family life, can be very harmful, undermining the parent’s authority in the eyes of the child or making the child fearful of removal. Certainly, in the criminal context we routinely recognize the dangers of state coercion that arise simply from forcing an individual to talk to a state official. Similarly, the state is effecting an extraordinary intervention in the family relationship just by insisting that the state social worker and others have the right to participate in a conversation about the parents’ day-to-day parenting activities.

Thus, informal processes replace the initial factual adjudication of whether acts of abuse or neglect warranting state intervention actually occurred with a free-ranging family therapy session. There is virtually no limit on the topics that can be discussed nor on the people who may be invited to join. Mediation programs typically give discretion to the mediator to invite people who are not parties to the case, including foster parents, extended family members, and

223. See WEXLER, supra note 24, at 124 (citing study that found that in half of all emergency removals there was no maltreatment).
224. See supra notes 36-37 and accompanying text.
225. Cf. In re T.D., 553 A.2d 979, 982 (Pa. Super. 1988) (noting that dependency proceeding may color a child’s future attitude toward and relationship with parents); see also GOLDSTEIN, supra note 97, at 9, 25, 174-78 (Children “react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control.”); Joseph Goldstein, Medical Care for the Child at Risk: On State Supernention of Parental Autonomy, 86 YALE L.J. 645, 649-50 (1977) (“Court or agency intervention without regard for or over the objection of parents can only serve to undermine the familial bond which is vital to a child’s sense of becoming and being an adult in his own right.”); Murray Levine, A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists, in LAW IN A THERAPEUTIC KEY 323, 330 (David B. Wexler & Bruce J. Winnick eds., 1997) (noting that the very appearance of a child welfare agency social worker at the door of a family’s home “raises the specter that children may be removed,” and quoting one social worker who said, “[w]e terrorize people . . . Just the thought of [the child welfare agency] frightens people.”).
228. See Mumma, supra note 79, at 23 (contending that there is no distinction between mediation and therapy).
members of the "community," such as a local church pastor.229 Once these people are brought to the table, all become equal participants, entitled to have their "concerns" heard and their "needs" met. Rather than seeking to determine the truth of the allegations of abuse or neglect, the focus of the discussion becomes "[f]inding solutions which meet the competing needs and interests of all parties."230 Suddenly, the needs and interests of foster parents, aunts, uncles, grandparents, and social workers are placed on an equal footing with those of the parents and children.

But before the family is forced to participate in therapy, the process is supposed to first make a determination as to whether state intervention is warranted.231 This stage has been skipped. In essence, the mediation session becomes the very state intrusion that the proceeding is supposed to determine whether or not to allow in the first place.232

C. Possibilities for Successful Informality in Child Welfare?

The recurring theme that emerges from the above analysis is that informalism is particularly ill-suited to meeting the goals of procedure in situations involving gross disparities of power between the parties.233 It also appears that formality is better at making accurate factual determinations and helping to assure consistent and just outcomes in an environment of moral and cultural diversity,234 while informalism is probably better at preserving an ongoing relationship between the parties.235 In other words, informal processes work best under conditions of relative social equality, where there is community consensus about norms and values, and where preserving relationships in the future is more important than reaching accurate factual determinations about what happened in the past.236

229. See PROGRAM DESCRIPTION, supra note 70.
230. Id.
232. See Hofrichter, supra note 227, at 239 ("Within the mediation session, many programs encourage disputants to 'tell their stories,' ventilate their feelings, and otherwise reveal details about their personal lives. The purpose is not to punish or reprimand but rather to understand the roots of the conflict. But this sort of therapeutic openness magnifies the extent to which the state penetrates the lives of disputants: Their deepest emotions and most personal problems become part of the process of conflict resolution. This intervention itself is regulation, regardless of its effect on the outcome."). Where state intrusion into the private lives of parents is explicitly coercive, there are constitutional limits. See In re T.R., 731 A.2d 1276 (Pa. 1999)(court's order compelling mother of dependent child to undergo involuntary psychiatric examination held unconstitutional).
234. See supra notes 170-97 and accompanying text.
235. See supra notes 209-11 and accompanying text.
236. These principles suggest that the Family Group Decision Making (FGDM) model, at least as practiced among the indigenous Maoris of New Zealand where it was originally developed, may provide one context in which informalism can be successfully used in the resolution of child welfare disputes. See supra note 80. By shifting the locus of the dispute from the interface between state and individual to the relationships among family members, FGDM may make possible the kind of creative problem solving that depends on a community of shared norms and values and may lessen the degree to which power imbalance infects and distorts the process.

The New Zealand model may be difficult, if not impossible, to replicate in this country. See Auerbach,
Increasing Formality in Child Welfare Proceedings

Certainly the adjudicatory phase of a dependency proceeding or a termination of parental rights proceeding involves all the elements that make informality a bad strategy for achieving the outcome and process goals of procedure. The central issues in the dispute are retrospective and fact-based. The preservation of a relationship between the disputants is not paramount. In a dependency adjudication, there is no pre-existing voluntary relationship between the family and the state, and it has not yet been established that such a relationship is warranted. In a termination case there may be a pre-existing relationship between the state social worker and the parent, but preservation of that relationship is of little relevance, since the state no longer seeks to provide rehabilitative help to the parent in any case. Finally, the power imbalance between the parties in both proceedings is extreme.

In the post-adjudicatory phases of a dependency case, however, the characteristics of the dispute are somewhat different. At the dispositional phase (where the court faces a decision about where the child should be placed, having already determined that abuse or neglect occurred) and at subsequent periodic review hearings, the case shifts from a retrospective, fact-based inquiry to a prospective inquiry into what steps the parent must take and what services the agency must provide to alleviate the conditions that led to placement. But perhaps the most important difference between an adjudicatory hearing and subsequent dispositional and review hearings is that in the latter the relationship between the state and the parent has been legitimized. An adjudication of dependency answers affirmatively the question whether state intervention is warranted, and the case then proceeds on the assumption that it is. Accordingly, the preservation of the relationship between the parent and the state social worker becomes a legitimate goal at the dispositional and review phases of a dependency proceeding and, indeed, an important factor in ensuring the success of the prospective rehabilitative plan. Although the power disparity and the potential for dissensus on norms and values persists, the shift in the relative importance of retrospective fact-finding (formality’s strength) vis a vis the preservation of relationships (informality’s strength) may warrant a shift to less formal procedures at these stages of a dependency case.

supra note 73, at 100, 114 (suggesting that in the U.S. informal dispute resolution has “worked where it was indigenous to an immigrant community, but the attempt of legal professionals to impose it upon poor people was unsuccessful”), id. at 118-20 (discussing unsuccessful attempt in 1960s to transplant tribal dispute resolution mechanism used by indigenous Kpelle tribe of Liberia to urban American poor). In the pluralistic, fragmented culture of modern America, it is less clear that an allegedly abusive parent is likely to be part of a functioning community. But see Carol B. Stack, Cultural Perspectives on Child Welfare, 12 N.Y.U. REV. L. & SOC. CHANGE 539 (1984) (criticizing child welfare system for failing to take account of existing extended kinship networks in minority communities in the U.S.).

237. Some may argue that the use of adversarial processes at the adjudicatory phase will be so damaging to the relationship between social worker and parent that attempts to preserve that relationship through informal processes at the dispositional and review stages will be unavailing. Agencies may be able to address this problem, however, by assigning a different set of social workers to handle ongoing cases from those that handle investigations. To some degree, this problem is already alleviated by the widespread practice of state agency social workers contracting with independent agencies to provide ongoing services to families. Thus, following the initial investigation, agency social workers may act more as case managers than direct service providers.
CONCLUSION

Child welfare bureaucracies and court systems make thousands of decisions each day that profoundly effect the lives of millions of people, touching an aspect of life that many hold central to their identity. Too often, however, the policies and doctrines that shape the procedures by which these decisions are made are based on superficial reactions to the latest tabloid horror story about child maltreatment. Resistance to the adoption of formal procedures in these cases has frequently been justified by vague allusions to the need to avoid the harshness of the adversarial process in cases involving women and children and by reference to the questionable assertion that the deprivation of liberty effected by the forcible separation of parent and child is less grievous than the deprivation that is held up as the defining standard in questions involving procedure: criminal imprisonment. While a feminist critique of values can reveal the arbitrariness of the male norm embedded in such value judgments, it also forces us to question the traditional liberal notion that important interests demand formal procedures. Ultimately the question of procedure must be resolved through a contextual examination of the peculiar set of power dynamics and incentives that operate in child welfare cases.

I have argued that, at least in termination of parental rights cases and at the initial adjudicatory phase of dependency cases, traditional formal adversarial process offers the best hope of protecting against the distortions of power imbalance and the dangers of prejudice and snap judgments. I do not mean to argue that formality offers the perfect solution. My analysis has proceeded largely based on what is, with little speculation about what might be. By endorsing formality as the best among existing alternatives, I do not mean to suggest that a better third way might not be imagined.